



# Homebuilding market study

Annexe G - Review of the legal framework

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## G.1 INTRODUCTION

- G.1.1 This Annexe represents an overview of the main rights and remedies available to homebuyers of new homes and individuals engaged in self building. It is not comprehensive and is not meant to be. Instead, it merely provides support for our conclusion that the relevant law is very complex and that the homebuyer's current access to redress does not provide effective protection. The Annexe refers to the position in England and Wales, noting any key similarities and differences in Scotland and Northern Ireland.
- G.1.2 There are broadly two types of homebuyer. The most common is the homebuyer who purchases a new home that has been or will be designed and constructed by a homebuilder. Most of the review will deal with the rights and obligations of this type of homebuyer. The other is a homebuyer who buys a plot of land with a view to designing and building or overseeing the building of their own home (a self build homebuyer). For the purposes of this Annexe self build covers all instances where homebuyers are involved in the production of their new home.<sup>1</sup>
- G.1.3 A homebuilder will usually be a property developer which designs and constructs new homes for sale on one or more sites. Each site will be divided into plots of land on which houses or flats will be built. The homebuilder will either own the land on which the new homes will be built or build on the land under licence. The homebuilder will engage and manage contractors, sub-contractors, architects and others to complete the construction works. The homebuyer will have no or little involvement in the design or construction works.
- G.1.4 In contrast, self build homebuyers are more involved in the construction works. They tend to engage architects to design the home and commission builders or architects to engage and manage contractors, sub-contractors and others to complete the work on a single plot of land.

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<sup>1</sup> *Homes to DIY for – The UK's self-build housing market in the twenty-first century* James Barlow, Robert Jackson and Jim Meikle.

Alternatively, they may engage and manage the construction team themselves.

## **G.2 PROBLEMS ENCOUNTERED BY HOMEBUYERS**

G.2.1 Homebuyers can encounter problems when:

- They are trying to obtain answers to enquiries about the new home before signing a contract for sale.
- They are trying to recover monies paid (for example, reservation fees or deposits) towards buying their new home, because the homebuilder has defaulted in some way (for example, the homebuilder has not built the new home on time).
- They are trying to arrange for defects in construction works to be repaired after they have moved into their new home.

G.2.2 Homebuyers have a number of rights and remedies. The scope and effectiveness of these vary according to the type of loss suffered and when the loss was suffered.

### **G.3 RIGHTS, REMEDIES AND OBLIGATIONS THAT ARISE DURING THE MARKETING OF A NEW HOME FOR SALE AND PRE-CONTRACT ENQUIRIES**

#### **The homebuilder's duty to disclose defective title and other problems with new home**

G.3.1 One of the problems that may arise in the purchase of new homes is where they are sold with defective title. Good title means that homebuyers can fully enjoy their new homes and the land they are built on, free from disturbance and without their right to do so being the subject of a successful challenge from third parties. In contrast, where there are defects in title, there are technical or real risks that homebuyers will not be able to have the full enjoyment of their new homes and land. This will be because third parties may claim certain rights over the new homes and the land or homebuyers will not be able to exercise the rights they require to enable them to fully enjoy their new homes and land.

G.3.2 Defects in title are varied and may include:

- a claim for adverse possession of the land by a third party
- restrictive covenants held by a third party over the land
- rights of way held by a third party over the land
- a lack of a right of way to reach the property
- a lack of the correct rights to run pipes, cables etc under a neighbouring property
- a lack of the correct planning and/or building consents.

G.3.3 Given this problem, a homebuilder, its sales team and any estate agent it engages must provide as full and accurate information as is reasonably

possible, when marketing the sale of a new home and responding to enquiries about it.

G.3.4 As part of that, the homebuilder has a legal duty in common law to disclose latent encumbrances and defects<sup>2</sup> in the title<sup>3</sup> of the new home. This applies whether or not the homebuyer makes enquiries about them. A latent encumbrance or defect is one that is not apparent.<sup>4</sup>

G.3.5 This is reinforced by legislation. For example, section 24 of the Law of Property Act 1969 provides that for unregistered land<sup>5</sup> a seller is under a duty to disclose matters, which are registered at the Land Charges Department.<sup>6</sup>This displaced section 198 of the Law of Property Act 1925 which provided that when a charge is registered a homebuyer can be treated as having constructive notice of it.<sup>7</sup>

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<sup>2</sup> An encumbrance or defect for these purposes is a burden or hindrance on a property which affects the ability of the owner to transfer ownership of it to another. Examples of encumbrances are a mortgage or an easement.

<sup>3</sup> Title refers to a person's right to claim he or she owns the land and/or has the right to enjoy it.

<sup>4</sup> Yandle and Sons v Sutton [1922] 2 CH 199.

<sup>5</sup> Unregistered land is land which has not been registered with the Land Registry. For more information on registered and unregistered land see the Land Registry website [www1.landregistry.gov.uk/regional/](http://www1.landregistry.gov.uk/regional/)

<sup>6</sup> For more information on the Land Charges Department and the Land Registry see website [www1.landregistry.gov.uk/regional/](http://www1.landregistry.gov.uk/regional/)

<sup>7</sup> Constructive notice means a homebuyer can be treated as if he had knowledge of something even if he did not have actual knowledge of it. For more information on Land Charges and the Land Charges Department see the Land Registry website [www1.landregistry.gov.uk/regional/](http://www1.landregistry.gov.uk/regional/)

G.3.6 Section 4 of the Land Registration Act 2002 provides that the transfer of a freehold, leasehold or other property interest must be registered with the Land Registry.<sup>8</sup> Section 7 of the 2002 Act states that failure to make an application for first registration of title<sup>9</sup> when required can make a contract of sale void.

G.3.7 The aim of both sections of the legislation and common law duty of disclosure is to ensure there is a complete and accessible record of the title history of a property for sale.

### **Limits on duty to disclose**

G.3.8 The scope of the duty to disclose is restricted in a number of ways. First, it is restricted by the caveat emptor rule. Caveat emptor means let the buyer beware. That means that the onus is on homebuyers to be sure of what they are buying. In the event of legal dispute, a homebuyer can be treated as if they bought their new home with full notice of its actual state and condition. Given the rule, homebuyers are usually advised to make comprehensive enquiries about the title, quality and fitness of their new homes with the help of relevant experts before committing to buy. This will include any solicitor, licensed conveyancer or surveyor they may instruct.

G.3.9 The nature of the caveat emptor rule was explained in *Wallis v Russell*<sup>10</sup> by Fitzgibbon LJ:

'Caveat emptor does not mean in law or Latin that the buyer must take a chance, it means that he must take care. It applies to the purchase of specific things, e.g. to a horse or a picture upon which

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<sup>8</sup>A person who has a freehold interest in property is someone who owns both the property and the land it stands on indefinitely. A person who has a leasehold interest in property is someone who has a right of exclusive possession (but not ownership) of all or part of that property for a specified period, subject to terms and conditions, as recorded in a lease agreement. For more information on the Land Registry see its website [www1.landregistry.gov.uk/regional/](http://www1.landregistry.gov.uk/regional/)

<sup>9</sup> Title refers to a person's right to claim he or she owns the land and/or has the right to enjoy it.

<sup>10</sup> [1902] 2 IR 585 at 615, IR CA

the buyer can and usually does exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also whenever by usage or otherwise it is a term of the contract express or implied that the buyer shall not rely on the skill or judgment of the seller'.

G.3.10 The rule remains in place, despite there having been two reports by the Law Commission<sup>11</sup> and numerous views expressed in<sup>12</sup> and out<sup>13</sup> of Parliament on whether the principle needed modification in favour of homebuyers.

G.3.11 Secondly, the duty of disclosure may be limited by provisions in the contract of sale between the homebuilder and homebuyer.

G.3.12 The contracts of sale used by homebuilders are usually amended versions of the Standard Conditions of Sale (Fourth Edition), the National Conditions of Sale (24<sup>th</sup> Edition) and the Law Society Conditions of Sale 2003 of England and Wales (the Standard Conditions).<sup>14</sup> In Northern Ireland the contract of sale usually consists of amended versions of the Law Society for Northern Ireland's conditions of sale.<sup>15</sup> Whilst in Scotland, missives<sup>16</sup> are used to reach agreement on the terms and

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<sup>11</sup> See for example the Law Commission 1989 Report *'Let the buyer be well informed'* which rejected calls for changes to the principle of caveat emptor and called instead for the implementation of public registers in relation to matters like contaminated land.

<sup>12</sup> The House of Commons Select Committee on the Environment 1990 concluded that the rule placed a heavy burden on consumers. It recommended that the government should legislate to place a duty on vendors to declare all information in their possession about the presence of contamination on land they want to sell. The government did not follow this recommendation.

<sup>13</sup> See article on Royal Institute of Chartered Surveyors research *'The Cutting Edge 1996 An analysis of the caveat emptor principle as applied to contaminated land'* by Miles Keeping of Oxford Brookes University, ISBN0-854 06-930-5.

<sup>14</sup> The Explanatory Notes on the Standard Conditions of Sale (Fourth Edition) (October 2003) is on the Law Society for England and Wales Website address:  
[www.lawsociety.org.uk/search/view=query.law#](http://www.lawsociety.org.uk/search/view=query.law#)

<sup>15</sup> The best known are the General Conditions of Sale, the Law Society of Northern Ireland (3rd Revision).

<sup>16</sup> Missives are letters exchanged between the parties' legal advisers which eventually result in a formal agreement.

conditions of sale. To make the conveyancing process easier for the parties concerned standard missives drafted by experienced solicitors are regularly used by large numbers of the profession in property sales, to reflect geographical and other localised differences in the country. Examples of these missives have been recommended and produced by the Law Society of Scotland.<sup>17</sup>

G.3.13 An example of the limits that can be placed on the duty of disclosure is Condition 3.1.1 of the Standard Conditions. It provides that a homebuilder will be selling the property: 'free from encumbrances, other than those mentioned in Condition 3.1.2'.

G.3.14 Condition 3.1.2 states property will be subject to encumbrances specified in the contract, as well as those the homebuilder: 'does not and could not reasonably know about.'

G.3.15 In addition, the duty does not apply to matters which can readily be discovered by a homebuyer who actually inspects a new home before buying it<sup>18</sup> or to matters that the homebuyer already has actual knowledge of.<sup>19</sup>

G.3.16 Further, the duty to disclose does not apply to planning matters, which are not seen as concerning title.<sup>20</sup> This can include any information on the grant or refusal of planning permission for the development of land.<sup>21</sup>

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<sup>17</sup> Standard missives for various geographical locations in Scotland (for example, the Borders, Ayr, Glasgow and Edinburgh) can be found on the Law Society of Scotland website address: [www.lawscot.org.uk/Members\\_Information/convey\\_essens/stdmissives/](http://www.lawscot.org.uk/Members_Information/convey_essens/stdmissives/)

<sup>18</sup> This is stated in paragraph B5.3.2 of the Law Society of England and Wales *'Conveyancing Handbook' 14<sup>th</sup> Edition 2007*. In the case of *Pankhania v Hackney London Borough Council* [2002] ALLER (D) 22 the court held that in the circumstances of that case the existence of a subsisting commercial tenancy would not have been readily apparent from an inspection of the property prior to its purchase. Therefore, the seller's failure to disclose the tenancy amounted to misrepresentation.

<sup>19</sup> This is stated in paragraph 5.3.1 of the Law Society of England and Wales *'Conveyancing Handbook' 14<sup>th</sup> Edition 2007*.

<sup>20</sup> This is stated in paragraphs B3.8.1, B5.3.4 and B24.2.1 of the Law Society of England and Wales *'Conveyancing Handbook' 14<sup>th</sup> Edition 2007*.

## Scotland

G.3.17 In Scotland many aspects of the law relating to the duty to disclose and remedies are similar to those that apply in England and Wales. For instance, a homebuilder is obliged to provide good title to the homebuyer. Where land is unregistered, the homebuyer is obliged to provide marketable title. That is title that:

- Makes the homebuyer the owner of the new home.
- Has no 'heritable securities'<sup>22</sup> that are adverse to the homebuyer's interest.
- Has no unusual conditions.
- Have no leases, which adversely affect the new home or the land on which it is built.<sup>23</sup>

G.3.18 Where land is registered, sections 1 to 3 of the Land Registration (Scotland) Act 1979 provide that the homebuilder's obligation is to ensure that the title to a new home is one that can be sent to the Keeper<sup>24</sup> immediately after purchase. If the homebuilder's ownership is

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<sup>21</sup> Development of land is defined in section 55(1) of the Town and Country Planning Act 1990 as: 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.' Examples of development include the construction of new buildings, the demolition or alternation existing buildings and change of use of existing buildings. However, it is considered good practice on the part of homebuilders to disclose all planning matters. See paragraph B5.3.4 of the Law Society of England and Wales 'Conveyancing Handbook' 14<sup>th</sup> Editions 2007.

