TRUST CLAUSES

Trust clauses are not new: the PSG has recommended their use for some time, specifically in the context of rejection of an application for registration of a disposition many weeks or months after submission, to provide some protection against the intervening insolvency of the granter. They can also be useful if there is the possibility (for whatever reason) of a delay in being able to register the disposition following delivery.

This style trust clause appears as an optional clause in the PSG Dispositions. For ease of reference we have produced this standalone document on the style and guidance for its use.

Trust clause wording

1. **Trust Clause**

1.1 Considering that the Seller has sold the Property to the Purchaser and has received payment of the whole Price in exchange for delivery of this disposition, the Seller declares that it holds the Property in trust for the Purchaser until the date of registration of this disposition (or of any substitute disposition, *mutatis mutandis*, required to register the Purchaser's title to the Property) in the Land Register of Scotland, but solely for the purposes of holding title to the Property and of procuring registration of the Purchaser's title to the Property.

1.2 From the Date of Entry the Seller will be under no duty to maintain, preserve and insure the Property.

1.3 The Seller will co-operate with the Purchaser to procure registration of the Purchaser's title to the Property in the Land Register of Scotland.

1.4 The Seller undertakes promptly to execute and deliver (or join with the Purchaser in so doing) all such forms, plans or other documents as the Purchaser may reasonably require to procure registration of the Purchaser's title and the Purchaser will reimburse the Seller, on demand, the Seller's reasonable costs in doing so.

Guidance note

The PSG recommended the use of a trust clause following the introduction of the one-shot rule under the Land Registration etc. (Scotland) Act 2012, and the experience of many practitioners of having their application rejected many weeks or months after submission (and that a number of these rejections have been erroneous).

At that time, the PSG consulted with colleagues expert in the areas of insolvency and trusts. The outcome of those deliberations resulted in broad support for their use.

It is accepted, given the protection given in a personal insolvency situation, by both an advance notice and section 78 of the Bankruptcy (Scotland) Act 2016, there is less of an issue in situations where the disposer is an individual.

However section 78 provides no protection for corporate insolvency, and the seller in a commercial transaction is far more commonly a corporate entity.

While an advance notice will protect against any *competing deed* granted by or in favour of an insolvency practitioner, it provides no protection from corporate insolvency arising before the disposition has been registered.

Provided the disposition is signed and delivered to the purchaser before the date of the administrator's or liquidator's appointment, the directors were entitled to sign and deliver the disposition (and agree to hold the property in trust).

The existence of a trust clause could help to fortify the grant of a disposition in good faith and for adequate consideration against the risk of successful challenge by the administrator or liquidator.

The incorporation of a trust clause in a disposition can also provide buyer protection in circumstances where there is a delay due to circumstances beyond control of the parties, such as a prolonged system outage, Registers' strike (trust clauses first became popular during industrial action at the Registers in 1982), or restrictions due to a pandemic.