

Joint Committee on Housing, Planning, Community and Local Government
Houses of the Oireachtas

3 April 2017

Re: Submission – Building regulations and consumer protection

Dear Sirs,

I refer to your letter of 30 March inviting me to address a meeting of the Joint Committee of Housing, Planning, Community & Local Government on the subject of 'legal remedies for home owners when defects are detected'.

I am grateful for the opportunity to make a presentation to the Committee about my research, and now enclose a submission for consideration by the Committee, which will form the basis of my presentation before the Committee on 5 April.

I am specialist construction lawyer in my third 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, supported by 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 measures of law reform 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 pyrite in thousands of houses in Ireland has had a devastating impact on thousands of affected owners of homes and businesses.

These failures highlighted the lack of effective, accessible legal remedies under Irish law.

Speaking as someone who has examined the legal context for these building failures in detail over the past four 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 legal remedies for home owners.

The Committee should note that my research is in progress, and that the opinions and recommendations are expressed should be seen in that 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.

Yours sincerely,

Deirdre Ní Fhloinn

Summary of recommendations

Reform

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. Provide for transfer of any action in negligence that has accrued prior to the sale of a dwelling.
2. Amend the Statutes of Limitations to implement the recommendations of the Law Reform Commission in relation to building defects.
3. Provide by legislation for minimum mandatory terms that would apply in all contracts for residential building work.
4. Consider introducing information packs for purchasers of residential housing.

Remedies

5. Defects insurance should be mandatory for all new homes.
6. A consumer-friendly and cost-effective system of dispute resolution should be established for home owners dealing with defective housing.

Regulation

7. Review the operation of the Building Control (Amendment) Regulations 2014, to determine its effectiveness in practice. Review the evidentiary basis for exempting certain housing from its requirements in SI 365/2015.
8. Review resourcing of building control authorities, and introduce nationwide review and audit of enforcement activities by building control authorities, to support the procedures set out in the 2016 Code of Practice for Inspecting and Certifying Buildings and Works¹.
9. Consider introducing greater transparency in enforcement activity by Building Control Authorities, to build public engagement and confidence in the system.
10. 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 via the Building Control Management System.

¹ Code of Practice for Inspecting and Certifying Buildings and Works, Department of Housing, Planning Community and Local Government, September 2016

Consumer protection for purchasers of new homes in Ireland

Submission to Joint Committee on Housing, Planning, Community and Local Government

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

April 2017

1. This submission is in three parts. In the first part, headed Remedies and reform, I summarise the position under Irish law with regard to housing defects, and discuss insurance and dispute resolution. Secondly, under the heading of Regulation, I discuss aspects of building control in Ireland, and 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 for those involved in residential construction.

Part 1: Remedies and reform

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. The issues are broadly divided into substantive questions of whether the law provides a remedy, and procedural issues of whether the remedy is accessible to home owners within a reasonable time and at a reasonable cost.

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, or 12 years if the contract has been signed under seal. The Law Society/CIF standard form Building Agreement used for most new housing in Ireland provides for the builder to sign under seal. Even if a remedy is available against the original builder in contract, however, the builder may be insolvent.
4. There are several recent examples from cases before the Irish courts involving houses where owners had brought proceedings against builders, designers and other construction professionals, and where the builder-defendants were insolvent or failed to even enter an appearance to the proceedings.² This can leave professionals who have issued opinions or certificates on compliance with Building Regulations as the 'last man standing' to meet claims. This is also partly due to the Civil Liability Act of 1961, which allows a plaintiff to pursue any one of a group of defendants who are collectively responsible for a defective building for the full amount of the claim.
5. One of the limitations of the Building Control (Amendment) Regulations of 2014, which introduced a system of mandatory certificates of compliance, is that it did nothing to deal with

² Recent examples include *Mitchell v. Mulvey Developments* [2012] IEHC 561, *Farrell v Arborlane* [2015] IEHC 545, and *McGee v Alcorn* [2016] IEHC 59.

the problem that professionals giving certificates were effectively left holding the risk that the contractor would be insolvent and not able to meet a claim. The Regulations made it easier to pursue professionals for defective design or negligent inspection, but did little in practical terms to improve recourse against negligent builders. A builder is required to provide a certificate of compliance with Building Regulations on completion of building works, but opinion is divided among lawyers as to whether a subsequent purchaser of a unit, without a contract with the builder, could recover on the basis of that certificate.

6. 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 assignment of the contract without the consent of the building contractor – therefore, a person buying an apartment or house that is less than 6/12 years old will have no remedy under the law of contract, even though the original purchaser would have had a remedy within that period, 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).
7. 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.
8. The 1989 Home Building Act of New South Wales 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 6/12 years from the date of the breach.
9. An owner may have difficulty in pursuing a builder without being party to the original building agreement, because of the rules of recovery in the law of tort, and may also find his action barred by the Statutes of Limitation, which can bar a defects action before the owner realises that there is a defect, or what is causing it. The Law Reform Commission has made recommendations on several occasions to address these problems.