<sup>22</sup> Section 2 of the Conveyancing (Scotland) Act 1924 defines 'heritable securities' as financial or other 'burdens and securities' which are payable from land and are noted on a deed of title or appear in the appropriate Register of Sasines.

<sup>23</sup> A definition of marketable title can be found in '*Conveyancing*' (2<sup>nd</sup> Edition, 1999, Butterworths pg 91) by Professors Reid and Gretton.

<sup>24</sup> The Keeper is the senior official responsible for the Land Registers of Scotland. See the Registers of Scotland website [www.ros.gov.uk/index.html](http://www.ros.gov.uk/index.html) and paragraph 2.4 of the 'Framework Document Registers of Scotland' September 2007 which is on that website.

registered it will have a real title in the land and the new home. The Keeper will not have to make further enquiries or requisitions about title and can issue an unrestricted land certificate.<sup>25</sup> Failure to disclose 'heritable securities' or unusual conditions gives the homebuyer the right to withdraw from the purchase.<sup>26</sup>

G.3.19 The limits of the duty are similar to those that exist in England and Wales. For example, caveat emptor also applies in Scotland.<sup>27</sup>

G.3.20 Also limits may be placed on the duty to disclose in missives agreed between the homebuyer and homebuilder.<sup>28</sup>

### Northern Ireland

G.3.21 There is also a duty of disclosure in Northern Ireland. The homebuilder must also show good title as the homebuyer has the right to see that they are receiving what they believe they are buying.<sup>29</sup> This also means that the homebuilder must disclose latent defects in title.<sup>30</sup>

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<sup>25</sup> Whyte v Lee (1869) 6 R 699, Armia Ltd v Daejan Developments Ltd 1979 SC [HL] 56 and Morris v Ritchie [1992 GWD 33-1950].

<sup>26</sup> Morris v Ritchie [1992 GWD 33-1950].

<sup>27</sup> This was reinforced by the case of Aberdeen Development Co v Mackie, Ramsey & Taylor 1977 SLT 177 where the court held that because of the principle of caveat emptor the only guarantee the seller gives to the buyer of a house is that the seller has good title. The guarantee does not cover defects in property whether evident or latent.

<sup>28</sup> See for example paragraph 2 of the 'Edinburgh Standard Clauses (2007 Edition)' and the client guide produced by the Edinburgh Conveyancers Forum which can be found on [www.espc.com](http://www.espc.com). It states that the seller confirms that so far as they are aware there are no material defects in relation to various issues (for example wet rot, dry rot, rising damp, wood worm, land fill or contaminated land). Paragraph 2 of section 4 of the client guide states that both parties should note that the declaration is as to the seller's awareness only and is not an absolute warranty as to fact. Standard missives for various geographical locations in Scotland can be found on the Law Society of Scotland website [www.lawscot.org.uk/Members/Information/convey\\_essens/stdmissives/](http://www.lawscot.org.uk/Members/Information/convey_essens/stdmissives/)

<sup>29</sup> Clarke v Taylor [1899] 11ER 138, Re Lyons and Carroll's Contract [1896] 11R 138 and Pryde v Pryde [1968] 19 NI LQ 214.

<sup>30</sup> Geryani v O'Callaghan [25 January 1995] HC (1994/677 Sp).

G.3.22 The limits on the duty of disclosure are similar to those in England and Wales. For example, caveat emptor also applies in Northern Ireland. Limits on the duty to disclose can also be placed in the contract of sale.

### **Remedies for failure to properly disclose, rescission, discharge by way of repudiatory breach, damages and specific performance**

G.3.23 Where the homebuilder fails to disclose information or provides inaccurate information before the contract for sale is signed the homebuyer can withdraw from the proposed sale.

G.3.24 Where the contract has been made, if a homebuilder has not disclosed a substantial matter the homebuyer may be able to rescind, that is terminate the contract. The homebuyer may terminate by way of rescission if there has been an actionable misrepresentation<sup>31</sup> or there has been a contractual right to rescission, in which case the contract is treated as having been terminated from its start, or by the homebuyer treating himself as discharged from further future obligations under the contract where there has been a repudiatory breach of the contract. That is a breach that substantially defeats the purpose of the contract.

G.3.25 The aim of rescission is to restore the parties to the position they would have been if the contract had never been made.<sup>32</sup> In reality this is often difficult to achieve. Where significant time, money and effort has been incurred by both parties in trying to complete the purchase, rescission rarely results in the recovery of all that has been lost. For this reason, it is not unusual for a court assessing a claim of rescission to take a pragmatic view and order a claim for damages instead.

G.3.26 An example of a contractual right of rescission is Condition 7.1.3 of the Standard Conditions. It provides that rescission is available where: (a) there has been an error or omission by the homebuilder because of fraud

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<sup>31</sup> The right to rescind a contract of sale where there has been a misrepresentation is set out in condition 7.1.3 of the Standard Conditions of Sale.

<sup>32</sup> This is confirmed by paragraph M2.1.2 of the Law Society of England and Wales '*Conveyancing Handbook*' 14<sup>th</sup> Edition 2007.

or recklessness; or (b) the homebuyer was obliged to accept property differing substantially in (quantity, quality or tenure) from what the error or omission had led him to believe.

G.3.27 In those instances, a homebuyer has a right to:

- Return of their paid deposit with interest.
- Return of documents.
- Cancellation of registration of the contract at the homebuilder's expense.<sup>33</sup>

G.3.28 As an alternative, it may be possible for the homebuyer to treat the contract as discharged by way of repudiatory breach. That means the parties are excused from further performance of their primary obligations under the contract which have not been performed at the time the repudiatory breach is accepted. Instead, there is substituted a secondary obligation to pay monetary compensation for the non-performance, by way of damages payable by the 'guilty party'.

G.3.29 Where the breach of contract is insubstantial the homebuyer can be made to fulfil their part of the sale (for example, pay the rest of the completion monies), but has a right to insist on compensation for the breach by way of a reduction in the purchase price.<sup>34</sup> This is referred to as the right of abatement.<sup>35</sup>

G.3.30 The amount of damages recoverable for any contractual breach is based on the test set by *Hadley v Baxendale* [1854] 9 Ex. 341 in which the court held:

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<sup>33</sup> See condition 7.2 of the Standard Conditions.

<sup>34</sup> This is stated in paragraphs M2.4 and 2.6 of the Law Society of England and Wales '*Conveyancing Handbook*' 14<sup>th</sup> Edition 2007.

<sup>35</sup> This is stated in paragraph M2.6.3 of the Law Society of England and Wales '*Conveyancing Handbook*' 14<sup>th</sup> Edition 2007.

'where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, [that is] according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it'.

G.3.31 Examples of the type of damages that could be recovered by a homebuyer include money lost because of:

- A reduction in the value of a new home.
- Wasted conveyancing costs.
- Removal costs.
- Costs of alternative accommodation or storage.

G.3.32 Another remedy that may be available to a homebuyer is specific performance. The effect of a court order for specific performance is that the 'guilty party' can be ordered to fulfil one or more of their contractual obligations. For example, an order could require a homebuilder to provide information to a homebuyer whose repeated requests for that information before the order was made have gone unheeded. Also a homebuilder could be required to complete building works within a specified period where there has been unreasonable delay.

G.3.33 Specific performance is an equitable<sup>36</sup> and discretionary remedy. It can be claimed either on its own or in conjunction with a claim for damages or rescission depending on the circumstances.

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<sup>36</sup> Equitable remedies derive from a group of legal principles which are intended to supplement the English common law practices. They tend to be applied where a court considers that the application of common law would have too harsh an effect. The aim of their application is to achieve natural justice.

G.3.34 It is a difficult remedy to obtain especially for contracts involving land and construction works. There are a number of grounds on which a court cannot grant a specific performance order. Examples include:

- Where an order for damages would be enough to compensate a homebuyer's loss.
- Where an order for specific performance would cause the 'guilty party' exceptional hardship.<sup>37</sup>
- Where making an order for specific performance would mean making a homebuilder fulfil a contractual obligation under continued supervision.

G.3.35 Specific performance is rarely ordered by courts to enforce contracts to build or repair.<sup>38</sup> Damages are often seen as a more suitable remedy by courts.<sup>39</sup> Sometimes, because of the technical nature of building or repair works, it is viewed as too difficult for a court to determine whether works have been satisfactorily completed.

G.3.36 The tendency has been that courts will only grant specific performance of build and repair contracts where:

- The required building work is clearly defined in the contract.
- The homebuyer's interest in achieving performance is so substantial that damages will not be enough to compensate them.

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<sup>37</sup> This is stated in paragraph M4 of Law Society of England and Wales *'Conveyancing Handbook' 14<sup>th</sup> Edition 2007*.

<sup>38</sup> See *Norris v Jackson* [1860] 1 John & H319 Cf *Soames v Edge* [1860] John 669.

<sup>39</sup> *Hall v Warren* [1804] 9 Ves 605.

- The homebuilder is in possession of the land on which the works are being done.<sup>40</sup>

G.3.37 This impacts on the enforcement of standard contracts of sale of new homes. They often include a term in which a homebuilder promises to build a new home within a reasonable time. If there is unreasonable delay, in order to obtain a court order for specific performance, a homebuyer would have to ensure that their claim did not fall within one of the grounds or restrictions mentioned above.

G.3.38 Specific performance is recognised in the Standard Contract. For example, Condition 6.8 states that where a notice to complete a sale has been served by a homebuyer and the sale still does not go ahead, the innocent party's right to apply for specific performance is not excluded. This means the homebuyer (if they are the innocent party) can make a court application for the remedy. However, the homebuyer's position will be far more difficult if the contract is amended to exclude this Condition.

## Scotland

G.3.39 There are similar rights to damages, rescission, treating the contract as discharged for repudiatory breach and specific performance. However, specific performance is known as specific implementation in Scotland.<sup>41</sup>

## Northern Ireland

G.3.40 Similar rights to damages, rescission, treating the contract as discharged for repudiatory breach and specific performance are also available in Northern Ireland.<sup>42</sup>

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<sup>40</sup> Hounslow London Borough Council v Twickenham Garden Developments Ltd [1971] Ch 233; Ford Sellar Morris Developments Ltd v Grant Seward Ltd [1989] 2 EGLR 40; and Tustian v Johnston [1993] 2 ALLER 673.

<sup>41</sup> Connor v Potts [1897] 1IR 534 and Architectural Installation Services v James Giobbon Windows [1990] 16 Con.L.R.68.

<sup>42</sup> Lowry v Reid [1927] NI 142.

## **Misrepresentation, Breach of Contract, Misdescription, Mistake and Related Consumer Legislation**

G.3.41 Hand in hand with the duty to disclose is the homebuilder's obligation to ensure that its sales team and/or estate agent do not make misleading statements during the marketing and sale of a new home. To do otherwise could lead to claims of misrepresentation, breach of contract or misdescription.

G.3.42 Misrepresentation and misdescription are recognised in the Standard Conditions. For example, Condition 7.1.3 of the Standard Conditions states that errors and omissions will include misrepresentations or misdescriptions.

### **Misrepresentations**

G.3.43 A misrepresentation claim will only succeed if a homebuyer can prove that a homebuilder or those representing it made misleading statements of fact,<sup>43</sup> which induced them to enter into the contract to buy a new home, and caused them financial or other loss. Statements of opinion<sup>44</sup> or mere 'puffs' will not suffice.<sup>45</sup>

G.3.44 It is possible to make a misrepresentation in writing, by words and/or by conduct.<sup>46</sup> There are three types:

- Fraudulent misrepresentation, which is a deliberately dishonest statement, intended to deceive.<sup>47</sup>

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<sup>43</sup> Solle v Butcher [1950] 1 KB 671 and Pankhania v Hackney London Borough [2002] ALLER (D) 22.

<sup>44</sup> A statement of opinion can be actionable if it can be proved that it was made by someone who had or professed to have specialist knowledge or skill and it was never genuinely held. See Edgington v Fitzmaurice [1885] 29 Ch 459.

<sup>45</sup> Grandiose or exaggerated advertisements inviting a party to enter into negotiations are mere puffs and may not amount to misrepresentations. See the case of Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256.

<sup>46</sup> Gordon v Selico [1986] 18 HLR 219 and Taylor v Hamer [2002] EWCA Civ 1130.

- Negligent misrepresentation, which is a careless statement for which there is no reasonable basis for belief.<sup>48</sup>
- Innocent misrepresentation, which is a statement that arises from a genuinely innocent mistake.

