PRACTITIONERS' GUIDE

TO THE

COMBINED STANDARD OFFER

AND

COMBINED STANDARD CLAUSES (2009 EDITION)

Issued by the Standard Missives Joint Working Party of
The Edinburgh Conveyancers Forum and
The Royal Faculty of Procurators in Glasgow

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1. EXPECTATIONS

If you have not used Standard Missives (SM) then you are missing out on a new way of practising conveyancing. Imagine submitting an offer and receiving a de plano acceptance or imagine submitting an offer, receiving a short qualified acceptance and issuing a straight acceptance. One or other happen regularly to users of SM.

Use of the Standard Offer and Clauses has been built up by publicity and word of mouth recommendation. In effect it is you as Practitioners who need to encourage other Solicitors to join as well if this project is to produce maximum benefit and success.

2. STARTING POINT

In 2004 the Edinburgh Conveyancers Forum (ECF) launched its first Standard Missive.
In 2005, The Standard Missives Working Party of the Royal Faculty of Procurators in Glasgow (RFPG) looked at various standard missives then in use and decided to use the Edinburgh Standard Missives as its basic style as it was then fairly recent and it was felt it would be helpful if there was similarity between Glasgow and Edinburgh. RFPG then looked at each clause and attempted to make the missives suit Glasgow practitioners with familiar language and approach.

Since then Glasgow and Edinburgh have swapped ideas and wording with each revision. It occurred to both that the Missives were so similar that they could be combined. There is an obvious advantage to using a common style throughout a larger geographical area with fewer regional styles to be kept up to date. Thus the Combined Standard Missives were born with a desire to agree common wording. If agreement on practice or wording could not be reached by ECF and RFPG they asked 4 Professors of Conveyancing to act as arbiters to decide which was the best approach or wording.

We have worked from the premise that most individual firm offers are based on a "wish list" of best possible outcomes but the reality is that qualified acceptances cut these down to size and there then emerges a wording that most people "settle for". We have generally looked at the "settled for" position of what practitioners will usually accept thus avoiding the existing painful process of offer and numerous qualified acceptances.

3. CHANGES IN THE 2009 CLAUSES

The Working Parties of the Royal Faculty of Procurators in Glasgow and The Edinburgh Conveyancers Forum would like to acknowledge the support and assistance which they have received from Professors Brymer, Paisley, Reid and Rennie ("the Panel"), without whom the Combined Standard Clauses could not have been conceived.

The Panel was asked to opine on the following specific areas of distinction between practices in Glasgow and Edinburgh:-

3.A PANEL CHANGES

3.A1 Definition of "the Property".

The Glasgow Missive defines "the Property" as including "all necessary rights of access and all rights exclusive, mutual and others pertaining thereto *and the parts, privileges and pertinents thereof*".

The Panel's view was:-

(1) The Panel doubted whether "parts, privileges and pertinents" added anything but did not feel strongly that the phrase needs to be excluded (although they would favour shortening it to "all other parts and pertinents").

(2) Subject to its aftermentioned comments regarding 'necessary access', the Panel generally favours the Glasgow wording. The standard offer is not a Standard Missive. Revisals can be made in a qualified acceptance.

(3) The Panel is not in favour of using general words like "necessary rights of access". Many existing rights of access are not "necessary" at all. They are purely desirable or beneficial or even useful. They may add material value to the property but they are not "necessary".

3.A2 Awareness of Defects.

The Edinburgh Missive has an 'awareness of defects' provision. The Glasgow Missive has no such provision. The Panel was asked to comment on whether or not it is appropriate to incorporate a 'state of awareness' clause.

The Panel's view was:-

(1) Such "awareness" clauses are fairly widely used in practice. However, it is questionable how enforceable they are. A qualification will invariably be made along the lines of "So far as the seller is aware (but no warranty is given in this respect) there are no such facts etc…." This therefore makes the argument about such matters somewhat pointless.

(2) It is usually the case that clauses of this type are deleted and a statement being added in the qualification to the effect that the purchaser shall be deemed to have relied on his or her own survey – *caveat emptor*. The Panel is also concerned as to how one actually one would pin down "awareness".

