

Client Guide

To the Edinburgh standard offer
and Edinburgh standard clauses (2007 edition)

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PROPERTY

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The purchase of a house is the most important single financial transaction most clients undertake. It can be a stressful process for both buyer and seller (and sometimes their Solicitors too!). The advice and assistance of a Solicitor experienced in house purchase and sale and conveyancing is absolutely essential.

An offer is required to be in writing and there is no binding or enforceable contract until an offer or a qualified acceptance of an offer is met with by a straight acceptance in writing.

Up to the 1970's missives comprised around five clauses. However cases and other developments in the law have made the process more complicated. Offers have expanded greatly in size and complexity. Rarely in recent practice has it been possible or wise to give an unconditional acceptance of an offer. In addition most individual firms' offers tended to be based on a "wish list" of best possible outcomes for the purchaser. The reality however was that qualified acceptances cut the offer down to size and there then emerged a wording that most Solicitors would "settle for". The Edinburgh Standard Clauses have been based on the "settled for" position of what most practitioners will usually accept. Therefore now neither Solicitors nor their clients should have to go through the existing painful process of offer and numerous qualified acceptances. That is the aim.

The offer, any qualified acceptances and final acceptance are called "the Missives" and when final agreement is reached the Missives are said to be concluded and there then exists a legally binding contract. Until that point both the seller and purchaser can back out. When the Missives are concluded either party can sue the other to carry out his or her part of the bargain.

One of the greatest advantages of the Scottish system in the past was the speed with which the Missives were concluded. The system of each Solicitor having his own style of offer as these became longer and longer and more technical, has slowed this process.

With this in mind the Edinburgh Conveyancers Forum has introduced a style of offer which it is hoped will be used by most Solicitors in Edinburgh and the surrounding areas. The offer appears in Section 2 and will define the Purchaser, the Property, the Price, the Date of Entry (i.e. the date you have contracted to obtain your keys) and details of any moveable items included in the price. Some of these moveable items are already covered by Clause 1 of the Standard Clauses under the heading "Fixtures, Fittings and Contents". The offer makes reference to the Edinburgh Standard Clauses (2007 Edition) and incorporates them as conditions of the offer.

The other important clause in the Standard Offer is that it makes the bid "subject to survey". It is now almost uniform practice in Edinburgh that offers are made on this basis as this is believed to be the simplest and most convenient way to avoid unnecessary expense which might be incurred as a result of multiple surveys. The intention behind the Standard Offer is that once your offer has been verbally accepted, a survey or valuation will be carried out on your behalf. Assuming that report is acceptable to you, your solicitor would submit a further written letter which would withdraw that provision thus allowing the issue of an unqualified acceptance by the seller's solicitor.

It is not possible to insist that everyone uses these approved styles. All houses are different and parties are free to contract as they wish. However guidelines have been issued to Solicitors that use the Standard Clauses requesting that changes should be made only for valid reasons e.g. making the offer subject to survey and not for the reason of style rather than substance.

The aim is to conclude the Missives with either a straight acceptance of the offer or hopefully not more than one qualified acceptance before a final acceptance. The aim is that ideally the Missives should be concluded within one week.

You should realise however that if an offer is submitted in the Edinburgh Standard style it is now quite conceivable that you will receive an unqualified acceptance. Accordingly purchasing clients will have to be completely "upfront" with the seller and will need to state whether their offer is subject to survey or subject to loan finance or subject to conclusion of the Missives for the sale of their own property. Complete frankness is required as a purchaser may find himself/herself bound to a contract thinking the old method would allow him/her more time. From the seller's point of view there will be now greater transparency regarding the purchaser's position to whom to turn.

The purpose of this Guide is to explain the various clauses so that both purchasers and sellers have a clear understanding of their rights and obligations. It is however only a guide.

Solicitors preparing Missives have many years of training and experience behind them and it is therefore not possible to fully explain in a short guide like this the legal principles relative to each clause. If a dispute arises as to the meaning of the Missives the Solicitor is the expert

The form of offer and the Standard Clauses are designed for use with residential property and should not be considered for other types of property such as shops or offices.

It is hoped that the introduction of the Edinburgh Standard Offer will result in the process of conclusion of Missives becoming much more straightforward with few of the inherent delays that were involved under the old system.

Speed and ease of conclusion of Missives (and clauses with which both the Solicitor and the client can become familiar) are enormous benefits. Edinburgh now has the tools to make this a reality.

1. FIXTURES, FITTINGS & CONTENTS

The offer should specify any moveable items included in the sale.

Heritable fittings and fixtures are items of a moveable character that have become “heritable” through attachment to the Property and become part of it and removal of which would damage the Property.

Some moveables and “standard” fixtures (notably carpets and floorcoverings, blinds, curtain rails and runners, but not curtains) are included under item1 (d).

2. AWARENESS OF DEFECTS

This asks a seller to confirm that so far as they are aware there are no material defects arising on a number of issues set out in the clause. Both parties should note that the declaration is as to state of the seller’s awareness only and is not an absolute warranty as to fact.

3. SPECIALIST REPORTS

3 (a) This obliges the seller to deliver at settlement any guarantees for specialist treatment (usually rot or rising damp treatments). If these disclose a prejudicial position the purchaser may be entitled to withdraw from the Missives within a stipulated time limit.

3 (b) &

3 (c) Self explanatory.

4. CENTRAL HEATING ETC.

The test is now “working order” i.e. if it works on the Date of Entry (when the keys are obtained) that is sufficient. If you have any concerns about the working order of the central heating or other system it is recommended that you arrange for a separate inspection of it as it will not be covered by the surveyor’s report. Any defects existing at the Date of Entry require to be intimated within five working days after settlement.

5. DEVELOPMENT

The seller is expected to state they are not aware of any development proposals affecting the property. Under planning legislation neighbour notification requires to be given by an owner of adjoining property for certain kinds of development. If a seller has been served with such a notice then a qualification will be required in the acceptance to explain that there is an exception from the warranty. The purchaser should be notified of any fresh notices being served prior to the Date of Entry (i.e. when the price is paid) as they will require to decide whether or not to object.

6. STATUTORY NOTICES

(a) The Local Authority have the power to serve Statutory Repair Notices on common property, usually tenements. It is felt therefore that the watershed for liability between buyer and seller should be the date of conclusion of missives i.e. if the notice has been issued during the seller’s previous period of ownership or before they will remain responsible with the change in liability being the date when the contract is concluded.

(b) If the seller has received written notification etc. of any scheme of common repairs or improvements he requires to tell his Solicitor so that this can be disclosed in a qualified acceptance to the offer.

(c)–(g) provides an agreed mechanism for retention of a sum to deal with such notices.

7. FACTORING

This clause is largely self explanatory. If the property is a modern flat and part of a larger building or a tenement or is a house forming part of a development with common amenity areas this clause may apply. Any charges for maintenance of common items will be apportioned. If there is a Factor he will carry out the apportionment. The seller's Solicitor shall notify the Factor of the change of ownership. Please note that the seller will remain liable for repairs authorised or instructed or work undertaken but not yet completed or completed but not yet paid for.

8. ALTERATIONS

The topic of structural alterations to the property has been a contentious topic for many years. The clause however seeks to set out the relevant paperwork which will be required in the event of alterations having been carried out to any property. The clause however states that this paperwork should only be sought for works which have been carried out in the past 20 years (10 years for windows) The intention behind the clause is that historic alterations, particularly those of a trivial nature should no longer be the subject of lengthy in depth investigation as part of a standard conveyancing process unless other circumstances dictate to the contrary.

9. FAMILY LAW ACT/LITIGATION

Self explanatory.

10. ACCESS

Self explanatory.

11. NEIGHBOUR DISPUTES

Self explanatory.

12. UTILITIES

Self explanatory.

13. BREACH OF CONTRACT BY SELLER

If the Seller does not implement his part of the Missives this provides a right to the purchaser to claim damages for reasonable losses.

14. BREACH OF CONTRACT BY PURCHASER

If the purchaser fails to implement his part of the contract by paying the price before 2pm on the Date of Entry, this specifies the remedies open to the seller.

15. N.H.B.C/BUILDING WARRANTY

Many new homes offer protection to owners of houses built by developers if serious structural defects appear in the first ten years. There are a number of schemes operated by NHBC and others acceptable to the Council of Mortgage Lenders("CML"). Most banks and building societies are covered by the CML Lender's Handbook for Scotland.

16. TITLE CONDITIONS

There are various title matters that need to be looked at by a purchaser's Solicitor to check that the title is a valid and marketable (i.e. readily saleable) title. The titles will be exhibited to the purchaser's Solicitor and the purchaser will have a right to resile (i.e. get out of the contract) with no penalty to either seller or purchaser provided the purchaser's solicitors intimate within ten working days of receiving the titles that there is a problem and this problem cannot be rectified within six weeks of intimation of the problem.

17. SETTLEMENT

This provides for a standard provision that the price will be paid on the Date of Entry in return for the formal deed transferring title (the Disposition), an empty property and keys for same.

18. REGISTRATION OF TITLE

These provide technical provisions dealing with the required procedure for registering the purchaser's title in the Land Register of Scotland.

19. INCORPORATED BODIES

This clause protects the Purchaser where the Seller is a Limited Company or other "Incorporated Body".

20. RISK

Without this condition the risk of destruction or damage would pass to a purchaser when the Missives are concluded despite the fact that the purchaser would not yet be living in the house. It is thought to be fairer that the seller should bear the risk until the date on which the keys are handed over.

21. PROPERTY ENQUIRY CERTIFICATE (“PEC”)

It is normal for the seller to pay for and produce a certificate from the Local Authority or a private searching company confirming that there is nothing adverse from a planning point of view. If the PEC discloses any matter which is materially prejudicial to the purchaser or to the property the purchaser can resile from the Missives (i.e. get out of the contract) without penalty provided the purchaser’s solicitors intimate within ten working days of receiving the PEC that there is a problem and this problem cannot be rectified within six weeks of intimation of the problem.

22. COAL AUTHORITY REPORT

It is now common for a seller to obtain at his expense a Coal Mining Report if the Property is within a local coal mining area. The purchaser is entitled to resile from the Missives (i.e. get out of the contract) without penalty if something materially prejudicial to the property of the purchaser’s proposed use of the property is disclosed provided the purchaser exercises the right to resile within five working days of receipt by his Solicitor of the Coal Mining Report.

23. OCCUPANCY RIGHTS

If the property is a matrimonial home and is in the sole name of either the husband or wife then the husband or wife not named on the title may have occupancy rights. If the seller is in a civil partnership then the partner may have a similar right.

24. SUPERSESSION OF MISSIVES

This clause does not mean that the seller is responsible for the property for two years. It does mean that any part of the Missives or contract ceases to be enforceable after a period of two years except regarding Clause 5 and 16 which remain in full force until implemented.

25. SELLER’S ADDRESS

Self explanatory.

26. LIMITATION OF CLAIMS

This clause is designed to give protection to a purchaser against a breach of the contract by the seller which becomes apparent after the purchaser has paid the price and received the title deeds and keys. It allows the purchaser to seek damages from the seller except in relation to the matters mentioned. It is felt that claims under £100 are minor in nature (compared to the value of the property) and that purchasers should be excluded from claiming for such minor claims.

27. INTERPRETATION

Self explanatory.