G.3.45 To mount a successful misrepresentation claim a homebuyer has to produce cogent evidence that satisfies the civil balance of probabilities test. That is that it was more likely than not that a fraudulent, negligent or innocent misrepresentation was made inducing the homebuyer to buy the new home.<sup>49</sup> Further, the more serious the allegation the higher the required degree of proof. This is the case, for example, for claims of fraudulent misrepresentation or negligent professional misconduct.<sup>50</sup>

G.3.46 If the misrepresentation has been incorporated into the contract as a contractual term, a homebuyer may also have a right to claim damages for breach of contract and/or specific performance of the contract.

G.3.47 A successful misrepresentation claim can ultimately result in an order for rescission of the contract of sale, combined with damages in the case of a fraudulent or negligent misrepresentation.<sup>51</sup> If a case involves the lesser evils of negligent or innocent misrepresentation, the court has the power under section 2(2) of the Misrepresentation Act 1967 to make an order for damages instead of rescission, at its discretion. Damages available for misrepresentation are awarded on a tortious basis.<sup>52</sup> They are designed to put the innocent party in the position he would have

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<sup>47</sup> Derry v Peek [1889] 14 App Cas 337.

<sup>48</sup> Hedley Byrne v Heller [1964] AC 465 where the court held that a negligent statement could form the basis of a tort action. See also Esso Petroleum Co. Ltd v Mardon [1976] Q.B.108 where the court held that a negligent statement could be actionable in contract law.

<sup>49</sup> Miller v Ministry of Pensions [1947] 2 ALLER 372 and the Civil Evidence Acts of 1968 and 1995.

<sup>50</sup> Hornal v Neuberger Products Ltd [1957] 1 QB 247, [1956] 3 ALLER 970, CA. Miles v Cain [1989] Times, 15 December, CA

<sup>51</sup> Hadley v Baxendale [1854] 9 Ex. 341

<sup>52</sup> Chesneau v Interhome, the Times 9 June 1983 CA and Royscott Trust v Rogerson [1991] 2 QB 297.

been in if the representation had not been made – the presumption being that if the misrepresentation had not been made, the claimant would not have entered into the contract. In the case of a property transaction, the proper measure of damages is, *prima facie*, the difference between the contract price and the fair value of the property.

G.3.48 The homebuyer is unlikely to have any rights against a contractor in this context because he will usually not have engaged the contractor or anyone else involved in the construction works and therefore will not have had any dealings with them. The homebuilder is more likely to have dealt directly with contractor and his team. As a result, the homebuilder is more likely to have actionable rights via misrepresentation against the contractor and any others engaged to do the building works.

G.3.49 If the homebuyer does have some contact with the contractor and his building team, where there is no right to claim misrepresentation there may be a legal right in tort for negligence.<sup>53</sup> However, even if there was a sound case there are limits on the type and amount of damages that can be recovered in tort actions.

G.3.50 A successful tort action can result in a damages award, but damages which are reasonably foreseeable.<sup>54</sup> That does not include damages which are based on what the courts have described as 'pure economic loss'.<sup>55</sup>

G.3.51 This usually means a homebuyer could get compensation for personal injury or damage to personal property, but cannot recover for a claim that is solely based on, for example, money lost because there are defects in a new home caused by a contractor. This is the case, unless

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<sup>53</sup> A tort is a civil wrong. There are several types of tort including negligence and deceit. Negligence means failing to exercise reasonable care and skill to someone to whom you owe a duty of care. Whilst deceit means a false statement of fact knowingly or recklessly made with the intent that it shall be acted on by another, and that the other acts on and suffers damage as a result.

<sup>54</sup> *Hadley v Baxendale* [1854] 9 Ex. 341.

<sup>55</sup> *Murphy v Brentwood DC* [1991] AC 398 and *Henderson v Merrett Syndicates Ltd* [1995] 2AC 145.

these can be linked to an actionable misrepresentation or a special relationship and the monetary loss arises because of a difference between the contract price for the property and its fair value.

G.3.52 Broadly, courts have been unwilling to allow the recovery of 'pure economic loss' in tort actions for three reasons. First, the belief that to allow such claims could open the floodgates to a significant amount of litigation. Financial loss arising from a negligent act or omission in building works could be suffered by an indeterminate number and variety of potential claimants. This could go well beyond the norm, for example the original homebuyer, his successors in title and the homebuilder and would be unfair to a defendant.<sup>56</sup>

G.3.53 Second, it has been argued that allowing 'pure economic loss' claims in tort to succeed would make the law of tort virtually indistinguishable from that of contract.<sup>57</sup>

G.3.54 Third, where a tort claim concerns the quality and fitness of building work there may be difficulty in determining the standard by which the works should be assessed. The terms of a contract of sale or construction contract have been viewed by some as a more useful starting point of assessment than the content and scope of a defendant's duty of care in tort.<sup>58</sup>

G.3.55 The limited exception to this is where a special relationship between the defendant and the homebuyer can be proven.<sup>59</sup> In that instance 'pure economic loss' may be recoverable.

G.3.56 A special relationship will arise if the defendant:

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<sup>56</sup> See Cardozo CJ in *Ultramares Corp v Touche Niven & Company* [1931]255 NY 170 and the judgment of Lord Bridge in *Caparo Plc v Dickman* [1990] AC 398. See also *Morgan Crucible v Hill Samuel* [1991] 1 ALLER 148 and *Mortgage Express v Bowerman and Partners* [1995] 2 ALLER 769.

<sup>57</sup> *Murphy v Brentwood DC* [1991] AC 398 per Lord Bridge at 468D-470C and 480F-481C.

<sup>58</sup> *Junior Books v Veitchi* [1983] AC 520 see dissenting speech of Lord Brandon.

<sup>59</sup> *Hedley Byrne v Heller* [1964] AC 465.

- Provided information, advice or other services to the homebuyer.
- Assumed responsibility for the quality of that advice and the consequences of it to the homebuyer.
- In doing the above caused the homebuyer to rely on that advice and suffer financial loss as a result.<sup>60</sup>

G.3.57 This will be difficult to demonstrate for homebuyers. Given that homebuilders engage contractors, contractors are usually answerable to homebuilders not homebuyers. As such, any advice or services provided by contractors or others engaged in the construction of a new home will be provided to the homebuilder not the homebuyer.

G.3.58 However, a self build homebuyer's position against contractors and others involved in building works is much stronger. They will not have to rely on a tortious claim. As well as a right to claim misrepresentation, they are more likely to have a right to claim breach of contract, because they will have directly engaged those involved in constructing their new home. As a result, they will have direct contractual rights via which they can claim damages, rescission, repudiation and specific performance.

### **Misdescription in the particulars of sale**

G.3.59 A misdescription claim will succeed if it can be shown that there was an error in the particulars of sale. A typical example is an error in plans or specifications attached to a contract of sale. If substantial, a homebuyer can seek to rescind the contract and recover damages. A substantial error will be one that deprives the homebuyer of his bargain.<sup>61</sup> If insubstantial, a homebuyer can only get damages. Damages may include the right of abatement and the right to recover any deposit or reservation fee paid.

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<sup>60</sup> Hedley Byrne v Heller [1964] AC 465.

<sup>61</sup> Watson v Burton [1957] 1 WLR 19.

## Misdescription by statement

- G.3.60 The concept of misdescription also appears in consumer related legislation. Examples include the Estate Agents Act 1979, the Property Misdescriptions Act 1991 and the Property Misdescriptions (Specified Matters) Order 1992.<sup>62</sup>
- G.3.61 The 1979 Act regulates the overall conduct of estate agents. Whilst the 1991 Act and 1992 Order provide that it is a criminal offence<sup>63</sup> to make a misdescribe, that is make false or misleading statements<sup>64</sup> about 'prescribed matters' during the course of conducting agency or property development business. It is a strict liability offence.<sup>65</sup> Prosecutions are usually taken by Trading Standards Departments in local authorities.
- G.3.62 'Prescribed matters'<sup>66</sup> cover a wide variety of oral and written statements, including misleading statements on the aspect, view, environment and physical or structural characteristics of a property.<sup>67</sup> However, the list does not include misleading statements about the price of certain types of new build property.<sup>68</sup>
- G.3.63 The 1991 Act and 1992 Order apply to estate agents and homebuilders.<sup>69</sup> Homebuilders have to comply with the requirements of the Act and the Order. This is because the Act and the Order apply to

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<sup>62</sup> S.I.1992/2834.

<sup>63</sup> Section 1(1) and (2) of the Property Misdescriptions Act 1991.

<sup>64</sup> Section 1(5)(a) of the Property Misdescriptions Act 1991 provides that 'false' means 'to a material degree' and section 1(5)(b) of the Act defines 'misleading statement' as meaning: 'a statement is misleading if (though not false) what a reasonable person may be expected to infer from it, or from any omission from it, is false.'

<sup>65</sup> A strict liability offence usually means there is not need for the prosecuting authority to prove intent.

<sup>66</sup> They are described as specified matters in the 1992 Order and listed in Schedule 16 of the Order.

<sup>67</sup> *Lewin v Barratt Homes Ltd* [1999] EGCS 139. In this case an estate agent was convicted for statements made in photographs and through the display of a show house.

<sup>68</sup> See article 2, paragraph 16 of Schedule of Property Misdescriptions (Specified Matters) Order 1992. *Lancashire County Council v Buchanan* [2007] EWHC 3194 (Admin).

<sup>69</sup> Section 1(1) and (5)(f) of the Property Misdescriptions Act 1991.

statements made in the course of a 'property development business' as well as 'estate agency business'.

G.3.64 Section 1(5)(f) of the 1991 Act provides that the Act will apply to false or misleading statements made in relation a property development business if they are made:

- In the course of 'a business ...concerned wholly or substantially with the development of land'; and
- they are made for the purpose of, or with a view to, disposing of an interest in land consisting of or including a building, or part of a building, constructed or renovated in the course of the property development business.

G.3.65 Despite criminal sanction, a homebuyer cannot cancel a contract of sale solely on the basis that there has been a breach of the 1991 Act and 1992 Order.<sup>70</sup>

G.3.66 Estate agents and homebuilders were also subject to section 14(1) of the Trade Descriptions Act 1968 (the 1968 Act).<sup>71</sup>That provided that it is a criminal offence to make a false statement in a contract for the supply of services. As with the 1991 Act and 1992 Order prosecutions were usually taken by local Trading Standards Departments.

G.3.67 There have been prosecutions under the 1968 Act which cover services supplied in relation to land. For example, a homebuilder was convicted for making false statements about the availability of a National House Building Council (NHBC) warranty on a new home.<sup>72</sup>

G.3.68 Where there has been a conviction under the 1991 Act, 1992 Order or the 1968 Act, section 130 of the Powers of Criminal Courts Act

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<sup>70</sup> Section 1(4) of the Property Misdescriptions Act 1991.

<sup>71</sup> Section 14 has since been repealed by regulation 30(3) of and Schedule 4 to the Consumer Protection from Unfair Trading Regulations 2008.

<sup>72</sup> *Breed v Cluet* [1970] 2 QB 459.

(Sentencing) Act 2000<sup>73</sup> states that a homebuyer may be able to obtain a compensation order in the criminal courts<sup>74</sup> or a damages award in the civil courts against the offender for any injury, loss or damage he has suffered as a result.<sup>75</sup>

G.3.69 Section 14 of the Trade Descriptions Act 1968 has since been repealed and replaced by the Consumer Protection from Unfair Trading Regulations 2008 (the CPR Regulations).<sup>76</sup> The CPR Regulations are new, however, their breach is also a criminal offence.<sup>77</sup> A conviction can also result in compensation order or damages award. For more on these Regulations see paragraph G.3.81 to G.3.88.

G.3.70 To avoid the expense of legal action a homebuyer may also make a misrepresentation, misdescription or misleading statement complaint against an estate agent via an alternative redress scheme, for example the Ombudsman for Estate Agents. Since June 2008 the Ombudsman has provided an OFT approved redress mechanisms for complaints against estate agents under the Consumer Estate Agents Redress Act 2007.<sup>78</sup>

G.3.71 There is inevitable overlap between misdescription, misrepresentation and misleading statements. It is not impossible that misleading statements, conduct or documents can amount to both. Examples include statements that claim that:

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<sup>73</sup> *Breed v Cluet* [1970] 2 QB 459.

<sup>74</sup> Section 131 of the Powers of Criminal Courts Act (Sentencing) Act 2000 states that if the conviction was obtained in a magistrate's court the compensation order cannot exceed £5,000.

