

**MEMORIAL FOR OPINION OF
PROFESSOR ROBERT RENNIE**

on the subject of

**PRESCRIPTION AND LOCAL AUTHORITY CONSENTS FOR CONSTRUCTION AND ALTERATION
DATED: 27th JUNE 2016**

for

**THE GLASGOW CONVEYANCERS FORUM
and
THE EDINBURGH CONVEYANCERS FORUM
and for publication on their respective websites
(Ref: ICF/GCF1/1)**

For some years, The Combined Standard Clauses and The Scottish Standard Clauses Editions 1 and 2 have contained a clause dealing with alterations requiring exhibition of Local Authority Consents for Construction and Erection within 20 years of the date of entry.

The present clause in Scottish Standard Clauses (Edition 2) is Standard Clause 8 ("SSC 8") which is as follows:-

"8. ALTERATIONS

- 8.1. Where there have been additions or alterations (including change of use) completed to the Property within 20 years of the Date of Entry, or if the Property has been erected within that period, then the Seller shall exhibit before and deliver at the Date of Entry:
- 8.1.1. all necessary Listed Building Consents and either:
- 8.1.1.1. all necessary Building Warrants (including stamped warrant drawings where available) and Certificates of Completion (or, if applicable, Notices of Acceptance of Completion Certificate); or
- 8.1.1.2. an unqualified Property Inspection Report, Letter of Comfort, or equivalent provided by the relevant Local Authority or other mutually agreed supplier.
- 8.2. All Planning Permissions or other Local Authority consents necessary for additions or alterations (including change of use) completed to the Property (or if the Property has been erected) within 10 years of the Date of Entry shall be exhibited before and delivered at the Date of Entry."

There have been different reasons why the 20 year period was fixed upon. The reasons were:-

1) Practice

There is attached a Memo from HBJ Gateley Wareing, dated 16 December 2008, at the time of agreeing an updated Combined Standard Clauses clause for alterations. This Memo simply indicates that this is a practice that is accepted regarding Building Warrants and Completion Certificates by most solicitors and it requested an Opinion regarding Listed Building Consents. The Opinion was issued by Professors Brymer, Paisley, Reid and Rennie and at Clause 2.2 on the subject of Listed Building Consents stated that the view of the Panel on the matter is that a 20 year cut-off for Listed Building Consents is preferable. That tends to indicate that a practice of a majority of the Profession is enough to settle the question.

However, there remains an element of the profession that believes that there is no cut-off stated in law and that they should request Permissions for alterations whatever age they are.

2) Prescription

The reason Glasgow Members of The Combined Standard Clauses Working Party had chosen a 20-year cut-off was because of long negative prescription. The Edinburgh Members of The first Combined Standard Clauses Working Party were persuaded to increase their period from 15 to the 20 years being used in Glasgow.

The Memorial Questions:-

1. Does the 20 year period of long negative prescription apply to the obligations requiring the obtaining of Building Warrant and Completion Certificate and / or Listed Building Consent ("the Permissions") for the erection and / or alteration of buildings if they have been erected or altered without challenge by the Local Authority for over 20 years?

Reference is made to The Prescription and Limitation (Scotland) Act 1973. The format of that Act is that 20 year prescription applies to all obligations not covered by shorter prescriptive periods, unless they are excluded from it. Section 7 appears to apply to all obligations except those to which 10 year prescription for product liability applies or obligations to make reparation for personal injuries or death or if they are one of a list of imprescriptible obligations set out in Schedule 3. None of the imprescriptible obligations appear to apply.

2. Do the Building (Scotland) Acts contain anything which indicates that they are expressly excluded from negative prescription?

There is no such express provision of which the Memorialists are aware. However Section 9 of The Building (Scotland) Act 1959 (which came into force in 1964) was to the effect that it is an offence to use or occupy a building that did not have a Completion Certificate for its erection.

3. Does S. 9 of the 1959 Act apply only to the original construction of the building, rather than its alteration?

However, Section 9 of the 1959 Act was repealed by The Building (Scotland) Act 2003 which came into force on 1 May 2005. Section 21 of the 2003 Act deals with occupation or use without Completion Certificates. This has been expanded to cover both construction or conversion and Sub-Section 5 now makes it an offence for any person to occupy or use a building,

1) knowing that no Completion Certificate has been accepted in respect of construction or conversion or 2) without regard to whether a Completion Certificate has been so accepted.

This may be construed as a continuing offence and some argue that prescription cannot therefore apply to that offence.

However, it appears to the Memorialists that there has never been a case of prosecution under Section 9 of The Building (Scotland) Act 1959 nor under The Building (Scotland) Act 2003. It seems that the requirement of the Local Authority to request paperwork for

alterations would appear to have prescribed. An offence of using or occupying may be theoretically possible but in practice highly improbable.

Also, if the requirement of the Building (Scotland) Acts to require the Permissions for alterations would appear to have prescribed then the "without regard to whether a Completion Certificate has been so accepted" wording of Section 21 has to be read in the context that it would not be reasonable for a purchaser to have enquired about consents if their solicitors do not as a matter of practice check whether or not they were or were not obtained for historic alterations.

The practice of the profession is simply to have a set reasonable period so that one does not have to enquire about Permissions after 20 years and theoretically forever. It is not designed to "*get round*" the need for consents. It is to have a balanced, practical and, indeed, risk managed approach to this matter in specifying a 20 year period.

4. The Memorialists wish to know whether the 20 year period of prescription in the 1973 Act and in Standard Clause 8 is an appropriate provision in the circumstances?

Some solicitors may believe that the request for paperwork should not be limited as it shows that the building has been properly constructed or altered. The Memorialists' suggest that the enquiries that are made for Local Authority Consents are simply for paperwork and are not primarily to establish safety of the building and in any event we are talking of historic alterations and it is not unreasonable to think that if safety were a problem it would have shown itself within a 20 year period. It is the job of the surveyor to pronounce on safety. In addition, properties that have been constructed according with Building Warrants and Completion Certificates may still cease to be safe whether they had a Building Warrant at the time or not.

5. Do you agree with the Memorialists' view in the paragraph immediately above?
6. Can a solicitor comply with CML requirements (particularly paragraph 5.4 of the CML Lenders' Handbook for Scotland) by using and relying on SSC 8 and not enquiring about historic alterations after 20 years?
7. Please add any other comments that may assist.

Ian C Ferguson
 Secretary and Treasurer
 Glasgow Conveyancers Forum
 c/o Mitchells Robertson
 George House, 36 North Hanover Street
 Glasgow, G1 2AD
 (DX GW 77; Glasgow)
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