

PRACTITIONERS' GUIDE

TO THE

COMBINED STANDARD OFFER

AND

COMBINED STANDARD CLAUSES (2013 EDITION)

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**Issued by the Standard Missives Joint Working Party of The Edinburgh Conveyancers
Forum and The Steering Committee of The Glasgow Conveyancers Forum**

1. METHOD

The Combined Standard Missives covering the Glasgow and Edinburgh geographical areas were born in 2009, amended in 2011 and so the new 2013 edition is version 3. As with earlier versions if agreement on practice or wording could not be reached by the Joint Working Party (JWP) of the Steering Committee of The Glasgow Conveyancers Forum (GCF) and The Edinburgh Conveyancers Forum (ECF) we 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 previous painful process of offer and numerous qualified acceptances.

2. CHANGES IN THE 2013 OFFER AND CLAUSES

The JWP of the GCF and ECF would like to acknowledge the ready support and assistance which they have received from Professors Brymer, Paisley, Reid and Rennie (“the Panel”), to this revision of the Combined Standard Clauses (CSC).

Changes to the Style Offer This has changed.

1. The ARTL Clause (Fourth) of CSC 2011 has been deleted.

ARTL has been a disappointment and was not fit for purpose despite all the trials gone through. There was genuine goodwill on the part of the profession and ROS to make it work but the technology did not meet expectation. Hopefully a new version will be available at some point. Meantime we are matching current practice by deleting the ARTL Clause as that is what most practitioners are doing.

2. There was an optional Clause (Fifth) for Edinburgh Agents and it has been deleted.

This made provision re replacement windows compliance with Building and Planning Regulations as at date of installation but things appear to have changed with City of Edinburgh Council and our Edinburgh colleagues advise that the Clause is no longer required.

Changes to the Combined Standard Clauses

1. Fixtures, fittings and contents

Clause 1 (d) the words “solar panels;” have been inserted after “satellite dishes;” They are most likely heritable fittings and fixtures in any event but it does seem sensible to add these as they are becoming much more common.

2. Clause 15.2 “All keys” are to be delivered not just “the keys”.

3. Incorporated Bodies

Clause 17 (a) the words “or limited liability partnership,” have been inserted on the first line of sub clause (a). These are registered in the Register of Charges and so similar searches can be carried out against them.

4. Green Deal etc

Clause 27. This is an entirely new Clause dealing with Green Deal plans and Energy Performance Certificates (EPCs).

The new sub clause (a) simply provides that the property is not subject to a Green Deal plan as defined in Section 1 of the Energy Act 2011. It is a very simple clause but of course is designed to tease out whether there is a Green Deal plan.

The vast majority of houses are not subject to a Green Deal and therefore there is little point in putting in detailed provisions at this stage.

If there is a Green Deal plan then the parties are going to have to make provision with regard to it to which I will refer later.

Sub clause (b) provides that the Seller shall deliver at or prior to settlement an EPC in compliance with the Energy Performance of Buildings (Scotland) Regulations 2008, as amended.

When properties are being sold on the open market there will of course be an EPC as part of the Home Report so in most cases an EPC has been seen. However in cases of “off market” sales a Seller is still due to give an EPC and this clause has been added to cover this.

5. Interpretation

Clause 28 This Clause now appears as Clause 28 rather than 27 so is different from its numbering in the previous editions. That is something we have tried to avoid in previous revisions but it is now necessary as it is a new clause.

3. GUIDELINES

The system is a voluntary one and is a facility not a straightjacket. It is for each Firm to decide whether it wants to use the system or needs to make changes to the standard wording to cover a special case. 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:-

3.1 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.

Changes should be for a valid reason e.g. making the offer subject to survey and not for an invalid one i.e. “pet” qualifications or amendments of style, rather than substance.

3.2 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.

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

3.4 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 purchaser has to be aware of this. Complete frankness is required as a purchaser may find that he will be bound into a contract sooner than the old method giving him more time. That will not now be possible. There should now be greater transparency re the purchaser’s position.

3.5 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.

3.6 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

3.7 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 (2013 edition)".

3.8 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 (2013 Edition).

3.9 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.

3.10 Conflict of Standard Offers

If buying a property in Inverness we suggest use of the Inverness Standard Offer and in other areas the Standard Offer applicable to that 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 Guide and the Client Guide are also available on that website.

4. Use

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.

5. GUIDANCE ON NEW OR TOPICAL CONVEYANCING MATTERS

5.1 GREEN DEAL PLANS

See the text of a Seminar at a GSPC event re The Green Deal on 9/10/13

Speaker Ian C Ferguson, GCF Committee Member + Partner of Mitchells Robertson, Glasgow

Definitions

These are contained in Section 1 of the Energy Act 2011 (the 2011 Act).