(3) The Panel believe that this is something which the Home Report should identify. The risk of having an awareness of defects clause is that although it is almost bound to be qualified as aforesaid, a purchaser may erroneously think that he is absolutely protected should a defect arise. The Panel is therefore of the view that it is better to have a clear cut situation where the purchaser knows that he has no guarantee as to the state of repair of the property.

3.A3 Provision of Guarantees/Specialist Reports.

In relation to the provision of guarantees/specialist reports, the Edinburgh Missive provides for delivery of "any guarantees in force" and goes further by stating that in the event that such documentation is deemed to be "materially prejudicial", the purchaser then has a right to resile.

The Panel's view was:-

(1) There are two situations which can arise. In the first place, a surveyor for the purchaser (or indeed the independent surveyor) may discover some defect which would require specialist treatment. In such a case, it is obviously very important that any existing guarantee and the specification indicating what is guaranteed is made available. On the other hand, there may be situations where the surveyor picks up no defect but there is still a guarantee for work which has been properly done, say 15 years ago with 5 years of the guarantee left to run. The Panel does not favour a clause which would allow a purchaser simply to pick technical holes in the guarantee and then rescind even although there was no suggestion that the work had not been done properly. The Glasgow clause covers such a situation. If there is a guarantee, for say double glazing or dry rot, then it must be handed over. In the Opinion of the Panel, this is sufficient.

(2) If it is the former case where the surveyor has picked up a problem and the seller says that there is a guarantee, then the Panel believe that the Missives require to be tailored to suit that situation with an extra clause to the effect that it will be shown that the guarantee is enforceable and does cover the defect as disclosed by the surveyor.

(3) The Panel also believe that if a right to resile is to be retained, it would need to be much more carefully targeted against whatever mischief, precisely, the provision is intended to solve.

3.A4 Awareness of Developments.

The Edinburgh Missive requests a statement from a seller that they are not aware of "proposals, applications or redevelopment plans".

The Panel's view was:-

(1) While accepting that there can often be benefits of such "awareness" provisions, the Panel is of the view that they can also be potentially dangerous.

(2) The Panel is generally not in favour of clauses which result in uncertainty and argument. The Edinburgh General Clause is a "catch all" clause. How would one be aware of an application for planning for an adjoining property however unless there had been neighbour notification or a notice in the local newspaper?

(3) There is more difficulty with the words "proposals" and "redevelopment plans". In practice, such clauses tend to be qualified either by deleting them with reference to a Property Enquiry Certificate which is to be delivered or by stating that the seller has not received written notification of any such proposal. The latter is a more clear cut situation.

3.A5 Liability for Statutory Notices.

In Edinburgh, the watershed date for the transfer of liability for Local Authority Repair Notices from seller to purchaser is the date of conclusion of missives. In Glasgow, the date is the date of entry. These provisions reflect longstanding practice in each city. It is believed that the distinction may reflect the situation that in Glasgow many tenemental properties are factored whereas in Edinburgh few traditional tenements are (with the co-proprietors relying on the Local Authority to perform such a role).

The Edinburgh position however is also based on the argument that a purchaser is expected to acquire a property "as seen".

The Panel's view was:-

that the arguments in favour of Edinburgh's position with regard to this matter were persuasive, and that the watershed date for the transfer of liability for Local

Authority Repair Notices from seller to purchaser should be the date of conclusion of missives.

3.A6 Listed Building Consents

Although both the Edinburgh and Glasgow Missives adopt the view that Local Authority documentation for previous alterations are only looked for in respect of work carried out within the period 20 years preceding the date of entry, in Edinburgh there is concern that there is no time limit under the relevant Planning legislation for possible Listed Building Consent .

The Panel's view was:-

that a 20 year cut-off for Listed Building Consents is preferable.

3.A7 Declarations of Trusts in Dispositions

The view of the Panel was that the Panel is not in favour of trust clauses. Put bluntly, trust clauses in Dispositions have never really worked. Any Deed of Conveyance containing such a Clause is arguably internally inconsistent. There is no clear trust purpose. In any event, it is the view of the Panel that the Clause is now also not necessary because of the bankruptcy legislation changes. There may also be possible limiting effects on the Keeper's indemnity.

The Panel's view was:-

that the trust clause device in Dispositions should be eradicated.

