

Building regulations and consumer protection: legal remedies

*Opening Statement to Joint Committee on Housing, Planning, Community and Local Government
5 April 2017*

I am grateful to the Committee members for this opportunity to speak to you about my research, and have made a written submission to the Committee.

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, at Reddy Charlton Solicitors here in Dublin and as in-house counsel at London Underground, in each case specialising in construction.

I would like to provide a synopsis of my submission for the benefit of the members, following which I am happy to take questions.

Numerous housing defects have come to light in Ireland in recent years, which have highlighted the lack of effective, accessible legal remedies under Irish law.

Speaking as someone who has examined the legal context for these housing 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, and without improving legal remedies for home owners.

My submission, and the preliminary recommendations that are emerging from my research, are grouped under the themes of Reform, Remedies, and Regulation. I'll briefly address each. For ease of reference I'll use the term 'home' to include both houses and apartments.

Irish law is stacked against home owners who discover defects. We are all now familiar with the stories of warranty policies that failed to provide the cover that home buyers expected, and with the problem of widespread insolvencies in the construction industry which left many home buyers with no-one to pursue for defects.

The Building Control (Amendment) Regulations of 2014, with their requirements for periodic inspections and certification by those involved in construction, have undoubtedly contributed to a cultural change in compliance with Building Regulations. They did not, however, address the underlying problems of Irish law and practice that left people without legal remedies.

Irish law is unclear in a number of important respects with regard to remedies for building defects. The relationship between sellers and buyers of new houses in Ireland is contained in two contracts: a contract for sale of the land (or a lease, for apartments), and a building agreement, usually in the form of the Building Agreement agreed between the Law Society and the Construction Industry Federation in 1987.

That agreement is entered into with the first purchaser of a home, who is the only person who may sue under that contract. It is drafted on the basis that it will be signed under seal, for which the period for bringing proceedings is 12 years from the date of breach of contract. The agreement contains a warranty in favour of the buyer. If the home is sold during that 12 year period, the agreement does not transfer with the house, and the benefit of the warranty in the contract is lost.

I mention in my submission the statutory duty in English law for builders to carry out their work in a workmanlike manner with proper materials, so that the house is fit to live in when completed; this duty is owed to the first and subsequent purchasers. I also refer to the law of New South Wales, which implies warranties into contracts for building work, which also pass to subsequent purchasers. The Sale of Goods and Supply of Services Act of 1980 implies a term that a provider of services, which would include a builder, will supply the service with due skill, care and diligence, using materials that are sound and reasonably fit for purpose. This is an important protection, but the term also remains with the Building Agreement and, therefore, the first purchaser of a home.

In Ireland, a second purchaser may be able to rely on a defects insurance policy, which should transfer with the property, but which will be subject to various exclusions and limitations. Defects policies have an essential role to play, but will often provide substantially less protection than the first buyer would have had by law.

An action may also be statute-barred before an owner has had the opportunity to identify and investigate a defect in their home; the Law Reform Commission recommended a change in law to deal with this in a 2011 Report, so that time for bringing proceedings would start once the owner knew or ought to have known of the defect, but this has not been implemented.

Even where the standard Building Agreement is used, solicitors acting for builders may include unfair terms in the agreement. In the past these terms have included limiting the buyer to one snag list, imposing very short timescales for snagging, and allowing the builder to change materials, specifications, and even dimensions of the site and building after the contract is signed. The High Court banned the use of a number of sample terms in 2001, but this was still a problem as recently as 2016.

Legislation could be introduced to provide for minimum mandatory terms that would apply in all contracts for residential building work, and that would pass automatically to subsequent purchasers.

These legal problems are not new; the Law Reform Commission described them in 1977, and again in 1982 in a report that included a draft Defective Premises Bill. The Bill includes a 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 Law Society building agreement also contains an arbitration clause. Recent research suggests that many consumers have little understanding of the effect of an arbitration clause. In parts of Australia, arbitration clauses may not be included in building agreements with

consumers. Arbitration can be a daunting, costly, and time-consuming process for a home owner. The same can be said of bringing proceedings through the courts.

Cost-effective and accessible remedies for defects are an essential part of housing quality: even if compliance with Building Regulations is improving dramatically following the 2014 Regulations, some percentage of new homes will have defects. Remedies are essential when defects emerge.

I suggest in my submission that a review be carried out of the operation to date of the Building Control (Amendment) Regulations, as well as the resourcing and enforcement activities of building control authorities. The Food Safety Authority of Ireland provides a model for a transparent regulatory system, which publishes annual reports and significant amounts of information in relation to its enforcement activities.

Finally, I suggest that an Irish Building Authority be established to administer building control on a nationwide basis. A single national building inspectorate service was part of the Programme for Government in 2011, and the infrastructure is in place with the Building Control Management System, which is a national system for lodgement of certificates and other documents required under the Building Control Regulations. The Authority could monitor local inspection and enforcement of building control, be a hub of knowledge gathered from around the country from building control activity also have a regulatory role in licensing those involved in construction.

I would like to finish with a quotation from the Law Reform Commission Report of 1982, in response to the suggestion that increased protection for consumers would increase the cost of houses:

"Economies achieved at the expense of defective building work were not in the interests of purchasers or lessees of houses"

Now that we have evidence of tens of millions of euro that has been spent, and will continue to be spent, by both the State and home owners to deal with housing failures, I would suggest to the Committee that the cost of ensuring quality housing and effective, accessible remedies for defects must be seen as an essential part of the cost of building homes.

I am grateful for the invitation to address the Committee today and I am happy to take questions.