An Energy Plan is an arrangement made by the occupier or owner of a property for a person to make energy efficiency improvements to the property.

An Energy Plan is a Green Deal Plan if:-

- (a) the energy efficiency improvements are to be paid for wholly or partly in instalments; and
- (b) all of the requirements listed in paragraphs (a) to (e) of sub-section (4) are met in relation to the plan at the time when it is made (not reproduced).

The payments in instalments agreed in the plan are to be:-

- (a) made by the person who is for the time being liable to pay the energy bills for the property;
- (b) made to the relevant energy supplier through the energy bills for the property;
- (c) recoverable as a debt by the relevant energy supplier from the person referred to in para (a)...

Acknowledgement Forms

The Green Deal (Acknowledgment) (Scotland) Regulations 2012, which came in to force on 28 January 2013 are made under Section 1 of the 2011 Act. They cover a requirement to secure acknowledgement of a Green Deal Plan where there is or may be a change of electricity bill payer at a Green Deal Property.

Regulation 3 applies where the Green Deal Plans contains an early repayment term and Regulation 4 covers where the Green Deal Plan does not contain an early repayment term.

Both Regs 3 and 4 require that when Property subject to a Green Deal Plan is sold or let the Seller or Owner serves the applicable form. The 2 alternative Acknowledgement Forms are attached.

Nature

The amount repayable is not like that due under a Standard Security. However the charge attaches to the electricity supply of the house and so that extent it is charged on the house and applies to the house owner or tenant in the nature of a heritable debt.

Perhaps we should think of it like we do common charges which transmit against singular successors.

Practice

The Property Standardisation Group "Offer to Sell - Vacant Possession - Guidance Notes" are at ([http://www.psglegal.co.uk/documents/offer to sell/Guidance Vacant Possession V6.doc](http://www.psglegal.co.uk/documents/offer%20to%20sell/Guidance%20Vacant%20Possession%20V6.doc)).

Clause 11.4 of the current PSG Offer to Sell (with vacant possession) sets the default position as being that there is no Green Deal Plan affecting the property.

The New Combined Standard Clauses (2013) Edition deals with this in a brand new Standard Condition "27 Green Deal et cetera). Sub-clause (a) provides "The property is not subject to a Green Deal Plan as defined in Section 1 of the Energy Act 2011".

This has adopted the PSG position as the default position for the reason that most sales will not involve a Green Deal. The Client Guide is being amended to make this clear and that other provision will need to be made if a Green Deal is involved.

CML Handbook

This has been amended and most lenders wish to be told if there is a Green Deal Plan. I attach a copy of the requirements of the various lenders under CML Handbook.

What to do if there is a Green Deal Plan?

I suggest that we are already seeing how practice shall evolve by the approach of PSG and CSC 2013 that the default position is that there is no Green Deal Plan and so no debt is transmissible. I suspect that purchasers' solicitors will wish to know that there is no debt transmitting if there is a Green Deal Plan. If the Green Deal contains an early repayment term, then I imagine provision will be made that the amount due under the Green Deal Plan will be repaid and evidence exhibited of repayment at or within a week or so of settlement. Where the Green Deal is not repayable, purchasers may wish a deduction made of the amount outstanding under the Green Deal Plan as compensation for their higher energy bills.

This is a negotiable issue and because we are in a largely purchasers' market, purchasers are likely to provide along the above lines.

In a sellers' market, the sellers may feel more inclined not to agree but I think that once this all beds down during the current buyers' market, a norm will have been established and it will be very difficult for sellers to "change an established norm" later.

I suspect this result is not the result expected by the Government and its hopes for the scheme.

However "Which", the consumer body, are sceptical of the benefits and the rates of interest and urge consumers to compare with alternatives.

At its most basic, purchasers will see a property with improvements. As with any other improvements they will not expect to pay for the cost of these because the seller could not or would not pay for them himself outright. Also CSC SC1 provides

"The Seller warrants that at the Date of Settlement all items included in the Price are owned by the Seller, are or will be free of all debt...". So for movables in a sale we provide that they are not subject to HP or are cleared of debt as a condition of purchase.

It remains to be seen how practice develops but I think that the Green Deal will be treated like any other type of debt relating to heritable or moveable property included in a sale.

