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Buying and Selling Real Estate in Scotland

ILN REAL ESTATE GROUP



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SCOTTISH LAW

1. Introduction

This guide applies to real estate in Scotland only.

2. Tenure

Real estate, both commercial and residential in Scotland may be either of the following:

Freehold

Freehold real estate is the absolute property of its owner, subject to any rights and title burdens or servitudes in favour of third parties. These may affect how the real estate is used.

Leasehold

Leasehold real estate is held under a lease for a fixed period of time, usually subject to the payment of rent and the performance of obligations specified in the lease. The terms of the lease will dictate whether or not the leaseholder is entitled to transfer its interest to a third party or whether it can sublet either the whole or part of the real estate.

3. Know your client (KYC)

It is necessary to carry out due diligence on the purchasing entity to comply with UK and European-wide Anti-Money Laundering Regulations. The documents which are required will vary depending on the purchasing entity, but they will need to establish the identity of the purchaser and its ultimate beneficial owner. Actual requirements are set out at greater length in Section 4.

4. Guide to purchase and sale of Residential Property

We are frequently asked by purchasers and sellers to answer many basic and wide-ranging questions concerning all types of residential property and investments. It is difficult to produce a comprehensive guide covering every

aspect of a purchase/sale and conveyancing transaction. In these notes, we have attempted to highlight only the main topics. Each transaction has its own peculiarities and potential problems. We shall be pleased to answer more detailed questions and to advise as required.

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1. THE SURVEY

Ideally a purchaser should always obtain the most detailed survey report on the property to be purchased. Better to be “safe than sorry.” While a prospective purchaser is entitled to instruct their own report, generally, they may choose to rely on the home report referred to in the following section.

2. HOME REPORT

With a very limited number of exceptions (for example new build properties) all homes (all types) that are advertised for sale in Scotland from 1st December 2008 require a home report. This is a statutory requirement. The report consists of a pack of documents that will report on the condition of the property. It will contain



a valuation of the property, and a report on the home's energy efficiency. The responsibility for providing the Home report rests with the seller, who will be responsible for the costs involved in obtaining the information required and producing the report. A prospective purchaser will be able to rely on its contents and is entitled to ask the seller for a copy of the report. The report comprises three documents:

(1) THE PROPERTY QUESTIONNAIRE

This is completed by the seller and contains useful information helpful to a purchaser, for example, details of any alterations to the property, the council (local authority) tax banding, any managing agents' details, and details of repairs affecting the property.

(2) SINGLE SURVEY

Although instructed by the seller, the survey is prepared by a chartered surveyor and will report on the valuation of the home and its condition. A purchaser may rely on that survey and providing the purchaser is happy with the terms of that survey report and providing the purchaser's lender (if any) is also satisfied with the terms of that survey report, then a purchaser may feel it unnecessary to obtain and pay the cost of an independent report.

(3) THE ENERGY REPORT

Again, this is prepared by a chartered surveyor and will report on the energy efficiency of the property, its environmental impact and if appropriate will suggest ways to improve the property's energy efficiency.

Home reports dramatically change the level of information that a seller is legally obliged to have available when selling their home. The home report needs to be available to be exhibited to prospective purchasers before a property is marketed for sale.

We always advise that a prospective buyer should obtain the most detailed Report possible on a property, before proceeding with any purchase and should be comfortable and satisfied with the terms of any home report or survey instructed directly, before entering into a binding contract for the purchase of any property.

3. OFFER AND ACCEPTANCE – “MISSIVES”

When a written offer is submitted, that itself does not create a binding contract between the seller and purchaser. The offer for the property will, if generally acceptable to the seller as to purchase price and entry date, be accepted usually with legal qualifications. The offer, and any qualifications made by the two solicitors on behalf of their respective clients as part of the contract negotiations and the final acceptance will together constitute a binding contract between the seller and the purchaser (called “the missives”). Only after the final acceptance is issued will there be a binding contract and “missives will be concluded.” The contract must be written. Verbal agreement is not sufficient to conclude a contract. It should be understood that individual purchasers and sellers do not usually sign the missives and the contract is made binding by the signature of the purchaser's and seller's solicitors.

