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Mr. Tom Sheridan,
Principal Clerk
Committee on Housing and Homelessness
Houses of the Oireachtas

11 May 2016

Re: Submission – Oireachtas Housing and Homelessness Committee

Dear Sirs,

I refer to the call for submissions to the Committee on Housing and Homelessness issued in April 2016. I now enclose a submission for consideration by the Committee.

I am specialist construction lawyer in my second year of a PhD at Trinity College Dublin. The title of my thesis is 'Consumer remedies for defective dwellings: devising a model for effective redress', for which I have been awarded a scholarship by the Irish Research Council, with support from the Housing Agency and Dublin City Council. I was in practice as a solicitor for 14 years before starting a PhD.

The starting point of my research is the lack of legal remedies available to home owners when defects emerge in housing; for example, because actions are statute-barred (as they were for many of the owners whose houses were damaged by pyrite), because the builder/developers are insolvent, or because the homeowner is not the first purchaser of their home, and thus has no remedy in contract against the builder.

The outcome of my research will include an outline of the main law reform measures that I believe will be necessary to re-balance the relationship between consumers and builder/developers in the Irish housing market, in order to provide effective, accessible remedies.

Many lives have been ruined by poor quality housing constructed in Ireland in the past twenty years. The Committee will be aware of some of the major housing failures such as Priory Hall, Millfield Manor, Longboat Quay. Numerous other developments are also thought to have been constructed in breach of Building Regulations. The discovery of damaging levels of the mineral pyrite in the foundations and brickwork of thousands of houses in Ireland has had a devastating, and very costly, impact on thousands of affected owners of homes and businesses.

These failures highlighted the lack of effective legal remedies under Irish law in respect of building defects. In many cases, the original builder/developers of the buildings were insolvent, and other features of the Irish legal regime governing remedies inhibited the availability of financial redress.

Speaking as someone who has examined the legal context for these building failures in detail over the past three years of my research, I have grave concerns that Ireland will embark upon a major programme of building homes, without considering lessons learned from the housing failures of the past decade, and without improving the position of home owners with regard to their legal remedies for defective housing.

I therefore call on the Committee to recommend that a review be carried out of the building failures that have emerged in Ireland in the past ten years, to consider the deficiencies in the legal regime that became apparent as a result, and to devise a package of reform of law and practice that will address these deficiencies. I have set out the relevant law, with suggested recommendations for law reform, in this submission.

The Committee should note that my research is in progress as I am only at the mid-point of my PhD; therefore, the opinions and recommendations are expressed should be seen in this context. It is possible that my PhD thesis, when complete, may take a different approach to some of the issues set out within. I believe, however, that this submission reflects my emerging conclusions based on my research to date on Irish law and on the legal position in other jurisdictions, as well as my experience in practice as a construction lawyer.

I am happy to address the Committee in relation to my submission.

Yours sincerely,

Deirdre Ní Fhloinn

Recommendations:

1. Review the Defective Premises Bill published in the LRC Report of 1982 with a view to introducing new primary legislation to include a transmissible warranty of quality from builders and those involved in the building process, in favour of the first and subsequent purchasers of houses.
2. Provide by legislation for assignment of causes of action in negligence by operation of law upon the transfer of a dwelling.
3. Review the Building Control (Amendment) Regulations 2014 to take account of the concerns raised above, and review the evidentiary basis for exempting certain housing from its requirements in SI 365/2015.
4. The development and use of alternative forms of contract for delivery of large-scale housing projects should be considered.
5. Amend the Statute of Limitations 1957 to implement the recommendations of the Law Reform Commission in relation to building defects.
6. A consumer-friendly system of dispute resolution should be established for home owners dealing with defective housing.
7. Continue to invest in building control for local authorities, recognising that their role and objectives are quite different to the role and objectives of private building control certifiers who are appointed to protect the interests of building owners, rather than the interests of the general public in ensuring compliance with the Building Control Acts.
8. Consideration should be given to the creation of an Irish Building Authority, to which the functions of the existing building control authorities would be transferred, that would administer building control on a nationwide basis.