<sup>75</sup> Section 134 of the Powers of Criminal Courts Act (Sentencing) Act 2000 states that, if a criminal compensation order has been made the homebuyer can only recover from a civil action the difference between the amount of the compensation order and any excess ordered by the civil court and/or any unpaid portion of the compensation order.

<sup>76</sup> Regulation 30(3) of and Schedule 4 to the CPR Regulations 2008.S.I. 2008/1277.

<sup>77</sup> See Part 3 of the 2008 Regulations.

<sup>78</sup> See the OFT website address:

[www.offt.gov.uk/advice\\_and\\_resources/small\\_businesses/competing/protection](http://www.offt.gov.uk/advice_and_resources/small_businesses/competing/protection)

- Land is ripe for immediate or suitable development, when there is a covered culvert running under it<sup>79</sup>
- Premises are in good repair when they are not<sup>80</sup>
- A house is not damp when it is.<sup>81</sup>

## Mistake

G.3.72 Where a contract of sale has been made because of a fundamental mistake of fact, it can be treated as void. This means the homebuyer can set the contract aside and recover any monies paid.

G.3.73 Examples of fundamental mistakes include:

- The destruction of the subject matter of a contract before it was made<sup>82</sup>
- A misunderstanding about the meaning of a contract.<sup>83</sup>

## Scotland

G.3.74 Scottish law on misrepresentation, misdescription, mistake and breach of contract is similar to that of England and Wales.<sup>84</sup> For example, section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provides that negligent misrepresentation can give rise to an action for damages.

G.3.75 The 1979 Act applies to Scotland<sup>85</sup> however, there are some modifications. For example, section 19 of the 1979 Act recognises and

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<sup>79</sup> Re Puckett and Smith's Contract [1902] 2 Ch 258, CA.

<sup>80</sup> Cree v Stone [1907] 10<sup>th</sup> May Times.

<sup>81</sup> Strangways v Bishop [1857] 29 LTOS 120.

<sup>82</sup> Hitchcock v Giddings [1817] 4 Price 135.

<sup>83</sup> George Wimpey UK Ltd v VI Components Ltd, BLD 2506024771.

<sup>84</sup> Molphy v Coyne (1919) 53 ILTR and O'Brien v Kearney [1995] 2 IRLM 232.

<sup>85</sup> See section 36 of the Estate Agents Act 1979.

regulates the long established conveyancing practice in England and Wales of the receipt of pre-contract deposits. The section does not apply to Scotland. Instead, section 20 of the 1979 Act prohibits the receipt of deposits in Scotland.

G.3.76 As in England and Wales section 14 of the 1968 Act which also applied to Scotland has been replaced by the CPRs. Whilst the 1991 Act, the 1992 Order apply to Scotland with some modifications.<sup>86</sup>

G.3.77 In the event of convictions under the 1991 Act, 1992 Order and until its repeal under the 1968 Act compensation in the criminal courts and damages in the civil courts can also be obtained by homebuyers in Scotland.<sup>87</sup>

## Northern Ireland

G.3.78 Similar laws on misrepresentation, misdescription, mistake and breach of contract apply in Northern Ireland, For example, section 2(2) of the Misrepresentation (Northern Ireland) Act 1967 also provides that negligent misrepresentation can give rise to an award for damages in lieu of rescission. The 1979 Act on estate agents also applies to Northern Ireland.<sup>88</sup>

G.3.79 As with the rest of the UK section 14 of the 1968 Act which applied to Northern Ireland has been replaced with the CPRs. The 1991 Act and the 1992 Order apply with modifications to Northern Ireland.<sup>89</sup>

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<sup>86</sup> Section 7 of the Property Misdescriptions Act 1991. The 1992 Order was made under section 1(7) of the 1991 Act and also applies to Scotland and Northern Ireland. See also section 40 of the Trade Descriptions Act 1968.

<sup>87</sup> See for example, section 249 of the Criminal Procedure (Scotland) Act 1995 empowers the courts to make compensation orders post conviction.

<sup>88</sup> See section 36 of the Estate Agents Act 1979.

<sup>89</sup> Section 7 of the Property Misdescriptions Act 1991. The 1992 Order was made under section 1(7) of the 1991 Act. Therefore it applies to Scotland and Northern Ireland. See also section 40 of the Trade Descriptions Act 1968.

G.3.80 As in England, Wales and Scotland, where there have been convictions under the 1991 Act, 1992 Order and until its repeal the 1968 Act compensation in the criminal courts and damages in the civil courts can also be obtained by homebuyers in Northern Ireland.<sup>90</sup>

## Unfair Commercial Practices

G.3.81 There may also be scope for legal action by the homebuyer where a homebuilder's conduct amounts to an unfair commercial practice. The CPR Regulations which came into force on 26<sup>th</sup> May 2006<sup>91</sup> outlaw unfair commercial practices which distort consumer decisions. They apply to the provision of services and selling of products to consumers. Regulation 2 of the CPR Regulations defines 'product' as any 'goods or service' which includes land.<sup>92</sup>

G.3.82 Regulation 3 places a general duty on businesses not to trade unfairly when dealing with consumers. It gives a number of examples of unfair commercial practice including a practice that:

- Is not professionally diligent
- Materially distorts, or is likely to materially distort the economic behaviour of a consumer
- In effect prevents a consumer from making an informed decision

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<sup>90</sup> See for example article 14 of the Criminal Justice (N.I.) Order 1994 N.I. 15.

<sup>91</sup> Regulation 1 of the CPR Regulations 2008.

<sup>92</sup> See paragraph 14.17 of Part 4 of Consumer Protection from Unfair Trading Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive by the OFT and the Department for Business Enterprise and Regulatory Reform. The guidance can be found on the OFT website address:

[www.offt.gov.uk/advice\\_and\\_resources/small\\_businesses/competing/protection](http://www.offt.gov.uk/advice_and_resources/small_businesses/competing/protection)

G.3.83 Regulations 5 to 7<sup>93</sup> prohibit misleading acts, omissions and aggressive commercial practices. A misleading act can include:

- The provision of misleading written or oral information about the availability, existence, price, and characteristics of a property
- The provision of inaccurate information about consumers' rights, as well as the risks they may assume on entering a transaction.

G.3.84 Schedule 1 of the CPR Regulations lists 31 specific practices that will always be viewed as unfair. Examples range from certain sales techniques and advertising methods, to the failure to deal with consumer requests for future contact. Examples include, claiming to be a signatory to a code of conduct when you are not and claiming a product has been approved endorsed or authorised by a public or private body when it has not.<sup>94</sup>

G.3.85 Breach of the CPR Regulations can lead to:

- Criminal prosecution by the OFT, local Trading Standards Departments, the Department of Business Enterprise and Regulatory Reform in England and Wales<sup>95</sup>
- Civil enforcement action by any of these bodies for commission of a Community infringement under Part 8 of the Enterprise Act 2002.<sup>96</sup>

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<sup>93</sup> For more information on regulations 5 to 7 see Part 2 Chapters 7 and 8 of the guidance 'Consumer Protection from Unfair Trading Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive' by the OFT and the Department for Business Enterprise and Regulatory Reform. The guidance can be found on the OFT website address: [www.of.gov.uk/advice\\_and\\_resources/small\\_businesses/competing/protection](http://www.of.gov.uk/advice_and_resources/small_businesses/competing/protection)

<sup>94</sup> For more information on Schedule 1 see Part 2 Chapter 6 of the guidance 'Consumer Protection from Unfair Trading Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive' by the OFT and the Department for Business Enterprise and Regulatory Reform. See illustrations of possible breaches of the Regulations from page 77 of the Guidance.

<sup>95</sup> They are defined in regulation 2 of the CPR Regulations as the enforcement authorities. Regulation 20 of the CPR Regulations provides they are under a duty to enforce the Regulations.

G.3.86 Although they are untested in the homebuilding industry, the CPR Regulations could potentially cover a range of commercial misconduct that some homebuyers claimed to have experienced in the homebuilding sector. For example, misleading statements about the time within which a new home will be constructed, the status of legal documents and the quality and fitness of a new home.<sup>97</sup>

G.3.87 A key aspect of the CPR Regulations is that homebuyers will themselves be able to take civil action to enforce their rights under the Regulations.

### Scotland and Northern Ireland

G.3.88 The CPR Regulations apply to Scotland and Northern Ireland. Breach of the Regulations can lead to criminal prosecution and/or enforcement under Part 8 of the Enterprise Act 2002 by local Trading Standards Departments and the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate in Scotland and by the Department of Enterprise, Trade and Investment in Northern Ireland.

### Home Information Packs

G.3.89 Since 6 April 2008<sup>98</sup> all homebuilders marketing the sale<sup>99</sup> of any new home must possess a Home Information Pack (HIP) and provide a copy to a prospective homebuyer within 14 days of being requested to do

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<sup>96</sup> Schedule 10 of the Enterprise Act 2002 and regulations 27 to 29 of CPR Regulations.

<sup>97</sup> For more information see illustrations of possible breaches of the Regulations from page 77 of 'Consumer Protection from Unfair Trading Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive' by the OFT and the Department for Business Enterprise and Regulatory Reform.

<sup>98</sup> New homes constructed in accordance with energy performance requirements in regulation 17C of the Building Regulations 2000 (S.I.2000/2531) were exempt from HIP requirements until 6 April 2008.

<sup>99</sup> Section 149(2) of the Housing Act 2004 provides that a property is put on the market when the fact that it is or may be available for sale is first made public, by or on behalf of the seller. A copy of a HIP must be provided within a period of 14 days beginning with the day on which the request is made. This can be extended in certain circumstances.

so.<sup>100</sup> Self build homebuyers are also required to provide HIP reports when selling on their homes.

G.3.90 There are exceptions to the HIP rule. For instance, there is no obligation to provide a HIP where the homebuilder believes the homebuyer:

- Is unlikely to have the money to pay for the new home
- Has no genuine interest in buying the new home
- Is not a person to whom the homebuilder wants to sell.<sup>101</sup>

G.3.91 A HIP must include documents that evidence the ownership and environmental efficiency of a new home.<sup>102</sup> Examples include:

- An energy performance certificate where the home is built<sup>103</sup>
- A predicted energy assessment where the home is not yet built
- Proof of registered title
- Searches and search reports.<sup>104</sup>

G.3.92 There is no requirement to provide a home condition report, which provides a more detailed examination of the construction and conditions of a new home. This would include identification of serious defects in a new home which need urgent repair, replacement, or further

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<sup>100</sup> Section 159(9) of the Housing Act 2004. For example where a longer time is needed to obtain certain documents.

<sup>101</sup> Section 156(4) of the Housing Act 2004.

<sup>102</sup> For a sample HIP which gives more detail on what type of matters a HIP should cover see the Communities and Local Government website [www.homeinformationpacks.gov.uk/pdf/sample\\_HIP\\_11.pdf](http://www.homeinformationpacks.gov.uk/pdf/sample_HIP_11.pdf)

<sup>103</sup> This is in line with Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy and performance of buildings which was implemented the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007.

<sup>104</sup> Regulation 8 of the Home Information Pack (No.2) Regulations 2007 (S.I.2007 1667).

investigation.<sup>105</sup> There is also no requirement to provide a warranty, policy or guarantee for defects in design, building or completion.<sup>106</sup> However, they can be provided on a voluntary basis, along with other documents, for instance, information about the standards to which a property has been built.<sup>107</sup>

G.3.93 A homebuilder or self build homebuyer will usually engage surveyors, estate agents, or specialists firms to provide HIPs.

G.3.94 Failure to possess or provide a HIP can result in a penalty charge of £200 enforced by Local Trading Standards Departments.<sup>108</sup> Local Trading Standards Departments also have power to compel a homebuilder to produce a HIP.<sup>109</sup> Under section 170 of the Housing Act 2004, if a homebuilder fails to commission a HIP, a homebuyer can commission their own and recover the fees they pay from the homebuilder.

G.3.95 If a HIP provider does not provide a good service, the homebuilder or self build homebuyer who engaged it has the right to sue for breach of contract. The homebuyer has the same right if they commissioned the HIP.

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<sup>105</sup> For a sample HCR which gives more detail on what type of matters an HCR should cover see the Communities and Local Government website:  
[www.homeinformationpacks.gov.uk/pdf/sample\\_HIP\\_11.pdf](http://www.homeinformationpacks.gov.uk/pdf/sample_HIP_11.pdf)

<sup>106</sup> CLG is considering including further mandatory elements in the HIPs which would also apply to new homes (such as on maintenance fees and facilities such as car parking). In the longer term, there could also be requirements for provision of information which only applies to new homes such as about warranties and contract terms. Such a requirement would also determine that homebuyers are given this kind of information early enough for them to consider properly before paying any monies to the homebuilder, such as reservation fees (unless the reservation fee was refundable).