3.B <u>OTHER CHANGES TO GLASGOW STANDARD CLAUSES</u>

The numbering of the clauses below is that of the new CSM;

1 (c) New and includes items in the Sale Particulars or adverts made available to the Purchaser.

(d) The order has changed but there is little change apart from including the plural with regard to white goods etc. "Garden Statuary" in Edinburgh style not included.

New final sentence. The property is to be left in a clean and tidy condition at settlement.

5 (a) With regard to Local Authority notices and orders these are sellers liability if dated prior to or on the "date of conclusion of missives" instead of "the date of entry".

(b) New last sentence. The seller undertakes not to enter into approve or otherwise authorise any such scheme of common repairs prior to settlement without the consent of the purchaser.

(d) Now reads "and/or" rather than "and".

(f) Minor amendment only. The last two sentences dealing with the retention and any shortfall have been added.

6 There is a new sub-clause (d) regarding <u>other</u> outgoings and charges.

7 Substantial changes to the previous style.

(a) Deals with additions, alterations and erections within <u>20 years</u> of the date of entry and covers Listed Building Consents, Building Warrants and Certificates of Completion or Notices of Acceptance of Completion Certificate or a Local Authority Property Inspection Report or Letter of Comfort or equivalent.

(b) Covers planning permissions within <u>10 years</u> of the date of entry.

(c) This was the old (b) with no changes.

10 The word "or" replaces the word "and" in the original Clause 10.

11 (b) and (c) are new but in the main come from the old PEC Clause 19.

14 No reference to Local Authority Completion Certificate (covered at Clause 7). It now reads "NHBC documents or such equivalent approved by CML" rather than listing all the names of alternative providers.

15 (a) Reworded with no reference to solum or foundations as covered by the Tenements (Scotland) Act 2004.

(d) Only "constructing" is included (not "maintaining" in previous style).

(e) The new wording is "proper and convenient use" rather than "necessary servitudes and wayleaves required for its proper enjoyment".

The final paragraph is a departure and follows the Edinburgh Style. The Purchaser is entitled to resile but only if he intimates his intention to do so within 10 working days of receipt of the Titles <u>and</u> only if these matters are not rectified or clarified to the Purchasers satisfaction (acting reasonably) by the date of entry or within 6 weeks from the date of intimation whichever is the earlier.

17 The Certificate of Non-Crystallisation has now to confirm that the property is released from the floating charge and not a provision that upon delivery of the Disposition the property will cease to form part of the assets which are subject to the floating charge.

19 (a) PEC now to be dated "after the date of conclusion of the missives"

(b) If the PEC discloses any matter materially prejudicial to the purchase of the property the purchaser can resile on similar terms as that provided for the Titles at Clause 15. Note 10 working day period to intimate intention to resile <u>and</u> Seller has time to remedy.

(c) The order has been changed but it is similar to the original. Sub-Clause (c) (ii) of the Glasgow Standard Clauses has been omitted but this is now dealt with at new Clause 11(b) and (c).

20 The Coal Report is to be exhibited "prior to settlement" not "the date of entry". There is a similar clause for resiling as for the Titles at Clause 15 and PEC at Clause 19. Note 10 working day period to intimate and Seller has time to remedy.

23 Both Seller and Purchaser authorise release "on demand". It is not now linked to there being a claim after settlement.

24 The de minimus limit has been increased from £100 to £200.

26 (c) Definition of "the missives" now reads "the offer" instead of "the offer or other document".

(d) This is new. Instructions to be in writing and includes faxes or e-mails.

Old Clause 27(e) is delete.

3.C <u>OTHER CHANGES TO EDINBURGH STANDARD CLAUSES</u>

1 "Garden Statuary" has been deleted. "Fire grates, fenders and associated ironmongery" have been added.Second para "settlement" has been substituted for "entry"

2 (a) New wording. There is no right to resile and no necessity of a 20 year period.

4 The old 5 (a) has been dropped. It now also refers to development "which has not been completed".

5 (a) "Entry" substituted for "settlement" in old Clause 6 (a).

(b) New added words "not received written notification of" any scheme of common repairs or improvement. Addition of the words "or where any such scheme is instructed".

(c) Retention to be held in an interest bearing account by the Purchasers solicitors omitting the words "jointly for the purchaser and the seller".

(d) There is added the words "in terms of clauses (a) and/or (b) above".