Consumer protection for purchasers of new homes in Ireland

Submission to Committee on Housing and Homelessness

Deirdre Ní Fhloinn - Solicitor and PhD Candidate, Trinity College Dublin

1. This submission is in two parts. In the first part, I set out a number of features of Irish law related to recovery of damages by house purchasers for defective housing, which I put in the form of questions. In the second, I propose the establishment of a Building Authority for Ireland, with responsibility on a national basis to monitor and enforce building standards for all buildings, including housing, and with a regulatory role in relation to builders, sub-contractors and other entities who contribute to the design and construction of housing.

Part 1: Why doesn't Irish law provide effective remedies?

2. The availability of a legal remedy to repair defects to a house in Ireland is limited in a number of significant ways that are highly prejudicial to buyers. I have set out below a number of potential avenues for remedies, highlighting problems with those avenues, and suggesting recommendations for reform.

Shouldn't a home owner have a remedy under their building contract?

3. Houses and apartments, unless built by owner-occupiers, are built on the basis of contracts, usually with the first purchaser of the house or apartment. If the other party to that contract – the builder – delivers a defective house or apartment, the primary remedy of the purchaser should be for breach of contract, which is available for 6 years from the date of breach of contract. Even if a remedy is available against the original builder in contract, however, the builder may be insolvent. There are several examples from cases before the Irish courts involving dwelling houses where home owners had brought proceedings against builders, designers and other construction professionals, where the builder-defendants were insolvent or otherwise not a mark for litigation.¹
4. Home owners have also found that defects policies put in place for their house or apartment at the time of purchase was not available to cover the defects that emerged in the property². There is no system for comprehensive, mandatory, latent defects insurance in Ireland, and the defects policies on the market are subject to various limitations and exclusions, such as exclusion of liability for the presence of pyrite in aggregates. There are various examples from international practice that would be of assistance in devising appropriate insurance requirements; for example, the New South Wales Home Building Act requires home warranty insurance to be arranged by the contractor for any residential construction work above a certain value.
5. The common law rule of privity of contract remains part of Irish law; therefore, an action for breach of contract can only be brought by the parties to that contract. It is unlikely that anyone but the first purchaser of a dwelling will ever have a remedy in contract against the builder. The Law Society standard form building contract used for new dwellings in Ireland prevents

¹ Recent examples include *Mitchell v. Mulvey Developments* [2012] IEHC 561, *Farrell v Arborlane* [2015] IEHC 545, and *McGee v Alcorn* [2016] IEHC 59.

² The Report of the Pyrite Panel notes at page ii that HomeBond circulated a letter on 31 August 2011 confirming that it would no longer provide cover for pyritic heave in light of the High Court decision in *James Elliott Construction v Irish Asphalt* [2011] IEHC 269

assignment of the contract without the consent of the building contractor – therefore, a person buying an apartment or house that is less than six years old will have no remedy under the law of contract, and will have to pay for the repairs to them out of their own funds if insurance is not available to cover the repairs (as many homeowners have found in relation to pyrite damage).

6. An example of an alternative approach to home building contracts is the Defective Premises Act of 1972 in England and Wales, which provides that a person taking on work for or in connection with the provision of a dwelling owes a duty to each person who takes an interest in that dwelling to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed. The 1989 Home Building Act of New South Wales takes a similar approach, and implies a number of warranties into contracts for building work, the benefit of which passes to successors in title to the party who originally employed the building contractor. If a similar rule was introduced into Irish law, it would mean that the action for breach of contract would not disappear when a house or apartment is sold within the limitation period of 6 years from the date of the breach.

What if the home owner has no contract with the builder?

7. At present, Irish law is not clear on whether a person may recover damages for a defective house against a builder with whom that person has no contract. This ambiguity needs to be addressed by law reform. Even if the Irish courts were to confirm that the cost of remedying a defect is recoverable under the law of tort, the cause of action in tort remains with the person who held the legal interest in the property at the time that the cause of action accrued, which under Irish law is the date on which the defect caused damage to the house.
8. Under s. 3 (1) of the Latent Damage Act 1986 in England, a cause of action in negligence in respect of a housing defect passes automatically to a person buying a property; under Irish law, that cause of action disappears when the property is sold, because it can only transfer by a specific assignment of the cause of action, which is not done as part of Irish conveyancing practice. The Irish Law Reform Commission in its report on Claims in Contract in respect of Latent Damage (other than Personal Injury)³ draws attention to the common law rule, and notes that the rule ‘had to be uprooted in England, by s.3 of the *Latent Damage Act, 1986....*’. This is, therefore, another example of how a potential remedy for a house buyer against a builder, subcontractor or designer may be foreclosed because of the prejudicial treatment of house purchasers by Irish law.

Recommendations:

Review the Defective Premises Bill published in the LRC Report of 1982 with a view to introducing new primary legislation to include a transmissible warranty of quality from builders and those involved in the building process, in favour of the first and subsequent purchasers of houses.

Provide by legislation for assignment of causes of action in negligence by operation of law upon the transfer of a dwelling.

³The Law Reform Commission, Report on the Statutes of Limitations: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury) (LRC 64 – 2001)

Didn't the Building Control (Amendment) Regulations 2014 deal with these problems?

9. Building control is the means by which the administration and enforcement of the Building Regulations is carried out by Building Control Authorities ('BCAs') in accordance with the Building Control Acts 1990 and 2007. The 1990 Act designated local authorities as BCAs, provided for the making of Building Regulations and Building Control Regulations, and set out the powers of BCAs with regard to inspection and enforcement. The Acts are the legal basis for the Building Regulations 1997-2014 and the Building Control Regulations 1997-2014. The Building Control (Amendment) Regulations 2014 introduced several new requirements in relation to the provision of certificates of compliance with Building Regulations, apparently on the basis that these could be relied upon by subsequent purchasers of buildings where defects emerge.
10. The Regulations, however, create no new legal remedies for home owners, and the relationship of the certificates required to be given under the Regulations with the legal rules governing liability in contract and tort are not clear. One of the consistent criticisms of the Building Control (Amendment) Regulations 2014 is that the system imposes a disproportionate liability on professionals in light of the civil liability regime in Ireland by which each of a group of concurrent wrongdoers/tortfeasors can be held liable for the entirety of the loss suffered as a result of their concurrent default. There is a strong body of opinion amongst lawyers that the new statutory certificates create additional liabilities for professionals, without addressing other problems of contractor insolvency and the lack of defects insurance.
11. Statutory Instrument 365/2015 exempted certain developments from the requirements of the Building Control (Amendment) Regulations 2014; this should be reconsidered, as the case of *McGee v Alcorn* referred to earlier in this submission demonstrates that housing failures are by no means confined to multi-unit developments or large housing estates.
12. In my opinion, the Building Control (Amendment) Regulations 2014 do not address the deficiencies in Irish law that continue to prevent home owners from accessing remedies for defective housing. Primary legislation is required in order to provide for those remedies and for effective dispute resolution where defects emerge.

Recommendation 3:

Review the Building Control (Amendment) Regulations 2014 to take account of the concerns raised above, and review the evidentiary basis for exempting certain housing from its requirements in SI 365/2015.

13. There have been a number of innovations in construction practice in the UK that would be of assistance in considering how to deal with the housing crisis in Ireland. The UK Government Construction Strategy 2016-2020⁴ emphasises collaborative procurement techniques and early contractor involvement on projects, to improve quality and to manage risk in a more holistic way.
14. In December 2014, a report was published by the Department of Public Expenditure and Reform and the Office of Government Procurement, following a review of the Public Works

⁴https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510354/Government_Construction_Strategy_2016-2020.pdf (accessed 11 May 2016)

Contract⁵, which contains a number of recommendations for changes that should be implemented or considered for public sector construction procurement in Ireland. The report recommended that consideration be given to the use of other forms of contract published by independent bodies and used internationally⁶. It is noteworthy that the Irish Association of Consulting Engineers in its submission to the review process noted that ‘*Collaborative methods of working such as required for BIM is not taken into account in the PWCs*’. A review of the submissions made to the Review process shows that a significant number of professional bodies and other stakeholders suggested that collaborative working should be facilitated in the PWCs and that international forms should be permitted in order to benefit from pre-existing protocols to support the use of BIM on Irish projects. The Society of Chartered Surveyors in Ireland went so far as to state that ‘*the PWCs promote and facilitate an adversarial approach*’.

15. The significance of this issue for housing is that the procurement method and form of contract used can have a significant impact on the delivery of a project on time and within budget. Several London local authorities have used collaborative forms of contract for both new-build and regeneration projects, with significant savings in time and cost.⁷

Recommendation 4:

The development and use of alternative forms of contract for delivery of large-scale housing projects should be considered.

Why have some actions in respect of housing defects been statute-barred?

16. An action may become barred under the Statutes of Limitations before the damage has been detected. This is at variance with the position in other jurisdictions: for example, in England and Wales the 1986 Latent Damage Act prevents the cause of action in negligence becoming statute-barred where facts relevant to the cause of action are not known at the date of accrual of the cause of action.

Has the Law Reform Commission examined these problems already?

17. The Law Reform Commission (‘the LRC’) has considered aspects of these problems on a number of occasions. In the LRC working paper of 1977 relating to the law relating to the liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises⁸, the unequal bargaining power between consumer and builder was noted:

‘...although the contract represents the only real method by which the purchaser/lessee can protect himself in our law, the unequal bargaining position of the parties, the shortage of an adequate supply of suitable housing property and the practices of the professions do not ensure the proper recognition of the legitimate interests of the average home purchaser/lessee’.

⁵ <http://constructionprocurement.gov.ie/wp-content/uploads/Report-on-the-Review-of-the-Performance-of-the-Public-Works-Contract1.pdf>

⁶ at p. 19, para. 3.2.4.

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325951/SCMG_Trial_Projects_Case_Study_CE_format_130614.pdf (accessed 11 May 2016)

⁸ Working Paper no. 1 – 1977: the Law relating to the liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977).

The paper included the General Scheme of a Bill to amend the law relating to the liability of builders, vendors and lessors for the quality and fitness of premises, which included an obligation on a person carrying out work to see to it that the work was carried out in a good and workmanlike manner with suitable and proper materials. The paper also recommended that measures be introduced to underwrite the insolvency risk of builders.

18. The LRC followed its working paper with its 1982 Report on Defective Premises⁹, which included the scheme of a Defective Premises Bill. The Bill included a new statutory duty on a person undertaking or executing work, in favour of the person who commissioned the work and any person who acquired an interest in it, to see that the work was undertaken in a good and workmanlike manner with suitable and proper materials. The duty would be owed to the person commissioning the work and to persons who subsequently acquired an interest in it – so the first and subsequent purchasers of an apartment, or house, for instance. The Defective Premises Bill of 1982 contained in the Report was never implemented.
19. In its 2001 Report on the Statutes of Limitation: Claims in Contract and Tort in respect of Latent Damage (other than personal injury),¹⁰ the LRC recommended the introduction of a ‘discoverability’ test for latent defects, and that the cause of action for construction liability claims should accrue at the date of completion or practical completion, such that claims would need to be brought within six years of accrual or three years from discovery. These amendments have not been implemented into Irish law. The issue was revisited in the Commission’s 2011 Report on Limitation of Actions¹¹, in which it revisited the considerations raised in its earlier reports, examined the practice in other jurisdictions, and recommended the introduction of a ‘discoverability’ test, with a two-year limitation period from the date of discovery (subject to limited exceptions), and a long-stop date of 12 years. Legislation should be introduced to implement the LRC’s recommendations, as it causes great injustice to homeowners to discover that their action is statute-barred when they could not reasonably have been aware that a defect was causing damage to their home. Many of the actions of householders affected by pyrite damage were statute-barred in circumstances where there was widespread ignorance both at State and industry level of the damage that was being caused to the foundations of homes and buildings by contaminated aggregates.
20. In its Report on Privity of Contracts and Third Party Rights¹², the LRC recommended the introduction of legislation to allow third parties to enforce contracts in certain circumstances, analogous to the circumstances dealt with in the Contracts (Rights of Third Parties) Act 1999 of England and Wales. This legislation, if introduced, would be of particular relevance to construction contracts, and would go some way to addressing some of the difficulties for claims set out above.
21. There are also templates available for law reform from other jurisdictions: in Canada, billions of dollars of remedial work was required in order to deal with the consequences of water ingress to facades of thousands of units built between the late 1980s and early 2000s; a commission of enquiry was held into the causes, and a Homeowner Protection Act introduced.