<sup>107</sup> Regulation 9 and Schedule 10 of the Home Information Pack (No.2) Regulations 2007 (S.I.2007 1667).

<sup>108</sup> Sections 166 and 168 of the Housing Act 2004 and regulation 35 of the Home Information Pack (No.2) Regulations 2007 (S.I.2007 1667).

<sup>109</sup> Section 167 of the Housing Act 2004.

G.3.96 If successful, a homebuilder or self build homebuyer could potentially recover damages, including:

- The cost of repairing defects that should have been noted in the HIP
- Any reduction in the value of the new home.

G.3.97 However, there is no obligation on the part of the homebuilder or self build homebuyer to pass on to an affected homebuyer any part of the compensation received.

G.3.98 Where the homebuyer has commissioned the HIP they will have similar contractual rights to a homebuilder and self build homebuyer. Where the homebuyer has not commissioned the HIP they can only pursue a tort of negligence/deceit action. To succeed they would have to prove amongst other things that the HIP provider:

- Owed them a duty of care
- Failed to exercise the expected standard of skill, care and diligence.

G.3.99 As mentioned before tortious claims are less beneficial than contractual ones in that the homebuyer will not be able to recover 'pure economic loss' unless the homebuyer can show there was a special relationship.<sup>110</sup> See paragraphs G.3.49 to G.3.58.

G.3.100 A homebuilder or self build homebuyer can also make a complaint against the HIP provider, via an alternative redress scheme instead of starting court action. This will also be an available option to homebuyers who have commissioned HIP reports. For example, if the HIP was commissioned from an estate agent, the homebuilder or self build homebuyer could pursue a complaint via the Ombudsman for Estate Agents.

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<sup>110</sup> See for example *Hedley Byrne v Heller* [1964] AC 465 where it was held that economic loss could be recovered under the tort of negligence where there had been a negligent misstatement in circumstances where a special relationship existed.

## Scotland

- G.3.101 Similar laws apply to Scotland from 1 December 2008, Part 3 of the Housing (Scotland) Act 2006 will place an obligation on a homebuilder and self build homebuyer marketing a new home for sale to possess and supply on request a Home Report (HR).
- G.3.102 Amongst the documents that must be supplied with an HR and are similar to those that must be supplied in a HIP are: an energy report, which has an assessment of the energy efficiency of the new home and its environmental impact; and a property questionnaire, to be completed by the homebuilder or self build homebuyer, which contains additional information about the home, for example its council tax banding.
- G.3.103 However, there appears to be a key difference. An HR must also include a single survey, provided by a chartered surveyor or approved government inspector. This is akin to a home condition report, in that it must contain a detailed description of the quality and fitness of the property, details of its valuation and an accessibility audit for people with particular needs.<sup>111</sup> From this, it appears that Scottish homebuilders have to provide more information about the quality and fitness of a new home than their English, Welsh and Northern Ireland counterparts.
- G.3.104 Homebuilders, self build homebuyers and homebuyers have similar access to legal rights and remedies in relation to a poorly prepared HR as those in England and Wales in relation to a poorly prepared HIP.
- G.3.105 Approved redress systems as an alternative to court action are also available in Scotland.

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<sup>111</sup> For more information on what must be included in Home Reports see the guidance and sample documents provided on the Scottish Government website 'Home Report the new way of buying and selling homes in Scotland' [www.scotland.gov.uk/Topics/Built-Environment/Housing/BuyingSelling/Home-Report](http://www.scotland.gov.uk/Topics/Built-Environment/Housing/BuyingSelling/Home-Report)

## Northern Ireland

G.3.106 The position is not the same in Northern Ireland. Since 30<sup>th</sup> September 2008 a homebuilder and self build homebuyer need only obtain and provide on request an Energy Performance Certificate when a new home is constructed.<sup>112</sup> A certificate can only be produced by a trained and accredited assessor.<sup>113</sup> Assessors must join accredited schemes and be properly licensed. The skills and knowledge required of assessors to achieve a licence have been set by [the] Asset Skills (the Sector Skills Council for the Property, Facilities Management, Housing and Cleaning Industries).<sup>114</sup> If poorly prepared, a homebuilder, self build homebuyer and homebuyer have similar legal rights and remedies as those available in England and Wales. Approved redress schemes as an alternative to court action are also available in Northern Ireland.

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<sup>112</sup> See The Energy Performance of Buildings (Certificates and Inspections) Regulations (NI) 2008 in force since 30 June 2008. The Regulations implement Directive 2002/91/EC of the European Parliament and the Council of 16 December 2002 on the energy and performance of buildings.

<sup>113</sup> For more information on the standards that must be met in order to obtain a certificate see the Northern Ireland Executive website [www.northernireland.gov.uk/](http://www.northernireland.gov.uk/)

<sup>114</sup> For more information see the Northern Ireland Executive website [www.northernireland.gov.uk/](http://www.northernireland.gov.uk/)

## **G.4 SERVICES PROVIDED BY SOLICITORS, LICENSED CONVEYANCERS AND SURVEYORS**

### **Solicitors and Licensed Conveyancers**

- G.4.1 In addition, to obtaining information from a homebuilder, a sales team, estate agent or HIP provider, a homebuyer can get assistance in the purchase of a new home from professional experts in the property field. For example, a solicitor or licensed conveyancer or a surveyor.
- G.4.2 The solicitor or licensed conveyancer will provide legal services by helping the homebuyer complete the conveyance of the new home (see Annexe K for more details concerning the homebuying process). The surveyor may provide a HIP or survey of the property. The situation is the same in Scotland and Northern Ireland.
- G.4.3 A key aspect of a new home purchase is the homebuyer's need to be confident that the new home has sound title, is of the right quality, is fit for purpose and is being sold at the right price. Traditionally the checking of title has been done with the help of solicitor or licensed conveyancer who will act for the homebuyer.
- G.4.4 A solicitor and licensed conveyancer will have a duty of care <sup>115</sup> towards their client, the homebuyer, which requires them to exercise reasonable care and skill. The scope of their duty will depend on the instructions they receive.<sup>116</sup> A solicitor and licensed conveyancer may not only have

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<sup>115</sup>Ross v Caunters [1980] 1 Ch 207 and White v Jones [1995] 2 AC 207

<sup>116</sup>Ross v Caunters [1980] 1 Ch 207 and White v Jones [1995] 2 AC 207. Solicitors also determine the scope of their duty by way of client care letters which they are required to send under the Solicitors Code of Conduct 2007 when taking initial instructions from their clients. On Page 6 of the Law Society publication 'Yours clients –your business' October 2007 the Law Society state that amongst other things a good client care letter should clearly identify the client, the clients objectives, the issues involved and the options available to the client and state what the client is instructed to do next (and what is not included in the retainer if appropriate). The publication can be found on the Law Society website [www.lawsociety.org.uk/home.law](http://www.lawsociety.org.uk/home.law)

a duty to their client but, in certain circumstances, to third parties as well.<sup>117</sup>

- G.4.5 This is reinforced by section 13 of the Supply of Goods and Services Act 1982 which provides that in a contract of service where the supplier acts in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.<sup>118</sup>
- G.4.6 A solicitor's or licensed conveyancer's failure to exercise reasonable care and skill can form the basis of a breach of contract and/or a tort of negligence claim. If successful, they can be required to pay damages, which could include, in certain circumstances, financial loss, on the basis that there is a special relationship between the homebuyer and the solicitor or licensed conveyancer.<sup>119</sup> See paragraphs G.3.49 to G.3.58. In addition, or instead of court action, a claim could be made against a solicitor or licensed conveyancer's indemnity insurance.
- G.4.7 The checking of quality, fitness for purpose and the value of the new home can be done by way of a surveyors report. However, solicitors acting for all parties in the sale also have duties relating to ensuring that there is transparency about the true value of the new home (see paragraph G.4.17).

## Surveyors

- G.4.8 If a homebuyer decides to obtain a survey, the surveyor will owe a duty of care akin to that of a solicitor or licensed conveyancer. As with solicitors and licensed conveyancers, the scope of the duty will be defined by the homebuyer's instructions and the professional standards

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<sup>117</sup>Ross v Caunters [1980] 1 Ch 207 and White v Jones [1995] 2 AC 207. Caparo Plc v Dickman [1990] AC 398 and Morgan Crucible v Hill Samuel [1991] 1 ALLER 148 and Mortgage Express v Bowerman and Partners [1995] 2 ALLER 769.

<sup>118</sup>Wilson v Bloomfield [1979] 129 S, 860, CA- solicitor found negligent because he supplied incorrect replies to preliminary enquiries.

<sup>119</sup>Pilkington v Wood [1953] Ch.770. See also Hedley Byrne v Heller [1964] AC 465 where it was held that economic loss could be recovered under the tort of negligence where there had been a negligent misstatement in circumstances where a special relationship existed.

expected of a surveyor. Section 13 of the Supply of Goods and Services Act 1982 will also apply here, as will guidance and practice notes provided by organisations which regulate the conduct of surveyors. An example of the latter is the Royal Institute of Chartered Surveyors 'Red Book' of standard instructions to valuers.

G.4.9 Further, although a surveyor's duty of care will be owed to the person or firm that has engaged them, they may also owe a duty to any third party that they knew or should have known would have received his report.<sup>120</sup>

G.4.10 Surveyors tend to provide three types of survey:

- A mortgage valuation survey (also known as a 'basic survey') which gives a financial valuation of the property.
- A homebuyer's report and valuation, which explains a property's state of repair and its financial value, following a limited inspection.
- A full structural survey, (a 'building survey') which is the most thorough. It is a comprehensive report setting out all structural defects (minor or major) after a full inspection.<sup>121</sup>

G.4.11 Basic surveys are usually commissioned by mortgage lenders to establish whether a new home is adequate security for a mortgage. Homebuyers tend to rely on these, although they only confirm a new home's value and rarely cover issues of quality and fitness for purpose.<sup>122</sup>

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<sup>120</sup> Smith v Eric S Bush (a firm) [1990] 1 AC 831. Qureshi v Liassides (Unreported) [1995] EC 123. See also Caparo Plc v Dickman [1990] AC 398 and Morgan Crucible v Hill Samuel [1991] 1 ALLER 148 and Mortgage Express v Bowerman and Partners [1995] 2 ALLER 769.

<sup>121</sup> For more information on valuation and survey procedures see 'Council of Mortgage Lenders Valuation and Survey Procedures Simultaneous Processes' on CML website address: [www.cml.org.uk/cml/policy/issues/650](http://www.cml.org.uk/cml/policy/issues/650).

<sup>122</sup> For more information on valuation and survey procedures see 'Council of Mortgage Lenders Valuation and Survey Procedures Simultaneous Processes' on CML website address: [www.cml.org.uk/cml/policy/issues/650](http://www.cml.org.uk/cml/policy/issues/650)

G.4.12 Since 1 September, the Council of Mortgage Lenders (CML) introduced new procedures in the valuation process to ensure that there is more transparency about the true value of a new home.<sup>123</sup>

G.4.13 The new procedures are set out in part 2 of the Council of Mortgage Lenders' Handbook. They provide that mortgage lenders are entitled to ask homebuyers to declare on their mortgage application form any incentive or discount they are being offered by the homebuilder. If an incentive or discount is not declared the mortgage lender has the right to vary or withdraw a mortgage offer.

G.4.14 The procedures also require mortgage lenders to ask homebuilders to complete 'disclosure of incentives' forms. The forms will detail all incentives and discounts offered by the developer.

G.4.15 Copies of the forms must be sent to the surveyor (preferably before the surveyor carries out the survey) and to the lender's solicitor or licensed conveyancer. If the forms are not sent then the sale of the new home cannot be completed.

G.4.16 Further, surveyors are required to inform mortgage lenders if they have or have not received a copy of a form. This is set out in CML Guidance and also in section 5.5 of Appendix 3 of the RICS 'Red Book' of standard instructions to valuers.

G.4.17 In addition, in accordance with Law Society Guidance on mortgage fraud and money laundering, solicitors acting for all parties in a new home sale are obliged to inform the mortgage lender of the true price of a new home. This includes not only informing the lender of straightforward price reductions, but any other allowances which may amount to a price

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<sup>123</sup> For more information see 'Council of Mortgage Lenders introduces new valuation process to help reinforce confidence in new –build market on CML website address: [www.cml.org.uk/cml/policy/issues/1223](http://www.cml.org.uk/cml/policy/issues/1223) and [www.cml.org.uk/cml/media/press/1873](http://www.cml.org.uk/cml/media/press/1873).

reduction. Examples include incentives offered by homebuilders such as free holidays and part-subsidisation of mortgage payments.<sup>124</sup>

G.4.18 If a surveyor provides a poor service, whoever engaged them can take action for breach of contract and recover damages, which can include financial losses incurred as a result.