(e) Minor amendment.

(f) Retention to be held in an interest bearing account by the Purchasers solicitors. No reference to the account being held jointly for the Purchaser and the Seller.

6 New heading "Property Management and Factors"

(a) New. The common charges are to be apportioned as at the date of entry with the Seller responsible for all common repairs and improvements carried out, instructed or authorised on or prior to the date of entry.

(b) Similar to the old clause but includes "proposed, instructed, authorised or completed" instead of "contemplated or outstanding work undertaken but not yet completed" repairs.

(d) Since common charges have now been specified at (a) this covers "all other outgoings and charges".

7 (a) (i) Now includes Listed Building Consents previously covered in the old Clause 8(c).

(c) The old 8(c) and (d) are deleted and the new (c) is the old (e).

The previous 8(d) is now dealt with in the offer where an additional clause can be added if selling in the Edinburgh region.

8 Condensed version. Original clauses 9(a) and (b) are delete.

10 New heading "Title Disputes" rather than "Neighbour Disputes". There is deleted the previous wording in old Clause 11 "or any other material matters relating to the property nor is the seller aware of any such disputes having occurred in the past".

11 (b) Definition of mains services now excludes "electricity and if applicable gas"

(c) New. This is mentioned here rather than in the PEC Clause 19.

13 Minor amendments (c) refers to the price as being paid "after the due date" instead of "remains unpaid".

(c) (i) New wording "ordinary damages in respect of" rather than previous version "an amount equal to".

(d) (i) Same amendment as in (c)(i) above.

(d) (ii) The deduction is reworded to be of "any amount by which the price obtained by the Seller on a resale of the Property exceeds the Price".

14 The words "NHBC Documentation" appear without the previous version of words in brackets being "Buildmark Ten Year Notice Insurance Certificate or otherwise".

15 In the previous wording 16(e) there was reference to "necessary" servitudes and wayleaves but that word has been removed due to the panel comments earlier. There have been added the words "and convenient" after "proper". The second sentence of the old condition 16(e) has been deleted i.e. "Any such servitude and wayleaves shall have been formally constituted and any liabilities relating to the same are equitably apportioned".

16 The previous Clause 17 and 18 have been merged. The 2pm time limit for payment has been dropped and there has been added "a good or marketable title".

(a) Form 10 to be brought down to a date of more than 3 working days prior to the date of entry. The previous version was to the date of settlement.

(b) Similar change to (b) in respect of the Form 12 report.

19 New insertion that PEC is to be dated "not earlier than 3 months prior to the date of entry"

20 The second sentence of the old Clause 22 "The report shall have been issued no more than 6 months prior to the date of entry" has been deleted. The period to intimate intention to resile is now 10 working days rather than the old 5.

23 "All parties authorise their agents to release their current address on demand". This is no longer linked to "in the event of any claim arising after settlement".

24 The £100 limit has been increased to £200.

25 A new clause.

26 New clause (e) and (f).

4. GUIDELINES

First of all, let us be clear. The system is a voluntary one. This system is a facility not a straightjacket. It is for each Firm to decide whether it wants to be part of the system or chooses to remain outwith it. Having said that, it will be increasingly difficult for Solicitors who remain outwith the system, to remain so it if more and more Solicitors start to use it. We recommend the following Guidelines to make the system work properly.

The 10 Guidelines are not rules leading to disciplinary action if not adhered to. They are:-

1. **The offering Solicitor should endeavour to submit the offer in the Standard Offer style referring to the Standard Clauses with as few changes as is possible.**

   If a change is required you should ensure that this is for a valid reason e.g. making the offer subject to survey and not for an invalid one i.e. "pet" qualifications or amendments which differ in style, rather than in substance.

2. **The selling Solicitor should attempt if possible to issue a de plano acceptance.**

   Your new perspective is not how many changes you can make but how few. De Plano acceptance should be possible if there are no unusual or onerous title conditions or some problem with the description or with the documentation held being incomplete. However "pet" qualifications should be avoided.

3. **The aim is to conclude missives with either a de plano acceptance or at most with one qualified acceptance before an acceptance.**

4. **Goodwill is required from both the purchaser and seller to keep the missives adjustment period to as short a time as possible. Ideally missives should be concluded within one week.**

   That is an aim but we hope as Solicitors become more aware of how the system works it will be achievable and in many cases missives may be concluded by return.

