

Scottish Law Agents Society

Submissions to Scottish Executive on the final report of the Housing Improvement Task Force- Stewardship and Responsibility, a policy framework for private housing in Scotland

June 2003

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The Scottish Law Agents Society was established by Royal Charter in 1884. It is the largest voluntary association of Scottish Solicitors from all branches of the profession and from all parts of Scotland. We have some members practising abroad. The Society does not have any responsibility for regulation but its objects include the promotion of legal services in Scotland.

SLAS is active in responding to consultative documents issued by the Scottish Executive, the Scottish Law Commission and others and is generally interested in the good government of Scotland. The Society has a number of specialist committees including a Conveyancing Committee.

The Society publishes a legal journal called the Scottish Law Gazette published six times a year with articles on professional practice and developments in the law and the Memorandum Book published annually containing valuable information for practitioners.

Scope of our response

We intend confining our response to the issues raised in chapter three of the Report. We have already submitted our responses in relation to the consultation on the draft Tenements Bill incorporating the issues raised by the Task Force.

General comments

In our view the conclusions reached by the Task Force that there are few market related incentives to encourage owners to maintain their property is not evidence based [para113]. The issue which the Task Force has failed to address is that housing is a scarce resource and that the finite number of properties available in a market will lead to a significant proportion of the value being attributable to the land on which a property is built and the existing permission to use the property for residential purposes. It is the experience of our members that properties which are well maintained will attract higher prices than similar properties which are in poor condition. This premium will not reflect the value of improvements and repairs where the market has become distorted through the lack of supply of land for housing where it is required because of the existing system of controls imposed as a result of the planning regime. The issue of lack of supply in the central belt in Scotland has recently been made by many bodies including the Chartered Institute of Housing in Scotland. The stated aim of creating a clear incentive to maintain properties [para114] will not be achieved without addressing the lack of supply which is artificially distorting the market. The proposition that redressing apparent information asymmetry will improve the market ignores the supply side issues. In our view the proposals of the Task Force will have no impact in achieving the aim which appears to be the sole justification for the changes which are proposed.

The lack of a conceptual legal analysis

The Task Force fail to make any analysis of the rights which generally flow from ownership of property. Property Rights are enshrined in Protocol 1 to the European Convention of Human Rights which is incorporated into Scots law by the Human Rights Act 1998. In a western liberal democracy property rights are acknowledged to be

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qualified. Generally however an owner can make such use of his property as he pleases, provided that third parties rights are not affected. Thus an owner can consume his property and has no duty to maintain it. Thus any incentive to maintain would require to be an economic one. The Task Force also fails to make any attempt to analyse the relationship of purchaser and seller. In a typical residential transaction neither party is acting in the course of a business. The approach of the Task Force is to apply consumer solutions to a situation where by legal definitions of consumer one party is not acting in the course of a business and the other party is. This leads to solutions which, in our view, are inappropriate.

Speed and costs - the measure of success

The Report notes [para116] the by international standards the Scottish system of buying and selling has relatively low transaction costs and has clear outcomes and relative speed compared with England and Wales. It is clear that the Task Force proposals will increase costs and slow the process by making processes which are presently concurrent sequential. In our view the tests which the Task Force set themselves are not met.

The single survey

scheme 1 or scheme 2?

We note that the Task Force considers that scheme one valuations are inadequate and that many solicitors encourage purchasers to obtain a scheme 2 report [para 129]. Conveyancing business is now a very price sensitive area and there is no doubt that the cost is the reason why many choose to have only a scheme 1 valuation. The important issue here which is ignored by the Task Force is that of choice. If purchasers make an informed choice as to the differences between the two reports then in our view it ought to be their right to choose. The Financial Services Authority has recently carried out some excellent work on consumer understanding of information contained in documents. In our view a standard disclosure of the differences in types of report would be sufficient and many surveyors already have such documents. We see no need to impose a scheme 2 report on all where the purchaser makes an informed choice.

We note the implied criticism of the present situation of multiple surveys and valuations. We question whether this is a problem. The concept of buying the market rate for information is in our view appropriate.

