

NOTICE OF POTENTIAL LIABILITY FOR COSTS

The Tenements (Scotland) Act 2004 ('the 2004 Act') came into force on 28th November 2004. The Act introduces a new notice that is capable of being registered in the General Register of Sasines or registered in the Land Register of Scotland. This is the 'notice of potential liability for costs' in respect of a tenement flat.

The 2004 Act also amends the Title Conditions (Scotland) Act 2003 ('the 2003 Act'), to introduce a second form of notice of potential liability for costs which can be registered against the title to a burdened property.

Introduction

Section 11 of the 2004 Act provides rules for determining when a flat owner's liability arises to contribute to certain costs, such as those of common repairs or a communal insurance premium. Normally when a payment has become due, liability lies with the owner of the flat at the time and does not transmit to successor proprietors. Section 12 introduces a new rule. In addition to the present owner, an incoming owner may also become severally liable if a notice of potential liability for costs is registered in the relevant property register 14 days before the date on which the new owner acquires the flat. The 2004 Act also amends section 10 of the 2003 Act to insert an equivalent provision in relation to the liabilities of incoming owners of burdened properties in respect of the cost of work or maintenance carried out under affirmative burdens prior to the acquisition date.

Form and Content of Notices

Notices of potential liability for costs must follow, as near as practicable, the statutory form given in Schedule 2 of the 2004 Act as amended by the Tenements (Scotland) Act 200 (Notice of Potential Liability for Costs) Amendment Order 2004. The amendment adds the underlined words to the preamble of the notice which now reads:-

'This notice gives details of certain maintenance or work carried out or to be carried out in relation to the flat specified in the notice. The effect of the notice is that a person may, on becoming owner of the flat, be liable by virtue of section 12(3) of the Tenements (Scotland) Act 2004 (asp11) for any outstanding costs relating to the maintenance or work.'

Flat to which notice relates. [This must describe the flat in a way that is sufficient to identify it. Where the flat has a postal address, the description must include that address. Where the flat has been registered in the Land Register, the description must make reference to the Title Number of the flat or the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified Division of the Register of Sasines.]

Description of the maintenance or work to which the notice relates. [In general terms.]

Person giving notice. [The name and address of the person applying for registration of the notice ('the applicant') or the applicant's name and the name and address of the applicant's agent. Agents are encourage to enter a statement that the applicant is either owner of a flat in the tenement or the manager of the tenement.]

Signature. [The notice must be signed by or on behalf of the applicant. There is a condition for registration that the execution have self-proving status, i.e. it must be witnessed with the name and address of the witness also being given on the notice]

Date of signing [Self-explanatory]

Who may register a notice of potential liability for costs?

An application for registration of a notice may only be made by (or on behalf of) one of the following:

1. the owner of the flat against which the notice is to be registered
2. the owner of any other flat in the tenement
3. any manager of the tenement. 'Manager' is defined as 'any person appointed to manage the tenement'

A notice of potential liability for costs may be registered in relation to more than one flat so long as it is in respect of the same maintenance or work.

Registration Procedure

Notices of potential liability for costs are only registered against the title of the subject property or flat. They are not dual registered against the title to other flats in the tenement. In the Land Register, application should be made on Form 2 with Form 4 in duplicate. Where the subject property or flat has a Sasine title the statutory Sasine Application Form must be used. Notices are outwith the scope of stamp duty land tax and no SDLT certification is required. In all cases the registration fee is the miscellaneous event fee, currently £30. A single fee is payable even if the notice relates to more than one property.

The Keeper is not required to investigate or determine whether the information contained in any notice is accurate. In addition a new paragraph (q) has been added to section 12(3) of the Land Registration (Scotland) Act 1979 to confirm that there is no entitlement to indemnity for loss arising in consequence of any inaccuracy in any information contained in a notice of potential liability for costs.

Discharging a notice

The 2004 Act does not make any provision for the discharge of notices or clearing them from the register. Notices expire 3 years after registration but can be renewed by registering again before the end of that period.

In some cases, the costs to which a notice refers will be repaid during the three year period. Information to this effect may be drawn to the Keeper's attention by informal letter of satisfaction or by a non-statutory discharge. Where the terms of a letter or non-statutory discharge are sufficiently clear and it is apparent that the signatory to the letter or the granter of the discharge is either (a) the party who registered the notice or (b) acting on behalf of that party, registration officers may add a note to the relevant burdens section entry. This should be done by way of application Form 2 with a miscellaneous fee of £30. When creating the note, registration officers must take care to avoid wording that suggests that the Keeper regards the debt as having been repaid. It is for any interested party to satisfy themselves as to the true position.

Example style for note:-

Note: By an informal letter/non statutory discharge dated 00/00/0000, XXX, who as manager of the tenement registered the foregoing notice, stated/acknowledged that the relevant costs relating to the maintenance or work described in the above notice have been repaid.

The entering of a note is at the Keepers discretion. In some cases the Keeper may decline to enter a note if he is not content that it is appropriate to do so, for example, because there is some ambiguity in the wording of the document or because it is not clear that the party who is confirming that the relevant costs have been repaid is, or is acting on behalf of, the person or company that originally registered the notice.

Gebbie & Wilson, October 2007