

**REMEDIES FOR DEFECTIVE HOUSING: DEVISING A MODEL FOR LEGAL
REDRESS AND REGULATORY REFORM**

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by

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DECLARATION

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Methodology and major findings

The principal research methodologies used in this thesis are doctrinal and comparative, and to a lesser extent, the socio-legal and empirical methods. The thesis contains a review and analysis of primary sources, including caselaw and legislation from Ireland. The comparative method was used to introduce caselaw and legislation from England and Wales, Australia, the United States, New Zealand, and Canada. The research also involved review and analysis of secondary sources including journal articles and monographs which engage with the existing statutory regime in the aforementioned jurisdictions and which deal with caselaw from the relevant national courts. The socio-legal method was used extensively to inform the analysis of the primary and secondary sources in Ireland. This involved consideration of monographs, journal articles, official publications including Government and Oireachtas reports and Law Reform Commission reports. This method was used to examine the socio-legal lens of behavioural science in its application to the operation of law in practice, and to consider how insights from behavioural science could inform proposed reforms of law and practice. Part of the research for chapter 4 involved the collection and analysis of empirical data from each of the State's 31 local authorities relating to enforcement of building control legislation.

Permission was obtained from the ethics committee of the College's Law School for the carrying out of empirical research via interviews and case studies with various persons who had been affected by construction defects, in order to validate the theoretical difficulties in accessing legal remedies described in the first chapter of the thesis. Four interviews were carried out. The insights from those interviews inform the substantive discussion of the issues that affected those persons in the relevant chapters of the thesis, and a summary of the interviews is attached at the appendix. The purpose of the case studies was to validate the legal constraints on recovery of remedies described in this thesis. While not statistically significant, each study demonstrates that the problems described are relevant and current. The four case studies include an apartment owner in a development with defects; a home owner whose home in was affected by pyrite damage; a home owner whose home was affected by damage from mica in brickwork in County Donegal, and a home owner's experience of complaining in respect of performance by an architect retained to the registration body for architects.

The major findings of this thesis are as follows:

There are significant deficiencies in the system of legal remedies for housing defects, both substantive and procedural. The system of private law remedies continues to suffer from deficiencies identified by the Law Reform Commission in 1977 and 1982, and the position is worsening in light of the chill cross-winds from the courts of England and Wales, which have decisively rejected recovery in negligence against builders for residential construction defects. The law relating to recovery in negligence in respect of building defects continues to be uncertain.

The use of standard form contracts in sales of new homes prejudices home buyers in a number of respects, necessitating an application to the High Court in 2001 to prevent the continued inclusion of unfair terms. The bodies responsible for maintaining and promoting those contracts, including the Law Society of Ireland, have been shown to be poor gatekeepers of home buyers' rights.

Procedural constraints on recovery by home buyers include the widespread use of arbitration clauses in building agreements; the effect of the Statutes of Limitations, notwithstanding recommendations of the Law Reform Commission. Substantive constraints on recovery include the persistence of the privity of contract rules, again despite recommendations for reform from the Law Reform Commission, the result of which is that actions for breach of contract in respect of defects in new homes are limited to the first purchasers of those homes, and are lost if the home is transferred during the limitation period.

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

The principal findings of this thesis are reflected in preliminary form in the Report on Building Standards, Building Controls & Consumer Protection of the Houses of the Oireachtas Joint Committee on Housing, Planning & Local Government of December

2017, to which the author contributed via a written submission and a presentation to the Committee.

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Chapter 1 – Introduction and context

...as the plaintiffs have found out to their cost and dismay, they have been the victims of abysmal building practices and systemic and massive breaches of the relevant Building Regulations. This has meant that the plaintiffs have been left with properties which, as matters stand, are unmarketable and, in some instances at least, must be close to being uninhabitable.¹

Introduction

The limitations of legal redress for defective homes have been highlighted by a number of recent high-profile building failures in Ireland. 250 residents of an apartment development in North Dublin, Priory Hall, were evacuated from their homes at short notice by Dublin City Council in 2011 due to fire concerns.² Damaging levels of reactive pyrite have also been discovered in the foundations and brickwork of thousands of houses, leading to the establishment of a panel of inquiry and a redress scheme for affected home owners.³

Other developments affected by significant defects include Millfield Manor, Newbridge, Co. Kildare, Beacon South Quarter, Co. Dublin, and Longboat Quay, Dublin 2.⁴ Numerous other developments are also thought to have been constructed in breach of Building Regulations.⁵ The occurrence of widespread cracking in hundreds of homes in Co. Donegal and Mayo since 2014 has led to the discovery that the homes were built with defective blocks containing high levels of mica, which absorbs water and causes cracking to walls, leading to structural failure in some cases. A report commissioned by the Irish

¹ Per Hogan J. *Mitchell v Mulvey Developments & Ors* [2014] IEHC 37.

² RTÉ News Online, 'Priory Hall apartments to be evacuated' 14 October 2011. <https://www.rte.ie/news/2011/10/14/307467-prioryhall/> (accessed 24 June 2018); Tim O'Brien, 'Priory Hall developers told to hand over their passports' *The Irish Times* (Dublin 18 October 2011).

³ Pyrite Panel, *Report of the Pyrite Panel* (Pyrite Panel, 2012). Significant problems with commercial buildings contaminated by pyrite have also come to light in recent years, resulting in a number of cases before the Irish courts. In both *James Elliott Construction v. Irish Asphalt* [2011] IEHC 269 (HC) [2014 IESC 74 (SC) and *Noreside v Irish Asphalt* [2011] IEHC 364 [2014] IESC 68 (SC), the defendant quarry was held liable in respect of sub-standard construction materials pursuant to the terms of merchantable quality implied by s 14 of the Sale of Goods Act 1893 (as amended).

⁴ Sarah Burns, 'Four Celtic Tiger developments that had fire and safety issues' *The Irish Times* (Dublin 24 January 2018);

⁵ A blog established in 2013 to provide a forum for debate on matters relating to Building Regulations and regulatory reform has collated details of thirty developments that are in the public domain. It is to be assumed that there are other developments that have experienced defects where resolution of the issues, or a fear of devaluation of properties, has led residents to avoid releasing information to the public domain. See BRegs Forum, 'Defective "Celtic Tiger" projects: The Cubes' <<http://www.bregsforum.com/2017/01/26/defective-celtic-tiger-projects-the-cubes-sandyford-look-back-17/>> accessed 26 August 2018.

Government was published in May 2017, which suggests that up to 6,000 houses in Mayo and Donegal may be affected.⁶

Various measures have been introduced by the Irish Government in response to these failures, including the Building Control (Amendment) Regulations 2014⁷, and the establishment of the Pyrite Resolution Board in 2013.⁸ The Law Reform Commission has also considered various aspects of deficiencies in legal and financial remedies in respect of home defects, but, as will be discussed in this thesis, its recommendations in this respect have generally not been adopted.⁹

A key theme of this thesis is the inadequacy of the State response to defective housing, both in terms of law reform and of assistance for affected home owners. There has been little investigation of the causes and contributing factors that led to widespread building defects that have become apparent in recent years, and no package of reform has yet been devised that provides effective redress to owners of defective homes.

Various residential building failures have highlighted the lack of effective legal remedies under Irish law in respect of residential building defects, as the State ultimately stepped in to pay for the rectification of the Priory Hall development and to provide funding for the Pyrite Resolution Scheme. These interventions reflect another research theme considered in this thesis, that of the transfer of private risk to the State and public authorities (and, ultimately, where the State and its emanations have discharged the costs of rectification of defects, to the State's taxpayers).

The principal hurdles encountered by home owners were, that actions in respect of defects could become statute-barred before legal proceedings could be brought, legal uncertainty regarding recovery in negligence for building defects, the action for breach of contract being confined to the original home buyer, and the insolvency of original builder/developers and consequent inability to meet damages claims.

⁶ Expert Panel on Concrete Blocks, *Report of the Expert Panel on Concrete Blocks*, 2017.

⁷ Building Control (Amendment) Regulations 2014, SI 9/2014.

⁸ The Pyrite Resolution Scheme was established pursuant to the Pyrite Resolution Act 2013, is administered by the Housing and Sustainable Communities Agency, and is mostly funded by the Irish Government: <https://www.oireachtas.ie/index.php/en/debates/question/2017-10-25/281/> (accessed 26 June 2018).

⁹ Law Reform Commission, *The Law relating to the Liability of Vendors and Lessors for the Quality and Fitness of Premises*, (1977); Law Reform Commission, *Report on Defective Premises* (LRC 3, 1982), Law Reform Commission, *Report on Limitation of Actions*, LRC 104-2011 (2011).

This thesis is structured as follows:

The substantive portion of chapter 1 is divided into three parts.

Part A deals with the background and legal context for the Irish residential construction landscape in which the building failures discussed in this thesis took place.

Part B deals with the themes of this thesis which feature in the discussion throughout each chapter.

Part C sets out the general legal environment for remedies for defective housing. The legal challenges to recovery by home buyers of financial and other remedies in respect of defects are set out, which sets the scene for the broader discussion on rights and remedies in chapter 2. These include the contractual arrangements for purchase of housing in Ireland; the principle of privity of contract; the limitations on recovery of economic loss under the law of tort; the complexity of determining the date of accrual of causes of action, and the limitations on liability of building control authorities for failure to detect defective building works.

Chapter 2 considers rights and remedies in residential construction, exploring consumer protection, justifications for intervention in consumer contracts, and the legal mechanisms for such intervention, before evaluating the first of the two options considered in the Law Reform Commission's 1977 Working Paper on Liability of Vendors and Lessors of Real Property¹⁰ and the Commission's 1982 Report on Liability for Defective Premises.¹¹ (These two documents feature throughout this thesis as the touchstone for analysis and proposals for reform; as such, they will be referred to as 'the 1977 Working Paper' and 'the 1982 Report' for ease of reference).

Chapter 3 deals with remedies outside contract, starting with an analysis of the law regarding recovery in negligence for building defects, civil recourse against gatekeepers such as designers and certifiers, product liability and the 'statutory duty' model reflected

¹⁰ Law Reform Commission, (1977) (n 9).

¹¹ Law Reform Commission, (1982) (n 9).

in the English Defective Premises Act 1972 and proposed by the Law Reform Commission for reform of remedies in its 1982 Report.

Chapter 4 describes the current regulatory context under Irish law and highlights features of regulatory regimes from other jurisdictions, international responses to building failures, and analyses current and proposed systems for registration of those involved in the construction process.

Chapter 5 examines aspects of procedural law governing the recovery of legal remedies for construction defects, including limitation of actions and methods of dispute resolution, in order to demonstrate how these procedural rules act as a significant barrier to home owners seeking effective remedies, and that the problems are not limited to deficiencies in substantive remedies.

Chapter 6 deals with risk management and insurance in the context of residential construction, considers the current home warranty policies in use in the Irish market, and compares the Irish model with that of French and other civil law jurisdictions that impose 10-year ‘decennial’ liability on designers and builders, supported by equivalent insurance, and of Australian territories that impose mandatory defects insurance requirements as part of the licensing regime.

Chapter 7 re-introduces the research themes and summarises the analysis and proposals for reform of the thesis and sets out options for reform in light of the discussion in the foregoing chapters.

Glossary

The following terms are used for consistency throughout this thesis:

‘The 2014 Regulations’ refers to the Building Control (Amendment) Regulations, 2014;

‘Building Regulations’ refers to Building Regulations made pursuant to the Building Control Act 1990 (as amended). Building Regulations are essentially the building code governing construction in Ireland.

‘consumer’ is used throughout this thesis to refer to a person who purchases a home as their residence;

A ‘home’, in addition to being used in its normal broad meaning, refers to a house or apartment bought by a home buyer, in order to avoid the repetition of distinguishing between houses and apartments. Where caselaw, common law principles and statute deal differently with houses and apartments (for instance, in the case of the Multi-Unit Developments Act 2011, which is principally applicable to apartments), these distinctions are highlighted in the following discussion;

A ‘home buyer’ refers to any person who purchases the legal interest in a house or apartment, either as a leaseholder (in the case of an apartment) or a freeholder (in the case of a house), whether new or second-hand, and whether as an owner-occupier or as an investor.¹² The term is used in preference to ‘purchaser’ in this thesis to allow for a broader discussion of the position of the home buyer both under Irish law and internationally in the academic discourse.

‘HomeBond’ refers to a form of home warranty product originally introduced into the Irish market in the late 1970s. As discussed in chapter 6, Part C, the HomeBond product has evolved since its introduction from a warranty product to its current form of structural defects insurance.

The ‘LSBA’ refers to the standard form of Building Agreement recommended by the Law Society of Ireland for use in sales of new homes.¹³

A ‘seller’, in the case of a second-hand home, refers to the vendor of the home. In the case of a new home, the seller may be a developer seeking purchasers for new homes from plans, which they will either sell directly (where the seller owns the land) or indirectly (where a developer has licensed the site from a third-party owner who has covenanted to

¹² There are still second-hand homes that will be sold subject to ground rents created prior to the introduction of the prohibition on the creation of long leasehold interests by s 2 of the Landlord and Tenant (Ground Rents) Act 1978, As the Statute of Limitations is likely to have long since expired in respect of any defects in such houses (see chapter 5), remedies for purchasers of such homes are not considered in this thesis.

¹³ The Conveyancing handbook published by the Law Society of Ireland states that ‘The Law Society Conveyancing Committee consistently reminds practitioners that in a new house transaction the standard documents should be used, that is the building agreement and the Contract for Sale’. Law Society of Ireland, *Conveyancing* (8th edn, Oxford University Press 2016), 394.

execute transfer deeds on completion of sales of homes).¹⁴

A – BACKGROUND AND LEGAL CONTEXT

The process of purchasing a new home in Ireland

Most new homes in Ireland are bought off-plans from speculative developers, based on plans and specifications. A house or apartment development is said to be built on a speculative basis where buyers are not secured for units in advance of construction. A developer secures a site, which the developer may not own, and arranges for design and layout of the estate development, which may be houses, apartments, or a combination of both.

The developer typically applies for planning permission and engages the professional team of quantity surveyors, architects, engineers, fire safety engineers and other specialist advisers. A builder (often a limited liability company) is appointed to carry out construction of the development based on the plans prepared by the professional team. A ‘showhouse’ may be built in order to attract purchasers and to provide a model for the designs of the units to be built at the development.

Purchasers pay a booking deposit in order to secure a unit in the first instance, but neither the seller nor the purchaser is bound at that point.¹⁵ Contracts for sale, together with a building agreement, are issued by the vendor’s solicitor. The vendor may be the developer, or a landowner from whom the developer has secured a licence for development of the site, in consideration of an undertaking from the owner to execute the necessary site transfers on completion of units.¹⁶

The financing of such construction, historically, was done by means of debt financing,

¹⁴ The Law Society noted in 2016 that its Conveyancing Committee was receiving ‘an increasing number of queries from solicitors acting for purchasers who are being offered contracts for the sale of sites, which are not based on the ideal situation where the builder is the owner of the land and in a position to execute an assurance of the sites to the purchasers of the houses’, noting that the Contract for Sale in such cases should include a warranty to the effect that the vendors had a ‘sufficient interest under a licence’ to call for a transfer in due course of the site to the purchaser. Law Society of Ireland, (n 13), 394.

¹⁵ Law Society of Ireland, (n 13), 24-28.

¹⁶ *Ibid*, chapter 8.

with the bank loans paid off in instalments as sales were completed.¹⁷ This method of financing residential construction contributed to the significant increase in housing construction in Ireland between 1990 and 2007. Kelly observes that Irish banks were able to borrow significant amounts on international markets at very low interest rates, which fuelled a significant increase in their borrowing, and which in turn was passed on in borrowings to Irish homebuyers and property developers:

With unlimited funds at their disposal, the problem facing Irish banks was finding people to lend to...While mortgages were growing fast, they were not growing fast enough for Irish bankers, but salvation appeared in the form of property developers.¹⁸

Honohan commented in 2009 that

Although international pressures contributed to the timing, intensity and depth of the Irish banking crisis, the underlying cause of the problem was domestic and classic: too much mortgage lending (financed by heavy foreign borrowing by the banks) into an unsustainable housing price and construction boom.¹⁹

Ireland was, during the Celtic Tiger years, in a perfect storm of light-touch construction regulation and a construction boom. As will be discussed in chapter 4, the principal legal framework for construction regulation relies heavily on private actors and lacks a coherent enforcement capacity and the means of external oversight of its effectiveness. Home buyers anxious to buy their first homes were far removed from the management of risk in the homes they were buying, in transactions governed by an incoherent set of rules that would often fail to provide a remedy in the event of defects.

Developers of speculative housing typically raised finance by using development land as security for borrowing. In this model, the financing bank had security for its loan, but the home buyers at the end of the development chain had no security to assure them that their

¹⁷ The financing paradigm has shifted a great deal since the Irish financial crisis of 2008 onwards, with the largest housebuilders now financed to a significant extent by investor equity rather than per-project bank financing; Joe Brennan, 'Who'd be a listed Irish housebuilder in this market?' *The Irish Times* (Dublin 7 September 2018).

¹⁸ Morgan Kelly, 'What happened to Ireland?' (2009) 6 *Irish Pages* 7, 9. Kelly goes on to note that 'By 2008...Irish banks were lending €115 billion to developers alone, 40 per cent more than they were lending to everyone in Ireland in 2000.' (9).

¹⁹ Patrick Honohan, 'Resolving Ireland's Banking Crisis' (2009) 40 *The Economic and Social Review*, 207, 208.

homes were good quality and built in compliance with law (crucially, the Building Regulations).²⁰

Buyers have limited opportunities to inspect homes during construction. It is notable that the Law Society Contract for Sale contains no warranty in relation to compliance with Building Control Regulations. Instead, a vendor must produce a Certificate of Compliance on Completion as required by the Building Control (Amendment) Regulations 2014.²¹ There is no requirement in the Regulations that the certifier be independent of the developer, and the system of inspection and certification established under the Regulations provides little verifiable evidence of meaningful oversight by building control authorities (as discussed in chapter 5).

B – LEGAL ENVIRONMENT FOR REMEDIES FOR RESIDENTIAL CONSTRUCTION DEFECTS: Part 1 – existing Irish law

The legal transaction – buying or building a new house in Ireland

The availability of a legal remedy to repair defects to a house in Ireland is limited in a number of significant ways that are highly prejudicial to buyers.

In order to consider the appropriate intervention (if any) into the law of contract to address the issues raised in this chapter, it is helpful to reflect on the nature of the contractual relationships between key members of residential construction projects, particularly between buyers and sellers of residential property.

Houses and apartments, unless built by owner-occupiers, are built on the basis of contracts, usually with the first buyer of the house or apartment. If the builder delivers a defective home, the primary remedy of the home buyer should be for breach of contract, which is available for 6 years from the date of breach of contract, or 12 years if the contract

²⁰ Building Regulations are made pursuant to the Building Control Act 1990 and contain a schedule of requirements that constitute the Irish building code; these Regulations are discussed further at chapter 4.

²¹ Law Society of Ireland Practice Note, 'Certificates of Compliance with Building Regulations', 6 June 2014. (<https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Certificates-of-compliance-with-Building-Regulations/#.W4KVPC2ZO7w>, accessed 26 August 2018).

has been signed under seal.²² For reasons set out below, however, the contractual remedy may not be available to the home owner.

The anatomy of the new home purchase transaction consists of the following:²³

1. A prospective purchaser selects a home from plans prepared by marketing agents acting for a developer; in order to 'secure' the home, a booking deposit is paid. This deposit may be returned if the purchaser or seller decide not to proceed. At this point, no binding contracts have been entered into.
2. Contracts are issued by solicitors acting for the seller, which may be the developer (if the developer owns the land) or a third party with whom the developer or builder has entered into a licence agreement in order to construct upon the land. The licence arrangement may be used in order to ensure that the developer/builder is not on the title to the land, usually for tax purposes.
3. The terms of the contract to be entered into are considered further below. If the new home is a house, the contract for sale will provide for transfer of land to the purchaser upon completion, and if the new home is an apartment, the contract will provide for a lease to be entered into by the purchaser.
4. Solicitors acting for the purchaser will consider the draft contracts and may propose amendments, and will ultimately (if the purchase is to proceed) return signed contracts to the seller's solicitor.
5. Upon completion of the new home, the purchaser's solicitor will be notified and invited to have an expert attend at the site to prepare a 'snag list' of outstanding items to be attended to prior to or following completion of the transaction.
6. Completion of the transaction occurs shortly following the preparation of the 'snag list' and may not be delayed unless there are significant 'snags'. Completion involves payment of the purchase price and the exchange of executed deeds (if the new home is a house) or leases (if the new home is an apartment).
7. New homes constructed by 'speculative' developers will usually be sold with a new home warranty product, of which the market leader in Ireland is the HomeBond product.

²² Statutes of Limitations, s 11.

²³ Law Society of Ireland, *Conveyancing*, (n 13), chapter 12.

The purchase of housing in Ireland involves a number of conflicts between perceptions and reality. The buyer may perceive that they are buying a house, but conveyancing transactions principally consist of the transfer of land, on which a house or apartment has been or is being built. The common law reflects this perspective by holding the seller immune from action in respect of the quality of the house sold with the land, unless the seller is constructing a house on the land. In this legal paradigm, however, concerns for securing a good and marketable title to the property may be prioritised over ensuring that the dwelling itself is of good quality, particularly where there are systems that seek to provide a measure of assurance with regard to the quality of the dwelling, such as opinions and certificates on compliance with Building Regulations, and a home warranty policy.

The legal reality is that the buyer is subject to two very different types of risk in purchasing a home; the first is the risk associated with the land, for example, of defective title or encumbrances, which may be the primary concern of the buyer's solicitor. The second is the risk that the home may be defective. The buyer's solicitor, not being qualified to assess the condition or physical quality of the house, will advise the buyer to retain a surveyor or other professional in order to do so, although the Law Society recently estimated that as many as 20% of home buyers do not have a survey carried out.²⁴ There is a limit to what a buyer's adviser will be able to detect without carrying out intrusive opening-up investigations to which the vendor is unlikely to agree, that could demonstrate instances of non-compliance with Building Regulations (for example, in the numerous cases now apparent in Irish apartment developments of inadequate fire-stopping).²⁵

This survey (if carried out), together with an opinion or certificate of compliance with Building Regulations from a professional engaged by the builder or developer, may be

²⁴ Law Society of Ireland Conveyancing Committee, *Concerns over purchasers who do not get dwellings surveyed* (2018).

²⁵ Technical Guidance Documents are published and updated periodically by the Department of Housing, Community and Local Government to assist persons involved in construction to comply with the Building Regulations. Technical Guidance Document for Building Regulations Part B, 93: 'If an element that is intended to provide fire separation (i.e. it has requirements for fire resistance in terms of integrity and insulation) is to be effective, then every joint, or imperfection of fit, or opening to allow services to pass through the element, should be adequately protected by sealing or fire-stopping so that the fire resistance of the element is not impaired.' In essence, fire-stopping is fireproof material that must be placed around building services such as pipes that need to pass through fire separation elements such as internal walls. Serious deficiencies in fire-stopping have been discovered in a number of Irish residential developments, and one example that has been documented is the fire report prepared following the fire at Millfield Manor, Co. Kildare in 2015. See Michael Clifford, 'Housing defects special report: we can't afford to make the same mistakes again' *Irish Examiner* (Cork 1 August 2016).

the only means by which the buyer assesses and manages the defects risk prior to contracting for the purchase. However, a key feature of the relationship between the builder and the buyer is the building contract itself, which is a source of rights and remedies in the event of defects.

Roberts, writing in 1966, criticised the apparent pre-occupation of the law with the land transfer transaction, rather than the quality of the house to be built upon it:

This purchase [of a new home] will naturally entail a great deal of paper-work since the purchase of the house includes the parcel of land upon which it is situated. Indeed, to the legal mind, the transaction is seen as the purchase and sale of the land upon which the house rests.²⁶

The relationship between sellers and buyers of housing differs significantly depending on whether the dwelling is new, or second-hand. New homes in Ireland are often sold from plans, by ‘speculative’ builders who design and finance housing estates and apartment developments before buyers have been secured for the units. The legal relationship entered into with such buyers consists of (i) a contract for the sale of the land relating to the unit in sale, and (ii) a building contract for the construction of that unit.²⁷

The land transfer agreement contains no warranties of quality in respect of the unit. New houses are transferred by deed, with the buyer acquiring the freehold title; new apartments are ‘transferred’ by creation of a leasehold interest, usually of several hundred years, in favour of the purchaser.

A building contract is regarded as a services contract for the purposes of Irish law and is thus governed by the Sale of Goods and Supply of Services Act 1980, section 39 of which implied certain terms into all services contracts, in relation to the quality of the service provided. However, the terms take effect as terms of the contract between the parties. Remedies for breach of the terms must therefore be sought within the framework of the law of contract, and will generally be confined to the original parties to that contract.

²⁶ Ernest F Roberts, ‘The Case of the Unwary Home Buyer: the Housing Merchant Did It’ (1966) 52 Cornell L Rev 835, 836.

²⁷ Law Society of Ireland, (n 13), 382-393.

Law Society/Construction Industry Federation Building Agreement

The form of contract used in Ireland for the purchase of new housing consists of (i) a contract for sale in respect of the site, and (ii) a building agreement in respect of the unit, in a form agreed between the Law Society of Ireland and the Construction Industry Federation.²⁸ ('the LSBA') The current form of the agreement is the 2001 edition, and it is used for the majority of speculative building of houses and apartments.²⁹ As this agreement is used almost invariably for the sales of new homes in Ireland, it will be analysed in some detail in this thesis.

This practice is also followed for apartments, save that the site is not sold when an apartment is sold; rather, the purchaser enters into a long lease, usually for several hundred years, in respect of the apartment.³⁰ In *Palaceanne Management Limited and Allied Irish Banks Plc*³¹ Clarke J. described the arrangements for purchase of new apartments as follows:

...the arrangement entered into with the respective purchasers of the sold apartments was that two separate contracts were entered into. These were a contract for the grant of a lease from Ms. Coles in which Palaceanne were joined together with a construction contract with a company called Enniskeane Developments Ltd. Such arrangements are not untypical of the sort of contractual arrangements entered into for the purchase of newly developed properties, whether houses or apartments.³²

The development and use of the LSBA is an example of two of the research themes of this thesis: the making of private residential construction law between private parties, and the quasi-regulatory role that the Law Society in particular plays as gatekeeper of the process

²⁸ It is noted in the Law Society Conveyancing handbook that 'The building agreement currently used by almost all practitioners is one that was originally approved and agreed in 1987 between the Law Society and the Construction Industry Federation. This was amended in 2001. This has always been considered to be the most important contractual document in a new house conveyancing transaction'. Law Society of Ireland, (n 12), 382.

²⁹ Building Agreement, (2001 Law Society of Ireland and Construction Industry Federation), referred to in this thesis as the 'LSBA'.

³⁰ Law Society of Ireland, (2016) (n 13), 409.

³¹ *Palaceanne Management Limited and Allied Irish Banks Plc* [2012] IEHC 182.

³² *Ibid*, [1.2].

from the buyer's perspective. The Law Society is one of the drafters and curators of the LSBA, while its members act on behalf of buyers of new homes. The ability of the Law Society to influence the content of the LSBA over time, however, has been called into question by the 2001 litigation in relation to unfair terms discussed later in this chapter, and a recent Practice Note from the Society suggesting that unfair terms that have been prohibited by order of the High Court continue to be used in building agreements.³³

The LSBA nonetheless represents the interests of the builder – vendor more effectively than those of the buyer. As the LSBA is a form of private law-making outside parliamentary scrutiny, there is no public mechanism by which the parties involved could be required to review and update the form to improve the position of buyers, notwithstanding its widespread use in new homes. It also operates outside judicial scrutiny as it contains an arbitration agreement; there have been very few decisions of the Superior Courts dealing with its terms since its introduction in the 1980s.³⁴

The LSBA contains a number of provisions of importance to remedies for defects:

Condition 8 (e) preserves the common law rights of the purchaser, and provides that

‘Nothing in this Agreement or in any collateral or ancillary document shall deprive the Employer of his rights at Common Law which are hereby confirmed.’

Condition 8 (a) deals with liability for defects, but the warranty itself is conditional upon the contractor's membership of the HomeBond scheme:

If the Contractor is registered under the National House Building Guarantee Scheme and is entering into a collateral agreement for the furnishing of a Guarantee under the Scheme for the Works the Contractor HEREBY AGREES with the Employer that he shall without payment:-

³³ Law Society of Ireland Practice Note, ‘Unfair Terms in building contracts – reminder’, 4 March 2016. https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Unfair-terms-in-building-contracts--reminder/#.Wy_E-S2ZO7w (accessed 24 June 2018).

³⁴ One of the few authorities is *Healy v Whitepark Developments*, an unreported judgment of Kelly J. of 15 June 2009, discussed at chapter 5 below.

make good any major defects which arise within a period of eighteen months after the Completion Date or the date of payment of the balance of the Contract Price, whichever is the earlier;

make good any minor defects which arise within a period of six months after the same date.

Clause 9 (a) provides as follows:

The Contractor or the Employer shall not without the prior written consent of the other assign this Agreement or any part thereof.

Clause 11 is an arbitration clause, which will be discussed further at chapter 5 below.

The obligation at condition 8 (a) is subject to various exclusions from the Contractor's liability, which are set out at condition 8 (d) and include defects in plasterwork due to operation of any central heating system, items covered by a separate guarantee issued to the Employer by any manufacturer, and 'consequential loss arising as a result of any defect or the remedying thereof.'

This obligation is considerably more limited than what the employer could recover at common law; in the absence of jurisprudence regarding the interpretation of clause 8 (e) set out above, it is difficult to know whether the preservation of the Employer's common law rights is sufficient to overcome this limitation. These exclusions are arguably consistent with the extent of the contractor's common law obligations of fitness for habitation, which would exclude superficial / decorative defects.³⁵ As discussed below at chapter 6, however, 'fitness for habitation' is an outmoded concept which does not, it is submitted, establish an adequate standard for the builder's obligation.

Many home buyers would not be aware that by preserving the purchaser's common law rights, the contract does not exclude section 39 of the Sale of Goods and Supply of Services Act 1980. Section 39 provides as follows:

³⁵ As further discussed in Chapter 2 below.

39.- Subject to section 40, in every contract for the supply of a service where the supplier is acting in the course of a business, the following terms are implied-

- (a) That the supplier has the necessary skill to render the service,
- (b) That he will supply the service with due skill, care and diligence,
- (c) That, where materials are used, they will be sound and reasonable fit for the purpose for which they are required, and
- (d) That, where goods are supplied under the contract, they will be of merchantable quality within the meaning of section 14 (3) of the Act of 1893 (inserted by section 10 of this Act).

Section 39 is arguably the single most protective part of Irish law applicable to housing defects, as it provides a warranty, not only in relation to the contractor's workmanship, but also of the fitness for purpose of materials used in construction of the dwelling by the contractor. Unfortunately, due to the arbitration clause in the LSBA, there is no guidance from the Irish courts on the application of section 39 to housing defects.

The question arises of whether section 39 would offer sufficient protection to home buyers, if practice were changed to allow home purchasers access to the courts, or to a tribunal established to deal with defects disputes, which could allow for development of caselaw on the application of the section. However, this would not address the problem caused by the restriction on assignment of the contract; as section 39 operates by implying terms into services contracts, those terms remain with the contract when the home is sold, if the contract is not transferred, and do not travel with the home.

Taken in conjunction, the arbitration clause at clause 11³⁶ and the restriction on assignment

³⁶ Clause 11 of the LSBA provided as follows until October 2018: 'Any dispute between the parties hereto shall be referred to arbitration by an arbitrator who shall in default of agreement between the parties be appointed on the application of either party by either the President of the Incorporated Law Society of Ireland or the President of the Construction Industry Federation such arbitrator to be appointed from a list of arbitrators approved jointly by the President of the Incorporated Law Society and the President of the Construction Industry Federation or in the Event of either of such persons being unable or unwilling to act by the next senior officer of the respective institutions.' According to a practice note of the Conveyancing Committee of the Law Society dated 5 October 2018, the reference to the Construction Industry Federation has now been removed, in light of the finding by Kelly J. in *Healy v Whitepark*, unreported, 15 June 2009; no explanation is given in the note as to why it took over 9 years to amend the LSBA following the decision. The decision and amendment is discussed further at chapter 5.

at clause 9³⁷ of the LSBA make it significantly less likely that the building contract will ever be used either as a source of remedies, or enforced via an order of specific performance.

Sovern identifies as ‘transaction costs’ the costs payable by a buyer that are not paid to the seller. In the case of housing, the cost to the purchaser of having a survey carried out would be an example of a transaction cost. Sovern argues that sellers can avoid performance by increasing the buyer’s transaction costs, for example by including an arbitration clause in the sales contract:

Critics have pointed out that consumers are unlikely to appreciate the full significance of terms providing for binding arbitration; indeed even for them to try may be irrational, given the cost of learning enough to evaluate all the terms in a standard form contract and the low likelihood that a consumer would end up in a dispute that required arbitration.³⁸

Sovern concludes that this and other practices allowed one vendor to insulate itself from competition and thus to dictate contract terms as a monopolist; the corollary in Ireland may be said to be the terms of the LSBA. On one view, it is arguable that agreeing to a standard form building agreement allowed a representative organisation for builders³⁹ to co-opt the Law Society of Ireland, itself the gateway to every conveyancing transaction into the purchase of new homes, into promoting a set of terms that are normatively unacceptable and often amended to insert very prejudicial terms to consumers.⁴⁰

In 2001, the Director of Consumer Affairs, with the support of the Law Society, obtained a High Court order prohibiting the use of a list of unfair clauses in building agreements.⁴¹ Despite the order, the Law Society has issued practice notes on two subsequent occasions,

³⁷ Clause 9 (a) of the LSBA provides as follows: ‘The Contractor or the Employer shall not without the prior written consent of the other assign this Agreement or any part thereof.’

³⁸ Jeff Sovern, ‘Toward a New Model of Consumer Protection: the Problem of Inflated Transaction Costs’ (2005-2006) 47 *William & Mary Law Review* 1635, 1646.

³⁹ The Construction Industry Federation describes its membership and role in the following terms: ‘The CIF is the Irish construction industry’s representative body and provides a broad range of services for members to assist in addressing issues that arise in the course of conducting their business.’ www.cif.ie/about/ (accessed 26 August 2018).

⁴⁰ See discussion in chapter 2 regarding the application by the Director of Consumer Affairs to the High Court in relation to the use of unfair terms in the LSBA (34-35).

⁴¹ *In the matter of an application pursuant to Regulation 8 (1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*, High Court (Kearns J.) 20 December 2001.

most recently in 2016, to warn practitioners that the prohibited clauses continue to be included in Building Agreements for new houses and apartments.⁴² Neither the High Court order, nor the threat of disciplinary proceedings by the Law Society against solicitors who propose such clauses, have eliminated the practice. The Law Society confirmed to the author in the course of this research that there had been no disciplinary proceedings initiated against solicitors who continued to include prohibited terms in residential construction contracts.

An owner may have difficulty in pursuing a builder without being party to the original building agreement, due to the rules of recovery in the law of tort. He may also find his action barred by the Statutes of Limitation, which can bar a defects action before the owner realises that there is a defect, or what is causing it, as discussed in chapter 4. The Law Reform Commission has made recommendations on several occasions to address these problems, as discussed further in chapters 2 and 6.

Another contracting model which is common in rural Ireland is that of the ‘self-builder’, where the landowner engages direct labour informally for the construction of the home, and enters into contracts directly with suppliers for the materials required. Anecdotal evidence to the author suggests that many of the homes affected by mica damage in Donegal were apparently built in this way, and this is reflected in the case study in the Appendix of mica damage to a holiday home in Donegal.

The significance of this model from a legal perspective is that the legal consequences for these arrangements are very different to those that apply to the ‘speculative’ home building model. The land owner in the ‘self build’ model may not enter into any formal building contract, as the construction work is done by direct labour, which may be engaged informally, and the land owner will have direct contracts with suppliers.

The result is that the self-builder can bring an action for breach of contract against suppliers which would not be available to the home buyer who buys from a builder/developer. In the case of the homes affected by mica damage in Donegal, home

⁴² Law Society of Ireland Conveyancing Committee, *Breach of Unfair Terms Order may be deemed to be misconduct* (13 December 2015); Law Society of Ireland Conveyancing Committee, *Unfair terms in building contracts - reminder* (4 March 2016).

owners who contracted directly for the purchase of bricks may therefore be able to bring an action for breach of contract based on the implied term of merchantable quality from section 14 (2) of the Sale of Goods Act 1893. The *Noreside* and *James Elliott* cases discussed in chapter 2 suggest that the supplier would be likely to be held liable in such a case, as the defective bricks are analogous to the defective aggregates supplied in those cases.

The equivalent provision to section 14 (2) in services contracts is section 39 of the Sale of Goods and Supply of Services Act 1980; section 39 (c) implies a term in construction contracts that materials used will be ‘sound and reasonably fit for the purpose for which they are required’. If the builder is insolvent or has insufficient assets to make them a ‘mark’ for litigation, however, the home owner who has bought from such a builder will find that section 39 is of little use to them. If the supplier is still trading in those circumstances, the owner will also find that there is little authority to support a duty of care in negligence by a supplier to a home buyer, as the home buyer’s loss would be regarded as economic loss unless the goods supplied damaged ‘other property’.⁴³

In informal ‘direct labour’ building contracts, section 39 of the 1980 Act will likely not avail a home owner, as the individuals who carried out the labour would not have supplied the materials as part of the services.

Privity of contract

The common law rule of privity of contract remains part of Irish law; therefore, an action for breach of contract can only be brought by the parties to that contract.⁴⁴ It is unlikely that anyone but the first purchaser of a dwelling will ever have a remedy in contract against the builder. As the LSBA prohibits assignment without consent, a person buying a dwelling within the limitation period for an action under the original contract will have no contractual remedy. The original buyer would have had a remedy within that period, but that remedy remains with the original contract, and the second buyer will have to pay for the necessary repairs out of their own funds if insurance is not available to cover the repairs.

⁴³ *D&F Estates Ltd v Church Commissioners for England and Wales* [1989] AC 177; [1988] 2 All ER 992.

⁴⁴ See discussion in chapter 2.

The Irish Law Reform Commission published a report in 2008⁴⁵ in which it recommended various changes to Irish law to modify the application of the principle of privity of contract. The most significant in this context is the recommendation that a third party should be entitled to enforce the term of a contract that expressly confers a benefit on that party or expressly confers a right of enforcement on a third party.⁴⁶

Even if a remedy is available against the original builder in contract, however, the builder may be insolvent, in which case any judgment secured against him may be of little value to the home owner.⁴⁷

Regulatory environment

Regulation of the building process in Ireland is achieved principally by two legislative codes. The Planning and Development Acts 2000 to 2018 require permission to be obtained from the planning authority for the area in which development is to take place, and consider ‘*proper planning and sustainable development of the area*’.⁴⁸ The construction of the development itself, however, is principally dealt with via Building Regulations made pursuant to the Building Control Acts 1990 to 2014.

Building control is the means by which the administration and enforcement of the Building Regulations is carried out by Building Control Authorities in accordance with the Building Control Acts 1990 to 2014.⁴⁹ The Building Control Acts provides the framework for administration and enforcement of building control by building control authorities, provided for the making of Building Regulations and Building Control Regulations.⁵⁰ The Building Control Acts are the legal basis for the Building Regulations 1997-2019 and the Building Control Regulations 1997-2018.

⁴⁵ Law Reform Commission, *Privity of Contract and Third Party Rights* (LRC-88-2008).

⁴⁶ *Ibid* [3.03] and [3.11].

⁴⁷ Hogan J. commented in *Mitchell v. Mulvey Developments* [2012] IEHC 561, which involved significant defects in a number of homes in an estate in Co. Sligo, that ‘I have endeavoured – all too belatedly and perhaps, I fear, inadequately – to compensate these plaintiffs for the manifold wrongs that they have been obliged to endure over the last eight to nine years, although it is as yet unclear whether these awards are actually enforceable in practice’. [56].

⁴⁸ Section 34 (2) (a), Planning and Development Act 2000.

⁴⁹ The Building Control Act 2007 included various amendments to the 1990 Act with regard to enforcement procedures and provided for registration of architects, surveyors, and building surveyors.

⁵⁰ Building Control Act 1990, ss. 8 – 13.

The Building Control Act 1990 ('the 1990 Act') introduced a new system of oversight over buildings by providing for the establishment of building control authorities, and for the making of Regulations dealing with Building Regulations, which set out technical requirements relating to buildings, and Building Control Regulations, which deal with the powers of Building Control Authorities to monitor compliance with, and to enforce the provisions of, the Building Regulations.⁵¹

This resulted in a multiplicity of building control authorities throughout Ireland, with no requirement or common objective of consistency in decision-making and administration of the building control system; there is no single entity with responsibility for the quality of new buildings in Ireland.

The second schedule to the Building Regulations sets out prescriptive technical requirements, and technical guidance documents provide guidance. Part D of the Building Regulations requires all works to which the Regulations apply to be carried out 'with proper materials and in a workmanlike manner', and Part A requires buildings to be designed and built in order to transmit loads to the ground safely. The overall intention of the Building Regulations, however, relates to safety of inhabitants and users and buildings, and (more recently) to meeting Ireland's international obligations in relation to insulation and energy performance, now reflected in Part L of the Building Regulations.⁵²

The system of building control established by the 1990 Act, and further developed into 2014 with the introduction of mandatory inspection and certification requirements, is a hybrid public/private model and would be seen as a 'co-regulatory regime'. The public role is performed by the State's 31 building control authorities⁵³, by 'authorised officers' appointed by those authorities, and by the courts; enforcement powers under the 1990 Act may only be exercised by building control authorities and not by assigned certifiers.

The private role is discharged by land owners and developers commissioning the carrying

⁵¹ See Eoin O'Cofaigh, 'Building Control' in Eoin O'Cofaigh, 'Building Control' in D Keane and A Hussey (eds), *Construction Law and Practice* (Construction Law and Practice, Round Hall 2007).

⁵² Part L of the Building Regulations was inserted by Building Regulations (Part L Amendment) Regulations 2008, SI No. 259/2008).

⁵³ The Building Control Authorities were established under s 2 of the 1990 Act; rather than creating entirely new bodies to discharge the role prescribed by the 1990 Act, s 2 of the Act simply designates existing local authorities, county councils, and borough and urban district corporations as building control authorities for the purposes of the Act.

out of works, who are required to appoint competent, registered designers and assigned certifiers, and competent builders, each of whom must provide certificates of compliance with Building Regulations in respect of their work.

The Building Control (Amendment) Regulations 2014 ('The 2014 Regulations')

A significant change in building control administration was introduced by the Building Control (Amendment) Regulations 2014⁵⁴ ('the 2014 Regulations'), which introduced a system of mandatory private design and inspections by professionals. The 2014 Regulations require design and inspection of developments⁵⁵ to be carried out by registered construction professionals⁵⁶ who must provide certificates of compliance with Building Regulations in respect of their design and inspection roles.⁵⁷

Inspections are carried out by an Assigned Certifier appointed by a person commissioning construction work. The substantial breaches of Building Regulations subsequently discovered at the Priory Hall complex provided the impetus for this regulatory change.⁵⁸

One of the limitations of the 2014 Regulations is that they did not deal with the problem that professionals giving certificates are often left holding the risk that the builder would be insolvent and not able to meet a claim.⁵⁹ The Regulations made it easier to pursue professionals for defective design or negligent inspection but did little in practical terms to improve recourse against negligent builders. A builder is required to provide a certificate of compliance with Building Regulations on completion of building works, but the law is unclear as to the legal basis on which a subsequent purchaser of a unit, without

⁵⁴ Building Control (Amendment) Regulations 2014, SI 9/2014.

⁵⁵ The Regulations apply to the design and construction of a new dwelling, an extension to a dwelling involving a total floor area greater than 40 square metres, and works for which a fire safety certificate is required. (Building Control Regulations 1997, SI 496/1997, article 9 (2)(b), as inserted by Building Control (Amendment) Regulations 2014, SI 9/2014, Article 7.

⁵⁶ Either an architect or a building surveyor registered under the Building Control Act 2007, or a chartered engineer for the purposes of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969).

⁵⁷ The Assigned Certifier must undertake to carry out inspections (in accordance with an inspection plan), co-ordinate inspections by others (such as specialist subcontractors) and to certify compliance with the Building Regulations in the Completion Certificate.

⁵⁸ Minister for the Environment, Community and Local Government Phil Hogan stated in 2013 that 'We will publish new regulations within the next week to ensure the likes of Priory Hall will not happen again and will minimise the opportunities for unscrupulous builders, developers and professionals to allow consumers to be treated this way in the future'. Dáil debates, 12 March 2013.

⁵⁹ *Farrell v Arborlane* [2015] IEHC 545 (HC); [2016] IECA 224 (CA) is a case in point, where the building contractor was in receivership and proceedings were brought against an engineer who had given an opinion on compliance with Building Regulations.

a contract with the builder, could recover on foot of that certificate, as builders have traditionally been excluded from liability for negligent misstatement.⁶⁰

The 2014 Regulations create no new legal remedies for home owners, and the relationship of the certificates required to be given under the Regulations with the legal rules governing legal liability are not clear.⁶¹ The system established by the 2014 Regulations arguably imposes a disproportionate liability on professionals in light of the civil liability regime in Ireland. The boundaries between regulatory requirements and private remedies have been left unclear by the Regulations, and may require judicial input in order to clarify the status of the certificates of compliance that must be furnished in accordance with the Regulations.

A further statutory instrument introduced in 2015 exempted ‘one-off houses’ from the requirements of the 2014 Regulations.⁶² The jurisprudence suggests, however, that housing failures are by no means confined to multi-unit developments or large housing estates.⁶³

Although there are considerable powers of enforcement of building control under the Building Control Acts, enforcement activity can be very costly and resource-intensive. This may suggest not only that additional resources are required for Building Control Authorities, but also that a review be undertaken of building control on a nationwide basis for its effectiveness in monitoring and enforcing compliance with Building Regulations. This will be discussed further in chapter 4.

Construction defects and insurance

Defects policies that accompanied the sales of houses and apartments at the time of purchase are often insufficient to cover the defects that emerge in the property; an example is the considerable damage done to numerous homes and commercial buildings in Ireland by reactive pyrite, which was found in the aggregates (stone) used as infill under concrete

⁶⁰ Deirdre Ni Fhloinn, ‘Compliance with Building Regulations and Liability’, *Construction Bar Association Annual Conference*, 2016.

⁶¹ *Ibid.*

⁶² Building Control (Amendment) (No. 2) Regulations 2015, SI 365/2015.

⁶³ Each of *Ward v McMaster* [1986] ILRM 43 (HC) [1988] IESC 3 [1988] IR 337 (SC), *O'Donnell v Kilsaran Concrete* [2001] IEHC 155, [2001] 4 IR 183 and *McGee v Alcorn* [2016] IEHC 59 concerned ‘one-off’ houses that had significant defects.

slabs in buildings.⁶⁴ There is no legal requirement for mandatory latent defects insurance in Ireland, and the defects policies on the market are subject to various limitations and exclusions, such as exclusion of liability for the presence of pyrite in aggregates.⁶⁵ Numerous homeowners found themselves without a financial remedy when one of the main home warranty providers in the Irish market, HomeBond, withdrew cover for pyrite damage from existing policies in 2011.⁶⁶

The current HomeBond policy, for example, contains a limit of €50,000 for ‘Latent Defects’ as defined in the policy, for a period of five years, and an aggregate limit of €500,000 for Latent Defects in a continuous unit such as a terrace of houses. There are significant limits on recover of the costs of alternative accommodation and professional fees in connection with repair or rebuilding.⁶⁷ The limit for Structural Defects (as defined in the policy) is €200,000; one case from 2016 involving defective foundations included a claim for €277,000 to repair a defective house, and the plaintiff’s quantity surveyor in the case indicated that the cost would be considerably more if the house had to be demolished and rebuilt.⁶⁸

There are various examples from international practice that would be of assistance in devising appropriate insurance requirements; for example, in New South Wales, residential construction work above a certain value cannot be carried out without home warranty insurance, and certain limitations in home warranty insurance policies are set by law.⁶⁹ The 2016 report of the English All-Party Parliamentary Group for Excellence in the Built Environment found that consumers generally did not know what home warranties did and did not cover.⁷⁰ The Irish Government considered the issue of latent defects insurance following the recommendation of the Pyrite Panel in this regard in 2012,

⁶⁴ The Report of the Pyrite Panel notes that HomeBond circulated a letter on 31 August 2011 confirming that it would no longer provide cover for pyritic heave in light of the High Court decision in *James Elliott Construction v Irish Asphalt* [2011] IEHC 269; Pyrite Panel, *Report of the Pyrite Panel* (Pyrite Panel, 2012), ii.

⁶⁵ The market leader in home defects insurance is HomeBond, which excludes cover for damage related to pyrite; HomeBond policy document, Section 4: Exclusions, paragraph 21, refers to ‘Any loss, damage, cost, expense or liability of any nature directly or indirectly caused by resulting from or in connection with the presence or alleged presence of any sulphides including but not limited to pyrite and/or their derivatives’.

⁶⁶ Pyrite Panel, (n 64), ii, vii, xi, 74.

⁶⁷ HomeBond Latent Defects Insurance policy document, section 3, and see https://www.homebond.ie/home_buyers/ (accessed 15 June 2018).

⁶⁸ *McGee v Alcorn* [2016] IEHC 59 [55].

⁶⁹ Daniel Smith, ‘Builders’ Warranty First Resort or last resort or does it really matter?’ (Institute of Actuaries of Australia XVth General Insurance Seminar 16-19 October 2005).

⁷⁰ All Party Parliamentary Group for Excellence in the Built Environment, *‘More Homes, Fewer Complaints’, Report from the Commission of Inquiry into the quality and workmanship of new housing in England*, (July 2016), 6.

but recent Ministerial comments suggest that this is no longer being pursued.⁷¹

Dispute resolution

The LSBA contains an arbitration agreement. As will be discussed further in chapter 5, arbitration can be a daunting process for a home owner. It can also take many years for disputes involving defects to be resolved, particularly if some of the defendants are insolvent or no longer trading. In one case involving residential defects from 2015, the Court of Appeal dismissed proceedings against an engineer arising from an opinion on compliance with Building Regulations given 15 years previously. The home owner, while clearly responsible for part of the delay, had nonetheless been party to ten years of legal proceedings in respect of defects in her apartment development, which culminated in dismissal of the proceedings.⁷²

There are models available from other jurisdictions that provide models for more cost-effective and timely methods of dispute resolution. New South Wales Fair Trading, for example, provides an advocacy and dispute resolution service for home owner, as discussed further below in chapter 6.

Improved access to remedies was one of the recommendations of the 2016 Report of the All-Party Parliamentary Group for Excellence in the Built Environment, which proposed a New Homes Ombudsman to assist in resolving disputes between consumers and builders or warranty providers, which the APPG suggested should be funded by a levy on housebuilders:

We see this as the key recommendation to provide more effective consumer redress if things go wrong, and a good way of applying pressure on housebuilders and warranty providers to deliver a better quality service....it would need to be completely independent and replace the dispute resolution service offered as part of

⁷¹ The Minister responsible for the Building Control (Amendment) Regulations 2014 undertook to review insurance prior to commencement of the Regulations, but Minister Paudie Coffey subsequently reported to the Dáil that the Department had decided against the introduction of mandatory defects insurance. See <http://www.merriestreet.ie/en/News-Room/Releases/new-regulations-will-prevent-disastrous-building-failures-in-future-minister-hogan.49322.shortcut.html>; <https://www.kildarestreet.com/wrans/?id=2015-11-03a.2775&s=LDI#g2778.r> [both accessed 17 June 2018]

⁷² *Farrell v Arborlane* [2015] IEHC 545 (HC); [2016] IECA 224 (CA).

the [voluntary, industry-led] Consumer Code for Home Builders.⁷³

C: Legal Context, Part 2: Law Reform Commission reports

A number of reports of the Law Reform Commission have dealt with legal remedies for defective dwellings. The Commission's work in this area during the mid-1970s to the early 1980s was significantly influenced by the earlier work of the Law Commission of England and Wales, which had produced a report on liability of vendors and lessors of property in 1970⁷⁴, recommending a new statutory duty of quality binding on persons who 'took on' building work. This was swiftly followed by the enactment of the principal law reform recommended by the Law Commission, the Defective Premises Act 1972. The Law Commission's report contains a number of passages that explain the reasoning behind the 1972 Act and that have entered the discourse with regard to remedies:

From the point of view of tort liability premises are defective only if they constitute a source of danger to the person or property of those who are likely to come on to them or to find themselves in their vicinity. In the contractual sense they are defective if their condition falls short of the standard of quality which the purchaser or lessee was entitled to expect in the circumstances.⁷⁵

This observation provides an unequivocal categorisation of dangerous defects as giving rise to tort liability, with non-dangerous defects belonging to the law of contract. This perspective reflects the current position under English law, subject to the further limitation that a dangerous defect, until it causes injury or damage to property other than the defective property itself, is not recoverable in tort.⁷⁶

This distinction was adopted by the Irish Law Reform Commission in its Working Paper of 1977 relating to the law relating to the liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises ('the 1977 Working Paper').⁷⁷ The formulation of the legal treatment of remedies for defective housing established two channels which were a

⁷³ All Party Parliamentary Group (n 70).

⁷⁴ Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises*, (Law Com No 40, 1970).

⁷⁵ *Ibid* 1.

⁷⁶ *D & F Estates v Church Commissioners for England and Wales* [1989] AC 177; *Murphy v Brentwood DC* [1991] 1 AC 398.

⁷⁷ Law Reform Commission, (n 9).

significant influence on the jurisprudence that followed both reports, in relegating tort law to a role with regard to dangerous defects only.

The distinction was, arguably, of lesser consequence in England and Wales, in light of the introduction of the statutory duty in the Defective Premises Act 1972.

The unequal bargaining power between consumer and builder was noted by the Commission:

...although the contract represents the only real method by which the purchaser/lessee can protect himself in our law, the unequal bargaining position of the parties, the shortage of an adequate supply of suitable housing property and the practices of the professions do not ensure the proper recognition of the legitimate interests of the average home purchaser/lessee.⁷⁸

Over twenty years later, a report commissioned by the National Consumer Agency contains assumptions with regard to the ability of consumers to protect their interests in light of the practice of retaining solicitors to carry out conveyancing transactions.⁷⁹ The report highlights the problems solicitors face in dealing with unreasonable amendments by builders and developers to building agreements for home homes, which the Agency itself described as being offered on a 'take it or leave it' basis:

In a strong market, as has been experienced in Ireland over the past number of years, contract conditions may be dictated by the developer and presented to the prospective purchaser on a 'take it or leave it' basis. There may be little scope for negotiation in such circumstances, such as where there is a waiting list for cancellations in an over-subscribed new development.⁸⁰

This suggest that solicitors, who perform a vital role as gatekeepers of legal risk on behalf of their clients, may be severely constrained in seeking a meaningful negotiation of

⁷⁸ Ibid [60].

⁷⁹ The report suggests that 'the presence of a solicitor in the transaction serves to vindicate the consumer's rights and also provides an additional layer of redress...'. National Consumer Agency, *The Home Construction Industry and the Consumer in Ireland*, (2008), 12.

⁸⁰ Ibid 8.

contract terms, either due to market forces and housing supply constraints, and because the Law Society itself continues to endorse the LSBA.

Chapter 3 of the 1977 Working Paper summarises the criticisms of the legal regime as it stood at that time: no implied terms of quality of fitness for purpose of property, inequality of bargaining power between buyer and seller, common-law immunity from negligence of vendors and lessors, and builder's ability to acquire immunity by selling.⁸¹ The Commission drew attention to the fact that the common law immunities were more appropriate to the 19th century context with a buyer's principal concern was the land, rather than the modern buyers, 'whose primary concern is not addressed to the land as such, but to securing for himself and his family a place to live'.⁸²

The anomalous situations where liability could depend, for example, on whether the builder was also the seller, could give rise to obstruction of justice, as well being very complicated, and warranted a reassessment in light of 'modern values and developments'. For example, 'the privileged immunity which the law of torts accords to vendors and lessors is an immunity which is difficult to justify in logic or law'.⁸³

The Working Paper criticised the legal position in a number of respects. It noted the unequal bargaining position of the parties throughout the purchase transaction, and that 'no terms are normally implied by the law with regard to the quality or fitness of the property in question'.⁸⁴ The position of builders was criticised on the basis that they could insulate themselves from liability in negligence by selling the building, and thus benefiting from the immunity of vendors and lessors.⁸⁵

Two significant legal developments in the 1980s addressed some of these criticisms. Firstly, section 39 of the Sale of Goods and Supply of Services Act 1980 provided for various terms to be implied into contracts for services. These terms may not be excluded where the purchaser deals as a consumer. This is a significant limitation, as a purchaser who buys a unit as an investment is arguably not 'dealing as a consumer', and thus the

⁸¹ Law Reform Commission (n 9) 35-36.

⁸² Ibid 38.

⁸³ Ibid 38.

⁸⁴ Ibid [51].

⁸⁵ Ibid [51].

protection of the section may in principle be lost if its effect is excluded in a contract with an investor. Secondly, the 1985 decision of the High Court in *Ward v McMaster*⁸⁶ made clear that the immunity of a vendor does not apply where the vendor is also the builder of the house.

With regard to the immunity of vendors and lessors, the Working Paper noted that the immunity had become anomalous in light of various legal developments including the expansion of the law of negligence and the development of strict liability for manufacturers of defective products.⁸⁷ The view is expressed that strict liability for vendors is not suggested, but that vendors 'should give certain warranties with regard to the state of the premises and that, with regard to injuries to the person and to property, they should be liable at least for negligence'.⁸⁸

Although the Commission's reasoning for recommending that vendors and lessors of property should bear some liability for defects is understandable, it is submitted that requiring vendors and lessors to provide a warranty in respect of defects presents a number of problems. It is quite possible that a property would change hands more than once without a vendor being aware of the existence of a defect. It is also likely that few private individuals would have the means to pay for remedial works in defective properties. It is for this reason that insurance is an essential part of any redress scheme in respect of housing defects, as discussed below in chapter 6.

The Working Paper included the General Scheme of a Bill to amend the law relating to the liability of builders, vendors and lessors for the quality and fitness of premises, which included an obligation on a person carrying out work to see to it that the work was carried out in a good and workmanlike manner with suitable and proper materials. The paper also recommended that measures be introduced to underwrite the insolvency risk of builders.⁸⁹ This recommendation has not been acted upon and undermines any law reform that may be introduced to improve legal remedies.

⁸⁶ *Ward*, (n 63).

⁸⁷ Law Reform Commission, (n 9) [56-57].

⁸⁸ *Ibid* [56-57].

⁸⁹ This issue will be considered further in chapter 6.

Options proposed in the Working Paper

The Working Paper proposed a number of options for improving the position of purchasers, which will be discussed throughout this thesis. It was noted that the parties were in an unequal bargaining position, and that ‘no terms are normally implied by law with regard to the quality or fitness for purpose of the property in question’.

The discussion in the Working Paper of the contracting process for the sale of new houses is of particular interest. It is noted that the purchaser’s position is ‘extremely weak’, probably buying for the first time from an experienced repeat player, who, due to demand, can adopt a ‘take it or leave it’ attitude.⁹⁰ This undoubtedly continues to be the case 40 years later, based on the Law Society’s continued attempts to curtail unfair contract practices by solicitors acting for builders and developers, and in a market where the demand for housing is a considerably more pressing issue than in 1977.⁹¹

Standard form contracts for construction of new housing

The Commission noted that no standard form contract existed for speculatively built housing, and that the ones in use omitted key terms that were included in the Law Society standard agreement for the sale of second-hand houses. For example, there was no provision for a completion date, delay damages, or an entitlement to delay completion until the site was complete.⁹²

Some of these issues are now dealt with in the LSBA and, in the case of multi-unit developments, in the Multi-Unit Developments Act 2011, but the protection thereby afforded to homebuyers still falls far short of dealing with the deficiencies identified by the Commission. Although the Law Society Building Agreement preserves common-law rights (and thereby preserves the implied terms from section 39 of the Sale of Goods and Supply of Services Act 1980), the warranty is conditional on HomeBond membership⁹³,

⁹⁰ Law Reform Commission (n 9), 40.

⁹¹ A report presented to the Oireachtas Joint Committee on Housing, Planning and Local Government on 20 September 2017 by Dr. Rory Hearne and Dr. Mary Murphy stated that 8,794 social housing units had been built in Ireland in 1975; the figure for 2017 is less than 1,000 (Jack Power, ‘Just one third of promised social housing units for 2017 built’, *Irish Times*, Dublin 15 December 2017.).

⁹² *Ibid.*, 41-42.

⁹³ Clause 8 (a), Law Society / Construction Industry Federation Building Agreement conditions. HomeBond is a home warranty policy that has been through several iterations since its introduction in the late 1970s, and is offered

the contract is only available to the first purchaser, and the fundamental problem of builder insolvency and financial capacity has not been addressed at all.

Instead, builders, purchasers and their solicitors, and banks providing mortgages, continue to contract for the construction and sale of new homes on the basis that the builder may be a limited liability company with no assets and no insurance in respect of potential liability for defects. The result is often that the purchaser's recourse, if the builder is insolvent or where the plaintiff is not the first purchaser, is via a home warranty or insurance policy such as HomeBond, and possibly against a professional who has provided an opinion or certificate of compliance.

With regard to the regulatory regime for the quality of residential construction, the Working Paper stated that 'the principal purpose of this paper is to examine the civil liability of vendors, lessors and builders for injuries caused by defective buildings' but noted that 'any increase in the civil liability of these parties should improve the quality of housing and building in general in the country'.⁹⁴

The Commission took the view that the regulatory regime for housing quality assumed 'considerable significance in providing a regime of protection for the purchaser/ tenant'.⁹⁵ Amongst the regulatory regimes considered by the Commission were the planning regime, the Housing Act powers to make bye-laws for rented housing, and building bye-laws, which were the most significant aspect of the regulatory regime in the Commission's view.⁹⁶

The Commission had high hopes for the draft Building Regulations which were to apply nationally; however, it would be 1992 before Building Regulations were actually introduced, and then only pursuant to a parent Act, the Building Control Act 1990. As discussed in chapter 3, the 1990 Act significantly diluted the influence of local authorities in improving standards in construction, notwithstanding the impetus for its introduction

as a structural defects warranty policy in conjunction with the sale of new homes. HomeBond is discussed further in chapter 6.

⁹⁴ Law Reform Commission (n 9), 27

⁹⁵ Ibid 27.

⁹⁶ Ibid [36]– [42].

provided by the tragedy of the 1981 Stardust fire.⁹⁷

D - RESEARCH THEMES

The principal research themes considered in this work are as follows:

Who – or what – should be protected?

1. This theme explores consumer protection and the question of who (or what) should be protected, taking account of the balance of power between sellers and buyers of new housing, and the anatomy of the decision to buy: can buyers protect their own interests, given sufficient professional advice and support, or should the State intrude to set the rules of engagement, via implied terms or statutory duties?
2. Defining the appropriate response for effective redress is both a theme and objective of this research. The concept of redress is explored in this thesis on both a broad and narrow basis; the broad basis is represented by the analysis and proposals for regulatory change and changes in insurance coverage considered at chapters 4 and 6; the narrow basis addresses the individual, in the discussions in relation to legal remedies for defective housing considered at chapters 2 and 3, and in the analysis regarding procedural justice in chapter 5.

Risk transfers to home buyers and home owners

This theme considers:

1. the management of risk in residential construction, and the consequences of the disconnection of risk from those in a position to manage it (builders and gatekeepers such as designers, assigned certifiers and building control authorities) and the home buyer who assumes financial risk of the building's condition, and

⁹⁷ The Stardust fire of 14 February 1981 casts a long shadow over Irish construction regulation. The system of prior approval of designs via fire safety certificates issued by building control authorities was introduced in order to ensure local authority review and approval of designs for fire safety. See Ralph Riegel, 'State feared that Stardust tribunal's proposals would expose it to claims' *Irish Independent* (Dublin 28 December 2013).

2. the extent to which law and practice facilitate the limiting of liability of builders, (for example, through the use of limited liability companies to contract for residential building work), and the ‘builder’s windfall’, where the original building contract and source of remedies remains with the first purchaser of the home, and how these features of the transfer risk from builders/developers to buyers.

Regulatory failure and regulatory reform

1. The response of successive Irish Governments over recent decades has contributed to regulatory failure and to a high incidence of housing defects. This includes failure to investigate and reflect upon the causes and contributing factors to building failures, such as the role of regulation and the extent to which wrongdoers were shielded from liability under public law. It is argued that this had led to continuing regulatory failure⁹⁸ and a dismissal of the need for reform of legal remedies.⁹⁹
2. A related theme is the nature and proper role of regulation in order to minimise the risk of residential construction defects; the discussion and analysis of this theme deals with the balance of public and private interests and power and the role of regulatory failure and enforcement strategies in the occurrence of defects;

The role of gatekeepers

A theme considered throughout this thesis is the role of gatekeepers who play a regulatory or transactional role in the residential construction sector, including solicitors involved in the conveyancing process, the Law Society Conveyancing Committee, certifiers engaged to provide certificates of compliance with Building Regulations, and building control authorities, and the influence and incentives of such actors.

Risk, insurance, public-private power transfers and the role of the State

⁹⁸ The ongoing regulatory failure and the empirical evidence which forms part of this research is set out in chapter 4.

⁹⁹ During a debate on the Report on Building Standards, Building Controls and Consumer Protection in May 2018, the Minister for Housing, Planning and Local Government, Eoghan Murphy TD, stated that ‘The proposal in the committee’s report to create new legal remedies or redress procedures or dispute resolution facilities for homeowners affected by defects would require broader consideration. . . While it may have benefits in some instances, it does not represent a panacea for the resolution of building compliance issues.’ Dáil debates, 24 May 2018.

1. The theme of responsibility and risk is central to the critique of the regulatory system and of the system of private law remedies discussed in this thesis; this includes the relationship between responsibility for defects and the financial risk of those defects, and the manner in which insurance and warranty coverage responds to those risks;
2. The final theme is that of privatisation of law and dispute resolution in residential construction, the transfer of power from State to private entities to regulate the residential construction sector, and the implications of these developments for transparency, accountability and access to justice.

Chapter 2 – Rights and remedies in contract

Introduction and context

The legal structure of the home-buying relationship is invariably contractual, as it necessarily involves a transfer of land, which must be evidenced in writing. In this chapter, the contractual relationship is examined from the perspective of the traditional lens of consumer protection, to consider how the relationship accommodates the particular position of the home buyer

Section A deals with consumer protection, the perceived vulnerability of consumers and the role of vulnerability in the home buying process. The purchase of a home is usually the most significant investment in a person's life; if there are defects in the home, the home owner may have no option but to live in the property until the defects are rectified and may not have access to the funds required to carry out expensive repairs. It is therefore anomalous that there should be no meaningful avenue of redress for consumers dealing with defects in their homes.¹

Section B introduces the concept of the persistence of rights and the builder's windfall, Part 1 Rights to redress in respect of defective housing may be limited or curtailed by reason of choices made by the original purchaser of that housing. This phenomenon is considered from the perspective of negative externalities² that may result from this choice, in order to provide a normative justification for the intervention discussed and advanced in this chapter. The concept of the 'builder's windfall' supports the argument that the second and subsequent purchasers should not be prejudiced by the choices made by the first purchaser. The protection afforded over time by the original building contract should instead attach to the home, and not become disconnected from the home by successive transfers, at least during the limitation period for actions under the contract. The second

¹ Quill refers to the 'growing recognition of consumer protection in modern legal systems, reflecting current social values'. Eoin Quill, 'Consumer protection in respect of defective buildings' (2006) 14 Tort Law Review 1, 2.

² The term 'negative externalities' refers to the costs imposed on third parties from a given transaction; for example, the cost of rectification of the Priory Hall development referred to in Chapter 1 may be seen as a negative externality, as the development and sale of the units generated costs that were ultimately borne by third parties such as the Irish State and Dublin City Council, as well as by home buyers who purchased units on the mistaken premise that they complete and in substantial compliance with Building Regulations.

facet of the ‘builder’s windfall’ is then discussed,

in providing a justification for modification of the privity doctrine in order to provide remedies in contract for second and subsequent purchasers of housing.

The third and final part of the chapter considers the common law rule of privity of contract. An action for breach of contract can only be brought by the parties to that contract. It is unlikely that anyone but the first purchaser of a dwelling will ever have a remedy in contract against the builder. The Law Society/Construction Industry Federation form of Building Agreement (‘the LSBA’) also prohibits assignment of the contract without the consent of the building contractor.³

Therefore, a person buying an apartment or house that is sold within the limitation period for breach of contract⁴ will have no remedy under the law of contract, even though the original purchaser would have had a remedy within that period, and will be at risk of the cost of remedial works if insurance is not available to cover the repairs (as many homeowners have found in relation to pyrite damage). This discussion explores the research theme of risk transfer to home buyers raised in chapter 1, in considering the ways in which the law and practice obliterates legal rights, limits the builder’s liability and transfers risk from builders to buyers.

Section C deals with modes of legal intervention in contracts, and examines potential remedies for housing defects. Law reform in other common law jurisdictions has introduced statutory duties, that operate outside the confines of contracts, or transmissible warranties of quality, imposed by statute, that travel with the property with each sale during the limitation period. This section considers models from other jurisdictions that have used the implied terms model to insert mandatory contractual provisions into residential construction contracts. In chapter 3, consideration will be given to the alternative model, to impose statutory duties that operate outside contract and prescribe minimum standards for residential construction.⁵

³ Law Society/Construction Industry Federation form of Building Agreement, 2001 edition, (‘LSBA’) clause 9 (a).

⁴ The limitation period will be six years from breach, if signed under hand, and 12 years from breach, if signed under seal (Statute of Limitations 1957, s 11).

⁵ The ‘statutory duty’ model is reflected in both the English Defective Premises Act 1972 and was the preferred

A: CONSUMER PROTECTION

Consumer contracts, bargaining power, and fairness

For most people, the purchase of a home is the most significant investment of their lives. It is also an investment that carries a significant degree of financial risk. The condition of the building, the location of the building, and the obligation to repay the mortgage for which the house may be offered as security are all aspects of the purchaser's risk. A home may be a valuable asset, particularly after the passage of time and in a rising property market. Nevertheless, a home is a fundamental part of the human need for security and shelter.⁶

The question of the proper role of consumer protection in the relationship between buyers and sellers of housing in Ireland is fundamental to the design of the redress for defects. Preliminary considerations include the definition of the rights a purchaser should have, and the identification of what is being protected: the purchaser's investment, or the safety of the occupants of the unit. The traditional view of tort law is that the former is the province of contract law, while the latter may justifiably ground recovery in tort. This view is challenged in the following chapter.⁷

Consumer purchasers are generally in a vastly less powerful position than sellers, both in terms of the information that the seller has about the product, and in terms of the seller's bargaining position. In markets where housing is at a premium and prices increasing steadily, sellers may set the terms of the bargain, including contract terms.

