

**OPINION**

**by**

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# OPINION

## Re: Statutory Repair Notices in Edinburgh

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### 1. BACKGROUND

- 1.1 I, Professor Stewart Brymer, OBE, LLB (Hons), W.S., NP, Solicitor, 8B Rutland Square, Edinburgh, EH1 2AS have been requested by the Chair of the Edinburgh Conveyancers' Forum ("ECF") ("the Memorialists") to give an Opinion on a matter arising as a result of the practice, both past and present, of practitioners when dealing with what are generally termed Statutory Repair Notices issued by the Local Authority in Edinburgh (be that the Corporation of Edinburgh, the City of Edinburgh District Council and, latterly, the City of Edinburgh Council) (hereinafter referred to as the "Local Authority").
- 1.2 I received a letter of instruction from the Chair of ECF on 9 February 2016 ("the Letter of Instruction").
- 1.3 The Local Authority has specific statutory powers to issue notices ("Statutory Repair Notices") on tenemental co-proprietors ordaining them to carry out stated common repairs, failing which the Local Authority reserve the right to carry out the works directly themselves and then, at a later stage, to issue invoices for an appropriate share of the repair costs to the co- proprietors. The relevant legislation is set out in Part VI of the City of Edinburgh District Council Order Confirmation Act 1991.
- 1.4 In terms of that legislation, the Local Authority is, in fact, entitled to serve invoices for an appropriate share of the repair costs not necessarily on the proprietors on whom the Notice was served, but on the actual proprietors at the time of the issue of the invoices (which in practice may be many years after the works were in fact carried out).
- 1.5 Because of that suspensive liability, there has been a long established practice in Edinburgh (until relatively recently) that where a Local Authority Search disclosed the existence of a Statutory Repair Notice which had not been invoiced by the Local Authority, the Purchaser's solicitor was entitled to make a retention in respect of that possible liability ("Retention") that may be imposed on his or her client. In general terms, that was usually based on contractor's estimate giving an indication of the

likely costs with an augmentation, usually of 25%, then added. In terms of the missives for the sale and purchase of the property in question ("the Missives"), the Retention was then held by the Purchaser's solicitors until such time as the Local Authority issued a final invoice in respect of the repair works. The Retention was then utilised to meet that cost or was released upon exhibition of the invoice otherwise being paid by the former owner. The Memorialists have advised me that that has been the standard practice in Edinburgh for many years. However as a result of that practice, it is believed that there may be thousands of Retentions currently held by local agents in anticipation of prospective invoices being issued by the Local Authority.

- 1.6 I am informed that the Local Authority has encountered well publicised difficulties in the course of the last 5-7 years in relation to its running of this Statutory Repair Notice regime. Those difficulties are a matter of public record. The Memorialists have advised me however that the Local Authority have accepted that the basic nature of the Statutory Repair Notice scheme has merit and have decided to retain its overall format at this stage, particularly the element of compulsory works. As a matter of policy, that has been welcomed by ECF.
- 1.7 The crux of the possible problem, however, is that as ECF currently understand it, the Local Authority will be deciding later this year in respect of numerous notices which have not in their phrase been "activated" (i.e. where no works have been carried by the Local Authority) that they will now be seeking to cancel or otherwise remove these Notices from their records. Such non-activated Notices can go back many years and the Local Authority appear to have reached a policy decision that it would no longer be appropriate to seek to rely on them should they wish to carry out common repairs in the future to a particular tenement property. The policy benefits in "clearing the books" of such historic Notices is recognised by ECF and again is to be welcomed.
- 1.8 However, in practice, it is anticipated that many solicitors who are members of ECF will currently be holding Retentions on behalf of clients based on such historic Notices. The question that requires to be answered therefore is: how such Retentions should now properly be disposed of by the agents holding same at this time? It is the view of the ECF Committee that the answer to that rests on the terms of the contract between buyer and seller i.e. the Missives.
- 1.9 It is anticipated, however, that a large number of such Missives will be based on the relevant set of Standard Clauses in force at the time of any particular transaction (be that Edinburgh, Combined or Scottish versions). The earliest version of the Edinburgh Standard Clauses goes back to April 2005 but the relevant clause in question has in fact been little changed since that time. The Memorialists

provided me with a copy of Standard Clause 6 from the said 2005 version along with a copy of Standard Clause 6 from the current Scottish version (together referred to as “the Clauses”).