1) Form of acknowledgment where green deal plan contains an early repayment term

Acknowledgment of green deal plan

[I/We]*, [Insert name and address of person[s]* giving acknowledgment] acknowledge[s]* that:

(a) a green deal plan dated [*insert date*] with reference number [*insert reference number*] has been entered into for [*insert description of green deal property*] (“the property”); and

(b) for such time as [I am/we are]* the bill payer[s]* at the property, [I/we]* will be:

(i) liable to make payments under the green deal plan; and

(ii) bound by the terms of the green deal plan which bind [a]* bill payer[s]* at the property.

[I/We]* further acknowledge that, when [I/we]* have ceased to be the bill payer[s]* at the property, [I/we]* will continue to be bound by the term[s]* in the green deal plan which enable[s]* the green deal provider to require early repayment of the amount outstanding under the green deal plan (see note 2).

(Note 1: A person will be a bill payer if they are:

(a) liable to pay the electricity bill at the property; or

(b) made the bill payer under regulation 6 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc). Regulations 2012. That regulation applies where there is no supply of electricity to the property and applies to those who are entitled to sell such a property or those who are tenants under a registrable lease at such a property.

Note 2: See regulation 38 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 for the circumstances when a green deal plan may allow a green deal provider to require early repayment of credit, including from a person who used to be a bill payer at the property.)

[Signed.....[Insert signature of person[s]* giving the acknowledgment]

[Dated.....[Insert date acknowledgment is given].

* Delete as appropriate. ”

2) Form of acknowledgment where green deal plan does not contain an early repayment term

Acknowledgment of green deal plan

[I/we]*, [Insert name and address of person[s]* giving acknowledgment] acknowledge[s]* that:

(a) a green deal plan dated [*insert date*] with reference number [*insert reference number*] has been entered into for [*insert description of green deal property*] (“the property”); and

(b) for such time as [I am/we are]* the bill payer[s]* at the property, [I/we]* will be:

(i) liable to make payments under the green deal plan; and

(ii) bound by the terms of the green deal plan which bind [a]* bill payer[s]*

at the property.

(Note: A person will be a bill payer if they are:

(a) liable to pay the electricity bill at the property; or

(b) made the bill payer under regulation 6 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012. That regulation applies where there is no supply of electricity to the property and applies to those who are entitled to sell such a property or those who are tenants under a registrable lease at such a property.)

[Signed.....[Insert signature of person[s]* giving the acknowledgment]

[Dated.....[Insert date acknowledgment is given]

* Delete as appropriate. ”

5.2 NOTICES OF POTENTIAL LIABILITY FOR COSTS (NPLCs)

The ECF and GCF jointly instructed an Opinion from Professor Robert Rennie on some areas of concern about possible wrongful use of NPLCs. A full copy is available on the ECF website, www.edinburghconveyancersforum.com. A short summary of the main points follows.

Summary

1. **Q1 Is it appropriate for a purchaser to request and a seller to provide sight of a quick copy of an NPLC?**

A1 **Purchaser's side** A purchaser's solicitor should be satisfied by a letter from the party who registered the Notice to the effect that the sums due in the Notice have been satisfied. There is no need to see a quick copy notice.

A1 **Seller's side** It depends on whether or not the seller accepts that the sums demanded are due irrespective of when they became due.

2. **Q2 Does the Notice cover sums outstanding at time of registration or all sums outstanding at settlement of the sale?**

A2 The Notice can only cover sums outstanding at the time the Notice is registered.

3. **Q3 What level of detail or breakdown of sums claimed under the Notices should be sought to determine extent of the liability.**

A3 There is no guidance on this in the 2004 Act.

The statutory form is "Description of the maintenance or work to which the Notice relates" so there is nothing in the form re a cost figure being inserted. However his opinion is that the costs must refer to the maintenance or work. It does not cover legal expenses of registration or costs of recovery.

4. **Q4 There is no statutory Discharge style so what does he recommend re a style of a "letter of satisfaction" or evidence required that all sums due have been repaid? What is suggested practice and timescale for delivery**

A4 Style

" We (insert name of party lodging notice) do hereby confirm that all sums due in respect of the notice of potential liability for costs registered by us on (insert date) in relation to (insert address of flat with registered title number) have been fully satisfied."

A4 Practice and Timing.

A one month period. A letter of obligation to deliver a satisfaction letter is not in classic form. However that does not mean a selling solicitor would not be bound by it but it would affect the selling solicitor's cover under the master policy.

Note. This is a summary of the Q&As for convenience only. You should read the full Opinion.

Written by Ian C. Ferguson of Mitchells Robertson, as a Member of the Standard Missives Joint Working Party of The Edinburgh Conveyancers Forum and The Steering Committee of The Glasgow Conveyancers Forum