   Given the possibility of a de plano acceptance purchasing Solicitors and their clients have to be completely "up front" with their colleagues and the seller if the offer is subject to (1) survey, (2) loan or (3) conclusion of missives for the sale of the purchaser's existing property. If so this should be disclosed in the offer. The client has to be aware of this and that complete frankness is required as the client may find that he will be bound into a contract thinking that the old method would buy him time. That will not now be possible. There should now be greater transparency re the purchaser's position.

5. **Purchasers should be warned that if their offer is subject to survey etc then their offer is less likely to be accepted than one which is not so qualified.**

   Your clients will require education in this regard. However, to assist with this we have prepared a Client Guide which you may send out to both purchasers and sellers advising that it is likely that the offer that will be sent or received will be in that style.

6. **On receipt of a non-Combined standard offer, the selling Solicitor should consider requesting an offer in the new style.**

   Please be prepared to direct your colleagues to where the styles are e.g.

   (1) the RFPG website which is www.rfpg.com

   (2) the Edinburgh Conveyancers Forum www.edinburghconveyancersforum.com and

   (3) the Law Society's website www.lawscot.org.uk which has styles of all standard offers

7. **We recommend that where your firm is a member of an SPC that the Property Schedules contain the wording "Offers are invited in the style of the Combined Standard Offer and incorporating the Combined Standard Clauses (2009 edition)".**

8. **If the offering solicitor does not use the Combined Standard Offer we suggest it is met with a qualified acceptance which will accept the offer but only to the extent of the**

price, entry and extras (if these are so agreed) but then will delete all the other clauses and incorporate by reference the Combined Standard Clauses (2009 Edition).

9. **It is accepted that on some occasions clients may ask for the wording of the offer to be changed.**

   Perhaps they remember your pet wording and prefer it. It is suggested that solicitors using this Standard Offer will explain to their client that there are enormous benefits in using a standard wording which is standard throughout Edinburgh and Glasgow and elsewhere.

   You could explain for example that if your client insists on changes then they are likely to face resistance from your colleagues who are also using the same style and are unlikely to accept the changes. You could also explain that solicitors are being urged to use discipline to ensure that any changes are material ones and not simply because they would like the wording to be slightly different from the standard.

10. **Please do not send the title deeds at the offer and acceptance stage. Send these immediately on conclusion of missives.**

    It would be acceptable to send the titles if there is a title problem or send the documentation if there is a documentation problem asking the purchasing solicitors to examine this and satisfy themselves. However, please do restrict the titles or documentation sent to those in question and do not be tempted to send all the titles and all the documentation simply because you are wishing to qualify on only one point.

5. <u>ENFORCEMENT</u>

As has been explained this is an entirely voluntary system with solicitors being encouraged to use the standard offer for the benefit of themselves and their clients. There is no sanction other than disapproval and “peer pressure” to conform.

6. <u>CONFLICT OF STANDARD OFFERS</u>

What happens when you are buying a property in Inverness? Should you use the Combined offer? We suggest that courtesy will dictate that when buying in the Inverness area you use the Inverness Standard Offer and similarly in other areas the Standard Offer applicable in each regional area.

This is simple courtesy to the solicitors who have spent the time and effort on agreeing a standard style for their area and will ensure that there will be a harmonious relationship between you and solicitors in other areas of the Country.

All the Regional Standard Clauses are easily accessible on the Law Society of Scotland website. This Practitioner's Guide and the Client Guide are also available on that website.

The use of the CSC and the two Guides are freely available to any solicitor in private practice who wishes to use them subject to the condition that the Guides are not to be sold or hired out but distributed free of charge. You are entitled to "badge" the Client Guide to make it your firm's own. If you feel the wording could be better explained than we have done in our version then of course you are free to do that too.

7. CONCLUSION

Standard Conditions have changed the Rules forever and from now on conclusion of missives should be a more straightforward process with fewer of the inherent delays that were involved when each solicitors firm had their own style and stuck steadfastly to it.

Speed and ease of conclusion of missives and clauses with which the practitioner and the client can become familiar are enormous benefits. You have the tools to make this a reality. Please use them and attempt to follow the spirit of the Guidelines.

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