

# **Oireachtas Joint Committee on Housing, Local Government, and Heritage**

**1 December 2020**

## **Residential Defects Redress Scheme**

### **Opening Statement – Dr Deirdre Ní Fhloinn BL**

I would like to thank the Chairperson and committee members for the invitation to address you today in relation to residential building defects and proposals to help homeowners with defective homes.

I am a practising barrister specialising in construction law and was formerly a solicitor specialising in commercial and residential construction and infrastructure projects. Last year I was awarded a PhD from the Law School at Trinity College Dublin on the subject of liability for building defects. My research was prompted by the many thousands of Irish houses and apartments built during and since the Celtic Tiger years that have been found to have serious defects. From my professional experience, and as is clear from media coverage of developments around the country, there are many apartment buildings that have serious defects, including deficiencies in fire-stopping inadequate separation between units, and water ingress. Some of the problems that have emerged with houses include pyrite damage, mainly in Dublin and the surrounding counties, and failure of brickwork caused in part by muscovite mica, which is particularly acute in Mayo and Donegal.

#### ***The findings of my PhD***

The major findings of my PhD are that there are significant substantive and procedural deficiencies in the system of legal remedies for housing defects.

By substantive, I mean that a home owner will typically find that the original building contract with the builder of their home will often not provide them with a remedy. The builder may be insolvent. If the home owner is not the first owner of the apartment, they may not be able to rely on that contract. There is a long-standing practice of builder-developers setting up different limited companies for each development that they build. The money comes through the developer and the building company is just a shell. So even if the owner can sue the builder, the builder is unlikely to pay for the defects in the home. Builders are also not required to carry insurance in respect of defects. Instead, home buyers are steered towards latent defects policies that have significant limitations on what is recoverable. The main home defects policy

in the Irish market does not cover pyrite damage, for example, which is one of the reasons that the Pyrite Remediation Scheme was set up.

Home owners also face many hurdles in securing a remedy even if they have a good legal case. The building contract they signed could have very unfair terms in it. It is likely to have an arbitration clause in it, which is a process the home buyer may find difficult, and that usually won't involve other parties who might also be responsible for the defects, such as architects or engineers. Litigation, if available, is extremely expensive and the value of the home defects would often put claims in the monetary jurisdiction of the High Court, which is a very slow and expensive process.

### ***Recent cases – buyers, management companies and receivers***

Some attempts have been made to hold receivers responsible for building defects. In two recent cases, the High Court and the Court of Appeal held that receivers were not bound by the obligations of developers to complete multi-unit developments in accordance with planning and building control requirements. This will present further obstacles for management companies and apartment owners to obtain any assistance with the costs of fixing defects. There are many examples throughout Ireland of receivers being appointed in respect of developers' borrowings, to sell unsold parts of developments, including commercial and apartment units, and realise the lender's security. If the receiver is not liable for any repair costs in respect of the defects in the development, the apartment owners will be left to pay the costs of fixing the defects.

### ***Regulatory failure***

The other major finding of my PhD thesis is that the building control system failed to prevent the occurrence of widespread building defects in Ireland. In my opinion the system was designed to be a light-touch regulatory system that appears strong but that has never been enforced in a robust or consistent way.

The building control system, which forms the backbone of Irish construction regulation, operates without oversight from an external building regulator and is not enforced consistently, in contrast to other regulated industries. Failure to give proper consideration to the appropriate regulatory model for construction led to design failures in the system that have compromised its legitimacy and effectiveness since its introduction in 1991. Insurance models in respect of building defects are limited and unsatisfactory, which will undermine any law reform to

improve remedies. These problems are not unique to Ireland. In many other jurisdictions there are licensing and registration requirements, insurance obligations, and regulatory powers that are visible and enforced. In Ireland, there is no licensing or registration requirement for construction work and the regulatory system operated by local authorities is under-resourced and under-funded compared to other sectors.

*Developments in the UK since the Grenfell Tower fire*

Following the Grenfell Tower fire, the Irish Government established a Fire Safety Task Force which reported in 2018, but which failed to address the underlying causes both in industry practice and in regulation that have led to widespread residential defects, including fire safety related defects. There has been a comprehensive review of Building Regulations and fire safety in the UK in the two reports of the Hackitt review, which was initiated following the Grenfell fire and which resulted in the 2020 Building Safety Bill. This proposes a regulator for building safety within the UK Health and Safety Authority, responsible for ensuring safety of persons in all new multi-occupancy buildings in England over 18 metres high. The Bill also provides for the establishment of a New Homes Ombudsman, which had been recommended by a Parliamentary Committee some years back, and makes provision both for the publication of a code of conduct for developers as well as criminal liability of officers and managers of bodies corporate for offences committed under the Act.

I am happy to deal with the Committee's questions in this session.

**Dr. Deirdre Ní Fhloinn BL**

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