- 1.10 It is expected, however, that any non-standard clause missives will also be in similar terms as the Clauses reflect what has been long-standing normal practice in Edinburgh.
- 1.11 The Clauses provide that any Local Authority Notice calling for repairs issued or dated prior to the date of conclusion of Missives, will be the responsibility of the Seller. The Clauses state that liability under that provision will subsist until met and will not be avoided by the issue of a fresh Notice. Where the works called for by the Notices have not been carried out by the Date of Entry under the Missives, provision is made for a Retention to be made pending settlement of the Seller's liability.
- 1.12 As the Memorialists have correctly pointed out however, the Clauses did not anticipate the possibility of the Local Authority simply cancelling/waiving/deleting such Notices from their records. At this point in time, it is not known how the Local Authority will phrase such cancellation but the effect is anticipated to be the same namely that Notices will no longer exist and they will not be replaced by a new Notice.
- 1.13 As a result, the view of the ECF Committee is that in such circumstances (bearing in mind the Retention is in effect simply part of the original price payable by the Purchaser), the Retention should forthwith be released to the Seller (or more properly the Seller's agents). The Memorialists do not believe that any further discussion on that point would be merited and it would be a duty on the part of the Purchaser's agents to pay over the Retention with any accrued interest without further debate.
- 1.14 It is accepted that there may well be practical issues centred on the fact that, after what may be a long period of time, the Sellers’ agents will not be able to ascertain the whereabouts of their clients but that is a separate issue which the selling agents would have to deal with in accordance with The Law Society of Scotland Accounts Rules in relation to credit balances.
- 1.15 However, because of the anticipated widespread nature of this particular exercise which it is proposed be undertaken by the Local Authority and the expectation that purchasing clients may express concern that sums held back to cover possible works are no longer going to be available for their benefit, the ECF members are seeking appropriate professorial Opinion confirming that the above analysis of the contractual position is correct and that members should take such action as and when the Local Authority decide to cancel such non-activated Notices.

1.16 Finally, I am advised that the Memorialists accept that there may be issues of professional practice over and above the strict contractual position and confirm that ECF will be seeking the thoughts of The Law Society of Scotland in that regard they have received my opinion on the contractual position as outlined above.

## 2. **POINT AT ISSUE**

2.1 The salient point at issue is, in essence a narrow one in that I am asked to comment on what might constitute best professional practice with regard to the proper disposal of Retentions by the agents holding same at the point in time when the Local Authority decides to cancel or otherwise remove historic Statutory Repair Notices from their records where no works have been carried out by the Local Authority.

## 3. **OPINION**

3.1 It has long been the practice of Local Authorities to serve a Statutory Repair Notice in respect of a property which is in a serious state of disrepair in order to seek to secure the return of the property to its former condition.<sup>1</sup> This has rightly been viewed as being a good thing especially in cases of multi-occupancy properties such as tenements where there is a common interest in ensuring that the fabric of such a property is maintained in an appropriate manner. The existence of such Statutory Repair Notices are, however, only able to be verified in a Local Authority Search over the property in question – such notices not being registrable in the Register of Sasines or in the Land Register.

3.2 As is stated in Gretton & Reid,<sup>2</sup> the main problem arises where a Statutory Repair Notice has not been complied with by the date of entry. As noted by the Memorialists, the accepted way of dealing with this is for the Missives to provide that any Statutory Repair Notices outstanding as at the date of entry shall be provided for by way of a retention being made from the purchase price of enough money (plus a tolerance as mentioned above) which will then be placed on deposit receipt in the joint names of the agents of the seller and the purchaser. This then is a matter of contract between the seller and the purchaser.