4. TITLE DEEDS AND CONVEYANCING

Once there is a binding contract, the two solicitors (one for the seller and the other for the purchaser) will carry out the necessary conveyancing formalities and prepare the legal documentation. The purchaser's solicitor will receive and examine all the relevant Title Deeds of the property and will check the conditions, which apply to ensure that there are no unusual and exceptionally oppressive or onerous conditions. They will check to ensure that Local Authority Consents are in place for



any structural or other alterations to the property requiring consent. The existence of any structural alterations should be highlighted in the Survey/Home Report. During the Conveyancing process, checks are made to ensure, for example, that there are no previous Securities or mortgage deeds affecting the property, which will remain undischarged after the purchase has been completed, and to ensure that there are no court orders (such as a Bankruptcy Order) which prevent the seller from granting a good and marketable clear title to you. Similar procedures operate in reverse in the case of a sale. The seller's solicitors will answer any reasonable observations made on the conditions in the title deeds and searches.

The purchaser's solicitor will prepare the conveyance of title deed in favour of the purchaser, and after settlement of the transaction takes place, ensure that the purchaser's title is registered in the Land Registers. The registration system is electronic, and all deeds are now held electronically by the Scottish Land Registry.

5. LAND AND BUILDINGS TRANSACTION TAX (formerly Stamp Duty)

This tax has been recently introduced by the Scottish Government and replaces Stamp Duty. It is based on the price of the property purchased, and the level of tax has been increased for more expensive properties. Please ask us for a calculation of the tax payable when considering purchasing a property in Scotland.

6. MONEY LAUNDERING REGULATIONS

Every solicitor in Scotland must comply with The Law Society of Scotland's money laundering regulations. This means that if we have not acted for a client in the past, we must in every case obtain verification of identity. If the documentation required cannot be

produced, then we may have to report the transaction to the relevant authority. We would also likely withdraw from acting. We will need to see the original of one of the following: UK passport, resident's permit issued to EU nationals, UK (or EU equivalent) photo driving license, Inland Revenue Tax Notification, firearms certificate, or suitable ID from client who reside outwith the EU and the original of one of the following: bank statement, utility bill, council tax bill, mortgage statement, land registry confirming house purchase, confirmation of house purchase from other solicitor, tenancy agreement or confirmation of address from Electoral Register, or the equivalent from clients residing outwith the EU. Clients from the EU and further afield will also be required to provide information about the source of funds to be used for their purchase. If the purchaser is buying or selling as a limited company, partnership, or other body, but not as an individual, we still need to carry out such money laundering checks, as are required by the laws in force at the time. We will supply prospective clients with details of the current requirements at the outset of the transaction.

7. INSURANCE

We recommend that buildings insurance on the property and if relevant life policies on purchaser's lives are effected (provided proper advice is taken and given) and, subject to that, put into force as soon as missives are concluded in any purchase because from that date a purchaser will be under a legal obligation to purchase the property and pay the purchase price.

8. GENERAL

Hopefully, we have covered some of the more relevant issues that may arise during a residential sale or purchase transaction. We did



not set out in these notes to answer every question but have simply dealt with some of the most often raised questions.

5. Purchase/Leasing of Commercial Property

The principles of commercial property practice in Scotland are not dissimilar to English practice. There will be differences in terminology, legal variances where the actual law differs in each country, and the Land and Buildings Transaction Tax payable. We would refer you to Fladgate LLP's excellent guide for general information, but should you have a specific query relating to purchase or leasing in Scotland generally, or indeed any planned purchase, sale, lease, or development of commercial property in Scotland, please refer your query to us and our experts will be pleased to assist you.