G.4.19 Although there is some recognition of third party rights, if a homebuyer does not engage the surveyor they cannot claim breach of contract. Instead they are confined to a claim in the tort of negligence/deceit. This problem may also arise against others involved in the building of a new home. For example, where defects in the construction of a new home are caused by the failure of an architect engaged by the homebuilder and not the homebuyer to carry out his work with reasonable care and skill. The homebuilder will have the right to take legal action against the architect for breach of contract. This right will not be available to the homebuyer. Instead the homebuyer may have an action via the tort of negligence.

G.4.20 The restriction on the recovery of 'pure economic loss' in tortious actions will also apply here. See paragraphs G.3.49 to G.3.58. It may be easier to overcome by proving that there was a special relationship between the surveyor or architect and the homebuyer on which the homebuyer relied. However, this will not be easy to prove.<sup>125</sup>

G.4.21 Contract and tort claims against solicitors, licensed conveyancers, surveyors or others involved in the homebuilding sector must be supported by cogent evidence that satisfies the civil balance of

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<sup>124</sup> For more information see the Law Society 'Mortgage Fraud Practice Note' 19 March 2008 on the Law Society website at: [www.lawsociety.org.uk/home.law](http://www.lawsociety.org.uk/home.law) and the Law Society 'Anti-Money Laundering Practice Note' 22 February 2008 on the Law Society website at: [www.lawsociety.org.uk/home.law](http://www.lawsociety.org.uk/home.law).

<sup>125</sup> *Ross v Caunters* [1980] Ch 297, applying *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223. *Forster v Outred & Co (a firm)* [1982] 2 ALLER 753. *Platform Home Loans v Oyston* [1999] EGCS 26 HL; and *Philips v Ward* [1956] 1 ALLER 874 and *Watts v Morrow*, *the Independent* 20 August 1991.

probabilities test.<sup>126</sup> This is made all the more difficult by the fact claims which consist of allegations of professional misconduct can sometimes require a higher degree of proof.<sup>127</sup>

G.4.22 To that end, homebuyers may have to produce a range of documents including contracts, plans, specifications, permissions and warranties to substantiate their claims.

G.4.23 In addition, there will usually be a need to measure the misconduct complained of against practice statements, guidance and codes of conduct produced by recognised bodies like the Solicitors Regulatory Authority or the Royal Institute of Chartered Surveyors.

G.4.24 To supplement this, a homebuyer would usually have to produce expert evidence from practitioners in the field who will be better able to navigate the rules and guidance that apply to this area. This will be an expensive and time consuming exercise.

G.4.25 In addition to or instead of court action, claims can be made against a solicitor's, licensed conveyancer's or surveyor's indemnity insurance or via the organisations that regulate their conduct.<sup>128</sup> The chances of success, (that is proving that there has been misconduct and recovering adequate compensation) will depend on the validity and strength of a homebuyer's claim and the financial limits placed on the insurance cover.

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<sup>126</sup> *Miller v Minister of Pensions* [1947] 2 ALLER 372 and the Civil Evidence Act 1968 and Civil Evidence Act 1995.

<sup>127</sup> *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 ALLER 970, CA. *Miles v Cain* [1989] Times, 15 December, CA.

<sup>128</sup> For example, complaints can be made about solicitors to the Legal Complaints Services or the Office of the Legal Services Ombudsman and Legal Services Commissioner. Their respective websites are [www.olso.org/](http://www.olso.org/) and [www.legalservices.gov.uk/](http://www.legalservices.gov.uk/). As a result of the Legal Services Act 2007 an Independent Office for Legal Complaints will be created by the Ministry of Justice. It is proposed that this will happen in 2010. See Ministry of Justice '*Legal Services Reform Update June 2008.*'

## Scotland and Northern Ireland

G.4.26 In Scotland and Northern Ireland a homebuyer has similar contractual and delictual<sup>129</sup> rights against solicitors, licensed conveyancers and surveyors.<sup>130</sup>

G.4.27 For example, the position on reasonable care and skill is similar in Scotland and Northern Ireland.<sup>131</sup>

G.4.28 The Supply of Goods and Services Act 1982 Act applies in part to Scotland. The Act applies in full to Northern Ireland. For more information on this see paragraphs G.7.4 to G.7.9.

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<sup>129</sup> Broadly, delictual liability is a legal wrong which may give rise to certain legal obligations, for example to make reparation for damage caused.

<sup>130</sup> Crawford v Boyd & Co [1935] 69 ILTR 65.

<sup>131</sup> Donoghue v Stevenson 1932 SC (HL) 31, Arenson v Casson, Beckman, Rutley & Co [1975] 3ALLER.901 and O'Connor v First National Building Society [1991] ILMR 208.

## **G.5 RECOVERING RESERVATION FEES AND DEPOSITS AND RETAINING COMPLETION MONIES**

### **Reservation fees and deposits**

- G.5.1 In order to buy a new home the homebuyer is often required to sign a 'reservation agreement' and pay a reservation fee. The aim of the 'agreement' is to prohibit the homebuilder from negotiating with other potential purchasers for a limited period. It is not an agreement to exclusively negotiate a sale of the new home with the homebuyer.
- G.5.2 Usually if exchange of contracts or a complete sale of a new home is not achieved within the limited period the homebuyer will not be able to recover all or some of the reservation fee.
- G.5.3 As with most sales of homes, a homebuyer can be asked to pay a deposit of [up to] 10 per cent [or less] of the purchase price, on the date the contract for sale is exchanged. The rest of the money due is payable on completion.
- G.5.4 From a homebuilder's perspective, the reservation fee and deposit are intended to protect a homebuilder from the risk of a homebuyer's lack of true commitment or default. The homebuilder may have incurred considerable expense and effort during construction on the promise that a homebuyer can and will buy.
- G.5.5 If the homebuyer has a mortgage, their mortgage lender must also be kept informed of developments so it can release the deposit and completion sums due for payment on time.
- G.5.6 On the date of completion, a homebuyer must pay the balance of the purchase price to the homebuilder. Once the completion money is paid by the homebuyer they can move into the property.
- G.5.7 The completion date can be fixed quite quickly if the new home is built. If it is not, the homebuilder often has the right to defer completion until the construction works have been certified as complete. This can cause

problems where the works are delayed, especially where a homebuyer is selling their existing home in order to buy the new one.

- G.5.8 The sale of the existing home may be part of a chain of conveyances which require the homebuyer to vacate their existing property by a fixed date. If the new home is not built on time, the homebuyer may be forced into renting alternative accommodation until construction works are complete.
- G.5.9 Another problem arises if the homebuyer is in rented accommodation which must be vacated within a specified time period.
- G.5.10 A homebuyer may have the right to recover the deposit with interest or retain with interest some or all outstanding completion monies if construction, repair or maintenance works are not completed within a reasonable time.
- G.5.11 If a deposit is held by the homebuyer's or homebuilder's solicitor as agent for the homebuilder, the deposit belongs to the homebuilder, unless the contract of sale has terms and conditions that say otherwise.
- G.5.12 If the deposit is held by the homebuyer's or homebuilder's solicitor in the capacity of stakeholder then the solicitor's position is a neutral one. The deposit cannot be paid out to the homebuilder until such payment is authorised by the homebuyer. Further, the homebuyer may have the right to return of the deposit if the homebuilder has failed to fulfill its contractual obligations. If the solicitor pays the deposit to the homebuilder in error then they will be liable to the homebuyer to account for the money.<sup>132</sup>

## **Retention**

- G.5.13 In the sale of pre-existing homes, in order to exercise a right of retention (that is a right which can be exercised by homebuyers or mortgage lenders to withhold the payment of all or some monies due for payment

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<sup>132</sup> Hastingwood Property Ltd v Saunders Bearman Anselm [1991] Ch 114.

until an issue in dispute is resolved, for example repairs), the contract of sale must clearly state that the homebuyer has a right of retention and the terms and conditions of that right. For example, until the issue in dispute is resolved, whether the homebuyer's or the homebuilder's solicitor can withhold the retained sum on completion of the sale and how (for example on account in the joint names of the homebuyer and homebuilder). It is also usually agreed that if an issue in dispute is not resolved by an agreed date, the retention money should be paid back to the homebuyer. Further, if the financial loss incurred by the homebuyer exceeds the sum that has been retained, the homebuyer can also claim the deficit from the homebuilder.

G.5.14 To reinforce the right of retention in relation to mortgage lenders, the Council of Mortgage Lenders introduced a new initiative in 2003 for England and Wales which recommended that mortgage lenders did not release mortgage funds until a satisfactory final inspection of the property was completed. The aim was to address the problems experienced by homebuyers who moved into new homes that had not been properly finished.<sup>133</sup>

G.5.15 However, in the case of a homebuyers right to retain exercising the right of retention will be difficult where the homebuyer of a new home has signed up to a contract of sale which limits or excludes their rights and remedies if the homebuilder has failed to fulfill its contractual obligations, for example if the homebuilder has not completed the construction works within a reasonable time.<sup>134</sup>

G.5.16 A homebuilder usually has the right to refuse to return a deposit if the homebuyer is in default of their obligations. For example, if they:

- Fail to pay the balance of the sale price on completion.

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<sup>133</sup> See Council of Mortgage Lenders Website <http://www.cml.org.uk/cml/media/press/180..>

<sup>134</sup> See paragraphs 3.9 and 3.10 of the Law Society of England and Wales '*Conveyancing Handbook*' 14<sup>th</sup> Edition 2007.

- Will not accept warranty cover provided by the homebuilder. This may apply even if the deposit exceeds the actual financial loss suffered by a homebuilder.

## Scotland

G.5.17 The position on reservation fees, deposits, and the retention is similar to England and Wales in Scotland. The deferral of completion dates on new homes to accommodate revised building schedules is at odds with traditional Scottish conveyancing practice where key terms are agreed early on, including the moving in date.

G.5.18 The Council of Mortgage Lenders 2003 initiative in England and Wales recommending the exercise of retention by mortgage lenders until new homes are properly finished was extended to Scotland in 2004.

## Northern Ireland

G.5.19 The position on reservation fees, deposits, and the right of retention of completion monies in Northern Ireland is similar to England and Wales.

## **G.6 THE RIGHTS AND REMEDIES OF HOMEBUYERS IN RELATION TO THE CONTRACT OF SALE**

G.6.1 Where a contract of sale has been made, a homebuyer will have a right to take action for breach of contract against a homebuilder, if the latter fails to fulfill its contractual obligations.

G.6.2 Examples of the standard terms and conditions that a new home contract for sale may include are that the:

- New home must be constructed within a reasonable time, subject to the homebuilder's right to defer if there are delays in the construction works.
- New home must meet minimum standards of quality and fitness.
- New home must be sold for an agreed price.
- Homebuyer must accept warranty/insurance cover provided by the home builder.

G.6.3 If a breach of contract claim succeeds a homebuyer can claim damages and/or seek rescission or repudiation of the contract against a homebuilder. This is confirmed in Condition 7.3 of the Standard Conditions which provides for the payment of interest at an agreed contract rate on monies due, by whoever is responsible for any delay.

G.6.4 Also the contract of sale of a new home may fall foul of the Unfair Terms in Consumer Contracts Regulations 1999 (the 1999 Regulations),<sup>135</sup> the Unfair Contract Terms Act 1977 (1977 Act) and the Consumer Protection from Unfair Trading Regulations 2008 (the 2008 Regulations).

G.6.5 The Act and the Regulations can be enforced by the OFT and local Trading Standards Departments against a homebuilder under Part 8 of

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<sup>135</sup> S.I 1999/2083.

the Enterprise Act 2002. A homebuyer can also take civil action in their own right in contract or tort which may be supported by evidence of breaches of the Act and the Regulations.

## Scotland

- G.6.6 The law in relation to contracts of sale in Scotland is similar to that of England and Wales. The 1999 and 2008 Regulations apply to Scotland.
- G.6.7 However only parts of the 1977 Act apply to Scotland. An example is section 17 of Part II of the 1977 Act. That provides that any term in a consumer contract or standard form of contract which unreasonably or unfairly tries to exclude or restrict liability, where a party has failed to perform a contractual obligation will have no effect in law.
- G.6.8 As in England and Wales, enforcement action under Part 8 of the Enterprise Act 2002 can be taken against homebuilders by appropriate enforcement authority, which for Scotland is the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate in Scotland.
- G.6.9 A homebuyer can also take civil action in their own right in contract or delict<sup>136</sup> which could be supported by evidence of breaches of the Act and the Regulations.