Fact or opinion -condition and valuation

The Task Force have singularly failed to address the issue of the objective and subjective elements contained in a Scheme 2 report.[paras 154-159]. The condition of the property is an objective standard but the resulting valuation is far more subjective. This may depend on local market conditions knowledge of comparable property and an evaluation of the location and the making of those comparisons. In the leading English authority *Singer & Friedlander Ltd v John D. Wood & Co* [1977] EGLR 84 it was held that +/- 10% or perhaps would not amount to negligence on the part of a surveyor in reaching a valuation. In the Scottish case of *Harrison v DM Hall* 21st October 2001 it was held that a an 'error' of 15% was not of itself evidence of negligence [in fact the 'error' was of the order of 20%] in these terms :

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"In the result I am of opinion that while the evidence shows that the defenders' valuation was high, it does not show that it was so high as to be one which was not within the legitimate range of professional opinion"

If one applies this to a house with a 'correct valuation' of £100,000 valuations within the range of £80,000 to £120,000 may not give rise to a successful claim for negligence against a surveyor. In our view the existence of multiple surveys is likely to assist the seller in obtaining a realistic price. This is a legitimate objective of any system. Multiple surveys are likely to lead to a more efficient market in our view.

We note that the proposals of the Office of the Deputy Prime Minister in relation to the draft Housing Bill in England [March 2003] do not include a valuation in the home condition report proposals. It is envisaged that the valuation will be commissioned by the purchaser or lender and will be a desktop exercise based on the report on condition. There appears to us to be a lack of clarity of liability where defects are subsequently found or where the valuation turns out to be 'wrong' in the English model.

Are the needs of seller and purchaser the same?

In the Scottish proposal we again consider that there has been no analysis of the differing information needs of the seller who needs to know what price to put the property on the market and the purchaser who needs to know about its value and condition. We note that in the Bristol experiment 36% of purchasers did not rely on the seller's survey.

Will purchasers accept a single survey or will they want to second guess?

We have had anecdotal evidence from our members that where a seller's survey has been commissioned in very active markets prospective purchasers are accessing this information and then commissioning their own scheme 1 valuations with a view to having a 'better' valuation than competitors. In other situations prospective purchasers are offering at closing dates subject to survey thus making the Scottish system more like the English system. This suggests to us that any voluntary scheme is unlikely to succeed in Scotland. This is a view which is shared by the Office of the Deputy Prime Minister and given the evidence which we refer to we do not share the optimism expressed by the Task Force in para 164.

The nanny state approach

Given the characterisation of the relationship between seller and purchaser as a contract between two private individuals we are concerned that the advice received from the executive that should legislation be required it might be necessary to place duties on sellers and sanctions for non-compliance. This smacks of a big brother nanny state approach.

We also note that in the English proposals the Office of the Deputy Prime Minister contained in the draft Homes Bill are compulsory and also require a certification authority and a central closed register of home condition reports. We agree with the

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comments of the Task Force that the costs of such a system could be prohibitive and unnecessary [para 146].

Residual liability of surveyors

We are concerned that where the surveyor as a matter of contact will be liable to the eventual purchaser there will be potential liability to the seller in delict where for example the price is set too low. We note that this point was made by RICS [para150]. There may also be delictual liability to unsuccessful offerers who might have been prepared to offer more had there been a higher valuation but this would be restricted in size to loss of opportunity claims.

The unnecessary contents

With regard to content of the proposed single survey we see no need to require this to contain extra items which may or may not be required by a purchaser such as an access/disability audit, security audit or energy efficiency audit. The total cost of the survey will be increased by £160 with all three added. We note that the design of the energy efficiency audit in the Bristol pilot in England was changed half way through because it was unintelligible to parties [final evaluation of Bristol pilot March 2003]. One of the cost advantages of the Scottish system is being compromised by this proposal.

Shelf life of reports

We note recommendation 25 that there should be no shelf life for a single survey. Many CML lenders require that the survey report is dated within three months of settlement and lenders will require to vary this rule [this is partially acknowledged in para 142]. This paragraph states that the surveyor should have no liability where there have been changes in the condition. This however simply ignores the evidential difficulties which may result. In practice we suspect that CML members will not change their rules and if a survey is instructed before the property is put on the market the period of currency will be short. If it takes six weeks from offer to settlement we suspect that a survey will have a real shelf life of around six to seven weeks. In active markets this will no doubt be enough but in less active markets it will not. Recommendation 25 simply does not address this issue. Again in low demand areas the report is silent on how these might be treated. We note with concern the attitude of the Office of the Deputy Prime Minister in relation to the proposals in England. There the preferred solution is to ignore low demand low value properties of which there may be as many as two million. In Scotland there are many low demand low value properties often tenement flats and former right to buy properties. If the survey is not current then the property will be even harder to sell.