Recommendation 5:

⁹ Report on Defective Premises (LRC – 3 – 1982)

¹⁰ 2001(LRC 64-2001)

¹¹ (LRC 104-2011)

¹² (LRC – 88-2008)

Amend the Statute of Limitations 1957 to implement the recommendations of the Law Reform Commission in relation to building defects.

Do home owners have access to effective dispute resolution where defects emerge?

22. The standard form building agreement used by the Law Society of Ireland for construction of new houses and apartments contains an arbitration agreement, as do the main terms of engagement for architects, engineers and surveyors. Arbitration can be an daunting process for a home owner.
23. There are models available from other jurisdictions that may be useful to consider in this respect; The Fair Trading office of New South Wales, for example, provides an advocacy and dispute resolution service for home owners, along with protective legislation in relation to licensing and registration of builders, and statutory warranties of quality for house building¹³.

Recommendation 6:

A consumer-friendly system of dispute resolution should be established for home owners dealing with defective housing.

Should building control authorities be held liable for housing defects?

24. A building control authority is very unlikely to be held liable for the cost of rectification of building defects arising from failure to detect non-compliances with Building Regulations. However, where there is a significant building failure that requires the evacuation of residential buildings, political pressure may result in significant public expenditure to provide accommodation for residents and ultimately to underwrite the building failure. This was, of course, the case with Priory Hall, where Dublin City Council and the Irish State paid for alternative accommodation and repair works following evacuation of the development under the Fire Services Act 1981, where the original builder/developer was insolvent.
25. It is far preferable to invest in an effective building control system, supported by a legal regime that affords a remedy to homeowners, than for the State to continue to act as the ultimate guarantor of building failures.

Recommendation 7:

Continue to invest in building control for local authorities, recognising that their role and objectives are quite different to the role and objectives of private building control certifiers who are appointed to protect the interests of building owners, rather than the interests of the general public in ensuring compliance with the Building Control Acts.

Part 2: A Building Authority for Ireland

¹³http://www.fairtrading.nsw.gov.au/ftw/tenants_and_home_owners/home_building_and_renovating/resolving_building_dispute_s.page (accessed 11 May 2016)

26. The catastrophic consequences of significant building failures in human and financial terms oblige us to consider whether the regulatory model is sufficiently coherent and responsive to widespread non-compliances with Building Regulations that are still coming to light in Ireland.

27. The Programme for Government 2011-2016 published by the Department of the Taoiseach states as follows under the heading of ‘Reforming Local Government’:¹⁴

‘We will examine what services could be converged between two or more local authorities, such as technology support, human resources, and fire services. We will introduce a single national building inspectorate service’.
(*emphasis added*)

28. The infrastructure for the national building inspectorate service is already being put in place with the continuing development of the Building Control Management System as a centralised building control administration system and resource for information on building on a nationwide basis.

29. The creation of a centralised body would allow building control inspectors to operate on a nationwide basis, facilitating the risk-based inspection system contemplated by the Code of Practice for the 2014 Regulation. It would also facilitate the effective implementation of the Common Framework for Building Control Authorities adopted by the City and County Managers’ Association in July 2014, which includes a guide to building control administration, a standard inspection approach, and template reports.

30. Again, there are examples internationally of how such an authority could operate: for example, the Australian Victorian Building Authority, and the Building Commission of Western Australia. The Building Commission oversees the regulation of building, painting, surveying and plumbing services, and includes the Building Services Board, which controls the registration and licensing of builders, painters and building surveyors.

31. An Irish Building Authority could be established with responsibility on a national basis to monitor and enforce building standards for all buildings, including housing, and with a regulatory role in relation to builders, sub-contractors and other entities who contribute to the design and construction of housing. This would allow the Construction Industry Register to operate within a regulated framework, independent of the main construction industry stakeholders, and would contribute to public confidence in the Register.

Recommendation 8:

Consideration should be given to the creation of an Irish Building Authority, to which the functions of the existing building control authorities would be transferred, that would administer building control on a nationwide basis and that would have a regulatory role in relation to builders, sub-contractors and other entities involved in providing housing.

Deirdre Ní Fhloinn
11 May 2016

¹⁴http://www.taoiseach.gov.ie/eng/Work_of_the_Department/Programme_for_Government/Programme_for_Government_2011-2016.pdf, at p. 26