## Northern Ireland

- G.6.10 The law in relation to contracts of sale in Northern Ireland is the same as for England and Wales. The 1999 and 2008 Regulations and the 1977 Act apply to Northern Ireland as they do in England and Wales. Enforcement action under Part 8 of the Enterprise Act 2002 can be taken against homebuilders by the Department of Enterprise, Trade and Investment in Northern Ireland. As with the rest of the UK, a homebuyer can also take civil action in their own right in contract or tort which

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<sup>136</sup> Broadly, delictual liability is a legal wrong which may give rise to certain legal obligations, for example, to make reparation for damage caused.

could be supported by evidence of breaches of the Act and the Regulations.

## **G.7 THE RIGHTS AND REMEDIES OF THE HOMEBUYER IN RELATION TO A NEW HOMEBUILDING CONTRACT**

### **Construction contracts**

G.7.1 With most new home sales the normal practice is that a homebuyer buys their new home from a homebuilder who has engaged contractors, sub-contractors and others to build the home. In that instance there will be a construction contract between the homebuilder and the contractor. The homebuyer will not be a party to it. The contracts are usually amended versions of the standard form contracts produced by the Joint Contracts Tribunal Limited.<sup>137</sup> It has a number of members which include the Royal Institute of British Architects, the Royal Institute of Chartered Surveyors, the Scottish Building Contracts Committee and the Royal Society of Ulster Architects. The latter two are responsible for amendments made to the standard forms for Scotland and Northern Ireland respectively.<sup>138</sup>

G.7.2 In contrast, if a self build homebuyer directly engages contractors and others involved in the construction of his new home they could be party to the main construction contract.

### **Standard terms in construction contracts**

G.7.3 The construction contract will usually have standard warranty terms. Examples include, that the contractor undertakes to:

- Complete the construction by an agreed date.
- Work in a good and workmanlike manner.
- Supply good and proper materials.

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<sup>137</sup> For more information on the Joint Contracts Tribunal Limited see website address:

[www.jctltd.co.uk/](http://www.jctltd.co.uk/)

<sup>138</sup> Samples of the standard form construction contracts provided by the Joint Contract Tribunal can be found on its website [www.jctltd.co.uk/](http://www.jctltd.co.uk/)

- Ensure that the new home will be fit for human habitation.

G.7.4 These terms reiterate the standard implied terms in the Supply of Goods and Services Act 1982. The 1982 Act provides that where it is not expressly set out in a building contract various warranties can be implied. For instance, section 13 of the 1982 Act provides that there must be reasonable care and skill in the supply of services. Section 14 of the 1982 Act implies that a service must be carried out within a reasonable time. Whilst section 4 of the 1982 Act provides that it is an implied condition that materials supplied are of satisfactory quality.

## Scotland

G.7.5 The Supply of Goods and Services 1982 Act applies in part to Scotland. For example, section 11C provides that goods supplied must correspond with their description and section 11D provides that goods supplied must be of satisfactory quality.

G.7.6 Whilst section 11F states that where such terms are breached the injured party can claim damages and if the breach is material rescind or repudiate the contract.<sup>139</sup>

G.7.7 However, other rights are recognised in Scottish case law and are not covered by statute. For example, the right that a service be completed with reasonable care and skill.<sup>140</sup> This suggests that the legal position in England and Wales is simpler in that consumers need only rely on legislation such as the 1982 Act which is well understood and well established. Whilst Scottish homebuyers have to rely on case law, the content and effect of which may be variable.

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<sup>139</sup> See for example section 11P of the 1982 Act.

<sup>140</sup> *Donoghue v Stevenson* 1932 SC (HL) 31 and *Arenson v Casson, Beckman, Rutley & Co* [1975] 3 ALLER.901

## Northern Ireland

- G.7.8 The law on supply of goods and services in the Northern Ireland is similar to that of England and Wales in that most of the 1982 Act applies to Northern Ireland.<sup>141</sup>
- G.7.9 Where these terms are breached the homebuilder and self build homebuyer have the right to claim damages and if the breach is material, rescind or repudiate the contract.

## Performance bonds

- G.7.10 Where new home projects are sizeable, a homebuilder may require the contractor to provide a performance bond. A performance bond underwrites a contractor's building obligations in a construction contract. As such, it acts as a form of financial security. The standard terms of a performance bond are that a bank or insurance company will pay (on a contractor's behalf) compensation to the homebuilder for financial loss suffered because the contractor has not fulfilled its obligations. The contractor may also require performance bonds from other members of the construction team.
- G.7.11 Subject to the terms of the bond, compensation can cover the reduced value of a new home and/or the cost of repairing defective work. However, a homebuilder is under no obligation to pass on any sums received via the enforcement of a performance bond to an affected homebuyer.

## Scotland

- G.7.12 Performance bonds are used in Scotland, although there are some differences in drafting style from England and Wales.<sup>142</sup>

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<sup>141</sup> Section 20 of the Supply of Goods and Services Act 1982 states that Act applies to Northern Ireland.

## Northern Ireland

G.7.13 Performance bonds are also used in Northern Ireland. They are similar to those used in England and Wales except that they are sometimes referred to as contract bonds or guarantees.<sup>143</sup>

### Privity of contract

G.7.14 The position of the homebuyer is not assisted by the privity of contract rule, which is that only a party to a contract can enforce it.<sup>144</sup>

G.7.15 The effect in relation to a construction contract is that the homebuyer and any subsequent buyers of a new home will not have the right to enforce a contract between the homebuilder and contractor or any bond that underwrites it. Instead a homebuyer may have to pursue a claim via the tort of negligence or deceit. The limits of a tort claim have already been considered. See paragraphs G.3.49 to G.3.58.

G.7.16 Self build homebuyers who have directly engaged contractors will have contracts with them and will not have this problem. They can take action based on a breach of contract.

G.7.17 There are exceptions to the privity rule, but these are of little help to homebuyers. One of the best known is the Contracts (Rights of Third Parties) Act 1999. Section 1 provides that a person who is not a party to a contract can enforce it if he can show that it conferred a benefit on him which he has not received. To prove this he has to show the contract has an express provision to that effect which names him. This could allow a homebuyer to sue a homebuilder or others engaged in the

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<sup>142</sup> The differences in drafting style and legal approach between England, Wales and Scotland are discussed in paragraphs 3.34 to 3.51 of '*Construction Law Greens Concise Scots Law*' 1999 Edition by James P Connolly.

<sup>143</sup> For more information see for example Allianz website address: [www.allianz-ni.co.uk/Business-Insurance/Specialised-Niche/Guarantee-Bonds/index.html](http://www.allianz-ni.co.uk/Business-Insurance/Specialised-Niche/Guarantee-Bonds/index.html) and the NHBC website

<sup>144</sup> Dunlop Pneumatic Tyre Company Limited v Selfridge & Co Limited [1945] AC 847

construction of their new home if works on the home are defective or not completed on time.

G.7.18 However, the Act has limited effect. Despite its acceptance by some in the construction industry,<sup>145</sup> there remain many homebuilders and contractors who regularly contract out of its effects.<sup>146</sup> This confines the benefit of any contractual rights and indemnity cover they may have to each other.

### Scotland

G.7.19 The Contracts (Rights of Third Parties) Act 1999 does not apply to Scotland. Unlike England and Wales, there is more extensive recognition of third party contractual rights in Scottish case law via the doctrine of *jus quaesitum tertio*.<sup>147</sup>

### Northern Ireland

G.7.20 The position on third party rights is the same as in England and Wales in that the 1999 Act applies to Northern Ireland.<sup>148</sup>

## Collateral warranties

G.7.21 A homebuyer could in theory try to make a collateral warranty agreement with a contractor. The agreement can have the warranty

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<sup>145</sup> In 2005 the JCT modified some of its construction contracts in recognition of the rights in the Contracts (Rights of Third Parties) Act 1999. This has received a mixed response. See *'Collateral Warranties- A time for change?'* by Clive Lovatt: [www.addleshawgoddard.com/view.asp?content\\_id=1549&parent\\_id=959](http://www.addleshawgoddard.com/view.asp?content_id=1549&parent_id=959). See also *'Why third party rights don't work' in 'Building'* by Jeff Brown 2006 issue 43 website address: [www.building.co.uk/](http://www.building.co.uk/)

<sup>146</sup> See section 1(2) of the Contracts (Rights of Third Parties) Act 1999.

<sup>147</sup> *Jus quaesitum tertio* means a right acquired by a third party in a contract between others. The limits of the right in construction contracts are considered more detail in 'Construction Law' by James P Connolly paragraphs 5.07 to 5.09. See also the case of *Scott Lithgow Ltd v GEC Electrical Projects Ltd*, 1989, S.C 412.

<sup>148</sup> See section 10 of the Contracts (Rights of Third Parties) Act 1999.

terms mentioned in paragraph G.7.3 (for example that the construction be completed by an agreed date). This would give a homebuyer a direct contractual right to sue for defective construction works.

G.7.22 However, it is generally accepted that collateral warranties are not easy to obtain as they are complex, costly and laborious.<sup>149</sup>

Comment [d1]: See footnote 145

Comment [s2R1]: As above.

G.7.23 To ensure complete protection, a homebuyer would have to enter into separate collateral warranty agreements with all those engaged in the construction of their new home (for example, a contractor, sub-contractor, architect and engineer and so on).

G.7.24 To achieve that he would also have to negotiate terms, not only with them but also with their insurers. This is because the terms and conditions of collateral warranties will define the extent of a contractor's, sub-contractor's, architect's or engineer's exposure to liability and therefore the amount of insurance cover an insurer is willing to provide them. There may also be a need to consult their mortgage lender for approval of terms.

G.7.25 Because they are difficult and costly to obtain collateral warranties are more common in commercial property transactions, where the average commercial property buyer will have the time and money to fund such an exercise with help of a lawyer who has the required expertise. However even in the commercial world they are seen as a painful necessity.

## Scotland and Northern Ireland

G.7.26 Collateral warranties are also used as a tool to circumvent the privity rule in Scotland and Northern Ireland. Concerns about their use are similar to those raised in England and Wales.<sup>150</sup>

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<sup>149</sup> See FN 145 '*Collateral Warranties- A time for change?*' By Clive Lovatt.

Also see '*Collateral warranties-Beware*' by Jonathan Collins [www.healys.eu](http://www.healys.eu)

<sup>150</sup> See '*Collateral Warranties –An Unnecessary Encumbrance?*' by Macauley and Wedderburn 1999 S.L.T 23. In this article it was suggested that greater use should be made of the Scottish doctrine *jus quaesitum tertio*, in place of collateral warranties.

## G.8 WARRANTY/INSURANCE COVER

G.8.1 Instead of collateral warranty agreements, homebuyers typically benefit from warranty and insurance cover policies. These are obtained by homebuilders with the help of specialist providers. Among the larger known providers are Building LifePlans, the Local Authority Building Control, the NHBC, Premier Guarantee and Zurich Building Guarantee.

G.8.2 The cost of such cover is usually included within the build cost of a new home and its existence is confirmed by the issue of a certificate. Mortgage offers tend to be subject to a condition that a homebuyer must provide the lender with evidence that warranty cover on the new home exists.<sup>151</sup>

G.8.3 Typically, a homebuyer will be covered for specific risks. Examples include financial loss incurred because a homebuilder:

- Becomes insolvent or commits fraud and as a result has not started or completed a new home;
- Has caused physical damage to a new home because of defective works in specific parts of the new home (for example, the foundations, and roof coverings or below ground drainage);
- Has caused financial loss as a result of failing to comply with Building laws.

G.8.4 The cover usually has limits. The most common are that:

- It will only last for a maximum of 10 years

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<sup>151</sup> Part 1, paragraph 6.6 of the Council of Mortgage Lenders Handbook. For more information the handbook is reproduced on the Councils website address:  
[www.cml.org.uk/handbook/frontpage.aspx](http://www.cml.org.uk/handbook/frontpage.aspx)

- Claims are subject to a financial cap (for example a maximum of £1 million)
- There is no cover for 'minor damage', for example dampness, condensation and shrinkage
- There is no cover for defective work which has not been approved by the warranty and insurance provider
- There is not cover for loss or damage resulting from flooding from whatever source or from a change in the water table
- There is no cover for any reduction in value for the new home.

G.8.5 The scope of the cover within a 10 year period can also vary. For instance, during the first two years of most warranties the homebuyer must approach the homebuilder for repairs or financial recompense for defects or damage. Typically during years three to 10 the warranty provider will deal directly with claims.

G.8.6 The cover may be more extensive if the building work was carried out by a contractor approved by the warranty provider.