Unfair terms in building contracts

10. In 2001, the Director of Consumer Affairs, with the support of the Law Society, obtained a High Court order prohibiting the use of a list of unfair clauses in building agreements. The application was made due to the practice that had emerged of solicitors acting for builders and developers inserting additional clauses into the Law Society standard form that were very prejudicial to consumers, such as the following:
 - a. A power for the builder to re-sell the house or apartment if any payment from the buyer was late by more than 14 days, even where the buyer had made stage payments;

- b. Exclusion of any liability for the builder in respect of defects unless they were acknowledged in writing by the builder;
- c. a clause that limited the buyer to one ‘snag list’ only, which had to be submitted within 7 days of notice from the contractor’s solicitor;
- d. a right for the builder to change materials, specifications and to change ‘the dimensions of the site and building’ during construction.

11. Despite the High Court order, the Law Society has been issued practice notes on two subsequent occasions, most recently in 2016³, to warn practitioners that the prohibited clauses continue to be included in Building Agreements for new houses and apartments. Neither the High Court order, nor the threat of disciplinary proceedings by the Law Society against solicitors who propose such clauses, have eliminated the practice.
12. Irish home buyers are in a ‘take it or leave it’ situation when it comes to building agreements, particularly in a time of acute housing shortage, and have no meaningful way of negotiating the terms of building agreements even where they are represented by solicitors. This problem could be dealt with by specifying mandatory terms by legislation that apply in every building contract, and that cannot be excluded by the parties.
13. One of the recommendations of the All Party Parliamentary Group Report into new housing in England (see appendix for executive summary and recommendations) was that builders should be required to provide buyers with a comprehensive information pack, including details about plans and specifications, warranty and building control inspections, what the warranty covers in simple language, and how to contact the builder in case of defects. This information would not be difficult to assemble for the Irish market, as it reflects existing practice in Ireland.

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 for transfer of any action in negligence that has accrued prior to the sale of a dwelling.

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

Provide by legislation for minimum mandatory terms that would apply in all contracts for residential building work.

Consider introducing information packs for purchasers of residential housing.

Doesn't every new house or apartment have a defects insurance policy?

³ Law Society of Ireland Conveyancing Committee Practice Notes, 13 December 2005 and 4 March 2016.

14. 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 property⁴. 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.
15. The current HomeBond policy, for example, contains a limit of €50,000 for ‘Latent Defects’ as defined in the policy, for a period of five years, and an aggregate limit of €500,000 for Latent Defects in a continuous unit such as a terrace of houses. There are significant limits on recover of the costs of alternative accommodation and professional fees in connection with repair or rebuilding.⁵ The limit for Structural Defects (as defined in the policy) is €200,000; one case from 2016 involving defective foundations included a claim for €277,000 to repair a defective house, and the plaintiff’s quantity surveyor in the case indicated that the cost would be considerably more if the house had to be demolished and rebuilt⁶.
16. There are various examples from international practice that would be of assistance in devising appropriate insurance requirements; for example, in New South Wales, residential construction work above a certain value cannot be carried out without home warranty insurance, and certain limitations in home warranty insurance policies are set by law. It is worth stating that the 2016 report of the All Party Parliamentary Group on new housing found that consumers generally did not know what home warranties did and did not cover.
17. This obviously requires engagement between Government and the insurance industry in relation to the risks that insurers are prepared to take. The Minister responsible for the Building Control (Amendment) Regulations 2014 undertook to review insurance⁷ prior to commencement of the Regulations, but Minister Paudie Coffey subsequently reported to the Dáil that the Department had decided against the introduction of mandatory defects insurance⁸.

Recommendation:

Defects insurance should be mandatory for all new homes.

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

18. The standard form building agreement used by the Law Society of Ireland for construction of new houses and apartments contains an arbitration agreement. Arbitration can be a daunting process for a home owner. It can also take many years for disputes involving defects to be resolved, particularly if some of the defendants are insolvent or no longer trading. In one defects case considered by the Court of Appeal in 2015, the defendant engineer sought to have proceedings by a homeowner dismissed, where the opinion on compliance with Building Regulations had been given 15 years previously; the Court refused to dismiss the proceedings, but the case illustrates that fact that for the homeowner, a period of nearly ten years had already

⁴ 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

⁵ HomeBond policy document, section 3, and see https://www.homebond.ie/home_buyers/

⁶ McGee v Alcorn [2016] IEHC 59

⁷ See <http://www.merrionstreet.ie/en/News-Room/Releases/new-regulations-will-prevent-disastrous-building-failures-in-future-minister-hogan.49322.shortcut.html>

⁸ See <https://www.kildarestreet.com/wrans/?id=2015-11-03a.2775&s=LDI#g2778.r>

passed between starting the proceedings and the decision of the Court of Appeal, which did not decide the case.⁹

19. 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.
20. It is worth noting that access to remedies was one of the recommendations of the House of Commons All Party Parliamentary Group for Excellence in the Built Environment, published in July 2016, which proposed a New Homes Ombudsman to assist in resolving disputes between consumers and builders or warranty providers, which the APPG suggested should be funded by a levy on housebuilders:

*‘We see this as the key recommendation to provide more effective consumer redress if things go wrong, and a good way of applying pressure on housebuilders and warranty providers to deliver a better quality service....it would need to be completely independent and replace the dispute resolution service offered as part of the [voluntary, industry-led] Consumer Code for Home Builders’.*¹⁰

Recommendation 6:

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

Regulation

Didn't the Building Control (Amendment) Regulations 2014 deal with the problem of defects?