The decisions made by home buyers, and the bargaining position of those buyers, affect

option of the Irish Law Reform Commission in its report and draft Bill dealing with Defective Premises in 1982.

⁶ Ann Dupuis and David C. Thorns, 'Home, Home Ownership and the Search for Ontological Security' (1998) 46 *The Sociological Review* 24; Shelley Mallett, 'Understanding home: a critical review of the literature' (2004) 52 *The Sociological Review* 62; Ade Kearns, Rosemary Hiscock, Anne Ellaway and Sally Macintyre, 'Beyond Four Walls'. The Psycho-social Benefits of Home: Evidence from West Central Scotland' (2000) 15 *Housing Stud* 387.

⁷ Another significant consideration is the extent to which the law should vindicate a right to a home, and whether there is any basis in law for asserting such a right; this enquiry has been extensively considered and developed by Kenna and others: Padraic Kenna, 'Globalisation and Housing Rights' (2008) 15 *Indiana Journal of Global Legal Studies* 397; Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011); Rachel Bratt, Michael Stone and Chester Hartman, *A Right to Housing: Foundation for a New Social Agenda* (Temple University Press 2006).

subsequent owners. Many products will never be sold by the first buyer. Housing, by contrast, is designed to last for generations and is likely to be bought and sold several times during its life-span. Therefore, the interests of first and subsequent purchasers for a reasonable period of time following the first purchase must be considered in devising appropriate remedies.⁸

Who is the consumer? Is the consumer invariably vulnerable?

One of the key questions to be considered is outlining the parameters of a revised legal regime assigning enhanced rights in respect of defective housing is to define the beneficiaries of those enhanced rights. The traditional consumer protection model, reflected in both Irish and European Union law, assigns enhanced rights based on the nature of the beneficiary, and on the nature of the transaction. The first approach is reflected in various legislation introduced in recent decades in Ireland, some of which follows consumer protection instruments introduced by the European Union. The defining characteristics of a consumer throughout the legislation is that of a natural person acting outside their trade, business, or profession.⁹

An alternative approach would take as its starting-point the transaction itself and would consist of remedies designed to take account of the re-allocation of risk that results from the emergence of a defect. On this view, the transaction concluded between the parties includes consideration which is assessed by reference to the commensurate risk and value received for that consideration. When a defect emerges, the value of the building or construction work is diminished to the extent of that defect, in various ways; the building is devalued, and expense must be incurred in rectifying the defect, which results in both

⁸ It is not suggested that a remedy should be available against the original builder of a house for the duration of the life-span of the house, likely to be at least one hundred years. Both the law of contract and the law of tort will cease to provide any remedies in respect of a given defect upon the expiry of the limitation period applicable to the cause of action, if there is one; if Irish law is changed in the manner recommended by the Law Reform Commission (as discussed further in chapter 5) the limitation period would end no later than 15 years following completion of the unit. Law Reform Commission, *Report on Limitation of Actions*, LRC 104-2011 (2011).

⁹ The Sale of Goods and Supply of Services Act 1980 provides that a person deals as a consumer when 'he neither makes the contract in the course of business nor holds himself out as doing so' (s 3 (1)). The European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004, SI 853/2004, the European Communities (Late Payment in Commercial Transactions) Regulations 2002, SI 388/2002, the Consumer Protection Act of 2007, Consumer Credit Act 1995 all refer to 'a person acting outside his trade, business or profession'. The European Consumer Rights Directive of 2011 varies the formula slightly in referring to a person 'acting outside their trade, business, craft or profession.' (Directive 2011/83 of the Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, recital 17).

direct and indirect financial loss (such as the costs of alternative accommodation during repair works).

The availability of a financial remedy for breach of contract should, in the normal course, compensate the owner for these losses, but may be unavailable, due to the insolvency of the building contractor or the expiry of the limitation period for such an action under the Statutes of Limitations.

The principal law reform for remedies proposed in this thesis essentially seeks to protect the home itself, by creating a set of rights that attach to the home regardless of changes in ownership; the effect is the same as the model examined in chapter 3 and advocated by the Law Reform Commission in 1982, of a statutory duty that would operate outside the law of contract.

This approach is justified not only in order to compensate for deficiencies in existing law (identified in chapter 1), but also to re-balance the relationship between the parties. Dagan and Heller use the term 'relational equality' to describe the creation of conditions, for example by legal intervention of employment rights legislation or the striking down of consumer contracts on the basis of unconscionability,¹⁰ 'an aspect of private law's normative baseline for just relationships'.¹¹ The authors advocate relational equality as a means of analysing contractual relationships where formal equality would fail to adjust for the bargaining position of the parties. It is apparent from the persistence of unfair terms in residential construction contracts that the fact that home buyers are represented by solicitors is not sufficient to achieve relational equality in their relationships with sellers.¹²

Conceptual problems may result from adopting the existing language and concepts of consumer law in pursuit of improved legal remedies for home owners. Quill argues that a house or building should not be regarded as simply a larger version of the types of consumer goods to which consumer legislation will typically apply:

...to say that a building is just a big product fails to recognise the greater practical

¹⁰ Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017), chapter 8 (Kindle edition).

¹¹ *Ibid* chapter 10 (Kindle edition).

¹² As discussed in chapter 1, section B.

and economic significance that building purchases entail, particularly in the case of the purchase of one's home.¹³

The owner of a defective building may suffer significant financial loss in the event of a defect, for which the remedy generally cannot consist of the replacement of the goods, and where remedial works will often not be carried out by the original builder. The builder may be unwilling or unable to carry out the remedial works, or the owner may be unwilling to retain him for this purpose.¹⁴

Are home buyers vulnerable?

A significant and wide-ranging inquiry into consumer protection and residential construction was undertaken in England by the All-Party Parliamentary Group for Excellence in the Built Environment, which published its report, 'More Homes, Fewer Complaints', in 2016.¹⁵

Amongst the findings of the report were that there was an imbalance in bargaining power between consumers and building companies, and that consumers who experienced difficulties with defects 'find their means of redress are inadequate'.¹⁶

The vulnerability of the Irish home buyer was recognised in a significant piece of research commissioned by the National Consumer Agency from Grant Thornton, and published in 2009.¹⁷ The report identified problems with the level of home buyers' understanding of the nature of the home buying transaction, poor levels of consumer focus amongst the professional bodies involved in the industry, and relatively high levels of dissatisfaction and financial loss arising from the purchase of new homes.¹⁸

The report's examination of 'consumer detriment' included an estimate of 17,940 'loss

¹³ Quill, (n 1).

¹⁴ Britton has argued that one option for dealing with defects is for the homeowner to seek specific performance of the building contract, but this will be of little benefit if the contractor has become insolvent, for example. Philip Britton, 'The State, the Building Code and the Courts: Prevention or Cure?' (Society of Construction Law, D152A, (updated version March 2014)).

¹⁵ All Party Parliamentary Group for Excellence in the Built Environment, 'More Homes, Fewer Complaints', Report from the Commission of Inquiry into the quality and workmanship of new housing in England, July 2016).

¹⁶ Ibid 5.

¹⁷ National Consumer Agency, *The Home Construction Industry and the Consumer in Ireland*, November 2008.

¹⁸ Ibid, Vol. 1 (5; 20-34), Vol. 2 (4-5).

incidents' in 2007 out of a total number of 78,000 new house purchases, at an average loss value of €1,911, and noted that home buyers would not have been aware of some detriments that would not have been visible or manifest at the time of the survey undertaken as part of the research.¹⁹ This means that at least 23%, or nearly one in four, of new homes sold in 2007 contained defects, snags or problems that resulted in loss values to home buyers, and suggests a widespread and systematic disregard for compliance with Building Regulations and/or contractual specification requirements by home builders and/or those for whom they were responsible, including materials suppliers and sub-contractors.

Vulnerability is at the heart of modern debates relating to consumer protection. Browne, Clapp, Kubasek and Biksacky²⁰ argue that consumer law 'needs to serve as a countervailing force moving the terms of the bargain in the direction of respect for consumer welfare'²¹, and that the extent of force required depends on assumptions about the capability of consumers to protect their own interests, and assumptions about the behaviour of consumers. The authors suggest that the 'individualism' of American social and public life has created a vision of the consumer as a self-reliant atomistic agent, responsible for his own choices, such that Government intervention to protect the consumer's interests should be regarded as paternalistic and unnecessary:

...the legal protection of consumers does not evolve in the abstract. It emerges from a context that leans on a particular understanding of who an American consumer *should* be. The more that legal policy is shaped by individualism, the more consumers will be expected to protect themselves, making use of the rational calculating skills they are assumed to have or to somehow learn.²²

This assumes that the consumer is a rational decision-maker with perfect information, which is at odds with contemporary accounts of how decisions are actually made. Behavioural economics has made a significant contribution to modern perspectives on individual decision-making²³, and offers insights that are highly relevant to policy and

¹⁹ Ibid, Vol. 2 (2-3).

²⁰ Kevin Bischoff Clapp M. Neil Browne, Nancy K. Kubasek, Lauren Biksacky, 'Protecting Consumers from themselves; Consumer Law and the Vulnerable Consumer' 63 Drake Law Review 157.

²¹ Ibid 159.

²² Ibid 165.

²³ Amos Tversky and Daniel Kahneman, 'Rational Choice and the Framing of Decisions' (1986) 59 The Journal of

law reform in the field of consumer protection.²⁴ One of the most prominent legal commentators in this area, Cass Sunstein, argues that private choices should not invariably be regarded as sovereign, in part because paternalistic legal intervention is aimed at protection of the decision-maker, but that 'if actions that gratify private preferences produce "harm to others", governmental intervention is appropriate'.²⁵

There is a clear potential for tension between the value of vulnerability as a criterion for intervention, and the principle of freedom of contract. Dagan and Heller examined the concept of freedom of contract in their 2017 monograph, in which they presented 'choice theory' as an alternative to traditional accounts of contract law. They criticised the work of Charles Fried to the extent that it situated freedom of contract in a 'flawed, rights-based view'. Instead, they offered choice theory as a model capable of promoting individual autonomy while 'providing the economic and social benefits people seek in working together'²⁶, and that the theory 'requires that contract law offer different, but equally valuable and obtainable, frameworks of interpersonal interaction'.²⁷

The authors examine the tension between mandatory rules and contractual freedom, and conclude that 'mandatory rules and sticky defaults which limit choice within a type can surprisingly enhance freedom overall - so long as there exists a sufficient range among types in that important sphere of human activity'.²⁸ Section 14 of the Sale of Goods Act 1893 implies a term of merchantable quality into contracts for the sale of goods. It is an example of a 'sticky default', in that parties may decide to disapply the section, but the cases of *James Elliott Construction v Irish Asphalt*²⁹ and *Noreside Construction v Irish Asphalt*³⁰ suggest that parties may be unaware of the numerous terms that may be implied by law via various enactments.³¹ The defendant quarry was found liable in both cases for breach of section 14 of the 1893 Act; it is apparent from both sets of litigation that

Business S251.

²⁴ Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008).

²⁵ Cass R. Sunstein, 'Legal Interference with Private Preferences' (1986) 53 *University of Chicago Law Review* 1129, 1130.

²⁶ Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017) (Kindle edition) (preface).

²⁷ *Ibid* chapter 10 (Kindle edition).

²⁸ *Ibid* chapter 10 (Kindle edition).

²⁹ *James Elliott Construction v Irish Asphalt* [2011] IEHC 269.

³⁰ *Noreside Construction v Irish Asphalt* [2011] IEHC 364.

³¹ The Construction Contracts Act 2013, for example, provides for implied terms of payment and payments dates, that may not be excluded as between contractors and sub-contractors of contracts for 'construction operations'.

insufficient consideration was given to the implied terms from section 14 in the contractual arrangements between the parties.

Dagan and Heller also accept that mandatory rules may be necessary in order to avoid 'third party negative externalities', where the costs of a transaction extend beyond the contract parties to third parties.³² The possibility of cognitive error in the purchase of dwellings appears to be a significant likelihood, and if so, should be taken into account in the design of a contractual model for such transactions.

In the next section, research into consumer decision-making will be discussed, in conjunction with insights from both law and economics scholars and behavioural science. The purpose of the investigation is to understand how consumers buy housing. The questions being explored in this section are, firstly, whether consumer behaviour when buying housing is itself a justification for intervention to protect their interests, and secondly whether the decision-making process could be improved, for example, by giving consumers more information about the nature of the property and the potential risks involved in the purchase.

Home buyer decision-making and behavioural science

Ramsay poses the question of how policymakers should take the 'costly behavioural biases' of consumers into account.³³ He suggests that in areas such as product safety, a relatively bright-line rule, such as a duty to supply safe goods, may be socially optimal even if the consequence is a reduction in consumer choice.³⁴ Ramsay characterises the neo-classical approach to consumer policy as being rooted in 'consumer sovereignty', which involves the freedom to make choices, both good and bad, but challenges this view by asking who the 'consumer' is assumed to be in this paradigm, and whether they have short- or long-term preferences.³⁵ Applying this enquiry to the purchase of housing illustrates its importance to the question of the proper beneficiaries of a protective regime.

Ramsay argues that the concept of 'consumer sovereignty' is central to regulatory

³² Ibid chapter 10 (Kindle edition).

³³ Iain Ramsay, *Consumer Law and Policy* (3rd edn, Hart Publishing 2012), 62.

³⁴ Ibid 62.

³⁵ Ibid 63.

interventions.³⁶ The home buyer, however, must embody not only his own needs but those of his successors in title, and of the State and other actors who may have to expend resources in order to deal with housing defects. Any enhanced remedies for buyers, therefore, must take account of these broader considerations, interests and context.

Housing stands in stark contrast to other consumer purchases because it is a basic human requirement, designed to last 50-100 years, that is likely to change hands several times. Defects may well take years to become manifest, and the purchase of a home is usually one of the most significant purchases of a person's life. These factors point to the vital importance to the consumer of the home-buying transaction, and the potentially devastating consequences that may follow from discovery of defects. Housing represents a category of purchase decisions in which the vulnerability of the buyer differs from the same person's vulnerability when initiating other transactions.

Regulation is premised on the phenomenon of variable vulnerability, which leads to greater regulation of goods or services that have the potential to cause significant harm. Vulnerability can be personal or may derive from the transaction itself; it is submitted that home buyers are acutely vulnerable in the home buying transaction, even when legally represented.

Stark and Choplin refer to the 'availability heuristic', which can significantly affect consumer decision-making as it produces a tendency in buyers to under-estimate the risk they are assuming in entering into the transaction:

...scenarios under which things can go wrong never enter their minds. This a problem, because extensive psychological research on people's judgments of the likelihood of events has found that people judge likelihood by the ease with which instances or associations come to mind (the "availability heuristic").³⁷

Kahnemann and Tversky's ground-breaking research on behavioural science rejected the view that human beings make decisions rationally and with the capability to take relevant

³⁶ Ibid 95.

³⁷ Jessica M. Choplin Debra Pogrund Stark, 'A Licence to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities' (2009) 5 NYU Journal of Law and Business 617, 666.

evidentiary factors into account when making significant decisions. Instead, the framing of purchase decisions and the manner in which the seller markets and prices goods, has a significant effect on how those goods are bought.³⁸ The authors also note that decision-making efficiency is difficult to improve, as decision-makers lack sufficient information to understand the long-term consequences of their decisions, a problem compounded by the lack of information available on particularly important decisions, which may be ‘unique and therefore provide little opportunity for learning’.³⁹

As most people will buy a home only once or twice during their lives, the home purchase transaction appears to fit the model of the unique decision in which home buyers have little prior experience to draw upon in order to inform their choice, not least because the purchase of a new home differs significantly from the purchase of a second-hand home.⁴⁰

Korobkin and Ulen built upon early insights from behavioural science that comprehensively undermined the traditional assumption that parties were rational actors capable of assessing their risk and the value to them of particular transactions.⁴¹ The authors identify complex decisions as being particularly vulnerable to decision-making in which individuals fail to maximise utility, suggesting that more complex problems require parties to ‘minimize effort by adopting simplified strategies, thus violating the procedural predictions of rational choice theory’.⁴²

There is increasing evidence from behavioural science to suggest that home buyers do not make choices based on rational cost-benefit analysis, but instead use a set of intellectual heuristics to assist them in dealing with complex decisions. International empirical research into home-buying preferences indicates that housing quality is seldom taken into

³⁸ They describe the principle of invariance, whereby different representations of the same choice – for example, a procedure that carries a 10% chance of death or a 90% chance of survival- should yield the same preference, and found that far more people would choose a procedure when presented with the survival risk rather than the mortality risk. Tversky and Kahneman, (n 23).

³⁹ Ibid S274.

⁴⁰ In both transactions the seller will offer no warranty in relation to the condition of the property, and although the buyer’s solicitor will advise that a survey be carried out, the surveyor will have considerably more information in relation to a second-hand home than a new home, not least in the fact that defects in a second-hand home will have had some period of time in which to become manifest.

⁴¹ ‘Now that the [law and economics] movement has reached intellectual maturity, the rationality assumption severely limits its continued scholarly development. There is simply too much credible evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory’ Russell B. Korobkin and Thomas S. Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics,’ (2000) Cal L Rev 1051, 1055.

⁴² Ibid 1078.

account by home buyers in any jurisdiction, with the consistent concerns being location, neighbourhood setting, and size or adaptability of the housing unit.⁴³

A number of commentators have also developed the ‘bounded’ rationality theory, which arguably reflects the actual process of decision-making rather than the idealised ‘rational choice’ theory.⁴⁴ Korobkin argues that the ‘rational choice’ assumptions of economics, if both sellers and buyers have perfect information about the nature of the product being sold and the value of any warranties that are given by the seller, would ensure that contract terms would be efficient.⁴⁵

The Economic and Social Research Institute published a report in 2016 in relation to how consumers purchase complex products which contains a number of insights of relevance to the purchase of residential construction services.⁴⁶ Firstly, it is argued that a transaction that results in loss of consumer surplus is evidence of cognitive bias in consumer decision-making.⁴⁷ The consumer surplus is represented by the extent to which the value to the customer of the transaction is in excess of the price paid by the customer. Put simply, if a customer receives less value than the purchase price, this suggests that the consumer does not appreciate the true value of the transaction. An example of a transaction where this occurs is in the selection of mobile phone tariffs, where many people fail to appreciate the true cost of what they are buying and lack the information to make a meaningful comparison with other competing offerings.⁴⁸ Various studies are cited in support of the argument that there are markets in which the calculation of the surplus in a given transactions ‘is beyond consumers’ cognitive capabilities’.⁴⁹

Absent an empirical study in relation to consumer attitudes towards the purchase of

⁴³ Chris Leishman, Peter Aspinall, Moira Munro and Fran J. Warren, *Preferences, quality and choice in new-build housing*, (2004, Joseph Rowntree Foundation); Sylvia J. T. Jansen, 'Different Values, Different Housing? Can Underlying Value Orientations Predict Residential Preference and Choice?' (2014) 31 *Housing, Theory & Society* 254.

⁴⁴ Schmolke summarises this theory as follows: ‘At its core lies the idea that the human actor does not aim for the optimal, that is, utility-maximising choice, since this is too costly due to his limited capacities to gather and assess information...he contents himself with choosing a satisfactory option, thereby saving ‘choosing costs’. Klaus Ulrich Schmolke, 'Contract Theory and the Economics of Contract Law' in EV Towfigh and N Petersen (eds), *Economic Methods for Lawyers* (Economic Methods for Lawyers, Edward Elgar Publishing Limited 2015).

⁴⁵ Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review*, 1203, 1216.

⁴⁶ Pete Lunn, Marek Bohacek, Jason Somerville, Áine Ní Choisdealbha, Féidhlim McGowan, *Price Lab: An Investigation of Consumers' Capabilities with Complex Products*, (Economic and Social Research Institute 2016).

⁴⁷ *Ibid* 3.2

⁴⁸ *Ibid* 4, citing Grubb (2009) and Bar-Gill and Stone (2009).

⁴⁹ *Ibid* 5.

housing in Ireland, it is difficult to demonstrate that purchasers suffer from cognitive bias in engaging in these transactions. There are, however, a number of factors that suggest that this may indeed be occurring in Ireland. Firstly, the dramatic decrease in housing construction between 2008 and 2018, coupled with very low levels of social housing construction⁵⁰, has led to a critical lack of supply of housing.⁵¹ Secondly, the fact that it was necessary for the Director for Consumer Affairs to bring an application to the High Court to restrict the use of unfair terms in residential building contracts, coupled with the Law Society's notice to practitioners in this regard from 2016, suggests that there continues to be a significant imbalance in the buyer-seller relationship.⁵²

There has been no research into the role that contracting arrangements for the purchase of new homes had in Ireland's housing failures, such as the exclusion of purchasers and their advisers from the construction process. This means that a purchaser does not engage a surveyor to inspect a unit on their behalf until after notification of completion by a developer's solicitor, and has no representative with the entitlement to access the site of the works during construction. In this, the model differs sharply from the commercial model, in which the employer is invariably represented by a professional who will be entitled, by contract, to access and inspect the works.⁵³

If home buyers are genuinely unaware or indifferent to the potential defects risk in buying a house or apartment, this should inform policy and law reform in this area; not only to protect the buyers themselves, but also to protect future downstream buyers of the units from the decisions of the original buyer. Craswell states that:

It can be shown...that if buyers are completely insensitive to differences among the riskiness of different products – even if accurately informed about the average level of risks – then riskier products will suffer no disadvantage, and sellers will have no

⁵⁰ In each of 2015 and 2016, fewer than 500 social housing units were built. Kitty Holland, 'Last Year Worst for Housing Construction since 1970s', *Irish Times*, Dublin, 9 February 2017.

⁵¹ Central Statistics Office figures published in 2018 indicate that the total number of houses constructed in Ireland between 2011 and 2017 was 53,578: Eoin Burke-Kennedy, 'New homes overstated by nearly 60%, CSO figures show' *The Irish Times* (Dublin 14 June 2018); by contrast, over 88,000 houses were completed in 2006 alone: Central Statistics Office, *Construction and Housing in Ireland 2008 Edition*, (Central Statistics Office 2008), 7.

⁵² See the discussion later in this chapter. The updated practice note of the Law Society in 2016 indicates that the practice continues despite the High Court order, and these factors, in turn, suggest little scope for negotiation of these contracts.

⁵³ Law Society of Ireland Conveyancing Committee, *Concerns over purchasers who do not get dwellings surveyed* (Law Society of Ireland, 2 February 2018).

incentive at all (other than that provided by the threat of liability) to increase the level of their precautions'.⁵⁴

A Law Society practice note from 2018 indicates that 20% of purchasers do not retain a surveyor to inspect a house or apartment before purchase, which suggests that a significant number of purchasers are not taking quality into account in deciding whether to buy a unit. This suggests a poor understanding of the potential risks and costs involved in buying a defective property, as the typical cost of a home survey is less than €500, while the average cost of a home is over €230,000.⁵⁵ This is perhaps not surprising, however, if one reflects on the insights of behavioural science discussed above. Eisenberg, drawing on the research of Kahnemann and Tversky among others, notes the human tendency to underestimate risk, stating that 'people often not only underestimate but ignore low-probability risks'.⁵⁶

Why intervene in residential construction contracts? What rights should a buyer enjoy?

The foregoing discussion on the cognitive bias and information asymmetry that apparently characterises the home buying decision concentrates on the first buyer of the home. The purchase of defective housing can have effects, and can cause loss, well beyond the first buyer, however. Amongst the common features of housing defects is the risk of late manifestation of defects, which may have the effect of imposing the risk of defects on a subsequent owner. There is also the possibility of financial risk to the State or public authorities that may intervene to carry out, or to discharge the cost of, rectification works.⁵⁷

A number of different interests are addressed by the various regulatory and legal regimes affecting housing quality. The first is safety. Building Regulations made under the Building Control Act 1990 aim to protect the health and safety of people in and around

⁵⁴ Richard Craswell, 'Contract Remedies, Renegotiation, and the Theory of Efficient Breach' (1987-1988) 61 S Cal L Rev 619, 656.

⁵⁵ Fiona Reddan, 'Average house prices rise €21,000 nationally over 12 months to June', (Dublin, The Irish Times, 14 August 2018).

⁵⁶ Melvin Eisenberg, 'The Limits of Cognition and the Limits of Contract', (1995) 47 Stan. L. Rev. 211, 223.

⁵⁷ Amongst the evidence for this risk in Ireland is the Pyrite Resolution Scheme, the rectification of the Priory Hall development, and the investment required to be made by the National Asset Management Agency in rectifying defects in its housing stock.

buildings.⁵⁸ Building contracts (including terms implied by law) seek to serve the buyer's right to redress in the event of defects, by specifying performance obligations of the builder and payment obligations of the buyer. The second interest is the investment interest, which represents the financial value of the buyer's asset and is generally, in the case of housing, protected by the law of contract.

The third interest can be referred to as the home interest. There is no legal right to a home under Irish law, in contrast to a number of jurisdictions where a right to home and/or shelter is protected by law, and in some jurisdictions, has been elevated to the status of a constitutional right. Housing may be regarded as a qualitatively different type of asset, or building, to assets or buildings that may be used, for example, for commercial purposes.

Fox O'Mahony argues that the distinct character of houses and apartments as homes gives rise to 'home rights' independent of the property interests in the units in question, held by all residents. In the context of enforcement of creditor rights against properties in which children are living, for example, she observes that:

When dealing with child occupiers, the child's interest in the property *as a home* is irrelevant as far as either property law or the law of contract is concerned.⁵⁹

Fitzpatrick, Bengtsson and Watts refer to the tension between 'natural rights and socially constructed rights' to housing, which seeks to articulate an alternative formulation of housing rights between the aspirational and the legally enforceable, drawing on essential human capabilities, such as control over one's environment, for which housing is a prerequisite.⁶⁰

The externalisation and socialisation of housing defects

⁵⁸ The purposes for which Building Regulations may be made are set out at section 3 of the Building Control Act 1990, the first of which refers to 'making provision for securing the health, safety and welfare of persons in or about buildings, and persons who may be affected by buildings or by matters connected with buildings'. (Section 3 (a), Building Control Act 1990).

⁵⁹ Lorna Fox O'Mahony, *Conceptualising home: theories, laws and policies* (Hart Publishing 2006), 137.

⁶⁰ Suzanne Fitzpatrick, Bo Bengtsson and Beth Watts, 'Rights to Housing: Reviewing the Terrain and Exploring a Way Forward' (2014) 31 *Housing, Theory & Society* 447, 451.

There is a risk to society and a financial risk to the State that results from housing defects. A Briefing Paper prepared by the UK's Building Research Establishment in 2015 which examined the cost of poor housing to the National Health Service suggests that housing quality has a comparable impact on public health to that of smoking or alcohol.⁶¹ Defects can result in loss of home by the evacuation of residents from unsafe buildings, by the demolition of dangerous buildings, or by the interruption with family life and peace of mind that comes from anxiety in relation to defects. Pevalin et al., in a recent empirical study, associated poor quality housing conditions with adverse mental health, noting that social tenants were particularly likely to be affected.⁶²

In 2017, the European Committee of Social Rights made a finding of breach of Article 16 of the European Social Charter against Ireland in relation to the poor quality of social housing; Article 16 refers to the right of the family to social, legal and economic protection.⁶³ The complaint contained evidence of the significant impact on health and well-being of tenants in Irish local authority housing resulting from housing defects, stating that 85% of tenants in one local authority estate were living in housing with poor quality materials, presence of pyrite, dampness and mould.⁶⁴

The first interest considered above is dealt with further in chapter 4. The last is a matter of social policy, beyond the scope of this thesis. It is with the second interest, which can be characterised as the 'investment' interest, that private law is principally concerned. It is only the investment interest that provides a legal remedy for the buyer who suffers loss due to a defect. The safety interest is protected mainly by public law in the form of the Building Control Acts and Building Regulations; these laws are enforceable only by public authorities. Enforcement of building control, as discussed in chapter 4, is an unregulated discretionary process, entirely resource-dependent, over which individuals affected by breaches have no control.

⁶¹ Simon Nicol, Mike Roys, and Helen Garrett, 'The cost of poor housing to the NHS' (2015) Building Research Establishment Briefing Paper.

⁶² David J. Pevalin, Aaron Reeves, Emma Baker and Rebecca Bentley, 'The impact of persistent poor housing conditions on mental health: A longitudinal population-based study' (2017) 105 *Preventive Medicine* 304.

⁶³ *International Federation for Human Rights (FIDH) v Ireland* Collective Complaint no 110/2014, 23 October 2017.

⁶⁴ *Ibid* at p. 18; Amongst the consequences of living in poor quality housing are 'poor health (in particular, to respiratory problems and stress-related conditions), and with accompanying financial costs in terms of health care...The costs associated with trying to pay for endless repairs or 'more bottles of Milton' (bleach), damp-proofing, and redecorating are crippling, especially for people who are already financially challenged' (35).

It is to private law, therefore, that the home buyer must turn for the vindication of the interest which is in his power to enforce: the investment interest. The manner in which the law protects that interest at present has been set out in Chapter 1. The following section considers how the law could respond to the limitations identified in Chapter 1, the contract gap. The ambiguities in the law of tort and the procedural barriers to remedies will be dealt with in chapters 3 and 5 respectively.

Closing the contract gap; consumer protection

Practice suggests that risk management is approached very differently in residential and commercial construction. A commercial project of any significant size will usually feature architectural, engineering, surveying, fire safety, inspection and certification and project management services. By contrast, a home buyer will usually retain only a solicitor, for the conveyance, and a surveyor, to inspect the unit.

The opportunity for a surveyor to discover defects is limited in a number of respects; foundations will be covered and walls will be plastered; deficiencies in fire-stopping, a consistent problem in Irish new-building housing, is hidden behind internal walls and in ceiling voids. The manner in which the risk is managed by the ultimate owner in each case is instructive: the commercial employer uses numerous risk management strategies during the design and execution of the works.

The home buyer, by contrast, has no say in design of speculatively built housing, no rights of inspection of the works during construction, no remedy if the completion of the unit is delayed (which usually results, for the commercial employer, in liquidated damages⁶⁵).

Harvey and Parry refer to the recognition of the ‘consumer surplus’ in *Jarvis v Swan Tours*⁶⁶ in which the Court assessed damages for a holiday where the holiday package had been sub-standard. The consumer surplus refers to the phenomenon whereby consumers

⁶⁵ Bailey comments, with regard to such clauses, that ‘In the event of a contractor being late in the completion of its works due to its own default, the owner may be entitled to recover liquidated damages from the contractor for late completion, should the relevant contract contain a liquidated damages provision. If not, the owner will be entitled to recover its actual loss, as damages for breach of contract, in accordance with the usual rules for the recovery of damages’. Julian Bailey, *Construction Law* (2nd edn, Sweet and Maxwell 2016), 955.

⁶⁶ Brian Harvey and Deborah Parry, *The Law of Consumer Protection and Fair Trading* (6th edn, Butterworths 2000); *Jarvis v Swan Tours* [1973] QB 233; [1973] 1 All ER 71.

make purchases based on the pleasure or utility of the thing purchased, and can be compensated by a quantification of foregone pleasure or utility.

Merrillees and Cotman suggest that ‘the consumer is better served by a regulatory system that encourages rigorous quality control at the production stage rather than one which relies for its sanctions on the consumer having the energy and funds to activate a breach of warranty claim in respect of defects which a less rigorous production system allows to occur’.⁶⁷

Consumer protection - the European dimension

Consumer protection has a long heritage in Europe and in the United States. Gutman traces the development of consumer law in the US from postal fraud legislation in 1872, through John F. Kennedy’s highly influential Special Message in 1962⁶⁸, which Gutman describes as the ‘cornerstone of consumer law and the consumer movement generally in the United States’⁶⁹, and subsequent legislation including the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Special Message, according to Gutman, was particularly influential on the philosophy and objectives of the European Commission’s Preliminary Programme for a consumer protection and information policy in 1975.⁷⁰

European law has been most significant source of consumer law in Ireland since membership of the European communities in 1973. European consumer law regulates a broad range of areas of activity for the benefit of consumers, including distance sales, liability for dangerous products, and services provided online. Weatherill notes that European consumer policy originated in the progression of the European Community towards market integration, but acquired a significant independent mandate following the Maastricht Treaty of 1993, which ‘embraced consumer protection for the first time as an explicit EC competence’.⁷¹

⁶⁷ Bill Merrillees and Nigel Cotman, ‘An Economic Analysis of Consumer Protection Law’ (1976) 48 *The Australian Quarterly* 79.

⁶⁸ Papers of John F. Kennedy. Presidential Papers. President's Office Files. Speech Files. Special message to Congress on protecting consumer interest, 15 March 1962.

⁶⁹ Kathleen Gutman, ‘Development of Consumer Law in the US: Comparison with the EU Experience’ (2012) 4 *Journal of European Consumer and Market Law* 212, 212.

⁷⁰ *Ibid* 213.

⁷¹ Stephen Weatherill, *EU Consumer Law and Policy*, (2017 Elgar European Law), 17.

The Consumer Rights Directive of 2011⁷² establishes significant rights for consumers in relation to both goods and services, but specifically excludes contracts for the creation, acquisition or transfer of immovable property or of rights in immovable property, and contracts for the of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes.⁷³

Although European law has introduced significant protective measures for consumers in a wide range of areas, it is arguable that consumer policy in the European Union has been motivated more by concerns regarding free movement of goods and services, and the extent to which harmonised rules of supply and remedies may facilitate that, than by concern for the protection of consumers. Howells, Twigg-Flesner and Wilhelmsson argue that ‘European consumer law and policy in recent times have risked over-emphasising the internal market goal’, and that the EU’s consumer protection philosophy needs to be substantiated, particularly by reference to the welfare goals of consumer policy and the concept of consumer vulnerability.⁷⁴

Everson suggests that the European Court of Justice ‘is no longer in the business of creating a distinct European consumer. Instead, that consumer has now served its primary judicial purpose of acting as a vital motor of European integration and providing, at the same time, legitimacy for European law’.⁷⁵ He argues that the European Commission is committed to the privatisation of consumer affairs by strengthening standardisation bodies and releasing framework consumer policy directives, as an ‘intensification of efforts to establish the character of the citizen consumer through the direct democratization of the market’.

The comparative lack of attention to the position of homeowners in the union, notwithstanding the great importance to homeowners of their rights in relation to the

⁷² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁷³ Ibid, Article 3 (3) (e) – (f).

⁷⁴ Christian Twigg-Flesner Geraint Howells, Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2017), kindle edition, chapter 1.

⁷⁵ Everson, ‘Legal Constructions of the Consumer’, in Frank Trentmann, *The making of the consumer: knowledge, power and identity in the modern world* (Berg Publishers 2006), 108.

purchase of housing, may be attributable in part to the fact that residential construction tends to be an a national industry.⁷⁶ This is reflected in the fact that EU intervention in the construction industry has been limited to the implementation of specific policy objectives such as facilitating free movement of construction products, which resulted in the introduction of the Construction Products Regulation⁷⁷, rather than any general programme of reform aimed at protection of home buyers.

In the 2016 decision in *James Elliott v Irish Asphalt*⁷⁸ the European Court of Justice 2016 held that the Technical Standards Directive establishes a presumption of conformity of construction products manufactured in accordance with a harmonised standard, but that this did not require the Irish court to disregard a national law of a general nature, such as the Sale of Goods and Supply of Services Act, which requires that a construction product should be of merchantable quality. Rather, the presumption of conformity is about the free circulation of products within the EU. Simoncini has drawn attention to the court's justification for adjudication of the system of harmonized standards on the basis that the European Commission administers the architecture, but not the content, of the system for harmonisation of standards, but notes that the European Parliament has taken a contrary approach, 'repositioning standards under a private governance approach'.⁷⁹ The Construction Products Regulation exemplifies the intervention of European Union law into the field of liability for housing defects; while the system may have some benefits for consumers by establishing a relationship between products and standards, any such benefits are incidental to the primary objective of the Regulation as promoting free movement of construction products.

⁷⁶ A list of the top 25 construction contractors in Ireland for 2017 published by the main industry body suggests that Irish companies dominate the industry in terms of market share: <http://ciftop50contractors.com/> (accessed 24 November 2018).

⁷⁷ Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marking of construction products and repealing Council Directive 89/106/EEC.

⁷⁸ Case C-613/14 *James Elliott Construction Ltd. v. Irish Asphalt Ltd.*, and see 'Pyrite Litigation before the ECJ – A Report on Case C-613/14 *James Elliott Construction Ltd. v. Irish Asphalt Ltd.*' Brian Kennedy SC, Construction Bar Association Annual Conference 2016.

⁷⁹ Marta Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine: A Study on EU Agencies* (Bloomsbury Publishing 2018), 112. The European system for creation of standards is something of a public private hybrid; standards are created by private entities (ESOs), including the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC), that are independent of the European Union. Members agree to collaborate on production of standards and to withdraw conflicting national standards once standards are adopted. The European Union does not create standards. Instead, following a 1985 resolution of the Council of the EC, European legislation provides for essential requirements, which may then be translated into standards by one of the ESOs. Harmonised standards refers to standards which are devised by a standards body in response to a request from the EU Commission. Council of the European Union, Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards 85/C 136/01 (1985).

Kohl suggests that harmonisation of ‘consumer’ construction law at EU level could be achieved by reference to the existing points of convergence between the common and civil law jurisdictions, and would form the basis for harmonisation of European construction law generally.⁸⁰ Kohl refers to a 1988 resolution from the European Parliament that the EU Commission should take steps to harmonise contracts, monitoring of building operations, and liabilities of house builders and developers, supported by defects insurance. This was followed by the Mathurin report of 1991⁸¹, and the GAIPEC report of 1992⁸², which advocated a separate liability regime for each of the Member States.

These reports resulted in a draft Directive providing for minimum standards in building contracts, a harmonised limitation period for actions, and compulsory defects insurance⁸³. However, a proposed European Directive on Liability was never implemented⁸⁴, having apparently foundered due to lack of support from key member States such as Britain, Germany and Denmark⁸⁵. Regarded as unnecessary as a driver of inter-state trade, and incidental to the single market, the particular plight of the home buyer is apparently not a priority for the European consumer protection project.

While purchasers of housing may buy throughout the Union, the builders of housing are typically local or national, with little cross-border activity in the residential construction market. A 2017 European Commission report into Cross-Border Trade for Construction Products reports a 48% increase in intra-Community trade in construction products between 2003 and 2015, but no corresponding statistics are available in respect of the intra-Community trade in construction services.⁸⁶ As European consumer policy is motivated to a significant extent by the objective of facilitating cross-border economic activities, there may be little pressure on the Union to promote consumer interests in residential construction services.

Another significant factor is the existing differences between civil and common law

⁸⁰ Benoît Kohl, 'Towards a European Consumer Construction Law?' (2010) *International Construction Law Review* 211.

⁸¹ Claude Mathurin, *Étude des responsabilités, des garanties et des assurances en vue d'une harmonisation au niveau communautaire*, 1989.

⁸² GAIPEC, *Liability and insurance regimes in the construction sector*, 1992

⁸³ Brian Drake (ed), *Construction Economics in the Single European Market* (E & FN Spon 1995), 150.

⁸⁴ Kohl (n 80), 215.

⁸⁵ *Ibid* 216.

⁸⁶ European Commission, 'Cross-Border Trade for Construction Products', Main Report, October 2017.

jurisdictions in the level of protection offered to consumers. A number of European countries (including France and Belgium) impose 10-year statutory warranties of quality on builders, which must be supported by mandatory ‘decennial’ insurance. An initiative which explored the possibility of harmonising national laws with regard to remedies apparently foundered in the early 1990s, in part because a number of European countries already had a relatively protective regime for consumers of consumer-buyers of homes.⁸⁷ The European Union has concentrated its efforts in the years since on the aspects of residential construction that involve cross-border implications, such as the movement and marketing of construction products within the Union, now regulated by the Construction Products Regulation.⁸⁸

Consumer protection in public and private law

People living in houses and apartments have almost invariably entered into contracts for the right to do so, either as purchasers or tenants; at least one adult in each housing unit will have done so. We must, therefore, enter into contracts in order to benefit from one of the necessities of life, that of shelter. It is therefore essential that the terms of such contracts should be examined for fairness and regulated if necessary. At present, the contracts for construction and sale of a residence, however, is regulated only by the grounds on which the common law will set aside certain terms, along with the Sale of Goods and Supply of Services Act 1980 and the Unfair Terms in Consumer Contracts Regulations 1995.⁸⁹ The 1980 Act implies terms in favour of the purchaser; the 1995 Regulations relieve the purchaser from performance or liability arising from terms deemed unfair by the Regulations. The 1995 Regulations implemented the Unfair Contracts Terms Directive 1993⁹⁰, which has been described by Weatherill as ‘the first incursion of Community law into the heartland of national contract law thinking’.⁹¹

In principle, the Directive and Regulations afford a significant measure of protection to

⁸⁷ Kohl (n 80), 224.

⁸⁸ Construction Products Regulation (n 75).

⁸⁹ European Communities (Unfair Terms in Consumer Contracts) Regulations, SI 27/1995 as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000, SI No. 307 of 2000 amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013, SI 160 of 2013.

⁹⁰ Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, implemented in Ireland by the 1995 Regulations (n 89).

⁹¹ Weatherill, (n 71), 115.

consumers. Article 3 (1) of the Directive provides as follows:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The equitable principle of unconscionability is described by Wheeler and Shaw as 'an ancient equitable jurisdiction to set aside certain unconscionable bargains where one party is in a position to exploit the weakness of the other'.⁹² Although it still appears in the American jurisprudence⁹³, the doctrine has been subsumed, to an extent, into various instruments of consumer protection legislation, of which the most significant in Irish law are the Unfair Terms in Consumer Contracts Regulations 1995⁹⁴ and 2013⁹⁵. The court is empowered pursuant to the 1995 Regulations to disapply terms that are unfair. The standard of review is established by the general language of the Regulations and supplemented by a Schedule of terms that are presumed to be unfair.

The predecessor in English law of the Unfair Contract Terms Directive, the Unfair Contract Terms Act 1977, has been described by Wheeler and Shaw as 'the central plank of legislative intervention in the field of contractual justice'.⁹⁶ Wheeler and Shaw refer to 'individualism' of social contract theory, which they say 'continues to find an echo in the dominance of individualism in neo-classical contract doctrine today'.⁹⁷ The legal structure for the purchase of new housing in Ireland reflects this dominance; although purchasers are invariably represented by solicitors, they nonetheless enter into contracts that contain a number of terms that are seriously prejudicial to their interests, such as the restriction on assignment and as will be discussed in chapter 5 below, the arbitration agreement.

⁹² Sally Wheeler and Jo Shaw, *Contract Law Cases, Materials and Commentary* (Clarendon Press 1994), 541.

⁹³ Eric A Posner, 'Contract law in the welfare state: A defense of the unconscionability doctrine, usury laws, and related limitations on the freedom to contract' (1995) *The Journal of Legal Studies* 283; Brown argues that recognition of unconscionability in the Uniform Commercial Code in 1954 contributed to its incoherent application in subsequent jurisprudence, in failing to specify sufficiently what constitutes unconscionable behaviour, and that 'the value of unconscionability to commercial transactions has been somewhat questionable because of the uncertainty in its definition as well as its application': Evelyn L Brown, 'The Uncertainty of UCC Section 2-302: Why Unconscionability Has Become a Relic' (2000) 105 *Com LJ* 287, 288, 307.

⁹⁴ Unfair Terms in Consumer Contracts Regulations 1995, SI 27/1995.

⁹⁵ Unfair Terms in Consumer Contracts Regulations 2013, SI 160/2013

⁹⁶ Wheeler and Shaw (n 92), 475.

⁹⁷ *Ibid* 123.

The building contract is a somewhat artificial legal structure to conceal the reality that the purchaser is buying a speculatively-built house from a developer, and the purchaser's role in the residential building bears few of the hallmarks of the traditional employer-contractor relationship, save with regard to payment. In contrast to commercial employers, the home buyer has no right of inspection or evaluative role with regard to the quality of the works, and has no representative entitled to access the site and inspect the works.⁹⁸

The Law Society issued a Practice Note in 1995 in response to a complaint 'that a firm of builders operating in the Dublin area has apparently instructed its solicitors not to return parts of the building contract and agreement of sale executed by the builder/vendor to the purchaser's solicitors until the closing'. The Note states that the practice is 'unacceptable', in part on the basis that 'A solicitor for a purchaser is in considerable difficulty in preparing a certificate of title for a lending institution if that solicitor is not in possession of parts of the contract completed by the builder/vendor'.⁹⁹ This statement suggests that the building contract is principally intended as evidence of the purchase of the unit, for the purpose of the lending institution's requirements, rather than as any meaningful description of obligations undertaken by the builder on behalf of the purchaser.

A related practice which emerged during the late 1990s was that of introducing significant amendments to the Law Society building agreement ('the LSBA') which were prejudicial to purchasers. The Law Society made a complaint to the Office of the Director of Consumer Affairs, calling on the DCA to use the powers in Unfair Terms in Consumer Contracts Regulations 1995 in order to seek a High Court declaration prohibiting the use of such terms.¹⁰⁰ In 2001, the Director of Consumer Affairs, with the support of the Law Society, obtained a High Court order prohibiting the use of a list of unfair clauses in the LSBA.

⁹⁸ In contrast, clause 11 of the RIAI form of Building Agreement typically used for private sector construction in Ireland gives this to the Architect, appointed by the employer. The Employer's Representative discharges a similar role in the standard public works contracts used by the Irish Government.

⁹⁹ Law Society of Ireland, Practice Note, 'Return of completed Building Contract/ Agreement for Sale', 1 August 1995.

¹⁰⁰ *In the Matter of an Application pursuant to Article 8 (1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*, unreported, Kearns J., 20 December 2001; 'Court slams door on unfair building contracts', Gazette of the Incorporated Law Society, January 2002, 5.

The application was made due to the practice that had emerged of solicitors acting for builders and developers inserting additional clauses into the LSBA that were very prejudicial to consumers, such as the following

1. A power for the builder to re-sell the house or apartment if any payment from the buyer was late by more than 14 days, even where the buyer had made stage payments;
2. Exclusion of any liability for the builder in respect of defects unless they were acknowledged in writing by the builder;
3. A clause that limited the buyer to one 'snag list' only, which had to be submitted within 7 days of notice from the contractor's solicitor;
4. A right for the builder to change materials, specifications and to change 'the dimensions of the site and building' during construction.

An order was granted by the High Court in December 2001 prohibiting the use of such clauses or 'any term that is intended to, or does, in fact, have like effect'. In the article in the Law Society Gazette in which the proceedings are reported, it is stated that 'It has long been the Conveyancing Committee's view that there should be no need whatsoever in the vast majority of new house purchases to go outside the general terms and conditions of the standard building agreement...'¹⁰¹

A Practice Note subsequently issued by the Conveyancing Committee of the Law Society noting that 'a number of solicitors for builders are still using the prohibited terms and terms having the like effect as those found to be unfair', and that complaints arising from breach of the High Court order 'may be deemed to be misconduct'.¹⁰² Despite the High Court order, the Law Society has issued practice notes on two subsequent occasions, most

¹⁰¹ Ibid 17.

¹⁰² Law Society of Ireland Conveyancing Committee Practice Note, 2005. The ODCA noted in its Annual Report for 2006 that 'In 2006 ODCA agreed an arrangement with the Law Society of Ireland allowing building contracts in breach of the 2001 High Court Order to be referred to their Complaints and Client Relations Committee for possible disciplinary measures against the solicitors involved. Office of Director of Consumer Affairs, *Annual Report* (Office of the Director of Consumer Affairs, 2006), 11.

recently in 2016,¹⁰³ to warn practitioners that the prohibited clauses continue to be included in Building Agreements for new houses and apartments. Neither the High Court order, nor the threat of disciplinary proceedings by the Law Society against solicitors who propose such clauses, have eliminated the practice.

It is apparent from the above discussion, that the Law Society lacks the means of regulating the content of building agreements between builders and purchasers of dwellings; in this respect, the value of its ‘gatekeeper’ role as curator of the main contract terms governing residential construction must be doubted. It is arguable that this failure to provide effective means of preventing the use of unfair terms in residential construction contracts constitutes a breach of Article 7 (1) of the Unfair Contract Terms Directive, which provides that ‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’.

It is notable in this regard that even the unamended version of the LSBA contains two terms, the arbitration agreement and the restriction on assignment, that are challenged in chapter 5 of this thesis on grounds of procedural injustice, and that have been effectively prohibited in two Australian jurisdictions.¹⁰⁴

A communication of the European Commission from April 2018 announced a package of measures to enhance consumer protection by means of a Directive providing for improved enforcement and modernisation of EU consumer protection rules, and a Directive on representative actions for the protection of collective interests of consumers. The Communication states that the intention of the second Directive is as follows:

This proposal intends to facilitate redress for consumers where many consumers are victims of the same infringement, in a so-called mass harm situation.¹⁰⁵

¹⁰³ Law Society of Ireland Conveyancing Committee Practice Notes, 13 December 2005 and 4 March 2016; in the practice note of March 2016, it was noted that ‘There has been an increase in the number of queries to the Conveyancing Committee about unfair terms in building contracts for new housing.’

¹⁰⁴ Domestic Building Contracts Act 1995, s 14 (Victoria); Home Building Act 1999, s 7c (New South Wales) each prohibit pre-dispute arbitration agreements; each of the statutes also provides for warranties in favour of home buyers that can be enforced by second and subsequent buyers of the home within the limitation period.

¹⁰⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM (2018), 183 final.

The Communication also refers to proposed new remedies for consumers whereby the consumer could seek financial compensation for harm caused by unfair commercial practices. This proposal appears aimed at situations such as Volkswagen's misleading advertising of emissions for new vehicles; it may be difficult for a home buyer to demonstrate that loss occurred from an unfair term.

It is arguable that, if the Law Society is not able to effectively police the inclusion of such clauses, home buyers should be able to appeal to the Competition and Consumer Protection Commission that could be empowered to bring enforcement action against vendor/developers who persisted with such practices.

Standard form building contracts and contractual justice

The use of standard form building agreements for purchase of new housing raises normative considerations of contractual justice. Von Mehren suggests that 'The justice of an autonomous ordering of production and distribution decision can be done from two perspectives - one procedural, the other substantive.'¹⁰⁶ Contractual justice, on this view, requires parties to 'act with a degree of awareness, independence, and responsibility', without which the contract would lack procedural justice.¹⁰⁷

Parties cannot necessarily be treated as negotiating contracts on the basis of procedural equality, according to von Mehren: '...certain parties, individually or as a class, are such poor traders that the other party to the transaction will almost always obtain the best terms possible...'.¹⁰⁸ He distinguishes between 'one-sided ordering', which occurs, for example, where one party presents its own standard form to the other, and 'two-sided ordering', where the parties negotiate terms in which they both have an input, suggesting that substantive justice provides justification for legal intervention in 'one-sided ordering' cases on the basis that the gains from such transactions may accrue almost exclusively to the party presenting those terms.¹⁰⁹ The LSBA, although regarded as the industry standard, is invariably presented by the seller of the new home, and often amended in

¹⁰⁶ A. von Mehren, 'Contractual Justice' in Mojr/Nijhoff (ed) *International Encyclopedia of Comparative Law*, vol vii (International Encyclopedia of Comparative Law, 1982), 64-67.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 67.

order to introduce amendments that are prejudicial to the buyer.

Bates argues that sellers impose terms in contracts with consumers, and thus that enforcement by courts of such terms allows the seller ‘to reshape the law to his advantage’.¹¹⁰ He suggests that transactional efficiency requires standard form contracts, but that such contracts are a fictional representation of an ideal transaction, based on ‘bargaining, choice, and assent’¹¹¹, with the result that ‘the consumer-seller contractual relationship has become one primarily of form rather than substance’.¹¹² This is an aspect of one of the research themes of this thesis: the largely private nature of Irish residential construction law, in which both the contracts and the resolution of disputes arising from those contracts are devised and administered largely by private actors.¹¹³

Hale argues that the fact that a person enters into a contract without being legally compelled to do so does not mean that the person is not in fact compelled to do so.¹¹⁴ Inequality, however, follows from the holding of property and protection of property rights by law; Hale comments that ‘Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others’.¹¹⁵

This is a key aspect of the context for sales of new homes, which defines and shapes the contractual relationships in which interests in property are created and traded, and in which the bargaining position of the purchaser or lessee will inevitably be affected by the economic power of the seller / lessor, particularly during periods of land scarcity. Foucault refers to this context as ‘a net-like organisation’ in which ‘individuals are the vehicles of power’.¹¹⁶

The incorporation into contract law of normative considerations of fairness and equality

¹¹⁰ Larry Bates, 'Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection' (2002) 16 *Emory International Law Review* 1, 2.

¹¹¹ *Ibid* 3.

¹¹² *Ibid* 6.

¹¹³ The LSBA was drafted as a joint exercise between the Law Society and the Construction Industry Federation; it, in turn, requires disputes arising under the agreement to be referred to arbitration, with the arbitrator to be appointed by the President of one or other body. The purchaser's solicitor is, of course, a member of the Law Society, but (as further discussed in chapter 3), the Law Society and its members occupy a ‘gatekeeping’ role which has contributed to the contractual injustice experienced by home buyers.

¹¹⁴ Robert L. Hale, 'Bargaining, Duress and Economic Liberty' (1943) 43 *Columbia Law Review* 603, 603-606.

¹¹⁵ *Ibid*, 628.

¹¹⁶ Michael Foucault (ed), *Two Lectures* (Power/Knowledge, Harvester 1980), 98.

of bargaining power is the basis for the variety of legal interventions under the heading of ‘consumer law’. Wilhelmsson refers to this conception of private law as ‘social private law’, which he characterises as ‘the materialisation of private law in the form of norms for protecting the weaker party in a legal relationship’, of which the central question is ‘to what extent can and should a party’s economic and social position be taken account of as a legal fact in contract law?’¹¹⁷

Commercial construction employers and home buyers contrasted

The commercial employer will use a form such as the standard form of contract published by the Royal Institute of Architects in Ireland¹¹⁸ which affords the Employer significant rights including the right to appoint a representative who is entitled access the site of the works and may give instructions to the contractor requiring defective work to be put right. The home buyer, by contrast, will, except for bespoke or once-off housing, contract on the basis of the LSBA, which ensures that he is entirely excluded from the building process, with no power to inspect or intervene. As Britton points out, a commercial employer also enjoys greater security for performance following completion of the works, noting that the employer may have retained part of the contract sum, or the contractor may have provided a bond or a parent company guarantee.¹¹⁹

The position is somewhat different, arguably, in the case of the person who sits between these two categories. If a person purchases a house or apartment as an investment, should they be treated as a commercial investor or as a home-owner/consumer? Should they be deprived of a remedy on the basis that they own a residence elsewhere? The definitions of ‘consumer’ in the legislation as a person ‘acting outside their business, trade or profession’ would not exclude such a person unless their purchase of housing was regarded as being made in the course of their business.

Therefore, a person whose ‘business’ is not primarily in the field of property management and development might purchase several investment properties and yet still be regarded by the law as a ‘consumer’ in respect of those purchases. Should such a person be denied

¹¹⁷ T. Wilhelmsson, *Critical Studies in Private Law* (Kluwer 1992), 72.

¹¹⁸ Standard form of Contract 2012 edn; (Royal Institute of Architects in Ireland, 2012).

¹¹⁹ Philip Britton, ‘Judicial Remedies for Construction Defects: Common Law, Equity, or Statute?’ (Society of Construction Law May 2016), 6.

enhanced legal rights? If the purchaser owns numerous investment properties, should they be treated differently? One way to avoid having to draw a dividing-line in cases such as this is for the remedy to ensure the persistence of rights in the building itself, rather than being designed by reference to the identity of the purchaser. A stand-alone statutory duty that operated independently of the parties' contractual arrangements could achieve this objective.

Would better information lead to improved outcomes for consumers?

Mandatory disclosure requirements by sellers before contracts are entered into are now a familiar feature of the consumer contracts landscape.¹²⁰ Ben-Shahar has described the opportunity given to consumers to read the terms of standard form contracts before entering into them as a 'myth', argues that individuals cannot appreciate the implications of contract terms, nor make a meaningful assessment of the risks involved in the transaction;¹²¹ in his view, 'attentions should be focused on identifying better methods of empowering individuals to "legislate" their own private affairs through private law'.¹²² He concludes that for consumers to be given opportunities to read the 'fine print' of contracts 'is sterile ammunition against the power and sophistication of contract drafters'.¹²³

From the perspective of defects, the difficulty for Irish consumers with regard to the information that they are given in relation to the purchase of housing is that they will be given virtually no information about the condition of the unit. The common law of *caveat emptor* is reflected in the standard Law Society contract for sale, and solicitors typically advise their clients to retain the services of a professional architect or surveyor to inspect the unit before completion of the purchase. There is no incentive or requirement for sellers to determine the condition of their own properties prior to sale; instead, the buyer must determine what they can about the unit's condition.¹²⁴ Many defects that have

¹²⁰ Parts II and III of the Consumer Credit Act, for example, prescribe requirements in relation to the advertising of financial products, information to be furnished to consumers before entering into credit agreements, and provide for a 10-day period during which the consumer may withdraw from the agreement. Consumer Credit Act 1995, Part II and III, s. 30.

¹²¹ Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' (2009) 5 *European Review of Contract Law* 1, 14.

¹²² *Ibid* 6.

¹²³ *Ibid*, 27.

¹²⁴ Section 45 of the Sale of Goods and Supply of Services Act 1980 provides a statutory remedy in cases of non-fraudulent misrepresentation, where the representation would have been actionable at common law if made fraudulently, and where the maker of the representation did not have reasonable grounds for believing the representation to be true. However, s 45 could only provide a remedy where a representation had actually been

emerged in Irish housing stock in recent years might not be detectable on a pre-purchase inspection by a buyer's adviser; fire-stopping in apartment buildings is one example, where the relevant elements would not be visible without a more intrusive survey, for example to include the opening up of walls, than that typically carried out.¹²⁵

In a note from the Harvard Law Review from 1986,¹²⁶ two cases are cited in which real estate brokers were held liable for failure to disclose defects of which they were aware. In the first, *Easton v Strassberger*,¹²⁷ an appellate court in California found that the defendant real estate broker was in breach of duty for not having ascertained the condition of the property in question before offering it for sale, citing the 1963 decision in *Lingsch v Savage* to the effect that real estate brokers were required to disclose all material facts to buyers.¹²⁸ The closest equivalent to a similar doctrine under Irish law would be the tort of deceit, which differs from the US formulation of 'fraudulent concealment' in requiring the making of a false statement, rather than the withholding of information.¹²⁹

One of the recommendations of the 2016 report of the English All-Party Parliamentary Group for Excellence in the Built Environment was that builders should be required to provide buyers with a comprehensive information pack, including details about plans and specifications, warranty and building control inspections, what the warranty covers in simple language, and how to contact the builder in case of defects.¹³⁰ It is questionable whether additional information would be sufficient to enable the purchaser to make an informed decision in relation to risk, however, as it seems unlikely that the vendor would volunteer information in relation to latent defects.

Waldron casts doubt on the usefulness of information as tool for consumer protection, noting that

made, and vendors typically do not disclose information in relation to the condition of the home. The Law Society of Ireland standard form Requisitions on Title do not seek information about potential defects or the physical condition of the property in sale.

¹²⁵ The Law Society Requisitions on Title (Law Society of Ireland, 2015) query whether the property in sale has ever been inspected by a fire authority, and if so, what the fire authority's requirements were in light of its inspection; there is also a query as to whether any notices have been served under the Fire Services Act 1981 and/or under the Building Control Act 1990.

¹²⁶ Note: 'Imposing Tort Liability on Real Estate Brokers Selling Defective Housing', 99 Harvard Law Review, 1986, 1861-1873.

¹²⁷ *Easton v Strassberger* 152 Cal. Appl. 3d 90, 199 Cal. Rptr. 383 (1984).

¹²⁸ *Lingsch v Savage* (1963) 213 Cal. App. 2d 729.

¹²⁹ *Derry v Peek* (1889) 14 App Cas 337.

¹³⁰ All Party Parliamentary Group for Excellence in the Built Environment, 'More Homes, Fewer Complaints', Report from the Commission of Inquiry into the quality and workmanship of new housing in England, (July 2016), 7-8.

If we have learned anything from this disaster [the leaky condominium crisis in British Columbia], it surely should be that the consumer will always be ill-prepared to protect herself in the highly technical, complex environment of the construction industry.¹³¹

The statistics regarding the number of home buyers who do not retain surveyors to inspect properties suggests that better information would not lead to better choices by home buyers, and may reflect a misunderstanding of the potential likelihood and risk of defects, rather than recklessness. Waddams suggests that a warranty from a vendor in favour of the purchaser would be preferable to a legal duty of disclosure. He notes that, in land transfer transactions in Ontario, a standard form of sales contract was modified following discovery of widespread dangerous insulation in home construction:

The buyer's disappointment and loss are the same whether or not the seller knew or could have known the true facts. The warranty approach, therefore, may, if the scope of the warranty is clear, lead to greater certainty and greater simplicity of application, and may match the buyer's expectation more exactly.¹³²

The inclusion of a contractual warranty in the sales contract for housing would also provide the buyer with a more beneficial damages regime, in that the law of contract does not restrict recovery of damages for economic loss in the same manner as the law of tort.¹³³ Ramsay argues that 'the information approach may be inappropriate where consumers face high processing costs..or where consumers, even with perfect information, systematically underestimate the risks of low-probability events'.¹³⁴ It is submitted that the fact that purchasers will have informally committed to purchasing a home (via the 'sale agreed' procedure) prior to having any survey carried out makes it significantly less likely that the buyer will be able to make an informed decision about risk without the decision being afflicted by the optimism bias described by Ramsay above.

¹³¹ Mary Anne Waldron, 'How T-Rex Ate Vancouver: The Leaky Condo Problem' (1999) 31 *Canadian Business Law Journal* 335, 364.

¹³² S.M. Waddams, 'Pre-contractual duties of disclosure' in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Essays for Patrick Atiyah, Clarendon Press 1991), 246.

¹³³ See discussion in chapter 3 regarding recovery of economic loss in tort claims.

¹³⁴ Ramsay (n 33), 101.

B: The persistence of rights and the builder's windfall, Part 1

The LSBA is divided into two parts: the first is the Building Agreement, and the second is the conditions applicable to that agreement.

The builder's warranties of performance in the LSBA are set out in the Building Agreement, as follows:

1. The Contractor will for the Contract Price build and completely finish in a good substantial workmanlike manner and deliver to the Employer the works on the Site in accordance with the Plans and subject to the conditions annexed hereto numbered 1 to 17.
2. The Contractor shall complete the Works and make same fit for habitation and use (vacating the Site and clearing away all scaffolding, unused materials and rubbish therefrom) within calendar months from the date hereof.

The conditions contain few references to quality, save that condition 2 provides as follows:

2. (a) The materials and workmanship shall be of the respective kinds described in the Plans and where not so described shall be of reasonable quality.

This condition is notable for the fact that appears to be less protective of the consumer's interest than the term implied by section 39 of the Sale of Goods and Supply of Services Act 1980, that any materials used in a services contract shall be 'reasonably fit for purpose'.

The warranties of performance at 1 and 2, however, would be sufficient to allow a home owner to bring an action for breach of contract in the event of defects, although the home owner would have to demonstrate that the effect of the defects were that the works were not completely finished, and/or in a 'good substantial workmanlike manner'. There are no reported decisions of the Irish courts on the meaning of these conditions, presumably on the basis of the compulsory arbitration provision also included in the conditions. They are nevertheless of great significance in terms of ascertaining the buyer's principal legal remedy; if it is correct that construction defects are the province of contract and not tort, then these warranties should invariably be invoked in the event of housing defects. The

reasons that the warranties have not featured significantly in the litigation to date, however, are due to widespread builder insolvencies (with the result that actions against builders were not pursued and/or defended in many cases), and due to privity of contract.

The common law rule of privity of contract has not been modified in Ireland as it has in England and Wales.¹³⁵ Therefore, the residential construction contract (usually in the form of the LSBA) that forms part of the purchase transaction, including the crucial implied terms of quality from section 39 of the Sale of Goods and Supply of Services Act 1980 (discussed in the next section), does not pass to subsequent purchasers of the unit unless there is an assignment of the building contract.

This results in relief from liability in contract where the home is sold during the initial limitation period in contract, which will be either six or twelve years depending on how the contract has been executed; this is characterised in this thesis as the ‘builder’s windfall’. This is a significant loss of value to subsequent purchasers, as the contractual warranties are considerably broader in scope than the typical home defects policy.¹³⁶

Libertucci suggests that the relative frequency with which American homes are sold is grounds for recognising that subsequent purchasers should not be disadvantaged by the choices of the first purchaser:

Because society is now so fluid, it is reasonable to assume that when a house is sold to a purchaser, that house will be resold within a few years. Subsequent purchasers should not be penalized because they did not happen to be the “first” purchaser’.¹³⁷

Libertucci goes on to argue that courts should not deny a remedy to subsequent purchasers simply because they have not sustained injury from the defects, and refers to the Uniform Land Transactions Act, which provides for a 6 year limitation period¹³⁸, which would

¹³⁵ By the Contract (Rights of Third Parties) Act 1999; Paul A McDermott and James McDermott, *Contract Law* (2nd edn, Bloomsbury Professional 2018 (Kindle edition)), chapter 19, [19.01].

¹³⁶ The limitations of the HomeBond home warranty policy commonly offered with sales of new housing in Ireland are set out and analysed at chapter 6.

¹³⁷ Linda M. Libertucci, 'Builder's Liability to New and Subsequent Purchasers' (1991) 20 Sw U L Rev 219, 230, and see also at 241 Libertucci's reference to the decision of the Supreme Court of Illinois in *Redarowicz v Ohlendorf* 92 Ill. 2d @ 175, 441 N.E. 2d at 324, in which the court stated that 'the subsequent purchaser should not be denied the protection of the warranty of quality because he happened to purchase the home about one year after the original buyer'.

¹³⁸ Uniform Land Transactions Act, S 2 – 521.

begin to run when the first warrantee obtains possession of the property, and warranty of quality that runs with the land.¹³⁹ Unfortunately, the Act was not adopted by a single one of the United States.¹⁴⁰

...as land speculation proliferates, multiple numbers of unprotected subsequent purchasers will appear on the title during the initial ten years following the original purchase and be left with no remedy. The structure of the statute of limitations will have created unwilling intermediaries which have the effect of shortening the statute of limitations and unfairly cutting liability.¹⁴¹

Other jurisdictions have dealt with this issue by providing that subsequent purchasers may rely on the original building contract as if they were party to it.¹⁴²

PRIVITY OF CONTRACT & THE BUILDER'S WINDFALL, PART 2

What is referred to in this thesis as the 'builder's windfall' arises where the builder is relieved from contractual liability by the transfer of the home within the limitation period for actions under the original building contract. At present, the LSBA is drafted on the basis that it will be executed under seal by the parties, giving rise to a limitation period of 12 years from the date of the breach of contract. As the contract cannot be assigned, if the house or apartment is sold during that 12-year period, the builder receives a 'windfall' of relief from potential liability under the contract as the only person who may enforce it no longer has an interest in the property, and will suffer no actionable loss if a defect becomes apparent subsequent to the transfer.

Privity of contract

¹³⁹ Libertucci, (n 137), 241; Uniform Land Transactions Act, Section 2312 (b).

¹⁴⁰ Richard Amandes, 'The Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act Twenty Years Later: Why Have There Been No Adoptions?' (1995-1996) 20 Nova Law Review 1033.

¹⁴¹ Libertucci, (n 137), 244.

¹⁴² The 1998 Homeowner Protection Act of British Columbia provides at section 23 (3) that the warranty in section 23 (1) is for the benefit of whoever is the owner of the new home from time to time until the end of the period within which an action may be brought under subsection (5), and that owner is deemed (a) to have given good consideration for the benefit of the protection, and (b) to be the only person entitled to recover damages for a breach of the protection. Similarly, the warranties in the Home Building Act 1989 of New South Wales are enforceable by successors in title to the original employer, by virtue of s 18B (f) of the Act.

The common law has long recognised the principle of privity of contract, which has two elements. Firstly, a person is not bound by, and secondly, is not entitled to enforce the terms of, a contract to which he is not a party. The rule has been subject to various modifications over time.¹⁴³ Furmston and Tolhurst observe that even in its earliest formulation under Roman law, the rule was ‘not without qualifications’.¹⁴⁴ They trace the current formulation of the rule to *Tweddle v Atkinson*¹⁴⁵, which they regard as the authority that confirmed the second aspect of the rule, that a third party cannot enforce a contract, even if the contract is made for the third party’s benefit.¹⁴⁶ The authors note, however, that the discussion in the case ‘is overwhelmingly in terms of consideration. The words ‘privity of contract’ do not appear.’¹⁴⁷ Crompton J treated the case as turning on the rule that consideration must move from the promisee, which Furmston and Tolhurst regard as another formulation of the privity rule itself.¹⁴⁸

Furmston and Tolhurst also appear to suggest that the court in *Tweddle* went further than was necessary in foreclosing enforcement by a third party for whose benefit the contract was made, citing Flannigan, who lamented that the concession by counsel in *Tweddle* on the privity point meant that ‘the general third party right of action should be lost on an unnecessary concession’.¹⁴⁹

The idea that the court could have recognised and retained such an action is consistent with the observations of the Law Commission in its 1996 Report to the effect that ‘...we see our draft Bill as achieving at a stroke and with certainty and clarity what a progressive House of Lords might well itself have brought about over the course of time’.¹⁵⁰

Merkin takes issue with the view that the older cases treat privity and the requirement for

¹⁴³ A 19th century article in the Harvard Law Review noted, for example, that the doctrine was ‘not taught in the School in the present day’. Jesse W. Lilienthal, ‘Privity of Contract’, Harvard Law Review Vol. 1, No. 5 (Dec. 15, 1887), 226-232.

¹⁴⁴ Michael Furmston and Gregory Tolhurst, *Privity of Contract* (Oxford University Press 2015), 2.

¹⁴⁵ (1861) 1 B & S 393, 121 ER 762.

¹⁴⁶ Furmston and Tolhurst, (n 144), 5.

¹⁴⁷ *Ibid* 6.

¹⁴⁸ *Ibid* 6. The authors refer to the dicta of Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge and Co. Ltd.* [1915] AC 847, in which his Lordship articulates two principles: privity of contract, and the requirement that consideration must move from the promisee, as ‘two different ways of saying the same thing’. (Furmston and Tolhurst, (n 144), 2.

¹⁴⁹ Furmston and Tolhurst, (n 144), 7. Robert Flannigan, ‘Privity – the End of an Era (Error)’ (1987) 103 LQR 564, 568.