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<sup>1</sup>See Professor McDonald's Conveyancing Manual (Seventh Edition) para 20.28(3) and Sinclair, Conveyancing Practice in Scotland (Sixth Edition) para 6.10 (e) 5.

<sup>2</sup> Conveyancing, (Third Edition) paras 4-28 and 11-20.

- 3.3 As the Memorialists have confirmed, various difficulties have arisen in Edinburgh with regard to outstanding Statutory Repair Notices which it seems likely the Local Authority will act upon. The question, therefore, rightly is as to what will happen to Retentions in circumstances where the Local Authority cancel or otherwise remove Statutory Repair Notices from their records where no works have been carried out by the Local Authority?
- 3.4 I agree with the Memorialists that there are policy benefits in records being cleared of such historic notices subject only to the fact that the works specified in such notices may be assumed still to be outstanding. That fact, if accurate, is clearly not in the best interests of the various proprietors of properties in a tenement for example and it is to be hoped that the proprietors take steps to undertake the necessary repair work listed in the Statutory Repair Notice in question in their common interest. That would be in accordance with the aims and objectives of the Housing Improvement Task Force which was commissioned by the Scottish Government to report on stewardship and responsibility with regard to Scotland's private housing stock. The HITF reported in March 2003.<sup>3</sup> Such works may, of course, be undertaken in accordance with the provisions of the relevant titles to the various properties and/or in terms of the relevant legislation.<sup>4</sup> That, however, is a separate matter from the question posed of me by the Memorialists.
- 3.5 As regards the Retention, it is clearly a matter of contract between the seller and the purchaser as regulated by the terms of the Missives. While the purchaser will have purchased the property based on a survey/valuation which would have valued the property as unimproved by the works envisaged by the Statutory Repair Notice and that purchaser may (or may not) have acquired the property at a lower price to take account of the works required, that is, at best, a quasi-moral argument only. It is to the Missives that one must have regard in order to ascertain what should happen to the Retention in circumstances where the Statutory Repair Notice has been cancelled or otherwise removed without the works listed therein having been carried out.
- 3.6 In my opinion, if the Local Authority state that Statutory Repair Notices are rescinded/no longer to have effect/withdrawn or similar words and, as a result the notice for which a retention was made ceases to exist even though the works listed therein have not been carried out, then the Retention being part of the purchase price, must be returned to the former owner in terms of the Missives. In virtually all contractual provisions which I have seen over the years, the liability for such works has

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<sup>3</sup> [www.gov.scot/Publications/2003/03/16686/19494](http://www.gov.scot/Publications/2003/03/16686/19494)

<sup>4</sup> Tenements (Scotland) Act 2004

been inextricably linked to the Statutory Repair Notice rather than to the works themselves. As the Memorialists themselves state however, much will depend on the actual wording used when the Local Authority cancel or remove the notices in question. Wording such as *“for the time being no action will be taken”* or *“the Council reserve the right to re-issue...”* or *“This letter does not in any way prejudice the right of the Council to serve a further notice in respect of any required repairs in the future etc.”* would be problematic.

- 3.7 While I could, from an equitable point of view, conclude that a practical solution would be to split the Retention equally between the seller and the purchaser, that does not sit well with my comment above with regard to the contractual provision between the parties and, for that reason, should be discounted.
- 3.8 For the record, I agree with the Memorialists that certain responsibilities are likely still to exist under and in terms of The Law Society of Scotland’s Accounts Rules and this should be further investigated with that body.
- 3.9 I am informed that it has been the practice of ECF in the past for Professorial Opinions to be published on their website and to be widely disseminated to ECF members. I confirm that I have no issue with this practice being followed in this case.
- 3.10 I have nothing further to add.

Date: 11 March 2016

Signed: