

POLICY NOTE

THE NOTICE OF POTENTIAL LIABILITY FOR COSTS (DISCHARGE NOTICE) (SCOTLAND) ORDER 2014

SSI 2014/313

The powers to make this Order are conferred by section 10A(3B)(a) of the Title Conditions (Scotland) Act 2003 (“the 2003 Act”) and section 13(3B)(a) of the Tenements (Scotland) Act 2004 (“the 2004 Act”), as inserted by section 86 of the Housing (Scotland) Act 2014 (“the 2014 Act”). It is subject to the negative parliamentary procedure.

Background

A notice of potential liability for costs under section 10(2A) of the 2003 Act or section 12(3) of the 2004 Act may be registered against a property. The effect of such a notice is that a new owner may become liable for costs incurred in relation to maintenance or other work. Section 12(3) covers potential liability for costs only for flats. Section 10(2A) deals with any other burdened properties except flats.

Under section 10A(3) of the 2003 Act and section 13(3) of the 2004 Act the notice of potential liability expires after three years, unless it is renewed.

There is no provision in the legislation for the liability to be formally discharged if the debt is paid off or otherwise extinguished before the three years have elapsed or during any further three year renewal period.

Policy Objective

Section 86 of the 2014 Act amended section 10A of the 2003 Act and section 13 of the 2004 Act to provide for a statutory discharge procedure under which notices of potential liability for costs may be discharged if the debt has been paid off or otherwise extinguished. The purpose of this Order is to prescribe the form of these discharge notices.

The notices could have been included as schedules to the 2014 Act. However, prescribing the notice of discharge form in secondary legislation allows for flexibility to respond to changing circumstances.

The application for a notice of discharge is not mandatory. In addition, as noted, notices of potential liability for costs will continue to expire after three years, unless renewed.

Consultation

Two brief consultations were held. A mini consultation was held with key stakeholders. This involved issuing a letter seeking their views on the proposed discharge procedures for notices of potential liability for costs. The bodies consulted were the Law Society of Scotland, the Royal Institution of Chartered Surveyors, the Scottish Law Commission, the Property Managers’ Association Scotland and the Scottish Law Agents Society. Only the Law Society of Scotland responded. They were supportive of the provisions being made in the Bill which became the 2014 Act. The other consultation was solely with the Law Society of Scotland to

offer them the opportunity to provide any comments on an earlier draft of the notice of discharge forms prior to being laid in Parliament. The Society raised several points. Where possible these were incorporated into the final version of the forms.

Impact Assessment

An Equality Impact Assessment (EQIA) was carried out for the 2014 Act. The Act is aimed at homeowners. An Equality Impact Assessment has not been undertaken on the provisions of this Order on the basis that the policy is aimed at a specific situation rather than specific societal groups.

Financial effects

Impact Assessments (Partial regulatory, equality and a strategic environmental assessment pre-screening report) were carried out for the 2014 Act.

Information on costs was not included in the Financial Memorandum prepared for the Bill for the 2014 Act as the sums involved were not significant.

There are fees in respect of registering a notice of discharge with Registers for Scotland: £60.00 per Land Register title sheet affected by the discharge and in the Sasines a comprehensive fee of £60.00 per notice. The fees set are consistent with those charged by the Registers of Scotland for registering a notice of potential liability for costs. As stated above there is no obligation to use this new procedure. Notices of potential liability will continue to expire at the end of three years, unless renewed, as is currently laid down in the legislation.

Civil Law and Legal System Division
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