¹⁵⁰ Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises*, (Law Com No 40, 1970)

5. Lord Denning also took the view that the common law should permit enforcement of contracts by third party beneficiaries, on the basis that to do so was to do no more than to hold the promisor to the contract:

consideration as aspects of the same principle, however, noting that in *Price v Easton*¹⁵¹, two members of the court based their decision on the fact that the claimant in the case was not party to the contract, which Merkin describes as ‘noteworthy for its recognition of the separability of the issues of consideration and privity’.¹⁵² This distinction between privity and consideration supports for the discussion that follows with regard to the position of the home owner who is a successor in title, as it concentrates on a key objection of the common law, that a stranger to the contract had not provided value for the promise.

From a normative perspective, this objection could be dealt with by treating the consideration paid by the original home buyer as sufficient to satisfy this requirement notwithstanding subsequent transfers of the property, at least within the limitation period for actions under the contract. The reason for this is that there will only be one owner or group of owners at any given point in time who could sue in respect of the loss resulting from a defect. The financial loss that is caused by a home defect includes the costs of repair, alternative accommodation, professional fees to assess and quantify the damage as well as supervising the repair works, and other associated expenses.¹⁵³

McDermott and McDermott comment that the rule is ‘well established in Irish law’, citing *Murphy v Bower*¹⁵⁴, in which the Court of Common Pleas rejected a claim from a railway contractor against the defendant engineer in respect of a refusal to certify the value of works, where the engineer had been engaged by the employer under the contract.¹⁵⁵ The authors point to an ‘uneasiness’ on the part of the Irish courts with regard to the rule, however, citing *Glow Heating Ltd. v Eastern Health Board*¹⁵⁶, in which a sub-contractor successfully relied on a payment clause in a main construction contract where the main contractor had become insolvent.¹⁵⁷

¹⁵¹ (1833) 4 B & Ad 433.

¹⁵² Robert Merkin (ed.), *Privity of Contract* (Informa Law 2000), 15.

¹⁵³ As discussed above in chapter 2, a home owner may also claim damages in respect of distress and inconvenience; this head of damages will also only be suffered by the owner or owners for the time being of the property. Therefore, there should be little risk to the builder that, if actions could be brought in contract by any person who may own the house during the limitation period, that the builder would be exposed to a multiplicity of claims in respect of the same damage. For example, if a house’s chimney is defective, and the second owner recovers the repair cost from the builder by relying on the original building contract, a subsequent owner could not claim in respect of the cost of that defect (as the third owner will suffer no loss following the repair) but could plausibly recover in respect of a separate defect, in the same manner in which the original owner, had there been no transfers of the property during the limitation period, could theoretically claim at different times in respect of different defects causing loss.

¹⁵⁴ *Murphy v Bower* (1868) IR 2 CL 506.

¹⁵⁵ Paul A McDermott and James McDermott, *Contract Law* (2nd edn, Bloomsbury Professional 2018 (Kindle edition), [19.07]. For a discussion on trusts and agency as exceptions to the rule see paragraphs [19.21] – [19.55].

¹⁵⁶ *Glow Heating Ltd. v Eastern Health Board* [1988] IR 110.

¹⁵⁷ McDermott and McDermott, (n 155) [19.11]

As the carrying out of construction works is necessarily a multi-party activity, privity of contract is of particular relevance to the question of the remedies for defects, in at least two respects.

Firstly, the person who bears the economic cost of remedying a defect (in our example, the homeowner) will generally have entered into two contracts only, one with the vendor of the land, and one with the builder. The homeowner cannot, therefore, enforce the obligations contained in any of the myriad of agreements for supply of services and goods to the building of which he is to be the ultimate owner, such as the appointments of the professional team engaged in designing the building, or the contracts for supply of building materials or of fittings or services such as kitchens, heating and plumbing systems.

In theory, the homeowner should not require direct contractual remedies against each of the parties involved in the supply and construction of the finished unit, as the building contractor should be liable as a matter of contract law for the default of his sub-contractors. Indeed it may be undesirable that a person with a contractual remedy should not pursue that rather than attempting to secure a remedy in tort extrinsic to the contractual chain of which the building contract and the various contracts that support the building contract form part. As noted by Lord Pearce in the 1968 decision of the House of Lords in *Young & Marten Ltd. v McManus Childs Ltd.*,¹⁵⁸

If...the employer can sue the contractor in respect of the faulty materials, then the contract can in turn recover from the manufacturer with whom the ultimate blame lies. This would follow the normal chain of liability which attaches to sales and sub-sales of goods.¹⁵⁹

Secondly, the principle is of particular significance in relation to situations where a new building is sold within the period of the original limitation period under the relevant building contract. If the building contract has not been assigned by the original party to that contract to the subsequent purchaser or purchasers, those purchasers have no right to

¹⁵⁸ *Young & Marten Ltd. v McManus Childs Ltd.* [1968] 2 All ER 1169.

¹⁵⁹ *Ibid* [1174] (Lord Pearce).

enforce the terms of that contract, and no remedy against the vendor in respect of the defects.

The LSBA expressly prohibits assignment. The House of Lords, in its 1993 decision in *Linden Gardens Trust v Lenesta Sludge*,¹⁶⁰ held that a purported assignment of a contract which itself prohibited assignment was invalid and that the contract was not capable of being enforced by the purported assignee.¹⁶¹ The House rejected the argument that a prohibition on assignment of a building contract was contrary to public policy; Lord Browne-Wilkinson stated in this respect that:

A party to a building contract...can have a genuine commercial interest in seeking to ensure that he is in contractual relations only with a person whom he has selected as the other party to the contract. In the circumstances, I see no policy reason why a contractual prohibition on assignment of contractual rights should be held contrary to public policy.¹⁶²

It may be argued that the view expressed by the House in *Lenesta* was, perhaps, premised on the typical employer-contractor relationship in a large commercial project. In the case of an individual building contract for a house or apartment that may be one of many in a large development, the policy argument in favour of allowing assignment, particularly after completion of the works, may be much stronger. At that point, the only enforcement action that any home buyer would take would relate to defects in the building works, and the identity of the owner at that time is probably of very little consequence.

It is quite different to the example of a contractor and employer who may have a commercial relationship spanning years and which involves several collaborations on construction project. On a typical once-off residential building project, the contractor will have virtually no contact with the home buyer, and has no long-term interest in the relationship.

¹⁶⁰ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] UKHL 4.

¹⁶¹ *Ibid* [12] (Lord Browne-Wilkinson): Lord Browne-Wilkinson commented as follows in this respect: ‘The reason for including the contractual prohibition viewed from the contractor’s point of view must be that the contractor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract. Building contracts are pregnant with disputes: some employers are much more reasonable than others in dealing with such disputes.’

¹⁶² *Ibid* [14] (Lord Browne-Wilkinson).

In those circumstances, it is arguable that there should be greater flexibility in relation to the rules of assignment of contracts, as the converse situation proves very prejudicial to purchasers within the original limitation period to whom the original building contract is not assigned, and essentially delivers a ‘windfall’ of value to the building contractor, in being exonerated, in practical terms, from any contractual liability arising from works for which it has been paid.

Law Reform Commission Report on Privity of Contracts and Third Party Rights

In its Report on Privity of Contracts and Third Party Rights,¹⁶³ the Irish Law Reform Commission recommended the introduction of legislation to allow third parties to enforce contracts in certain circumstances, analogous to the circumstances dealt with in the Contracts (Rights of Third Parties) Act 1999 of England and Wales.¹⁶⁴ This legislation, if introduced, would be of particular relevance to construction contracts, and would go some way to addressing some of the difficulties for claims set out above.

The Commission proposal, however, would allow third party enforcement of contractual rights only where the contract itself did not prohibit this; the introduction of the 1999 Act in England and Wales does not prevent parties to a contract from agreeing that no third party shall be entitled to enforce the contract. The two original parties to the LSBA will usually be the builder and the first purchaser, and, as noted above, the builder will usually dictate the terms of the contract. It seems unlikely that a purchaser will insist on preserving rights of third parties who might be his successor in title, when excluding the rights will not affect his own rights.

The Report refers to construction contracts as an example of the problems posed by the privity rule, giving the example of a person contracting with a builder for an extension to her mother’s home:

¹⁶³ Law Reform Commission, *Report: Privity of Contract and Third Party Rights*, LR 88 - 2008, (2008).

¹⁶⁴ The 1999 Act gives effect to the report of the Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242 Cm 3329 July 1996), which took account of judicial criticism of the privity rule (Law Commission Report, [2.64]- [2.69]); in *Darlington Borough Council v Wiltshire Northern Ltd.* [1995] 1 WLR 68, Steyn LJ observed that ‘...there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties’. (at 76).

Example 1: Mary contracts with a builder for the construction of an extension to Mary's mother's home. The contract is clearly intended to benefit Mary's mother. However, if the builder refuses to complete the building, or provides a defective service, Mary's mother is not entitled to sue the builder for breach of contract.¹⁶⁵

The same example was used in the earlier Law Commission report.¹⁶⁶

In one sense, this example does not get to the heart of the problem of the privity rule in construction contracts, because in this example, the identity of the beneficiary is known, and the simplest option is for the contract to be entered into by the beneficiary (Mary's mother, in the example given). In the case of residential construction contracts for new homes, however, the first purchaser will not know the identity of the potential beneficiaries of the contract over time, nor whether he will sell the property during the limitation period.

Even if the first purchaser did have this information (for example, in the case of a parent purchasing a home for a child), it seems unrealistic to think that the purchaser will seek to ensure that a subsequent transferee of the home should have the right to enforce the contract, unless alerted to the issue by solicitors, and absent a change in conveyancing practice to provide for the rights of subsequent transferees in this way.

The Commission refers to the particular difficulty of privity with regard to building defects by presenting an example of a developer who will not ultimately own the building.¹⁶⁷ The developer may assign the benefit of its rights under the construction contract to the building owner, who may then enforce the contract, albeit that the owner cannot recover more than the original assignor could have recovered against the builder.¹⁶⁸ This example, however, represents the commercial but not the residential development paradigm; while a commercial owner, investor or tenant may be in a position to insist on assignment of the rights under the original construction contract, an individual apartment or home owner will not, and the management company of an apartment development will

¹⁶⁵ Law Reform Commission, (n 163), 6.

¹⁶⁶ 'Say for example, a client contracts with a builder for work to be done on the home of an elderly relative. If the work is done defectively, it is only the client who has the contractual right to sue the builder for its failure to deliver the promised performance.' Law Commission, (n 164), 43.

¹⁶⁷ Law Reform Commission, (n 163), 10.

¹⁶⁸ *Ibid.*

be under the developer's control until after completion of the construction works, and thus will not receive any assurances of quality or performance, or assignment of any building contract that may have been in place for construction of the development. Another difficulty, acknowledged by the Commission, is that a contractual prohibition may be used to restrain assignment.¹⁶⁹

Both the Law Commission report of 1996 and the subsequent Law Reform Commission report of 2008 refer to the difficulties faced by commercial parties on construction contracts, but fail to acknowledge the particular position of residential home owners who may have no contractual remedy when defects become apparent. The Law Reform Commission acknowledged that their proposed reforms would only confer rights on third parties where this was the intention of both parties, and could be circumvented by a party dealing with a consumer that sought to exclude the rights under the new Act.¹⁷⁰ The Commission concluded, however, that making special provision for consumers was beyond the remit of their proposals and more appropriately considered in the context of consumer protection policy.¹⁷¹ Accordingly, the draft legislation that accompanies the Report allows parties to opt out of its provisions.¹⁷²

The Law Commission report states as follows:

Our proposals will mean...that subsequent purchasers or tenants of buildings can be given rights to enforce an architect's or building contractor's contractual obligations without the cost, complexity and inconvenience of a large number of separate contracts.¹⁷³

The Law Commission characterised as 'perverse and unjust' the situation where the party who has suffered the loss could not sue, while the original contracting party, who has

¹⁶⁹ Law Reform Commission, (n 163), 11.

¹⁷⁰ In the example of a person buying a gift for a friend, for example, the Commission commented that 'The reforms proposed by the Commission would facilitate consumer protection...but would only do so where the retailer and consumer intended to give the friend rights under the contract.' Law Reform Commission, (n 163), 86.

¹⁷¹ The Commission commented in this regard that '...any further reform which offers extra protections to third party consumers, regardless of the intention of the contracting parties, must take place within a general review of consumer law, and not as part of a review of the rule of privity'. (87). In this, the Law Reform Commission followed the approach of the Law Commission in its earlier report, in which it had expressed concern about how its proposals might conflict with other policy developments in the field of consumer policy, including rights of consumers with regard to defective residential construction work (Law Commission, (n 163), 94).

¹⁷² Law Reform Commission, (n 163), 92-93.

¹⁷³ Law Commission (n 162), 1.

suffered no loss, retains the right to sue, citing *Beswick v Beswick*.¹⁷⁴

The rise of collateral warranties

Kelly¹⁷⁵ notes that multi-party construction projects ‘may require the individual negotiating and signing of hundreds of separate collateral warranties, which can be difficult, expensive, and time consuming’. She suggests that the need for such warranties could be avoided by a modification of the privity rule that would allow third party rights to be included in construction contracts, and notes that there is provision for this in the English standard form Joint Contracts Tribunal forms of building contract.¹⁷⁶ Kelly advocates a statutory scheme of third party rights:

If the privity rule was abolished and replaced by a general scheme of third party rights, there would be a reduced need for collateral warranties. Third party rights could be provided for in the main contract, without the need to go through the lengthy process of negotiating and obtaining separate warranties.¹⁷⁷

The use of collateral warranties in construction projects became widespread following the decision of the House of Lords in *D & F Estates v Church Commissioners for England*, on the basis that property owners or others with an interest in the carrying out of construction works could have no legal remedy against contractors and sub-contractors whose services did not meet the threshold of ‘special skill’ contemplated by *Hedley Byrne*. Cornes and Winward comment that:

It follows from the *D. & F.* decision that, for example, tenants, purchasers and funds could not rely in future on the possibility of being able to obtain recompense in tort in respect of defects in design or construction of buildings; hence the immediate and urgent boost in the use of collateral warranties since that decision. The collateral warranty tries to fill the gap in the law of tort by creating a contractual relationship.¹⁷⁸

¹⁷⁴ [1968] AC 58.

¹⁷⁵ Cliona Kelly, ‘Privity of Contract - the benefits of reform’ (2008) 1 Judicial Studies Institute Journal 145. It is noteworthy that such a scheme exists in England and Wales pursuant to the Contract (Rights of Third Parties) Act 1999.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* 152.

¹⁷⁸ David Cornes and Richard Winward, *Winward Fearon on Collateral Warranties* (Blackwell Publishing 2002) 38.

However, the individual homeowner could be regarded as an invisible stakeholder in such arrangements. Collateral warranties are invariably provided for institutions providing construction financing, whose financial risk diminishes as the lender is repaid from proceeds of sale. Warranties are also given to large commercial tenants such as retail institutions taking leases of part of a mixed commercial and residential development. The receipt of a warranty is very much a function of bargaining power; an anchor tenant taking a 35-lease of a unit in a building will demand collateral warranties from designers, contractors and sub-contractors, while the purchasers of apartments who are taking 500-year leases of units in the same building will obtain no such warranties.

If, therefore, the introduction of third party rights should be considered on the basis of minimising the expense and disruption of obtaining warranties on large-scale construction projects, then this argument must apply with a great deal more force when one considers the position of purchasers who are at a considerably greater financial risk, but who lack the negotiating power of a commercial tenant.

The desirability of enhancing the rights of homeowners by contract, rather than by clarification or expansion of remedies in tort, is recognised in the Law Reform Commission report, in which it states that:

The development of a system of third party contractual rights would not hinder future judicial development of a tort of economic loss, but it would facilitate a situation where parties could regulate for themselves their future financial rights, obligations and liabilities.¹⁷⁹

It is possible to assign a contract from one party to another, but the ability to assign a contract may be restricted by law or by agreement, where the contract itself includes a restriction on assignment, as the LSBA does; clause 9 (a) of the LSBA provides that ‘The Contractor or the Employer shall not without the prior written consent of the other assign this Agreement or any part thereof’.

A recent Irish application of the privity doctrine in a building defects case is *Brennan v*

¹⁷⁹ Law Reform Commission, (n 163), [2.34].

Flannery.¹⁸⁰ The High Court in 2013 (and subsequently the Court of Appeal in 2015) refused to award damages personally against the defendant shareholder of a building company, on the basis that the proper party to any litigation involving defects in the house in question was the company itself and not its shareholders:

The whole notion of establishing a limited liability company is to produce the result that the liability of the persons who are the shareholders of the company is limited. That is the danger of contracting with a limited liability company. But a company is a separate and distinct legal person from its shareholders and directors.¹⁸¹

Brennan is an excellent example of the manner in which the law facilitates the transfer of risk from builders to home buyers, one of the principal research themes of this thesis. The use of limited liability companies to carry out high-risk activities, including residential construction, allows builders to insulate themselves from future liabilities, particularly as there are no bonding or minimum capitalisation requirements for residential construction companies, notwithstanding the concerns raised in this respect by the 1977 Working Paper.¹⁸²

Rethinking contractual relationships – do construction contracts need to be seen differently?

Collins, in his 1999 work *Regulating Contracts*, argued that 'a new configuration of laws regulating contracts' was emerging from the normative conflict between law and regulation, giving rise to 'a new style of legal discourse about contracts'.¹⁸³ The author refers to the contractualization of social relations, one feature of which he refers to as atomization. This consists of the binding of parties into an exclusive relationship by contract, which is then in tension with third parties by reason of the externalities of the parties' transaction. Contract law, he argues, proceeds on the basis that those externalities can be ignored, while regulation has as its objective the internalization of the costs of transactions to the parties to that transaction. Giving the example of the sale of a used

¹⁸⁰ *Brennan v Flannery* [2013] IEHC 145 (High Court) [2015] IECA 78 (Court of Appeal).

¹⁸¹ *Brennan* [2013] IEHC 145 [9], per Kelly J.

¹⁸² As discussed further below in chapter 6.

¹⁸³ Hugh Collins, *Regulating Contracts* (Oxford University Press 1999), 9.

car, private law would allow a person to purchase a car in poor condition, but the legal system might intervene to prevent this out of concern for the consequences for that transaction, such as the risk to pedestrians.¹⁸⁴

It is precisely this tension that is also at play in transactions for the purchase of housing; one purchaser may accept a house that is poor quality or defective, with consequences for other parties such as the tenants who may live in the house, subsequent purchasers, or indeed the State or welfare authorities who may become involved if the house becomes dangerous to life or health, or uninhabitable.

If the home purchase transaction is analysed from the perspective of relational contract theory developed in the work of Ian Macneil and Stewart Macauley¹⁸⁵, this prompts consideration of whether the ‘exchange/bargain’ model of contract law, reflected in the Irish home buyer’s legal relationship with builder/developers, is appropriate. In Macneil’s conception of relational contract, the promise/exchange basis for contracts on which classical and neo-classical is founded is rejected in favour of an approach that emphasises the relationship of the parties over time.¹⁸⁶ Instead of seeing a contract as a discrete exchange in which the parties’ obligations are ‘frozen’ at the point of contract formation, the relational approach takes into account normative features of the contractual relationship such as reciprocity and contractual solidarity.¹⁸⁷

Jean Braucher subsequently built upon Macneil’s approach to relational contracts in proposing two alternative perspectives to describe the consent element of contracts. In one, consent is an event which takes place at the commencement of the contractual relationship. In the other, it is a process of commensurate duration with the contractual relationship:

Drawing on Macneil’s relational approach, one can conceptualize consent either as a discrete event or as a continuing process. The event model of consent, which

¹⁸⁴ Ibid 23.

¹⁸⁵ Stewart Macauley, ‘Non-contractual relations in Business: a Preliminary Study’ (1963) 28 Am Soc Rev 1.

Macauley sets out the results of extensive empirical research, noting that the original formation of a contract is often accompanied by contract formalities, but that dispute resolution and adjustments of contracts were, in the sample of contracting parties interviewed, often done without reference to the original contracts, suggesting that relationships take over from formal legal structures at an early stage of a contract process.

¹⁸⁶ Ian Macneil, ‘Relational Contract: What we do and do not know’, (1985) Wis L.Rev. 483.

¹⁸⁷ Ibid 504.

coincides with an exchange paradigm of contract, freezes the content of obligations at the outset.¹⁸⁸

Macneil refers to construction contracts as examples of relational contracts. This approach makes sense when one considers the relationship required for the completion of a construction project, which is considerably more complex and lengthy than, say, a contract for the sale of goods.

The relevance of relational contract theory to analysis of remedies available in respect of residential construction defects is as follows. Firstly, it is submitted that remedies available following completion of the construction contract are constitutive of an ongoing relationship between the parties. Secondly, the contractor's warranty of performance creates a further relationship, following completion, for the duration of the limitation period, and as such is consistent with the view of consent as a process which is co-extensive with the duration of the contractual obligations and relationship. Under Irish law, the duration in time of that relationship depends on whether the remedy sought is in contract (in which case the start date of that period is the date of breach) or in tort (in which case the start date of that period is the date of "damage").

In the Irish model, the home buyer is drawn into a type of legal fiction in which they contract to purchase land (or agree to take a lease of an apartment), engage a builder to construct their home, and then take possession of the unit upon completion of the transfer of the site (in the case of a house) or commencement of the lease (in the case of an apartment). The buyer, no doubt, believes that they are buying a home. The reality is that they are buying land, or entering into a long lease, and engaging a builder, usually a limited company which may not be able to meet any claim, to construct their unit.

The LSBA is drafted on the basis that it should be signed under seal but contains a restriction on assignment of the contract.¹⁸⁹ Therefore, in the event of a transfer of the unit within the limitation period, the ongoing relationship between the original builder and purchaser is severed, and the benefit of the ongoing contractor's warranty of

¹⁸⁸ Jean Braucher, 'Contract Versus Contractarianism: the Regulatory Role Of Contract Law' (1990) 47 Wash & Lee L Rev 697.

¹⁸⁹ Condition 9 (a) of the LSBA provides as follows: 'The Contractor or the Employer shall not without the prior written consent of the other assign this Agreement or any part thereof'.

performance for the balance of the limitation period is lost. The common principle of privity of contract ensures that the subsequent purchaser cannot enforce that contract. There is little normative justification for excluding the subsequent purchaser from enforcement of the contract during the limitation period. The identity of the purchaser is of no consequence to the contractor following completion, when the builder has been paid in full for performance; there is no provision in the building agreement for retention of any part of the purchase price for a period following completion, as there usually would be in a commercial building agreement. Relational contract theory provides a means of explaining and justifying the relationship between builder and buyer of new homes as an active source of legal remedies for the duration of the limitation period under the construction contract.

C: Legal Intervention

Implied terms in Irish consumer contracts

One of the principal legislative tools of consumer protection is the implied term. In Irish law, the Sale of Goods and Supply of Services Act 1980 ('the 1980 Act') is the most significant example of implied terms for consumer protection. Section 14 of the Sale of Goods Act 1893 ('the 1893 Act') implies a warranty of merchantable quality into contracts for the supply of goods.

Section 39 of the 1980 Act is a broad term that applies to services contracts unless excluded by the parties (and subject to limitations on any such exclusion where one of the parties deals as a consumer). The section implies terms of skill to render the service, that the supplier will carry out the service with skill, care and diligence, that any materials used will be reasonably fit for purpose and that any goods supplied under the contract will be of merchantable quality. The 1980 Act is particularly important for construction contracts, as it operates at two levels of the construction supply chain (the supply of materials to the builder, and performance of services by the builder for the home buyer). The 1980 Act distinguishes between contracts entered into between businesses and contracts between business and consumers; many of the implied terms provided for in the

1980 Act apply to both types of terms, but may not be excluded where one of the parties deals as a consumer.¹⁹⁰

The two provisions amount to a significant inroad into the freedom of parties to services contracts to negotiate warranties of performance, particularly where one of those parties deals as a consumer within the meaning of the Act.

In two cases from the last ten years involving commercial parties and defective construction materials, *Noreside Construction v Irish Asphalt*¹⁹¹ and *James Elliott Construction v Irish Asphalt*¹⁹², section 14 of the 1893 Act played a pivotal role in defining the extent of a supplier's liability to a building contractor for defective construction materials, in each case resulting in the supplier being held liable for the costs of remedial works necessitated by the incorporation of the materials into construction works. Section 14 can be excluded from contracts save where one party deals as a consumer.

The *Noreside* decision suggests that even large commercial entities are at times incapable of negotiating an orderly allocation of risk by contract, and that it may be preferable for the law to impose an allocation of risk by default, with the option for larger commercial purchasers to exclude the legal model if they wish to do so. In this way, the 1980 Act provides a precedent, in establishing a regime applicable to all contracts but specifying enhanced protections that must apply in contracts with consumers.

Barnett characterises contract default rules that can be excluded by the parties as being based on the consent of the parties to be legally bound by the underlying, or background, legal rules of contract:

Terms supplied by default rules are not a product of the expressed or implied-in-fact consent of the parties as these two notions have traditionally been understood... In a very real sense, such terms can be and often are indirectly consented to by parties who could have contracted around them – but did not.¹⁹³

¹⁹⁰ Sale of Goods Act 1893, s 55 (4), as inserted by the Sale of Goods and Supply of Services Act 1980, s 22.

¹⁹¹ [2011] IEHC 364.

¹⁹² [2011] IEHC 338.

¹⁹³ Randy E. Barnett, 'Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud' (1992) 78 Virginia Law Review 821.

Another example of the fluidity of contract, tort and statute in externally imposed standards is section 8 of the Domestic Building Contracts Act 1995 of the State of Victoria, Australia.¹⁹⁴ Although characterised in the statute as an implied term of contract, there is no guidance in the statute as to how the warranties are intended to interact with the remainder of the contract between the parties or the general background rules of contract law. Section 8 provides that the warranties ‘are part of every domestic building contract’; section 9 is headed ‘Warranties to run with the building’, and provides that ‘In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract.’¹⁹⁵

The Act does not provide, however, that the builder in that scenario could enforce the contract against such a subsequent owner. If the subsequent owner does not, therefore, become a party to the contract, but is merely treated as if they were a party to the contract, the Act may be seen as creating two distinct sets of obligations: (i) implied terms in the original contract between the builder and the building owner, which take effect and operate in accordance with contract law, and (ii) a statutory duty in favour of subsequent purchasers to enforce the warranties set out in section 8. There is support for this view in the fact that the Act confines the rights of subsequent purchasers to enforcement of the section 8 warranties; the remedy of specific performance of the original contract would not, on this view, be available to the subsequent purchaser, which again suggests that the duty created on his behalf by section 9 is a stand-alone statutory duty.

The foregoing statutory provisions, particularly section 39 of the 1980 Act, are valuable measures of consumer protection. However, the legal mechanism for their incorporation

¹⁹⁴ Section 8 of the Domestic Building Contracts Act 1995 (Act No. 91/1995) provides for six separate warranties from the builder applicable to all domestic building work, including a warranty ‘that the work ‘will be carried out in a proper and workmanlike manner’ (s 8 (a)), using materials that are ‘good and suitable for the purpose for which they are used’ (s 8 (b)), in compliance with law (s 8 (c)), with reasonable care and skill (s 8 (d)), so that the home will be ‘suitable for occupation’ when the work is complete (s 8 (e)). If the contract specifies a result to be achieved or the particular purpose for which the work is required, a warranty of fitness for purpose may be implied (s 8 (f)).

¹⁹⁵ The section warranties can be pleaded in addition to breach of the express terms of contract, and the section 8 warranties include warranties with regard to breach of the Building Code of Victoria: Matthew Bell, ‘Are Australia’s Cities Out-Growing Its Construction Legislation?’ (2017) 43 Monash University Law Review 648, 658.

into the parties' relationship is the contract, from which they cannot subsequently be detached. They all suffer, therefore, from the assignment-privity problem, which may disconnect them from the home purchase with which they were originally associated by contract. This, in itself, provides a justification for legislative intervention, if only to ensure that these terms, which could provide an important measure of consumer protection, should be available to second and subsequent purchasers.

The development of the common law over time has also generated a number of terms that may be implied in building contracts. In *Brown v Norton*¹⁹⁶, Davitt P. summarised the common law duty as follows:

...where there is an agreement to purchase a house in the course of erection...the Court may hold, in the absence of any circumstances negating such an implication, that the vendor impliedly agrees (1) that he will complete the building of the house; (2) that as regards what has already been done at the date of the agreement the quality of the work and materials is such, and as regards what then remains to be done the quality will be such, that the house when completed will be reasonably fit for immediate occupation as a residence; and (3) that as regards what then remains to be done the work will be carried out in a good and workmanlike manner with sound materials.

The formulation that the house will be 'fit for immediate occupation as a residence' is a variant on the implied term in the English authorities that a house will be fit for habitation. Bailey states that 'At common law, it is the obligation of a builder who constructs a residence or a substantial part of one to ensure that his work, when completed, will be reasonably fit for human habitation.'¹⁹⁷

There is also an implied warranty of quality of goods supplied by a contractor in connection with a building contract¹⁹⁸ and an implied warranty of fitness for purpose, where a contractor had taken on both design and construction obligations.¹⁹⁹

¹⁹⁶ [1954] IR 34.

¹⁹⁷ Julian Bailey, *Construction Law* (2nd edn, Sweet and Maxwell 2016), Vol. 3, 1454.

¹⁹⁸ *Young & Marten Ltd. v McManus Childs Ltd.* [1969] 1 AC 454.

¹⁹⁹ *IBA v EMI and BICC* [1980] BLR 1.

The common law duty of a builder is often expressed as the ‘threefold’ duty, in line with the obligations articulated in *Hancock v VW Brazier (Anerley) Ltd.*²⁰⁰ that the construction work should be carried out in a good and workmanlike manner, using good and proper materials, in order to provide a building reasonably fit for its intended purpose.

Comparative perspective – legislative protection for homeowners

It is instructive to look to a number of other jurisdictions with whom Ireland shares the common law tradition to consider how additional protection for home buyers has been provided for by legislation. One example is from British Columbia, where the Homeowner Protection Act 1998 provides for a transmissible warranty, deemed to have been agreed between the builder and vendor, on the one hand, and the owner of a new home, on the other. The warranty covers defects in materials and labour for a period of two years, defects in the building envelope for a period of five years, and structural defects for a period of 10 years.²⁰¹

There is also extensive legislation protective of home buyers in a number of Australian territories, including New South Wales and Victoria. As these jurisdictions are also considered elsewhere in terms of options for both insurance coverage and dispute resolution, the legislative regime of each jurisdiction for home buyer protection will be examined in the following section.

New South Wales and Victoria – legislative regimes for home buyer protection

As noted above, the Home Building Act 1989 Act of New South Wales (as amended by the Home Building Amendment Act, 2014) provides that residential building work²⁰² will be performed ‘in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract’.²⁰³ The warranties set out in s.18 of the 1989 Act are considerably broader than those implied by section 39 of the Sale of Goods and Supply

²⁰⁰ *Hancock v B.W. Brazier (Anerley) Ltd.* [1966] 1 WLR 1317 [1966] 2 All ER 901.

²⁰¹ Section 23 (1), Homeowner Protection Act 1998.

²⁰² The Act defines ‘residential building work’ as ‘any work involved in, or involved in coordinating or supervising any work involved in, the construction, alteration or repair of a dwelling’. The Act also applies to plumbing, gas fitting, electrical wiring, air conditioning, and refrigeration.

²⁰³ Section 18B (a), Home Building Act 1989.

of Services Act 1980, in Ireland, and also broader than the terms implied by the Defective Premises Act 1972 in England.

Following amendments to the Home Building Act in 2015, the six-year statutory warranty period prescribed by the 1989 Act now only applies to "major defects" which render the building uninhabitable or at threat of collapse. All other defects are subject to a statutory warranty for a 2-year period only. Contracts must be in writing, signed and dated by both parties, with names of the parties, a sufficient description of the work, the contract price if known, and a statement of the applicable statutory warranties. A contractor cannot recover damages from the owner for breach if the contract is not in writing.²⁰⁴ Warranties of proper workmanship, suitability of materials, compliance with laws, due diligence, and fitness for occupation are implied into residential construction contracts.²⁰⁵

A person who has suffered a breach of a statutory warranty is required to mitigate his loss, and to make reasonable efforts to ensure that a person against whom the warranty can be enforced is given notice in writing of the breach within 6 months after the breach becomes apparent.²⁰⁶ A person seeking to rely on a statutory warranty is also required to give access to the party in breach for the purpose of rectification.²⁰⁷

The Act also provides that a breach of warranty becomes apparent for the purposes of the Act when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach. Section 18D extends the benefit of the Act's statutory warranties to successors in title to the person entitled to the benefit of the statutory warranty.²⁰⁸ Non-contracting owners of residential property also enjoy the same rights.²⁰⁹

It is noteworthy that owners' management companies may bring proceedings for breach of the statutory warranties in respect of defects in the common areas, and individual apartment owners may do so for defects in their own apartments. In *Owners Strata Plan*

²⁰⁴ Home Building Act 1989, s 10 (1).

²⁰⁵ Ibid s 18 (b)(1).

²⁰⁶ Ibid s 18 BA (1)(a) and s 18 BA (3)(a).

²⁰⁷ S 18 BA (3)(b) requires a person who has suffered a breach of warranty to allow 'such access to the residential building work concerned' as the person in breach 'may reasonably require for the purpose of connection with rectifying the breach'.

²⁰⁸ S 18 D (1).

²⁰⁹ S 18 D (1) 1A.

*62930 v Kell & Rigby Holdings Pty Ltd.*²¹⁰, the Supreme Court of New South Wales held that both an owners' corporation and an individual owner were entitled to rely on the statutory warranties in the 1989 Act. The case concerned the implied warranty in section 18 B (L) of the Home Building Act 1989 that building works will result in a dwelling house that is reasonably fit for occupation as a dwelling'. Ward J considered the case law of England and Wales and concluded that 'insofar as the statutory warranty of reasonableness for occupation as a dwelling, in the context of residential building works, seems akin to a warranty of reasonable fitness for habitation, the authorities in other areas... suggest that the test is whether the dwelling in question is in a condition (or has particular features) that would make it injurious to health'.

The availability of a cause of action to management companies is in contrast to the Irish position. As an owners' management company of an Irish apartment development will typically not be party to the original building contract for the development, it may be limited to an action in breach of contract against the original developer or to an application under section 24 of the Multi-Unit Developments Act 2011.

An action for breach of contract will only be available where the developer has contracted with the owners' management company to complete the development (usually as part of an agreement for transfer of the common areas of the development to the owners' management company). Section 24 empowers the Circuit Court to direct the developer of a multi-unit development to complete the development in accordance with the Planning and Development Acts 2000 to 2018 and the Building Control Acts 2000 to 2014. The limitation of this remedy is apparent from the recent High Court decision in *Re Lance Homes Ltd.*²¹¹

The 1989 Act establishes a limitation period of 7 years after practical completion.²¹²

The Domestic Building Contracts Act 1995 is the principal source of home buyer protection in Victoria. Section 8 of the Act implies a number of warranties into contracts for the construction of domestic buildings; section 9 of the Act provides that such

²¹⁰ [2010] NSWSC 612 at [91]-[93].

²¹¹ [2018] IEHC 444. The court acknowledged the entitlement of an owners' management company to a order for the rectification of defects in a multi-unit development, but held that such an order could not be enforced against the liquidator of the original developer, and that the order essentially ranked as unsecured debt.

²¹² Home Building Act 1989, s.18E.

warranties may be enforced by subsequent owners of the unit as if they had been a party to the original building contract. The warranties must be specifically included in any domestic building contract but apply whether or not they are so included. The Act also provides that warnings must be given to domestic employers with regard to price escalation clauses, and a copy of the building contract must be furnished to the employer.²¹³

The 1995 Act applies to ‘domestic building work’, which includes most forms of building work concerning the construction, renovation or alteration of a home, including the preparation of plans or specifications for that work.²¹⁴

The warranties at section 8 are a central part of the Act. Six warranties are set out, which are deemed by the section to be part of every domestic building contract. According to section 8, a builder engaged in domestic building work warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the contractual plans and specifications and all legal requirements, and that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used, that (if a house) it will be suitable for occupation. Warranties extend to successors in title²¹⁵, and cannot be excluded.²¹⁶

Domestic building work is defective for the purposes of the Act where the work includes a breach of any of the section 8 warranties, and/or a failure to maintain a standard or quality of building work specified in the contract.²¹⁷

The concept of ‘fitness for occupation’ is used in a number of the Australian states as part of the duty imposed (generally by means of implied warranties) on builders. The benchmark in England and Wales, by contrast, is ‘fitness for habitation’. In *Braham v Evans*²¹⁸, the Supreme Court of Western Australia endorsed the finding of the tribunal that a house was not fit for occupation where the house lacked footings (foundations), a waterproof membrane, had inadequate roof framing and construction causing water ingress and ceiling deflection, inadequate joists under an upper floor and a defective

²¹³ Domestic Building Contracts Act 1995, ss 15 and 25.

²¹⁴ *Ibid* s 3

²¹⁵ *Ibid* s 9.

²¹⁶ *Ibid* s 10.

²¹⁷ *Ibid* s 3.

²¹⁸ [2008] WASC 274.

balcony.²¹⁹

Should law dictate the contract terms?

Schwartz and Scott identified two features that they regarded as essential to the existence of a contract: firstly, that it should be a bargain entered into between two informed parties, and secondly, that those parties had a choice to negotiate on the terms.²²⁰ It is arguable that neither feature is typically present in the purchase of a new home.

The foregoing criticism of the use of the LSBA in practice suggests that it fares poorly on both from a consumer welfare perspective. This suggests that the terms on which home buyers and builders contract should be fixed by law, in light of the lack of contractual reciprocity between the parties.

Bar-Gill argues that any legal intervention to address consumer welfare loss should aim to facilitate efficient market conditions, for example by mandatory disclosure, rather than using ‘broad, intrusive regulation of consumer contracts’ to address perceived market failures. He also emphasises the importance of evidence of specific market failures in order to justify intervention, rather than assuming, for example, ‘that all sellers respond strategically to consumer mistakes’.²²¹ On this view, in principle, more evidence of market failure would be needed in order to justify intrusive regulation.

The unusual feature of Irish law, however, is that section 39 of the Sale of Goods and Supply of Services Act 1980 in fact is a very robust and intrusive measure of consumer protection, dealing with both the standard of services and the quality of materials to be used in construction. The Act came into force on 31 December 1980, between the dates of publication of the 1977 Working Paper and the Report on Defective Premises published by the Law Reform Commission in May 1982.

The Report does not consider the impact of section 39, nor how it should interact with the

²¹⁹ Ibid [33].

²²⁰ Alan Schwartz and Robert E. Scott, ‘The Common Law of Contract and the Default Rule Project’ (2016) 102 Virginia Law Review 1523.

²²¹ Oren Bar-Gill, ‘The Behavioral Economics of Consumer Contracts’, 28 *Derecho & Sociedad* 34.

proposed statutory duty in the Defective Premises Bill that accompanied the Report. It is suggested in chapter 7 of this thesis that the proposed reform and the 1980 Act can co-exist, in part because a review and updating of the Sale of Goods legislation is under active consideration at present, and likely to result in a codification of the relevant law in light of the 2011 report of the Sales Law Review Group.²²² There is also a long tradition of concurrency of duties in the Irish law of obligations²²³ which has proved resilient in the face of regular academic debates about the boundaries between contract and tort, and of the apparently imminent demise of each.²²⁴

Schwartz and Scott²²⁵ describe contract law as playing a ‘residual role; that is, the *law* is the rules and standards that specify by default parts of contracts when parties leave them blank’.²²⁶ The context for their review is the United States, in which contract law is derived from caselaw and from the Uniform Commercial Code and restatements. The authors argue that the project of defining default rules and standards (for the Code and Restatements) was unsuccessful, and that the common law is a preferable source of default rules of contract law; a rule, according to Schwartz and Scott, is a directive for future behaviour of parties, such as a requirement to repair faulty goods within a particular time-frame.

Schwartz and Scott also refer to the ‘sticky default’, commenting that ‘A default rule is sticky when the costs to parties of contracting out are high relative to the gains.’²²⁷ They argue that such rules may be justified ‘when parties are uninformed about their legal relationship’²²⁸, for example where a party makes a choice in relation to a contract term either due to misunderstanding of the issue or due to cognitive error.²²⁹ The foregoing

²²² Sales Law Review Group, ‘Report on the Legislation Governing the Sale of Goods and Supply of Services’, (2011, the Stationery Office).

²²³ *Finlay v Murtagh* [1979] IR 259; In *Kennedy v AIB* [1996] IESC 9; [1998] 2 IR 48, Hamilton CJ, while accepting the principle of concurrent liability in tort, stated that contracting parties nonetheless derived their relationship from the contract, and that the law of tort could not impose greater liability on a party than that which was derived from the contract, endorsing the dicta of Lloyd J. in the decision of the Court of Appeal of England and Wales in *National Bank of Greece SA v Pinos Shipping Company No. 3* [1988] 2 Lloyd’s Rep 226, as follows: ‘...obligations in tort which may arise from such a contractual relationship cannot be greater than those to be found expressly or by necessary implication in their contract.’

²²⁴ Grant Gilmore and Ronald KL Collins, *The death of contract* (Ohio State University Press 1995); Steve Hedley, ‘Making sense of negligence’ (2016) *Legal Studies* 491.

²²⁵ Alan Schwartz and Robert E. Scott, ‘The Common Law of Contract and the Default Rule Project’ (2016) 102 *Virginia Law Review* 1523.

²²⁶ *Ibid* 1525.

²²⁷ *Ibid* 1566.

²²⁸ *Ibid* 1567.

²²⁹ *Ibid* 1568.

discussion of the limitations of the LSBA and the difficulty faced by the Law Society in policing its use in practice suggest that ‘sticky terms’ may be essential in Irish residential construction contracts.

Remedies available in contract – and principles of assessment of damages

There is a broad spectrum of rights involved in the purchase of a home. Legal rights include the right to secure performance of the building contract and the contract for the transfer of the land, or the creation of the lease of a new apartment; the right to various other remedies in the event of breaches of those contracts, principally the right to damages. The right to secure performance is different in character depending on the point at which the right is asserted; prior to completion, the contractor has possession of the site and should carry out and complete the construction works in accordance with the plans and specifications agreed between the parties.²³⁰ Following completion, if there are defects and/or outstanding work, the contract remains enforceable during the limitation period, but practical difficulties arise in having the contractor return to the site to perform the works.

The point in time at which damages are assessed can be highly contested in defects cases, as the cost of carrying out remedial works can increase significantly over time. In *Corrigan v Crofton*²³¹, the High Court awarded damages based on the cost of remedial works as at the date of the hearing of the matter, rather than the date of commencement of proceedings, on the basis that the defendant builder/vendor had caused delay by contesting liability, and where the plaintiff had no option but to wait until the outcome of litigation before starting the remedial works. This was consistent with the earlier decision of the court in *Johnson v Longleat Properties Ltd.*²³² in which the costs of repair of a defective home were assessed at the date on which the plaintiff might reasonably have commenced such repairs. The authorities present challenges to plaintiffs in deciding

²³⁰ The decision in *Hounslow LBC v Twickenham Garden Developments Ltd.* [1971] 1 Ch 233 suggests that the contractor has a right to remain on site in order to complete the works, and that the employer may be in breach of contract if he seeks to revoke the licence; Lyden notes that recent jurisprudence, as well as one of the leading monographs on construction law, casts doubt on this view, and that the preferred view is that the contractor may be removed from the site and can be compensated by an award of damages if the employer has wrongfully terminated the building contract. This suggests that the contractor in *O’Reilly v Neville* would not have been entitled to insist, as a matter of contract law, on returning to complete the defective works.

²³¹ [1985] ILRM 189.

²³² Unreported, High Court (McMahon J.) 19 May 1976.

whether to mitigate their losses by undertaking repairs in advance of awards of damages in their favour.

The 2017 decision in *O'Reilly v Neville*²³³ is noteworthy by reason of the judge's refusal to award damages for distress and inconvenience, notwithstanding several recent decisions of the High Court in which substantial sums were awarded under this heading in respect of damage to family homes.²³⁴ If the remedy in these cases were governed by statute, a statutory entitlement to damages under this heading could be introduced.²³⁵

Webb reiterates the point made by other theorists that performance and compensation represent separate contractual interests; essentially that we have a right to performance, or a right not to be injured or to have our property damaged, and that damages are not a substitute for that right at the defendant's election.²³⁶ Webb characterises these as the performance interest and the compensation interest, pointing to the dictum of Parke B. in *Robinson v Harmon*²³⁷ which clearly links the award of damages to the plaintiff's right to performance, and 'tells us that the loss which forms the subject matter of this claim is separate from the breach of contract itself.'²³⁸ On this basis, therefore, Webb explains that the pre-requisite for an order for specific performance, that damages would be an inadequate remedy, is consistent with the view that both specific performance and damages awards are aimed at recognising and upholding the performance interest.²³⁹

The 2014 decision of the High Court in *Mitchell v Mulvey Developments*²⁴⁰ concerned assessment of damages in respect of defects in a housing complex at Strandhill, Co. Sligo,

²³³ [2017] IEHC 554.

²³⁴ *Mitchell v Mulvey Developments* [2014] IEHC 37; *McGee v Alcorn* [2016] IEHC 59. There is a debate in the caselaw as to whether claims for distress, anxiety and inconvenience (for which damages were awarded in both *Mitchell* and *McGee*) are in fact injury. The recent Supreme Court decision in *Hanrahan v Minister for Agriculture* [2017] IESC 66 affirms the principle that 'in general, damages for breach of contract do not include damages for distress, upset and inconvenience' (per O'Donnell J [25]), but Hogan J in *Mitchell* awarded substantial damages for distress and anxiety without distinction as to the basis on which he did so, and referring to both negligence and breach of contract.

²³⁵ An example of such an entitlement is the Central Bank (Suspension and Enforcement) Act 2013, which established an action for breach of statutory duty at section 44 of the Act, for failure by a regulated financial services provider to comply with any obligation under financial services legislation.

²³⁶ C. Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *Oxford Journal of Legal Studies* 41, 43: 'It is not a duty simply to pay compensation should [the defendant] cause an injury. Otherwise the negligent causing of the injury would not in itself constitute a breach of duty'.

²³⁷ (1848) 1 Exch 383 at 385: 'The rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, as far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'.

²³⁸ Webb, (n 236), 49.

²³⁹ Webb, (n 236), 52.

²⁴⁰ *Mitchell* (n 234).

built between 2004 and 2005. Defects emerged in a number of houses in the estate as a result of what the Court described as ‘*abysmal building practices and systemic and massive breaches of the Building Regulations*’. Hogan J referred to the decision in *Leahy v Rawson*²⁴¹, in which O’Sullivan J awarded the sum of £5,000 per year to the plaintiffs in respect of ‘*anxiety and upset as a consequence of the negligence of the building contractor defendants*’. He accordingly awarded general damages of between €5,000 and €20,000 per year for anxiety, distress, upset and inconvenience, as well as special damages, (e.g. the cost of repair) to each of the various plaintiffs.²⁴² In this respect, Irish law seems to be at variance from the English authorities. Bailey comments that:

‘...the compensatory nature of an award of damages does not in general extend to permit damages to be awarded for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation suffered as a consequence of a breach of contract’.²⁴³

Bailey further suggests that residential construction contracts would not come within the category of contracts for which such damages might exceptionally be awarded, as they are contracts ‘to provide a physical end product’ rather than contracts with the objective of providing ‘pleasure, relaxation or peace of mind’.²⁴⁴

Rectification - specific performance

Specific performance is an equitable remedy whereby a court may order a party to complete the performance which it has undertaken by contract. The courts have historically been reluctant to grant specific performance of construction contracts, in part because of the complexity of such works and the need for supervision make them inappropriate for court orders (bearing in mind that a person may be committed for breach of a court order). Relevant authorities include *Ryan v Mutual Tontine*²⁴⁵ and *NE Lincolnshire BC v Millennium Park (Grimsby)*²⁴⁶, in which the Court of Appeal for

²⁴¹ *Leahy v Rawson* [2004] 3 IR 1.

²⁴² It is notable that damages for distress and inconvenience in the amount of €25,000 were awarded in the 2016 decision of the High Court in *McGee v Alcorn* [2016] IEHC 59, as the case was brought in tort, rather than contract; this is discussed in chapter 3 below.

²⁴³ Julian Bailey, *Construction Law* (2nd edn, Sweet and Maxwell 2016), 1143.

²⁴⁴ *Ibid* 1144.

²⁴⁵ *Ryan v Mutual Tontine* [1893] 1 Ch 116.

²⁴⁶ *NE Lincolnshire BC v Millennium Park (Grimsby)* [2002] All ER 151.

England and Wales allowed an appeal against an order for specific performance for one part of a development agreement consisting of construction of a roundabout, in part on the basis that damages were an adequate remedy.

A concept referred to by Weinrib which is helpful to the analysis of the remedy of specific performance is the ‘continuity of right and remedy’.²⁴⁷ This is presented as being based on an idea from German law, *Rechtsfortsetzungsgedanke*, that the ‘injured right lives on in a claim for damages’²⁴⁸, and that the relationship between the duties and rights in private law continue after breach of duty.²⁴⁹ Weinrib sees plaintiff and defendant as ‘the doer and the sufferer of the same injustice’²⁵⁰ The significance of Weinrib’s conception of corrective justice for private law remedies for construction defects is that he views the right as surviving its own breach’²⁵¹: ‘Although the defendant’s wrong has modified the physical condition of the object embodying the plaintiff’s right, the right remains intact as the normative marker of the relationship between them with respect to that object’. Weinrib cites Blackstone²⁵² to the effect that the remedy should either restore the right itself or give its equivalent to the injured party.²⁵³

Weinrib goes on to argue that the duty owed by the defendant changes by reason of the initial violation, so that the defendant can no longer offer the original contemplated performance in order to discharge the duty; rather, ‘the duty continues to exist in a new form that requires the performance appropriate to this new stage of the parties’ relationship’.²⁵⁴ Remedies, in Weinrib’s view, can be qualitative (in restoring the exact thing) or quantitative (specific performance, or an award or damages).

Applied to building defects, a corrective justice approach might, therefore, suggest that the remedy of specific performance would be more appropriate than damages, in order to require the defendant to rectify the defects within the framework of the original contract.

²⁴⁷ Ernest J. Weinrib, *Corrective Justice* (Oxford University Press 2012), 87.

²⁴⁸ *Ibid*, 87, citing Walter van Gervan et al., *Common Law of Europe Casebooks: Tort Law*, (2000 Hart Publishing), 753.

²⁴⁹ Weinrib, (n 247), 87.

²⁵⁰ Weinrib, (n 247), 87.

²⁵¹ *Ibid*, 90.

²⁵² Blackstone, IV Commentaries, 9.

²⁵³ Weinrib, (n 247), 91.

²⁵⁴ *Ibid*, 93

In an article published in 1978, Kronman queried the then-recent analysis of Calabresi and Malamed in distinguishing between property rules and liability rules.²⁵⁵ In an article that was the foundation stone for the development of the Law and Economics school of legal theory, Calabresi and Melamed argued that an entitlement was protected by a property rule where the entitlement could not be exploited by another without the owner's permission, while a liability rule protected an entitlement where the entitlement could be appropriated subject to payment of damages.

Kronman highlighted the fact that this account of legal entitlements failed to consider the proper characterisation, in the property-liability rule paradigm, of the ability of a contract party to seek enforcement of a promise.²⁵⁶ He argues that a contractual right should be protected by a property right, on the basis that most contracts have only two parties, who are known to one another, such that 'the costs of negotiating a voluntary transfer of contract rights are likely to be low'.²⁵⁷

Despite these features, however, Kronman notes that courts almost invariably award damages rather than specific performance, and that a court will look to whether the subject-matter of the obligation is unique, which he acknowledges is a problematic concept in which all goods can ultimately be rendered commensurable.²⁵⁸ He goes on to address a common reason given for the courts' reluctance to enforce performance of construction contracts - that it would require supervision by a court²⁵⁹ - but points to an alternative conclusion, that the possibility of enforced performance might reduce the incidence of breach of contract, and, therefore, of the need for judicial involvement.²⁶⁰

The possibility of using the remedy of specific performance to address building defects has been considered by Britton²⁶¹, who refers to the decision of the House of Lords in *Co-*

²⁵⁵ Calabresi, Guido and Melamed, A. Douglas, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1971-1972) 85 Harv. L Rev. 1089.

²⁵⁶ Kronman, 'Specific Performance', University of Chicago Law Review, Vol. 45 (No. 2), (Winter, 1978), 351, 352.

²⁵⁷ Ibid 353.

²⁵⁸ Ibid 354, 359.

²⁵⁹ Burrows notes that specific performance was not ordered where such an order 'would require what is termed constant supervision', citing in this respect the 1893 decision of the Court of Appeal in *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 in which the court refused to grant specific performance of a contractual obligation to keep a porter in attendance at a block of flats. Andrew S Burrows, *Remedies for torts and breach of contract* (3rd edn, Oxford University Press 2004), 495.

²⁶⁰ Kronman (n 256), 373.

²⁶¹ Philip Britton, 'Make the Developer Get the Job Right: Remedies for Defects in Residential Construction', Society of Construction Law, March 2013.

*operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.*²⁶² in support of use of the remedy for this purpose. In that decision, Lord Hoffmann confirmed that specific performance could be granted of a sufficiently precise obligation, citing the decision of the Court of Appeal in *Mayor, Aldermen and Burgesses of Wolverhampton v Emmons*²⁶³ in which the court ordered specific performance of a contract that had been the sold by the plaintiff local authority subject to the condition regarding construction of housing on the land.

Britton notes, however, that in the *Emmons* case the further condition had been satisfied that the plaintiff could not engage another builder to carry out construction of the houses, by reason of the fact that the plaintiff no longer owned the land, citing *Snell's Equity* to the effect that '...the defendant is in possession of the land so that the claimant cannot employ another person to build without committing a trespass'.²⁶⁴

The LSBA requires all disputes arising under the agreement to be submitted to arbitration. Section 20 (1) of the Arbitration Act 2010 provides that an arbitral tribunal, unless the parties agree otherwise, 'shall have the power to make an award requiring specific performance of a contract (other than a contract for the sale of land).' In the absence of publication of arbitral awards, it is not possible to determine whether specific performance is ever awarded under the LSBA.

The authors of *Keating on Construction Contracts* state that the court does not often order specific performance of a contract to build or do repairs, but it has jurisdiction to do so and sometimes does, noting that an order was declined by the Technology and Construction Court in *Hunt v Optima (Cambridge) Ltd.*²⁶⁵ 'where the developer itself sought the order in lieu of monetary judgment'.²⁶⁶ A similar situation arose in the decision of the High Court in *O'Reilly v Neville & Ors*²⁶⁷, in which the defendant builder sought an order of specific performance as part of its defence to a claim for damages for breach of contract.

²⁶² *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1998] AC 1.

²⁶³ *Mayor, Aldermen and Burgesses of Wolverhampton v Emmons* [1901] 1 QB 515.

²⁶⁴ McGhee, *Snell's Equity* (32nd ed.) (London Sweet and Maxwell 2010) [17-017].

²⁶⁵ [2013] EWHC 681

²⁶⁶ Vivian Ramsay Stephen Furst and Others, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell Thomson Reuters 2016), 356.

²⁶⁷ *O'Reilly v Neville & Ors* [2017] IEHC 554.

The defendants argued that clause 8 of the building contract, which was in the LSBA form, entitled them to re-enter the property to carry out the rectification works.²⁶⁸ The decision is a helpful contribution to an area where there is very little jurisprudence. The case concerned the plaintiffs' family home, in which a number of defects had appeared following the purchase of the house in 2005, which ultimately led the plaintiffs to vacate the house entirely in 2010, following which they brought proceedings against the defendant builder. The plaintiffs originally sought to rescind the contract, and then withdrew this claim in favour of a claim in damages.

The contractor maintained that it had been willing to return to the site and to rectify the defects throughout the period between issue of proceedings and the hearing before the High Court, and argued that the plaintiffs had not facilitated this, and that an order of specific performance was more appropriate than an award of damages. An interesting feature of the case is that an offer was made by the defendants to return to site by open correspondence of March 2012, but the plaintiffs did not reply until three years later to confirm their rejection of this proposal on the basis that it did not 'properly or at all address the serious defects in their dwellinghouse'.²⁶⁹

This suggests a need for clarity, for which legislation may be required, about the circumstances in which a builder should be permitted or required to return to the site of residential construction works in order to complete or rectify the works. As Britton points out, the Court of Appeal decision in *Woodlands Oak v Conwell*²⁷⁰ suggests that a domestic construction employer may be treated as having failed to mitigate its loss if it does not permit the contractor to return to site to deal with defects, and that if the contract itself allows the contractor to do so, 'then failing to do so may put a cap on the damages available of whatever it would have cost the builder to do the extra work, which may be zero'.²⁷¹

However, where Britton conceives of the remedy of specific performance as a means by which the home owner can require a contractor to return to the site to rectify defects, in

²⁶⁸ Ibid [119].

²⁶⁹ Ibid [17].

²⁷⁰ [2011] EWCA Civ 254, [2011] BLR 365.

²⁷¹ Britton (n 261), 12.

the *O'Reilly* case, the remedy was sought by the builder, presumably on the basis that it was significantly cheaper for the builder to rectify the defects than to pay damages to cover the cost of having another builder do so. It is noteworthy that the plaintiff in *O'Reilly* indicated to the court that she would be guided by the advice of her consultant engineer, who in turn suggested that the contractor was capable of completing the work, subject to appropriate supervision.²⁷²

The foregoing authorities and discussion suggest that, while specific performance is traditionally regarded as a beneficial remedy for a party seeking performance of contractual obligation, the *O'Reilly* decision demonstrates that it can be used as a means by which a contractor, already in breach, can be given a chance to mend their hand despite the detrimental impact on the home owner that may have arisen from the breach. Specific performance of a residential building contract will typically involve the contractor being allowed back into the site of the home buyer's home, which may be a highly prejudicial outcome for a home owner who has had to bring proceedings arising from the contractor's breach.

Botterell²⁷³ argues that where parties contract for the performance of a particular obligation, such as the sale of specific objects, the promisee thereby obtains an interest in performance. If the promisor defaults in performance, on this view the promisee should be awarded damages based on the gain that the promisor has made from that default, on the basis that the promisor 'is using as her own what rightfully belongs to the promisee.'²⁷⁴ Botterell describes this as the 'particularity of performance', and argues that this particularity means that 'a promisee can be said to own the promisor's contractual performance', and that disgorgement of profits from breach should be allowed in such circumstances.²⁷⁵ This argument would support a view that a home owner, in addition to obtaining damages equivalent to the cost of rectification of defects in their home together with ancillary costs such as accommodation and professional fees, should also be awarded damages in respect of the loss of the performance expectation arising from the breach. This was the basis for the awards of general damages in the case of *Mitchell v Mulvey Developments* discussed in chapter 2. Edelman has argued that gain-based damages

²⁷² *O'Reilly* (n 267), [103].

²⁷³ Andrew Botterell, 'Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract' (2010) 16 Legal Theory 135.

²⁷⁴ *Ibid* 145.

²⁷⁵ *Ibid* 152.

should only be available in case of deliberate breach of contract and limited to the profits attributable to that breach. The difficulty for a home owner with this position is that it would be extremely difficult to calculate the profit made by a building contractor attributable to a particular breach (for instance, the failure to construct the home in accordance with Building Regulations). This would require the home owner to meet an evidential threshold more appropriate to high-value commercial litigation where extensive discovery of underlying documentation could be sought.²⁷⁶

A key question in dealing with breaches of contract is to consider whether the appropriate remedy should be damages for breach, or an order requiring the wrongdoer to comply with its original undertaking. Barker considers the meaning of ‘vindication’ of rights in private law, and considers the enforcement of a right as the strongest form of vindication, giving the example of the order of specific performance²⁷⁷, but notes that English and common law systems ‘tend to ‘vindicate’ property rights only indirectly by making interference with them wrongful and then undoing the effects of the wrong’ Vindication by restoration, not by specific enforcement, is...the predominant approach to rights protection in common law systems’.²⁷⁸

If we consider what it might mean to vindicate a plaintiff’s right in a building defects case, there are various options: firstly, the rectification of the defects is the most pressing. There will then be the expenses to the plaintiff of dealing with the defects, such as alternative accommodation and professional fees incurred in investigating and taking legal action in respect of the defect. We might conclude, therefore, that a combination of remedies is appropriate to deal with housing defects, which might include, firstly, specific performance of the building contract, or damages in lieu of performance to allow the home owner to retain another builder to complete the works or rectify the defects. The *O’Reilly* case demonstrates that there may be difficulties in forcing home owners to allow contractors back to site in order to rectify defective works, and that the order may be used tactically by defaulting contractors in order to minimise their exposure to rectification costs.

²⁷⁶ James Edelman, ‘Restitutionary Damages and Disgorgement Damages for Breach of Contract’ 8 RLR 129 (2000).

²⁷⁷ Kit Barker, ‘The Mixed Concept of Vindication in Torts and Private Law’, in *Tort law: Challenging Orthodoxy*. edited by Stephen G. A. Pitel, Jason W. Neyers and Erika Chamberlain. (2013, Oxford, Hart Publishing) 73.

²⁷⁸ *Ibid* 74.

Barker sees a role in modern private law for punitive damages, but suggests that they should be limited to ‘*public* purposes such as deterrence’.²⁷⁹ Deterrence could take on a very important role in housing defects to the extent that there may be limited capacity or resources in public building control authorities to enforce compliance with building standards; an award of punitive damages could serve a similar purpose to the range of fines that might be imposed in a prosecution for breach of the Building Control Acts in Ireland, for example. The willingness of the Irish courts to award damages for distress and inconvenience in defects cases could also have a deterrent effect, although the authorities typically demonstrate that builder insolvency is a significant barrier to meaningful awards against builders.

The litigation in *Dublin City Council v McFeely*²⁸⁰ provides an example of the difficulties that would be faced by a court in ordering specific performance in the event of defects. Remedial works orders were made by the High Court pursuant to the Fire Services Act 1981, and a schedule of works directed to be carried out. When the defendant failed to comply with the orders of the High Court, however, an order was made for attachment and committal of the first named defendant, which was ultimately set aside by the Supreme Court on the basis that the 1981 Act did not grant jurisdiction to a court to make such an order.²⁸¹

Burrows cites Megarry VC in *Tito v Waddell (No. 2)*²⁸² to the effect that a court might be more inclined to grant an order of specific performance if there was a clear definition of what was to be done, but criticises the court’s reasoning where Megarry VC suggests that a court might also be more willing to grant specific performance against a defendant who had secured some or all of the benefit to which they were entitled under the contract.²⁸³

Burrows also cites *Rainbow Estates Ltd. v Tokenhold Ltd.*²⁸⁴, where the court endorsed

²⁷⁹ Ibid 82.

²⁸⁰ [2015] 3 IR 722.

²⁸¹ The Supreme Court considered the effect of an undertaking given by the defendant to carry out remedial works to an apartment development, which had subsequently led to a motion for attachment and committal of the defendant when the works were not carried out; as the time period for carrying out of the works had not elapsed when the defendant was removed from the site for persistent default, the Supreme Court overturned the order for attachment and committal. Murray J. commented that it was ‘at least doubtful’ whether section 23 of the Fire Services Act 1981 conferred jurisdiction on the High Court to make an order beyond restricting or prohibiting the use of a building until remedial works were carried out. (at 751).

²⁸² [1977] Ch 106.

²⁸³ Burrows, *Remedies* (n 259), [479].

²⁸⁴ [1999] Ch 64.

the view that the ‘constant supervision’ concern could be addressed by having an adequate specification for the works. *Dublin City Council v McFeely* suggests that a specification of works will not be sufficient to overcome the problem of supervision, however. Burrows goes on to criticise the objection on the basis that enforcement problems, particularly infrequently, should not impact on availability in principle of the remedy, and suggests that a person could be appointed as an officer of the court to ensure enforcement or investigate the allegations.²⁸⁵

The State’s role in providing legal remedies

One of the principal themes of this thesis is the persistent failure of the Oireachtas to enact law reform to provide improved legal remedies for homebuyers, notwithstanding the various reports of the Law Reform Commission calling for such reform, and the evidence presented by multiple building failures that have illustrated the deficiencies in legal remedies. The role of the State in facilitating such remedies is acknowledged in the theory of civil recourse articulated by Goldberg and Zipursky, who suggest that the State is the third actor in the relationship between wrongdoer and victim and can be called upon to act.²⁸⁶

Goldberg and Zipursky argue that the plaintiff’s claim is connected to the plaintiff’s ‘power to obtain a remedy’ via an underlying principle of tort law, which they refer to as the ‘principle of civil recourse’.²⁸⁷ The principle, in their view, entitles the victim of a wrongdoing to require the State to assist him in obtaining a remedy to that violation of his relational right: ‘Government, in other words, is obliged to respond to those who have wronged them’ which they characterise as ‘...an affirmative right to be provided with a means of responding, through the legal system, to certain kinds of mistreatment at the hands of others’.²⁸⁸

This view of the State’s role as a positive actor in resolution of disputes between private parties, instead of merely facilitating such resolution through the courts, provides a

²⁸⁵ 481

²⁸⁶ Helge Dedek, ‘Of Rights Superstructural, Inchoate and Triangular’ in Donal Nolan and Andrew Robertson, *Rights and Private law* (Bloomsbury Publishing 2011), 213.

²⁸⁷ John Goldberg and Benjamin Zipursky, ‘Rights and Responsibilities in the Law of Torts’, in Nolan and Robertson, (n 286) 68.

²⁸⁸ Nolan and Robertson (n 286), 269.

normative justification for law reform. It is submitted that in circumstances where significant failures of the legal regimes for regulation and for private law remedies are identified, the State (specifically, the legislature) should act. The remedial and regulatory failures that have contributed to housing defects and the irrecoverability, in many cases, of damages in respect of such defects are readily apparent from the jurisprudence and from the work of the Law Reform Commission discussed in this chapter.

It is notable in this regard that Goldberg and Zipursky explicitly reject the corrective justice theory of Weinrib and others, contending instead that the State does not itself rectify private wrongs, but empowers parties to do so themselves if they choose.²⁸⁹ It is submitted that the State's obligation in this regard, therefore, is not limited to ensuring that parties have access to the courts, but further that the legal tools (via causes of actions and remedies) are available to parties in order to vindicate their rights.

Conclusion

The contractual arrangements that attend the purchase of a new home in Ireland are prejudicial to home buyers in a number of key respects. The terms of the LSBA do not reflect contemporary norms of consumer protection, nor of innovation in dispute resolution for consumers. The home buyer enjoys little bargaining power with builder/developers and is confined to contracting on the basis of a standard form that appears to have changed very little since the 1980s. The fact that the contract itself is incapable of assignment without consent suggests that the contract is not seen or treated as a source of obligations and remedies following completion during the limitation period, as the effect of the restriction is to confine any contractual remedies to the original buyer. One of the findings of this thesis is that there is a need for a re-evaluation of the relationship between buyers and sellers of new homes that allows more agency to buyers, at least where defects are concerned. If the practice is followed whereby the contract is signed under seal, there is no justification for denying a remedy in contract to second and

²⁸⁹ Ibid. 271.

subsequent purchasers. As noted in the *O'Reilly* case discussed above, the original contract may be a valuable source of a remedy, for example, in specific performance, which would not be available otherwise.

The builder also receives a 'windfall' of value where a home is sold within the limitation period without an associated assignment of the building contract, and is effectively relieved from liability for the remainder of that limitation period. This constitutes one of the many transfers of risk from builder to home buyer that are analysed in this thesis. Even within the original limitation period for an action in contract, the contractual remedy may be barred due to the doctrine of privity of contract. It was argued in this chapter that there is no normative justification for denying a remedy to a second purchaser on the basis of privity during the original limitation, and that the means by which the law does so simply produces a 'windfall' of relief from liability to the builder.

The proposals of the Law Reform Commission in 2008 largely address this problem, subject to the suggestion in this chapter that the parties should not be able to 'contract out' of allowing a third party to enforce a building contract where that third party has taken a transfer of the home. Otherwise, parties may simply circumvent any reform by including a provision that excludes the legislation. This proposal is supported by the view articulated in this chapter, that construction contracts should be treated differently to other business-to-consumer contracts by reason of the longevity of the relationship between the parties, and the consequences for second purchasers of choices made at the time of the original contract.

The 'builder's windfall' phenomenon also provides a challenge to the view expressed in the authorities and commentary in relation to recovery in negligence for building defects that economic loss arising from building defects should be recoverable only in contract, on the basis that parties should take steps to protect their economic interests by contract. The foregoing analysis of the consumer-builder relationship in Ireland, and the purchase transaction, demonstrates that even purchasers who are legally represented have little negotiating power in the home buying relationship.

The argument is made that second and subsequent purchasers should be entitled to enforce the original building contract for this reason.

In chapter 6, consideration is then given to the manner in which a financial remedy for these legal rights could be assured or improved.

Examples from Australia and Canada suggest that significant intervention into residential construction contracts is warranted from a consumer protection perspective. The chapter concludes with a discussion of the remedies of damages and specific performance, along with suggestions as to these remedies could be used in order to vindicate the contractual rights of home owners. As noted previously, however, in many cases home owners cannot rely on the original building agreement and must seek their remedies outside the law of contract; it is to these owners that we now turn in chapter 3.

Chapter 3 – remedies outside contract

Introduction

Having reviewed and analysed the law with regard to contractual remedies in the previous chapter, we now turn to remedies outside contract. The chapter sections are organised as follows.

The first section considers the law of negligence as a potential source of remedies for home owners dealing with defects. The potential remedies for home owners under the law of negligence are discussed and analysed, by reference to liability of builders and subcontractors, by reference to Ireland, England and Wales, and Australia.

Product liability is considered in the second section, with a particular focus on potential recovery by home owners in respect of defective building products. The potential liability of ‘gatekeepers’ to home owners is considered in the third section which identifies potential avenues of legal recourse against the ‘gatekeepers’ referred to in the first chapter.

The final section sets out a comparative review and analysis of statutory duties and the statutory duty model proposed by the Law Reform Commission in its 1982 Report on Defective Premises. This section includes a comparative analysis of duties imposed by law on builders with regard to new homes and residential construction, and considers the ‘implied warranty of habitability’ that displaced *caveat emptor* in the United States, and the ‘statutory duty’ model reflected in the Defective Premises Act 1972 of England and Wales and proposed in the Law Reform Commission Report of 1982.¹

A: NEGLIGENCE

Recovery in negligence for building defects – a comparative view

This section analyses decisions of the courts of three jurisdictions – Ireland, England and Wales, and Australia, in relation to recovery of economic loss in negligence for building

¹ Law Reform Commission, *Report on Defective Premises* (LRC 3, 1982).

defects, and seeks to identify the extent to which the legal environment of each jurisdiction has informed the approach of the courts to the issue.

The approach taken for this purpose is to review the extent of legislative intervention in each jurisdictions to provide measures of protection for home buyers, and whether that intervention has limited the scope of what may be recovered in negligence for defects.

The analysis indicates that the retreat from recovery for defects, led by the courts of England and Wales through a series of cases in the 1980s and 1990s, may be regarded in part as a product of their environment, and that legislative intervention in the area of remedies acted as a limitation on the scope of the duties that the courts were prepared to impose.

Tort law is a blunt tool with which to address the risks of defective construction. It enters the picture some time after completion of the building works, and at a point in time where law can no longer deal with the risk of defects. It differs from regulation, in that it is necessarily reactive and retrospective in its application. Regulation, by contrast, can evolve over time to incorporate lessons learned from poor construction, and can introduce procedures to minimise risks of defects.

Irish law provides few legal remedies for regulatory failure.² The home owner must turn to private law for such remedies. In most cases the source of a remedy for building defects should be the original building contract. In Ireland, many owners of defective houses have found that they cannot access a remedy in contract. The action may be statute-barred, as the limitation period can start under Irish law before an owner is aware of the defect. The contract itself may contain a limitation on the builder's liability. If the house has been sold during the limitation period, the contract will usually have remained with the original purchaser of the property, leaving the owner little option but to consider pursuing a remedy under the law of negligence.

² A notable exception to this assertion would be where regulation derived from a requirement of European Union law. If such a requirement involved an active obligation on a Member State to regulate in a particular area of competence, citizens who suffered loss as a result of failure to regulate could recover damages, in principle, based on the *Francovich* criteria (*Joined cases C-6/90 and C-9/90 Francovich v Italian Republic* [1991] ECR I-5357). The 2017 decision of the Supreme Court in *Ogieriakhi -v- Minister for Justice & Equality and ors* [2017] IESC 52 held that the *Francovich* criteria essentially require a plaintiff claiming to have suffered loss as a result of failure to transpose European Union law to demonstrate that the Member State in question has erred in a manner that is inexcusable and the plaintiff has suffered loss as a result. As the Irish regulatory regime for construction is largely derived from national, rather than European Union law, it seems unlikely that a plaintiff who has suffered loss as a result of housing defects could ground a claim for *Francovich* damages.

Recovery for economic loss under the general law of negligence has been rejected in some jurisdictions, such as England and Wales, while continuing to have some application in others, including Canada,³ New Zealand,⁴ and Ireland. The front upon which this issue has seen its longest-running battle across the various common law jurisdictions has been that of recovery in negligence for building defects.

Tort scholars in common law countries have spent the past three decades documenting and analysing the extent to which the courts of those countries will allow claims in tort to be maintained against builders in respect of the cost of repairing defective buildings. The courts, in turn, refer to the jurisprudence of their counterparts in other jurisdictions as the milestones along the way, offering their own reasoning for adopting or departing from the leading cases of the House of Lords in *Anns v Merton London Borough Council*,⁵ *D & F Estates v Church Commissioners for England and Wales*,⁶ and *Murphy v Brentwood District Council*⁷. Principles of negligence appear throughout the cases – foreseeability, proximity, reliance, and the assumption of responsibility. There is a marked absence, however, of an engagement by the courts with the legislative context for these decisions, and of how that context should inform their view on liability in negligence for building defects.

This section seeks to situate the leading cases in those national contexts, specifically in terms of how the legislative context of the relevant jurisdictions has informed the approach of the courts to this issue. In doing so it is hoped to contribute another dimension to the debate on whether economic loss should be recoverable for building defects, and to consider whether there is a residual role for these claims even following legislative intervention.

Why should tort law provide a remedy? Vulnerability?

Beever suggests that ‘vulnerability appears to be a particularly bad candidate for an explanation of even part of the law of negligence’, on the basis that vulnerability derives from the risk to the claimant rather than to the particular characteristics of the claimant.

³ *Kamloops (City of) v Nielsen* [1984] 2 S.C.R. 2; *C.N. v Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021.

⁴ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

⁵ *Anns v Merton London Borough Council* [1978] AC 728.

⁶ *D&F Estates Ltd v Church Commissioners for England and Wales* [1989] AC 177; [1988] 2 All ER 992.

⁷ *Murphy v Brentwood District Council* [1991] UKHL 2, 1 AC 398.

In Beever's conception of the law of negligence, a corrective justice approach seeks to achieve justice between individuals, while a distributive justice approach seeks to uphold the 'fair distribution of risks throughout society'.⁸ He goes on to take issue with Cane's argument that 'corrective justice provides the structure of tort law within which distributive justice operates'⁹, but that distributive justice concerns itself, in part, with the relationship between plaintiffs and defendants, arguing that this essentially describes corrective justice, and that tort law, with its concern for relationships between individuals, is grounded in corrective, rather than distributive justice.¹⁰

Beever points to the consequences of this distinction for the development of negligence theory, arguing that 'those theorists argued that the private law is based on correct (commutative) justice rather than distributive justice'.¹¹ The argument brings us back to Weinrib's formulation of corrective justice, which, as we have discussed, does not assist us in determining the proper remedy for the home owner dealing with defects.

An alternative justification for why the law of tort should provide a remedy to second and subsequent purchasers is a ground that appears in the negligent misstatement jurisprudence as reliance. The relationship between the second purchaser and the builder is not a contract: there is no performance obligation by the builder or consideration by the purchaser. There is, however, reliance by the purchaser on the builder having complied with his obligations in his relationship with the first purchaser, of workmanship and quality of materials (derived, at least, from section 39 of the Sale of Goods and Supply of Services Act 1980, if not explicitly provided in the contract) and of compliance with laws (based on the general obligation to comply with the Building Control Act 1990 and Building Regulations made thereunder). Reliance is regarded as sufficient grounds for recovery in the negligent misstatement cases in light of the nature of the maker of the statement.¹² However, there is little normative justification for distinguishing between the reliance placed on the inspector who certifies compliance with the works, and the reliance placed on the person or persons who have actually carried out the works.

⁸ Allan Beever, *Rediscovering the law of negligence* (Bloomsbury Publishing 2007), 65 -66.

⁹ Peter Cane, *Tort law and economic interests* (Clarendon Press 1991), 413.

¹⁰ Beever, (n 8), 194-195.

¹¹ *Ibid* 68.

¹² See discussion later in this chapter in relation to civil remedies against gatekeepers such as ancillary and assigned certifiers appointed pursuant to the Building Control (Amendment) Regulations 2014.

Quill argues in favour of an expansion of the law of tort to compensate purchasers for defective buildings, and suggests three categories of purchaser for the purposes of defining the appropriate beneficiaries of an enhanced duty in tort, to include (i) private buyers, (ii) small businesses, and (iii) large businesses, each attracting a different duty of care. Crucially, Quill regards vulnerability as the defining characteristic which should result in a finding of a duty of care (and thus liability for defects) in favour of private buyers, and, arguably, small businesses. Large businesses, however, would be excluded from such an enhanced duty.¹³

Large commercial entities are less vulnerable, as they are in a better position to bargain for contractual protection; they can generally engage in a more searching examination of the property; and in many cases, the purchase represents a less significant investment of resources for them compared to persons buying a home.

England and Wales: liability for economic loss

A number of decisions of the courts of England and Wales in the 1970s and 1980s suggested that local authorities who had approved defective building works, or failed to detect defects upon inspections, could be liable in tort in respect of the cost of rectification. The English jurisprudence commenced with the 1971 decision in *Dutton v. Bognor Regis UDC*¹⁴, in which the Court of Appeal held that the local authority should be regarded as owing a duty of care to the plaintiff home owner unless there was some justification or explanation for excluding that duty. The defendant local authority's inspector had approved a defective foundation. The Court of Appeal found that the local authority owed a duty of care to a subsequent purchaser of the house, and the Council was therefore vicariously liable for the negligence of its inspector. The reasoning of Lord Denning with regard to the imposition of the duty of care on the defendant council relied significantly on the comparative positions of the plaintiff and defendant:

...Mrs. Dutton has suffered a grievous loss...She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible...In the first place, the builder was responsible...In the second place,

¹³ Eoin Quill, 'Defective Buildings the Limitation of Actions: Part 1' (1992) 10 Irish Law Times 2.

¹⁴ [1972] 1 QB 373, CA.

the council's inspector was responsible...In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss.¹⁵

Lord Denning, while accepting the principle articulated in *East Suffolk Rivers Catchment Board v Kent*¹⁶ to the effect that a statutory body could be liable for failure to exercise a statutory duty, but not for failure to exercise a power, held that Council was under a duty to inspect. The basis for this conclusion was the degree of control given to the council in respect of its inspection function, which included the ability to compel a building owner to remove work and to bring works into compliance with the relevant byelaws.¹⁷ On this basis, therefore, Lord Denning stated that 'the control thus entrusted to the local authority is so extensive that it carries with it a duty. It puts on the council the responsibility of exercising that control properly and with reasonable care.'¹⁸

Another aspect of Lord Denning's *dicta* is the contention that the local authority had been entrusted with a task of seeing to it that houses were properly built, in order to 'protect purchasers and occupiers of houses'. It is submitted, however, that this view represents an overly simplistic view of the local authority's function that fails to distinguish between the public interest in ensuring compliance with the building code, such that buildings are safe to occupy, and the private interest of a would-be buyer investing in an asset.

The distinction between the two roles is illustrated by the Irish regulatory regime, in which the public role of ensuring compliance with Building Regulations is entrusted to building control authorities established pursuant to the Building Control Act 1990, and the private role of ensuring that the financial interests of buyers and building owners are protected is entrusted to the assigned certifier, a private entity retained by contract to provide inspection and certification services in accordance with the Building Control (Amendment) Regulations 2014. Booth and Squires refer to the distinction as the reason that claims for damages from purchasers of defective properties have failed:

¹⁵ Ibid 397-398.

¹⁶ [1941] AC 74.

¹⁷ *Dutton* (n 14) 391-392.

¹⁸ Ibid 392.

Claims have been brought by purchasers of property whose defects, it is suggested, ought to have been detected by a public authority when it inspected them as part of its health and safety functions. The failure to detect the defect then led to the claimant believing that the property was not defective and to paying too high a price for it. Claims for damages in such cases have failed. This is because the allegedly negligent inspection was not conducted for the purpose of protecting the economic interests of future purchasers, and the claimant therefore failed to establish that the statement was ‘purpose specific’.¹⁹

A related head of claim which is dismissed by Booth and Squires is that of failure to regulate or to regulate sufficiently, which the authors say is usually insufficient to ground a duty of care to avoid economic loss, on the basis that the purpose for which the regulatory powers were exercised was not to protect the economic interests of a given class of claimants.²⁰

The Dutton decision was followed by the House of Lords in the 1978 case of *Anns v. Merton London Borough Council*.²¹ The plaintiffs were long lessees of seven flats in a two storey block which had been completed in 1962; structural movements were detected in 1970 that caused cracking in the walls; the plaintiffs sued the builder and the local authority in negligence, alleging that the local authority was vicariously liable for the negligence of its inspector in approving the plans for the block and failing to notice the inadequate foundations on subsequent inspections. Lord Wilberforce stated that the question of the duty of care had to be approached by asking, firstly, whether:

as between the alleged wrongdoer and the person who has suffered the damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit

¹⁹ Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford University Press 2006), 139.

²⁰ *Ibid* 139-140.

²¹ *Anns v Merton London Borough Council* (n 5), 751H.

the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.²²

Lord Wilberforce took the view that ‘there must surely be a duty to exercise reasonable care’ in carrying out inspections, noting that the inspector’s function in relation to the builder was ‘supervisory’ and that there would be no subsequent opportunities for inspection once the foundations passed by the inspector had been covered up. Buckley suggests that the emphasis in the case on foreseeability detracted from the question of whether it was appropriate for the court to treat a statutory power as sufficient to justify departure from the general principle that there should be no liability for an omission.²³

This in turn may have led to the making, albeit unsuccessfully, of claims which would more readily have been perceived to be doomed if foreseeability had not been wrongly regarded as a universal panacea which had obliterated the distinction between acts and omissions.²⁴

The House of Lords, in its 1983 decision in *Junior Books v Veitchi*,²⁵ then held that the cost of rectifying a defective floor could be recovered in tort by an employer against a sub-contractor. The decisions of the House of Lords in *D&F Estates* and *Murphy*, however, largely foreclosed any avenue of recovery against builders under this heading.

In *D & F Estates v Church Commissioners for England and Wales*²⁶, the House of Lords held that the cost of repairing a defective structure before it had caused personal injury or damage to property other than the structure itself was economic loss, and thus not recoverable in tort against a builder.²⁷

The House of Lords, in its 1991 decision in *Murphy v. Brentwood District Council*,²⁸ overruled its decision in *Anns*, and held that neither a builder nor a building control

²² Ibid 751-752.

²³ Richard A Buckley, *The Law of Negligence and Nuisance* (6th edn, LexisNexis 2017) [1.14].

²⁴ Ibid.

²⁵ *Junior Books v Veitchi* [1983] 1 AC 520.

²⁶ [1989] 1 AC 177.

²⁷ See Piggott for a discussion of the decision of Akenhead J. in *Linklaters Business Services v Sir Robert McAlpine Limited and ors* [2010] EWHC 2931 suggesting that such losses could be recoverable against sub-contractors, however. Ashley Piggott, ‘Economic Loss and Complex Structures’ (2010) 21 10 Construction Law 14.

²⁸ *Murphy v. Brentwood District Council* (n 7).

authority owed a duty of care to home owners in respect of defects in the foundations of the plaintiff's house which had not been detected by the defendant council's professional advisers during the statutory approval process for the house's design. Lord Keith of Kinkel endorsed the dicta of Deane J. in the Australian case of *Council of the Shire of Sutherland v Heyman*²⁹, to the effect that damage caused by defects should be regarded as economic loss rather than physical damage to property, and thus should not be recoverable in tort. Amongst Lord Keith's reasoning for rejecting the plaintiff's claim against the council was that, to impose liability in tort on a builder in such circumstances would be tantamount to imposing such a duty on the manufacturer of a chattel, which 'would open on an exceedingly wide field of claims, involving something in the nature of a transmissible warranty of quality'.³⁰

Lord Keith also observed that much of the litigation that was brought in the wake of *Anns* was between insurance companies, 'as is largely the position in the present case'; the case appears to have commenced as a subrogation claim by the plaintiff's insurance company, which had already compensated the plaintiff for the £35,000 loss at which he had been compelled to sell his house.³¹ Lord Bridge concurred with the view that a defect that had caused neither injury nor damage to property other than the defective building itself was 'economic loss' which was not recoverable in tort absent a 'special relationship of proximity'.³²

In *Murphy* the House of Lords held that the defendant local authority was not liable for the diminution in value of houses for which it had approved plans, where defects subsequently emerged. The loss was characterised as economic loss, and the local authority was held not to be under any duty to avoid loss of this nature to the plaintiffs.

Lord Bridge in *Murphy* stated that the loss arising from a defective chattel is a defect of quality. The cost of repair was regarded as economic loss, not recoverable in the absence of a '*special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss*', which is similar in scope and language to the

²⁹ *Council of the Shire of Sutherland v Heyman* 157 CLR 424.

³⁰ *Murphy*, (n 7), 469.

³¹ *Ibid* 458.

³² *Ibid* 475.

liability established under *Hedley Byrne v. Heller and Partners*³³ and the cases that followed it. His Lordship characterised a defect, which has not caused any injury or damage to property, as giving rise to economic loss, recoverable in contract but not in tort, absent a special relationship of proximity.

If a builder erects a structure containing latent defects which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from the dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the builder owner is purely economic.³⁴

England and Wales: legislative context

The 1990 decision of the House of Lords in *Murphy* makes clear that economic loss arising from building defects is not recoverable against a builder, absent a ‘special relationship of proximity’ consistent with the parameters of *Hedley Byrne*.

The need to re-affirm the predominance of contract as the appropriate method of governing relationships between builders and their clients was revisited in the 2011 Court of Appeal decision in *Robinson v Jones*,³⁵ in which Jackson LJ stated as follows:

Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder to take reasonable care to protect the client against suffering personal injury or damage to other property.³⁶

A review of the broader legislative context of England and Wales in which this pre-

³³ *Hedley Byrne v Heller & Partners* [1964] AC 465. The standard of care for professionals in the construction industry has a heritage of considerably greater vintage than *Hedley Byrne*, however; in *Armstrong v Jones* (1869) HBC 4th ed., Vol. 2, p.6 it was held that ‘an architect had a duty to exercise reasonable care, diligence, attention and skill (1) when making plans and specifications and (2) when supervising the work which was being carried out by a builder’ (summarised and reported in John Lyden (ed), *Irish Building and Engineering Caselaw* (Society of Chartered Surveyors 1989), 74).

³⁴ *D&F Estates Ltd v Church Commissioners for England and Wales* (n 6).

³⁵ *Robinson v. P.E. Jones (Contractors) Ltd.* [2011] EWCA Civ 9.

³⁶ *Ibid* [68].

eminence of contract law is asserted, however, discloses the significant intrusions into contractual relationships that had been made prior to *D & F Estates*, in the form of the Defective Premises Act 1972 and the Latent Damage Act 1986, and again prior to *Robinson*, in the form of the Contract (Rights of Third Parties) Act 1999, which made substantial adjustments to the principle of privity of contract. The Defective Premises Act 1972, for example, includes a statutory warranty of quality and workmanship in respect of dwellings which operates independently of contract and is thus available to purchasers other than the original signatory of the building contract for the dwelling.

Reference is made to the Defective Premises Act in both *D&F Estates* and *Murphy*. Lord Bridge in *D & F Estates* rejected the argument that a builder should be liable in negligence for the cost of replacing the defective plaster at issue in that case, on the basis, firstly, that to make the builder so liable ‘would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship, and fitness for purpose’.³⁷

His Lordship then went on to suggest that to hold the builder liable in such circumstances would mean that the courts, in developing the common law,

...had gone much farther than the legislature were prepared to go in 1972, after comprehensive examination of the subject by the Law Commission, in making builders liable for defects in the quality of their work to all who subsequently acquire interests in buildings they have erected. The common law duty...could not be so confined or limited. I cannot help feeling that consumer protection is an area of law where legislation is much better left to the legislators.³⁸

Lord Keith of Kinkel made a similar point in *Murphy*, noting that the decision in *Anns* imposed a liability on the builder beyond that provided for in the Defective Premises Act 1972, and commenting that ‘the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature.’³⁹

³⁷ *D&F Estates* (n 6).

³⁸ *Ibid* 1007.

³⁹ *Murphy* (n 7), 16.

The Defective Premises Act, on this view, erected a boundary around the negligence actions for building defects, despite the fact that the Act creates an independent statutory duty and remedy which is neither contractual nor tortious in nature. The Act is also very limited in terms of the duty created; section 1 (1) of the Act requires that a person who takes on work in connection with the provision of a dwelling shall see to it that the work is done in a workmanlike manner, using proper materials, so that the house will be fit for habitation when complete.

The other crucial point from the perspective of our comparison, however, is that the legislature had already intervened in England and Wales in advance of the retreat from *Anns*, which established the parameters of the duty that the court was prepared to recognise in *Murphy*. The courts were not, then, saying that the question should ultimately be one for the courts should not extend a common law duty beyond the statutory one.

Steel suggests that both Lord Keith in *D & F Estates* and Lord Oliver in *Murphy* treat *Junior Books* as applications of the *Hedley Byrne* principle, commenting that

...it is simply difficult to make a principled distinction between contracts involving the giving of advice or another professional service and those involving construction of a building in so far as assumptions of responsibility are concerned. In both types of cases the defendant is performing some task for the claimant with the (at least) implicit representation that it can be relied upon to do the task with reasonable care.⁴⁰

If *Junior Books* can be read so as to accommodate the ‘professional man’ paradigm of *Hedley Byrne* and the cases that followed it, the distinction between builders carrying out works and professionals provide design and advisory services, as far as the duty of care of negligence is concerned, becomes less clear-cut. The dicta of Jackson LJ in *Robinson v Jones* suggests that the features of the *Hedley Byrne* model of liability – the assumption of responsibility by the ‘professional man’ – are key to actionable negligence in respect of building defects. Pliener and Wheater have criticised *Robinson* on the basis that it attempts, unsuccessfully, to ‘draw a bright line between professionals and non-

⁴⁰ Sandy Steel, ‘Building contracts: a concurrent claim in tort?’ (2011) 4 Journal of Professional Negligence 226, 228.

professionals in relation to the assumption of duties, which is contrary to previous authorities'.⁴¹

Ireland: liability for economic loss

The 1980 decision of the High Court in *Colgan v. Connolly Construction Company (Ireland) Ltd.*⁴² established that a second purchaser of a property, who had no contract with the builder, could recover damages in respect of dangerous defects that presented a risk of personal injury, but that damages in respect of defects of quality were not recoverable in negligence.

In *Ward v McMaster*,⁴³ the plaintiff had purchased a house from an amateur builder, with the assistance of a loan from a local authority. The local authority was empowered under the 1966 Housing Act to make the loan, and was required under the Act to satisfy itself by means of a valuer's report as to (i) the value of the house and (ii) that the house represented adequate security for the loan. The house contained serious defects, and ultimately, the plaintiff and his family vacated the house and sued the builder, the local authority and the firm of auctioneers retained by the local authority to provide a valuation for the house.

Costello J delivered the decision for the High Court, and held that the builder of a house on his own land owes a duty of care to a subsequent purchaser of that house, based on the principle of *Donoghue v Stevenson*,⁴⁴ to avoid dangerous hidden defects and consequential financial loss and inconvenience. The court notably followed the decision in *Junior Books v Veitchi*⁴⁵ which, although it has not been specifically overruled by the English courts, has been repeatedly distinguished in subsequent jurisprudence.⁴⁶

⁴¹ David Pliener and Michael Wheeler, 'Robinson redux: be careful what you wish for' (2011) 27 Construction Law Journal 117, 117. The authors refer to *Batty v Metropolitan Realisations Ltd.* [1978] QB 554 Ltd [1978] QB 554, *Barclays Bank v Fairclough Building Ltd (No 1)* [1995] QB 214 and *Barclays Bank v Fairclough Building Ltd (No. 2)* (1995) 44 Con LR 34, and *Bellefield Computer Services v E Turner & Sons Ltd (No. 2)* [2002] EWCA Civ 1823 in support of the view that non-professionals can be subject to *Hedley Byrne*-type duties of care, and can thus be exposed to claims for economic loss in negligence, commenting that 'Ultimately, the reasoning in *Fairclough (No. 2)* remains compelling and Jackson L.J.'s reasoning in *Robinson* does little to displace it'. (129)

⁴² *Colgan v Connolly Construction (Ireland) Ltd.* [1980] ILRM 33.

⁴³ *Ward v McMaster* [1986] ILRM 43.

⁴⁴ *Donoghue v Stevenson* [1932] AC 562.

⁴⁵ *Junior Books v Veitchi* [1983] 1 AC 520.

⁴⁶ The case has not been followed in subsequent decisions of the Courts of England and Wales, although it has been followed in Singapore (*Man B & W Diesel S E Asia Pte and Another v PT Bumi International Tankers and Another* [2004] 2 SLR (R) 300), Malaysia (*Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* [1997] 3 MLJ

Costello J distinguished a line of cases in which it had been held that a builder who owned land on which he constructed a dwelling, who subsequently sold or let that dwelling, was immune from liability in tort, and found that the builder owed a duty of care to a purchaser of the house in relation to defects not discoverable by the kind of examination which the builder could reasonably expect the purchaser to make, and that the duty:

...was not limited to avoiding foreseeable harm to persons or property other than the bungalow itself...but extended to a duty to avoid causing the purchaser consequential financial loss arising from hidden defects in the bungalow itself (that is, duty to avoid defects in the quality of the work.⁴⁷

The builder was held to be in breach of duty in causing defects that resulted in a danger to the health and safety of the plaintiffs, defects in the workmanship which then needed to be remedied, and defects which resulted in inconvenience and discomfort to the plaintiff and his wife. The plaintiffs were awarded damages under each heading. The finding against the builder was not appealed,⁴⁸ and (although this issue has been the subject of some argument in the cases since)⁴⁹ still represents the Irish position with regard to the liability of a builder in tort in respect of defects of quality in a house.

In the 2001 decision of the Supreme Court in *Glencar Exploration v. Mayo County Council (No.2)*⁵⁰ in 2002, Keane CJ expressly reserved the question of whether economic loss was recoverable and did not overrule the earlier cases of *Ward v McMaster* and *Siney v. Dublin Corporation*⁵¹:

546, and Ireland (*Ward v McMaster* (n 43)).

⁴⁷ In *Simaan General Contracting v. Pilkington Glass* [1988] EWCA Civ J0217-4, Bingham LJ commented with regard to Junior Books: 'Plainly this decision contained within it the seeds of a major development of the law of negligence...It remained to be seen whether those seeds would be encouraged or permitted to germinate. The clear trend of authority since Junior Books indicated that...they will not'.

⁴⁸ The 1988 Supreme Court decision in *Ward* dealt with an appeal from Louth County Council, and upheld the finding of negligence against it; *Ward v McMaster* [1988] IR 337.

⁴⁹ The 2001 case of *O'Donnell v Kilsaran Concrete* [2001] IEHC 155 and the 2015 decision in *SSE Renewables (Ireland) Limited v William and Henry Alexander (Civil Engineering) Limited* [2015] IEHC 786 each involved unsuccessful attempts to have proceedings struck out on the basis that the loss claimed was economic loss and thus irrecoverable under Irish law.

⁵⁰ *Glencar Exploration v Mayo County Council* [2001] IESC 64 [2002] 1 IR 84 [2002] ILRM 181.

⁵¹ In *Siney v Dublin Corporation* [1980] IR 400 the Supreme Court had held the defendant local authority liable in negligence in respect of a flat provided under the Housing Act 1966, which contained defects rendering it unfit for human habitation. The damages claimed related to damage to the plaintiff's possessions in the flat, however, and did not include damages for rectifying defects to the property.

I would expressly reserve for another occasion the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement and those falling within the categories identified in *Siney and Ward v. McMaster* and whether the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.* should be followed in this jurisdiction.⁵²

The Chief Justice, in this passage, identifies three categories of actions for recovery of economic loss in negligence for which he appears to acknowledge that recovery is settled:

- (i) negligent misstatement: the line of authority of which the modern origin is *Hedley Byrne v Heller and Partners*⁵³, and which has been repeatedly endorsed in the Irish and English courts;
- (ii) damages for injury and property damage in respect of a local authority landlord's implied warranty of habitability (*Siney v Dublin Corporation*⁵⁴);
- (iii) damages for latent defects attributable to negligence by a builder or local authority (*Ward v McMaster*⁵⁵).

The reference to *Junior Books v Veitchi* may refer to the specific category of action that was at issue in that case, in which a sub-contractor was held to owe a duty of care to an employer in respect of a defective floor, or to the broader category of economic loss in negligence generally.

McMahon & Binchy suggest that the court in *Glencar* was leaning against the prospect of recovery of economic loss, and that

...it would only be prudent to reiterate that *Glencar* has cast a very dark shadow over recovery of damages for negligently inflicted economic loss and that qualitative defects savour strongly of contract.⁵⁶

The authors do, however, take the view that Irish law diverges sharply from the courts of

⁵² *Glencar* (n 50) [112].

⁵³ [1964] AC 465.

⁵⁴ [1980] IR 400.

⁵⁵ *Ward* (n 43).

⁵⁶ William Binchy and Bryan McMahon, *Law of Torts*, (4th edn, Bloomsbury Professional) chapter 13 (Kindle edition).

England and Wales in allowing recovery of economic loss in respect of dangerous defects, which are apparently spared the ‘dark shadow’ of *Glencar*, in contrast to the English authorities of the late 1980s, including *D & F Estates v Church Commissioners for England and Wales* and *Murphy v Brentwood*. This series of authorities, according to McMahon and Binchy, present a significantly greater normative justification for allowing recovery; to hold otherwise, in their view, would be to discourage building owners from ‘taking the necessary steps, with expedition, to make the premises safe’.⁵⁷

There is arguably a significant divergence between Irish and English law in relation to liability of building contractors in tort for defects of quality.

There has been no Irish decision that has adopted the reasoning in *Murphy*, and very little jurisprudence since *Ward* in relation to the liability of a builder in tort in respect of non-dangerous defects, nor in relation to the broader question of whether economic loss is recoverable in tort. In *O’Donnell v Kilsaran Concrete*,⁵⁸ proceedings were issued against a concrete supplier and a builder where defects appeared in a house built using defective concrete blocks. The defendants claimed that the plaintiffs’ case was statute-barred and that the damages sought were irrecoverable in any event as they amounted to economic loss. Herbert J confined his judgment to the limitation point, however, expressly declining to express a view on whether the plaintiffs’ claims would be successful on the merits.⁵⁹

In the more recent decision in *SSE Renewables (Ireland) Limited v. William and Henry Alexander (Civil Engineer) Limited and Aecom Limited*⁶⁰, one of the defendants sought the trial of a number of preliminary issues, including whether the plaintiff’s claim was bound to fail on the grounds that the pleaded loss and damage constituted economic loss, and whether it was also bound to fail on the basis that the communications alleged to give rise to an assumption of responsibility to the plaintiff were issued following completion of the design of the works. Hedigan J. observed that there was ‘no clear answer as to whether there can be a remedy in tort for such a loss’, and that it could not, therefore, be regarded as a discrete legal issue appropriate for trial as a preliminary issue.

⁵⁷ Ibid.

⁵⁸ *O’Donnell v Kilsaran Concrete Limited* [2001] IEHC 155.

⁵⁹ Ibid [23].

⁶⁰ *SSE Renewables (Ireland) Limited v. William and Henry Alexander (Civil Engineer) Limited and Aecom Limited* [2015] IEHC 786.

In a decision of the Court of Appeal from the following year, *Paulson Investments v Jons Civil Engineering*, Hogan J. adopted a similar approach in dealing with the defendant's claim that the proceedings should be struck out on the basis that the loss was economic.⁶¹ Hogan J. acknowledges that the legal position is unclear as to whether economic loss is recoverable in this jurisdiction, noting that the Chief Justice in *Glencar* 'appeared to doubt the correctness of the expansive approach taken in cases such as *Siney and Ward*'.⁶² The case is of particular interest in that it engages with the jurisprudence in England and Wales following *Murphy v Brentwood* until *Robinson v Jones* in 2011.

Hogan J. is in agreement with the underlying basis of the English authorities, that economic loss belongs to the realm of obligations undertaken voluntarily (in contract) rather than those imposed by law (in tort). Having referred to the 'long retreat' of the English courts from recovery of economic loss for building defects, Hogan J. commented that:

In the course of that retreat, the English judges have stressed the distinct and different nature of contractual obligations (which are consensually assumed) as compared with those obligations which are imposed by the law of tort (*i.e.*, independently of contract or consent)...the English courts now take the view that while these obligations overlap, there is now a difference as to the extent of the obligations in both tort and contract.⁶³

This view has considerable merit when viewed in light of the doctrinal concurrence between the Irish and English courts until *Junior Books v Veitchi*, which was endorsed by Costello J. in *Ward v McMaster*, and in light of the remarks of the Chief Justice in *Glencar*. The proposition that the Irish courts should follow the English courts in due course in order to re-align the course of the jurisprudence fails to take account of the Irish legal context, which, it is submitted, warrants the retention of this head of recovery until law reform has improved the position for home buyers. Firstly, as has been noted above in the discussion with regard to implied terms, two of the most significant building defects

⁶¹ *Paulson Investments Ltd. and Albert Enterprises Ltd. v Jons Civil Engineering Ltd. and P.J. Edwards and Co. Ltd.* [2016] IECA 169.

⁶² *Ibid* [65].

⁶³ *Ibid* [63].

cases to be considered by the Irish Supreme Court in recent years turned on interpretation of section 14 of the Sale of Goods Act 1893 and its application to the supply of materials at issue in each case.⁶⁴ Both cases concerned claims for breach of contract, but it was apparent in each case that the parties had given no consideration to the phenomenon of statutorily implied terms; such terms, perhaps, would not meet the threshold of ‘consensually assumed’ terms referred to above by Hogan J., and occupy a type of middle ground between statutory duty and conventional contract law.

Secondly, it is submitted that the existing Irish legislative context is sufficiently different to that of England and Wales to warrant a different approach to economic loss, at least in building defects cases. This argument is developed and discussed in further detail in the following section.

The Irish legislative context

Section 39 of the Sale of Goods and Supply of Services Act 1980 applies to all services contracts, including building agreements, unless expressly excluded. The section implies a number of terms that apply directly to building services: that the supplier has the necessary skill to render the service, that he will do so with 'due skill, care and diligence, and that any materials used will be 'sound and reasonably for the purpose for which they are required'.

As this warranty is implied into the original building agreement on foot of which the house or apartment is built, the term is treated at law in the same manner as if it had been written into the contract by the parties. The common law of privity of contract has not been modified in Ireland as it has in England and Wales,⁶⁵ and the implied term remains in that contract and does not pass to subsequent purchasers of the unit unless there is an assignment of the building contract, which is not done as part of a standard residential conveyance.

There is no equivalent in Irish law to legislation introduced in England and Wales that provides some measure of protection for homeowners, the Defective Premises Act 1972

⁶⁴ See the discussion of *James Elliott Construction v Irish Asphalt* and *Noreside Construction v Irish Asphalt* at Chapter 1, Section C.

⁶⁵ By the Contracts (Rights of Third Parties) Act 1999.

and the Latent Damage Act of 1986. The Irish Law Reform Commission's 1982 Report on Defective Premises⁶⁶ included the scheme of a Defective Premises Bill, very similar in its terms to the 1972 Act, but this was not introduced into Irish law. A plaintiff bringing an action in tort in the Irish courts against a builder could argue that various aspects of Irish law differ significantly from the law of England and Wales, to the detriment of home buyers, and that the boundaries around recovery in negligence apparently established by the 1972 Act should not apply in Irish law.

It is submitted that the Irish courts should, therefore, recognise that the *D & F Estates* and *Murphy* decisions are very much a product of their legal environment, which differs from the Irish legal environment in certain key respects. Firstly, as was mentioned by Lord Bridge in *D & F Estates*, the Defective Premises Act 1972 establishes a statutory duty on builders and others involved in construction of a dwelling, to see that the work taken on is done in a workmanlike, or, as the case may be, professional manner using proper materials and so that as regards that work the dwelling will be fit for habitation when completed. The cause of action is deemed to have accrued at the time when the dwelling as completed, or at a later date upon which the person who originally carried out the construction work for the dwelling does further work to rectify any defects.⁶⁷

Secondly, under Irish law, an action for breach of contract can only be brought by the parties to that contract. The Law Society standard form building contract used for new dwellings in Ireland contains a prohibition on assignment; if the dwelling is sold within the limitation period, the remedy in contract remains with the seller.

Thirdly, under s. 3 (1) of the Latent Damage Act 1986 in England, a cause of action in negligence accrues by operation of law to a person acquiring an interest in a property in respect of which a cause of action has accrued in relation to latent damage to the property. The Irish Law Reform Commission, in its report on Claims in Contract in respect of Latent Damage (other than Personal Injury)⁶⁸ drew attention to the common law rule that, where property is transferred subsequent to the accrual of a cause of action in tort (which, under Irish law, accrues when the damage is caused to the building by the defect), that

⁶⁶ Law Reform Commission (1982) (n 1).

⁶⁷ Defective Premises Act 1972, Section 1 (5) (England and Wales).

⁶⁸ Law Reform Commission, Report on the Statutes of Limitations: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury) (LRC 64 – 2001).

cause of action will not transfer without a specific assignment. The Law Reform Commission noted that the rule ‘had to be uprooted in England, by s.3 of the *Latent Damage Act, 1986*....’.⁶⁹

The decision in *Buckley v Lynch*⁷⁰ suggests some modification of the rule in Ireland. The plaintiff had brought proceedings against a builder in respect of defects in a new home. The builder sought contribution from the third party architect, who argued that, as a claim against it by the plaintiff would have been statute-barred, that the builder’s contribution claim was similarly statute-barred. The High Court held that the cause of action against the architect would have accrued at the earliest upon the acquisition of the plaintiff’s interest in the house from the builder. This authority appears to stand in contrast from the start date of ‘manifestation of the damage’ articulated in *Pirelli v Oscar Faber & Partners*⁷¹ which has been repeatedly approved by the Irish courts, most recently in *Brandley v Deane*⁷².

Finally, the Limitation Act 1980,⁷³ which was amended by the Latent Damage Act 1986, allows negligence claims to be brought in respect of defects within three years from the date on which the claimant knew, or ought reasonably to have known of the defect, up to a long-stop of fifteen years.

These factors might well influence an Irish court to maintain the position with regard to the liability of builders for economic loss that is set out in the judgment of Costello J in *Ward*.

The Law Reform Commission’s 1982 Report on Defective Premises⁷⁴ included the scheme of a Defective Premises Bill, which was not introduced into Irish law following the Report. The Bill included a statutory duty on a person undertaking or executing work, in favour of the person who commissioned the work and any person who acquired an interest in it, to see that the work was undertaken in a good and workmanlike manner with suitable and proper materials. The Bill provided that damages recoverable for breach of

⁶⁹ Ibid 41.

⁷⁰ [1978] IR 6.

⁷¹ [1983] 2 AC 1, [1983] 2 WLR 6.

⁷² [2017] IESC 83.

⁷³ Section 14B, Limitation Act 1980 (as inserted by section 1, Latent Damage Act 1986).

⁷⁴ Law Reform Commission (1982) (n 1).

the duty should include an amount for economic loss (if any) suffered by the plaintiff.

There are a number of aspects of the law as it stood at the time of the Report that would have informed the Commission's view, and that add additional weight to the importance of providing a legal remedy for owners dealing with defects. Firstly, the Commission may not have anticipated the retreat of the law of negligence in the 1980s in Ireland, England and Wales, as discussed above. The Commission treated the *McNamara v ESB*⁷⁵ decision, which recognised that an occupier owed a duty of care in negligence towards a child trespasser, as an indication of a trends towards a broader role for the law of negligence. The occupier's obligation to a trespasser at common law had been to avoid acting with reckless disregard for the safety of a trespasser; the common law position was restored, however, with the introduction of the Occupiers' Liability Act 1995.⁷⁶

Secondly, the Commission would not have anticipated that the introduction of nationwide Building Regulations would be accompanied by a significantly less onerous regime for inspection and building control than that which applied in 1977 under the building bye-laws system.⁷⁷ In effect, the regulatory regime which informed the Commission's view of the appropriate civil remedies was comprehensively deregulated in the years since, as discussed in chapter 4. The Commission's recommendations, therefore, it must be seen in that context; the options considered by the Commission for reform did not include a clarification of the law of negligence, but at the time the tide of the law of negligence was to allow recovery for economic loss; the Commission noted, for example, that its proposal to impose liability on a person with the power or duty to inspect building work was 'in line with recent developments in the law', citing *Siney v Dublin Corporation*.⁷⁸

Feldthusen has suggested that recovery of tort is inappropriate in defects cases, on the basis that the parties are invariably in a contractual chain of relationships leading from the original builder to the plaintiff, and that '...we should assume that the parties themselves

⁷⁵ [1975] IR 1.

⁷⁶ The Commission might not have anticipated that the 1995 Occupiers' Liability Act would restrict the liability of occupiers to the common law position as it was before the *McNamara* decision, so as to impose a very limited liability for entrants to land, instead of accepting, as the Law Reform Commission suggested, that the higher standard owed to trespassers following the *McNamara* decision should be extended to the other traditional common-law categories of entrants, invitees and licensees.

⁷⁷ See discussion in chapter 4 regarding the evolution from the building bye-laws system to the Building Control Act 1990.

⁷⁸ Law Reform Commission (1982) (n 1).

have constructed the best set of incentives to prevent avoidable defects'.⁷⁹ In effect, the ability of parties to allocate the risk of defects should foreclose recovery in tort, with remedies in tort available only where the parties cannot allocate the risks of physical injury and property damage that are the result of accidents, for example.

However, the experience in Ireland with residential building contracts suggests that Irish home buyers are in a 'take it or leave it' situation when it comes to building agreements, particularly in a time of acute housing shortage, and have no meaningful way of negotiating the terms of building agreements even where they are represented by solicitors. This problem could be dealt with by specifying mandatory terms by legislation that apply in every building contract, and that could not be excluded by the parties, or by imposing a statutory duty with similar effect.

Australia – recovery in negligence against builders

The 1995 decision of the High Court of Australia in *Bryan v Maloney*⁸⁰ concerned a claim by the third purchaser of house against a builder for the cost of repairing defective foundations. The court reasoned that a duty of care clearly existed to avoid physical injury, and that the distinction between this type of injury and economic loss was 'an essentially technical one' which had 'only recently attained general acceptance', citing the dicta in *Anns v London Borough of Merton*⁸¹ that latent defects in fact constituted 'material physical damage'.⁸²

The requirement for proximity, from the *Anns* test, existed, in the view of the court, in the house itself, as it was a permanent structure, which itself connected the builder and the plaintiff, and in the fact that the house was 'possibly the most significant investment which the subsequent owner will make during his or her lifetime'.⁸³ The court also dealt with the 'indefinite liability for an indefinite period' concern as expressed by Cardozo J. in *Ultramares Corporation v Touche*⁸⁴, but dismissed this on the basis that '...any difference in duration between liability to the first owner and liability to a subsequent owner is likely to do no more than reflect the chance element of whether and when the

⁷⁹ Bruce Feldthusen, 'Liability for Pure Economic Loss: Yes, But Why?' (1999) 28 Western Australia Law Review 84, 106.

⁸⁰ *Bryan v Maloney* [1995] HCA 17.

⁸¹ *Anns* (n 5).

⁸² *Ibid* [11]-[13].

⁸³ *Bryan* (n 80) 16.

⁸⁴ *Ultramares Corporation v. Touche*, 174 N.E. 441 (1932).

first owner disposes of the house'.⁸⁵

This reasoning highlights another significant part of the legal environment in which the decisions must be seen: under Irish law, the limitation period for the bringing of proceedings is unaffected by transfers of the property. This provides a normative justification for providing for the continuity of remedies beyond the first transfer of property, either by assignment of the original building contract, or by the creation of a statutory warranty of quality which operates (similarly to the warranty in the Defective Premises Act 1972 of England and Wales) independently of the contract.

Under English law, by contrast, subsequent transfers can extend the period for which proceedings may be brought, as there is provision in the Latent Damage Act 1986 for the limitation period to pause upon a transfer of property, and to re-commence when the purchaser has the knowledge required for bringing an action for damages in respect of the relevant damage, following which the purchaser has three years within which to bring the action.⁸⁶

Feldthusen⁸⁷ refers to the dissenting judgment of Brennan J. in *Bryan* in support of his argument that recovery in tort should not be available where the parties are in a position to allocate risks of loss by contract, suggesting that the judgment of the majority in *Bryan* is another example of the failure of the courts of both Australia and Canada to distinguish between the normative justifications for economic and physical damage.⁸⁸ The dissenting judgment presents a number of arguments to the effect that recovery in tort should not be permitted in latent defects cases. Firstly, Brennan J. considered that it would be anomalous to have claims by the original owner determined according to the contract, and claims by a subsequent owner determined pursuant to the law of tort. Amongst the concerns of Brennan J. in this respect was the point that the contract itself defines the obligations that the builder undertakes, and that a court would necessarily have to refer to that contract in proceedings between the builder and a third party. Secondly, Brennan J. took the view that to allow recovery in tort in respect of defects would be 'tantamount to a transmissible warranty of quality'; in the view of Brennan J., it was more appropriate for Parliament to deal with 'the social question of whether building costs should be

⁸⁵ *Bryan* (n 80) 17.

⁸⁶ Section 14A, Latent Damage Act 1986.

⁸⁷ Feldthusen (n 79) 106.

⁸⁸ *Ibid* 107.

inflated to cover the builder's obligation under such a transmissible warranty...'.⁸⁹

Over twenty years following the decision, Parliament did indeed legislate for a transmissible warranty of quality, by way of various statutes. In Tasmania, the Residential Building Work Contracts and Dispute Resolution Act 2016 contains a warranty of reasonable skill and care and of performance in 'an appropriate and skilful way'⁹⁰ and provides that a person who purchases or otherwise acquires a residential building 'succeeds to the right, in respect of statutory warranties, of his or her predecessor in title'. New South Wales introduced the Home Building Act in 1989, which provides for licensing of builders, implied terms of quality, and insurance for residential building work.

Bell and Jovic⁹¹ refer to the dicta of Gageler J. in *Brookfield Multiplex v Strata Corporation 61288*⁹² who opined that a duty of care to avoid economic loss to a subsequent purchaser should be 'confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care'.⁹³ The authors comment that '*Bryan* becomes, in this conception, a barnacle on an otherwise smooth hull of common law liability which is to be defined by contract rather than part of the superstructure of liability'.⁹⁴

Gageler J. goes on to suggest that protection should be provided by 'legislative extension of those statutory forms of protection',⁹⁵ principally the Home Building Act 1989 of New South Wales. The *Brookfield* decision, then, can also be regarded as seeking to confine the scope of tort liability in part because of an existing protective legislative regime, which, the court notes, in this case could be extended to vulnerable parties, rather than extending common law liability.

Rationale for restriction or expansion of recovery for economic loss

Bishop suggests the main rationales for the restriction against recovery for economic loss

⁸⁹ *Bryan* (n 80) 25.

⁹⁰ Section 25, Residential Building Work Contracts and Dispute Resolution Act 2016.

⁹¹ Matthew Bell and Wayne Jovic, 'Negligence Claims by Subsequent Building Owners: Did the Life of Bryan End Too Soon' (2017) 41 Melb UL Rev 1.

⁹² *Brookfield Multiplex Ltd v The Owners – Strata Plan No 61288* [2014] HCA 36 (2014) 313 ALR 408.

⁹³ *Ibid* 185.

⁹⁴ Bell and Jovic (n 91).

⁹⁵ *Ibid* 186.

as being that it ‘would place too great a burden on enterprise’,⁹⁶ that victims typically carry insurance,⁹⁷ and that the rule ensures that losses are distributed among numerous victims, citing Atiyah.⁹⁸ He concludes, however, that these rationales ‘do not provide a comprehensive theory to justify the common law restriction’,⁹⁹ and proposes such a theory, drawing heavily on the analysis of law and economics, and proposing justifications for the rule in a variety of instances. Bishop suggests that the efficiency criterion is an appropriate tool for courts engaged in consideration of economic loss cases, proposing that a rule that allowed recovery of economic loss ‘may induce too much too much avoidance activity by potential tortfeasors’.¹⁰⁰ Koziol refers to this risk as ‘the threat of overdeterrence’.¹⁰¹

A variant on the ‘burden on enterprise’ rationale, often referred to as the ‘floodgates’ argument, is that allowing recovery for economic loss would impose unquantifiable and extensive liability on tortfeasors. The case which gave rise to the ‘floodgates’ argument, *Ultramares Corporation v Touche*,¹⁰² concerned negligent misstatement by an auditor in relation to a company’s financial position. This is now a category of liability for which recovery of economic loss in Ireland, England and Wales is now uncontroversial, following *Hedley Byrne v Heller* and the many cases that followed it, the most recent of which in Ireland is *McGee v Alcorn*.

Koziol refers to the normative difficulties with justifying the exclusion of economic loss on the basis of the volume of claims and losses that tortfeasors might have to meet. He suggests that it ‘seems inconsistent that a wrongdoer who caused damage to property should have to compensate the costs of repair but would not be liable for pure economic loss caused by his faulty behaviour’,¹⁰³ but points to fair competition as an example of an act that may damage one’s competitors but which is not actionable under the law of tort. Bell and Jovic refer to the ‘floodgates’ concern as a ‘triple-headed hydra of liability for

⁹⁶ W Bishop, ‘Economic Loss in Tort’ (1982) 2 Oxford Journal of Legal Studies 1, 1.

⁹⁷ *Ibid* 2.

⁹⁸ Patrick Atiyah, ‘Negligence and Economic Loss’, 83 Law Quarterly Review 248, 270.

⁹⁹ Bishop (n 96) 2.

¹⁰⁰ Bishop (n 96) 13.

¹⁰¹ Koziol, ‘Recovery of economic loss in the European Union’ (2006) 48 Arizona Law Review 871.

¹⁰² 174 N.E. 441 (1932), Cardozo J. in the New York Court of Appeals stated that, if the defendant auditor were held to owe a duty of care to protect the plaintiff from economic loss arising from negligent misstatement, that ‘the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class’ (81).

¹⁰³ Koziol (n 101) 7.

an indeterminate amount, for an indeterminate time, to an indeterminate class' as being 'as mesmerising as any mythical beast'.¹⁰⁴

Koziol then suggests a number of criteria for determining whether recovery for economic loss should be allowed in any given case, of which the most relevant is whether the number of potential claimants are restricted in number, the presence of proximity or a special relationship, the importance of the financial loss to the plaintiff, and whether the tortfeasor acted in his own economic interest.¹⁰⁵

Applied to housing defects, these factors would tilt in favour of finding a duty to avoid this type of loss. The range of claimants will be limited to those who have an interest in the defective property; the builder/developer will invariably have acted in his own economic interest; and the financial impact on the plaintiff homeowner often relates to the plaintiff's most important asset, the home. In a very real sense, the 'floodgates' concern that is at the heart of the restriction on recovery of economic loss simply cannot arise in defects cases: a defendant cannot be liable to a wide range of plaintiffs in respect of identical measures of loss, as the loss in a defects case will always be confined to a particular building, and will largely consist of the cost of rectification and repair of that building, together with ancillary costs such as professional fees and alternative accommodation.

These heads of damages will necessarily be limited to the individual homeowner at the time that the loss is sustained; the only head of damage that could extend beyond the homeowner is that of distress and inconvenience. Even then, as discussed in the following section, damages under this heading are conventionally awarded in respect of the disappointment of the plaintiff's performance interest in having the contract performed; as Hogan J. noted in *Walter v Crossan*, there are no authorities in which such damages have been awarded independently of breach of contract.¹⁰⁶ Damages for distress and

¹⁰⁴ Bell and Jovic (n 91) 16.

¹⁰⁵ Ibid 16.

¹⁰⁶ [2014] IEHC 337. A problem with this position from the point of view of liability of construction professionals is that, in action such as *Mitchell v Mulvey Developments* (and later in *McGee v Alcorn*), the professional may be sued in negligence only in the same proceedings as a builder who is sued in contract. As the defendants are jointly and severally liable in respect of the 'same damage' by reason of s 11 of the Civil Liability Act 1961, this could essentially mean that a construction professional such as a designer or certifier could be held liable for a head of damages (for example, damages for distress and inconvenience occasioned by building defects) that would not be recoverable against them if they had been the only defendant in the proceedings (which would have thus not included a claim for breach of contract).

inconvenience occasioned by housing defects, therefore, should be recoverable only by the home owner(s) and not by any other resident in the home.

The ‘indeterminate liability’ concern was also a feature of the reasoning of the Supreme Court in *Glencar Exploration v Mayo County Council*¹⁰⁷, in which the Chief Justice stated as follows:

If A sells B an article which turns out to be defective, B can normally sue A for damages for breach of contract. However, if the article comes into the possession of C, with whom A has no contract, C cannot in general sue A for the defects in the chattle, unless he has suffered personal injury or damage to property within the *Donoghue v Stevenson* principle...To hold otherwise would be expose the original seller to actions from an infinite range of persons with whom he never had any relationship in contract or its equivalent.¹⁰⁸

It is submitted that this concern should not arise in cases involving housing defects, as the physical damage that constitutes the defect and/or its effects can only occur in one building, which will have one owner or group of plaintiffs who thereby suffer loss.

The ‘proximity/special relationship’ category, however, has been the main distinguishing feature between *Hedley Byrne* liability for negligent misstatement (and negligent performance of services) and liability for building defects since the *D & F Estates* and *Murphy* decisions. The paradigm of the *Hedley Byrne* wrongdoer has evolved significantly since its origins in a case that involved negligent misstatement on the part of a bank, made in response to a request from the plaintiff, who clearly relied upon the bank’s statement. The assumption of responsibility by the maker of a statement in the *Hedley Byrne*-negligent misstatement cases, however, is of a different character; the necessity of reliance, for example, that typically characterises the negligent misstatement cases¹⁰⁹ is evidence of the relationship between plaintiff and defendant that gives rise to the duty.

The legal environment applicable to builders, however, stands in contrast to the potential

¹⁰⁷ FN 37.

¹⁰⁸ *Glencar* (n 50), [111].

¹⁰⁹ *White v Jones* [1995] 2 AC 207; *Wildgust v Bank of Ireland* [2006] IESC 19.

liability of professional designers. It is possible that, if a case came before an Irish court on the question of the builder's liability in negligence for building defects, the court would follow the jurisprudence of the English courts and reject such a claim, absent a 'special relationship of proximity'. This issue was not considered in two recent Irish cases dealing with housing defects, *Mitchell v Mulvey Developments*¹¹⁰ or *McGee v Alcorn*¹¹¹ cases as the builders in those cases did not defend the claims.

As against this, the argument could be made that the divergence between Irish and English law in this respect goes well beyond the discrete issue of whether economic loss is recoverable for defects of quality, and that the English authorities must be read in the context of the relevant legislation that provides substantial protection and alternative remedies for plaintiffs. The builder will have entered into contracts with sub-contractors, allowing the builder to bring actions in respect of any default for breach of contract, rather than having to seek contribution from the other tortfeasors under the Civil Liability Act 1961.

Quill discusses the development of the law relating to liability of builders for defects of quality discussed above, and goes on to refer to caselaw of other jurisdictions where the Courts have not followed *D&F* and *Murphy* decisions, including New Zealand, Canada and Australia. The author suggests that the development of remedies in tort with regard to defective buildings have been prejudiced to some extent by the parallel development of legislative protection for defective products, which has obviated the need for judicial consideration of the scope of the duty. Quill, in common with Koziol, refers to the significance of the risk to the purchaser arising from a defective building as an argument in favour of tortious liability.¹¹²

An examination of consumer rights in construction in England and Australia by Britton and Bailey drew attention to the fact that English law, in common with Irish law, affords no special treatment to consumers as purchasers of dwellings.¹¹³ By contrast, the Australian Home Building Acts encompass a statutory redress system which regulates residential building contracts, and implies warranties of performance into those contracts

¹¹⁰ *Mitchell v Mulvey Developments* [2012] IEHC 561.

¹¹¹ *McGee v Alcorn* [2016] IEHC 59.

¹¹² Eoin Quill, *Torts in Ireland* (Gill & Macmillan 2009), 128.

¹¹³ Julian Bailey and Philip Britton, 'Domestic Bliss or Paradise Lost? Consumer Rights in Construction in England and Australia' (Meeting of the Society of Construction Law 2 November 2010; paper published May 2011).

which enure to the benefit of the first purchaser or tenant of a residential unit, but also to successors in title. The legislation is supported by mandatory home warranty insurance and by a State-provided dispute resolution system. The authors comment that '*English law at present simply fails to meet consumers' reasonable aspirations*'.¹¹⁴

The situation under Irish law is arguably significantly worse for consumers, in light of the limitations of the building control system, the existing Irish law in relation to limitation of actions, and the strict application of the common law principle of privity of contract. However, as discussed above, the legal environment in Ireland is very different to that of England and Wales, which supports the continued recognition of recovery of economic loss for building defects by the Irish courts.

It is notable that the High Court of Australia foreclosed recovery of economic loss in its 2014 decision in *Brookfield Multiplex Ltd v The Owners – Strata Plan No 61288*.¹¹⁵ The case concerned defects in an apartment complex; the plaintiff was the owners corporation of the building, and sued the builder for the cost of rectifying defects in the building. The High Court of Australia, overturning the decision of the Court of Appeal, held that the builder owed no duty of care to the purchasers of units in the building. French CJ opined that the buyers were not vulnerable,¹¹⁶ and that the owners corporation was not analogous to the 'downstream, arms-length purchaser of the house, who suffered economic loss by reason of latent defects in the construction...'.¹¹⁷ Hayne and Kiefel JJ considered that there had undoubtedly been reliance on the builder 'to do its work properly' but that reliance was insufficient to ground the duty without vulnerability.

Bell and Jovic suggest that the retreat of the Australian courts from the 'expansionist' view of *Bryan v Maloney*, as witnessed in the *Brookfield* decision, is motivated in part by the view that parties should protect their interests by contract, and in part by the fact of legislative intervention.¹¹⁸ The authors point to the dicta of Gageler J. in *Multiplex* to the effect that buyers have 'the freedom...to choose the price and non-price terms on which they are prepared to contract to purchase...',¹¹⁹ and comment as follows:

¹¹⁴ Ibid 2.

¹¹⁵ *Brookfield Multiplex Ltd. v Owners Corporation Strata Plan 61288* [2014]HCA 36.

¹¹⁶ Ibid [34].

¹¹⁷ *Brookfield* (n 115) [35].

¹¹⁸ Bell and Jovic (n 91).

¹¹⁹ *Brookfield* (n 115) [185].

The assumption that subsequent purchasers can protect themselves by contract is highly significant. If the assumption holds, it would be difficult to argue that any subsequent purchaser was reliant on or vulnerable to the parties involved in the construction.¹²⁰

The assumptions by courts of, firstly, the extent of legislative protection, and secondly, the ability of parties to protect their interests by contract, can both operate to reduce the potential liability in negligence. However, at least in Ireland, consumers have little influence over the content of residential building contracts.

Another significant assumption identified by Bell and Jovic is that a court may take the view, if legislation has been adopted, that it has dealt with the problem by introducing legal protection for homebuyers.¹²¹ However, the authors conclude that, while Australian legislatures ‘have commenced the process of plugging the gaps which exist in the absence of the common law security blanket’,¹²² common law liability should continue to have a role.

Assessment of damages in negligence for residential building defects

A consistent theme in the authorities dealing with liability in negligence for building defects is that of the proper measure of damages, and whether damages should be assessed based on the cost of repair of the defects, the diminution in value of the home by reason of the defects, or both. The 2016 decision of the High Court in *McGee v Alcorn*¹²³ contains a welcome exposition of the principles regarding the award of damages in negligence for building defects. The High Court awarded damages for remedial works to arrest the movement of the house, and damages for reinstatement of the house and garden consequent upon that work.¹²⁴

With regard to the damages claimed in respect of the correction of the ‘tilt’ that remained

¹²⁰ Bell and Jovic (n 91) 9.

¹²¹ Ibid 9.

¹²² Ibid 22.

¹²³ [2016] IEHC 59.

¹²⁴ Ibid [150-151].

following remedial works, O'Malley J. referred to *Munnelly v Calcon Limited*¹²⁵ to the effect that the diminution in value of the house was a more appropriate basis for assessment of damages, rather than the cost of the works that would have been required to correct the 'tilt'. The court took the view that the latter damages were 'excessive and unreasonable', in part as the cost of repair would be significantly in excess of the value of the house. On that basis, therefore, the court awarded damages of €75,000 to reflect a reduction in value of approximately 25% in consequence of the defects.¹²⁶

The authors of the 13th edition of *Hudson's Building and Engineering Contracts*, long regarded as one of the leading monographs on construction contracts, state that 'This book has stated, since at least the 4th edn in 1914, that "the measure of damages recoverable by the building owner for the breach of a building contract is...the difference between the contract price of the work or building contracted for and the cost of making the work or the building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach'.¹²⁷

Recovery of damages for distress and inconvenience in defects claims.

The court in *McGee* awarded the amount of €25,000 in respect of distress and inconvenience.¹²⁸ This was a surprising aspect of the judgment, as the previous jurisprudence had confined damages under this heading to actions for breach of contract; damages for distress are generally recoverable in tort only where the plaintiff can prove the existence of a psychiatric injury consequent upon the defendant's negligence.¹²⁹ This suggests that there is still room for debate in the authorities as to whether claims for distress, anxiety and inconvenience (which have been the subject of awards for damages in a number of recent housing defects cases) are in fact injury.

A 2014 High Court decision suggested that distress is only actionable consequent on a claim for breach of contract, but Hogan J in *Mitchell v Mulvey Developments*¹³⁰ awarded

¹²⁵ [1978] IR 387.

¹²⁶ *Ibid* [160].

¹²⁷ Robert Clay and Nicholas Denny (eds), *Hudson's Building and Engineering Contracts* (13th edn, Sweet & Maxwell 2015), 829.

¹²⁸ [1978] IR 387, [163].

¹²⁹ *Kelly v Hennessy* [1995] 3 IR 253.

¹³⁰ [2014] IEHC 37.

substantial damages for distress and anxiety without distinction as to the basis on which he did so, referring to both negligence and breach of contract.

Hogan J. in *Mitchell* did not distinguish between the first and second defendants (the original builder/party to the building contract), and the engineer who would not have had a contract with the plaintiffs. The question arises of whether the Civil Liability Act 1961 renders irrelevant the distinction between contract and tort for the purpose of assessing damages for distress and inconvenience, where judgment is given against concurrent wrongdoers, one of whom had a contract with the plaintiff. This is suggested by the following dicta from the judgment of Hogan J.:

In line with the other awards, I propose to award these plaintiffs in total €20,000 per year for total sum for anxiety, distress, upset and inconvenience as a result of negligence and breach of contract.¹³¹

The court awarded two plaintiffs €20,000 for each of the previous nine years, which Hogan J. characterised as ‘...a total sum of €180,000 for anxiety, distress, upset and inconvenience as a result of negligence and breach of contract’. The learned judge, therefore, did not regard it as necessary to distinguish between contract and tort in awarding under this heading, and referred to the dicta of O’Sullivan J. in *Leahy v Rawson*¹³² to the effect that damages were awarded of £5,000 per year in general damages for ‘anxiety and upset as a consequence of the negligence of the building contractor defendants’.

In *Leahy*, O’Sullivan J. in awarding damages for anxiety and upset did not specify the nature of the damages and the precise basis on which they were awarded, and it is notable in that case that the plaintiff in fact apparently had contractual relationships with each of the defendants, but the project in that case had been organised on an informal basis: the second and third defendants argued that they were engaged by the plaintiff for the purpose only of providing payment certificates only and not for the purpose of inspection or supervision. The court held that the second defendant had agreed to act outside the scope of his contractual retainer in providing advice to the plaintiff with regard to the standard

¹³¹ *Mitchell*, (n 111) [53].

¹³² [2004] 3 IR 1.

of workmanship of the works.

On this basis, the court held that a duty of care in negligence was owed by the second defendant to the plaintiff, and that the second defendant was in breach of that duty:

in my opinion the second defendant (and through him the third defendant as his partner) was under a duty of care to the plaintiff to advise her of the standard of work of the project and I further hold that he was in breach of that duty in failing so to advise the plaintiff' (no page or paragraph reference available).

The court went on to say that 'the consequence of such failure were [sic] entirely foreseeable and include the loss and damage to which I will refer hereafter'. Therefore, the award of £30,000 in respect of anxiety was not confined to the contractual relationships of the plaintiff.

In *Walter and Rodriguez v Crossan and Ors*¹³³ the court said that there was 'no doubt but that damages for distress and inconvenience...are at least in principle recoverable in an action for breach of contract', but that 'in none of these cases have damages been awarded *independently* of any breach of contract', restating the principle that the basis for the award of damages for inconvenience 'is to represent the loss of expectation in respect of the performance of the contract'.¹³⁴ The court held that 'damages for inconvenience can also be awarded in respect of the construction of a defective dwelling', citing *Johnson v Longleat Properties Ltd.*¹³⁵; *Quinn v Quality Homes*¹³⁶; *Leahy v Rawson*¹³⁷ and *Mitchell v Mulvey Developments*.

The court confined recovery of damages under this heading to actions for breach of contract, and held that damages under this heading were not recoverable in negligence:

It is true that in building cases it is sometimes said that such damages are awarded by reason of the negligence of the developer or other building professional. But in

¹³³ [2014] IEHC 377.

¹³⁴ *Ibid* [19].

¹³⁵ [1976-77] ILRM 93.

¹³⁶ [1976-77] ILRM 314.

¹³⁷ [2004] 3 I.R. 1.

none of these cases have damages been awarded *independently* of any breach of contract. In reality, therefore, the award of damages for inconvenience in these building cases is to represent the loss of expectation in respect of the performance of the contract brought about by the negligence and breach of contract on the part of the defendant.¹³⁸

The court cited *Johnson v Longleat* to the effect that inconvenience and loss of enjoyment are within the presumed contemplation of the parties as likely to result from breach of contract. Absent contract, however, damages are not recoverable under this heading.¹³⁹ The reasoning is that distress and inconvenience arising from breach of duty of care in negligence is not actionable without injury. Irvine J. in *Hegarty v Mercy University Hospital Cork* stated as follows in this regard:

Evidence of any actionable injury was seriously lacking in this case and without any actionable damage, stress and anxiety alone are insufficient to support a claim. Negligence is not complete until an alleged breach of duty goes on to cause damage to the extent recognised by the law and no such damage was demonstrated in this case.¹⁴⁰

Therefore, damages for distress and inconvenience are awarded in respect of the damage to the plaintiff's expectation interest and are grounded in contract law. The authorities do not deal with the question of whether a subsequent purchaser have an expectation interest under the original building contract, but it is submitted that such an interest is inconsistent with the existing law of privity of contract in Ireland.¹⁴¹ If the performance interest can be regarded as being an interest common to first, second and subsequent purchasers, this is another argument in favour of allowing assignment of the original building contract, or providing some means by statute for damages to be awarded under this heading to subsequent purchasers without the original contractual limitation period.

Hogan J. in *Walter v Crossan* noted that damages had been awarded for inconvenience

¹³⁸ *Walter v Crossan*, [19].

¹³⁹ The court cited in this regard the cases of *Larkin v Dublin City Council* [2007] IEHC 416; [2008] 1 IR 391, and *Hegarty v Mercy University Hospital Cork* [2011] IEHC 435.

¹⁴⁰ *Hegarty*, (n 139) [52].

¹⁴¹ In England and Wales, by contrast, it seems possible in principle that such an interest could be recognised in the context of actions brought by a third party to the contract under the Contract (Rights of Third Parties) Act 1999.

in a number of building defects cases, but that ‘...in none of these cases have damages been awarded independently of any breach of contract’, citing *Johnson*, and that ‘damages for inconvenience and upset are not recoverable where there is no contractual relationship’, citing *Larkin* and *Hegarty*. This suggests that such damages can be awarded where there is both negligence and breach of contract, although *Leahy* suggests that such damages will not be strictly limited to the inconvenience arising from the breach of contract (as the damages in that case apparently related both to the negligent certification and to the assumption of responsibility by the second defendant to the plaintiff in providing advice in relation to the quality of workmanship).

It is difficult to reconcile the judgments in *Mitchell* and *Walter* with the 2017 decision in *Murray v Budds & Ors*¹⁴², in which the Supreme Court affirmed the principles regarding damages for distress, to the effect that they are not recoverable in tort absent a psychiatric injury, and not recoverable for breach of contract save where the object of the contract was to provide relaxation or pleasure. The dicta of Bingham LJ in *Watts v Morrow*¹⁴³ was affirmed, in which the learned judge stated that:

A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party...But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind, or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.

A contract for construction and/or sale of a home cannot be said, it is submitted, to have as its object the provision of pleasure or relaxation. Hogan J. in *Mitchell* awarded various sums to the plaintiffs in respect of ‘anxiety, distress, upset and inconvenience as a result of negligence and breach of contract’ arising from residential building defects.

It would appear, therefore, that the award of damages for distress and inconvenience in *McGee* would be open to challenge in a subsequent decision. This would essentially leave home owners without a financial remedy for the considerable distress and inconvenience

¹⁴² [2017] IESC 4.

¹⁴³ [1991] WLR 1421.

of dealing with home defects, absent a contractual remedy. As noted in chapter 2, the only party to the construction project with whom the buyer will typically have a contract is the builder, who is very often not a ‘mark’ for damages.

B: PRODUCT LIABILITY

Liability for dangerous construction products and materials

Liability in respect of defects depends on the cause of the defect, which can be attributable to a range of factors such as design, workmanship, and defective products. Defective products have been a significant feature of Irish residential building failures. High levels of reactive pyrite have been found in aggregates used in construction of thousands of homes, and brickwork with excessive levels of mica and an insufficient proportion of cement is threatening an estimated 5-6,000 homes in Donegal and Mayo.¹⁴⁴

At common law, manufacturers of defective products were not regarded as owing a duty of care to the ultimate users of their products. The position changed significantly with the decision of the House of Lords in *Donoghue v Stevenson*¹⁴⁵ held that a duty of care was owed in certain circumstances with respect to the manufacture and supply of defective products.¹⁴⁶

Liability for Defective Products Act 1991

The Liability for Defective Products Act 1991 implemented the 1985 European Union Defective Products Directive.¹⁴⁷ As the Act is an implementing measure of European law, it does not entirely displace the existing common law rules with regard to defective products. The Act establishes a regime of strict liability for damage or injury caused by

¹⁴⁴. Expert Panel on Concrete Blocks, *Report of the Expert Panel on Concrete Blocks* (Department of Housing, Planning and Local Government, 2017).

¹⁴⁵ [1932] AC 562.

¹⁴⁶ Lord Atkin expressed the principle as follows: ‘... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in any injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care’.

¹⁴⁷. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

defective products. Section 2 (1) of the Act provides that the producer ‘shall be liable in damages in tort for damage caused wholly or partly by a defect in his product’. A plaintiff remains entitled to bring an action in negligence with regard to a defective product, but subject to the requirement to establish the various elements required to establish liability in negligence, including the standard of ‘reasonable care’ – effectively, the requirement to establish fault on the defendant’s part.

The definition of ‘product’ is very wide in the Act, and includes ‘all movables’ even where incorporated into another product or into immovable property.¹⁴⁸ This is in contrast to the common law position following *Donoghue*, as the manufacturer or supplier of construction materials, for example, would generally not intend those materials to reach the consumer in the form in which they left the manufacturer or supplier, in contrast to the bottle of ginger-beer at issue in *Donoghue*. This distinction may assume considerable importance in the ultimate determination of liability in respect of the Grenfell Tower fire in London in 2017, as manufacturers responsible for elements of the cladding seek to claim that their products were not defective, but were used inappropriately.¹⁴⁹

A ‘producer’ is given a broad definition in the Act.¹⁵⁰ Section 2 (3) also imposes liability on any person who supplied the product where the producer cannot be identified by taking reasonable steps, in the event that the supplier fails to identify the person who supplied the product to him following a request from an injured party to identify the producer. The supplier must accordingly identify the producer, or assume the liability of the producer.

Section 5 (1) provides that a product is defective ‘where it fails to provide the safety which

¹⁴⁸ The definition of ‘product’ was inserted by the European Communities (Liability for Defective Products) Regulations, 2000 SI 401/200.

¹⁴⁹ An example of this can be found in the opening statement of Arconic Architectural Products to the Grenfell Tower Inquiry in 2018. Arconic Architectural Products manufactured the cladding used in the refurbishment of Grenfell Tower, that ultimately played a significant role in the spread of the fire vertically on the exterior of the building, as the cladding consisted of two aluminium sheets with a highly combustible polyethylene core. The company’s opening statement to the Inquiry included the following statement: ‘ACM is only one component in an overall cladding system.... The company has involvement in the fabrication or installation of its products. At relevant times there was no legal bar to the use of combustible materials within a cladding system. The choice of products in an overall cladding system for a particular project, and its compliance with the regulatory regime, is the responsibility of those who design the relevant building works and those who carry them out.’ (Opening Statement of Arconic Architectural Products SAS Ltd. to Grenfell Tower Inquiry, 6 June 2018.)

¹⁵⁰ A ‘producer’ includes the manufacturer or producer of the finished product, or of any raw material or the manufacturer or producer of a component part of a product, or any person who, by putting his name, trade mark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product, has held himself out to be the producer of the product, or any person who has imported the product into a Member State from a place outside the European Communities in order, in the course of business, to supply it to another. (Liability for Defective Products Act 1991, s 2 (2)).

a person is entitled to expect, taking into account the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation. A maximum limitation period of 10 years from the date that a product was put into circulation applies to actions under the Act.

Amongst the defences to liability set out at section 6 of the 1991 Act is that ‘a producer of raw material or a component part is not liable if the defect can be attributed to the design of the product or the instructions given by the manufacturer of the finished product. This defence highlights the complexity likely to be encountered in attributing blame and liability to manufacturers and suppliers of materials used in the refurbishment of Grenfell Tower shortly before the 2017 fire.

Although section 2 of the Liability for Defective Products Act 1991 provides that ‘a producer shall be liable for damages in tort for damage caused wholly or partly by a defect in his product’, section 1 of the Act defines ‘damage’ as including ‘loss or, damage to, or destruction of, any item of property other than the defective product itself’. A product is ‘defective’ for the purposes of the Act if it ‘fails to provide the safety which a person is entitled to expect, taking all the circumstances into account’. On this basis, defective brickwork that is likely to result in damage to internal fixtures and contents of a home could give rise to liability under the Act.

As noted above in chapter 1, a landowner who purchases construction materials directly from a supplier, such as where the landowner engages direct labour for the construction works, may have an action against the supplier for breach of contract where the materials are not of merchantable quality for the purposes of section 14 of the Sale of Goods Act 1893.

Comparative – Australia

A very similar fire to the fire at Grenfell Tower, and involving similar cladding materials, occurred at the Lacrosse Building in Melbourne in 2014. As was the case with the Grenfell tower fire, the fire started in an apartment and spread up the outside of the

building via the cladding.¹⁵¹ The fire prompted a parliamentary enquiry, which issued a preliminary report in September 2017; amongst its recommendations was a complete ban on combustible cladding.¹⁵²

In the Australian state of Queensland, the Non-Conforming Building Products Act 2017¹⁵³ establishes a ‘chain of responsibility’ for construction materials. The Act provides that a person is regarded as being ‘in the chain of responsibility for a building product’ if that person ‘designs, manufactures, imports or supplies the building product, and knows or is reasonably expected to know that the product will or is likely to be associated with a building’, or where the person installs the product.¹⁵⁴ Persons subject to the duty must ‘ensure, so far as reasonably practicable ensure that the product is not a non-conforming building product for an intended use’.¹⁵⁵

The liability of a manufacturer for assembly of a product by a third party is likely to come under significant scrutiny in the course of the Inquiry into the Fire at Grenfell Tower¹⁵⁶, as one of the materials suppliers that has given evidence to the Inquiry has already disclaimed responsibility on the basis that it supplied but did not install the material in question.¹⁵⁷

Product liability for non-dangerous materials

A significant difficulty for home owners seeking to establish a duty of care owed by materials suppliers to home owners is that the courts have consistently leaned against imposing such a duty with regard to materials that do not pose a danger of injury or damage to property. The product liability regime in negligence has been confined to dangerous products, and the parallel regime established by the EU Directive and the 1991

¹⁵¹ See further the report of the fire by the city building surveyor for Melbourne: <https://www.melbourne.vic.gov.au/sitecollectiondocuments/mbs-report-lacrosse-fire.pdf> (last accessed 20 August 2018).

¹⁵² Senate Economics Reference Committee, *Non-confirming building products Interim report: aluminium composite cladding*, 2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-confirming45th/Interim_report_cladding (last accessed 20 August 2018).

¹⁵³ Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017 (Queensland).

¹⁵⁴ *Ibid* s 74AE.

¹⁵⁵ *Ibid* s 74AF.

¹⁵⁶ <https://www.grenfelltowerinquiry.org.uk> (accessed 26 June 2018).

¹⁵⁷ Opening Statement of Arconic Architectural Products SAS Ltd. to Grenfell Tower Inquiry, 6 June 2018.

Act discussed in the foregoing paragraphs also takes as its focus products that are dangerous, rather than sub-standard.

The definition of ‘damage’ contained in the 1991 Act refers to ‘death or personal injury’, or ‘loss of, damage to, or destruction of, any item of property other than the defective product itself’, and provided that the item of property ‘is of a type ordinarily intended for private use or consumption’.¹⁵⁸ This would seem to exclude construction materials, which are by their nature intended for incorporation into works, and not ‘consumed’ or used directly by the end-users of property.

In *Linklaters Business Services v Sir Robert McAlpine Limited and ors*¹⁵⁹, Akenhead J. in the High Court of England and Wales drew a distinction between construction works and components incorporated into construction works, finding that insulation that was installed around chilled pipework formed part of the pipework; therefore, a defect in the insulation was to be regarded as economic loss and thus not recoverable:

The insulation is a key component but a component nonetheless. It would follow that no cause of action arises in tort as between Southern and Linklaters. That is not at all unreasonable in any way because Linklaters or people in their position can protect themselves, as Linklaters did, with the securing of contractual warranties from relevant parties such as the key contractors in any given development.¹⁶⁰

Fairgrieve, Geraint and Howells identify a number of areas of the Product Liability Directive which they describe as ‘problematic’ and ‘ripe for classification or reform’, including the definition of ‘defect’, which is defined in Article 6 of the Directive as the issue of whether a product does not provide the safety which a person is entitled to expect.¹⁶¹ The authors point to the difficulty of having such an open-textured standard and the consequent latitude given to national courts in interpreting it. They suggest that ‘risk

¹⁵⁸ Liability for Defective Products Act, 1991, s 1.

¹⁵⁹ [2010] EWHC 2931.

¹⁶⁰ Ibid [119].

¹⁶¹ Duncan Fairgrieve, Geraint Howells, Marcus Filgerstorger, ‘The Product Liability Directive: Time to Get Off’ 4 JETL 1 (2013).

utility’ may be a factor, a doctrine that has a central role in US jurisprudence and considers whether the cost of eliminating the risk is less than the cost of the benefits of doing so.¹⁶²

C: GATEKEEPERS, PART 1: CIVIL REMEDIES

Liability of local authorities for failure to inspect

The system of building control established under the Building Control Act 1990 prescribes a comprehensive list of requirements to be met in the construction of new buildings. There is no requirement on building control authorities to inspect premises for compliance with the Building Regulations, nor to verify the contents of information such as drawings, specifications and certificates submitted to the authority in discharge of obligations pursuant to the Building Control (Amendment) Regulations 2014.

Building control authorities enjoy a statutory immunity against civil liability arising from failure to detect breaches of the Building Regulations, and the Act specifically provides that a building control authority is under no duty to verify the accuracy of any certificate submitted to it.¹⁶³ Section 21 of the 1990 Act provides that ‘A person shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any provision of this Act, or of any order or regulation made thereunder’. Trainor suggests that ‘it may well be held that S. 21 protection may only be of any real benefit to BCAs alone’.¹⁶⁴

While a failure on the part of a building control authority to detect a defect or other instance of non-compliance with Building Regulations would not in itself constitute a contravention of a provision of the Building Control Act or of a regulation made thereunder, it could be argued that any proceedings brought against a building control

¹⁶²¹⁶² Ibid 5.

¹⁶³ See further the report of the fire by the city building surveyor for Melbourne: <https://www.melbourne.vic.gov.au/sitecollectiondocuments/mbs-report-lacrosse-fire.pdf> (last accessed 20 August 2018).

¹⁶⁴ Section 21 provides as follows: ‘A person shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any provision of this Act, or of any order or regulation made thereunder.’ Trainor suggests that s 21 ‘would not appear to be an answer to an action for damages for breach of contract between the Building Owner on the one hand and either his Designer, Assigned Certifier or Building Contractor on the other’, suggesting that s 21 applied only to an action for breach of statutory duty and not to a general action in negligence. John Trainor, *The 2013 Building Control (Amendment) Regulations: Transforming the Regulatory Landscape*, Construction Bar Association Annual Conference (2013), [6.8 (a)].

authority for a failure by one of its authorised persons in fact arose by reason of a contravention of a provision of the Act or of a regulation (such as the Building Regulations) made pursuant the Act.

As discussed earlier in this chapter, the 1990 Act was preceded by a number of decisions of the English and Irish Courts between 1971 and 1991 in which building control authorities were held to have a duty of care to homeowners arising from failures of building inspectors to detect defects or breaches of building bye-laws.

*Ward v. McMaster*¹⁶⁵, in addition to dealing with the question of the builder's liability in tort, is also a rare Irish case in which a local authority was held liable (along with the builder) for defects in a house which the local authority's valuer had failed to detect. The plaintiff had purchased the house with the assistance of a loan from the local authority. The Supreme Court, in dismissing the local authority's appeal, relied significantly on the relationship between the parties created by the local authority's statutory duty as a housing authority.¹⁶⁶

The relationship between home buyers and building control authorities, since the introduction of the 1990 Building Control Act, is very different to the relationship between the plaintiffs in *Ward* and the defendant local authority. The Building Control Act 1990 creates powers rather than imposing duties, and does not require building control authorities to inspect or verify designs, plans, buildings, or certificates furnished for compliance with the Act. It is also possible that any action against a building control authority would be barred under section 21 of the 1990 Act, unless negligence could be made out independently of the question of breach of statutory duty.

The question of whether a failure to act on the part of a local authority was actionable in negligence was considered in the case of *Gorringe v Calderdale Metropolitan Borough Council*¹⁶⁷. The House of Lords rejected the plaintiff's claim that the defendant local authority should be liable in negligence for failure to place warning signs before a hazardous bend on a road. Lord Hoffmann stated that foreseeability of injury was

¹⁶⁵ *Ward v McMaster* [1985] ILRM 43 (High Court).

¹⁶⁶ The council was required, pursuant to the Housing Authorities (Loans for Acquisition or Construction of Houses) Regulations 1972 to satisfy itself that the house for which the loan was required was adequate security for the loan.

¹⁶⁷ [2004] 1 WLR 1057.

insufficient to ground a duty of care in negligence where the failure complained of was an omission:

Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it.¹⁶⁸

Lord Brown concurred, stating that

There seems to me, therefore, no good reason for superimposing upon such general powers and duties as are conferred upon highway authorities a common law duty of care in respect of their exercise. Nor does it seem to me that Parliament can have intended a private law liability in damages to flow from a public law failure in the exercise of the authority's powers or the discharge of its duties.¹⁶⁹

It seems highly unlikely, therefore, that a building control authority would be held liable to a home owner in negligence for failure to detect defects during the construction of the home. A crucial difference between the Irish and the English systems of building control, for example, is that there is requirement under Irish law for prior approval of designs by building control authorities save where a fire safety or disability access certificate would be required, which would apply to apartment blocks but not to houses. It is noted in *Keating on Construction Contracts* that:

It is an open question whether a local authority might be liable in negligence for carelessly passing defective plans or for careless inspection of building works if this causes physical damage to persons or property other than the product of the negligence.¹⁷⁰

¹⁶⁸ Ibid 1063.

¹⁶⁹ Ibid 1087.

¹⁷⁰ Vivian Ramsay, Stephen Furst and Others, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell Thomson Reuters 2016), 208.

The authors note in this regard that in *Murphy*, ‘the local authority appear to have conceded a limited duty of care, but Lord Mackay LC (at 457) Lord Keith (at 463) and Lord Jauncey (at 492) all reserved the question’.¹⁷¹

A related Irish case subsequent to *Ward* is the decision in *Sunderland v. Louth County Council*¹⁷². The defendant Council had issued planning permission for a site that was unsuitable for building; as a result, the plaintiff’s house flooded constantly. The court found that the Council owed no duty of care to the plaintiffs, in part on the basis that the planning code is a regulatory code, while the Housing Acts, which were the basis for the statutory powers in *Ward*, were protective of a class of persons.

Liability of estate agents?

In a 1986 Note in the Harvard Law Review, the argument is made that it is considerably more efficient from an economic point of view for real estate brokers to investigate properties for defects and to disclose the results to prospective purchasers.¹⁷³ At common law, however, there is no obligation on vendors or their agents to disclose defects. Lord Cairns in *Peek v Gurney* stated that ‘mere nondisclosure of material facts, however morally censurable...would in my opinion form no ground for an action in...misrepresentation’.¹⁷⁴

In *Hill v Wall*¹⁷⁵ the plaintiff brought an action in the tort of deceit arising from her purchase of an apartment that was found to have been constructed in breach of its fire safety certificate. The court held the vendors’ solicitors had furnished a certificate of compliance with ‘fire regulations’ to the plaintiff’s solicitor which specified that ‘the attic space from apartment no 3 cannot be used as habitable space and is only permitted as storage’, and further than the defendant developers had relied upon their architect to give an opinion in relation to compliance with planning permission. While the architect ‘may have erred in his professional responsibilities’, there was no basis for the developers to be held liable for deceit.

¹⁷¹ Ibid.

¹⁷² *Sunderland v Louth County Council* [1990] ILRM 658.

¹⁷³ Note, ‘Imposing tort liability on real estate brokers selling defective housing’ (1986) 99 Harvard Law Review 1861.

¹⁷⁴ *Peek v Gurney* 6 L.R. 377 (H.L. 1873).

¹⁷⁵ *Hill v Wall* [2016] IEHC 367.

Representations made by estate agents with regard to the purchase of houses may be actionable in the event of fraudulent or negligent misrepresentation, in negligent misstatement, or under statute, pursuant to the Consumer Protection Act 2007, sections 41 and 42 of which prohibit unfair and misleading commercial practices.

It is common for agents to seek to exclude liability in respect of representations in relation to the sale of houses or apartments, either on the basis of an 'entire agreement' clause in the contract for sale of the house, or on the basis of a disclaimer in the estate agent's brochure. The recent decision of the Supreme Court in *Walsh v Jones Lang LaSalle*¹⁷⁶ upheld a disclaimer in an estate agent's brochure with regard to the size of a commercial unit, notwithstanding a significant difference between the size as represented and the actual size.

The Consumer Protection Act 2007 contains a general prohibition on misleading commercial practices (section 42) which includes the withholding or concealing of material information, but only governs transactional decisions between consumers and traders. Section 46 (1) provides that a commercial practice is misleading 'if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transaction decision', and s 46 (3) specifies that the 'main characteristics of the product' constitute 'material information' in the context of a decision to purchase.

A trader is a person 'acting for purposes related to the person's trade, business or profession', and a consumer is a 'natural person...acting for purposes unrelated to the person's trade, business or profession'.¹⁷⁷ Therefore, the Act would not apply in sales of second-hand homes, nor in sales of new homes to a person acting in connection with the person's trade, business or profession.

The common law of *caveat emptor* is reflected in the standard Law Society contract for sale, and solicitors typically advise their clients to retain the services of a professional

¹⁷⁶ *Walsh v Jones Lang LaSalle Limited* [2017] IESC 38.

¹⁷⁷ Section 2 (1), Consumer Protection Act 2007.

architect or surveyor to inspect the unit before completion of the purchase.¹⁷⁸

In a note from the Harvard Law Review from 1986,¹⁷⁹ two cases are cited in which real estate brokers were held liable for failure to disclose defects of which they were aware. In the first, *Easton v Strassberger*¹⁸⁰, an appellate court in California found that the defendant real estate broker was in breach of duty for not having ascertained the condition of the property in question before offering it for sale.

The note cites the 1963 decision in *Lingsch v Savage* to the effect that real estate brokers were required to disclose all material facts to buyers.¹⁸¹ The closest equivalent to a similar doctrine under Irish law would be the tort of deceit, which differs from the US formulation of 'fraudulent concealment' in requiring the making of a false statement, rather than the withholding of information.¹⁸²

There is little incentive or requirement for sellers of second-hand housing to determine the condition of their own properties prior to sale, and the entire burden is placed on buyers to determine what they can about the unit's condition.

Many of the most significant defects that have emerged in Irish housing stock in recent years would not be detectable on a pre-purchase inspection by a buyer's adviser; fire-stopping in apartment buildings is one example, where the relevant elements might not be visible without a more intrusive survey than that typically carried out. Buyers also appear to derive a sense of security from the practice amongst lending institutions to have their own surveys carried out, apparently without appreciating or understanding that the lending institution's risk in the property is secondary to their own risk, and that the lending institution will seldom be as exposed to a drop in the value of the unit due to defects, as it will have provided only a percentage of the purchase price by way of a home loan. It is of concern, therefore, to note from a 2018 Law Society Practice Note that 20% of

¹⁷⁸ As noted above, however, a substantial proportion of buyers apparently do not follow this advice.

¹⁷⁹ Note: 'Imposing Tort Liability on Real Estate Brokers Selling Defective Housing', 99 Harvard Law Review, 1986, 1861-1873.

¹⁸⁰ *Easton v Strassberger* 152 Cal. Appl. 3d 90, 199 Cal. Rptr. 383 (1984).

¹⁸¹ (1963) 213 Cal. App. 2d 729.

¹⁸² *Derry v Peek* (1889) 14 App Cas 337. Note that Section 45 of the Sale of Goods and Supply of Services Act 1980 also provides a statutory remedy in cases of non-fraudulent misrepresentation, where the representation would have been actionable at common law if made fraudulently, and where the maker of the representation did not have reasonable grounds for believing the representation to be true.

purchasers have no survey carried out.

Liability of construction professionals for defective premises

The work of construction professionals is governed by the principles of negligent misstatement enunciated in *Hedley Byrne v Heller and Partners*¹⁸³ and subsequently developed through jurisprudence. Crucially, and in distinction to builders, advice by such persons, if negligent, can give rise to liability for economic loss. A professional may be sued both in contract and in tort for negligence where a duty of care is owed. Whether such a defendant will be liable for failing to take reasonable care will vary depending on the circumstances of each case. In *Sunderland v. McGreavey*¹⁸⁴, an architect who was asked to carry out a visual inspection, as distinct from a complete survey, under time pressure was held not liable when it transpired that the property was liable to flooding. In *Crowley v. Allied Irish Banks*¹⁸⁵, it was accepted that an architect would be liable for injuries caused by defective design, however in that case it was held that there was a *novus actus interveniens*, which broke the link between the architect's negligence and the plaintiff's injuries.

The professional will be held to the standard of the reasonably competent professional; the leading case on professional negligence is *Bolam v Friern Hospital*, in which the Court held as follows:

...where you get a situation which involves the use of some special skill or competence, then the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.¹⁸⁶

In the Irish case of *Quinn v Quality Homes*¹⁸⁷, a firm of architects issued a certificate in respect of structural underpinning work that had been carried out to a house, in reliance

¹⁸³ [1964] AC 465.

¹⁸⁴ [1987] IR 372.

¹⁸⁵ [1988] ILRM 225.

¹⁸⁶ *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, QBD at p. 121

¹⁸⁷ *Quinn v Quality Homes* [1976-1977] ILRM 314.

on a certificate from the structural engineers who had supervised the work. The works turned out to be defective. The High Court found that the architects should not have relied ‘blindly’ on the engineers’ certificate, and found that the architects could recover only a 40% contribution from the engineers of the amount for which the architects were held liable to the home owner.

The legal basis for liability for negligent inspection and certification was recently considered by the High Court in *McGee v Alcorn & Friel*¹⁸⁸. The plaintiffs, Mr. and Mrs. McGee, bought a house in 2008 for €430,000. Alcorn was the building contractor, and Friel was the architect technician who issued certificates confirming that he had inspected the construction of the house, that the foundations and ground conditions were satisfactory and suitable, and that the house complied with the Building Regulations. The foundations, in fact, had been built so badly that the house began to crack and tilt.¹⁸⁹ Alcorn, at the time of the judgment, had left the country and had a judgment in default marked against him. This left Friel carrying the liability for the entire loss. The judgment is particularly welcome as it contains a summary of the Irish jurisprudence in relation to negligence and negligent misstatement in the context of defective housing.

O’Malley J. drew together the various strands emerging from the jurisprudence to elucidate the following principles. Firstly, the court noted that a duty of care had been recognised by Costello J. in *Ward v McMaster* to avoid causing economic loss by reason of building defects, the duty applying in that case to both a builder and a local authority (albeit in limited circumstances, in the case of the local authority). O’Malley J. stated, however, that ‘*Because of the procedural manner in which the appeal had been run, the [Supreme] Court did not consider the question of liability for economic loss.*’¹⁹⁰ Thus, there is no further discussion in the Supreme Court judgment of the builder’s liability for economic loss. Secondly, the court drew attention to the decision in *Leahy v Rawson*¹⁹¹, in which O’Sullivan J had found an engineer liable for negligent misstatement on the basis

¹⁸⁸ [2016] IEHC 59.

¹⁸⁹ The engineer retained by the McGees to inspect the damage to their house described the workmanship as ‘pathetically bad’; the court described the house as having been built on a ‘bizarrely defective’ foundation; two of the house’s windows were not built on any foundation, and the house was built on ‘made-up’ ground, not suitable for building.

¹⁹⁰ *Ibid* [133]. The builder in *Ward*, who was found 90% liable for the cost of rectification works, did not appeal the decision of the High Court

¹⁹¹ *Leahy v Rawson* [2004] 3 IR 1.

of the *Glencar* formulation of the duty of care, rather than the formulation expressed by McCarthy J. in the Supreme Court decision in *Ward*.

Thirdly, the finding in *Glencar* was not, in the court's view, authority for the proposition that either *Siney v Dublin Corporation* or *Ward v McMaster* were incorrectly decided. Applying the various principles to the facts of the case, O'Malley J. held that there was proximity between the certifier and the purchasers of the house, as 'the only conceivable purpose' for supplying the certificates of inspection and compliance to the builder was 'for presentation to a prospective buyer.'¹⁹² On the question of whether it was just and reasonable to impose liability, the court was led 'in the same direction' on either the *Glencar* or *Ward* formulations, noting that no argument had been made by the defendant that there were any policy considerations against a finding of a duty of care.¹⁹³ The court concluded, therefore, that it was fair, just and reasonable to impose a duty of care to purchasers on professionals providing certificates of compliance in relation to construction works.

Plunkett has recently presented a compelling and logical analytical model that engages with, and arguably reconciles, the past four decades of authorities in the law of negligence and negligent misstatement. He argues that the cases in which negligence has been established may be categorised by reference to their facts to determine whether a duty of care arises, which in turns determines the parameters of the 'notional' duty of care:

'...notional duty is best understood as consisting of a small number of broad inclusionary and exclusionary situations that are subject to a larger number of narrow exclusionary and inclusionary situations'.¹⁹⁴

The examples provided by Plunkett of broadly inclusionary situations include carelessly caused property damage and carelessly caused psychiatric injury, while carelessly caused economic loss is identified as a broadly exclusionary situation, save in jurisdictions such as Canada which has allowed this head of loss in building defects cases.¹⁹⁵

¹⁹² *McGee* [136].

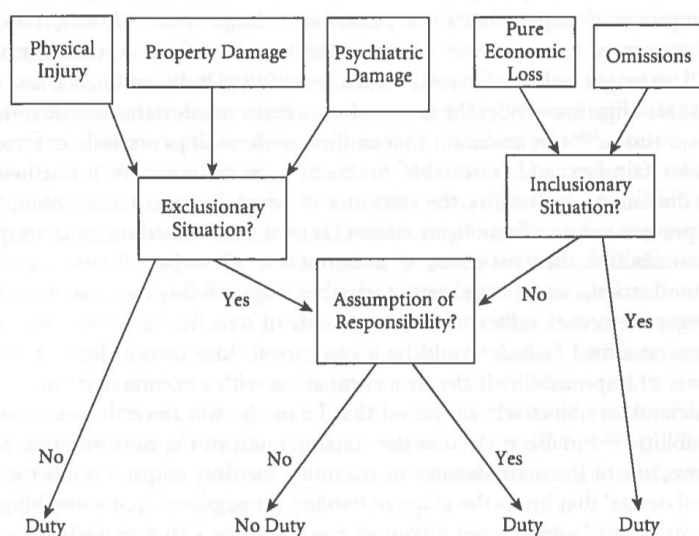
¹⁹³ *Glencar*, in addition to casting doubt on recovery of economic loss, departed significantly from the formulation of the duty of care expressed by McCarthy J from *Ward v McMaster*. Keane C.J. opined that, once reasonable foreseeability and proximity had been established, rather than asking whether public policy considerations should exclude the finding of a duty of care in negligence, one should instead consider whether it just and reasonable to impose a duty of a given scope on the defendant for the benefit of the plaintiff.

¹⁹⁴ James Plunkett, *The Duty of Care in Negligence* (Hart Publishing 2018), 115.

¹⁹⁵ *Ibid*, 116.

Plunkett then proposes a map for determining liability by reference to established categories, with the assumption of responsibility and reliance entering the enquiry only where the duty is within an existing recognised category of recovery, as follows. The categories of physical injury, property damage and psychiatric damage are *prima facie* recoverable save in an exclusionary situation, and the categories of pure economic loss and omissions are *prima facie* irrecoverable, save in an inclusionary situation:¹⁹⁶

Diagram 1: The Structure of the Notional Duty Enquiry



Applying the model to the duty of builders in respect of defective buildings under Irish and English law produces different results and highlights the differences that emerge from the authorities.

With regard to English law, the model reflects the dicta of Jackson LJ in *Robinson v Jones*¹⁹⁷ in which the court held that a builder will generally not be liable in negligence for building defects absent an assumption of responsibility; as such, economic loss is irrecoverable and will only be regarded as being in an inclusionary situation under

¹⁹⁶ Ibid, 141.

¹⁹⁷ *Robinson v P.E. Jones (Contractors) Ltd.* [2011] EWCA Civ 9 (England and Wales Court of Appeal). At paragraph 68, Jackson LJ expressed the principle as follows: “Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property. The law of tort imposes this duty, not only towards the first person to acquire the chattel or the building, but also towards others who foreseeably own or use it.”

English law if there is an assumption of responsibility. On this view, the assumption of responsibility will not ground a duty save in the category established in *Hedley Byrne v Heller*, of negligent advice or services by persons acting in a professional capacity.

With regard to Irish law, however, it has been argued in this chapter that economic loss is recoverable in negligence in respect of building defects, both in *Hedley-Byrne* type scenarios and against a builder. The model, therefore, is of considerable assistance in explaining the divergence between Irish and English law with regard to the builder's liability in negligence for defects of quality.

The paradigm where recovery in economic loss for negligence can be regarded as a category which is prima facie excluded may be shared across Irish and English law, but the finding of the Irish High Court in *Ward v McMaster* can be regarded as an additional category of enquiry analogous to the 'assumption of responsibility' enquiry in Plunkett's model.

Under Irish law, economic loss is not in an exclusionary category, either generally (given the reservations expressed by Keane CJ in *Glencar Exploration v Mayo County Council*) or with regard to building defects (given that *Ward v McMaster*, and *McGee v Alcorn* both allowed recovery in respect of building defects under the general law of negligence). Under English law it would be excluded, on both counts, in light of the authorities discussed above from *D & F Estates* through *Murphy v Brentwood* and more recently in *Robinson v Jones*. Different considerations should therefore apply to the question of whether such loss should be recoverable under Irish law, in addition to the different legislative context in Ireland.

In essence, *Ward* may be regarded as a sub-rule that departs from the category's rule of excluding liability, where *Robinson v Jones* is the paradigm that excludes the builder's liability for defects under English law, and *Ward* is the sub-rule that preserves that liability under Irish law. The fact that the ratio in *Ward* has been preserved via the succession of decisions set out above, and notwithstanding its endorsement of *Junior Books v Veitchi*, demonstrates its continued resilience in the face of the jurisdictional cross-winds from the courts of England and Wales.

D: STATUTORY DUTIES

United States: Caveat emptor gives way to the 'implied warranty of habitability'

In the United States, the common law approach to the liability of a vendor of land changed in the 1960s.¹⁹⁸ In the 1968 decision of the Texas Supreme Court in *Humber v Morton*¹⁹⁹ the court stated that ‘...the ordinary purchaser is not in a position to ascertain when there is a defect in a chimney flue, or vent of a heating apparatus, or whether the plumbing work covered by a concrete slab foundation is faulty’.²⁰⁰ Decisions from the courts in a number of States evidence a shift from *caveat emptor* to *caveat vendor*, whereby sellers were required to warrant the value of the thing sold, ‘in light of social change and “society’s shift toward increased specialisation’.²⁰¹

The shift was also reflected in the 1980 decision of the Supreme Court of South Carolina in *Terlinde v Neely*²⁰²:

...the ordinary buyer is not in a position to discover hidden defects in a structure, especially at a time when he is provided more elaborate furnishing which tend to obscure the structural integrity of the facility.²⁰³

Libertucci notes that ‘Twenty-four states had abandoned the doctrine of caveat emptor for the sale of new houses by the mid 1970s, and, by 1980, at least thirty-five states had adopted some form of warranty of quality.’²⁰⁴, and cites the decision of the California Supreme Court in *Siders v Schloo*²⁰⁵ which held owner-builders not liable in respect of defects because they were not commercial developers.

A significant feature of the US cases in relation to the implied warranty of habitability is that the warranty is a free-form remedy which can exist outside a contractual relationship

¹⁹⁸ Jane P. Mallor, 'Extension of the Implied Warranty of Habitability to Purchasers of New Homes' (1982) 20 Am Bus LJ 361 and *Bethlahmy v Bechtal*, 91 Idaho 55, 67, 415 P. 2d 698, 710 (1966).

¹⁹⁹ *Humber v Morton* 426 S.W. 2d 554 (Tex 1968).

²⁰⁰ *Ibid* 561.

²⁰¹ “The builder would be unjustly rewarded if his knowledge and expertise in building sound and secure homes with no hidden defects was imputed to the ordinary consumer”. (221)

²⁰² *Terlinde v Neely* 275 S.C. 395, 271, S.E. 2nd 768 (1980).

²⁰³ *Ibid* 769.

²⁰⁴ Linda M. Libertucci, 'Builder's Liability to New and Subsequent Purchasers' (1991) 20 Sw U L Rev 219.

²⁰⁵ *Siders v Schloo* 188 Cal. App. 3d 1217, 233 Cal. Rptr. 906 (1987).

between the parties. From the perspective of Irish and English law, a warranty is necessarily contractual in nature, and may be freely chosen by the parties or implied by law. The US implied warranty of habitability, however, has been relied upon by first and subsequent purchasers of housing, and is more akin to the independent statutory duty of habitability contained in the Defective Premises Act 1972 of England and Wales.

Prosser describes the implied warranty of habitability as ‘a freak hybrid born of the illicit intercourse of tort and contract’²⁰⁶, and Zipser notes that ‘the term “warranty” has caused much confusion...Those who helped developed “warranty” as a form of strict liability intended to create a different type of warranty, arising in tort, independent of any contract, and imposed as a matter of policy.’²⁰⁷

The common law implied warranty in respect of new homes is that they be ‘reasonably fit for human habitation’.²⁰⁸ The language used in the 1972 Act is ‘fit for habitation’. The caselaw of the English courts in the years since the introduction of the Act has clarified what is required in this regard. In the case of *Abdel-Haley Mahmoud Bayoumi v Protim Services Ltd.*²⁰⁹, the plaintiff bought a property in which waterproofing had been undertaken by the defendants. On appeal from an award in the plaintiff’s favour the Court of Appeal held that the breach of section 1 (1) of the 1972 Act need not be the only cause of the building being ‘unfit for habitation’, and that the damages available under the Act included ‘such damage as he may prove he suffered by reason of the breach’, citing paragraph 1292 Halsbury’s Laws of England:

the damage is recoverable in respect of the breach of statutory duty are such as our contemplated by the statute and this will include damages which are the natural consequence of the breach.²¹⁰

The Court was also prepared to accept the trial judge's view that the building was unfit for habitation by reason of damp in several parts of the building.

²⁰⁶ WL Prosser, 'The Fall of the Citadel (Strict Liability to the Consumer)' (1966) 50 Minnesota Law Review 791, 800.

²⁰⁷ Dean J. Zipser, 'Builders' Liability for Latent Defects in Used Homes' (1979-1980) 32 Stan L Rev 607, 614.

²⁰⁸ *Batty v Metropolitan Property Realisations Limited* [1978] 1 QB 554.

²⁰⁹ [1986] EWCA Civ 885.

²¹⁰ Halsbury’s Laws of England, Volume 45.

In *Quick v Taff Ely Borough Council*²¹¹ the tenant's council house was unfit for human habitation because of 'fungus, mould growth and dampness', and a partially collapsed external wall. In *Wallace v Manchester City Council*²¹² the trial judge found a breach of section 4 of the DPA due to various deficiencies in the plaintiffs council house including rotten windows, dampness, and a partially collapsed external wall.

In the 2001 decision of *Lee v Leeds City Council*²¹³, the court notes that 'fit for human habitation' standard was devised in the 19th century as the required standard for tenancies, and that its focus was on the health of tenants.²¹⁴ It is submitted that this is not an appropriate standard for defects in modern housing, where the plaintiff will be an owner rather than a tenant, and where the defects at issue may cause no injury or risk to human health but may nonetheless require substantial rectification work.²¹⁵

Another case in which the Act was considered was *Andrews v Schooling*.²¹⁶ The Court of Appeal held in this case that section 1 of the Defective Premises Act covers non-feasance as well as work actually done. Therefore, if the builder fails to install a damp-proof course, the Act would still apply.

In *Catlin Estates Ltd v Carter Jonas*²¹⁷, the court accepted the plaintiff's evidence that fires could not be let in winter 'because chimneys smoke', and there was a 'substantial risk that wind and rain could penetrate the building causing damage'. The court found nonetheless that the defects did not render the property unfit for human habitation, 'although it is clear that there are substantial defects in its construction which need to be remedied.'²¹⁸ The plaintiff had given evidence of water penetration, drainage smells, problems with fire alarms, plumbing leaks, leaking windows, smoking chimneys,

²¹¹ [1986] QB 809.

²¹² [1998] EWCA Civ 1166, [1998] 3 EGLR 38, [1998] 30 HLR 1111.

²¹³ [2002] EWCA Civ 6, [2002] 1 EGLR 103.

²¹⁴ [2002] 1 WLR 1488; Chadwick LJ noted that 'a statutory obligation to ensure at the premises left for human habitation were fit for that purpose was first imposed, in respect of tenancies at low or modest rents, by section 12 of the Housing for Working Classes Act 1885'. Chadwick LJ referred to the nine matters set out in section 10 of the Landlord and Tenant Act 1985 Act to which regard is to be had in determining whether, for the purposes of the Act, the house is unfit for human habitation (for example from damp, ventilation). [4] The court concluded that 'the house is regarded as an fit for human habitation if, and only if, it is so far a defective in one or more of the nine matters set out that it is not reasonably suitable for occupation in that condition'. [5]

²¹⁵ The damage described in the reports of the Pyrite Panel and the Expert Panel on Concrete Blocks, for example, would ultimately have threatened the structural integrity of the building but did not present on ongoing source of physical injury.

²¹⁶ [1991] 1 WLR 783.

²¹⁷ *Catlin Estates Ltd v Carter Jonas* [2005] EWHC 2315, [2006] All ER (D) 13 (Jan).

²¹⁸ [2005] EWHC 2315.

defective plumbing, and a leaking front door.

The court also considered that the date from which the limitation period began to run under the 1972 Act. Citing Buckley LJ in *Alexander and Anor v Mercouri*²¹⁹ in which the court held that the section 1 (1) duty applies to the carrying out of the work, so that the cause of action accrues immediately upon breach of that duty, the court in the *Catlin* case found the action statute – barred.

In *Glinn v Waltham Contractors*²²⁰ the court noted that many of the buildings defects at issue in the case could be described as static, commenting that ‘Indeed, it is unclear whether any part of the house would have failed the test of fitness with human habitation promulgated by the Defective Premises Act 1972’. The Defective Premises Act, in turn, was the model for the Irish Law Reform Commission’s proposal for reform in 1982.

In the *Terlinde* case, the court noted that the fact that the second purchaser did not know the builder didn’t ‘negate the reality of the “holding out” of the builder’s expertise and reliance that occurs in the market place’²²¹ This is analogous to the decision of the Irish *Wildgust v Bank of Ireland*²²² which followed a similar decision of the House of Lords in *White v Jones*²²³, each of which allowed recovery in negligence where the plaintiffs had not themselves been given the negligent advice, but were part of a category of persons whom the defendants ought to have known would suffer loss as a result of their carelessness.

The American cases and discussion are actually evidence that the implied warranty theory is more akin to an independent statutory duty outside contract than an implied term as we would understand it. Robertson challenges the view of the implied term as being based on the consent of the parties, noting that the implied term is regarded by some as equivalent to a public liability rule, similar in character to a tortious duty, without a necessary connection to the presumed intention of the parties:

The Supreme Court of Canada...has accepted that a distinction cannot be drawn

²¹⁹ [1979] 1 WLR 1270.

²²⁰ [2007] EWHC 149 (TCC).

²²¹ *Terlinde*, (n 202), 768.

²²² *Wildgust v Governor and Company of the Bank of Ireland* [2006] IESC 19.

²²³ *White v Jones* [1995] 2 AC 207.

between implied contractual obligations and obligations in tort. The source of the action, they said, ‘whether styled in contract or tort’, ‘is an objective expectation, defined by the courts, of the appropriate obligation and the correlative right’. There is, therefore, ‘no issue of private ordering as opposed to publicly imposed liability’.²²⁴

On this view, terms implied by law are public duties that use the vehicle of private contractual obligations but are clearly externally imposed and not chosen by the parties (for which the evidence is *Elliott and Noreside* in which the defendants strongly resisted implication of the term, to the point of engineering a referral to the ECJ on novel and complex grounds). This suggests that there is a greater conceptual fluidity between the two options proposed by the Law Reform Commission – the ‘implied terms’ and ‘statutory duty’ models – than is apparent from the discussion in the 1977 Working Paper and 1982 Report.

This insight is of assistance in devising the appropriate law reform proposed in this thesis; on either view, the new legal obligation can be regarded as a duty imposed by public law, capable of enforcement by private parties in their relations with one another. The remedial mischief can be solved whether the new obligation is regarded as an action for breach of statutory duty, or an action for breach of contract.²²⁵

England and Wales: Defective Premises Act 1972

Section 1 (1) of the Defective Premises Act 1972 provides that a person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or conversion of a building) owes a duty, if the dwelling is provided to the order of a person, to that person, and to every person who acquires an interest in the dwelling, ‘to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed’.

²²⁴ Andrew Robertson, ‘On the Distinction between Contract and Tort’ in A Robertson (ed) *The Law of Obligations: Connections and Boundaries* (The Law of Obligations: Connections and Boundaries, UCL Press 2004), 104, citing *British Columbia Hydro and Power Authority v BG Checo International Ltd.* (1993) 99 DLR (4th) 577, 585-586.

²²⁵ Numerous statutes also refer to ‘loss or damage’ in relation to civil claims, including the Central Bank (Suspension and Enforcement) Act 2013, which established an action for breach of statutory duty at s.44 for failure by a regulated financial services provider to comply with any obligation under financial services legislation. Therefore, law reform to address the problems discussed in this thesis could specify that liability for breach of statutory duty would arise pursuant to the Act and the consequences and remedies that could follow.

Bailey points out defects in design and construction, even substantial ones, will not give rise to a breach of the Act unless they render the dwelling 'unfit for habitation'.²²⁶

The duty is owed to the person who commissioned the work and every person subsequently taking an interest in it. The English Court of Appeal considered the meaning of the term 'fit for habitation' in *Bole v Huntsbuild*²²⁷, concluding that it required that a dwelling could be inhabited safely and without inconvenience²²⁸, and that the dwelling as a whole should be assessed, rather than considering whether each defect in isolation itself rendered the house unfit for habitation.²²⁹ The Court of Appeal, in its judgment granted permission to appeal from the decision of the High Court in the case, had noted the 'dearth of authority' on the interpretation of the term 'fit for habitation',²³⁰ noting that 'For a statute which has been on the books since 1972, there is a surprising dearth of authority on the precise meaning and effect of the "fitness for habitation" test.'²³¹

The standard established by the Defective Premises Act is a relatively limited one; the requirement is that the dwelling be 'fit for habitation', not that it should be free from defects, even serious defects. It is notable that, unlike Ireland, there is no standard form building agreement used in residential conveyancing in England and Wales.²³²

The independence of the contractual warranties from the statutory warranty in the Latent Damage Act was most confirmed in the 2012 decision of the English Court of Appeal in *Harrison v Shepherd Homes*.²³³ The case concerned ten sample claims from a series of actions involving over seventy plaintiffs who had purchased homes in a housing estate. The estate was built on a former landfill, where the houses had begun to settle and crack due to inadequate piling. A number of the claimants were not the first purchasers of the houses; those claimants brought an action pursuant to the Act, while the claimants who were also the original purchasers brought actions pursuant to their contracts as well as under the Act.

²²⁶ Julian Bailey, *Construction Law* (2nd ed. Sweet and Maxwell 2016), 1462-1463.

²²⁷ *Bole v Huntsbuild* [2010] BLR 154.

²²⁸ *Ibid* [28].

²²⁹ *Ibid* [34]

²³⁰ *Ibid*.

²³¹ *Ibid* [7].

²³² Philip Britton, 'Judicial Remedies for Construction Defects: Common Law, Equity, or Statute?' (Society of Construction Law May 2016), 16.

²³³ *Harrison & Ors v Shepherd Homes Ltd. & Ors* [2012] EWCA Civ 904.

Bailey describes the duty established by section 1 (1) of the Defective Premises Act of 1972 as ‘complementary’ to the implied contractual duty at common law.²³⁴ Britton and Bailey describe the Act as follows:

It is...as welcome as any plank in a shipwreck; but in our view does too little for too short a period, in comparison with the fully trained lifesaving patrol on hand in Australia...²³⁵

1982 Law Reform Commission Report - proposals for new statutory duty

The draft Bill that accompanied the Law Reform Commission Report of 1982 proposed the creation of a new duty on persons who undertook or executed any building work, which was included at section 1 (1) of the Bill in the following terms:

‘a person who undertakes or executes any work for or in connection with the provision of any premises (hereinafter referred to as ‘building work’) shall owe a duty

to the person who commissioned the work and

without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the premises)

to see to it that the work which he undertakes or executes, is executed in a good and workmanlike, or, as the case may be, professional manner and with suitable and proper materials, and so that, where the premises consist of a dwelling, they will be reasonably fit for occupation and habitation, and in the case of other premises, so that they will be reasonably fit for the purpose for which they were intended.’

The concept of a person ‘undertaking’ work was very broad, and was defined as including a bank, building society, or financial institution, or any person who participated in the

²³⁴ Julian Bailey, *Construction Law* (2nd ed. Sweet and Maxwell 2016), 1455.

²³⁵ Julian Bailey and Philip Britton, ‘New Homes and Consumer Rights: England and Australia compared’ (2011) 3 *International Journal of Law in the Built Environment* 269, 271.

management, control or conduct of the work in question, or a person entitled to fees in respect of the building work in question.

The limitation period for actions arising out of breach of the section 1 duty was to be 12 years; the Bill provided for the inclusion of ‘an action under section 1 of the Defective Premises Act 1977’ to be included in section 11 (5) of the Statute of Limitations 1957, which would have had the effect of imposing a 12-year limitation period for actions arising from the section. There was a deeming section in respect of the point at which the cause of action was to have been deemed to have accrued, which would have substantially clarified an issue that has given rise to numerous cases in the intervening years.²³⁶

The limitation period proposed would also have been of great significance in recent years in the context of pyrite litigation in particular. Finally, section 1 (11) specifically provided that ‘damages for breach of the duty created by this section includes damages for economic loss (if any)’, which would deal to some extent with the ongoing uncertainty under Irish law about recovery of economic loss under the law of tort. Section 3 of the Act specifically characterised the action for breach of sections 1 or 2 of the Act as an action for breach of statutory duty, and a wrong within the meaning of section 2 of the Civil Liability Act 1961.

The Scheme of the Bill was commendable for its simplicity and for the fact that it dealt with a number of issues that remain relevant, and in respect of which the legal position is unclear. The Section 1 duty consists of a transmissible warranty of quality that would survive sale of the house within the limitation period. Section 2 imposed a duty of sellers of housing to warn subsequent purchasers about risks of injury or damage to property arising from defects in the house, to the extent that the seller knew or ought to have known of them. The Bill prescribed a limitation period of 12 years, and the Act clarified the date of accrual of the cause of action.

It is notable that the 1977 Working Paper regarded the first and second options as alternatives, commenting that ‘*Reform here could be either by way of implied warranties*

²³⁶ Limitation periods are discussed further below in chapter 5.

or obligations imposed by statute: either 1 or 2. Both approaches would not be necessary'. The paper contrasts this with options 3 - 6, which it regards as interdependent in nature: *'A registration system for builders inevitably involves continuous inspection to ensure quality standards, and an insurance or bond system where it is considered necessary to guarantee the builders' financial stability'*²³⁷. The paper recommends, therefore, that one or options 1 or 2 should be introduced, supported by the measures in options 3 - 6:

The ideal solution it would seem, therefore, would be to adopt measures suggested at 1 or 2, and to re-enforce these rights by a scheme comprising some or all measures mentioned in 3 to 6, which would guarantee the quality and financial stability of the builder. Such a two phased approach seems to offer the best comprehensive solution to the vexed problems that arise in this area.²³⁸ Is it important to recall that in 1977 there was no national set of Building Regulations. Building bye-laws applied in urban areas but not elsewhere. Following the Stardust disaster in 1981, there was a renewed emphasis on building quality and safety, which eventually resulted in the passing of the Building Control Act 1990.

In its 1970 report, the English Law Commission recommended that the duty be applicable to 'a person taking on work in connection with the provision of a dwelling', in order to bring builders, developers, professionals, and subcontractors within the duty. The Commission took the view that the duty owed by subcontractors carrying out work from builders, supplying materials and purpose-built components, would be to builders rather than end users, and that suppliers of mass produced components and general building materials would not be subject to the duties created by the Act.

The 1977 Working Paper of the Irish Law Reform Commission adopted the Law Commission's distinction between dangerous defects and defect of quality, and examined the liability of vendors, lessors, and builders, under Irish law, for defective premises. The Law Reform Commission noted that 'although caveat emptor still applies to the purchaser of real property and although the general principles of negligence established in *Donoghue v Stevenson* seem not to affect the immunity conferred on the vendors of real property, the tendency is in recent case law to construe this as exceptional immunity in a

²³⁷ Law Reform Commission (1977), 78.

²³⁸ Ibid 78.

restrictive fashion’.²³⁹

With regard to builders, the Law Reform Commission stated that the builder gives no warranty as to the fitness for purpose for quality of the building, with the exception of a house sold in the course of construction, in which case the court will imply the threefold common law terms of fitness for habitation, good workmanship and proper materials. The Commission noted that the builders did not share the immunity of the vendors and lessors for dangerous buildings, for which builders could be liable in negligence based on *Donoghue v Stevenson* principles,²⁴⁰ but that the builder could rely on the immunity if he sold the building. The Commission cited the *Dutton* decision, at that stage only five years old as evidence ‘that these immunities are coming under pressure’,²⁴¹ in that Denning MR and Sachs LJ ‘were prepared... to declare that the immunity of a builder/vendors for negligence no longer existed’.²⁴²

The Commission observed from the progression of jurisprudence through *Purtill v Athlone UDC*, *Dutton v Bognor Regis*, *McNamara v ESB*, and *Anns v London Borough Council of Merton*, ‘that it is towards contracting such immunities rather than allowing such immunities to continue on affected by the general flood of negligence’.²⁴³

There is a provision in section 24 of the Multi-Unit Developments Act 2011 whereby a ‘developer’ as defined in the Act may be required to complete a multi-unit development (usually an apartment complex, with or without commercial units) in accordance with the planning and building control legislation. This is a potentially useful remedy which is available against developers by home owners and by owners’ management companies, and could potentially be used to overcome the (usual) lack of a remedy in contract by an owners’ management company against the original builder/developer. As the 2011 Act confers exclusive jurisdiction on the Circuit Court for the area in which the multi-unit development is located in respect of such applications, there is little jurisprudence on how these orders work in practice. In effect, the order creates a statutory form of specific performance. It is apparent from the 2018 decision of the High Court in *Re Lance*

²³⁹ Ibid.

²⁴⁰ Ibid [32].

²⁴¹ Ibid [33], 24.

²⁴² Ibid [33] 25.

²⁴³ Ibid [35] 26.

*Homes*²⁴⁴ that such orders can be made in relation to defects in common areas of multi-unit developments, which are an ongoing feature of Irish apartment stock.²⁴⁵ In that case, however, the High Court treated the remedial works order as equivalent to unsecured debt, which could not be enforced against the liquidators of the developer.²⁴⁶

Conclusion

With regard to the possibility of recovery in negligence, each of the jurisdictions considered for this section has *some* measure of legislative protection for home buyers. However, significant gaps exist; under Irish law, in particular, there is a problem of a multiplicity of rules that interact in ways that prejudice the home buyer, such as privity of contract and limitation of actions.

The statutory product liability regime, with its focus on dangerous products that are used or consumed by end-users, appears to be of limited assistance to home buyers. The common law principles regarding defective products co-exist with the statutory regime contained in the Liability for Defective Products Act 1991, but an action against a supplier or manufacturer of construction products could run into difficulties on the basis of the *Linklaters Business Services* decision, which, if followed by the Irish courts, could foreclose recovery against a materials supplier where the loss consists of damage to works into which the materials have been incorporated, rather than physical injury.

The only fruitful legal avenue for recovery under current law and practice is against gatekeepers – particularly professionals who inspect and certify construction works. It is submitted that the reforms brought about by the Building Control (Amendment) Regulations 2014, in requiring inspection and certification by registered professionals, has done very little to improve remedies, and has simply made an existing route to recovery slightly easier (as the mandatory certificates of compliance are in statutory form and cannot be amended, in principle). The recent history of such actions has been

²⁴⁴ *In re Lance Homes & the Companies Act* [2018] IEHC 444. The remedial works orders that had been made by the Circuit Court in the case were overturned on the basis that it the Circuit Court had jurisdiction to award damages in lieu of the orders (as they were effectively mandatory injunctions) and that, as such, the orders were to be regarded as unsecured debts in the liquidation of the developer.

²⁴⁵ See the submission of the Society of Chartered Surveyors in Ireland to the Department of Housing, Planning and Local Government, 'Defects in our Built Environment', 2017.

²⁴⁶ This suggests that the cost of compliance with remedial works orders should be treated as preferential debts in a liquidation of a developer.

characterised by very lengthy proceedings that are robustly defended by professional indemnity insurers; as such, they do not provide an accessible and timely remedy for home owners.²⁴⁷

Finally, the vulnerability of the decision in *McGee v Alcorn* as regards damages for distress and inconvenience also highlights a fault-line where the home buyer may be disadvantaged in pursuing a remedy outside the law of contract.

Where home owner protection has been effected by statute, the possibility of recovery against a builder in tort may be less pressing, but it should nonetheless remain available where sufficient protection is not provided by either contract law or legislation; courts should not assume that legislative responses provide adequate protection, and legislation should not curtail common law remedies where it itself is adequate to meet the home buyer's need for redress. Equally, courts should not assume that the relationship between buyers and sellers of housing allows for an orderly and equal bargaining over terms, and a fair allocation of risk; the Irish experience, at least, suggests that this is very far from reality.

²⁴⁷ *Farrell v Arborlane* [2016] IECA 224 is a case in point, where sixteen years elapsed between the certificate at issue in the proceedings and their eventual striking out by the Court of Appeal; see also *Honahan & anor v McNerney Construction Limited & Ors* [2018] IEHC 311 in which the High Court criticised the plaintiffs for their 'strategy of pursuing the deep pocket of the insurer instead of those who had a potential liability to the plaintiff, all of whom they had clearly identified in August, 2007'. [100].

Chapter 4 – Regulation of construction and State responses to residential building failures

Introduction and context

This chapter deals with the regulation of the construction process and provides an analysis and critique of State intervention into residential construction risks and failures by reference to theoretical perspectives, Irish and international examples. The regulatory regime is critically examined, both in terms of (i) regulating the process (principally via the building control system) and (ii) regulating those who may carry out building work, including a review of the proposed statutory model for registration of builders, in the context of international models for registration and licensing.

This chapter is divided into four parts.

Part A considers the purpose and content of regulation, the State's role in regulating construction, and the legal basis for the intervention by the Irish State in recent building failures.

Part B deals with regulatory failure and regulatory reform. The section opens with a critique of the inadequacy of the Irish State's response to residential construction failures. This includes both the failure to investigate the causes of defects in Irish residential construction and to identify and reflect upon the contributing factors to those failures. It is argued that this has led to continuing regulatory failure and a dismissal of the need for reform of legal remedies.¹ The central argument of Part B is that the current regulatory system is fractured and incoherent, involving multiple sources of regulation and regulatory bodies, and is insufficient without the credible threat of enforcement as a control mechanism.

Part C introduces the concept of 'Public gatekeepers' and discusses the role of regulatory

¹ During a debate on the Report on Building Standards, Building Controls and Consumer Protection in May 2018, the Minister for Housing, Planning and Local Government, Eoghan Murphy TD, stated that 'The proposal in the committee's report to create new legal remedies or redress procedures or dispute resolution facilities for homeowners affected by defects would require broader consideration... While it may have benefits in some instances, it does not represent a panacea for the resolution of building compliance issues.' Dáil debates, 24 May 2018.

failure and enforcement strategies in the occurrence of defects. Empirical research is presented on the enforcement of building control legislation in Ireland, and the role of enforcement, in comparison with food safety regulation.

Part D deals with the role of private gatekeepers in construction regulation, identifying and analysing transfers of regulatory power from the public to the private sphere, the nature of private regulation, and considers the nature and implications of co-regulation between public and private actors. The implications of these developments for transparency, accountability, and regulatory coherence is also considered.

A: THE PURPOSE AND CONTENT OF REGULATION

The role of the State in regulating residential construction, and in managing private risk

Residential construction is essential for creation of homes. We are united in our need for shelter, and a place in which we can live private lives and provide for those who depend upon us. Homes are also physical structures in which we live and work. Our health and our lives depend on the care that is taken in their design and construction. We each, therefore, depend on the quality of our own homes, and on the homes of others, in which we spend time. Whether from family and social ties or from a belief in the importance of home, therefore, we are invested in the quality of housing other than our own.²

Legitimacy is a fundamental value of the State's entitlement to regulate, and of the acceptance of a regulatory regime. The acceptability to a particular sector of proposed regulation is often addressed by means of consultation processes in which parties likely to be affected by the proposed regulatory measure are invited to contribute to the creation of the measure.³ While this may assist with acceptance of the initiative among the

² The work of Lorna Fox O'Mahony has elucidated important insights about the characteristics of residential buildings that distinguish them from commercial assets: '...the occupied home is a distinct type of property, based on its central role in our lived experiences as humans.' Fox O'Mahony and James A. Sweeney, 'The exclusion of (failed) asylum seekers from housing and home: towards an oppositional discourse', (2010) *Journal of Law and Society*, 37 (2) 285-314.

³ The 'Better Regulation' initiative of the Irish Department of Business, Enterprise and Innovation (www.dbei.gov.ie) has as its key objective 'to ensure that policy is evidence-based, as far as possible, through stakeholder consultation and impact analysis; therefore that regulation is introduced only when necessary'.

regulated population, the process of legislation by consultation may facilitate regulatory capture. Laffont and Tirole presented an analysis of regulatory capture in which they suggested that an interest group seeking to influence a regulatory outcome

...has more power when its interest lies in inefficient rather than efficient regulation, where inefficiency is measured by the degree of informational asymmetry between the regulated industry and the external monitor (Congress).⁴

Building Regulations are aimed at a variety of objectives, including the protection of health and safety of persons, access for people with disabilities, and the efficient use of resources, rather than the protection of property itself; they are not, however, designed to protect property, or to act as a source of private law remedies for defects.⁵ The State has traditionally sought to regulate housing construction and conditions in the interests of safety and health; the preservation of the value of a home as an asset has never been a primary objective of the regulatory model.⁶

Poor quality housing has an impact on public safety which may manifest itself in physical injury due to defects such as dampness⁷, or injury or death due to safety-related defects such as inadequate fire protection, a defect which has featured prominently in Irish apartment developments.⁸

⁴ Jean-Jacques Laffont; Jean Tirole, 'The Politics of Government Decision-Making: A Theory of Regulatory Capture' (Nov. 1991) 106 (4) *Quarterly Journal of Economics* 1089, 1109-1110.

⁵ Regulation 3 (2) of the Building Control Act 1990 provides that Building regulations may be made for a variety of purposes, including 'securing the health, safety and welfare of (i) persons in or about buildings, and (ii) persons who may be affected by buildings or by matters connected with buildings', as well as for conservation of fuel and energy, making provision for the needs of disabled persons, securing the efficient use of resources, and the encouragement of good building practice. Turner comments with regard to similar California code requirements that 'There is no discussion or analysis from the promulgators of the model code as to why protection of property should not be an express purpose of residential building requirements, or why it has been deleted from existing standards.' Michael D. Turner, 'Paradigms, Pigeonholes, and Precedent- Reflections on Regulatory Control of Residential Construction' (2001-2002) *Whittier Law Review* 3, 34.

⁶ The nature of building control as a regulatory regime for safety and health can be seen in its origins in the Public Health (Ireland) Act 1878 and the Public Health Acts (Amendment) Act 1890. The 1878 Act divided Ireland into sanitary districts and provided for the making of bye-laws, amongst other matters, 'With respect to the structure, and description and quality of the substances used in the construction of new buildings for securing stability and the prevention of fires, and for purposes of health' (section 41 (2)).

⁷ See *International Federation for Human Rights (FIDH) v Ireland* Collective Complaint no 110/2014, 23 October 2017, which concerned, in part, the significant health problems suffered by Irish social housing tenants living in very poor housing conditions, including the Balgaddy development that had been built in phases from 2004. The Committee found a violation of Article 16 of the European Social Charter [the right of the family to social, legal and economic protection] in light of the failure of the Irish Government 'to take sufficient and timely measures to ensure the right to housing of an adequate standard for not an insignificant number of families living in local authority housing...' (29). A child who developed bronchitis consequent upon damp conditions in his home was awarded €20,000 against the landlord by the Dublin Circuit Court of October 2017: <http://www.thejournal.ie/bronchitis-landlord-child-3673457-Oct2017/> (accessed 24 June 2018).

⁸ One of the problems with the State response highlighted in this thesis is the failure to investigate the causes of defects in Irish housing stock built during the past twenty years; therefore, information in relation to the incidence and nature of defects tends

The jurisprudence to date in relation to housing defects situates the loss from such defects within the common law paradigm of individual legal (usually contractual) relationships such as those between builders and home owners.⁹ This narrative of private risk has been promoted by the Irish Government when called upon to assist homeowners dealing with defects.¹⁰ This perspective ignores the manner by which private risk can become public risk through numerous residential building failures, which can be attributed in part to the failure to ensure building contractors be registered, bonded, and insured, notwithstanding the recommendation of the Law Reform Commission in this respect.¹¹

Over the course of 2012-2017, the Irish State expended over €36m on the rectification of the Priory Hall development in North Dublin,¹² together with the expenses of accommodating the residents following the order made under the Fire Services Act in relation to the development, and associated costs such as security for the development over a period of years.¹³ The State also assisted in negotiating with lending institutions on behalf of home owners in order to renegotiate or write off mortgages in relation to the affected units.¹⁴

In addition to these interventions in relation to privately-owned homes, the State has also faced significant costs in dealing with repairs for local authority housing, including at Balgaddy, in west Dublin, where defects including dampness, mould and cracking were

to be from media coverage and from the limited investigations that have been carried out at the instance of Government, including the Report of the Pyrite Panel (2012), the Expert Panel on Concrete Blocks, (Expert Panel on Concrete Blocks, *Report of the Expert Panel on Concrete Blocks* (Department of Housing, Planning and Local Government, 2017) and the Report of the Fire Safety Task Force (2018) (Fire Safety Task Force, *Fire Safety in Ireland The Report of the Fire Safety Task Force* (Department of Housing, Planning and Local Government), 2018).

⁹ The High Court in *Mitchell v Mulvey Developments* [2014] IEHC 37 Similarly, each of the leading home defects cases that have considered the extent of the duty of care of negligence by builders and professional advisers, from *Ward v McMaster* to *McGee v Alcorn* [2016] IEHC 59, have analysed the position largely from the perspective of the traditional private law model of the duty of care.

¹⁰ Minister of State and the Department of Housing, Planning and Local Government Damien English commented in this regard that 'In general, building defects are matters for resolution between the contracting parties involved...while my Department has overall responsibility for establishing and maintaining an effective regulatory framework for building standards and building control, it has no general statutory role in resolving defects in privately owned buildings, including dwellings...' Dáil debates, 7 December 2017.

¹¹ Law Reform Commission, *Report on Defective Premises* (LRC 3, 1982).

¹² Olivia Kelly, 'Priory Hall refurbishment bill likely to exceed €36.4m' *The Irish Times* (Dublin 22 November 2016).

¹³ The Minister for Housing, Planning, Community and Local Government stated in July 2017 that 'the full costs of remediation have yet to be finalised' but that '€21.191m has been recouped to Dublin City Council for the refurbishment works' of which €10.903m came from Exchequer funding. Dáil Deb, 4 July 2017

¹⁴ Olivia Kelly, 'Priory Hall residents accept resolution deal' *The Irish Times* (Dublin 10 October 2013).

discovered in 400 local authority homes.¹⁵

The response to date of the Irish State to housing failures has been to encourage relevant actors to provide solutions¹⁶, or, exceptionally, to step in and pay for repairs itself (examples for which include the Pyrite Resolution Scheme, and the remediation of the Priory Hall development.¹⁷

Where the State adopts a ‘wait and see’ approach to building failures, the consequences include both policy and legal incoherence. In the absence of law reform, gaps in legal remedies are revisited with each high-profile residential building failure. Turner characterises a similar approach by Government in the United States as ‘the market-based “do nothing until it happens” approach’, for which the alternatives proposed include financial assistance, but criticises proposals that shift the risk of defects back to homeowners and defects insurers as being premised on ‘the housing industry’s failure to adhere to building standards and its ability to lower minimum construction requirements’.¹⁸

Where the State has intervened to provide financial and other assistance to home owners with residential defects, it has done so in an incoherent and inconsistent matter. The Pyrite Resolution Scheme is the only intervention that has been established on a legislative footing in order to define a set of criteria for eligibility for the scheme and to define the works that could be carried out under the Scheme. Coherence is a particularly important concept when analysing problems involving multiple legal regimes and relationships:

¹⁵ The conditions resulting from defects in a recent social housing development, amongst other social housing developments, resulting in a finding of a violation of Article 16 of the European Social Charter in 2017; *International Federation for Human Rights (FIDH) v Ireland* Collective Complaint no 110/2014, 23 October 2017.

¹⁶ This was the case of the Longboat Quay development, where remedial works are being largely funded by Dublin City Council and by a receiver: see Olivia Kelly, ‘Deal worth €3.1m agreed to remedy Longboat Quay defects’ *The Irish Times* (Dublin, 19 December 2016).

¹⁷ See www.pyriteboard.ie and the Pyrite Resolution Act 2013; with regard to the basis for remediation of the Priory Hall development, Minister for Housing, Planning and Local Government Eoghan Murphy stated in a written answer of 4 July 2017 (Dáil debate, 4 July 2017) that ‘The difficult process of resolution of the Priory Hall issue, involving the relevant members of the Irish Banking Federation, the Residents’ Committee, the Government and Dublin City Council, concluded with a Framework Agreement in October 2013. In recognition of the unique and exceptional circumstances which arose in Priory Hall, all parties entered into this Agreement. The Framework sets out that the cost burden is shared between the State, DCC, the Irish Banking Federation and other stakeholders, as appropriate. The refurbishment of Priory Hall is being undertaken in a number of phases with 187 units overall being refurbished. The overall work scope relates to the extensive remediation of the residential and retain units, and extensive basement remediation including pyrite works. While the full costs of the remediation have yet to be finalised, to date, €21.191m has been recouped to Dublin City Council for the refurbishment works (€10.288m of which was self-funded through Local Property Tax receipts with €10.903m being provided in Exchequer Funds’.

¹⁸ Turner (2001-2002) (n 5), 75.

regulation¹⁹, insurance, tort and contract. As a measure of parallel systems changing in step with each other, coherence is challenged in systems governed by multiple legal rules when one set of rules changes without sufficient consideration of the collateral impact of the change; the introduction of the Building Control (Amendment) Regulations 2014 is an example of such a change.

The misalignment of regulation and private law

An analysis of the Building Control (Amendment) Regulations 2014 suggests that that insufficient consideration was given to the legal context in which the Regulations were to operate. For example, the prescribed form of Certificate of Compliance on Completion required to be completed and registered before a new building may be opened, occupied or used is in two parts: one signed by an Assigned Certifier, who is required to carry out and co-ordinate periodic inspections of the works during construction, the other by the builder who has carried out the works.²⁰ In each case, the signatory certifies compliance of the design/works with the Building Regulations. The legal consequences of the two certificates are very different, however. The jurisprudence by which the certifier may be held liable for negligent misstatement to a third party (such as a subsequent owner of the works) is very well established²¹, while the liability of a builder in tort for defective buildings is still a matter of some doubt.²²

While it might be said that a regulatory regime need not align perfectly with private law, the 2014 Regulations explicitly seek to create private law remedies for breaches of Building Regulations, without making clear whether the resulting remedy should be in negligence, negligent misstatement, or breach of statutory duty.²³

¹⁹ The principal forms of construction regulation include the planning code governed by the Planning and Development Acts, the regime governed by the Safety, Health and Welfare at Work Act 1989 (as amended), and the building control system governed by the Building Control Acts 1990-2007.

²⁰ Building Control Regulations, 1997 (SI No. 496/1997) (as amended), Part IIIC – Certificate of Compliance on Completion, which specifies the contents and form of the certificate required to be registered with the building control authority on completion of a building to which the Regulations apply.

²¹ *Hedley Byrne v Heller & Partners* [1963 AC 465]; *Bank of Ireland v Bell & Ors* [1966] IR 646; *Tulsk Cooperative Livestock Mart Ltd. v. Ulster Bank Ltd.* (Unreported, High Court, Gannon J., 13th May, 1983); and see discussion with regard to liability for negligent misstatement in chapter 3. See *McGee v Alcorn* [2016] IEHC 59 for an analysis of the jurisprudence since *Hedley* and an affirmation of the principles governing liability for negligent misstatement.

²² See discussion in chapter 3.

²³ Negligent misstatement would generally not be regarded as applicable to builders; since its genesis in *Hedley Byrne*, the tort (if it can be seen as a distinct tort from negligence) has been confined to professionals such as bankers, lawyers, architects, surveyors and engineers; builders are not regarded as having the ‘special skill’ that could induce the reliance on their advice necessary to generate liability for negligent misstatement.

In contrast to the Pyrite Resolution Scheme, there was no legal basis for the State financing of remedial works to the Priory Hall development. A decision was taken in order to rectify only one apartment development in the State on grounds of fire safety, leaving other apartment owners dealing with similar defects nationwide.²⁴ Widespread remedial works have been carried out in relation to social housing and housing which formed part of the portfolio of the National Asset Management Agency.²⁵ There has been a lack of transparency about the manner in which the State has intervened in these building failures, with the exception of the Pyrite Resolution Board. This makes it difficult to analyse the State's response across different failures, for example in order to establish the criteria by which decisions to intervene were made, and the consequence is that no useful legal or political precedent is set.

The Fire Services Act 1981 was passed within a year of the Stardust disaster and provides another example of regulatory misalignment, in this case between different legislative measures that do not fit together to form a coherent regulatory regime.²⁶ It now forms the basis of the statutory powers of fire authorities to order the evacuation of dangerous buildings but does not deal with the consequences of evacuation such as the status of outstanding mortgages on affected properties, and arrangements for alternative accommodation of residents. The evacuation of the Priory Hall development pursuant to the Act demonstrated the limited scope of the power to deal with housing failures. The fire authority had the power to require people to leave their homes without any corresponding obligation to re-house the residents nor to carry out remedial works.²⁷

A series of court orders made against the developer of Priory Hall similarly demonstrated the limitations in the Fire Services Act 1990, in that the remedial orders made against the the original developer personally were unenforceable.²⁸ These examples suggest that

²⁴ A number of affected developments have been named in the media, as well as becoming apparent from law reports: Eoin O'Broin, 'Having the political will to prevent another Priory Hall' *The Irish Times* (Dublin, 24 January 2018).

²⁵ Michael Clifford, 'Housing defects special report: we can't afford to make the same mistakes again' *Irish Examiner* (Cork, 1 August 2016), Sarah Bardon, 'Fire-safety issue in 150 vacant Nama buildings, PAC hears' *The Irish Times* (Dublin, 2 October 2015).

²⁶ Fire Services Act 1981 was enacted on 16 December 1981, ten months following the devastating fire at the Stardust disco in Dublin. See Report of the Tribunal of Inquiry on the Fire at the Stardust, Artane, Dublin, 30 June 1982.

²⁷ Sections 20 (1) - (3) of the 1981 Act allow a fire authority to service a fire safety notice on any owner or occupier of any building which appears to be a potentially dangerous building; the notice may prohibit the use of all or of a specified part of the building, with or without specifying precautions to be taken to render the building safe.

²⁸ See *Dublin City Council v Thomas McFeely, Laurence O'Mahony and Coalport Building Company* [2012] IESC

the piecemeal, reactive nature of Irish construction regulation has created significant risks in the gaps between different pieces of legislation. A holistic approach, in which the overall coherence of the regulation of the sector is prioritised, would be significantly more effective than the current disparate collection of legal rules.

The Irish Building Control regime

Building Regulations have a long heritage in the United Kingdom.²⁹ The Irish system that was in place for over 100 years until the passage of the Building Control Act 1990 (referred to in this chapter as ‘the 1990 Act’) was based on the Public Health Acts and was exclusively public.³⁰

The modern Irish building control system was shaped to a significant degree by the fire at the Stardust nightclub on February 14th, 1981, in which 48 people died and 241 were injured.³¹ A Tribunal of Inquiry, consisting of Keane J. (then a judge of the High Court), was appointed in the wake of the disaster to consider the causes and circumstances of the fire, the adequacy of measures to prevent and escape from fire at the venue on the night, and to make recommendations for reform of law and practice in relation to fire, fire prevention and the means of emergency escape from fire.³²

The Tribunal found that there were ‘serious shortcomings in the approach to fire safety in Ireland which must be remedied as a matter of urgency’³³, and recommended that education, training and practice in fire safety be overhauled and placed under the supervision of a National Fire Inspectorate, and further that significant changes be made to the system of public supervision of the construction and renovation of buildings.³⁴

45.

²⁹ The 19th century system of building control and bye-laws, on which our modern building control system is based, is principally concerned with fire safety and hygiene. Local authority control and supervision of building was exercised for many years in Ireland through the system of building bye-laws established under the Public Health (Ireland) Act 1878 and the Public Health Acts (Amendment) Act 1890.

³⁰ As Ley explains, the origins of modern building control are in legislation introduced in England to minimise the spread of infectious disease such as cholera, and to ensure that buildings were constructed with appropriate connections to the developing urban sewerage systems in British cities. (A.J. Ley, *A History of Building Control in England and Wales 1840-1990*, (RICS Books 2000), chapters 2 and 3.

³¹ ‘At least 40 dead in fire in Dublin club’, *The Irish Times*, Dublin, 14 February 1981.

³² Report of the Tribunal of Inquiry on the Fire at the Stardust, Artane, Dublin, on the 14th February 1981.

³³ *Ibid* 308.

³⁴ *Ibid* 309 – 332.

The Tribunal was firmly of the view that the responsibility for fire safety should be shared between owners, occupiers, designers and ‘the regulating authority’, and drew attention to the then-recent authorities of the English courts in *Dutton v Bognor Regis UDC*³⁵ and *Anns v Merton London Borough Council*³⁶, the principles of which the Tribunal considered would ‘probably, in the future, be adopted by our courts’ in light of the then-recent Supreme Court decision in *Siney v Dublin Corporation*³⁷:

In the view of the Tribunal, it would be anomalous and unacceptable to adopt a different principle in the field of fire safety, where as much as, or possibly more than the stability of structures is at stake.³⁸

The Tribunal was particularly critical of the fact that Building Regulations existed only in draft form although they had been contemplated by Section 86 of the Planning Act 1963³⁹, recommended that Regulations be made pursuant to the section, and made detailed recommendations as to the content of Regulations.⁴⁰ The Tribunal expressed concern as to the qualifications and experience of persons who might certify that buildings complied with regulations⁴¹; this concern would not be addressed until nearly 35 years later, with the passage of the Building Control (Amendment) Regulations 2014 which introduced design, inspection and certification requirements by registered professionals for most significant construction projects.

Particular concern is expressed in the Report regarding the enforcement of proposed legislation, noting that ‘the new regulations recommended by the Tribunal will be of little affect [sic] unless adequate means exist for their enforcement’.⁴² A contemporary analysis of building control enforcement is presented in chapter 4 and concludes that enforcement of Building Regulations is virtually never undertaken on a formal basis by Irish building control authorities.

One of the recommendations which now forms the core of the modern building control

³⁵ [1972] 1 QB 473.

³⁶ [1978] AC 728.

³⁷ [1980] IR 400.

³⁸ Stardust Tribunal Report (n 32), 311.

³⁹ *Ibid* 312.

⁴⁰ *Ibid* 316-320.

⁴¹ *Ibid*.

⁴² *Ibid* 321.

system is that fire certificates be required before premises may be opened to the public; it is for this reason that the 1990 Act requires applications for fire safety certificates to be made in respect of certain categories of works or development, although there is no requirement for approval of construction works that do not require a fire safety certificate.⁴³

In order to address the concerns expressed in the Report about the organisation, staffing and training of Dublin fire brigade, the Tribunal recommended the creation of a Inspectorate of Fire Services in order to ensure the 'control and direction by Central Government' of fire brigades around the country, which would be responsible for supervision and direction of fire-fighting services, fire prevention and fire protection measures, and the establishment and maintenance of a national training centre for fire personnel.

The response of the Irish Government to the Tribunal's report provides an insight into the model ultimately adopted for the Irish building control system; the then Minister for the Environment sent a memorandum to the Taoiseach objecting to many of the recommendations, and highlighting a concern that local authorities and the Department itself could face civil liability for failure to enforce the proposed building code:

If statutory responsibility for control and direction of the fire service is conferred on the Minister it is likely to leave him open to civil actions for damages in cases similar to (though not necessarily of the same magnitude as) Stardust...In the United Kingdom, decisions on particular cases have made it clear that where local authorities have powers (as distinct from duties) of inspection and control in relation to buildings, they are obliged to take reasonable care to ensure that these powers are used by them in such a manner as to avoid damage to property. The report suggests...that these principles will be adopted in this country in the future.⁴⁴

⁴³ Article 20A(2), Building Control Regulations 1997, as inserted by Article 10, Building Control (Amendment) Regulations 2014

⁴⁴ Extract from note from Secretary to Government to Taoiseach, Government Meeting, 20th December 1983, headed 'Inquiry into Fire at Stardust Club', enclosing Memorandum of Minister for the Environment of 1 November 1983 entitled 'Summary of Memorandum for the Government: Report of Tribunal of Inquiry into fire at Stardust Club, Artane, Dublin', Ref. Fire 427/I/I, (obtained by the author from the 1983 State Papers of the Department of the Taoiseach at the Irish National Archives, Dublin), 23.

The Tribunal's recommendations ultimately led to the passing of the 1990 Act, which established building control authorities and empowered them to carry out compliance and enforcement activities.⁴⁵ The 1990 Act was designed to empower the new building control authorities without obliging them actively to supervise construction, which can be seen as a response to the view expressed above that a greater role for building control authorities could expose them to civil liability for failure to detect defective works.⁴⁶ It is striking to consider that the jurisprudence that informed that 'ligh-touch' design of the Act was comprehensively overruled by the House of Lords in *Murphy v Brentwood* a year before the Act came into force, but it was too late by then to change the fundamental philosophy of the Act, that private actors should be responsible for compliance, with 'spot checking' only to be done by building control authorities.⁴⁷

The practical implementation of the Act is by way of Building Control Regulations and Building Regulations; the Second Schedule to the Building Regulations sets out various requirements and is essentially the Irish building code. The 1990 Act provides for appointment of authorised officers who may inspect the works and commence enforcement proceedings if necessary. There is a system of review and approval that applies to the grant of Fire Safety Certificates and Disability Access Certificates⁴⁸, but no general system of review and approval of designs or building work.

A significant change in building control was introduced by the Building Control (Amendment) Regulations 2014 ('the 2014 Regulations'), which require design and inspection of construction works to be carried out by registered professionals only. Designers and inspectors (called 'assigned certifiers') are required by the 2014 Regulations to provide certificates of compliance in a prescribed form in respect of their work (and that of others, in the case of the ancillary certifiers, who certify that the works

⁴⁵ 1990 Act, s 2. The involvement of a building control authority in building works generally begins with receipt of notice of commencement of construction, the Commencement Notice, which puts the building control authority on notice of commencement of the works, and thus alerts the building control authority so that it can exercise its statutory powers of inspection of the works. See Eoin O'Cofaigh, 'Building Control' *Construction Law and Practice* (Construction Law and Practice, Round Hall 2007), 3-07.

⁴⁶ Building Control Act 1990, s 6 (4). Building control authorities are empowered, but not required, to carry out building control activities in respect of any property. The authority is not required to review any documents submitted with a Commencement Notice in order to verify their accuracy or whether they comply with Building Regulations.

⁴⁷ *Murphy* was decided on 26 July 1990; the Building Control Act 1990 was commenced in part on 1 June 1991, and the remainder commenced on 4 December 1991.

⁴⁸ Building Control Regulations 1997 -2019, Part III.

comply with the Building Regulations consequent upon their inspection of the works.

The function of both authorised officers⁴⁹ and assigned certifiers⁵⁰ is to assess compliance with Building Regulations, but their roles and objectives are very different. The assigned certifier does not displace the authorised officer appointed pursuant to the Act.

This clearly presents significant problems of conflicts of interest. A designer is retained to prepare a design that complies with Building Regulations, and then issues a certificate of compliance with Building Regulations of its own design, without the need for any third party review or verification of that design.⁵¹ An assigned certifier is retained by the developer/owner to inspect the works in the course of construction and to provide a certificate of compliance with Building Regulations on completion of the works, in respect of his own inspection, and the builder signs the same certificate in respect of compliance with Building Regulations with regard to his own work. Although the assigned certifier may not be an employee of the developer / owner, there is a clear potential for conflicts of interest and little external oversight of this role.⁵²

This is in contrast to the system of building control established under the English Building Act 1984, which requires mandatory third party inspection of buildings in the course of construction, and requires a person undertaking work to appoint either a public or a private inspector, to carry out inspections during construction.⁵³ Approved inspectors have no enforcement powers under the English legislation but may notify breaches to their local building control officers.⁵⁴

⁴⁹ Appointed pursuant to the Building Control Act 1990.

⁵⁰ Appointed pursuant to the 2014 Regulations.

⁵¹ Article 9 of the Building Regulations 1997 requires a Certificate of Compliance (Design) to be furnished with a Commencement Notice, and the form of required to be submitted specifies that per signing is 'a person named on a register maintained pursuant to Part 3 of Part 5 of the Building Control Act 2007 or Section 7 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969..'

⁵² The assigned certifier role can only be carried out by an architect or surveyor registered pursuant to the Building Control Act 2007, or an engineer registered pursuant to The Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969. Therefore, instead of regulating the discharge of assigned certifier role in its own right, the 2014 Regulations co-opt the regulatory mechanisms of the 1969 and 2007 Acts in order to provide some assurance of the competence of the assigned certifier. The 2014 Regulations, however, make no amendments to the 1969 and 2007 Acts to provide for such regulation of the assigned certifier role, and there is no indication from the publicly available information from any of the registration bodies that those bodies carry out any review of the performance by registered architects, surveyors and engineers of assigned certifier roles from a regulatory perspective. There is no external regulatory body outside of the professional bodies to provide supervision and regulation of the activities of architects, surveyors and engineers.

⁵³ Section 13, Building Act 1984 (England and Wales), and see Billington MJ and others, *The building regulations: explained and illustrated* (John Wiley & Sons 2017), chapters 4 and 5.

⁵⁴ The Independent Review of Building Regulations and Fire Safety commissioned by the UK Government in 2017 noted in its interim findings that the referral process by which Approved Inspectors may notify Building Regulations breaches to Local Authority building control authorities for the purposes of initiating enforcement

The Irish building control system also differs from models in various jurisdictions in which a permission to build is required (including most European countries, Canada⁵⁵, and Australia) and where approval of design is required before construction (as it is in the majority of EU countries).⁵⁶

Assigned Certifiers have no enforcement powers and are engaged and paid by developers / land owners, either as a consultant or an employee. Ireland is not alone in continuing to grapple with the proper balance of public and private in building control. Draft legislation has been under consideration in the Netherlands for some time in order to provide for significant privatisation of the building control system. The proposals have been criticised on the basis that privatisation of building control does not necessarily improve quality or compliance with building codes, and may therefore prejudice consumers.⁵⁷

An analysis of private sector involvement in building code enforcement in Canada by Van der Heijden suggests that the involvement of private inspectors in building code enforcement can relieve pressure on city building departments, that gain access to a pool of expertise without recruiting additional staff, and that private sector organisations can often carry out building control more efficiently.⁵⁸ This may come at the expense of undesirable side-effects such as regulatory capture, problems in designing appropriate supervision or oversight of private actors, and discriminatory practices by private agents who may develop a preferred clientele of regulatees.⁵⁹ A significant difficulty with the public-private hybrid model is that the public building control function must compete for business with the private sector, which does not have the additional burdens of public

action was 'rarely used': Judith Hackitt, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Interim Report* (HMSO, 2017), 17.

⁵⁵ For examples of Canadian building permit requirements see Building Code Act 1992, s 8 (Ontario); Building Code (British Columbia), Subsection 2.2.7, Division C of the British Columbia Building Code; Regulation respecting building permit information - Act respecting land use planning and development (chapter A-19.1, s. 120.2) (Québec). Various requirements also apply throughout Australia, including Part 3, Building Act 1993 (Victoria); s 95 Environmental Planning and Assessment Act 1979 (New South Wales).

⁵⁶ Branco Pedro, Meijer and Visscher state that 'The general characteristics of the various building control systems in the European Union (EU) countries are similar. Designs must be prepared and submitted to an authority that approves their compliance with zoning requirements and building regulations.' João Branco Pedro, Frits Meijer and Henk Visscher, 'Building control systems of European Union countries: A comparison of tasks and responsibilities' (2010) 2 *International Journal of Law in the Built Environment* 45.

⁵⁷ Nico P.M. Scholten and Rob T.H. de Wildt, 'A Need to Innovate the Dutch Building Regulation' (2015) 9 *Journal of Civil Engineering and Architecture* 308.

⁵⁸ Jeroen van der Heijden, 'One task, a few approaches, many impacts: Private-sector involvement in Canadian building code enforcement' (2010) 53 *Canadian Public Administration* 351, [8].

⁵⁹ *Ibid.*, [4].

sector governance and accountability, as well as the enforcement role.⁶⁰

B: REGULATORY FAILURE AND REGULATORY REFORM

Examples discussed in this chapter suggest a lack of regulatory capacity in Irish construction regulation, measured by the failure of the building control systems and of the Irish Government respond consistently, effectively and appropriately to significant housing failures. This section includes a comparative analysis of the State's response to one of the most serious housing failures to occur in recent years, the Millfield Manor fire, in comparison with the response of the United Kingdom government to the Grenfell Tower fire in 2017, and the Californian response to the Library Gardens tragedy in 2015.

England: The Grenfell Tower Fire, 2017

The most devastating fire in modern British history destroyed a 24-storey residential tower block in West London, the Grenfell tower, on 14 June 2017. At least 72 people lost their lives in the fire, which spread rapidly via cladding on the building's façade.

An inquiry into the legal structure for fire safety in high-risk buildings was initiated following the tragedy; Dame Judith Hackitt was appointed chairperson of the inquiry. The inquiry issued a report of its interim findings and 'future direction of travel' in December 2017⁶¹ and issued its final report in May 2018.⁶² The report and its insights are very relevant for Ireland, as the Irish system for Building Regulations and fire safety in multi-occupancy buildings is relatively similar to that of the United Kingdom.

The Final Report advocates the creation of a new regulatory framework, that covers fire and structural safety during the entire life-cycle of a building from design and construction through its use and maintenance, is required, which should have multi-occupancy and higher risk residential buildings greater than 10 storeys as its initial focus. The design,

⁶⁰ The final report of the Independent Review of Building Regulations identifies a number of weakness with the structure of building control in the UK, including 'incentives for building control competitors to attract business by offering minimal interventions or supportive interpretations to contractors' and that 'the differences in the statutory (and non-statutory) processes add to the complexity and incoherence...there is no level playing field between AIs [private sector Approved Inspectors] and LABCs [local authority building control].' Judith Hackitt, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Final Report* (HMSO, 2018), 41.

⁶¹ Judith Hackitt, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Interim Report* (HMSO, 2017).

⁶² Judith Hackitt, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Final Report* (HMSO, 2018).

regulatory and maintenance history of the building should be recorded in a digital record accessible for dutyholders and the regulator over time.⁶³ A single regulatory body, the ‘Joint Competent Authority’ consisting of existing local authority building control, fire and rescue authorities, and the Health and Safety Executive, should have oversight of fire safety during construction and use of buildings, and should act as a ‘gateway point’ for review of plans and specifications of buildings for compliance with legal requirements.⁶⁴

Of particular note is the Final Report’s recommendation for increased regulatory oversight of dutyholders such as clients, principal designers and principal contractors responsible for higher risk residential buildings.⁶⁵ One of the principal research themes of this thesis is the role of gatekeepers, whose input to construction projects is vitally important, but whose activities are not regulated in a coherent manner in Ireland⁶⁶ and there is no oversight of the registration functions of the registration bodies.⁶⁷

The Final Report also recommends ‘clearer and stronger sanctions and an enforcement framework that includes..Improvement/Correction Notices’ and ‘Prohibition/Stop Notices’⁶⁸ together with a ‘clearer, more transparent and more effective specification and testing regime of construction products’.⁶⁹ These recommendations are of particular interest to the Irish building control system, which is criticised later in this chapter for its lack of sufficient enforcement tools, evidenced by very low levels of building control enforcement.

Ireland: Millfield Manor Fire (2015)

A terrace of six houses at the Millfield Manor housing estate, in Newbridge, Co. Kildare,

⁶³ Ibid 4, 13.

⁶⁴ Ibid 4.

⁶⁵ Ibid 35. ‘Gateway Points’ are identified in the Report that dutyholders will need to satisfy in relation to higher risk residential buildings; for example, the first point would be to satisfy the Joint Competent Authority of the means of access to the building by the fire service. ‘Full Plans Approval’ by the JCA is defined as the second Gateway Point (39), and completion of the work is the final Gateway Point, at which the principal designer and contractor should present sufficient information for the JCA to carry out an assessment of building safety (39).

⁶⁶ The Assigned Certifier appointed pursuant to the Building Control (Amendment) Regulations 2014, for example, must be a registered professional under the Building Control Act 2007 or a chartered engineer; three separate bodies, The Royal Institute of Architects in Ireland, the Society of Chartered Surveyors Ireland, and Engineers Ireland manage the registration of persons entitled to act as assigned certifiers.

⁶⁷ This is notwithstanding a recommendation in a report into the exercise of registration functions by the Royal Institute of Architects in Ireland that suggested that external oversight for the registration body should be considered. See Garret Fennell, *Independent Review of the Registration Arrangements for Architects under the Building Control Act 2007* (2013).

⁶⁸ Ibid 44.

⁶⁹ Ibid 94. The Report notes the weaknesses of the existing ‘pass/fail’ regime in the UK, where ‘products can fail several times and pass once, but the record of previous failures is not available’. (94).

was destroyed by fire in less than half an hour on the afternoon of 31 March 2015.⁷⁰

A report was commissioned by the Department of the Environment in 2015; two years later, in May 2017, a ‘case study’ document was published, which set out the results of a Fire Safety Risk Assessment carried out in relation to a sample number of units at the estate.⁷¹ The case study did not examine the causes of the terrace fire or even refer to it; therefore, there was no conclusion reached as the cause of the fire, although defects identified in the case study suggested that the fire spread through roof spaces due to inadequate separate and fire protection between units.

In August 2017, a document was published by the Department of Housing, Planning and Local Government entitled ‘Framework for Enhancing Fire Safety in Dwellings where concerns arise’⁷², which set out ‘guidance for occupants and owners of dwellings (houses and apartments) where fire safety deficiencies have been identified to enable continued occupation in advance of undertaking the necessary works to ensure compliance with the relevant Building Regulations’.⁷³

The document made clear that responsibility for compliance with Building Regulations lay with owners and their professional appointees, specifying that owners are subject to a statutory duty under the Building Control Acts ‘to ensure that the building is designed and constructed in accordance with the Building Regulations’⁷⁴, and that occupants should ‘ensure that they understand the fire safety provisions within the dwelling’.⁷⁵ The response suggests regulatory incapacity, as no public body was required (or entitled) to carry out an investigation into the causes of the failure, or to recommend any changes in law, policy or practice to prevent a similar occurrence in the future.

⁷⁰ Mark Hilliard, ‘Man arrested after blaze damages six houses in Millfield Manor, Kildare’ *The Irish Times* (Dublin 31 March 2015).

⁷¹ The study disclosed a number of dangerous defects in the units, including poor workmanship and improper jointing of plasterboard to separating walls within the attic space, penetration of separating wall within attic with roof timbers, fire-stop missing at top of separating wall between cavity closer and roof felt. Community and Local Government Department of Housing, *Framework for Enhancing Fire Safety in Dwellings where concerns arise* (2017), 3.

⁷² Community and Local Government Department of Housing, *Framework for Enhancing Fire Safety in Dwellings where concerns arise* (2017).

⁷³ *Ibid* 2.

⁷⁴ *Ibid* 5.

⁷⁵ *Ibid* 6.

California: Library Gardens balcony collapse (2015)

The foregoing discussion of the Irish Government's response to the Millfield Manor fire is in stark contrast to the regulatory response of the Californian authorities to a building failure in Berkeley, California, in June 2015. Six young people were killed, and seven were injured, when the balcony of a relatively new apartment building, failed suddenly.⁷⁶ The policy and regulatory responses of the various public bodies involved in dealing with the aftermath of the collapse are instructive.

Following the collapse, building inspectors promptly attended the site and carried out inspections of the building, the apartment in question and the apartment directly below, including the gathering of physical and photographic evidence from the site of the balcony failure; the remnants of the balcony itself were removed to a municipal facility for analysis.⁷⁷

The Contractor State License Board (CSLB)⁷⁸ played a central role in the investigation into the causes of the collapse, in order to determine whether action should be taken against the contractors responsible for construction of the development.⁷⁹ Protocol was established for testing of the balconies⁸⁰ was carried out all the various elements, including the steel decking, waterproofing membrane, and the engineered wood used in construction of the balcony. The conclusions of the investigation were that the failure was caused by dry rot damage which had occurred along the top of the cantilever about the deck joists, and which subsequently failed under the imposed loads of the evening of the collapse.⁸¹

⁷⁶ The tragedy provoked a wave of shock and grief in Ireland, as most of the victims were Irish students spending their summer holidays in the United States.

⁷⁷ Memorandum of 23 June 2015, Manager of Building and Safety Division of City of Berkeley Planning & Development Department, Building and Safety Division, contained in California Contractors State License Board, *Berkeley Balcony Investigation Materials* (2017), 124 - 133. A senior building inspector from the City Planning and Development department inspected the scene within hours of the collapse, and observed that the cantilevered balcony joists had sheared off, and that the deck joist ends protruding from the exterior wall of the building showed evidence of severe dry rot. (128).

⁷⁸ The CSLB was established in 1929 and is responsible for licensing and regulation of builders in California. See http://www.cslb.ca.gov/About_Us/History_and_BackGround.aspx.

⁷⁹ Promptly following the collapse, the CLSB liaised with the California Architects Board Office to retain professional services for the analysis of the remnants of the balconies and reporting on of the causes of the structure's failure. The CSLB published a booklet of the investigation materials in May 2017, following completion of the Board's investigation and sanction against Segue Construction: California Contractors State License Board, *Berkeley Balcony Investigation Materials* (2017) ('CSLB Investigation Materials').

⁸⁰ CSLB Investigation Materials (n 79) 4-8.

⁸¹ *Ibid*, Section 6.0 'Summary Conclusions', 68. The location of the dry rot indicated that there had been 'long term moisture saturation' of three layers of Oriented Strand Board that had been in direct contact with the cantilever balcony

There was a comprehensive policy and legislative response to the tragedy, including changes to the Berkeley Building Code⁸², the Berkeley Municipal Code⁸³ and a mandatory building inspection programme which was initiated by Berkeley City Council.⁸⁴

C: Residential construction regulation – what can be learned from food safety regulation?

In this section the regulatory regime for building control and food safety is compared, highlighting enforcement policy and analysing the systems through the lens of contemporary regulatory theory, and international examples. Empirical research and enforcement information is presented to contrast enforcement activities and outcomes in the two systems.

Building control - enforcement

The principal enforcement tool in the 1990 Act is the Enforcement Notice, which may be served where the construction of any building or the carrying out of any works to which

deck joists. Water damage and dry rot were also found to the wall OSB sheathing and the face of doubled deck joints along the deck-wall interface. The report identified a number of factors that contributed to the failure, including failure to provide pressure-tested micro-lam joists, failure to provide the appropriate waterproofing as required by the contract specification, and substitutions from the contract specification by the contractor, most notably the substitution of plywood for OSB, which is considerably more vulnerable to moisture. One of the most significant failures identified in the report was that the OSB layers had been left open to inclement weather for a period of 10 months during construction, which had caused the OSB to absorb a substantial amount of rain before the waterproof membrane was applied. (Section 6.0 'Summary Conclusions', 68-71, 97).

⁸² In November 2016, amendments were made to the City of Berkeley Building Code to require cross-ventilation for balconies, decks and similar exterior projecting elements exposed to the weather so that elements that were sealed underneath (as the Library Gardens balcony deck was) are adequately ventilated. Article 8, 'Construction of Exterior Appurtenances', 19.28.090 Technical Amendments for Construction of Exterior Projecting Elements and Appurtenances, amending Chapter 12 of the California Building Code, Ord. 7516-NS § 1 (part), 2016), adopted 29 November 2016.

⁸³ In July 2015, a new section was added to the Berkeley Municipal Code requiring exterior elevated wood and metal decks, balconies, landings, stairway systems, guardrails, handrails, or any parts thereof in weather - exposed areas to be inspected within six months of the adoption of the section and every 5 years thereafter, by a licensed builder, architect or engineer, to verify that the elements were in a general safe condition and free from dry rot and decay. Property owners are required to provide proof of compliance by way of affidavit. Berkeley Housing Code, Section 601.4, adopted 14 July 2015.

⁸⁴ Later in 2015, Berkeley City Council initiated a mandatory inspection programme of existing buildings, the Exterior Elevated Elements (E3) Inspection Program, which required properties with weather-exposed elevated elements to be inspected by 14 January 2016. 6,090 property owners were notified about the requirements of the program, and 402 properties were identified that required corrective work. Enforcement proceedings were threatened against building owners who did not file inspection certification or complete corrective work within the required timeframe. City of Berkeley Exterior Elevated Elements (E3) Inspection Program Pertaining to Balconies, Decks, Exterior Walkways and Stairways on Group R-1 and R-2 Occupancies, at <https://www.cityofberkeley.info/E3/>. It was reported in September 2018 that legislation had been passed requiring inspection of all decks and balconies of multi-family units of three or more by January 2025 throughout California: Carswell S, 'California passes balcony inspections law in response to Berkeley tragedy' *The Irish Times* (Dublin 18 September 2018).

the Building Regulations apply has been commenced or completed otherwise than in accordance with the Building Regulations.⁸⁵

An authorised person, may enter any land, before or after completion of works, seek information in relation to the works and take samples of materials where necessary to assess compliance with the Building Regulations.⁸⁶ The building control regime and the approach to its administration and enforcement were called into question by two recent reports, in each case commissioned by the government following discovery of significant defects in homes. The Pyrite Panel recommended that building control authorities should exercise their enforcement powers, and was concerned at the evidence presented to it that the cost and time of prosecutions were a deterrent for building control authorities.⁸⁷ The report of the Expert Panel on Concrete Blocks also drew attention to enforcement of building control as a relevant factor in the prevalence of sub-standard blocks used in the construction of houses in Donegal and Mayo.⁸⁸

Food safety regulation – enforcement powers

The regulatory framework for food safety in Ireland is contained in primary and secondary legislation, principally the Food Safety Authority of Ireland Act 1998 (referred to in this chapter as ‘the 1998 Act’), which established an independent regulatory body for food safety, the Food Safety Authority of Ireland (‘the Authority’), to which various functions and powers were assigned.⁸⁹ The Authority is required to carry out inspections to determine compliance with food safety legislation.⁹⁰ A certain level of inspections is therefore required in order to determine compliance. The inspection regime is well-

⁸⁵ A notice may require the removal, alteration or making safe of any structure, service, fitting or equipment, or the discontinuance of any works, and may prohibit the use of a building or part thereof until specified steps have been taken. The authority may carry out the steps specified in the notice itself if the person to whom the notice was served does not do so, and may recover the costs of doing so from that person. O’Cofaigh, (n 45), 3-09, and sections 8(7) and 8(8), Building Control Act 1990.

⁸⁶ Building Control Act 1990, s 11.

⁸⁷ The panel commented that ‘Building control authorities have a responsibility under the Building Control Acts 1990–2007 to enforce Building Regulations’ (Department of the Environment, Community, and Local Government, 2012, 21).

⁸⁸ The panel stated that it was ‘concerned regarding the current level of enforcement of the Building Control Regulations and the Construction Products Regulation and recommends that these roles be strengthened significantly’ (Department of Housing, Planning and Local Government, 2017, 81).

⁸⁹ The principal function of the Authority is to take all reasonable steps to ensure that food produced, distributed or marketed in Ireland ‘meets the highest standards of food safety and hygiene reasonably available’.⁸⁹ The Authority must encourage and foster ‘the establishment and maintenance of high standards of food hygiene and safety’, (Section 12) in order to implement its mandate of achieving the highest level of protection reasonably available in the interests of public health and consumer protection.

⁹⁰ Food Safety Authority Act 1998, s 12(2).

developed, delivered via service contracts with thirty-three public sector official agencies nationwide, including local authorities and the Health Service Executive.

The 1998 Act requires the Authority to monitor the agencies that carry out inspections on its behalf, and emphasises inspection, assurance and monitoring of the regulatory regime.⁹¹ Internal audit systems that must be implemented by inspection, and a system of audit operates from local level to the Authority and ultimately to the European Commission.⁹² Authorised officers of the Authority have broad powers to take action in respect of non-compliance with food legislation, detected during inspections.⁹³

A significant difference between the regulatory models for building control and food safety is that the Authority is as an independent regulatory body with responsibility for monitoring and ensuring the safety of food. The 1990 Act and the 1998 Act define a class of persons ('authorised persons' under the 1990 Act, and 'authorised officers' under the 1998 Act) empowered to exercise certain enforcement powers, although authorised persons may not themselves issue Enforcement Notices under the 1990 Act – which assigns this power to the building control authority⁹⁴– while authorised officers may themselves issue Improvement Notices under the 1998 Act.⁹⁵

Connery & Hodnett observe in this respect that regulatory statutes derived from EU

⁹¹ Food Safety Authority Act 1998, s 17 provides that 'The Authority shall consider and keep under review the efficacy of the food inspection services'. Section 48(9) of the Act similarly provides that 'The Authority shall take such measures as it considers appropriate to determine whether an official agency is adequately carrying out its functions under a service contract.' Monitoring is carried out by means of audit levels required pursuant to the Food Safety Authority Act 1998 and Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

⁹² The European Commission publishes the results of audits of national competent authorities; an audit carried out in 2014 resulted in a finding that the official control system for production of Irish fishery products had not been consistently applied, which was reported by an Irish national newspaper: Alison Healy, 'EC audit highlights gaps in food safety controls for fishery products' *The Irish Times* (Dublin 6 October 2014).

⁹³ Food Safety Authority Act 1998, Part IV. An Improvement Notice can be served by an authorised officer who is of the opinion that any activity involving the handling, preparation, processing, manufacturing, distribution, storage or selling of food, or the condition of any premises where such activities are carried out, is of such a nature that, if it persists, will, or is likely to, pose a risk to public health. The notice, served on the proprietor or person in charge of a premises, identifies the activity or defect in the premises giving rise to the risk, specifies the remedial action to be taken, together with a time limit for such action, and may include other requirements considered necessary by the authorised officer. Section 52(4) of the 1998 Act provides that where an Improvement Notice is not complied with, an Improvement Order may be issued by the District Court, which has the effect of elevating the original Improvement Notice, to the extent that it has not been complied with, to a court order. The Improvement Order itself includes the mechanism for the Authority or an official agency operating under a service contract to serve a Closure Order if the Improvement Order is not complied with within the time period specified, without the need to return to court (1998 Act, Section 52(5)).

⁹⁴ Building Control Act 1990, s 8.

⁹⁵ Food Safety Authority of Ireland Act 1998, s 58.

directives would not fall foul of the Article 38.1 right to a trial in due course of law. Where an EU directive requires the imposition of financial penalties, indictable offences may be created by statutory instrument, and many regulatory offences are in fact prosecuted in the District Court.⁹⁶ The mandatory requirements of European law therefore exercise a significant regulatory discipline on the Irish food safety regime.⁹⁷ By contrast, the fact that an authorised person under the 1990 Act may not issue an Enforcement Notice, and that recourse to the District Court may be required in order to enforce such a notice, may inhibit its effectiveness as a regulatory tool.⁹⁸

Regulatory theory, building control, and food safety

In highly influential research, Ayres & Braithwaite advocated a ‘responsive’ form of regulation, arguing that a combination of regulatory activities, from persuasion to sanction, is liable to generate better outcomes than either a strict ‘command and control’ approach or an approach based on negotiation and persuasion by the regulatory body. A regulator, in this model, should be responsive to the regulated industry, so that ‘The very behaviour of an industry or the firms therein should channel the regulatory strategy to greater or lesser degrees of intervention’.⁹⁹ A model of ‘risk-based’ regulation subsequently emerged that proposed allocating regulatory resources based on risk assessment rather than one premised on comprehensive surveillance and monitoring, but this has been criticised for leading to poor quality outcomes in healthcare regulation¹⁰⁰ and for validating the ideological retreat of the State from regulation.¹⁰¹ The risk-based

⁹⁶ Niamh Connery and David Hodnett, *Regulatory Law in Ireland* (Tottel Publishing 2009), 31.

⁹⁷ See European Communities (Official Control of Foodstuffs) Regulations 2010, which allows an authorized officer to serve a closure notices in respect of a premises for ‘failure to comply with food safety legislation’ (Article 19(1)), whereas the Food Safety Authority of Ireland Act 1998 requires a ‘grave and immediate danger to public health’ before a closure order can be made under s 53 (1).

⁹⁸ Building Control Act 1990, s 9. Each of the 1990 and 1998 Acts creates offences of failure to comply with enforcement tools, with accompanying powers of seizure, detention and prosecution. One important difference between the regulatory regimes is that the 1990 Act does not provide for an Improvement Notice procedure such as that in the 1998 Act or the 2000 Planning and Development Act (s 154(1)). The procedure allows activities to be targeted if ‘likely to pose a risk to public health’ if they persist (Section 52(1)).

⁹⁹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Socio-Legal Studies, Oxford University Press 1992), 4.

¹⁰⁰ Beaussier et al. pointed to a number of significant ‘high-profile breakdowns in care quality’ (206) that occurred notwithstanding the evidence and risk-based intervention strategy implemented in the UK by the Care Quality Commission, and concluded that, for risk-based regulation to be appropriate as a regulatory strategy, there needs to be ‘political tolerance for adverse outcomes’ (205). They also highlighted problems with defining the meaning of quality for different regulatory contexts (207). Anne-Laure Beaussier, David Demeritt, Alex Griffiths and Henry Rothstein, ‘Accounting for failure: risk-based regulation and the problems of ensuring healthcare quality in the NHS’ (2016) 18 *Health, Risk & Society* 205.

¹⁰¹ Black notes that ‘Through risk-based frameworks, regulators are attempting to define what, to their minds, are the acceptable limits of their responsibility and hence accountability.’ Julia Black, *The emergence of risk-based regulation and the new public risk management in the United Kingdom* (2005) Public Law 512, 512

model has also been criticised by Black and Baldwin for its failure ‘to protect consumers and the public from the catastrophic failure of the banking system’.¹⁰²

Tombs & Whyte suggest that ‘responsive regulation – because it opens the door to risk-based targeting and cedes ground to those who would argue for deregulation – contains the seeds of its own perennial degradation’.¹⁰³ They argue that one of the assumptions in the literature with regard to responsive regulation is that the state is in retreat from regulation, and that ‘state resources are not and never will be sufficient for the task of overseeing compliance with regulation’.¹⁰⁴ Tombs subsequently characterised risk-based and responsive models as part of a generalised academic orthodoxy of regulation that, by reason of its underlying premise of an acceptable level of regulatory failure, gave legitimacy to private actors in externalising the costs and damage caused by regulated activities.¹⁰⁵

The relevance of this critique to building control is that the Irish model of building control is firmly rooted in a risk-based allocation of resources for monitoring and enforcement.

Writing in 2016, Tombs highlighted the progressive decreases in regulatory inspections by UK health and safety executive inspectors and environmental health officers in the preceding decade. These decreases were accompanied by very low levels of prosecutions, indicating, in Tombs’ view, ‘an institutionalisation of regulation without enforcement as a sustained political initiative’.¹⁰⁶

There is a significant emphasis in the work of Black & Baldwin on the audit and monitoring of the performance of the regulatory model in practice.¹⁰⁷ The failure of the Irish building control model to include the means of assessment of its own effectiveness

¹⁰² Julia Black and Robert Baldwin, 'Really responsive risk-based regulation' 32 *Law and Policy* 181, 182

¹⁰³ Steve Tombs and David Whyte, 'Transcending the deregulation debate? Regulation, risk, and the enforcement of health and safety law in the UK' (2012) 7 *Regulation & Governance* 61, 62.

¹⁰⁴ *Ibid.*, 63.

¹⁰⁵ Steve Tombs, 'Regulation and the Academic Orthodoxy' (2015) 54 *Howard Journal of Criminal Justice* 57.

¹⁰⁶ Steve Tombs, 'Making better regulation, making regulation better?' (2016) 37 *Policy Studies Journal* 332, 334.

¹⁰⁷ It is notable that, in addition to record-keeping and audit applicable to food business operators and agencies carrying out inspections, the Authority itself is subject to monitoring and audit by the EU Directorate General for Health and Food Safety. An audit carried out in 2013 by the European Commission found that the ‘Food Safety Authority has put in place a number of mechanisms intended to verify that controls are delivered as required, have the desired effect, and are adapted when necessary’ European Commission, *Final report of an audit carried out in Ireland from 07 to 11 October 2013 in order to evaluate the systems put in place to give effect to the provisions of Article 8 (3) of Regulation 882/2004 of the European Parliament and of the Council*, 2014), 7.

in practice is a significant failing of the system.

There are criteria for a risk-based approach to inspections specified in the County and City Management Association's *Framework for Building Control Authorities*.¹⁰⁸ There is, however, no provision for review or audit of the effectiveness of building control authority inspection and enforcement activities, either in the Framework or in the Building Control Act 1990, nor to any system for gathering, aggregating and analysing building control information over time and between building control authorities. There is also no evidence from building control authorities through annual reports of local authorities to suggest that such an approach is occurring in practice.

Food regulation appears to operate effectively at all levels of the spectrum of approaches from 'soft' to 'hard' powers.¹⁰⁹ The evidence for this effectiveness is readily available on the Authority's website, which includes a considerable amount of information and guidance, representing 'soft' powers, giving details of enforcement proceedings that are ongoing, representing the 'hard' powers, and demonstrating the credible threat of enforcement.¹¹⁰

Building control enforcement, by contrast, appears to occur virtually exclusively in the lower half of the enforcement pyramid, concentrated on negotiated compliance, with formal enforcement tools under the 1990 Act seldom used.

The 2018 Law Reform Commission Report on Regulatory Enforcement suggests that negotiations between the Irish Financial Regulator and the Irish banks prior to the giving of the bank guarantee in 2008 'were not backed up by credible threats of more serious enforcement action when non-compliance continued or re-occurred'.¹¹¹ The Report recommends the creation of a multi-disciplinary agency charged with investigation and enforcement of corporate crime. The focus of the agency appears directed principally at

¹⁰⁸ These criteria include the authority's prior experience of the builder and project team, the use of the building, and the 'relative independence' of the persons who adopt the statutory roles under the Building Control (Amendment) Regulations, 2014. County and City Management Association, *Framework for building control authorities*, (2016) County and City Management Association, 12–13.

¹⁰⁹ The 2016 Annual Report of the Food Safety Authority states that 104 enforcement orders were issued by the Authority in 2016, including 94 closure orders, three Improvement Orders and nine Prohibition Orders. Food Safety Authority of Ireland Annual Report 2016 (2017), 23.

¹¹⁰ See https://www.fsai.ie/enforcement_audit.html [accessed 25 June 2018].

¹¹¹ Law Reform Commission Report, *Regulatory Powers and Corporate Offences*, Law Reform Commission 2018, 26.

financial offences, however. It is submitted that a dedicated building regulator is more appropriate as a regulatory superstructure for construction regulation, as set out in the final section of this chapter.

The ‘credible threat of enforcement’ is a key distinction between the Irish construction and food regulatory models.¹¹² Dublin City Council reported having issued two Enforcement Notices in 2016, along with twenty warning letters, despite the fact that the 1990 Act makes no mention of warning letters as a regulatory tool that can be used prior to issue of an Enforcement Notice¹¹³. This suggests that warning letters are essentially used as an improvement notice procedure; inspection of the Part IV register for Dublin City Council by the author indicated that repeated oral and written warnings typically precede the issue of Enforcement Notices. This also suggests a need for the warning letter to be recognised as a regulatory tool in the Building Control Acts.¹¹⁴

The use of informal enforcement mechanisms outside the procedures of the 1990 Act poses problems of accountability, as such letters are not subject to the appeal procedure against issue of an Enforcement Notice¹¹⁵, nor to judicial review, nor to recording on any public register.¹¹⁶ This effectively insulates the building control authority from third party oversight which is a particular concern given the lack of a centralised Building Regulator with responsibility for oversight of building control authorities.

The statistics available for building control enforcement in the annual reports of local authorities, and from data collected by the author from building control authorities directly, suggest that most enforcement activity in fact takes place on an informal basis without use of any formal enforcement tools that enforcement for non-compliance will be

¹¹² For example, there were only three cases in 2016 where it was necessary for the Food Safety Authority to apply for an Improvement Order as a result of failure to comply with an Improvement Notice; 263 Improvement Notices were issued, and only 3 Improvement Orders were served, suggesting that businesses were aware of the real risk of further enforcement action if the Notice was not complied with.. Food Safety Authority of Ireland (n 109), 23.

¹¹³ Dublin City Council. (2017). *Report to the Finance Strategic Policy Committee Re: Framework for the inspection of construction sites to monitor compliance with the requirements of the Building Regulations [Report 14 – 2017]*. Dublin: Dublin City Council.

¹¹⁴ it is notable in this regard the Planning and Development Act 2000 requires a warning letter to be issued where it appears to the planning authority that unauthorised development (other than development of a trivial or minor nature) may have been, is being or may be carried out.. Planning and Development Act 2000, s 152 (1).

¹¹⁵ Building Control Act 1990, s 9.

¹¹⁶ The question of whether a warning letter issued by a regulatory body was susceptible to judicial review was considered by the US Supreme Court in *Holistic Candles and Consumers Association v Food and Drug Administration* [2012, Case No. 11–1,454], which held that a warning letter did not constitute ‘final agency action’ for the purposes of the relevant legislation.

initiated only as a last resort, which keeps both the public and the courts excluded from the process of construction regulation.¹¹⁷¹¹⁸ This suggests that a national enforcement policy, together with a procedure to deal with less serious breaches and potential breaches, such as an Improvement Notice procedure, is needed for building control.

International perspective

Meijer & Visscher recently examined the position in seven EU countries, updating their earlier research and seeking to identify regulatory trends. They highlight the role of private parties in construction regulation, which they attribute to as ‘the persistent wish of governments to diminish the regulatory pressure of the building regulations on the building industry’.¹¹⁹ They refer to the range of tools that could be used in order to promote housing quality, such as quality levels in insurance and warranty policies, before concluding that ‘a coherent and evaluative approach to look at the effectiveness and efficiency of the requirements could still be developed further’.¹²⁰

The Victorian Building Authority carries out inspection and enforcement activities pursuant to powers under the Building Act, 1993¹²¹. Van der Heijden has conducted research into private sector involvement in building control in Australia, following the introduction of private actors into state building control regimes in the early 1990s.¹²² He

¹¹⁷ Fifteen building control authorities, out of a total of thirty-one nationwide, confirmed in writing to the author that no Enforcement Notices had been issued under the Building Control Act between January 2012 and July 2017, or (in the case of Louth and South Dublin) that no records existed of any such notices. (Pers. comm. to author from Carlow County Council, 30 August 2017; Cork City Council, 27 July 2017; Cork County Council, 27 July 2017; Donegal County Council, 15 August 2017; Galway City Council, 25 July 2017; Galway County Council, 1 August 2017; Kerry County Council, 18 August 2017; Kilkenny County Council, 25 July 2017; Limerick City and County Council, 15 August 2017; Louth County Council, 30 August 2017; Monaghan County Council, 27 July 2017; Roscommon County Council, 16 August 2017; South Dublin County Council, 18 August 2017; Waterford County Council, 9 August 2017; Wicklow County Council, 11 August 2017.)

¹¹⁸ In the case of one building control authority, Dublin City Council, a review of the register of enforcement notices by the author showed that formal enforcement was invariably preceded by numerous regulatory interventions, such as verbal cautions and warning letters, that are not part of the formal enforcement mechanisms in the Building Control Acts 1990-2007 and are not required to be included on the register. Details of the review of this register available from author; the register is not available online and copies were not permitted to be made. Dublin City is an outlier in terms of enforcement generally by its use of the enforcement notice procedure on 23 occasions, as most building control authorities never progress past the first stage of regulatory intervention depicted in the enforcement pyramid referred to in the *Framework for Building Control Authorities*, ‘persuasion/advisory letter/verbal’. (County and City Management Association, (2016) (n 108), 5)

¹¹⁹ Frits Meijer and Henk Visscher, ‘Quality Control of Constructions: European trends and developments’ (2017) 9 *International Journal of Law in the Built Environment* 143,144.

¹²⁰ *Ibid* 159.

¹²¹ In its annual report for 2016–17, the Victorian Building Authority noted that it had held 137 practitioner disciplinary hearings, had carried out 1,187 investigations into building and plumbing work, and had instigated 60 building and plumbing prosecutions. Victorian Building Authority. (2017). *Annual report 2016–2017*. Melbourne: Victorian Building Authority, 19.

¹²² Jeroen Van der Heijden, ‘On peanuts and monkeys: Private sector involvement in Australian building control’,

notes that, since the 1993 Building Act, private building surveyors have been entitled to carry out reviews of construction plans, to issue permits for building, to inspect buildings and to issue certificates of occupancy.¹²³ By contrast, Irish building control authorities have no authority over assigned certifiers appointed pursuant to the Building Control (Amendment) Regulations, 2014, who are answerable only to their own professional bodies in respect of any breach of their registration requirements or other professional misconduct.¹²⁴

Enforcement policy – Building control

Before the introduction of the 1990 Act, a circular letter was sent by the Minister for the Environment to all building control authorities.¹²⁵ The letter includes guidance in relation to the policy to be applied in operating the Enforcement Notice procedure, noting that, where a building control authority becomes aware that a contravention of the Building Regulations has occurred, ‘it would seem appropriate, in normal circumstances, *to raise the matter informally with the person concerned before availing of the formal enforcement procedures set out in the Act* [emphasis added]’. The letter suggests that a breach of the Building Regulations should be ‘reasonably substantive’ before an Enforcement Notice is served, and that ‘it is to be hoped that the need to serve an enforcement notice should arise only infrequently and that informal contact with the person concerned will usually obviate the need for it’.

The circular was clearly intended to shape and direct enforcement policy on a national basis from the commencement date of the Act, to the effect that enforcement policy is best conducted on an informal basis outside the enforcement procedures established by the Act, effectively creating a parallel, informal, compliance procedure. The circular may therefore have had the effect of largely shielding the Act and building control enforcement

(2010), 28 *Urban Policy and Research* (2), 195.

¹²³ The structure of the system, therefore, is quite similar to that which applies in Ireland pursuant to the Building Control (Amendment) Regulations, 2014. A key distinction that Van der Heijden highlights, however, is that the private certifiers must register with the Victorian Building Commission (now the Victorian Building Authority), which may audit certifiers and instigate disciplinary procedures where necessary. Ibid 10.

¹²⁴ The Building Control (Amendment) Regulations 2014 require that assigned certifiers must be registered pursuant to the Building Control Act 2007 (if an architect or surveyor) or pursuant to the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969 (if an engineer); each of the relevant registration bodies exercises a limited regulatory function.

¹²⁵ Department of the Environment, *BCL 2/92, Building control – General advice and guidelines* (Department of the Environment (1992)).

activities from judicial oversight.¹²⁶

It is difficult to say whether an enhanced role for building control would in fact improve quality. Beaussier et al., describing the UK regulatory regime for healthcare, suggest that the inspection-based model of regulation is necessarily very limited, in part because it is unlikely that an inspection visit would be sufficient to discover problems, and also because resistance from regulated entities and their agents could inhibit the effectiveness of any such inspection.¹²⁷

These observations suggest that a regulatory model for the relatively complex activity of residential construction should be multifaceted, with regulatory responses and interventions appropriate to each stage of construction, which could include design reviews and approvals, inspections during construction and on completion. The principal inspections carried out during construction works are by the assigned certifier, who has no enforcement powers, nor even an obligation to notify the building control authority of breaches of the Building Regulations.¹²⁸

The closest equivalent to regulatory oversight of the building control system is provided by the County and City Managers' Association, which has been active in developing the Building Control Management System, which it hosts, and in developing building control policy and guidance for building control authorities.¹²⁹ It can therefore be regarded as highly influential in the identification of national building control policy and trends.

¹²⁶ The circular is also difficult to reconcile with the statement of the then Minister for the Environment, Pádraig Flynn, TD, to the Dáil during the debate on the Building Control Bill, to the effect that 'If they find that the building does not comply with the regulations they can serve the enforcement notice and if that notice is not complied with they will have recourse to the courts. They will have the full power of the legislation to demand that the building complies with the standards and the regulations as set down' (Dáil Éireann, 15 February 1989). There is little jurisprudence on the interpretation of the enforcement powers under the 1990 Act; an unreported judgment of the High Court granted orders of certiorari in respect of a number of Enforcement Notices, confirming that such notices may be judicially reviewed in addition to being appealed in accordance with the procedure set out at Section 9 of the 1990 Act. *McGarrell Reilly Developments Limited v Fingal County Council* [2012, No. 1040JR], 18 March 2014.

¹²⁷ Beaussier et al., (n 100), 213.

¹²⁸ It is notable in this respect that an inspection and regulation regime which is led by building control authorities is contemplated by the recommendations of the 2017 *Safe as Houses?* report of the Oireachtas Joint Committee on Housing, Planning and Local Government, which recommended that:

To completely break the self-certification element that remains with S.I. 9 [the Building Control (Amendment) Regulations], Design Certifiers and Assigned Certifiers should be employed directly by local authorities, either on a contract basis or as full time local authority employees.

¹²⁹ County and City Management Association, (n 108).

In its submission to the Pyrite Panel, the Association describes the Irish building control system as ‘In essence... a system of self regulation’¹³⁰, and refers to a target of 12–15 per cent for inspections of buildings¹³¹. With regard to enforcement policy, the Association referred to the enforcement powers of building control authorities, including prosecutions for breach of Building Regulations, but suggested that the ‘cost, time, etc. of initiating court proceedings and getting a conviction, or a minimum fine to mitigating circumstances’ would not be warranted where there ‘is a genuine commitment given to make good the defect’, and advocating a ‘common sense approach’ having regard to ‘available resources and the need to secure the most beneficial, effective and efficient use of its resources’.¹³² This suggests an enforcement philosophy reflective of the guidance in the aforementioned circular, and borne out by evidence of the very low levels of actual enforcement activity undertaken by building control authorities.

It is instructive to recall the Memorandum of the then-Minister for the Environment to the Taoiseach following the report of the Stardust Tribunal discussed in chapter 1. The Memorandum outlines substantial resistance to the increased staffing and resources needed to deliver a nationwide building control system that would have a supervisory role, and expresses a concern that local authorities and the Department itself could face civil liability for failure to enforce the proposed building code:

The use of an approval-type system would involve substantial administration costs for local authorities, including staff costs. It is most unlikely, financial considerations aside, that local authorities would be able to recruit the necessary qualified staff to enable proper implementation of all fire regulations using an ‘approval type’ control system.¹³³

The Minister favoured, instead, ‘the use of a “certification” system based on approved certifiers, with spot checks by local authorities’ which the Minister regarded as ‘the only

¹³⁰ County and City Managers’ Association. (2016) (n 108). *Submission to the CoECLG Pyrite Investigation Panel*, 5.

¹³¹ *Ibid* 6.

¹³² *Ibid* 8.

¹³³ Extract from note from Secretary to Government to Taoiseach, Government Meeting, 20th December 1983, headed ‘Inquiry into Fire at Stardust Club’, enclosing Memorandum of Minister for the Environment of 1 November 1983 entitled ‘Summary of Memorandum for the Government: Report of Tribunal of Inquiry into fire at Stardust Club, Artane, Dublin’, Ref. Fire 427/I/I, obtained by the author from the 1983 State Papers of the Department of the Taoiseach at the Irish National Archives, Dublin.

feasible way' of administering building regulations, in light of scarce resources. The system, therefore, was starved of resourcing from its initial design, and this is reflected in the design of the model in the 1990 Act.

The Memorandum outlines substantial resistance to the increased staffing and resources needed to deliver a nationwide building control system that would have a supervisory role:

The proposal that the inspectorate should be able to give directions to fire authorities and specify fire cover standards and appliance manning levels would give it an unacceptable level of control over resource allocation in local authorities.

The regulatory structure, therefore, was apparently influenced significantly by questions of control and resource allocation within local authorities rather than on any consideration of what the appropriate model should be from a regulatory perspective:

The Tánaiste considers that it would be unacceptable for an inspectorate...to set standards or issue directions having resource implications, without the approval of the Minister and possibly the Government in certain circumstances.

The resulting model, therefore, operates entirely without external regulatory oversight of its effectiveness.

Building control – Inspections

A precursor to formal enforcement activity would usually be an inspection carried out by an authorised person pursuant to their powers under Section 11 of the 1990 Act. An audit of local authority performance carried out in 2015 by the National Oversight and Audit Commission, however, selected the carrying out of inspections of new dwellings as one of the performance indicators for the audit.¹³⁴ The audit noted that one building control authority, Waterford City and County Council, had carried out no inspections of 161 new

¹³⁴ National Oversight and Audit Commission. (2016). *Performance indicators in local authorities 2015. Report no. 11*. Dublin: National Audit and Oversight Commission.

buildings for which Commencement Notices were lodged in 2015, which it stated was ‘due to resourcing problems’.¹³⁵ The report also included statistics for the numbers of new homes inspected on behalf of building control authorities during 2015, which showed a wide variation, from 0 per cent in Waterford to less than 20 per cent in Cork City, Dún Laoghaire–Rathdown, Fingal, Galway City, Kildare, Kilkenny, Laois, Longford, Mayo, Tipperary and Westmeath. The report does not provide any further information in relation to enforcement activities conducted on foot of inspections; therefore, the data cannot be analysed to determine how many inspections resulted in formal or informal enforcement. This omission suggests a view that building control effectiveness can be audited and assessed by statistics for inspections in isolation, without any further consideration or assessment of measures taken on foot of those inspections.

Enforcement policy – Food safety

The enforcement policy for building control is in contrast to the guidance issued by the Authority to the Health Service Executive (which carries out inspections), which includes guidance on determining the risk profile of food business operators, risk categorisation, frequency of inspections and actions to be taken in the case of non-compliance.¹³⁶

The system for reporting of compliance and organisational data is a key distinguishing factor between building control and food safety in Ireland.¹³⁷ The Authority takes an active role in managing its service contracts.¹³⁸

The enforcement statistics reported in the Authority’s annual report for 2016 demonstrate that formal enforcement is undertaken regularly by and on behalf of the Authority.¹³⁹

¹³⁵ *Ibid* 15.

¹³⁶ *Guidance for the Health Service Executive on the inspection of food businesses, guidance note 1, revision 2.* Dublin: Food Safety Authority of Ireland.

¹³⁷ The official agencies carrying out inspection functions for the Authority include the Health Service Executive; the Department of Agriculture, Food and the Marine; the Sea-Fisheries Protection Authority; twenty-eight local authorities; the National Standards Authority of Ireland; and the Marine Institute.

¹³⁸ In its 2015 annual report, the Authority states: ‘Regular meetings were held with senior management in each agency and with the line managers responsible for the delivery of inspection and analysis’. Food Safety Authority of Ireland, *Annual Report 2015*, (2016), 9.

¹³⁹ The Authority’s annual report for 2016 records 94 Closure Orders, 263 Improvement Notices, 3 Improvement Orders, and 9 Prohibition Orders (Food Safety Authority of Ireland, *Annual report 2016*), 23). However, the engagement by the Authority with the public and with stakeholders is also evident from its report, which notes that a helpline for stakeholders ‘takes approximately 11,000 calls per year’, and that the Authority had published 59 publications during 2016, including codes of practice for industry, factsheets and other materials to support compliance (*Annual Report 2016*, 9, 25).

Role and modes of enforcement in regulatory systems

The regulatory model for Irish residential construction has a number of anomalies and fault lines. It is apparently poorly resourced; the submission to the Pyrite Panel by the County and City Managers' Association connects enforcement strategy with available resources.¹⁴⁰

While the food safety regulation system concerns a very different set of procedures and products, a number of features of the system have been highlighted in this paper which are a consistent feature of other successful regulatory regimes in Ireland and internationally. These include the use of formal enforcement powers, where necessary, and the reporting of compliance activities by regulatory bodies.

Analysis of building control enforcement suggests an over-reliance on informal enforcement and a need for additional tools in advance of the issue of enforcement notices, which would require a change in the legislation. The development of a national policy for appropriate use of the powers under the Building Control Acts, and the publication of the enforcement register online and in annual reports, could do much to increase the transparency and effectiveness of the system.

D: Private gatekeepers and the State: public-private power transfers, private regulation and co-regulation

The section considers the role of the private sector in construction regulation, and the implications of the assignment of regulatory power to private registration systems for building practitioners.

Role of the private sector in construction regulation

Van der Heijden refers to a 'global trend' in 'the introduction of private-sector actors in regulatory enforcement'.¹⁴¹ has analysed the impact of private sector involvement in

¹⁴⁰ County and City Managers' Association, *Submission to the CoECLG Pyrite Investigation Panel*, 8.

¹⁴¹ Jeroen van der Heijden, 'One task, a few approaches, many impacts: Private-sector involvement in Canadian building code enforcement' (2010) 53 *Canadian Public Administration* 351, 351.

building code enforcement in both Canada and Australia. Noting that private-sector involvement is regarded in having more ‘bang for the regulatory buck’.¹⁴² He expresses concern, however, in relation to financial relationships between enforcers and regulatees (354), which gives rise to a ‘a danger of regulatory capture’.¹⁴³ Other issues with private sector involvement include the risk that regulatees may be segregated by their value to the private sector actors, so that those with the greatest commercial influence will secure the best service. Van der Heijden concludes that private-sector involvement may result in effectiveness and efficiency gains but may pose concerns with regard to ‘conflicting interests and a decline of social equity and accountability’.¹⁴⁴

In Canada, Ontario has a system where private-sector inspectors are assigned to projects by the local authority, and subject to oversight by a public agency.¹⁴⁵ Private sector inspectors are similarly subject to supervision by an independent statutory agency (the safety codes council).¹⁴⁶ Empirical research amongst public and private sector organisations in Vancouver by Van der Heijden revealed a strong belief that private sector involvement had improved compliance with the building code, but no evidence was available for this view.¹⁴⁷

Overall Van der Heijden concludes that ‘private-sector involvement has a positive impact on the effectiveness and efficiency of a regulatory enforcement regime’¹⁴⁸ but a ‘tipping point’ may exist after which private sector enforcement does not product more efficiency and effectiveness, and highlights in particular the issuing of a permit to commence work or to occupy, which is a valuable document: ‘This high value might put pressure on a private-sector inspector not to “bite the hand that feeds”’.¹⁴⁹

In Ireland, the issuing of a permit to commence work is effectively public (in that local authorities can reject Commencement Notices) but the permit to occupy is a private public hybrid, consisting of the certificate of compliance on completion (as required by the 2014

¹⁴² Ibid 353, citing Gunningham (2002) and Sparrow (2000), Van der Heijden suggests that the private sector ‘appears, without additional capital, to carry out a more efficient enforcement process’, (353).

¹⁴³ Ibid 354.

¹⁴⁴ Ibid 354.

¹⁴⁵ Van der Heijden (n 141) 356.

¹⁴⁶ Ibid 356.

¹⁴⁷ Ibid 359.

¹⁴⁸ Ibid 367.

¹⁴⁹ Ibid 368.

Regulations) which must be signed by the assigned certifier, but which is ‘validated’ by the building control authority. In common with the informal enforcement procedures referred to above, the ‘validation’ procedures carried out by building control authorities with regard to commencement notices and certificates of compliance on completion are largely carried out outside the formal architecture of the 1990 Act and the regulations made pursuant to the Act.

Licensing and registration systems for builders and construction professionals

In this section, a comparative review is carried out of licensing systems in other jurisdictions, with a particular focus on builders, leading into a discussion of the normative justification for an independent regulatory authority for the construction industry in Ireland.

Skarbek notes that the typical justification for occupational licensing is ‘the existence of asymmetric information and negative externalities’ but that the introduction into a sector of occupational licensing may lead to increased costs and to consumers opting for cheaper, unlicensed substitutes.¹⁵⁰

To counteract the economic argument about information asymmetry, Skarbek offers the view that certification from third parties and the potential loss of customer goodwill are other factors that may be preferable for assuring consumers of quality. While the former may be true in Ireland (with the certificate of compliance on completion now a requirement for sale of most new homes), it seems unlikely that building contractors would be influenced by the desire to maintain customer loyalty, as a home purchase is seldom repeated. Consumers may have limited brand recognition of the work of particular house builders, or such considerations may be dismissed in a market where there is a significant under-supply of new housing.

Plesca analysed the impact of a proposal to introduce mandatory licensing for construction workers in Ontario, and concluded that, while the rationale for the introduction of

¹⁵⁰ David Skarbek, ‘Restricting reconstruction: occupational licensing and natural disasters’ in VHS Emily Chamlee-Weight (ed) *The Political Economy of Hurricane Katrina and Community Rebound* (The Political Economy of Hurricane Katrina and Community Rebound, Edward Elgar Publishing 2010) 72, 73.

mandatory licensing was ‘typically related to increased quality in that occupation’s output’, licensing was in fact promoted by the regulated sector, to increase barriers to entry and restrict wage competition.¹⁵¹ A number of commentators take the view that occupational licensing ultimately increases prices for consumers.¹⁵²

International position – regulation of construction and builders

There are various international examples of licensing schemes for builders include schemes in Australia, the US and Europe.

The Home Building Act 1989 of New South Wales restricts the carrying out of building work to the holders of contractor licences.¹⁵³ Enforcement action reports in relation to detection and enforcement of non-compliance with the Home Building Act are published by New South Wales Fair Trading. A person may not carry out residential building work without having in place home warranty insurance that complies with the Home Building Act, a copy of which must be furnished to the other party to the contract.¹⁵⁴

In the State of Victoria, Australia, there is a comprehensive system of licensing for building practitioners; various classes of licence are specified for the different classes of construction activity, including construction surveyors and inspectors, commercial builders, and domestic builders. Domestic building work includes construction, maintenance and improvement of homes. This requirement recognises the fact that a person undertaking works to their own home (or building their own home themselves or by direct labour) should nonetheless be subject to a certain level of regulation and supervision in order to ensure that the works are carried out competently and safely.¹⁵⁵

¹⁵¹ ‘...occupational licensing is implemented at the initiative and under the administration of the current association of workers in that occupation. Licensing imposes barriers to entry in that occupation, effectively restricting the supply of licensed workers in the occupation, driving their wages up.’ M. Plesca, ‘The Impact of Introducing Mandatory Occupational Licensing’ (2015) *Modern Economy* 1309, 1309.

¹⁵² Jeffrey M. Perloff, ‘The Impact of Licensing Laws on Wages Changes in the Construction Industry,’ (1980) *Journal of Law and Economics*, 23, 409; Sidney L. Carroll and Robert J. Gaston, ‘Occupational Licensing and the Quality of Service’ (1983) 7 *Law and Human Behavior* 139; Morris M. Kleiner and Robert T. Kudrie, ‘Does Regulation Affect Economic Outcomes? The Case of Dentistry’ (2000) 43 *The Journal of Law and Economics* 547; Morris M. Kleiner, ‘Occupational Licensing’ (2000) 14 *Journal of Economic Perspectives* 189; Lobo and Wilkinson 2006.

¹⁵³ Section 4.

¹⁵⁴ Home Building Act 1989, s 92 (1) and 92 (2).

¹⁵⁵ Victorian Building Authority <http://www.vba.vic.gov.au/>

California - licensing of building contractors

The California Contractors State License Board ('CCSLB') was established in 1929 and licenses 290,000 contractors in 44 licence classifications. The CCSLB website has details of all licences revoked, published on a monthly basis. Where a licence is revoked, the contractor must submit a disciplinary bond with the Registrar to reinstate, reissue or reapply for a new licence. Home owners may file claims directly with the bond issuer.

Following the Library Gardens balcony collapse, the CCSLB initiated proceedings against the original contractor, Segue Construction Inc., and three named officers, reciting the evidence of wilful departure from the plans and specifications and wilful departure from accepted trade standards for good and workmanlike construction.¹⁵⁶ In April 2017, by an order of the Registrar of Contractors to adopt a stipulated settlement, the contractor's licence was revoked for a period of five years, and each of the named officers were ordered to pay the CSLB's investigative costs, in the amounts of \$99,950 and \$15,000.¹⁵⁷

Most of the jurisdictions that require the licensing or registration of builders are outside Europe; the United States, Australia, Canada and Singapore are notable examples. However, the level of legal protection of homeowners who are dealing with defects in domestic construction works is generally fairly high in most European countries, and European systems of construction regulation analogous to building control are generally stricter than Ireland.

Meijer and Visscher have carried out extensive comparative research into construction regulation in the European Union.¹⁵⁸ In a recent article,¹⁵⁹ the authors examine the position in seven EU countries, updating their earlier research and seeking to identify regulatory trends. The role of private parties in construction regulation was highlighted by the authors and was attributed to what they describe as 'the persistent wish of

¹⁵⁶ Case No. N2015-483, Before the Registrar of Contractors State License Board, In the matter of an accusation against Segue Construction Inc., Erick David Hockaday, David Michael Dunlop and Kirk Alan Wallis, Contractor's License No. 638854, B.

¹⁵⁷ Case No. N2015-483, In the Matter of the Accusation Against Segue Construction Ltd., Erick David Hockaday, David Michael Dunlop and Kirk Alan Wallis, Order to Adopt Stipulate Settlement, 19 April 2017. http://www.cslb.ca.gov/Resources/PressReleases/N2015-483_SEGUE_CONSTRUCTION_INC_-_Filed_Order.pdf (accessed 24 June 2018).

¹⁵⁸ Frits Meijer and Henk Visscher, 'The deregulation of building controls: a comparison of Dutch and other European systems' *Environment and Planning B: Planning and Design* 617

¹⁵⁹ Frits Meijer, Henk Visscher, (2017) 'Quality control of constructions: European trends and developments', *International Journal of Law in the Built Environment*, Vol. 9 Issue: 2, 143.

governments to diminish the regulatory pressure of the building regulations on the building industry'.¹⁶⁰

A number of European countries, therefore, involve private actors in the process of construction quality. France operates a system where a private body carries out inspections during the course of construction and issues a completion certificate following inspection on completion of works.¹⁶¹ The French Civil Code, however, provides for a 10-year period of liability in respect of major defects in construction works, supported by mandatory defects insurance.

Regulatory models in the Irish construction industry

One of the striking features of the response of successive Governments to the widespread housing failures that have emerged in recent years is that there is apparently little political will to devise an impose an external regulatory system on the construction industry. There is no regulatory body for building work in Ireland. The current proposed model for regulation of the industry is Construction Industry Register Ireland.¹⁶²

According to the 1977 Law Reform Commission Working Paper, a registration scheme had been discussed between the Department of Local Government and the Construction Industry Federation, and the Irish Government had approved a proposal for registration from the Construction Industry Federation.¹⁶³ The scheme proposed included a six-year guarantee from a house builder registered with the Construction Industry Federation, with periodic inspections at key stages by officials from the Department of Local Government. A 'system of conciliation and arbitration' was to be established to deal with disputes arising from the guarantee scheme.¹⁶⁴

The working paper was critical of the limitations in the scheme as proposed, however, in that it would apply only to major structural defects in speculatively-built housing and not to contract houses or to incomplete houses; the guarantee only arose on default by the

¹⁶⁰ Ibid 144.

¹⁶¹ Ibid 147.

¹⁶² General Scheme of Building Control (Construction Industry Register Ireland) Bill 2017.

¹⁶³ Law Reform Commission, *The Law relating to the Liability of Vendors and Lessors for the Quality and Fitness of Premises*, 1977), 44.

¹⁶⁴ Ibid 89.

builder and was limited to six years rather than the ten years applicable to similar schemes in Northern Ireland and England; and that the registration body would be administered by the Construction Industry Federation.¹⁶⁵

Construction Industry Register Ireland

The Pyrite Panel recommended the establishment of a mandatory registration system for builders, supported by appropriate insurance, noting the anomaly that electricians and gas installers were regulated in Ireland, but that builders were not.¹⁶⁶

In May 2017, the general scheme of the Building Control (Construction Industry Register Ireland) Bill 2017 was published by the Department of Housing, Planning and Local Government, the object of which is to introduce mandatory registration with CIRI for builders.¹⁶⁷ A recommendation for registration was made in the Report of the Pyrite Panel, which pointed to the systems of registration of electricians and gas installers as a model. The key distinction between the model proposed for builders, however, is that the Commission for Energy Regulation has overall responsibility for regulation of electrical and gas installation, which it has delegated to the RECI and RGI registration bodies.¹⁶⁸ By contrast, it is not proposed that a regulatory body should oversee the operation of the CIRI register.

Although the measure has been repeatedly referred to by Government and industry stakeholders as being necessary for consumer protection and confidence in the residential construction sector¹⁶⁹, it is not proposed that it be empowered to award compensation or

¹⁶⁵ Ibid 34.

¹⁶⁶ Ibid 122.

¹⁶⁷ General Scheme of the Building Control (Construction Industry Register Ireland) Bill 2017; it is intended that the Act will apply to 'any builder carrying out building works under the Building Control Acts 1990 to 2014 which are subject to the Building Regulations 1997 to 2017 and which are not exempt under section 3 (2)', and Section 5 provides that a person shall not carry out building works or represent to the public that they are entitled to do so unless they are registered under the Act or exempt.

¹⁶⁸ Section 9E of the Electricity Regulation Act 1999 as inserted by s 13 of the Energy (Miscellaneous Provisions) Act 2006 allows the Commission for Energy Regulation to appoint a person to be the designated body (referred to as a Gas Safety Supervisory Body) for the purposes of the section; there are similar provisions in section 9B of the 1999 Act as inserted by s 4 of the 2006 Act, which provides for designation as electrical safety supervisory bodies. The bodies currently designated for this purpose are RECI (electricity) and CGI (gas).

¹⁶⁹ The Minister for Housing, Planning and Local Government stated as follows with regard to CIRI during a Dáil debate on the 'Safe as Houses' report: 'The main objective of the Building Control (Construction Industry Register Ireland) Bill is to develop and promote a culture of competence, good practice and compliance with the building regulations within the builder community of the construction sector. The establishment of a robust and mandatory statutory register of builders and specialist contractors is an essential consumer protection measure giving those who engage a registered builder the assurance that they are dealing with a competent and compliant operator.' Dáil debates, Report on Building Standards, Building Controls and Consumer Protection, 24 May 2018. See Joint

provide any remedy to a consumer who has a complaint or dispute in relation to a CIRI member.¹⁷⁰

The registration body to be established by the Bill will have no obligation to report any breaches of the Building Control legislation to building control authorities, and no enforcement powers where a matter complained of relates to a possible breach. Its remit would be limited to breaches of its own establishing statute, such as breaches of registration requirements.¹⁷¹ The Scheme also embeds the opt-out regime established by the SI 365/2015 as ‘self-builders’ are exempt. This is a crucial point from the perspective of consumer protection; as noted in the section dealing with licensing of building practitioners in the state of Victoria, for example, owner-builders are required to register and must demonstrate their competence to carry out building work.¹⁷² The leading home defects case of *Ward v McMaster*¹⁷³ related to a house that had been built by what would now be regarded as a ‘self-builder’, as the defendant who had constructed the house was a taxi driver by profession.

There is no provision in the draft Bill with regard to disclosure of interests requirements for members of its Boards or Committee.¹⁷⁴ In the event of an investigation into misconduct, an inspector appointed to consider the alleged misconduct must provide a draft of her report to the member under investigation (which could undoubtedly prompt judicial review or interlocutory applications to restrain continuance of the process).¹⁷⁵

Donnelly suggests that private delegation of the work of government can result in flexibility and responsiveness, where the delegation relieves government from the burden of establishing an administrative structure for the carrying out of the delegated task:

...the use of private regulators may provide a ‘politically feasible interim route’ for regulation when there is insufficient political consensus for government to

Committee on Housing Planning & Local Government, *Safe as Houses? A Report on Building Standards, Building Controls & Consumer Protection*, 2017)

¹⁷⁰ General Scheme of the Building Control (Construction Industry Register Ireland) Bill 2017, s 10.

¹⁷¹ *Ibid* s 11.

¹⁷² Building Legislation Amendment (Consumer Protection) Act 2016, Division 4. New South Wales has a similar regime, which requires owner-builders to apply for a permit (Home Building Act 1989, Part 3,

¹⁷³ *Ward v McMaster* [1985] ILRM 43 (High Court).

¹⁷⁴ Provisions regarding the avoidance of conflicts of interest are set out in various regulatory and quasi-regulatory statutes: s 12 (1), Legal Services Regulation Act 2015; s 12 (1), Competition and Consumer Protection Act 2014; s 11 (1), Central Bank (Supervision and Enforcement) Act 2013.

¹⁷⁵ Section 11 (4), General Scheme of Building Control (Construction Industry Register Ireland) Bill 2017.

establish a new public regulator.¹⁷⁶

Donnelly goes on to note that where similar delegations have occurred in the United States, the private delegates are exempt from requirements that apply to the Government and State agencies, such as ‘disclosure requirements, oversight structures, conflict of interest and reporting requirements, and ethical obligations’:

When governmental power is exercised by private actors, it is often placed beyond the reach of traditional legal accountability mechanisms, thereby undermining legal accountability.¹⁷⁷

On this view, the lack of oversight of the proposed CIRI registration body presents significant governance and legitimacy concerns. The proposal does not involve a formal transfer of regulatory power from the Irish Government, as there is no regulatory registration system for builders in operation in Ireland at present.¹⁷⁸

The author, addressing the Oireachtas Joint Committee on Housing, Planning and Local Government during pre-legislative scrutiny of the Bill, commented as follows:

Construction is a sector where everyone involved in building is legally bound by a common building code, set out in our Building Regulations. This code is regulated and enforced by building control authorities. The CIRI Scheme, if enacted, would result in a private system to regulate builders, and a separate public system to regulate what they build.¹⁷⁹

Waldron points to the influence of industry in shaping the Government response to the leaky condominium crisis in British Columbia: ‘Given public pressure, industry responded to the inevitability of regulation by attempting to shape the process so that the big companies would suffer little and costs would be controllable’.¹⁸⁰ The Irish

¹⁷⁶ Catherine M Donnelly, *Delegation of governmental power to private parties: a comparative perspective* (University of Oxford 2004), 81.

¹⁷⁷ *Ibid* 103

¹⁷⁸ This is in contrast to the mandatory registration systems for both gas installation and electrical works, where, in each case, private bodies perform registration and regulation that is described in statute, and formally delegated to those bodies.

¹⁷⁹ Joint Oireachtas Committee on Housing, Planning and Local Government, Pre-Legislative Scrutiny of the Draft General Scheme of the Building Control (Construction Industry Register Ireland) Bill 2017, 26 October 2017.

¹⁸⁰ Mary Anne Waldron, ‘How T-Rex Ate Vancouver: The Leaky Condo Problem’ 31 *Canadian Business Law Journal* 335, 365.

Government's proposal to require registration on CIRI for persons engaged in building works suggests a reluctance to engage with the cost and political difficulty in establishing an independent regulator for the Irish construction industry.

Regulation of gatekeepers – architects, engineers, surveyors

The concerns raised above in relation to the proposed Construction Industry Register Ireland model could also be made in relation to the registration bodies for architects, engineers and surveyors in Ireland, each of whom is a 'gatekeeper' for access to housing. The bodies to whom registration obligations for such professionals are assigned are the Royal Institute of Architects in Ireland, the Society of Chartered Surveyors in Ireland, and Engineers Ireland, each of which is an entirely private entity that is not subject to public governance and disclosure norms such as those set out in the Freedom of Information Acts 1997-2003, and the Ethics in Public Office Acts 1995 and 2001.

The three bodies are also not subject to any external regulatory oversight, although a review of the regulatory structure for architects suggested that an 'overarching supervisory regulator' should be considered for the architectural profession¹⁸¹

Booth and Squires raise the issue of whether a failure by a registration body adequately to supervise or to sanction a regulated professional could give rise to a duty of care to avoid causing economic loss to a member of the public¹⁸², but have suggested that this will not arise absent a specific assumption of responsibility with regard to the plaintiff's interests:

The courts have held, in other contexts, that where a regulatory body is conferred powers in order to protect a wider public interest, it will not owe a duty of care to prevent the subject of the regulation suffering economic harm. Any such duty, the courts have indicated, might undermine the ability of the regulatory body to

¹⁸¹ 'In the context of any future review of the overall regulatory structure for construction professionals there would be merit in determining if consumer confidence would be enhanced and the independence of the regulatory structure bolstered by the introduction of an overarching supervisory regulator to monitor and guide the self-regulatory or co-regulatory functions of the various professional bodies in this area.' Garrett Fennell, *Independent Review of the registration arrangements for Architects under the Building Control Act 2007*, (2013), 26.

¹⁸² Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities*, (2005 Oxford University Press) 755.

serve the wider public interest by conducting a robust and thorough investigation'.¹⁸³

The authors refer to *Wood v Law Society*¹⁸⁴, in which it was held that the Law Society owed no duty of care to a member of the public claiming to have suffered loss in consequence of the Law Society's response to a complaint regarding the conduct of a solicitor, with the court noting that the Society exercised its power to sanction conduct rather than to safeguard the interests of any particular person.¹⁸⁵

Does regulation improve construction quality?

There is very little evidence available in respect of the effect on quality of the various regulatory changes in Irish law since 1990. A study carried out in the State of Victoria, Australia, examined the extent of defects in 1000 houses, both owner-built and commercially built. Two conclusions are of particular note and relevance for the Irish context. Firstly, there was a lack of supervision of sub-contractor work, suggesting a need for improvements in management and inspection of works in its final stages.

Secondly, there was a significantly lower incidence of defects in the work of electricians, which were a regulated category of sub-contractor, than amongst other sub-contractors. In Ireland, electricians are extensively regulated under the RECI system which is under the overall regulatory responsibility of the Commission for Utilities Regulation, which provides oversight and enforcement capability. It is a significant shortcoming of the CIRI model that there is no proposal that it should operate within a regulatory oversight structure, and the findings from Australia should strike a cautionary note in terms of management of risk in residential construction, which is also largely carried out by sub-contractors with builders increasingly in a managerial role.¹⁸⁶

¹⁸³ Ibid 757. The authors refer to *Edwards v Law Society of Upper Canada* (2000) 188 DLR (4th) 613 Ont CA, in which the court stated that 'A body charged with the exercise of quasi-judicial powers must act in the public interest and must take into account a number of factors, only one of which will be the private interest of individuals such as the plaintiff. The threat of a suit for damages by a disgruntled individual would not leave the body free to exercise its discretion in the manner it considers to comport with the broader public interest'.

¹⁸⁴ The Times, 30 July 1993.

¹⁸⁵ Ibid 757.

¹⁸⁶ J Georgiou, PED Love and J Smith, 'A comparison of defects in houses constructed by owners and registered builders in the Australian State of Victoria' (1999) 17 Structural Survey 160, 167-168. The authors suggest that the 'high degree of self-management by subcontractors' evidenced by their research indicated that 'registered builders are providing little added value'. (167).

The case for an independent Irish building regulator

It is submitted that an independent regulatory body could provide the oversight of regulatory activities by building control authorities that the Food Safety Authority provides for the local authorities carrying out food inspections nationwide, and that the regulatory theory research discussed in this chapter suggests is an essential part of a regulatory system. The term ‘oversight’ is often used by the Department responsible for construction regulation in Ireland¹⁸⁷, but in the academic literature, ‘oversight’ in fact refers to the ‘enforcing of enforcement’¹⁸⁸ – the monitoring, for legitimacy and effectiveness, of the regulatory system and the regulatory bodies.

To achieve effective regulatory oversight for construction in Ireland, therefore, an oversight body should have supervisory regulatory jurisdiction over the work of building control authorities. It was reported in 2018¹⁸⁹ that one building control authority had been appointed to carry out this oversight role nationally, but such a relationship lacks the separation necessary in order to carry out an effective arms-length oversight function.

By borrowing the language of oversight, however, the Irish regulatory bodies involved in building control policy have co-opted the veneer of governance and effectiveness from regulatory theory.

An independent regulatory body could also act as custodian for the national building control management system (known as ‘the BCMS’)¹⁹⁰, which could be developed and

¹⁸⁷ An information note for home owners notes that ‘The Building Control Acts 1990 to 2014 sets out the statutory framework for the regulation and oversight of building activity’: the Department of the Environment, Community and Local Government, ‘Information Note for Owners of new dwellings and extensions who opt out of Statutory Certification for building control purposes’, undated.

¹⁸⁸ Van der Heijden (2010), (n 141), 352; Mary K. Marvel and Howard P. Marvel, ‘Outsourcing Oversight: A Comparison of Monitoring for In-House and Contracted Services’ (2007) 67 Public Administration Review 521.

¹⁸⁹ Minister of State at the Department of Housing, Planning and Local Government announced in February 2018 that ‘The Local Government Management Agency is working towards encapsulating all these work streams into a centralised structure for the governance and oversight of Building Control. This structure will ultimately be a shared service embedded in a lead local authority.’ ‘Building Regulations Compliance’, Dáil Éireann debate, 27 February 2018.

¹⁹⁰ The Building Control Management System (colloquially referred to as the ‘BCMS’) is a nationwide online portal for submission of documents required of land owners and developers undertaking construction work and supports activities of building control authorities countrywide. Most construction work, subject to exceptions such as single dwellings and certain domestic extensions, requires a Commencement Notice to be submitted to the building control authority before work starts (Building Control (Amendment) Regulations 2014). The Notice must be accompanied by detailed information and plans to demonstrate how the work will comply with the Building Regulations, as well as certificates and undertakings from owners, designers, assigned certifiers and builders in relation to the work to be

enhanced as a central regulatory tool for regulation of both the construction process and those engaged in construction. This could address some of the significant information gaps that follow from the incoherent regulation of the sector; compliance records captured by authorised officers could be recorded on the BCMS and could inform the registration / licensing system for builders, if the two systems were operated under a common framework.

External scrutiny and reputational value

The lack of transparency in regulation and governance of residential construction, coupled with the use of arbitration agreements in building agreements for new homes, has protected Irish builders and developers from one of the most significant commercial risks, that of reputational damage. Scott refers to the role of independent regulatory agencies in facilitating ‘monitory democracy’, which has the capacity to enhance accountability, transparency and enforcement by its interaction with Government, regulated actors and others in the wider community.¹⁹¹

Power suggests that reputational risk has come to the fore in the past two decades as more businesses have developed business models around intangible brands for whom reputation is fundamental: ‘for brand rich organisations, it is completely rational to manage reputation. Nevertheless, secondary risk management remains an issue for individual organisational actors for whom the costs of blame are perceived as high.’¹⁹² This observation suggests that, for companies where brand is less important than product, reputation management is less important.

The perception of the costs of blame is also potentially very relevant to the response of the Irish construction industry and regulatory regime to residential building failures. The public regulatory system, somewhat astonishingly, delivered few blows to the reputations of the Irish home builders when defects came to light.

carried out. The BCMS also contains the Certificates of Compliance on Completion required to be registered with BCAs before a building is opened, occupied or used. The BCMS was established by the Local Government Management Association and went live early in 2014 in order to support the administrative arrangements for building control established by the Building Control (Amendment) Regulations 2014. <https://www.localgov.ie/en/bcms> (accessed 25 June 2018).

¹⁹¹ Colin Scott, ‘Welfare, Regulation and Democracy’ (Social Justice Ireland Annual Social Policy Conference), 18 November 2014, 12.

¹⁹² Michael Power, ‘The risk management of everything’ (2004) 5 *The Journal of Risk Finance* 58.

The legal system could potentially have inflicted reputational damage via litigation, but did not do so, for two reasons: firstly, the corporate structure adopted by building companies insulates such companies not only from legal and financial risk (principally via limited liability) but also from reputational risk. As an ‘assetless shell’ is unlikely to be pursued through the courts, the publicity attendant on litigation is also avoided.

A related insight from a significant investigation by Hodges into behavioural science and compliance with law¹⁹³ suggests (citing Kagan, Gunningham and Thornton) that there are several reasons for why individuals comply with law; firstly, the threat of government and sanction; secondly, the prospect of disgrace among the person’s peers; and thirdly, the internal sense of the right thing to do.¹⁹⁴

Hodges also refers to the research of Shapiro and Rabinowitz in relation to voluntary regulatory compliance. Shapiro and Rabinowitz suggest that two predictive factors of voluntary regulatory compliance: firstly, that ‘voluntary compliance is more likely when prevention costs are low’, for example where information to assist with compliance is readily available and where a firm’s competitors are likely to comply on the same basis, such that regulatory compliance costs can be passed on to customers. Secondly, voluntary compliance is more likely where the firm is likely to face significant claims for compensation for injury or property damage if it does not comply: ‘In the absence of a credible threat of agency enforcement, a firm’s regulatory costs consist of potential personal and property damages that it must pay’.¹⁹⁵

Applying these factors to the evidence presented in this chapter regarding compliance with residential construction regulation, it may be observed that the likelihood of voluntary compliance with the regulatory regime is in fact very low, despite official assertions to the contrary. While it is difficult to assign prevention costs to particular risks, it is possible to speculate that for any one building company to test all aggregates for pyrite contamination during the period in which contaminated aggregates were used in Irish homes would have significantly added to its costs, and would have given competitors an advantage. Secondly, the various constraints on availability of legal remedies

¹⁹³ Christopher Hodges, *Law and Corporate Behaviour* (Hart Publishing 2015).

¹⁹⁴ *Ibid* 35-36.

¹⁹⁵ Sidney Shapiro and Randy Rabinowitz, ‘Voluntary Regulatory Compliance In Theory and Practice: The Case of OSHA’ (2000) 52 *Administrative Law Review* 97, 129.

described in chapters 2 and 3 and 5, suggests that the likelihood of building firms paying compensation for injury or damage is low.

Conclusion

The foregoing analysis presents a fundamental criticism of the regulatory regime for Irish residential construction. Irish and international examples demonstrate that regulatory models for the construction industry are generally insufficient without the credible threat of regulatory intervention as a control mechanism. The building control system suffers from design flaws that have compromised it from the outset; a lack of commitment to resourcing, a lack of any external oversight, a failure to ensure the Act and Building Regulations over a period of decades, and an apparent underlying philosophy that Ministers and local authorities must be protected from liability for failure.

It has been argued that this belief is misplaced, not only in light of the trend in the jurisprudence away from local authority liability and also by reason of the ability of the legislature to deal with such risks by law (as was done in ss 6 (4) and 21 of the Building Control Act 1990, both of which circumscribe the risk of the building control authority for failure in exercise of its powers under the Act).

The comparative analysis of construction and food safety regulation in this chapter concludes that the systems are similar in design, but vary greatly in implementation, drawing on analysis of enforcement statistics published by the Food Safety Authority of Ireland and obtained from building control authorities. It is argued that regulatory systems require enforcement and oversight in order to verify consistency of decision-making, compliance with their own rules and standards, and overall effectiveness, and that this lack of emphasis on enforcement and oversight is a significant failing in the Irish building control system.

The research finding of this analysis is that the regulatory 'toolbox' may appear sufficient in terms of legal powers, but that regulatory failure can occur if those powers are not exercised, and if compliance with regulations is not enforced. This, in turn, suggests that regulatory reform in the Irish context should initially focus on enforcement of existing regulations, although the findings of the Hackitt review suggest that a comprehensive

review of the building control system is warranted in light of the similarities between the two regulatory systems. The striking lack of enforcement of building control evidenced by the research conducted for this thesis points to regulatory incapacity in the Irish building control system, which requires enforcement and transparency in order for the system to be regarded as effective and accountable.

The research theme of gatekeeping is considered through the roles of assigned certifiers, building control authorities, and finally the proposed Construction Industry Register Ireland. Problems with conflicts of interest by assigned certifiers appointed pursuant to the 2014 Regulations are identified and analysed. Three cases of State responses to failures are set out, from the inadequate response of the Irish Government to the Milfield Manor fire in 2015, to the highly integrated and collaborative approach of the Californian authorities to the Library Gardens collapse in Berkeley in 2016. This can be distinguished from the Irish response by its publicity and regulatory consequences for the building company responsible. The ongoing Grenfell Tower Inquiry and the Independent Review of Building Regulations which reported in 2017 and 2018 also present a coherent and comprehensive suite of regulatory consequences with a clear direction and recommendations by Dame Judith Hackitt in the final report of the Independent Review published in May 2018.

The conclusions reached in the final Hackitt report should prompt a review of the Irish Building Regulations in light of similarities in the two systems and in the problems encountered in practice, such as the overlap and ambiguity of the Building Regulations, and the poor level of enforcement of the Building Regulations. Recent Ministerial comments, however, suggest that the 2014 Regulations, borne out of regulation by consensus through consultation between Government and industry, are as far as the Irish Government is prepared to take the mission of regulatory reform. This is a significant missed opportunity and the regulatory regime will continue to suffer as a result; from lack of enforcement and transparency to the ongoing development of policy based on industry and Government dialogue rather than on evidence. The central conclusion of the chapter, therefore, is that a robust, evidence-based, transparent regulatory system is needed in order to effect the significant cultural change needed to radically improve the quality of Ireland's housing stock.

Chapter 5: Procedural law, remedies, and justice

Introduction and context

In the previous chapters, the substantive law dealing with rights and remedies of homebuyers was considered. This chapter considers the manner in which three procedural constraints inhibit access to those remedies: the use of arbitration as the dominant model of dispute resolution, the impact of the Statutes of Limitation and common law rules with regard to limitation of actions, and the doctrine of privity of contract and its relevance and impact in residential construction.

This chapter is in two parts. The first part advances the argument that the current model of dispute resolution in residential construction is prejudicial to consumers and inhibits recovery of remedies and the quick, affordable resolution of disputes between consumers and builders. It critically analyses the practice of including arbitration agreements in the main forms of building contract for residential construction, the legacy of this practice in limiting judicial involvement in such disputes, and statutory intervention in dispute resolution in the forms of the Construction Contracts Act 2013 and the Mediation Act 2017. Models from other jurisdictions are considered and assessed as potential options for reform.

The second part of the chapter considers the impact of limitation periods on defects claims. Rules relating to limitation of actions are unclear and pose a significant conceptual challenge even to the superior courts¹, and ultimately operate as a tool for risk transfer from builders to home buyers. Different dates of accrual of causes of action between contract and tort, in conjunction with the possibility of concurrent liability in contract and tort of builders and other parties involved in construction process, leads to ambiguity and inhibits availability of remedies. Ongoing ambiguity in jurisprudence of the Irish courts with regard to the definition of ‘damage’ for the purposes of accrual exacerbates the risk of litigation for consumers. The lack of a ‘discoverability’ test, recently affirmed in the Irish Supreme Court decision in *Brandley v Deane*, bars actions

¹ This complexity is evidenced by the lengthy and intense analysis of the various authorities, and the relevant principles, in *Brandley v Deane* [2017] IESC 83.

in circumstances where many purchasers are not yet aware of defects.

A: DISPUTE RESOLUTION, CONSUMERS, AND ACCESS TO JUSTICE

Dispute resolution in Irish residential construction

Dispute resolution by litigation is fraught with uncertainty for consumers because of the existing uncertainty in the legal rules, and the delay and cost involved in litigation.

It is noted in the Report of the Pyrite Panel that:

the only option for householders in such cases appears to be to initiate legal action against the builder or his insurer or against the supplier of the defective hardcore material. Legal proceedings are costly and beyond the financial capacity of most householders and can be very time-demanding.²

The 2014 decision in *Mitchell & Anor v Mulvey Developments*³ provides an example of the trajectory and time delay involved in a residential defects claim. Amongst the defects complained of by the various plaintiffs were structural damage and water ingress.⁴ Court records show that proceedings were issued for two sets of plaintiffs in May 2009, and for another group of plaintiffs in August 2009, but the decision of the High Court awarding damages against the various defendants was not issued in February 2014, nearly ten years after the purchase of the houses. By that stage, the court noted, it was ‘as yet unclear as to whether these awards were actually enforceable in practice’.⁵

For the most part, however, disputes arising from Irish residential construction contracts will be dealt with outside of the courts, in accordance with the dispute resolution provisions of the LSBA, which requires disputes to be referred to arbitration. Until

² Pyrite Panel, *Report of the Pyrite Panel* (Pyrite Panel, 2012), 79.

³ *Mitchell & Anor v Mulvey Developments & Ors* [2014] IEHC 37.

⁴ *Ibid* [10], [37-40].

⁵ *Ibid* [56]. Three of the six defendants in the case had not entered an appearance to the proceedings; according to records of the Companies Registration Office, the building company had entered receivership in January 2010, and one of the professional team involved in the development had had a liquidator appointed in September 2013.

October 2018, the relevant clause provided that the Arbitrator would, ‘in default of agreement between the parties be appointed on the application of either party by either the President of the Law Society of Ireland or the President of the Construction Industry Federation’.⁶ Given that defects claims are typically brought against the original builder of the unit, the effect of this clause, until now, has meant that a representative body of which the builder may be a member plays a significant role in the selection of the tribunal for the hearing of the dispute between that member and the home owner.

This concern received judicial recognition in the 2009 decision in *Healy v Whitepark Developments Limited & Anor.*⁷ The decision was an unreported *ex tempore* decision of Kelly J., the content of which is set out in a 2018 practice note of the Law Society Conveyancing Committee. The parties had entered into the LSBA in connection with the construction of a new home; the defendant was a member of the Construction Industry Federation, which was at the time one of the joint appointing bodies for an arbitrator pursuant to clause 11 as discussed above. Kelly J. refused to stay proceedings to arbitration, and held that to require the plaintiff to submit to arbitration in circumstances where one of the appointing bodies for the arbitrator was a representative body of the defendant builder ‘offended the notion of natural and constitutional justice, and further that it fell foul of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995’.⁸ The 2018 practice note reports that the Law Society has, in light of the decision (and, apparently, the increase in home building), agreed an amended form of clause 11 with the Construction Industry Federation, which refers to the Law Society only as appointing body for an arbitrator in default of agreement:

Any dispute between the parties hereto shall be referred to arbitration by an arbitrator who shall in default of agreement between the parties be appointed on the application of either party by the president for the time being of the Law Society of Ireland (or if the said president is unable or unwilling to act, by the next senior officer of the Society), such arbitrator to be appointed from a list of arbitrators approved by the president of the Law Society of Ireland.

⁶ Law Society/Construction Industry Federation (n 2), clause 11.

⁷ *Derek Healy and Geraldine Healy v Whitepark Developments Limited and Paul Feeney*, ex tempore, Kelly J. (HC), 15 June 2009, referred to in Law Society of Ireland, *Conveyancing Committee and ADR Committee Practice Note: Change to Arbitration Clause in Building Agreement* (Law Society of Ireland, 5 October 2018).

⁸ *Ibid.*

The extraordinary time-lag of over 9 years between the decision in *Healy v Whitepark* and the consequent amendment of the LSBA suggests that, as a system of private, quasi-regulatory legislation with a significant impact on the legal arrangements for home building, the ongoing Law Society-Construction Industry Federation collaboration in producing and curating the LSBA is normatively objectionable and entirely unfit for purpose.

The LSBA has been in use since its introduction in 1987, and is the form recommended by the Law Society for new housing.⁹ This suggests that primary legislation should provide for both the substantive improvements in legal remedies discussed in this thesis and for procedural safeguards that are susceptible to review by the courts and to updating, where necessary, by the legislature.

Once-off houses (for example, where the owner already owns the land and commissions a builder) are more likely to have been contracted on the basis of the Royal Institute of Architects in Ireland standard form building agreement¹⁰, which also contains an arbitration clause. As such, this analysis proceeds on the assumption that purchasers of virtually all new homes for the past 30 years have entered into arbitration agreements as part of the building contract for their homes.

The effect of arbitration agreements

The presence of the arbitration agreement in the LSBA has undoubtedly resulted in the exclusion of the Irish courts from consideration of residential defects claims, notwithstanding the significant volume of such defects that became apparent in the period from 1987 to 2018. This has led to the arrested development of the jurisprudence in relation to the liability of builders in particular, which has failed to keep pace with the courts of England and Wales during the same period.¹¹ Estlund observes that the diversion of disputes from public to private fora ‘threatens to stunt both the development of the law and public knowledge of how the law is interpreted and applied in important areas of

⁹ The form would nearly invariably be used for speculative housing development (where the developer arranges for construction of units and then sells them on, either from plans or once complete)

¹⁰ Royal Institute of Architects in Ireland, Building Agreement, 2017 edition.

¹¹ See the discussion in Chapter 3 with regard to liability for economic loss.

public policy'.¹²

The normative difficulty with the use of arbitration agreements in consumer contracts is that it fundamentally deprives the consumer of a State-controlled public forum for determination of the dispute; rather than offering an opportunity for clarification of the law, arbitration can merely resolve disputes one at a time, and will not be conducted with an eye to the place of the ultimate award in the overall jurisprudence in an area, as litigation may be.

A related problem is that confidentiality, a fundamental feature of arbitration, may benefit the builder far more than the buyer in the residential construction defects scenario, which, in the opinion of Estlund, 'undermines the regulatory function of private-enforcement actions, which serve not only as a dispute resolution mechanism but also as an ex post alternative or supplement to *ex ante* prescriptive rules of conduct'.¹³ This phenomenon, in Estlund's view, goes farther than shifting claims from litigation to arbitration; claims subject to mandatory arbitration 'simply evaporate before they are even filed'.¹⁴ Glover has described the use of arbitration clauses in order to eliminate claims altogether, situating the phenomenon in the US as part of the privatisation of dispute resolution within 'a broader narrative about the erosion of the public realm in the world of litigation writ large'.¹⁵ Estlund also found that plaintiffs typically recovered significantly less via arbitration than they would have via litigation.¹⁶

Although juries are no longer a feature of civil litigation in Ireland, one can argue that there is a substantial difference between adjudication by a court and the arbitral process. In litigation, broader social considerations and fairness may be taken into account (as in the example of *Mitchell v Mulvey Developments*, in which Hogan J. was highly critical of the deficiencies in legal remedies for homebuyers.¹⁷ Where disputes are resolved by an arbitrator, the process is essentially aimed at the resolution of the dispute, but with no

¹² Cynthia Estlund, 'The Black Hole of Mandatory Arbitration' (2018) 96 North Carolina Law Review 679, 679.

¹³ Ibid 681.

¹⁴ Ibid 682. If the same were true in Ireland, it would undermine the recommendation of the 2017 *Safe as Houses?* report that called for a prohibition on confidentiality clauses in settlement agreements between consumers and builders.

¹⁵ J. Maria Glover, 'Disappearing Claims and the Erosion of Substantive Law', (2015) 124 Yale LJ 8, 3052, 3052.

¹⁶ Estlund, (n 12), 688: "'Dispute Diffusion" is the term I offer to capture these new commitments to the eclipse of court-based adjudication as the primary paradigm for government-authorized dispute resolution'.

¹⁷ *Mitchell* (n 3).

broader ramifications. An arbitrator will not conclude a judgment with a call to the legislature to intervene to improve the position of the parties, as Hogan J. did in *Mitchell*. There are also significant procedural differences between arbitration and litigation, which may work to the prejudice of consumers. In the United States, the use of mandatory pre-dispute arbitration clauses in consumer contracts to prevent class actions has been particularly contentious.¹⁸

Leff argues that the structure by which a consumer may seek redress in respect of defective goods may be expensive, cumbersome, and difficult to access, and suggests that it would be preferable to regulate against objectionable clauses in consumer contracts, supported by ‘an administrative enforcement arm to police these repetitive nasty practices.’¹⁹

Pre-dispute arbitration agreements - the international view

In a major empirical study into pre-dispute arbitration clauses in contracts for consumer financial services, Sovern, Greenberg, Kirgis and Liu found widespread misunderstandings amongst consumer respondents in relation to the effect of arbitration clauses. Many consumers were unaware of arbitration clauses in many of their contracts, and did not realise that an arbitration clause would prevent them from engaging in court litigation.²⁰ Green comments that ‘If ADR is truly a better way, the parties will want to enter into it without the economic coercion inherent in adhesion contracts’.²¹

Stipanowich describes the construction process as a ‘crucible of conflict’ which presents an ongoing challenge for the design of orderly legal arrangements both for legislatures and contracting parties.²² It is notable in this respect that legislation has been introduced

¹⁸ Welsh refers to the case of *Ross v American Express Co.* 35 F. Supp. 3d 407, in which it was claimed that ten issuing banks, accounting for 87% of all credit card transactions in the United States, had engaged in a concerted practice to insert pre-dispute arbitration agreements, including class action bars, into their member agreements. Nancy A. Welsh, ‘Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?’ 13 U St Thomas LJ 381, 384.

¹⁹ ‘One cannot think of a more expensive and frustrating course than to seek to regulate goods or “contract” quality through repeated lawsuits against inventive “wrongdoers”’; Leff A, ‘Unconscionability and the Crowd: Consumers and the Common Law Tradition’ (1970) 31 University of Pittsburgh Law Review 349, 356-357. This was the essence of the Law Society / Director of Consumer Affairs application to the High Court in respect of the LSBA, as discussed in chapter 2.

²⁰ Sovern J and others, ‘Whimsy Little Contracts’ with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements’ (2015) 75 Maryland Law Review 1.

²¹ Michael Z. Green, ‘Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?’ (1993) 5 Loy. Consumer L. Rep. 112, 118.

²² Thomas J. Stipanowich, ‘Reconstructing Construction Law: Reality and Reform in a Transactional System’ (1988) Wisconsin Law Review 463, 470.

in a number of jurisdictions to prohibit arbitration agreements being entered into with consumers prior to disputes.²³ In the United States, a rule introduced by the United States Consumer Financial Protection Bureau²⁴ restricted the use of pre-dispute arbitration agreements in contracts for financial products and services following an extensive research and consultation carried out from 2013 to 2017; the President of the United States, however, disapproved the Final Rule in November 2017, such that it had no further effect, suggesting that a bar to use of pre-dispute arbitration agreements would restrict consumer choice.²⁵

Floyd argues that the Final Rule ‘would have helped consumers and evened the playing field between consumers and financial services providers’, and that the Final Rule would have provided a vital ‘private enforcement tool’, via class actions and/or litigation, that arbitration would not provide, noting that ‘Arbitration proceedings lack the independence of elected or appointed judges and published opinions available for public inspection.’²⁶ Hollander refers to additional disadvantages of arbitration for consumers including the lack of a right of appeal and limitations on discovery.²⁷

Ben-Shahar has examined the impact of mandatory arbitration agreements from the perspective of law and economics, and argues that only the most affluent consumers engage in litigation, such that a bar on pre-dispute arbitration clauses effectively requires poorer consumers to subsidise litigation by the wealthy.²⁸

The privatisation of dispute resolution?

Various commentators have criticised the trend towards privatisation of consumer dispute resolution in the United States.²⁹ Knapp suggests that mandatory arbitration ‘represents

²³ Australian Territories: Victoria (Domestic Building Contracts Act 1995, s 14), New South Wales (Home Building Act 1989, s 7 C) and the Northern Territory (Building Act 1993, s 54A (2)(b)).

²⁴ United States Consumer Financial Protection Bureau, Arbitration Agreements, Final Rule (July 10, 2017).

²⁵ See (<https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements>, accessed 10 June 2018).

²⁶ Rebecca D. Floyd, 'Populist Conundrum: Big Banks or Plaintiffs' Bar? Banks Win as Congress Overrides the CFPB Rule Banning Class Action Waivers in Arbitration Agreements' (2018) 22 NC Banking Inst 165, 166, 174.

²⁷ Mindy R. Hollander, 'Overcoming the Achilles' Heel of Consumer Protection: Limiting Mandatory Arbitration Clauses in Consumer Contracts' (2018) 46 Hofstra Law Review 363, 365.

²⁸ Omri Ben-Shahar, 'The Paradox of Access Justice' (2016) 83 The University of Chicago Law Review 1755.

²⁹ Robin J. Effron, 'Ousted: The New Dynamics of Privatised Procedure and Judicial Discretion' (2018) 98 Boston University Law Review 127, 128: 'We are living in an era of robust privatized procedure. Arbitration and other private dispute resolution forums provide a complete exit from the procedure and personnel of the public courts.'

another step, and a giant one, in the privatisation' of American contract law.'³⁰, arguing that in contracts of adhesion, where consumers have no meaningful influence over the terms, the cost of arbitration and the loss of a right to trial by jury are substantial normative problems when analysing consumer contracts. Smith refers to the origin of arbitration as having been 'so that parties, with equal bargaining power, could reduce the costs of litigation by agreeing to resolve their dispute through the use of a mutually acceptable arbitrator', but that their use in consumer contracts in the United States had typically been in contracts of adhesion, in which no meaningful negotiation or understanding of the arbitration clause was possible by the consumer:

Mandatory arbitration effectively strips consumers of their rights to protect themselves from large corporations and jeopardizes the American judicial process of developing common law.³¹

The stultification of jurisprudence in relation to the builder's liability for defects is evidence of similar effects in Ireland.³²

Shapiro takes a different view of arbitration clauses, pointing out that the civil justice system is 'a public institution administered largely by private parties', evidenced in particular by the parties' ability to initiate proceedings and settle them without recourse to the court in which the proceedings are ostensibly taking place. He argues, therefore, in favour of a more interventionist approach by courts into arbitral processes, such as allowing review of procedural decisions and limiting enforcement of awards that exhibit procedural irregularity, rather than prohibiting arbitration entirely.³³

Collins has argued that there are benefits as well as disadvantages to consumer in entering into arbitration agreements: confidentiality of the process, flexibility and control of the process.³⁴ It is submitted that confidentiality, in the context of residential construction, is

³⁰ Charles Knapp, 'Taking Contracts Private- the quiet revolution in contract law' (2002-2003) 71 Fordham Law Review 761.

³¹ Shelly Smith, 'Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System' (2001) 50 DePaul Law Review 1191, 1191-1192, 1222.

³² The last significant case to deal with the builder's liability for residential construction defects was *Ward v McMaster*, which was decided around the time of the introduction of the LSBA, with its mandatory arbitration agreement. There have been almost no decisions of the Superior Courts on this issue since then notwithstanding widespread incidence of housing defects during the same period.

³³ Matthew A. Shapiro, 'Delegating Procedure' (2018) 118 Columbia Law Review 983, 988, 992.

³⁴ David Collins, 'Compulsory Arbitration Agreements in Domestic and International Consumer Contracts' (2008) 19 King's

of greater benefit to the range of potential defendants (who may suffer reputational damage) than to the consumer. While the value of homes may be affected by the publicity that can attend the discovery of defects, individual owners have no control over whether one of their number may disclose the fact of the defects, perhaps in the hope that media coverage may prompt State assistance or voluntary assistance from the builder/developer.

Procedural flexibility may also be less valuable to the plaintiff home owner than to the defendant. The existing procedures available through the Irish litigation process, such as the joining of the appeals in *Mitchell*, may only occur in arbitral proceedings with the consent of all of the parties.³⁵ The inherent jurisdiction of a court to manage its own procedures (evidenced by the ‘test case’ method discussed in the 2005 Law Reform Commission Report³⁶) is considerably broader than the jurisdiction of an arbitral tribunal, which derives exclusively from the arbitration agreement.

The foregoing discussion suggests that a binding commitment to arbitration, in light of its other procedural disadvantages, outweighs the possible benefit to the consumer of arbitration. It is notable that pre-dispute arbitration clauses with consumer have been prohibited in a number of jurisdictions, including Quebec³⁷ and Victoria.³⁸

Another significant problem of arbitration agreements in residential construction contracts is that the home owner has no means of appealing the award of an arbitrator or arbitral tribunal that has erred in law; the grounds on which an award may be set aside by the High Court are set out at Article 34 of the UNCITRAL Model Law, as transposed into Irish law by the Arbitration Act 2010. The grounds are expressly stated to be exhaustive, and deal with matters such as the capacity of the parties, whether a party was given proper notice of the appointment of the arbitrator, and where the award deals with a dispute outside the terms of the submission to arbitration.³⁹ It is a fundamental principle of

Law Journal 335, 342.

³⁵ Arbitration Act 2010, Section 16.

³⁶ Law Reform Commission, *Report on Multi-Party Litigation*, LRC 76-2005 (2005).

³⁷ Section 11.1 of the Consumer Protection Act provides as follows: ‘ Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer’s right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited. If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.’

³⁸ Domestic Building Contracts Act 1995, s 14.

³⁹ UNCITRAL Model Law, Chapter VII, Article 34 (2), adopted into Irish law by means of section 6 of the Arbitration Act 2010.

arbitration law that an award cannot be set aside where an arbitrator makes an error of law.⁴⁰ Budnitz comments, with regard to arbitrations in relation to consumer financial services, that the lack of a requirement for an arbitrator to follow the law ‘spares the financial institution the bad publicity surrounding unfavourable factual determinations and leverage other customers would receive from legal precedents beneficial to them’.⁴¹

Dispute resolution in consumer contracts – the European dimension

The academic debate and regulatory struggles around consumer arbitration in the United States find a counterpoint in Europe with the introduction of the 2013 EU Directive on consumer dispute resolution (‘the Consumer ADR Directive’) and the 2013 Regulation on online dispute resolution (‘the Consumer ODR Regulation’), each a significant development in the European procedural landscape of consumer protection.⁴² The Consumer ADR Directive applies to both domestic and cross-border disputes⁴³ between consumers and traders for both goods and services⁴⁴ and requires Member States to facilitate access by consumers to alternative dispute resolution procedures, and to ensure that disputes within the scope of the Directive may be submitted for resolution to an ADR entity within the meaning of the Directive.⁴⁵

The Consumer ODR Regulation provides for a European online dispute resolution platform (‘the ODR platform’) for resolution of disputes between consumers and traders. It is limited to disputes arising from contracts concluded online, however, and, as such, unlikely to be of relevance in cases involving residential defects, at least until home sales

⁴⁰ In *Snoddy v Mavroudis* [2013] IEHC 285, the Court refers to the decision of the House of Lords in *Lesotho Highlands Development Authority v Impreglio SpA and others* [2001] 1 AC 221, in which Lord Steyn stated that the grounds for non-enforcement of an arbitrator’s award under the New York Convention should be construed narrowly ‘and should never lead to a re-examination of the merits of the award’ [30]; in *Snoddy*, the Court refused to set an arbitral award aside for an error of law, on the grounds that to do so ‘would be usurping the Arbitrator’s role’. [35].

⁴¹ Mark E. Budnitz, ‘Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection’ (1995) 10 Ohio St J Disp Resol 267. 287.

⁴² Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 (implemented by SI 343/2015, European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 and SI 368/2015, European Union (Alternative Dispute Resolution for Consumer Disputes)(No.2) Regulations 2015) and Directive 2009/22/EC (Directive on Consumer ADR); Regulation (EC) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulations (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). The Consumer ADR Directive was transposed into Irish law by the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015, S.I. 343/2015, and the European Union (Alternative Dispute Resolution for Consumer Disputes) (No.2) Regulations 2015, S.I. 368/2015.

⁴³ Directive on Consumer ADR, Article 2 (1).

⁴⁴ Ibid Article 4 (1).

⁴⁵ Ibid Article 5 (1).

contracts migrate online.⁴⁶

A ‘grey list’ of potentially unfair terms is attached to the Unfair Contract Terms Directive⁴⁷ which cannot be enforced in business to consumer transactions. The Directive and the Irish implementing regulation have given rise to a number of cases relating to residential housing in Ireland, but none to date have considered the issue of whether an arbitration agreement contained in a building contract is an unfair term within the meaning of the Directive.⁴⁸

The issue has, however, been considered by the courts of England and Wales on several occasions. In *Mylcryst Builders Ltd. v Buck*⁴⁹ Ramsay J. found that an arbitration clause in a residential construction contract was unenforceable on the basis of the implementing regulations of the Unfair Contract Terms Directive, referring to a reference in the Directive’s schedule of potentially unfair terms to a term ‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions...’.⁵⁰

The Directive (and the English and Irish implementing legislation) incorporates a ‘grey list’ of terms which ‘shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. Accordingly, it is not sufficient to

⁴⁶ There are some movements in this direction with the Law Society of Ireland’s E-conveyancing project, which the Society has indicated should be implemented in 2019: Law Society of Ireland, ‘Overview of Proposed eConveyancing System’, (2015), and developments in blockchain technology look set to facilitate the online purchase and conveyancing of land in the coming years – see Peter Sparkes, ‘Blockchain Conveyancing?’ in Padraic Kenny and Sandra Murphy (eds) *The Future is Now! eConveyancing and Title Registration* (Clarus Press, Dublin, 2018).

⁴⁷ Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, implemented in Ireland by the European Communities (Unfair Terms in Consumer Contracts) Regulations, SI 27/1995 as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000, SI No. 307 of 2000 amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013, SI 160 of 2013.

⁴⁸ In *Allied Irish Banks v Coughlin* [2016] IEHC 752, the High Court refused summary judgment in proceedings to enforce a loan agreement on the basis that the court was required by the Unfair Contract Terms Directive to consider of its own motion whether the agreement was unfair for the purposes of the Directive, but in *Cronin v Dublin City Sheriff & Anor* [2017] IEHC 685 the High Court refused to set aside a possession order where the court that had granted the order did not consider whether the mortgage agreement was in breach of the Unfair Contract Terms Directive and Regulation.

⁴⁹ *Mylcryst Builders Limited v Buck* [2008] EWHC 2172.

⁵⁰ Unfair Terms in Consumer Contracts Regulations 1999, SI 2083/1999, paragraph 1 (q) of Schedule 2, which mirrors paragraph (1) (q) of Schedule 3 of the Irish equivalent, the European Communities (Unfair Terms in Consumer Contracts) Regulations, SI 27/1995.

demonstrate that an arbitration clause is in a consumer contract; the consumer, to resist enforcement of the clause, must also demonstrate the additional facts referred to above in terms of the imbalance of rights and obligations, detriment, etc.

Ramsay J. in *Mylcris* emphasised that ‘given the matters that have to be taken into account in determining fairness, each case must depend on its own facts’⁵¹ but took the view that ‘...the arbitration clause is a requirement which prevents Mrs Buck from having access to the courts and causes an imbalance between the Claimant as a professional builder and Mrs Buck as a layperson, to her detriment’. Similarly in *Zealander v Laing Homes*⁵² an arbitration agreement in an NHBC contract⁵³ was held to be unfair and unenforceable.

Negotiated settlement procedures and alternative dispute resolution

Another trend in dispute resolution is that of courts directing parties to submit their disputes to a dispute resolution procedure outside the court. In Ireland, courts have had the power to direct the parties to consider mediation for a number of years.⁵⁴ This power is now established in primary legislation by the Mediation Act 2017, which has been in force since January 2018. The Act provides that solicitors or barristers, prior to issuing proceedings on behalf of a client, must advise the client to consider mediation as a means of attempting to resolve the dispute, and must inform the client in relation to the nature and benefits of mediation services.⁵⁵ The Act also provides that a court may invite parties to proceedings to consider mediation in order to resolve their dispute, and to facilitate this may adjourn the proceedings or give such order or direction as is necessary⁵⁶, in which case the limitation period under the Statutes of Limitations is suspended during the period of the mediation⁵⁷.

The court may take ‘any unreasonable refusal or failure by a party to the proceedings’ to

⁵¹ *Mylcris*, (n 49) [42].

⁵² [2000] TCLR 724. See s. 91 (1) Arbitration Act 1996, and *Heifer International v Christiansen* [2007] EWHC 3015, per HHJ Toulmin.

⁵³ As will be discussed further in chapter 6, NHBC is the main home warranty provider in the United Kingdom.

⁵⁴ The Rules of the Superior Courts and the Circuit Court rules facilitated referral to mediation or conciliation in order to resolve disputes prior to the introduction of the Mediation Act 2017.

⁵⁵ Mediation Act 2017, s 14 (1).

⁵⁶ *Ibid* s 16 (1), s 19 (1).

⁵⁷ *Ibid* s 18 (1).

consider mediation or to attend mediation into account for the purposes of making a costs order in the proceedings.⁵⁸ The promotion of mediation may be seen in the context of the rise, both in Ireland and in our neighbouring jurisdiction of England and Wales, of active procedural management, both by procedural rules and by courts, of litigation, in order to minimise cost and delay.⁵⁹

The phenomenon of ‘managerial judging’ was described in 1986 as ‘a set of techniques for inducing settlements’, which emerged in order to encourage litigants to limit the number of issues to be decided, in order to facilitate efficient disposal of proceedings.⁶⁰ Resnik has criticised managerial judging for changing the emphasis of the judge’s role from adjudication to case management and facilitating settlement, with little oversight of this enhanced procedural role or evidence of its normative value or impact.⁶¹

In the Irish context, there is very little evidence on which to base any substantial analysis of experience of consumer dispute resolution in residential defects disputes since the introduction of the LSBA in 1987, in part due to the arbitration clause contained in that contract. In principle, the promotion and development of mediation for such disputes should be a positive one for consumers as it seems likely to lead to early and cost-effective resolution of disputes.

The power of courts to take a refusal to mediate into account in making costs awards, however, could have adverse consequences for consumers where a relationship with a builder has broken down (for example, where a builder persistently refused to rectify defects, and may benefit from the prolongation of the dispute resolution process where the defects are having a serious and detrimental impact on the home owner’s quality of life or that of their family).

Agapiou refers to the ‘gatekeeper’ role played by lawyers in relation to mediation, noting

⁵⁸ *Ibid* s 21.

⁵⁹ 1998 No. 3132 (L.17) Supreme Court Of England And Wales County Courts The Civil Procedure Rules 1998, [1.4].

⁶⁰ E. Donald Elliott, 'Managerial Judging and the Evolution of Procedure' (1986) 53 *University of Chicago Law Review* 306, 308.

⁶¹ ‘In the rush to conquer the mountain of work, no one...has assessed whether relying on trial judges for informal dispute resolution and case management, either before or after trial, is good, bad, or neutral. Little empirical evidence supports the claim that judicial management “works” either to settle cases or to provide cheaper, quicker, or fairer dispositions’. Judith Resnik, 'Managerial Judges' (1982-1983) 96 *Harvard Law Review* 374.

that a ‘growing body of research demonstrates that lawyers control which disputes are mediated, the choice of mediator and the prioritisation of interests within the process itself’.⁶²

Resolution of disputes in residential construction - comparative view

The Consumer Code for Home Builders was established in 2010 and applies to home builders in the United Kingdom who wish to secure registration with the main home warranty providers.⁶³ The Code imposes various requirements on participating home builders; for example, it requires new home buyers to be given pre-purchase information (such as information on the scope of the warranty cover), a reservation agreement dealing with the purchaser price and identity of the property. One of the important features of the Code is that it provides a dispute resolution service between purchasers and home builders in respect of the first two years following purchase of a home.⁶⁴ The dispute resolution scheme is relatively limited in its scope, however, as it is available only in respect of defects claims of a value of £15,000 or less.

Australia – resolution of disputes in residential construction

New South Wales Fair Trading operates a free dispute resolution service for residential building disputes. The parties must agree to the referral of the dispute to Fair Trading, which then attempts to resolve the dispute. A customer service officer from Fair Trading will contact the trader in order to seek a mutually acceptable resolution to the consumer’s complaint.⁶⁵ Complaints relating to building defects, if not resolved, can then be referred to a building inspector. A building inspector can make a Rectification Order requiring the trader to repair defective work.⁶⁶ If the matter is not resolved following intervention by NSW Fair Trading, the home owner may refer the dispute to the New South Wales Civil and Administrative Tribunal.⁶⁷ In New South Wales the Consumer Trader and Tenancy

⁶² Andrew Agapiou, 'The factors influencing mediation referral practices and barriers to its adoption: A survey of construction lawyers in England and Wales' (2015) 7 *International Journal of Law in the Built Environment* 231, 234.

⁶³ See www.consumercode.co.uk.

⁶⁴ Consumer Code for Home Builders, para. 5.

⁶⁵ See fairtrading.nsw.gov.au.

⁶⁶ New South Wales Home Building Act, s 48.

⁶⁷ Home building disputes are listed within 6-8 weeks. There is a considerable amount of user-friendly information on the process on the Tribunal’s website, as well as a facility for online submission of a complaint, which may mean that the procedure can be completed by a consumer without retaining a lawyer.

Tribunal hears ‘building claims’ up to \$500,000 AUD.

In the state of Victoria, disputes in relation to ‘domestic building work’⁶⁸ may be referred to Domestic Building Dispute Resolution Victoria (‘DBDRV’) for resolution by conciliation.⁶⁹ If the matter is accepted by DBDRV as suitable for conciliation, a dispute resolution officer will act as conciliator and will follow the Act’s procedures for conduct and completion of the conciliation.⁷⁰ There is also provision in the legislation for an assessor to be appointed in order to estimate the outstanding work required to rectify or to complete the domestic building works, and to report to the parties on the work required with an estimate of the cost.⁷¹

The Chief Dispute Resolution Officer of DBDRV has powers to issue dispute resolution orders in respect of disputes relating to breach of warranties in residential building contracts, failure to comply with the standard specified in a domestic building contract, failure to complete the works or failure to pay for work carried out under a domestic building works.⁷² Orders may be made requiring the builder to rectify defective work, to rectify damage caused, and to complete the work.⁷³

If the parties are unable to resolve their dispute, they may apply to the Victorian Civil and Administrative Tribunal to resolve the dispute. Section 14 of the Domestic Building Contracts Act 1995 provides that a clause in a domestic building work requiring disputes under the contract to be referred to arbitration is void.⁷⁴

In Western Australia, disputes in relation to residential building contracts may be referred to the Building Commission, and may be referred in default of resolution to the State Administrative Tribunal, which has power to order rectification of defective work by a contractor, or to order the payment of the rectification cost by a building contractor to a

⁶⁸ S 44 (2) of the Domestic Building Contracts Act 1995 defines a domestic building work dispute as a dispute arising between a building owner and a builder, building practitioner, sub-contractor or architect in relation to domestic building work or a domestic building contract.

⁶⁹ Domestic Building Contracts Act 1995, Part 4, as amended by the Building Legislation Amendment (Consumer Protection) Act 2016 (Victoria).

⁷⁰ S 46, Domestic Building Contracts Act 1995.

⁷¹ S 48, Domestic Building Contracts Act 1995.

⁷² S 49, Domestic Building Contracts Act 1995.

⁷³ S 49B, Domestic Building Contracts Act 1995.

⁷⁴ Bailey notes that this provision does not preclude an arbitration clause being entered into after a dispute has arisen, citing *Swintons Pty. Ltd. v Age Old Builders Pty Ltd.* [2005] 13 VR 381, [6] per Callaway J and [21] per Chernow V. Julian Bailey, *Construction Law* (2nd edn, Informa Law, 2016).

building owner.⁷⁵

Dispute Resolution – options for reform

The essence of any dispute resolution scheme that might be established for the benefit of consumers is that it should be swift and inexpensive. Under Irish law, a home owner may be waiting for years for redress if pursued through arbitration or litigation.

There are models for consumer arbitration schemes already in operation. The Irish Travel Agents Association Redress Scheme deals with claims up to a value of €25,000 (limited to €5,000 per person). Parties have the option of telephone mediation, a process that normally takes six weeks from receipt of the application, for which a fee of €50 is payable by the consumer and €300 by the ITAA member.

Consideration would have to be given to the appropriate claim limits and fees for a similar scheme to operate as between builders and home owners, but there is no reason that such a scheme could not be put in place, which would offer a significantly cheaper and more accessible route to a resolution of consumer – builder disputes. The Construction Industry Register Ireland offers a mediation service but is limited to providing a list of mediators, and thus adds little to what a party's solicitor would be required to advise them in any event. The service falls well short of the ITAA scheme, which is provided on behalf of the ITAA by the Centre for Effective Dispute Resolution, an internationally recognised dispute resolution body.

It is noteworthy that the Centre for Effective Dispute Resolution also administers the Dispute Resolution Scheme of the Consumer Code for Home Builders in the UK. There is some criticism of that scheme in the report of the All-Party Parliamentary Group Inquiry into the Quality of New Build Housing in England⁷⁶, to the effect that unreasonable time-limits have been imposed on consumers in disputes with builders, and that the requirement that the Scheme is a pre-condition to referral to arbitration or litigation cited as a significant barrier for consumers.⁷⁷ Any scheme would need to balance the need for speedy and cost-effective resolution of disputes with consumers' rights of access to the

⁷⁵ Building Services (Complaints Resolution and Administration) Act 2011.

⁷⁶ 'More Homes, Fewer Complaints', All Party Parliamentary Group for Excellence in the Built Environment, Report from the Commission of Inquiry into the quality and workmanship of new housing in England, July 2016.

⁷⁷ Ibid.

courts.

Another option would be to follow the recommendation of the above Inquiry that a New Homes Ombudsman should be appointed to mediate disputes between consumers and builders or warranty providers, paid for by a housebuilders' levy. The report emphasises that the Ombudsman should be completely independent of the construction sector.

Gill, Williams, Brennan and Hirst have argued that dispute resolution systems for business – to – consumer (B2C) disputes, notwithstanding the recent intervention of European Union law, should be developed in accordance with a number of key principles in order to ensure legitimacy and procedural quality.⁷⁸ The importance of a model that incorporates these principles into the design of dispute resolution systems is demonstrated by the proliferation of systems and dispute resolution methods, and the trend for such methods to become dominant, with court-based methods becoming the exception:

If, as seems likely, the courts end up as an infrequently used alternative to CDR (rather than vice versa), CDR [Consumer Dispute Resolution] mechanisms will take on a heavy mantle as the primary guardians of individual justice in relation to C2B disputes.⁷⁹

They propose a dispute resolution model that involves five stages. Firstly, research and analysis should be carried out of the existing dispute resolution system and context. The next stage is goal-setting, in which the range of possible alternatives for the dispute resolution system are considered. The designer should then consider system design choices including jurisdiction, funding (public, private, or a combination of both, and whether the consumer should be charged a fee to access the scheme), governance (including accountability, independence, impartiality and transparency) and the dispute resolution philosophy of the system. The fourth stage is process design choices, including process architecture and the attributes of decision-makers. Finally, the system should incorporate the means of its own evaluation, where the experience of operation of the system is fed back into the system.⁸⁰

A striking feature of the model is the degree to which it prompts consideration of the values that are to inform the dispute resolution system; for example, the authors elaborate

⁷⁸ Chris Gill, Jane Williams, Carol Brennan and Carolyn Hirst, 'Designing consumer redress: a dispute system design (DSD) model for consumer-to-business disputes' (2016) 36 *Legal Studies* 438.

⁷⁹ *Ibid.*, 463.

⁸⁰ *Ibid.*, 451, 454-455.

on their conception of ‘dispute resolution philosophy’ to suggest that, in areas where consumer detriment is likely to be high, it may be more appropriate for the system to incorporate consumer advice and standard-raising activities; essentially, this is a question of whether the system should seek only to respond to individual disputes, or whether it should also look to prevent disputes arising generally.⁸¹ They go on to observe that the maintenance of future relationships, often cited as a significant benefit of mediation, may be unnecessary in C2B disputes, and that rights-based dispute resolution systems may be preferable in such circumstances. This is a very significant point in the Irish context, where mediation has been promoted, via the Mediation Act 2017, as potentially suitable to most disputes.

The authors characterise mediation as an ‘interest-based’ process, in contrast to adjudication or ombudsman schemes, both of which they regard as potentially more appropriate if a ‘rights-based’ approach is to be taken.⁸² Sidoli del Ceno suggests that criticism of compulsory mediation is typically based on concerns relating to Article 6 of the European Convention on Human Rights⁸³, but defends mediation on the basis that it does not necessarily entail the final determination of rights, and merely delays, rather than prevents, access to the courts.⁸⁴

Statutory adjudication as a possible model

Another option for dispute resolution is to extend the scope of the Construction Contracts Act 2013. This Act established a new statutory dispute resolution procedure for payment disputes under construction contracts, which involves appointment of an adjudicator to resolve the dispute within a period of 28 – 42 days. The adjudicator’s decision is legally binding on an interim basis, which means that the amount awarded by the adjudicator must be paid. The parties remain free to refer the dispute to another resolution process (such as arbitration) subsequent to the adjudication, which may result in the adjudicator’s decision being effectively overturned, but the philosophy of the process is that parties should ‘pay now, argue later’. The Act does not apply to contracts for construction of

⁸¹ Ibid 457.

⁸² Ibid 458.

⁸³ The relevant part of Article 6 (1) is as follows: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

⁸⁴ Julian Sidoli del Ceno, ‘Compulsory mediation - civil justice, human rights and proportionality’ (2014) 6 International Journal of Law in the Built Environment 286, 294.

dwellings, however, unless they are greater than 200 sq. metres, and where one of the parties to the building contract intends to live in the dwelling.⁸⁵

The English legislation on which the Act was based also contains an exemption for residential building contracts from the scope of the Act (see s 106 of the Housing Grants, Construction and Regeneration Act 1996 (England and Wales)), but a number of commentators (and a judge of the High Court of England and Wales) have queried why the process should not be available in respect of all building contracts, given the significant savings in time and cost that can be achieved with a fast, cost-effective method of resolving disputes.⁸⁶

Hussey observes that the residential exclusion is ‘not unusual, but neither is it universal’, noting that contracts for residential construction are not excluded from adjudication legislation in New Zealand, nor in the Australian territories of the Northern Territory, Western Australia, and Tasmania.⁸⁷ Hussey suggests that any concerns in relation to loss of entitlements by the inclusion of consumer contracts within the scope of the 2013 Act could be dealt with by improving the quality of the information to be provided in notices served under the Act. The author mentions, for example, that the New Zealand legislation requires a notice of adjudication addressed to a residential occupier to be accompanied by an explanation of the adjudication process, and a statement of the occupier’s rights.⁸⁸

In *Westfields Construction Ltd. v Lewis*, Coulson J. remarked that s. 106:

...was intended to protect ordinary householders, not otherwise concerned with property or construction work, and without the resources of even relatively small contractors, from what was, in 1996, a new and untried system of dispute resolution. It was felt that what might be the swift and occasionally arbitrary process of construction adjudication should not apply to a domestic householder.⁸⁹

In his conclusions, Coulson J. suggested that the continuance of the s.106 exception was

⁸⁵ Section 2 (1), Construction Contracts Act 2013.

⁸⁶ Philip Britton, ‘Adjudication and the “Residential Occupier Exclusion”: Time for a Rethink?’, Society of Construction Law, May 2015.

⁸⁷ Anthony Hussey, *Construction Adjudication in Ireland*, (Dublin, Routledge 2017), 17.

⁸⁸ *Ibid* 17.

⁸⁹ *Westfields Construction Ltd. v Lewis* [2013] EWHC 376, [10].

‘hard to justify’ in light of the experience to date of adjudication.⁹⁰

The fact that the legislation was not designed to accommodate disputes between homeowners and builders does not, of course, mean that the procedure is not appropriate to disputes. However, it must prompt consideration of what features the procedure must have in order to be the right model for resolving such disputes. Britton queries whether courts should ‘lean against’ bringing a dispute within the Act, as the requirement to submit disputes to adjudication necessarily curtails a householder’s common law rights, and right of access to the courts.⁹¹

The 2005 decision in *Bryen & Langley v Boston*⁹² included a claim by the respondent that the provisions of a building contract providing for contractual adjudication were unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999. Rimer J. cited the dicta of Lord Bingham in *Director General of Fair Trading v First National Bank plc*.⁹³, to the effect that the requirement that, to be regarded as unfair, a term had to create an imbalance in the respective rights of the parties, contrary to the requirement of good faith. Good faith, according to Lord Bingham, consisted of ‘...fair and open dealing...that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps’.⁹⁴

The problem for the defendant in *Bryan*, according to Rimer J., was that his own agent imposed the contract terms on the supplier, which contained the provision for contractual adjudication; the same problem, the court noted, as had applied in the cases of *Lovell v Legg and Carver*⁹⁵ and *Westminster Building Company v Beckingham*.⁹⁶ It seems more likely, if each of the householders in these cases had in fact failed to understand the nature of adjudication, that this is more attributable to failures on the part of their contract administrators and solicitors.

⁹⁰ ‘Adjudication in construction contracts is generally thought to have worked well, and it has certainly reduced costs. Is it not time for s.106, and the other exceptions to statutory adjudication, to be done away with, so that all parties to a construction contract can enjoy the benefits of adjudication?’ *Westfields Construction Ltd. v Lewis* [2013] EWHC 376, [61].

⁹¹ Britton (n 86), 8.

⁹² [2005] EWCA 973.

⁹³ [2001] UKHL 52.

⁹⁴ Ibid 494.

⁹⁵ [2003] BLR 452.

⁹⁶ [2004] EWHC 138; [2004] BLR 163.

This suggests that homeowners should have options for dispute resolution, and the relationship between different types of dispute resolution, explained to them pre-contract.

There could also be significant implications for the procedure for enforcement of adjudicator's decisions. Enforcement of adjudicator's decisions under the Construction Contracts Act 2013 is dealt with pursuant to regulations made pursuant to the Act⁹⁷, which provide for applications for enforcement to be dealt with on affidavit. This procedure should be relatively speedy and cost-effective. Even where home owners are warned of the cost and risk of challenging enforcement of adjudicator's decisions, however, there could be cases like the *Westfield* case where a lengthy court procedure results from challenge to a relatively small award, which would eradicate the original savings in time and cost of the adjudication procedure.

Is adjudication the right type of scheme for disputes between builders and consumers?

In an exhaustive comparison and analysis of the procedures of the US and UK Financial Ombudsman services, Schwarcz identifies a number of features of the UK service that contribute to its effectiveness in dealing with disputes between consumers and financial services providers in the US, including a substantial 'filtering' process at the initial stage, which is often sufficient to resolve the dispute. Schwarcz notes that both the US and UK Financial Services ombudsman processes are 'fundamentally inquisitorial, with a neutral third party free to look beyond the parties' arguments in scrutinizing the merits of the dispute...this structure is crucial in making ADR truly accessible to uninformed consumers, who generally will have little sense of how to frame or substantiate their complaints'.⁹⁸

The process is both inquisitorial and flexible; Schwarcz describes it as 'combining ADR elements - including negotiation, conciliation and arbitration - into a single coordinated Scheme'.⁹⁹ Another important feature of the UK system, according to Schwarcz, is that the call centre is an effective filtering mechanism; only one in six calls are referred on to an adjudicator, in part because the £450 fee payable by an insurer at that point provides

⁹⁷ Rules of the Superior Courts (Construction Contracts Act 2013) 2016 SI 450/2016.

⁹⁸ Daniel Schwarcz, 'Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict', (2009) 83 Tul. L. Rev 735.

⁹⁹ *Ibid* 789.

an incentive to settle with the complainant, and requires insurers ‘to internalize the cost of resolving their disputes with their policyholders’.¹⁰⁰

This type of incentive may not be possible for Irish residential construction disputes, however, as the fee would need to be significantly larger in order to be comparable to the amount in dispute, and contractors would resist high fees that could arguably encourage home owners to make complaints.

Multi-party litigation of defects claims

It was reported in January 2014 that 400 new claims relating to homes damaged by pyrite had been submitted to the Commercial Court for case management.¹⁰¹ The High Court has an inherent jurisdiction to try one of a number of cases with similar issues as a test case. However, this is a different procedure to the ‘class action’ procedure from the United States. A significant development in this regard has occurred this year with the publication of the European Union ‘New Deal for Consumers’ which [requires Member States to provide for the means of collective redress]. This suggests that breaches of the Consumer Rights Directive and of the Unfair Contract Terms Directive will be able to be collectively litigated in future]. It is unclear how such proposals would interact with existing dispute resolution practice in residential construction disputes, particularly arbitration agreements.

The closest equivalent in Irish law to the class action is the ‘representative action’, which is governed by Order 15, Rule 9 of the Rules of the Superior Courts, which provides as follows:

Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.¹⁰²

The Law Reform Commission Report on Multi-Party Litigation noted that there are various categories of multi-party litigation for which procedural avenues exist in Irish law,

¹⁰⁰ Ibid 796.

¹⁰¹ <http://www.independent.ie/irish-news/building-giants-to-fight-liability-as-400-pyrite-claims-filed-29931191.html>

¹⁰² Rules of the Superior Courts, SI 15/1986, Rule 15, Order 9.

but that procedural reform of the area was required.¹⁰³ As an example of a public action that acted as a substitute for multi-party litigation, the Commission referred to the power of the Director of Consumer Affairs to apply to the High Court for an order restraining use of unfair contract terms¹⁰⁴, which was used in relation to construction contracts in the Law Society litigation in 2001.¹⁰⁵ The Report principally considered private actions, however, indicating that under Irish law, the only means of pursuing multi-party litigation is via representative actions or test cases.¹⁰⁶

As the Commission had noted in its earlier consultation paper on the subject, the representative action pursuant to Order 15 is subject to various limitations established in the jurisprudence, which significantly inhibit its utility in practice. The action can generally not be brought in respect of tort claims, and is limited to applications for injunctive or declaratory relief, rather than damages, which led the Commission to comment in its 2005 report that ‘the representative action has remained an underused and largely overlooked means of dealing with the demands of multi-party litigation’.¹⁰⁷

The test case method was also discussed in both the Consultation Paper and Report, but was regarded by the Commission as insufficient to deal with multi-party litigation, in view of its lack of procedural structure and the fact that all claims related to the subject-matter of the test case were nonetheless regarded as separate from a legal perspective.¹⁰⁸

The Commission report also notes that the joinder procedure can be used effectively in order to allow a group of plaintiffs to combine their actions into a single action against a given defendant, giving the example of *Abrahamson v Law Society*¹⁰⁹, in which several hundred plaintiffs sought the same relief against a single defendant. The difficulty with

¹⁰³ Law Reform Commission, *Report on Multi-Party Litigation, LR 76-2005*, (2005), 1.

¹⁰⁴ European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, Regulation 8 (1).

¹⁰⁵ As discussed above in chapter 2, however, the order of the High Court failed to prevent the practice, necessitated a number of further practice notes from the Law Society warning practitioners that disciplinary proceedings could follow if solicitors acting for developers continued to press for unfair terms. Given that the Law Society has not, in fact, commenced disciplinary measures against any solicitor notwithstanding the continuance of the practice, it is questionable whether the High Court injunction available pursuant to Regulation 8 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 amounts to ‘appropriate and effective means to prevent the continued use of such terms’ for the purposes of Article 7 of the EC Directive on Unfair Terms in Consumer Contracts (Council Directive 93/13 EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ No L 95/29, 21 April 1993).

¹⁰⁶ Law Reform Commission (n 103), 9.

¹⁰⁷ Law Reform Commission, *Consultation Paper on Multi-Party Litigation (Class Actions) (LRC CP 25 - 2003)*, (2003), 4-10; Law Reform Commission (n 103), 10.

¹⁰⁸ Law Reform Commission (n 103), 10-13.

¹⁰⁹ [1996] 1 IR 403.

this approach for residential construction claims, however, would be that residential owners typically would be seeking damages, the quantum of which would vary between plaintiffs; in *Mitchell v Mulvey Developments*¹¹⁰, the court dealt with this issue by considering the liability issues in the aggregate, but then proceeded to deal with three groups of plaintiffs separately for the purpose of assessment and award of damages for each. In effect, the three proceedings had been issued separately and each had their own distinct High Court record number, and were disposed of via a single judgment of the Court of Appeal.

The Commission ultimately recommended a new form of ‘Multi-Party Action’¹¹¹, structured by means of a ‘lead’ case that would represent the interests of the litigants in the action¹¹², with provision for the court to certify proceedings as multi-party actions where the court was satisfied that such an action ‘would be an appropriate, fair and efficient procedure in the circumstances.’¹¹³ The possibility of a multi-party action might be particularly relevant for residential construction defects, as defects in apartment and housing developments are typically not isolated occurrences, but affect multiple units in the same development. The problems of insolvency of defendants and of insurance coverage of the defendant group would remain, however.¹¹⁴

Edwards refers to the importance of class actions for negative-value claims, where the cost of litigation would exceed the value of the claim, and is critical of the impact of arbitration on the public administration of justice, noting that arbitration ‘cloaks countless conflicts’, deprives the public of information on disputes resolved by arbitration, including legal precedent and the judicial articulation of social norms, and allows defendants to avoid reputational damage: ‘Industry-wide adoption of pre-dispute arbitration agreements now plunges entire fields of law into shadow.’¹¹⁵

Conclusion – dispute resolution

¹¹⁰ *Mitchell & Anor v Mulvey Developments & Ors* [2014] IEHC 37.

¹¹¹ The Commission deliberately avoided use of the term ‘class action’ commonly used in the United States, in order to distinguish between the procedures (Law Reform Commission (2005), 24.)

¹¹² *Ibid* 38-39.

¹¹³ *Ibid* 41.

¹¹⁴ As highlighted by the Law Reform Commission in the 1977 Working Paper, and as further discussed in Chapter 6.

¹¹⁵ Benjamin P. Edwards, ‘Arbitration’s Dark Shadow’ (2018) 18 Nevada Law Journal 427, 430.

Of the models discussed above, the New South Wales model offers a number of advantages for Irish residential construction disputes. The appointment of a publicly funded inspector to assess the remedial works required in a given dispute, and to put a value on those works, would be very valuable and would potentially save a great deal of time (as this phase of a construction dispute is often delayed while the parties arrange for expert reports and, ideally, for experts to meet and agree schedules of works and estimated costs).

The conciliation model used in Irish construction disputes is commonly used on commercial forms of contract, and is similar to mediation but with a recommendation issued by the conciliator if the parties fail to reach agreement amongst themselves. Again, this could be a useful method of bringing these disputes to an informed, provisional, resolution relatively quickly and without the expense of litigation or arbitration.

The recent introduction of the Mediation Act 2017 requires legal advisers to advise clients about the benefits of mediation prior to issuing proceedings. It seems inevitable, therefore, that there will be a significant growth in the resolution of disputes by mediation, and a consequent development of capacity and expertise for this method. As such, it could provide a cost-effective and accessible model for residential construction disputes, whether on the basis of a traditional mediation model or as a conciliation with a recommendation. Architects and surveyors could be appointed to a panel maintained by an independent building regulator in order to carry out inspections of building defects and residential construction sites where disputes have arisen, in order to contribute an expert's view on the specification and likely cost of remedial works to the dispute resolution method.