The importance of dialogue between the surveyor and the purchaser

We are very concerned by recommendation 32 that follow up queries should not be possible with single surveys. While we understand the reasoning for this during the offer phase it will be very obstructive if the party who offers for the property cannot subsequently discuss matters with the surveyor. For example the survey report might state 'there have been alterations to the layout of the property in the past purchaser's agent to check for necessary consents' or 'evidence of dry rot treatments in the past purchaser's agent to check for guarantees'. Whether or not there is a purchaser's

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information pack when the documentation is produced it is usual for the purchaser's solicitor to pass on copies to the surveyor to ensure that these consents match up with the surveyors observations i.e. that the certifications covers all the features which the surveyor has drawn attention to. If this cannot be done then the surveyor's responsibilities will have diminished and the responsibility of the purchasing solicitor will have increased.

Funding the cost of surveys

We are concerned with the proposals for payment of the reports. The suggestion in para 152 is very concerning - that surveyors might agree to postpone billing the survey until the property is sold. Surveyors are in our members experience very prompt in issuing bills. There expectations of those surveyed in the Burnley and Bradford research indicated that sellers expected to roll up the costs of surveys into the sale expenses and expected that they would be settled from the sale proceeds. We are concerned that our members would be expected to fund the costs of the survey as part of a sales package [para153]. Many legal practices engaged in residential property transactions are not making adequate profits at present and would find the additional costs of funding single surveys and purchaser's information packs an additional strain which might lead to a reduced number of players in the market and is likely to mean an increase in fees to cover costs of funding. We note that the Task Force does not make any similar suggestion that the Registers of Scotland Executive Agency or local authorities should provide information which is held on their registers and only bill this when the property is sold.

Purchasers information packs

We have no problem with the idea of making available information which a purchaser may require. The Task Force report is very disappointing in that it looks only at old fashioned paper based solutions. There is no discussion of how the Executive or local and other public authorities can assist in making information available quickly and cheaply. What is needed is a comprehensive geospatial dataset which can be accessed over the internet in real time at reasonable cost. The Registers of Scotland Executive Agency has an excellent product in Registers Direct which permits real time minus 24 hours access to the property and personal registers. There exists a project ScotLIS which has some ambition to meet the requirements These appear to have been scaled back to providing a gateway rather than a single comprehensive dataset. The link to Glasgow City Council does not produce the access to the required information. In our view the commitment of the Executive to a comprehensive ScotLIS project would be a significant improvement to the buying and selling process which would render the production of paper based packs obsolete.

Purchaser behaviour

The final evaluation of the Bristol experiment [March 2003] discloses that only 42% of purchasers looked at the packs before making an offer. 40% of those that who consulted the packs did not look at the copy title deeds or other "legal documents. It is clear from this evaluation that only three documents were important to purchasers. These were the

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sales schedule, the survey report and the draft answers to the pre-contract enquiries which has no direct counterpart in the Scottish system. There is no evidence to suggest that purchaser behaviour in Scotland will be any different. In our view this suggests that purchasers information packs serve little purpose. Follow up interviews produced views that the copy title deeds etc were for the lawyers to follow up once the deal had been agreed. If that is the case then there is little need to have the pack available prior to marketing the property.

Pack contents

We note that the contents do not include a local authority property inquiry certificate [recommendation 34]. No doubt this was not included, unlike the English proposals, to combat currency issues in relation the certificate. However in many cases it may not be clear as to whether there any planning consents building warrants etc are in existence if these are not with the title deeds unless a property inquiry certificate is obtained. We suspect in most cases it will be necessary to obtain a property inquiry certificate to ensure that the consents etc placed in a pack are complete.

Summary or full information

It is suggested where a land certificate is not available then a summary of repair and maintenance burdens should be provided as should a summary of any property management arrangements. Many areas of Scotland have only recently had the system of land registration extended to them and the majority of properties will have only Sasine recorded titles. The work of examination of title will require to be undertaken by the selling agent which will then be duplicated by the purchasing agent. In England solicitors were paid a fee of £100 for the preparation of the packs. If an examination of title is to be required and the burdens summarised it is unlikely that this could be done for a fee of £100. In our view a fee of £250 + Vat might be required to cover the costs of the work. This additional cost will be borne by the seller increasing the costs of the transaction.

It appears to us to be unlikely that the selling solicitor will summarise anything as the omission of any information might give rise to a claim in delict by the purchaser.

Delays in preparation of packs

The average time of preparing packs in the Bristol experiment was 11 working days [Final Evaluation, March 2003]. However half way through the pilot concerns about the length of time it took to prepare the packs led to instructions to issue packs after 15 working days whether or not they were complete. It appears however that they were treated as complete for the purposes of the statistics. It is also the case that the around one third of the properties were new Beazer Homes so that the preparation of one pack would cover all the properties. The longest period in Bristol was 53 working days, nearly three months.