21. 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 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.
22. The 2014 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 legal liability are not clear.
23. One of the consistent criticisms of the 2014 Regulations is that the system imposes a disproportionate liability on professionals in light of the civil liability regime in Ireland. There is a strong body of opinion amongst lawyers that the new statutory certificates create additional liabilities for professionals, without addressing other problems such as contractor insolvency and the limitations of defects insurance products.
24. Statutory Instrument 365/2015 exempted 'one-off houses' from the requirements of the 2014 Regulations. This should be reconsidered, as the case of *McGee v Alcorn* referred to earlier in

⁹ *Farrell v Arborlane & Ors* [2015] IEHC 545

¹⁰ 'More homes, fewer complaints', Report of the All Party Parliamentary Group for Excellence in the Built Environment, Commission of Inquiry into the quality and workmanship of new housing in England, July 2016

this submission demonstrates that housing failures are by no means confined to multi-unit developments or large housing estates.

25. The Law Reform Commission published an Issues Paper in 2016, ‘Regulatory Enforcement and Corporate Offences’¹¹, which considers the failures of regulatory enforcement of the Irish banking that led to the near-collapse of the Irish banking system in 2008, and suggests alternative approaches to regulation that could be applied in other sectors. There are a number of observations in the Issues Paper in relation to regulatory failure in the banking system that are of particular interest to construction regulation.
26. The paper refers to the report of the former Governor of the Irish Central Bank, Professor Patrick Honohan, which investigated the performance of the Central Bank and Financial Regulator in the five years preceding the giving of a guarantee in respect of the Irish banks by the Irish Government in September 2008 (‘the Honohan Report’)¹², and to the 2011 Report of the Commission of Investigation into the Banking Sector (‘the Nyberg Report’)¹³.
27. The Paper refers to discussion in both reports of the approach to regulation of the Irish Financial Regulator, which it characterises as ‘light-touch’, principally reliant on ‘enforcement through moral suasion’, by which non-compliance was addressed with negotiation, rather than enforcement; the Nyberg Report states that ‘*negotiations were not backed up by credible threats of more serious enforcement action when non-compliance continued to re-occurred*’.¹⁴
28. Although there are considerable powers of enforcement of building control under the Building Control Acts, enforcement activity can be very costly and resource-intensive. This may suggest not only that additional resources are required for Building Control Authorities, but also that a review by undertaken of building control on a nationwide basis for its effectiveness in monitoring and enforcing compliance with Building Regulations.
29. Looking to practice in other regulatory regimes, it is suggested that the public profile of building control activities could be improved, which might also have a positive effect on encouraging compliance. An example is provided in the regime operated by the Food Safety Authority of Ireland, which publishes annual reports setting out its approach to enforcement and compliance, and regularly publishes information on enforcement activity, including the naming of businesses against whom orders are made.

Recommendations:

Review the operation of the Building Control (Amendment) Regulations 2014, to determine its effectiveness in practice. Review the evidentiary basis for exempting certain housing from its requirements in SI 365/2015.

Review resourcing of building control authorities, and introduce nationwide review and audit of enforcement activities by building control authorities, to support the

¹¹ Law Reform Commission Issues Paper LRC IP 8 – 2016, “Regulatory Enforcement and Corporate Offences”

¹² Honohan, ‘The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008’, available at www.bankinginquiry.gov.ie/Preliminary_Reports.aspx

¹³ Nyberg, ‘Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland: Report of the Commission of Investigation into the Banking Sector in Ireland (2011)

¹⁴ Nyberg Report, p. 91, para. 5.2.14

procedures set out in the 2016 Code of Practice for Inspecting and Certifying Buildings and Works¹⁵.

Consider introducing greater transparency in enforcement activity by Building Control Authorities, to build public engagement and confidence in the system.

Part 2: A Building Authority for Ireland

30. 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.
31. The Programme for Government 2011-2016 published by the Department of the Taoiseach states as follows under the heading of ‘Reforming Local Government’:¹⁶

‘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*)
32. 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.
33. 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 2016 Code of Practice for Inspecting and Certifying Buildings and Works. 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.
34. 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.
35. 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:

¹⁵ Code of Practice for Inspecting and Certifying Buildings and Works, Department of Housing, Planning Community and Local Government, September 2016

¹⁶http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_2011-2016.pdf, at p. 26

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 via the Building Control Management System.

Deirdre Ní Fhloinn
4 April 2017

Appendix

Summary and Recommendations from 'More homes, fewer complaints'

*Report of the All Party Parliamentary Group for Excellence in the Built Environment,
Commission of Inquiry into the quality and workmanship of new housing in England,
July 2016*