### Scotland and Northern Ireland

G.8.7 The position on warranty/insurance cover in Scotland is similar to that of England and Wales. NHBC and other specialist providers operate warranty/insurance cover services in Scotland. In Northern Ireland there is some provision of warranty/insurance cover for new homes but the market is not as extensive as in the rest of the UK. For example, guarantee schemes provided by NHBC and other specialist providers (sometimes referred to as Homebond schemes or building guarantee schemes) can provide cover for a maximum of 10 years against major

defects which may affect the foundations of a new home or cause smoke or after penetration.<sup>152</sup>

### **Consultants' certificates**

G.8.8 Further, it is not unusual for homebuyers to receive a professional consultant's certificate in place of or in addition to a warranty/insurance cover. These are usually given where a new home has been constructed under the supervision of a professional consultant (for example an architect or engineer).

G.8.9 Often the homebuyer is told that the certificate confirms the fitness and quality of the new home and that it can be relied on by subsequent purchasers.

G.8.10 Construction contracts usually include a standard clause that states that an architect, engineer or some other construction specialist has the power to issue a certificate. The certificate will confirm and approve construction, maintenance and/or repair work done by a contractor. Often a contractor will not get paid for work done until a certificate is issued.

G.8.11 There are various types of certificate. An interim certificate allows a contractor to get some payment because it has completed the initial stages of construction.

G.8.12 A final certificate usually confirms that:

- Works have been completed and/or defects have been sorted.
- The contractor should receive the balance of monies owed.<sup>153</sup>

G.8.13 They do not provide the coverage of warranties/insurance cover. For example, they do not provide protection as effective as warranty/insurance cover where building works are defective or

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<sup>152</sup> See the Construction Employers Federation website: [www.cefni.co.uk](http://www.cefni.co.uk)

<sup>153</sup> Morgan v Birni 9 Bing 672 and SC3 Moo & SC76 and Sutcliffe v Thackrah [194] AC 727.

incomplete and a homebuilder has become insolvent. There is much debate as to whether architects and other professional consultants' certificates are final and thus provide substantive evidence that construction works have been properly completed.<sup>154</sup>

## Scotland and Northern Ireland

G.8.14 Professional consultant's certificates are also used in homebuilding in Scotland and Northern Ireland. The problems which have arisen with certificates in England and Wales have also arisen in Scotland and Northern Ireland.<sup>155</sup>

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<sup>154</sup> See for example *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] 1 AC 266 where the House of Lords held that arbitrators and courts of law could open, revise and amend architects certificates.

<sup>155</sup> See for example the Scottish case of *Ayr Road Trustees v Adams* (1883) 11 R 326 where the court held that a final architect's certificate authorising payment of contractor is conclusive. However there remains debate how conclusive they are see paragraphs 4.58 to 4.66 of 'Construction Law Green's Concise Scots Law' by James P. Connolly. See also the House of Lords decision in *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] 1 AC 266 which involved two Northern Ireland companies.

## **G.9 DEFECTIVE PREMISES ACT 1972**

- G.9.1 Also, a homeowner may have a limited right to take action for breach of the Defective Premises Act 1972. Section 1 of the Act provides that a person responsible for work connected to the provision of a dwelling, has a duty to carry out the work in a workmanlike or professional manner, with proper materials.<sup>156</sup> If successful, the homebuyer could recover damages, which will include the loss in value of his property.
- G.9.2 However, section 2(1) of the Act provides that no action can be taken for breach of section 1 where: (a) in connection with: 'the provision of a dwelling or its first sale or letting for habitation any rights in respect of defects in the state of the dwelling are conferred by an approved scheme to which [section 2] applies on a person having or acquiring an interest in the dwelling; and (b) it is stated in a document that requirements as to design and construction imposed by or under the scheme, have or appear to have, been substantially complied with.' The effect of this is that where a new home is built under the umbrella of a warranty scheme, no action can be taken under section 1 of the Act by a new homebuyer.
- G.9.3 Even if there was no warranty in place, a homebuyer would have to prove, amongst other things that a contractor's failure led to defects that were so serious that they made the new home unfit for human habitation.<sup>157</sup>

### **Scotland**

- G.9.4 The 1972 Act does not apply in Scotland. Instead a homebuyer would have to rely on the law of delictual<sup>158</sup> liability for defective buildings,

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<sup>156</sup> Sections 1 and 3 of the Defective Premises Act 1972.

<sup>157</sup>: *Thompson v Clive Alexander & Partners (a firm)* (1992) 59 BLR 81.

<sup>158</sup> The law of delictual liability covers legal wrongs which may give rise to certain legal obligations, for example to make reparation for damage caused.

established via Scottish case law and heavily influenced by English and Welsh construction cases involving negligence.<sup>159</sup>

## Northern Ireland

G.9.5 There is equivalent legislation to the 1972 Act in Northern Ireland.<sup>160</sup> For example article 3 of the Defective Premises (Northern Ireland) Order 1975 1039 (N.I) provides that buildings must be properly built for habitation. However, as in England and Wales the article does not apply where the works relate to a building which is to be sold for the first time and is subject to protection by an approved scheme.<sup>161</sup>

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<sup>159</sup> Donoghue v Stevenson 1934 S.C (H.L.) 31 and cases like Murphy v Brentwood DC [1991] AC 398 and Mcleod v Scottish Special Housing Association 1990 S.L.T 749.

<sup>160</sup> Defective Premises (Northern Ireland) Order 1975 1039 (N.I 9).

<sup>161</sup> Article 4 of the Defective Premises (Northern Ireland) Order 1975 1039 (N.I 9).

## G.10 BUILDING REGULATION

G.10.1 The Building Act 1984 and Building Regulations 2000<sup>162</sup> provide that construction work must be carried out with adequate and proper materials and in a workmanlike manner. This means there must be compliance with minimum technical standards. Failure to comply can lead to civil and/or criminal regulatory action by a local authority.

G.10.2 However, at present homebuyers cannot enforce the Act or the Regulations against homebuilders or contractors because the provision which would have allowed them to do so is not yet in force.<sup>163</sup>

### Scotland and Northern Ireland

G.10.3 Similar laws concerning building standards can be found in Scotland and Northern Ireland. For example, the Building (Scotland) Act 2003, the Building Standard (Scotland) Regulations 2004,<sup>164</sup> the Building Regulations (Northern Ireland) Order 1979<sup>165</sup> and the Building Regulations (Northern Ireland) Regulations 2000.<sup>166</sup>

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<sup>162</sup> The Building Regulations 2000 S.I.2000/2531.

<sup>163</sup> Section 38(1) of the Building Act 1984 provides that breach of a duty imposed by Building Regulations is actionable, except in so far as the Regulations provide otherwise. However, this part of the section is not in force.

<sup>164</sup> S.S.1 2004/406

<sup>165</sup> No. 1709 (NI.16).

<sup>166</sup> S.R 2000/389.

## G.11 LIMITATION OF LEGAL ACTION AND LATENT DAMAGE

### Limitation periods

G.11.1 It is important to note that if a homebuyer wants to take court action to enforce any of the legal rights mentioned above he will be subject to time limits set out in the Limitation Act 1980.

G.11.2 For example, a homebuyer will be barred from taking court action for breach of contract or tort after 6 years from the date on which 'the cause of action accrued.'<sup>167</sup> In contract, that is usually the date on which the breach of contract occurred. In tort it is usually the date on which the tortious act occurred.<sup>168</sup>

G.11.3 Examples of when this may arise are:

- When defective work is done.
- An architect's certificate is not issued when it should have been.
- When personal injury is suffered or when damage to a building is done.<sup>169</sup>

G.11.4 There are exceptions to this general rule. If a contract was sealed as a deed<sup>170</sup> the action period can extend from six to 12 years.<sup>171</sup> The position is more time pressured where a claim involves personal injury. The time

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<sup>167</sup> Sections 2, 5 and 11 of the Limitation Act 1980.

<sup>168</sup> *Gould v Johnson* [1702] 2 SALK 422; *East India Co v Oditchum Paul* [1850] 7 Moo (PCC); and *Gibbs v Guild* [1881] 8QBD 296.

<sup>169</sup> *Donoghue v Stevenson* [1932] AC 362 and *Pirelli General Gable Works v Oscar Faber and Partners* [1983] AC.1.

<sup>170</sup> A formal written document that has a seal on it. That is a wax impressed with a device that is attached to the instrument as a mark of authenticity.

<sup>171</sup> Section 8 of the Limitation Act 1980.

bar is three years from the 'date the cause of action accrued' or the date the homebuyer becomes aware there is a problem.<sup>172</sup>

G.11.5 More generous is the limitation period for a claim against fraud which will not begin to run until the claimant has discovered the fraud or could with 'reasonable diligence' have discovered it.<sup>173</sup>

G.11.6 A significant exception is that relating to claims based on damage to property which cannot be detected with ease. Until 1986 the traditional position had been that the six year limitation period for tortious claims based on damage to property (rather than personal injury) would run from when the damage occurred, whether or not it was detectable.

## **Latent Damage Act**

G.11.7 There was an attempt to change this by the Latent Damage Act 1986. The 1986 Act amended the Limitation Act 1980 by creating two further 'longstop' dates, these are the latest dates which a tort or contract claim for latent damage can be taken. The application of the longstop dates is complex.

G.11.8 Broadly speaking, the first longstop date is [measured from] the date when the cause of action accrued. This can either be the later of:

- The traditional six year period<sup>174</sup>
- Three years from the 'starting date'.<sup>175</sup>

G.11.9 The 'starting date' is the earliest date on which the homebuyer had the knowledge required to bring action and the right.<sup>176</sup> Knowledge means,

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<sup>172</sup> Section 11 of the Limitation Act 1980.

<sup>173</sup> Section 32 of the Limitation Act 1980.

<sup>174</sup> Section 14A (4) (a).

<sup>175</sup> Section 14A (4) (b) of the Limitation Act 1980.

<sup>176</sup> Section 14A (5) of the Limitation Act 1980.

when the homebuyer discovered the damage, its cause and the person responsible for it.<sup>177</sup>

G.11.10 The second is an overriding time limit of 15 years from the date on which the negligent act or omission to which the damage suffered can be attributed occurred.<sup>178</sup> This can apply whether or not a cause of action has accrued or a starting date can be identified. Broadly speaking, it effectively bars latent damages claims that are more than 15 years of age.

G.11.11 The aim of the 15 years is to strike a balance between providing justice for those who may suffer as a result of latent defects and ensuring finality for potential defendants.

G.11.12 Applying, all of this to new homes, depending on the circumstances, a homebuyer's right to take court action for latent defects in a new home may only be available within 15 years of its construction.

## Scotland

G.11.13 The position in Scotland is set out in the Prescriptions and Limitations (Scotland) Act 1973 and is also complicated, though more favourable to homebuyers. Broadly, it provides longstop limitation periods of five and 20 years.

G.11.14 The five years runs from the date the relevant breach of contract causes physical damage and could have been discovered. The 20 years applies where the defect is latent and may never be discovered.<sup>179</sup>

G.11.15 To make the law simpler, the Scottish Law Commission had recommended a 10 year limitation period coupled with mandatory single

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<sup>177</sup> Section 14A (6)-(8) of the Limitation Act 1980.

<sup>178</sup> Section 14B of the Limitation Act 1980.

<sup>179</sup> *Pirelli General Cable Works v Oscar Faber & Partners* [1983] 2 A.C.1; *Sinclair v MacDougall* [1994] S.L.T. 76; *Strathclyde Regional Council v Border Engineering* [1998]; and Bell & Scott Construction Update May 2006

[www.bellscott.co.uk/contents/eupdates/constructlawupdate.htm](http://www.bellscott.co.uk/contents/eupdates/constructlawupdate.htm)

project insurance. However, this recommendation was not taken up for inclusion in the Housing Grants, Construction and Regeneration Act 1996.<sup>180</sup>

## Northern Ireland

G.11.16 In Northern Ireland the law is more akin to that of England and Wales. For instance, article 12 of the Limitation (Northern Ireland) Order 1989 No. 1339 (N.I. 11) provides that the overriding time limit for negligence actions which do not involve personal injury claims is 15 years from the date the negligent act or omission which caused the damage claimed for occurred.

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<sup>180</sup> See *The Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry, 'Constructing the Team' by Sir Michael Latham July 1994.*

## **G.12 CONCLUSION**

G.12.1 There appears to be a patchwork of law in areas like property, housing, goods, services and construction which can be applied to the marketing, purchase and construction of new homes by homebuyers. However, these are subject to a number of legal restrictions and limitations to the avenues of redress available to homebuyers.