In many cases our members advise that lenders do not respond quickly to requests for title deeds and if all relevant documentation is not in the bundle it will take time to assemble this. We suspect that sellers will be unwilling to wait perhaps 20 working days to place their property on the market. The experience of failures to recruit sellers

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and withdrawals during the process during the Bristol experiment bears this out. Sellers did not wish to miss out on active markets as conditions can change quickly. This issue is not addressed by the Task Force.

Concurrent and sequential processes

At present the information in the pack is produced by the selling agent after the offer has been accepted and before settlement of the transaction. It is therefore a concurrent process with the purchaser obtaining his mortgage finance and in many cases selling his own property. If the seller is obliged to assemble this information first it is inevitable that the whole sales process from start to finish will get longer. One of the advantages of the Scottish system would therefore be compromised.

Separate pilots or single pilots?

The cost implications of the proposed system have been given scant attention. In the Bristol experiment the costs were £591. In Scotland there would require to be added the disability audit, security audit and energy efficiency audit at £160. The RICS estimate of survey costs of £350 is £25 higher than the Bristol figure. This gives a figure to bring a typical property to market of £776 + say the fee for insertion is a Solicitors Property Centre of £180 or around £950. If the seller's solicitor required to examine a Sasine title in order to summarise the burdens this might add typically £150. If these fees are asked for up front they are likely to discourage many potential sellers. If the seller expects to roll up the expenses to be settled from the sale proceeds the strain on the finances of many legal firms will be prohibitive. It is in our view essential that the full costs of the system are tested.

Research

It is important that research into the uses of the packs made by purchasers are examined as the evidence to date suggests that purchasers do not take advantage of them.

It is equally important that research is carried out on the impact on legal practices and their continuing ability to compete in this market. The barriers to entry caused by the substantial funding which will be required should also be investigated.

Careful research into the problems of low value/low demand property should also be carried out and solutions brought forward rather than the preferred solution south of the border which seeks to deny that such properties are truly part of the owner occupier market.

Blind bidding and low upset prices

We do not share the belief that single surveys are the solution to blind bidding and low upset prices [recommendation 40]. We consider that low pricing is perceived as a feature of the active market conditions which Scotland is presently enjoying. The closing date system is an effective system. No abuse of the system has been suggested. It provides simple speedy conclusions and allows all interested parties to compete on a level playing field. We note that in many public contracts bids by sealed tender are used. We see no case to make any changes to the closing date system.

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Standard missives

We note the support for the Law Society initiative mentioned in recommendation 42 which does not actually seem to recommend anything. We are very concerned that offers to sell are inappropriate. The selling agent will owe duties to the seller. These will naturally be to minimise any warranties given by the seller. The purchaser's agent on the other hand will seek to insert clauses which will protect the purchaser and extend the obligations of the seller. An offer to sell reverses these roles. It is not the function of the Conveyancing Committee of the Law Society to determine what the relationship of purchaser and seller should be. The Law Society previously attempted to promote standard missives which to quote a leading author on conveyancing 'was met with derision from the profession for a variety of reasons' *Sinclair J Conveyancing Practice para 3.13*]. The confusion of roles inherent in the Law Society approach does not augur well.

Multiple surveys v multiple examination of title

There is one area where offers to sell are the norm and that is where property is sold by public auction. Here the articles of roup provide no warranties whatever, not even with regard to the title deeds. The purchaser's agent is required to examine the titles and obtain all other necessary information in advance of the auction. All the relevant information will be available in the pack. In our view there is a very real danger that with single surveys and purchasers information packs that an offer to sell will be very similar to articles of roup. The so called multiple survey problem will be replaced by each prospective purchaser requiring to instruct a solicitor to carry out a full examination of title including property inquiry certificates and any other necessary reports prior to offering. While this may be beneficial for solicitors the costs are likely to be even higher than the costs of the survey, considering the tight time scales in which such work will require to be undertaken. In our view this will significantly increase costs for purchasers.

Conclusion

At the outset the Task Force stressed the strengths of speed and cost in the current Scottish system. As far as we are aware Denmark is one of only two countries where a system such as the Task Force propose is running. This was introduced to get round a situation where the seller remains liable to the purchaser for 20 years for any defects in the property. The Task Force have rejected any change to the doctrine of *caveat emptor* in Scotland. Land registry information and local authority information is available on line. The costs of a sale at £100,000 were estimated in 1998 at £6500 or around 250% of the cost of selling a similar home in Scotland [DETR Housing research Summary 101, 1999].

The Task Force has not attempted to cost its proposals which suggests that it has not tried to measure its proposals against its own yardsticks. Our view is that the Task Force proposals will increase costs and slow down the process.