B: LIMITATION OF ACTIONS

Limitation periods are a highly significant procedural issue in building defects claims, in part because plaintiffs often seek to sue a range of potential defendants (including builders and designers) in both contract and tort. As limitation periods for tort actions will typically expire later than those in contract (for reasons discussed below), limitation periods for tort actions in building defects cases have generated a considerable amount of

jurisprudence in recent decades. The date of accrual of the cause of action is fundamental to any action and varies as between the laws of contract and tort, as further discussed in the following section.

Accrual of cause of action - contract

Under the law of contract, the cause of action for breach accrues upon the date of the breach. Canny notes in this regard that ‘In an action for breach of contract the cause of action is the breach, as a right of action accrues as soon as there has been a breach of contract, notwithstanding that no damage (or only nominal damage) has been suffered at that time.’¹¹⁶ In an action for breach of a construction contract, it is generally accepted that the cause of action will accrue upon practical completion of the works, as the contractor is entitled to rectify any breach of contract before that point.

If the contractor returns to the site to carry out further works, it is possible that any action for breach of contract in respect of those further works will accrue at the time of the breach, as there is generally no specific completion date in respect of works to repair defects during any defects liability period that may be specified by contract. Canny goes on to state that ‘In general the cause of action for defective work will arise at the time when the works as a whole are, or ought to have been completed.’¹¹⁷

The limitation period for actions in breach of contract arising from residential construction works, therefore, is generally uncontroversial; the date of completion will usually correspond with the date on which the developer’s solicitor notifies the home buyer’s solicitor of the need to carry out an inspection and snag list, or (at the latest) upon the date of transfer of the home, by which time any significant ‘snags’ should have been rectified, at which point the house can be said to be complete. There are no authorities from the Irish courts on the accrual of the cause of action for breach of contract in relation to the LSBA in light of the arbitration agreement.

¹¹⁶ Martin Canny, *Limitations of Actions* (2nd edn, Round Hall 2016) 183.

¹¹⁷ Ibid 187. The principle is subject to some modification where the contract provides for certification of work done in accordance with the contract by a contract administrator; as Canny points out, in that case ‘The right of action in respect of the work included in an interim certificate accrues when the certificate is (or ought to be) issued rather than when the work is done.’ (187).

Accrual of cause of action - tort

In the law of tort it arises on the date the wrongful act occurred (for torts which are actionable *per se*, such as the tort of trespass), or on the date of the damage resulting from the wrongful act.

In a series of decisions relating to building defects, the Irish courts have grappled with the question of when the cause of action in negligence accrues – essentially, to determine the point at which the damage arising from the defect can be said to have occurred. The courts have generally been unable to establish the specific date of manifestation of actionable damage from the evidence before them, notwithstanding the fact that the limitation period for actions in negligence expires, in principle, on a specific calendar date.

The 2017 decision of the Irish Supreme Court in *Brandley v Deane*¹¹⁸ affirmed the principle that the cause of action, in cases involving property damage arising from latent defects, accrues when the damage becomes manifest, whether or not it is discoverable or discovered.¹¹⁹ The court also affirmed the principle that the question of ‘discoverability’, which considers the point in time at which a defect could have been discovered, is not relevant to the question of when the cause of action accrues.

In rejecting the ‘discoverability’ test, the decision in *Brandley* is premised on the availability of evidence that distinguishes between the date on which the damage is manifest – in the words of McKechnie J., ‘capable of being discovered by a plaintiff’,¹²⁰ and a subsequent date on which the damage is discovered.

The limitation period is, consequently of an essentially unascertainable duration, causing unfairness to the parties, as well as the delay and expense of dealing with legal proceedings for which there may be a complete defence.

The Latent Damage Act 1986 was introduced in England and Wales order to deal with the

¹¹⁸ *Brandley & Anor v Deane & Ors* [2017] IESC 83.

¹¹⁹ In this, the court expressly approved the decision of the House of Lords in *Pirelli v Oscar Faber & Partners* [1983] 2 AC 1, [1983] 2 WLR 6.

¹²⁰ *Brandley*, (n 118), at 78.

injustice to plaintiffs highlighted in *Pirelli General Cable Works v Oscar Faber & Partners*¹²¹, of having time running at a point when defects had been neither discovered nor even discoverable. No such legislation has been introduced in Ireland, notwithstanding several recommendations of the Irish Law Reform Commission to that effect.¹²²

There is little academic analysis of the impact of limitation periods on consumer actions. This may be because many other jurisdictions have either modified the common law rule (such as England and Wales¹²³ and various Australian territories¹²⁴), or have significantly different procedural and substantive remedies governing building defects (in the case of France, Belgium, Egypt and other civil law jurisdictions in which the ten-year liability of builders and architects in respect of significant building defects is provided for by law and supported by decennial insurance).¹²⁵

England and Wales – accrual of cause of action in tort

The decision in *Cartledge v E. Jopling & Sons Ltd.*¹²⁶ applied s. 26 of the Limitation Act 1939, to the effect that the cause of action in tort accrues upon physical damage and not upon discovery of that damage. It is clear from the decision that the House of Lords struggled with the injustice of allowing the limitation period to run (and perhaps to expire) before the injury had been discovered by the plaintiff.¹²⁷

Lord Reid went on to find, however, that the 1939 Limitation Act specifically provided for the limitation period to be deferred in cases of fraud or mistake; therefore, the implication was that in all other cases, ‘time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation.’¹²⁸

¹²¹ [1983] 2 AC 1.

¹²² LRC 3 – 1982 Report on Defective Premises; LRC 64-2001 Report on Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury); LRC 104-2011 Report on Limitation of Actions.

¹²³ Limitation Act, 1980; Latent Damage Act, 1986.

¹²⁴ Building Act 1993, s 134 (Victoria); Home Building Act 1989, s 18E (New South Wales).

¹²⁵ As further discussed in chapter 6 below.

¹²⁶ *Cartledge v E. Jopling & Sons Ltd.* [1963] AC 758; [1963] 1 All ER 341.

¹²⁷ Lord Reid stated as follows in this respect: ‘It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action.’ *Cartledge* (n 128), 343.

¹²⁸ *Cartledge*, (n 126) 343.

In the 1982 decision of the House of Lords in *Pirelli*, chimneys were built as part of an extension to the plaintiff's premises; the works were completed in 1969. The plaintiff discovered cracking in the chimneys in 1977, but the court heard that the parties had agreed that the cracks must have appeared by April 1970. The House of Lords found that the cause of action in negligence had accrued when the cracking occurred at the top of the chimneys, notwithstanding the fact that it was not discovered until some years later. Lord Fraser distinguished between a defect, which might never cause damage, and damage itself, which would 'commonly consist of cracks coming into existence as a result of the defect even though the cracks may be undiscovered and undiscoverable'.¹²⁹

Following *Pirelli*, the Latent Damage Act 1986 introduced a discoverability criterion in respect of latent damage claims into the Limitation Act 1980. Negligence claims may now be brought in respect of defects within three years from the date on which the claimant knew, or ought reasonably to have known of the defect, up to a long-stop of fifteen years.¹³⁰

Accrual of the cause of action in tort under Irish law

Under Irish law, the date of accrual of the cause of action in tort in respect of a building defect is the date on which the defect caused damage to the building. Section 11 (2) (a) of the Statute of Limitations, 1957, provides that '*an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.*', but offers no guidance as to the determination of the date of accrual.

The separation of the concepts of the defect itself and the damage that it causes is fundamental to the reasoning of the Irish courts in a number of decisions dealing with this issue.

The concept of discoverability as the appropriate starting-point for the limitation period in tort was considered and adopted in the High Court decision in *Morgan v. Park*

¹²⁹ *Pirelli*, [1983] 2 WLR 6, at 12.

¹³⁰ Limitation Act 1980, Sections 14A and 14B, inserted by Latent Damage Act 1986, sections 1, 4 (1)(2).

Developments,¹³¹ in which Carroll J. held that the date of accrual of the action for negligence in the building of a house was the date of discovery of the defect or the date on which it should reasonably have been discovered.

The date of accrual was again discussed at some length in the 1991 Supreme Court decision in *Hegarty v. O'Loughran*.¹³² In holding that the relevant date was the date on which 'a provable personal injury, capable of attracting compensation, occurred to the plaintiff', the court rejected the 'discoverability' test in the *Morgan* decision, and instead adopted similar reasoning to that of Lord Reid in *Cartledge*, with the Chief Justice taking the view that there would be no need to provide for a limitation period based on 'discoverability' in cases of fraud,¹³³ if the general rule relating to the start of the limitation period was based on discoverability rather than actual damage.

In the 1999 High Court decision in *Irish Equine Foundation v. Robinson*,¹³⁴ the defendant architects and engineers had been retained for the design and supervision of the construction of an equine centre. The defendant's retainer commenced in 1979; the design was prepared in 1982; the certificate of practical completion was issued in March 1986; water ingress was discovered in late 1991, and proceedings were issued in January 1996.

The action in contract was clearly statute-barred. The only question before the court was whether the action in tort could be maintained. The plaintiff argued that the limitation period commenced when the ingress of water started in late 1991.

The High Court adopted the reasoning in *Pirelli* and affirmed the principle that discoverability 'cannot be relevant in considering what is the appropriate commencement date in respect of the limitation period'.¹³⁵ The court then went on to accept the defendants' argument that, if appropriately qualified experts had been retained to inspect the roof immediately after construction, they would have reported that the roof had been defectively designed. On that basis, therefore, the court held that the cause of action

¹³¹ *Morgan v. Park Developments* [1983] ILRM 156.

¹³² *Hegarty v. O'Loughran* [1991] 1 IR 148.

¹³³ s. 71 of the 1957 Act specifically provides that the limitation period does not begin to run, in cases where there has been fraud or fraudulent concealment by the defendant or his agent, 'until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it'.

¹³⁴ *Irish Equine Foundation v. Robinson* [1999] 2 IR 442.

¹³⁵ *Ibid* 445.

accrued upon completion of the building, and the action was statute-barred.

It might be argued that to insist upon a rule where damage must be observable before the cause of action can be said to accrue is simply the discoverability rule in another guise. The alternative approach, however, in accordance with the *Pirelli* decision and *Irish Equine*, is that a court may accept that a cause of action has accrued on a given date based on a hypothetical scenario where damage could have been observed at that date if the relevant building or section of the building had been examined. This seems a most unsatisfactory basis upon which to base a rule that requires precision in determining the limitation period, given the very serious consequences for the plaintiff of finding the action statute-barred.

Jurisprudence following Irish Equine – confusion reigns

In *O'Donnell v. Kilsaran Concrete*,¹³⁶ the presence of pyrite in construction blocks was regarded as a latent defect, but one which might never cause damage. On that basis, the cause of action in negligence based on the presence of pyrite in the blocks was held to accrue when damage was caused to the building due to a chemical reaction in the blocks caused by the presence of pyrite.

The court drew attention to the fact that no evidence was adduced by the defendants to refute this claim, notwithstanding the fact that a joint inspection was carried out with the defendant's expert, and that the defendants offered no evidence to contradict the evidence of plaintiffs' expert that the damage was of '*recent origin*'. On that basis, the court concluded that the cracking which occurred due to the excess of iron pyrites in the block work did not develop until well within the limitation period.

The Law Reform Commission, in its 2011 Report on Limitation of Actions,¹³⁷ examined the practice in other jurisdictions, and recommended the introduction of a 'discoverability' test, with a two-year limitation period from the date of discovery (subject to limited exceptions), and a long-stop date of 15 years.

¹³⁶ *O'Donnell v. Kilsaran Concrete* [2002] 1 ILRM 551.

¹³⁷ Law Reform Commission, *Report on Limitation of Actions*, LRC 104-2011(2011).

Irish Equine – criticism

The reasoning in *Irish Equine* puts the 'date of damage' as the date on which the defective design becomes manifest from an inspection of the building, as distinct from any damage caused by the design defect. It prompts the question of whether "damage" can consist of a defectively designed building or part of a building that has not yet begun to fail, bearing in mind that the roof in *Irish Equine* performed for a number of years before letting in water. This suggests a distinction between a design defect resulting in a latent defect, that performs as it should for a period of time before failing, and a defect that would cause the building or part of the building to fail immediately.

In either case, it is hard to distinguish such a concept from a defect that renders the building doomed from the start" to use the language of Lord Fraser from *Pirelli*.¹³⁸ *Irish Equine*, however, is an example of such a case, where the High Court found that the owner's cause of action did in fact accrue as soon as it was built, on the basis that the design defect could have been discovered upon completion by a competent professional. In common with *Pirelli*, there is a lack of evidence on which to interrogate this finding by the court; would the design defect have been discovered upon inspection of the roof, or was the court suggesting that the defect had already caused damage to the roof upon completion, although the water ingress did not occur until over 5 years later, in 1991?

Brandley v Deane – problem solved?

The problems left unsolved in *Irish Equine* and the cases since were highlighted again in *Brandley v Deane*.¹³⁹ The plaintiff developer issued proceedings against the first defendant, a consulting engineer, and the second, a groundworks contractor, in respect of two houses alleged to have been built with defective foundations and which had subsequently suffered extensive cracking. Each defendant applied to have the action dismissed on the basis that it was statute-barred.

The houses were completed in January/February 2005. Cracks were observed in

¹³⁸ 'There may perhaps be cases where the defect is so gross that the building is doomed from the start, and where the owner's cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional.'

¹³⁹ *Brandley v Deane* [2016] IECA 54.

December 2005, and a plenary summons issued on 30 November 2010. The defendants argued (in line with *Irish Equine*) that the foundations were defective from the outset, and that the cause of action accrued in March 2004 when the foundations were installed. The plaintiffs argued that the tort was not complete until damage had been caused following the installation of the defective foundations.

The High Court dismissed the action on the grounds that it was statute-barred; the plaintiffs appealed. Ryan P. delivered judgment on behalf of the Court of Appeal, and found that the plaintiffs had not suffered damage at the time when the defective foundations were installed, but at the later date of December 2005 when the cracking was observed, and that the action was not statute-barred. The court took the view that the plaintiffs had no right of action when the foundations were installed; they had suffered no loss, and would have had no cause of action if the defective foundations had been detected by their engineer and the contractor directed to put the work right. This was clearly at variance with the decision in *Irish Equine*. The defendants appealed the decision to the Supreme Court. McKechnie J., giving judgment on behalf of the court, distinguished between the defect, the occurrence of the damage resulting from that defect, and the manifestation of that damage. The learned judge then explained the finding in *Irish Equine* on the basis that Geoghegan J. in that case had approached the claim as being one for pure economic loss rather than property damage, such that ‘the design itself was the damage; this explains why time ran from 1987’.¹⁴⁰

The court, then, took the view that a latent defect arising from negligent design is a claim for economic loss, for which the limitation period commences with the negligent design, but that such a claim was distinguishable from the case before it, which the court treated as a property damage claim founded on negligence. This was notwithstanding the fact that the defendant was an engineer providing professional services, and that the claim related to negligent exercise of those services.

In allowing that Geoghegan J. appears to have regarded *Irish Equine* as being a claim for economic loss, is the court arguably treated economic loss as a cause of action in itself instead of recognising that economic loss must be grounded on a cause of action. The

¹⁴⁰ *Brandley* (SC) (n 118) 79-80.

economic loss in *Irish Equine* derived from the defective design, which ought to have been apparent from an inspection following completion, and which ultimately caused the roof to fail through water ingress. The claim, therefore, was for negligent design, which resulted in a physical defect (by means of the contractor's workmanship), which resulted in physical damage to the building (when the roof began to fail and let in water).

Wright refers to the discussion of the difference between defects and damage in *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd*.¹⁴¹, to the effect that 'a defective product was defined as something that is defective from the moment of its creation, whereas a damaged product suffers an alteration in state.'¹⁴²

The physical damage gave rise to two financial implications: the property was worth less (economic loss) and the property had to be fixed (cost of repair – also regarded as economic loss). Neither head of loss is 'physical damage' for the purposes of the law of negligence and therefore it is hard to see what was gained by characterising the claim in *Irish Equine* as an economic loss claim rather than a property damage claim. The Supreme Court decision in *Brandley* suggests that an 'economic loss claim' has an earlier date of accrual (the date of design) and that the 'property damage' claim has the later date of accrual (the date of manifestation). The difficulty with this position is that the property damage at issue is not physical damage within the meaning of the law of negligence, but is a category of 'damage' which only sounds in economic loss. The distinction is hard to justify, and may be adding complexity by creating the impression that *Irish Equine* can be coherently incorporated into the jurisprudence.

It is submitted that there is no basis on which to distinguish a claim against a professional in respect of negligent design, inspection and/or certification where that negligence results in a defective building; any claim in tort is necessarily a claim for economic loss, based on diminution in value and/or the cost of rectification, which is recoverable in principle in line with *Hedley Byrne v Heller & Partners*.¹⁴³ The engineer does not carry out the works; in all cases where negligence is established, the resulting defect, or damage, is an indirect consequence of professional services, whether of design, inspection, and/or

¹⁴¹ [2002] 2 Lloyd's Rep 379.

¹⁴² John D. Wright, 'Defects and damage — extent of insurance cover' *Construction Law* (2009) 20 7 *Cons.Law* 23

¹⁴³ *Hedley Byrne v Heller & Partners* [1964] AC 465.

certification.

Indeed, as the defects cases where the limitation period in tort is an issue typically involve claims for economic loss, the question arises of whether the judicial rejection of the ‘complex structure’ theory in *D & F Estates v Church Commissioners for England and Wales*¹⁴⁴ has left behind a type of legal sediment, where a ‘defect’ must cause damage to another part of the building in which the defect has been incorporated before the limitation period begins to run. This may explain why this type of claim, when brought against a professional, may be regarded as a claim for property damage rather than for pure economic loss.

The ‘conflation’ of concepts in economic loss cases is expressly referred to in *Brandley*, where McKechnie J. suggests that the learned judge in *Irish Equine* ‘seems to have conflated *defect* with *damage*: in a pure economic loss case, the defect *was* the damage *ab initio*’.¹⁴⁵ Canny refers to the confusion that has apparently arisen in the terminology used by the Irish courts in discussing this issue, noting that *Irish Equine*, *O’Donnell v Kilsaran*, *Pirelli, Hegarty v D & S Flanagan*, *Murphy v McInerney Construction* and *Brandley v Deane* ‘were all pleaded as “property damage” cases although, somewhat confusingly, several could be described in the taxonomy of tort law as being “pure economic loss” cases’.¹⁴⁶ Canny argues that the ‘economic loss’ cases in tort law include’.¹⁴⁷

It is submitted that this view presents a further challenge to the view of McKechnie J. in *Brandley* to the effect that cases involving defective buildings should be treated as economic loss cases where damage is attributable to design, but as property damage cases where (as in *Brandley* itself) the damage is attributable to negligent inspection and certification of the work of a sub-contractor. It is also at variance with the view of both the High and Supreme Courts in *Ward v McMaster*, which was expressly spared by Keane CJ. in *Glencar* and which does not treat the builder’s liability as based on a *Hedley Byrne*-type assumption of responsibility.

¹⁴⁴ *D & F Estates v Church Commissioners for England and Wales* [1989] AC 177.

¹⁴⁵ *Brandley* (SC) (n 118) [64]-[65].

¹⁴⁶ Martin Canny, *Limitation of Actions*, 2nd edn (2016 Round Hall), 217. Canny describes the ‘economic loss’ cases as those where *Hedley Byrne v Heller* and the subsequent line of cases in which ‘solicitors, accountants, valuers, advisers and businessmen assume responsibilities towards third parties that lead the courts to impose liability if they are negligent in the carrying out of those duties and cause that other person financial loss.’

¹⁴⁷ *Ibid* 217.

Australia – limitation periods for residential construction works

A number of Australian states and territories have introduced legislation that provides statutory warranties in respect of construction works, subject to long-stop dates. Thus, the limitation period for actions under the Building Act 1995 in the state of Victoria is 10 years from the date of the occupancy permit for the building works concerned, or the certificate of final inspection, if no occupancy permit is issued.¹⁴⁸

Section 18E of the 1989 Home Building Act of New South Wales provides for a number of statutory warranties in relation to building works, and requires a person entitled to the benefit of a statutory warranty to make reasonable efforts to give notice in writing to the person against whom the warranty can be enforced within 6 months after the breach of warranty “becomes apparent”. A breach becomes apparent for the purposes of the section. when any person entitled to the benefit of the warranty first becomes aware (or ought to have to become aware) of the breach.¹⁴⁹

With regard to the limitation period in negligence claims, Bailey draws a distinction between the date on which a defect becomes ‘known or manifest’, which ‘is not necessarily the time at which the damage first occurred’,¹⁵⁰ citing Deane J in *Sutherland Shire Council v Heyman*,¹⁵¹ who suggested in that case that time should not run until damage was ‘known or manifest’, and rejected the idea that one defective element of a building causes ‘damage’ to another:

The building itself could not be said to have been subjected to "material, physical damage" by reason merely of the inadequacy of its foundations since the building never existed otherwise than with its foundations in that state.¹⁵²

The 2014 decision of the Queensland Court of Appeal in *Melisavon Pty Ltd. v Springfield Development Corporation Pty Ltd.*¹⁵³ is similar on the facts to *Irish Equine*; the appellant engineers designed a clubhouse for a golf club; the car park and clubhouse exhibited signs

¹⁴⁸ Julian Bailey, *Construction Law*, (London, Informa Law, 2nd edn 2016) [26.52] 2108.

¹⁴⁹ Home Building Act 1989, Section 18 BA (3) - (4) (New South Wales).

¹⁵⁰ Bailey (n 148), 1294.

¹⁵¹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, cited in Bailey (2016), para. 14.79., p.1294.

¹⁵² *Ibid* 503-505.

¹⁵³ *Melisavon Pty Ltd. v Springfield Development Corporation Pty Ltd.* [2014] QCA 233.

of cracking and soil heave within a few years of completion. There is very useful analysis in the judgment about what should constitute the ‘manifestation’ of damage in negligence claims. McMurdo P. cited the decision of the Court of Appeal of New South Wales in *Cyril Smith and Associates Pty Ltd. v the Owners – Strata Plan No 64970*¹⁵⁴ to the effect that the key question ‘is, whether appreciated at the time or not, was the damage a physical manifestation as later proved of the structural defect?’¹⁵⁵

The court concluded that the cause of action accrued when the defect became manifest ‘in the sense of being discoverable by reasonable diligence’.¹⁵⁶

The significance of these decisions from the comparative perspective with Irish law is the opinion that, for damage to be manifest, some physical consequences of the defect must be visible, whether they are seen or not. The judgment in *Irish Equine* suggests that the post-completion examination that might have been conducted by an expert might have revealed the design defect in the roof, but there was no evidence before the court as to whether any physical consequences of that design defect were visible at the time; bearing in mind that it took over 5 years following completion for water to penetrate the roof.

The current state of Irish law as described above is highly unsatisfactory. Upon completion of the limitation period, a defendant may raise a full defence on the basis that an action is statute barred, if proceedings are issued even one day late. The commencement of the limitation period, however, in building defects cases, can rarely be assigned to a specific calendar date; as noted above, one of the leading authorities under Irish law was able to conclude no more than that the cracking which signalled the commencement of the limitation period was "of recent origin".

It would be preferable for Ireland to follow the practice of other jurisdictions and to provide some clarity around the date of commencement of the limitation period. Most new buildings in Ireland will have a certificate of compliance on completion which must be lodged with the local building control authority before the building can be opened, occupied or used.¹⁵⁷ This could be used as a reference point for commencement of the

¹⁵⁴ *Cyril Smith and Associates Pty Ltd. v the Owners – Strata Plan No 64970* [2011] NSWCA 181.

¹⁵⁵ *Ibid* [40].

¹⁵⁶ *Melisavon* (n 153) [43].

¹⁵⁷ Building Control (Amendment) Regulations, 2014.

limitation period.

In cases where there is no such certificate, the limitation period could start on the date of practical completion of the works, or, for works carried out without a contract, upon completion. It should be possible in most cases to adduce sensible expert evidence as to when completion in fact occurred, as it will typically coincide with the handover of risk in the site from the contractor to the employer.

To mitigate the unfairness that would be caused by bringing the limitation period back to completion of the works, legislation could be introduced similar to the legislation in England and Wales and a number of the Australian jurisdictions, which provide for uniform limitation periods, subject to a long-stop date, by reference to a commencement date which is capable of being ascertained.

In its 2001 Report on the Statutes of Limitation: Claims in Contract and Tort in respect of Latent Damage (other than personal injury), the Commission recommended the introduction of a ‘discoverability’ test for latent defects, and that the cause of action for construction liability claims should accrue at the date of completion or practical completion, such that claims would need to be brought within six years of accrual or three years from discovery.¹⁵⁸

These amendments have not been implemented into Irish law. The question of limitation of actions was revisited in the Commission’s consultation paper of 2009,¹⁵⁹ and in its 2011 Report on Limitation of Actions,¹⁶⁰ in which the Commission revisited the considerations raised in its earlier reports, examined the practice in other jurisdictions, and recommended the introduction of a ‘discoverability’ test, with a two-year limitation period from the date of discovery (subject to limited exceptions), and a long-stop date of 12 years.

Conclusion

This chapter examined two ways in which procedural limitations inhibit access to

¹⁵⁸ Law Reform Commission, **Report**: The statutes of limitations: claims in contract and tort in respect of latent damage (other than personal injury) LRC 64-2001 (2001).

¹⁵⁹ Law Reform Commission, *Consultation Paper on Limitation of Actions* (2009).

¹⁶⁰ Law Reform Commission *Report on Limitation of Actions*, LRC 104-2011(2011).

remedies for housing defects. Firstly, the dispute resolution system for residential construction is lengthy and expensive, and may deter meritorious claimants by reason of its procedural complexity and the delay and risk in securing a remedy. The requirement for mediation to be considered is a useful step, but does not address the difficulties with the process subsequent to mediation.

There is a need for a dedicated system for resolution of residential construction disputes, in part because these disputes almost invariably require some level of expert assessment of defects, outstanding works, and the value of work done and work outstanding. The New South Wales system of appointing a surveyor for this purpose is to be commended for its practicality in collating this information at an early stage of the dispute with a view to seek resolution.

The Law Society of Ireland in its application to the High Court in 2001 claimed that residential construction contracts are proposed by contractors on a ‘take it or leave it’ basis and that developers often refuse to negotiate on the terms. This suggests that the home buyer retaining a solicitor to act in the conveyancing transaction does little to alter the balance of power in the negotiation. Consumers cannot, therefore, be said to have made a meaningful choice of dispute resolution by arbitration. While it is quite possible that solicitors explain the implications of the arbitration clauses to buyers, the negotiating position apparently adopted by developer/builders is likely to foreclose any meaningful discussion on alternatives to arbitration. The Mediation Act 2017 should have an impact on this procedure, as parties may face cost sanctions for refusal to engage in mediation. However, the imbalance of power that characterises the relationship may dominate the mediation and simply delay resolution of the problems for the buyer. This suggests a need for a dedicated scheme for resolution of residential construction disputes, including guidance on the procedure and assistance with expert evaluation of remedial works for home owners, which could involve elements of the various methods described in this chapter.

The preceding discussion suggests that a substantial modification of the LSBA is required in order to re-balance the relationship between home buyers and developers/builders: firstly, by the inclusion of a permissive assignment clause, to allow purchasers to rely on the contract within the limitation period. Law reform to enact third party rights as

recommended by the Law Reform Commission may also achieve this aim. Secondly, the mandatory arbitration clause should be re-considered, and at the very least, amended so that the consumer's consent to the arbitral process must be sought before this method is used.

The respect for the arbitral process shown by the Irish judiciary, however, particularly since the introduction of the Arbitration Act 2010 and the accompanying implementation in Ireland of the UNCITRAL Model Law, appears to foreclose any greater review by the Irish courts of arbitration clause in consumer contracts as a matter of civil procedure. Another option for achieving this aim, therefore, would be that pre-dispute arbitration clauses with consumers should be prohibited via an amendment to the Arbitration Act 2010.

The second significant constraint, which has been a feature of the limited jurisprudence on housing defects, is the expiry of the limitation period before defects can be discovered and/or reasonably acted upon. The action under the original building contract generally accrues no later than completion and is not extended where defects are latent. This results in clear injustice where a buyer is not on notice of any potential defects while the limitation period continues to run against him. The cause of action in tort is also relevant, principally in actions against designers and certifiers, but also, possibly, against builders, as discussed in chapter 3. The current legal position regarding accrual of the cause of action in tort is incoherent and impenetrable, even to practitioners, and the Supreme Court recently called for clarification by legislation in *Brandley v Deane*.

Chapter 6 Risk allocation and insurance

Introduction and context

The issues of risk management and insurance are fundamental to the formulation of remedies and redress for housing defects. This chapter discusses defects and risk management in residential construction, the role of gatekeepers in identifying and managing the risk of defects, the relationship between liability and financial risk. Examples are then discussed of defects insurance systems in Ireland and internationally.

The principal research theme explored in this chapter is that of risk transfer from builders and sellers to home buyers, and how law and practice facilitates this phenomenon. Examples of risk transfers include contractual limitations on the builder's liability¹, procedural risk transfers including limitation periods for arbitration or litigation², and the ability of builders to operate via limited liability companies.

The privilege afforded by limited liability, in conjunction with the system whereby builders need not be bonded or insured in respect of their potential liability³, insulates builders and developers from recourse by home buyers. This is in contrast to the position of professionals such as engineers and architects, who are subject to a higher standard of care at common law and are regularly sued in respect of building defects. Builders are not required by law to insure against defects in their work⁴; this failure can, therefore, be seen as a kind of risk transfer to buyers. This is also in contrast to the position of construction professionals, who will invariably carry professional indemnity insurance in respect of their potential liability, both to the own clients and to third parties.

In addition to the difficulties of recourse against builders, Irish home owners who have experienced defects have found that home warranty policies put in place for their house

¹ As discussed, with regard to the LSBA, in Chapter 2.

² As discussed in Chapter 5.

³ This issue was highlighted in the 1977 Working Paper which is discussed further at Section D of this chapter.

⁴ The only category of insurance required by Irish law is motor insurance, which is required pursuant to s 56 (1) of the Road Traffic Act 1961. Although commonly carried by employers, employers' liability insurance is not compulsory in Ireland. This is in contrast to the position in Great Britain, which requires employers to carry insurance against liability for 'bodily injury or disease' suffered by employees 'arising out of and in the course of their employment' (Employers' Liability (Compulsory Insurance) Act 1969, s 1 (1)). .

or apartment at the time of purchase did not respond adequately, or at all, when defects emerged in the property.⁵ The defects policies on the market are subject to various limitations and exclusions, such as exclusion of liability for the presence of pyrite in construction materials.⁶

This chapter is arranged in four sections, which deal with the following:

The first part deals with the management of risk in residential construction, and the consequences of the disconnection of risk from the various actors in a position to manage that risk – builders, building control authorities and assigned certifiers, for example - and the home buyer who assumes the financial risk of the building's condition.

The second part considers the role of gatekeepers of risk management for home buyers such as building surveyors and assigned certifiers⁷, conveyancing solicitors, home warranty providers and defects insurers.

The third part deals with the relationship between liability for defects and the financial risk, considering key terms and jurisprudence regarding home warranty policies and international examples of home warranty schemes, as well as theoretical and doctrinal perspectives on the relationship between insurance and tort liability.

The final section discusses the essential characteristics of latent defects insurance, international examples and the recommendations of the 1977 Law Reform Commission Working Paper with regard to financial security for defects claims. Limitations of the HomeBond policy and the denial of cover following significant building failures such as pyrite are set out, with a view to identifying the essential features of defects insurance, by reference to Irish and international examples.

⁵ The Report of the Pyrite Panel (Pyrite Panel, 2012) notes at page ii that HomeBond circulated a letter on 31 August 2011 confirming that it would no longer provide cover for pyritic heave in light of the High Court decision in *James Elliott Construction v Irish Asphalt* [2011] IEHC 269.

⁶ The most recent version of the HomeBond policy from 2016 excludes liability for 'Any loss, damage, cost, expense or liability of any nature directly or indirectly caused by or resulting from or in connection with the presence or alleged presence of any sulphides including but not limited to pyrite and/or their derivatives'. (HomeBond Latent Defects Insurance Policy Document, Section 4: Exclusions). Note that the HomeBond policy is not available on the HomeBond website, but a general description of the coverage of the policy is contained in the Law Society of Ireland's *Conveyancing*, 8th edn, Oxford University Press (2016), 414-415.

⁷ Appointed pursuant to the Building Control (Amendment) Regulations 2014. In this chapter, this role is analysed from the perspective of risk management; in chapter 4, the assigned certifier's role as gatekeeper of the regulatory regime was considered.

A: THE MANAGEMENT OF RISK IN RESIDENTIAL CONSTRUCTION

Housing defects occur to varying degrees in every home building market worldwide, regardless of the regulatory regime.⁸ Residential construction projects typically involve a developer, a main contractor, and a number of suppliers and sub-contractors supplying materials and labour. As such, the identification and attribution of responsibility, and consequently, liability for construction defects can be a complex process.⁹

Notwithstanding considerable media coverage in relation to widespread construction housing defects, investigation and analysis of the prevalence and causes of Irish residential construction defects that have emerged during the past 10 years has been limited to significant failures such as damage caused by reactive pyrite and poor quality blocks.¹⁰

There have been more extensive studies of housing failures in other jurisdictions, however, which provide an insight into the value of investigating causes in order to avoid similar failures in future and to define the appropriate assistance or redress for owners of defective housing. Both the Canadian province of British Columbia, and New Zealand, have experienced widespread failures of cladding systems on condominium buildings, leading to a Commission of Inquiry in Canada, which resulted in the publication of two reports, legislation to protect home buyers, and a loan scheme.¹¹ Similar, and widespread, problems with defective condominium buildings in New Zealand resulted in a significant investigation and a report highlighting widespread defects in condominium buildings.¹²

⁸ James Sommerville and Julie McCosh, 'Defects in new homes: an analysis of data on 1,696 new UK houses' (2006) 24 *Structural Survey* 6; Olav Berge, 'Building Control in Norway and the Norwegian Regulatory System', (presentation) Irish Building Control Institute Conference 2003, suggesting that 'Building defects accounts for 2.5% of the annual turnover of the construction industry'; Dharmesh Gawde, Y.S. Patil and R.M. Swamy, 'Construction Standards of Residential Buildings Post-Handover' (2017) 4 *International Research Journal of Engineering and Technology* 1201.

⁹ This phenomenon is evidenced by, and perhaps complicated by, the rules of the Civil Liability Act 1961 discussed in chapter 5, whereby the plaintiff home owner typically bring proceedings against every potential defendant in order to improve her chances of securing judgment against at least one.

¹⁰ *Report of the Pyrite Panel*, (n 5); *Report of the Expert Panel on Concrete Blocks*, Department of Housing, Community and Local Government (2017).

¹¹ Dave Barrett, *The Renewal of Trust in Residential Construction* (Commission of Inquiry into the Quality of Condominium Construction in British Columbia, 1998). The report recommended the creation of the Homeowner Protection Office of British Columbia, which was established in 1998 and administered a low-interest loan scheme for a number of years. The reports also led to the passage of the Homeowner Protection Act 1998, which includes warranties of quality which can be enforced by first and subsequent home buyers (s 23) and a requirement for home warranty insurance (s 22).

¹² D. Hunn, I. Bond, and D. Kernohan, *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority*, Building Industry Authority, Wellington, August 2002.

The disconnection of risk from risk management in residential construction

Control mechanisms employed by defects insurers suggest that risk management is integrated into developments where the party bearing the financial risk of the building's failure is involved in design and inspection of the building.¹³ Commercial models of construction procurement invariably include a representative for the client, with various control powers including the power to inspect and approve designs, enter the site or any areas where work is being carried out, and direct that work be opened up for inspection and rectified where necessary. Wright comments in this regard that the insurer of a defects policy 'will appoint their own experts (the technical inspection agency) to review and approve the original designs, calculations and materials along with the construction methodology'.¹⁴

The predominant Irish model for new housing, in which builder/developers offer speculatively-built housing to the market at large, embodies an approach to risk from which the purchaser is disconnected throughout the construction process.

Standard form construction contracts have been a feature of commercial property development for nearly 100 years. Although a variety of forms are in use in Ireland and internationally on commercial projects, most forms feature various provisions to protect the interests of the employer. The principal private¹⁵ and public¹⁶ standard forms provide for the appointment of an architect or employer's representative to act on behalf of the employer with the right to access the site and inspect the works. Payment is usually made on the basis of periodic inspection and certification by that representative, who issues payment certificates for work carried out in accordance with the contract and which

¹³ Bunni describes the technical control services typically provided by specialists acting on behalf of latent defects insurers, including design reviews and approvals, site inspections, materials testing and quality control. Nael Bunni, *Risk and Insurance in Construction*, 2nd ed. (Spon Press 2003), 203.

¹⁴ John Wright, 'Inherent defects insurance popularity growing' (2017) 28 *Construction Law* 30, 30.

¹⁵ Royal Institute of Architects of Ireland, *Agreement and Schedule of Conditions of Building Contract* (2017), clauses 9 and 11; clause 11 provides that 'The Architect, and any person authorised by him shall at all reasonable times have access to the Works, the workshops of the Contractor, or other places where work is being prepared for the Works'.

¹⁶ Office of Government Procurement, *Public Works Contract for Building Works Designed by the Employer Document Reference PW-CF1 v.2.3* (Office of Government Procurement 2018), clause 8.3.1 provides as follow 'The Contractor shall ensure that the Employer's Representative, Assigned Certifier, and anyone authorised by the Employer's Representative, is able at all reasonable times to have access to all places where the Works are being executed...and any place where any Works Items are being produced, stored, extracted or prepared, or any other obligation of the Contractor under the Contract is being performed, and are able there to inspect, test, observe and examine all such items and activities'.

represents the value claimed by the contractor.¹⁷ Finally, the determination of practical completion is a matter for the employer's representative, and not for the contractor.

In the Law Society form of Building Agreement ('the LSBA'), by contrast, the purchaser's representative and technical advisor has no entitlement to access the site of the residential construction works until the purchaser receives a notice to complete from the builder's solicitor. The only inspection by a person independent of the developer/builder that may occur of the residential works during construction will be by an inspector from the building control authority. These inspections are not mandatory, and many Irish building control authorities inspect no more than 15% of all new buildings in the functional areas.¹⁸

As described in chapter 1, the risk model of the typical Irish speculative builder is that a developer engages a builder to construct the development. The works are completed and the developer's solicitor serves a notice of completion on the home buyer, inviting them to have a snagging list carried out.¹⁹

This is the first formal opportunity that the purchaser will have to inspect the home.²⁰ By this point, the unit is nearly complete; the safety-critical construction work such as fire-stopping is complete and hidden behind internal finishes. The buyer is not entitled to open up the works for inspection; the foundations have long since been covered over and are now hidden under a concrete slab.²¹

Residential housing procurement in Ireland has been characterised for many years by a combination of 'speculative' building and 'one-off' building. In the speculative building model, a builder/developer secures access to land, arranges design and planning

¹⁷ Royal Institute of Architects of Ireland, *Agreement and Schedule of Conditions of Building Contract* (2017), clause 35; Office of Government Procurement, *Public Works Contract for Building Works Designed by the Employer Document Reference PW-CF1 v.2.3* (Office of Government Procurement 2018), clause 11.

¹⁸ Deirdre Ní Fhloinn, 'Regulation of housing quality in Ireland: What can be learned from food safety?' (2018) 66 *Administration* 83.

¹⁹ Law Society of Ireland, *Conveyancing* (8th edn, Oxford University Press 2016), 384, 404.

²⁰ Term 5 of the LSBA provides that 'On receipt by the employer or his solicitor of notice from the contractor that the works have been completed, the employer shall be entitled to submit one snag list to the site foreman only within seven days of the completion notice.' The employer in this case is the home buyer; if the snag list is not submitted within the seven day period, the home buyer loses the right to submit a list. Law Society of Ireland, *Conveyancing*, 8th ed., (2016) Oxford University Press, 384.

²¹ Defective foundations were at issue in the 2016 High Court decision in *McGee v Alcorn*, and in the *Brandley v Deane* litigation which concluded before the Supreme Court in 2017.

permission for a development, and sells houses and apartments from plans. The model has been criticised for encouraging land speculation, land hoarding, and commodification of housing, as well as allowing landowners to control the supply and price of housing.²²

Developers can effectively control supply, which contributes to the imbalance in bargaining power, thus allowing developer/builders to contract on terms that insulate them from the risk of defects.

This model embodies an approach to risk from which the purchaser is disconnected throughout the construction process, as the LSBA provides the purchaser with no rights of access to the site of the works, no right to vary the scope of the works, and no right to retain part of the purchase monies as security against defects. It is also explicitly stated at Term 12 of the LSBA that the employer shall not be entitled to damages for delay; again, this is in sharp contrast to commercial building contracts, where liquidated damages invariably stipulated for each day all week of delay beyond the contractual completion date.²³ These are standard provisions in commercial construction contracts.

If the purchaser claims that the works are not complete due to the presence of major defects, either party may apply for an expert determination as to whether the works are complete, and if the expert so determined, purchaser is required to complete the purchase regardless of outstanding snags, provided that the builder undertakes to rectify them.²⁴

The consequences of having no representation of the purchaser's interests during the construction process is vividly illustrated by the most widespread and costly source of

²² Drudy and Punch commented in 2002, during the height of the Celtic Tiger construction boom, that 'With various constraints affecting supply in the short term (e.g. lack of serviced land, water, sewage and other facilities), a relatively small number of developers can hoard serviced land and release it slowly, thus exerting control over prices and profits from housing.' P. J. Drudy and Michael Punch, 'Housing Models and Inequality: Perspectives on Recent Irish Experience' (2002) 17 *Housing Stud* 657, 668. See also Laurence Murphy, 'Mortgage Finance and Housing Provision in Ireland, 1970- 90' (1995) 32 *Urban Studies* 135, in which Murphy argues that demographic change, policies favouring home ownership, and links between building societies and speculative developers all contributed to a situation where 'the development of homeownership in Dublin became dominated by large-scale speculative developers and consumption was predicated upon the availability of mortgage credit'. (142)

²³ Liquidated damages clauses are commonly included in commercial construction contracts to stipulate a fixed amount payable in respect of each period of delay following the agreed completion date. Bailey points out that such clauses, in addition to providing a financial remedy to the employer in respect of loss suffered in consequence of the delay, also provide a benefit to the contractor in specifying a predetermined amount payable in respect of periods of delay. Bailey, *Construction Law*, 2nd edn (2016) Informa Law, 1185-1186.

²⁴ Condition 12, Conditions of Law Society Building Agreement, 2001 ed., Law Society of Ireland and Construction Industry Federation.

housing failures that has occurred to date in Ireland, the contamination of over 10,000 housing units with reactive pyrite.²⁵

Kunreuther and Ley argue that there are financial and political advantages to ensuring that the financial risk of catastrophic failures should be borne by ‘risk producers’, and that financial responsibility requirements should apply to regulatory approvals for high-risk activities.²⁶ The authors refer to ‘self-insurance, commercial insurance, industry risk-pooling associations, and government-run compensation funds with subrogation rights to risk producers’ as examples of such financial responsibility requirements.²⁷ They argue that a ‘risk subsidy’ is provided by third parties to risk producers where those third parties are ultimately left with the financial consequences of the producer’s risk, and conclude that producers have no incentive to minimise risk as long as they are enabled to shift the financial consequences of their risk-creating activities to those third parties.²⁸

The failure of the Irish Government and of the construction industry to devise a new model of risk minimisation in residential construction following the large number of building failures that became apparent in recent years suggests that the risk subsidy borne by home owners and by the State in dealing with home defects remains, as no legal reform has been introduced in order to shift the financial burden of defects back to those responsible for them.

Innovation and quality improvement in residential construction

The speculative development housing model has been criticised for its failure to innovate beyond traditional building methods. Roy, Brown and Gaze link the ‘brick-and-block masonry construction’ model used in England and Wales to difficulties in quality control due to the number of ‘wet trades’ needed and due to the tendency of building contractors to sub-contract a significant amount of labour and work packages.²⁹ They suggest that

²⁵ *Report of the Pyrite Panel* (2012), 106. As the contaminated materials were concealed beneath concrete floor slabs, they would have been impossible for purchaser’s surveyors to detect during completion inspections.

²⁶ Howard C Kunreuther and Eryl V Ley, *The risk analysis controversy: an institutional perspective* (Springer Science & Business Media 2012), 195.

²⁷ *Ibid.*

²⁸ *Ibid.*, 196-197.

²⁹ Rajat Roy, Justine Brown and Chris Gaze, ‘Re-engineering the construction process in the speculative house-building sector’ (2003) 21 *Construction Management and Economics* 137, 137-138.

one of the reasons for the sluggish pace of innovation in the UK housebuilding sector is that ‘the UK house-building industry faces no international competition’, and argue that the industry must move away from the ‘sequential, craft-based’ brick and masonry model towards an industrialized process using off-site manufacture of key components, and focussed on the heating needs of different groups of customers.³⁰

The construction model that has predominated in the Irish house building industry (as well as that of the UK) for the past fifty years has been based on an inner and outer leaf of bricks and an inner leaf of cement blocks, with a cavity between the two. The purpose of the method is to prevent water ingress by drawing moisture down into the cavity to drain out, in order to keep the inner leaf dry.³¹ The same ‘brick and block masonry’ model was used for many years in Ireland, but Little has suggested that ‘cavity wall technology may be reaching its limit’ having regard, for example, to requirements regarding insulation between masonry leaves.

Auchterlounie has criticized the approach of the UK housebuilding industry to quality as being reactive, with an over-emphasis on technical defects, rather than ‘defining quality in a manner in which their customers can both understand and use to assess if it has been delivered’ and noted that there was ‘little interest within the UK private house building industry in trying to find out what customers actually want.’³²

The lack of coherent regulation in the housebuilding sector may contribute to a situation where innovation, information exchange and incorporation of improvements does not occur consistently across the industry. The importance of learning from failures, both on an industry level and at the level of individual organisations, has long been recognised across many economic sectors.³³ Hopkin, Rogers and Sexton argue that an organizational learning model could be used in order to reduce housing defects, recommending that industry actors carry out research and feedback on housing defects as well as the sharing of information and best practice.³⁴

³⁰ Ibid 144.

³¹ Joseph Little, 'Partial Fill Cavity Walls: Have we reached the limits of the technology?' (2005) 2 Construct Ireland.

³² Tony Auchterlounie, 'Recurring quality issues in the UK private house building industry' (2009) 27 Structural Survey 241, 242.

³³ Amy C. Edmondson, 'Strategies for Learning from Failure' (April 2011) Harvard Bus Rev.

³⁴ T. Hopkin, Lu, S-L., Rogers, P. and Sexton, M. , 'Detecting defects in the UK new-build housing sector: a learning perspective' (2016) 34 Construction Management and Economics 35; T. Hopkin, S. Lu, P. Rogers and M. Sexton, 'Reducing Defects through Organizational learning within a Housing Association Environment' (2016) 10 International Journal of Civil,

Ilozor et al examined the causes of housing defects in the state of Victoria, Australia, and concluded that many failures resulted from 'flawed management and project delivery systems', including errors, lack of knowledge and carelessness, rather than technical failures.³⁵ A significant percentage of defects were attributable to water ingress and condensation, which accounts for a substantial percentage of recent Irish residential construction defects.³⁶

Chong and Low, following substantial empirical research into the causes of building defects, concluded that designers were insufficiently aware of the requirements of standards and codes related to construction, and that they did not seek feedback from property managers regarding the performance undercurrent of defects of buildings following completion. They concluded that designers could 'improve overall building quality by consolidating efforts on a few major defects and gathering existing knowledge from the property managers.'³⁷

The problem of poor quality in residential construction was recognised in the All-Party Parliamentary Group 'More Homes, Fewer Complaints' report of 2016.³⁸ The subsequent House of Commons briefing paper of 2018, published in response to the 2016 report, refers to an ongoing initiative by the UK Chartered Institute of Building to investigate building quality, which led to a call for evidence in 2017 following the Grenfell Tower fire. 75% of respondents to the call for evidence considered quality management in the UK construction industry to be inadequate.³⁹

Environmental, Structural, Construction and Architectural Engineering 294, 294-295. The authors refer to the use of organizational learning in order to assess the cause of cracking in a number of timber framed properties, which led to the discovery that the cracking occurred in properties over three storeys, and reduced in subsequent projects limited to three storeys. (299).

³⁵ B. D. Ilozor, M. I. Okoroh, C. E. Egbu and Archicentre, 'Understanding residential house defects in Australia from the State of Victoria' (2004) 39 *Building and Environment* 327, 328.

³⁶ *Mitchell v Mulvey Developments* [2014] IEHC 37 and coverage of the case as reported in the media at the time: Sam Griffin and Tim Healy, '€1m payout over botched homes a 'hollow victory'' *Irish Independent* (7 February 2014), <https://www.independent.ie/irish-news/courts/1m-payout-over-botched-homes-a-hollow-victory-29987656.html> (accessed 16 August 2018); , 'Homeowners urged to inspect timber balconies for signs of rot' *Irish Examiner* (25 June 2018).

³⁷ Wai Kiong Oswald Chong and Sui-Pheng Low, 'Latent Building Defects: Causes and Design Strategies to Prevent Them' (2006) 20 *Journal of Performance of Constructed Facilities* 213, 221.

³⁸ 'More Homes, Fewer Complaints', Report of the All-Party Parliamentary Group of England and Wales for Excellence in New Housing (2016).

³⁹ Wendy Wilson and Christopher Rhodes, *Briefing Paper Number 07665: New-build housing: construction defects - issues and solutions (England)*, House of Commons Library (2018).

What is a defect?

Defining and assessing quality in residential construction is subject to a multiplicity of standards, as well as regulatory and contractual requirements.

Buckley characterise damages as ‘an adverse change in the physical characteristics of the property insured’, to be distinguished from defects, which ‘are only attributable to design, specification, material or workmanship’⁴⁰. He refers to *Skanska Construction Ltd. v Egger (Barony) Ltd.*⁴¹, in which the court distinguished between damage, which under the contract must be insured was required to be insured against, and defects, which would have been the contractor’s responsibility if they had become manifest before completion.⁴²

Therefore, at least in the context of all-risks insurance, Buckley’s view is that the manifestation of defects is not damage which was required to be insured against; he contends that the best example of ‘defect’ is found in Arnould’s *Law of Marine Insurance and Average*, which defines ‘defect’ as ‘a condition causing premature failure in the relevant part...when it is constructed or installed or which comes into existence as a result of the way in which the relevant part was designed, constructed, or installed’.⁴³ This distinction, if applied to the typical analysis of defects and property damage in the law of tort, could assist in segregating damage claims, the traditional province of tort law, from defects claims, which are generally treated as giving to economic loss.

How should risk be managed in residential construction?

The adage that ‘prevention is better than cure’ summarises the optimal approach to managing defects risks in construction; it is considerably more efficient for a builder to avoid defects than for the home buyer to procure remedial works following completion and occupation of the unit.⁴⁴ Bates argues that ‘litigation-based remedies do not protect

⁴⁰ Ibid 1073.

⁴¹ (2003) Lloyd’s Rep IR 479.

⁴² Ibid, [30-31].

⁴³ Arnould, *Law of Marine Insurance and Average* (18th edn, Sweet & Maxwell 2015).

⁴⁴ Again, the phenomenon of reactive pyrite in Irish housing is a case in point: the problem originated from the use of aggregates contaminated with pyrite beneath the ground floor concrete slabs of buildings, which then expand over time and caused cracking and deformation of the building above. The repair of a house that has pyrite damage requires the breaking and removal of the ground floor slab to remove the aggregates, displacement of the occupiers

consumers against harm, but rather presume that harm will result’ and that consumer protection should not be limited to providing remedies for harm, but should seek to prevent harm.⁴⁵

Construction law, between private persons, consists almost exclusively of duties derived from contract and tort. A substantial proportion of relationships between parties to construction projects (at least, relationships between buyers and sellers of construction services) are governed by contracts. This allows parties to decide which legal rules should govern their relationships, supported by international systems of dispute resolution (particularly arbitration) that support the parties’ private law-making. The law of contract allows parties to allocate risk in the manner of their choosing; as noted in chapter 2, however, home buyers do not enjoy equality of arms in negotiating building contracts, which are usually proposed by builder-developers on a ‘take it or leave it’ basis.⁴⁶

The law of tort is not shaped in this way by parties to construction projects. Its application to construction projects is sufficiently well-settled, with regard to the principal risks that might give rise to liability in tort, that construction insurances follow a standard model that responds to a set of principles of tort liability that has remained largely unchanged for decades (with the exception of tortious liability for building defects).⁴⁷

Ireland - investigation of materials and workmanship failures

Both the reports of the Pyrite Panel, published in 2012, and the Expert Panel on Defective Blocks, published in 2017 include comprehensive data and analysis on the consequences of the use of inappropriate and inferior quality materials in the construction of housing.⁴⁸ Other than these reports, there has been no investigation carried out by the Irish Government on the scale and causes of residential defects generally in Ireland,

during works, and reinstatement of floors, walls and finishes. (Report of the Pyrite Panel (2012), 95-96.) It is noted in the Report of the Pyrite Panel that ‘At present, it appears that the only proven successful method of dealing with the problem of reactive pyrite is by its removal and replacement of the slab and infill. This is a very intrusive and costly intervention.’ (Report of the Pyrite Panel (2012), 98). The average remediation cost under the Pyrite Resolution Scheme was reported in 2018 as an average of €70,000 per dwelling (Irish Examiner, ‘Over 1,000 homes repaired under pyrite scheme’, 4 April 2018).

⁴⁵ Larry Bates, ‘Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection’ (2002) 16 *Emory International Law Review* 1. 6.

⁴⁶ See chapter 2.

⁴⁷ As discussed in chapter 3.

⁴⁸ Department of Housing, Community and Local Government, *Report of the Pyrite Panel*, (2012); Department of Housing, Community and Local Government, *Report of the Expert Panel on Concrete Blocks* (2017).

notwithstanding the widespread incidence of inappropriate and/or defective construction materials such as pyrite and poor quality blocks, together with water ingress and fire safety issues in apartment developments. Inadequate fire-stopping.⁴⁹

In some cases, the material itself may have been adequate, but the manner of installation and fitting was very poor and resulted in breaches of the Building Regulations, as well as creating serious risks to the safety of occupants where residential units were not correctly separated as is required under Part B of the Building Regulations.⁵⁰ Perhaps the most notorious example is that of a terrace of houses at Milfield Manor, Newbridge, Co. Kildare, where a fire in one unit destroyed an entire terrace of houses in 20 minutes.⁵¹

This may be a contributing factor to the lack of academic analysis and discussion on the recent Irish history of residential defects. The resulting gaps in evidence, analysis and coherent reflection on possible causes is likely to inhibit the potential of the industry to learn from past failures and to improve quality. As such, there is a pressing need for research into the particular defects that have presented in Irish new-build housing in recent years, in terms of causes, costs of rework and rectification, and recommendations for improving quality.

International research on building defects and quality control in residential construction

Defects can add significantly to the cost of residential construction. One study of new housing built in the state of Victoria, Australia, between 1982 and 1997 estimated that defects accounted for around 4% of the price of a residential construction works, both for new homes and for renovations, with leaking roofs presenting frequently.⁵²

⁴⁹ See Sarah Burns, 'Four Celtic Tiger developments that had fire and safety issues' *The Irish Times* (Dublin 24 January 2018); Sarah Burns, 'Dublin City Council served 33 fire– safety notices last year' *The Irish Times* (Dublin 7 May 2018); Olivia Kelly, 'South Dublin apartments sale blocked due to safety concerns' *The Irish Times* (Dublin 28 July 2017).

⁵⁰ Department of Housing, Planning, and Local Government, 'Protection of Openings and Fire– Stopping', Building Regulations Technical Guidance Document B, (2017), section B3[3.4].

⁵¹ A document commissioned by the Department of the Environment, Community and Local Government following the Milfield Manor fire was finally published over two years after the fire and concerned the results of an investigation into units adjacent to the houses that were destroyed in the fire, rather than dealing with the causes of the fire in the units themselves. Eamon O'Boyle and Associates/Department of the Environment, Community and Local Government, *Framework for Enhancing Fire Safety in Dwellings where concerns arise*, (2017).

⁵² Anthony Mills, Peter E. Love and Peter Williams (2009) 135 *Journal of Construction Engineering and Management* 12, 14-16.

Hopkin, Lu, Rogers and Sexton carried out empirical research into defects analysis by housing associations in the United Kingdom. They found that the housing associations used information generated from defects in their new-build housing stock to modify their design and specification requirements in order to reduce defects, but placed insufficient emphasis on the role that onsite workmanship played in the incidence of defects; the authors concluded that the UK housebuilding industry could benefit from sector-wide adoption of organisational learning to incorporate experience of what caused housing defects in future developments.⁵³

Josephson and Hammerlund carried out an in-depth study of the causes of defects in seven projects in Sweden. Their findings indicated that construction defects had a number of different root causes, many of them related to human factors such as stability of the client's personnel during the project, the timing of key decisions by the client, cost pressures, and the project culture of the contractor organisation.⁵⁴ The cost of defects varied from 2.3% to 9.4% of the overall project costs, and most defects were attributable to the period of construction on site and supervision of labour and sub-contractors (as distinct from problems with the design and planning stage or the construction materials).⁵⁵ This is consistent with the problem of inadequate fire-stopping found in numerous Irish residential developments, and the role that inadequate skills and sub-contractor supervision may have contributed to this particular type of failure.⁵⁶

In the UK, however, there are a number of sources of data in relation to incidence and causes of defects in new homes. A study was carried out to analyse the causes of defects in 1,696 new homes over a period of 40 months by Sommerville and McCosh from 2003-2006. The authors characterise the residential construction market as 'a multi-billion pound industry, one of whose largest companies sees their core business as being a retailer rather than a house-builder'⁵⁷, and noted that little research had been carried out on defining consumer requirements, in contrast to the professional expertise that commercial

⁵³ Tony Hopkin, Shu-Ling Lu, Phil Rogers and Martin Sexton, 'Detecting defects in the UK new-build housing sector: a learning perspective' (2016) 34 *Construction Management and Economics* 35, 44.

⁵⁴ P. E. Josephson and Y. Hammarlund, 'The causes and costs of defects in construction: A study of seven building projects' (1999) 8 *Automation in Construction* 681, 686.

⁵⁵ *Ibid* 685.

⁵⁶ <https://www.rte.ie/news/2017/0901/901647-schools-fire-safety/> (accessed 8 August 2018).

⁵⁷ James Sommerville and Julie McCosh, 'Defects in new homes: an analysis of data on 1,696 new UK houses' (2006) 24 *Structural Survey* 6, 7.

and public sector employers may retain to assist in defining their requirements and managing the relationship with contractors.

They suggest that the home buyer ‘establishes a cognitive map of what they seek in a new home and this map is often at variance with the builder’s’.⁵⁸ The degree of variance may be illustrated by the respective attitudes of builders and homebuyers towards ‘snagging’, which they define as ‘the identification and rectification of errors, defects and omissions within a new house’, a process that the authors note has become an acceptable, if unwelcome, feature of the home buying process.⁵⁹

The snagging process, however, suggests that the homebuyer has some role in setting the contract requirements; in fact, as the authors point out:

The quality standards are set and managed by the builder - in some cases, even the inspection of the house for habitation approvals is significantly controlled by the builder.⁶⁰

Somerville and McCosh go on to highlight the poor legal remedies available to homebuyers dealing with snags, as the Sale of Goods Act 1979 excludes new homes and the warranty schemes such as the NHBC scheme ‘may rightly be viewed as an insurance policy, not consumer protection’.⁶¹

The empirical analysis carried out by Sommerville and McCosh suggested an average of 46 defects per home, in a range from a property with one defect to a property with 389 defects.⁶² Sommerville published a further article in 2006 in which he considered the extent of defects and rework in new build housing, and characterised the position of the UK home buyer as follows:

The UK house buyer is often a misguided soul; they misconstrue entering into the contract to purchase a new home as being a contract which confers a raft of rights

⁵⁸ Ibid 8.

⁵⁹ Ibid 8.

⁶⁰ Ibid 8.

⁶¹ Ibid 10.

⁶² Ibid 12.

on them...The stark truth of the matter of course is that since the Sale of Goods Act 1979...absolves those building new homes from any real fear of redress, the new house buyer is left to comprehend the full import and meaning of caveat emptor.⁶³

The legal rules of contract and tort offer limited scope for risk management as they currently stand. Contracts are used effectively in commercial projects to manage and mitigate risk but are not used in this way for consumer purchasers.

Atkinson carried out a survey of over 100 UK -based construction industry professionals, contractors and sub-contractors in order to research the role of human error in construction defects.⁶⁴ The responses to the questionnaires used suggested a number of potential contributing factors to incidence of defects, including the quality of communication on site and the qualifications, time-pressures, background and experience of site managers, and whether or not errors were detected by supervision; if not, they would often result in defects.⁶⁵

It is noteworthy, in this respect, that the role of the employer's representative or architect will often be limited to occasional inspections rather than maintaining a continuous presence on site; for this reason, Keating describes the clerk of works as the 'eyes and ears' of the employer on site.⁶⁶ For example, (albeit in a non-residential context), the Irish Department of Education, in response to the discovery of fire safety defects in newly built schools, announced in September 2017 that it would retain a clerk of works on all of its projects from that point onwards.⁶⁷

Research into the dynamics of house-buying and defects has apparently changed very little in the past twenty years, notwithstanding regulatory and technological changes that

⁶³ James Sommerville, 'Defects and rework in new build: an analysis of the phenomenon and drivers' (2007) 25 *Structural Survey* 391, 393.

⁶⁴ Andrew R. Atkinson, 'The role of human error in construction defects' (1999) 17 *Structural Survey* 231.

⁶⁵ *Ibid* 233.

⁶⁶ 'In large construction contracts, the employer may also employ a clerk of works whose functions have been described as being "the eyes and ears of the employer" on the site. Sometimes the role of the clerk of works is prescribed by the contract.' Vivian Ramsay and Others Stephen Furst, *Keating on Construction Contracts* (10th edn, Sweet & Maxwell Thomson Reuters 2016), 3.

⁶⁷ Opening Statement of Minister for Education and Skills to Joint Oireachtas Committee on Education, 26 September 2017.

have resulted in significant changes in construction methods.⁶⁸ In an article published in 2002, Roy, Brown and Gaze observed that ‘Speculative management of the land bank to profit from the dynamics of price inflation is the dominant business driver in the UK housing sector’, citing Bramley et al (1995).⁶⁹ This, in turn, had a dampening effect on innovation in construction methods, so that the house building industry continued to rely on traditional methods, that required lengthy build times.⁷⁰

B: THE ROLE OF GATEKEEPERS

Surveyors can be regarded as gatekeepers of risk, in that their role is to assess the condition of the home and to report to the prospective buyer in relation to possible problems with the home, including defects. A significant limitation in this model, however, is that the home buyer’s surveyor attends the site for the first time following notice of completion.

The design and assigned certifiers appointed pursuant to the Building Control (Amendment) Regulations 2014 are also gatekeepers of risk. The design certifier provides a certificate to the effect that the design of the works complies with the Building Regulations. At the completion of the works, the assigned certifier provides a certificate to the effect that he has implemented the inspection and co-ordinated the inspection work of others, and certifies, in reliance on the certificates of others involved in the construction works (known as the ‘ancillary certifiers’), that the works comply with the Building Regulations.

The assigned certifier’s role and certificate should provide a degree of reassurance to home buyers, in that the certifier must be a registered architect, surveyor or engineer, and given that the certifier may be liable for negligent misstatement to a home buyer in the event that the works do not conform to the certificate of compliance with the Building Regulations.

⁶⁸ For example, energy performance requirements now require all new houses to have very high energy ratings, which has driven innovation in insulation, airtightness and heating systems. Erwin Mlecnik, ‘Opportunities for supplier-led systemic innovation in highly energy-efficient housing’, (2013) 56 *Journal of Cleaner Production* 103.

⁶⁹ Rajat Roy, Justine Brown and Chris Gaze, ‘Re-engineering the construction process in the speculative house-building sector’ (2003) 21 *Construction Management and Economics* 137.

⁷⁰ *Ibid* 137, citing Barlow, (1999).

The assigned certifier, however, is retained and paid by the employer, and may have a long-standing commercial relationship with the employer. As such, the assigned certifier can be seen as managing risk for the employer, that the risk that the building cannot be opened pending completion of all relevant certificates necessary for the certificate of compliance on completion to be signed, rather than for home buyers. This results in a misalignment between the person who will be attending site and inspecting the works and the person at financial risk of defects; the assigned certifier may be the gatekeeper who knows most about the works, but is under no obligation to furnish any information in relation to potential risks to the home buyer, or to the building control authority.⁷¹

It is clear that the home buyer's solicitor should be the principal gatekeeper of risk for home buyers. However, the discussion in chapter 2 regarding unfair terms also demonstrates that solicitors acting for home buyers encounter a similar imbalance of negotiating power as that of their clients in dealing with solicitors acting for developers.

Finally, it might be thought that inspectors employed by the main home warranty providers such as HomeBond would provide a 'gatekeeping' role with regard to the home buyer's risk, as the warranty provider may be the most likely party involved in the project to have to discharge the cost of defects. It is clear from recent jurisprudence in relation to the HomeBond warranty policy, however, that the disclaimer of liability contained in that policy will be sufficient to negate a finding of a duty of care in negligence to a home buyer.⁷²

C: LIABILITY FOR DEFECTS AND FINANCIAL RISK

The builder's limited liability – a tool of risk transfer from builder to buyer

The speculative home-building model used for the majority of new developments in Ireland has historically relied on builders using debt to finance construction, or in some cases to finance construction of units via stage payments from purchasers.⁷³ The use of

⁷¹ Absent a request in writing from an authorised officer pursuant to section 11 of the Building Control Act 1990.

⁷² *Wilkinson & ors -v- Ardbrook Homes Ltd & Ors* [2016] IEHC 434.

⁷³ The Report of the Joint Committee of Inquiry into the Banking Crisis found that 'In the lead up to the [financial] crisis, many developers had become completely reliant on bank debt to fund their developments', and that it was 'not uncommon' for Irish banks to provide 100% of the residential development funding required by speculative

such methods meant that builder/developers could structure the arrangements for construction and sale of homes with little financial risk to themselves. In addition, where limited liability companies are used as the corporate vehicle for assuming the relevant obligations, there is no legal requirement that such a company have any minimum capitalisation or assets in order to meet claims against it.

Irish law allows the assets of company directors and shareholders to be used in discharge of a company's debts only in limited circumstances.⁷⁴ Therefore, the entity with whom the first purchaser contracts for the construction of a home may be a 'man of straw'. Even if the original builder is in existence and solvent at the time that legal proceedings are initiated in respect of a housing defect, the amount of any damages award may be beyond the capacity of the builder to discharge.⁷⁵ The cost of remedying the defect may be as much or even more than the original cost of construction of the house, when the costs of professional fees incurred in investigation of the defect, together with alternative accommodation costs and the cost of having another contractor carry out remedial works.⁷⁶

In its 1977 Working Paper on the Liability of Vendors and Lessors of Premises, the Law Reform Commission expressed the following view with regard to builder insolvencies:

in recent years the number of builders who have gone into liquidation is disturbingly high and it has been suggested that a reforming measure which merely gives the purchaser, etc. better civil remedies without addressing the

developers. (Houses of the Oireachtas, Report of the Joint Committee of Inquiry into the Banking Crisis, (2016), chapter 3). The insolvency risk of developer/builders where stage payments by purchasers was used in lieu of bank financing was highlighted in *Re Barrett Apartments Ltd.* [1985] ILRM 679, in which a purchaser who had paid a booking deposit in respect of the purchase of a new apartment was held to be an unsecured creditor in the subsequent liquidation of the builder. This risk led to the practice whereby purchasers would insist that selling agents hold such deposits rather than passing them on to builders. This method was successful in protecting the buyer's deposit in the case of *Brady v Flynn & Associates Ltd.* (unrep., High Court, Costello J. 21 January 1986).

⁷⁴ An example is in section 836 of the Companies Act 2014, by which a person who has been restricted from acting as a company director may be held personally liable for the company's debts if that person acts as a director in breach of the restriction order.

⁷⁵ Hogan J commented in *Mitchell v Mulvey Developments* [2014] IEHC 37 that 'I have endeavoured – all too belatedly and perhaps, I fear, inadequately - to compensate these plaintiffs for the manifold wrongs that they have been obliged to endure over the last eight to nine years, although it is as yet unclear as to whether these awards are actually enforceable in practice.' [56].

⁷⁶ An example would be the cost of 'jacking up' a house that has been built on poor foundations and is exhibiting signs of 'tilt', such as the house at issue in *McGee v Alcorn* [2016] IEHC 59.

problem of the insolvency built, or the builder who has disappeared, is useless reform.⁷⁷

The Commission also pointed to the practice of builders and developers using companies to avoid civil liability.⁷⁸ The Commission suggested that a registration and bonding system could assist with addressing the problem of builder insolvencies, and that builders could be required to demonstrate their financial stability as a condition of registration, potentially supported by the provision of a bond.⁷⁹

The Working Paper noted that an insurer would require builders to provide assets as security, and considered personal liability for individuals using shell companies to avoid liability⁸⁰; it attached considerable significance to the risk of builder insolvency:

...a practice is becoming common whereby developers and builders are using the corporate vehicle, or multiple companies, to evade possible civil liability in relation to defective construction. One way a builder can use the company structure to achieve this end is as follows: he forms a company with little or no assets to build a number of houses; when the houses are completed he liquidates the company or merely abandons it, and forms a new company to build his next lot of houses. In this situation the purchaser might have an action against an assetless shell or, if the company has been liquidated, might have no potential defendant at all against whom he might initiate proceedings.⁸¹

The paper concluded that the risk of builders using ‘assetless shell’ companies ‘could be partly solved by the introduction of a Register or a licensing system for builders’⁸², which would require examination of the builder’s technical competence and financial standing prior to registration or licensing of a builder.

Financial stability, builder insolvency and the use of limited liability companies

⁷⁷ Law Reform Commission, *The Law relating to the Liability of Vendors and Lessors for the Quality and Fitness of Premises*, (1977) 43-44.

⁷⁸ Ibid 44.

⁷⁹ Ibid 45.

⁸⁰ Ibid 45-46.

⁸¹ Ibid 44.

⁸² Ibid 45.

The Commission suggested that the registration or licensing scheme could be dependent on the builder's ability to provide a bond, and that the cost of administration of a guarantee scheme could be met by means of a levy on participants.⁸³

The problem of the liquidation or disappearance of the corporate body was regarded as more difficult to solve, but it was observed that the introduction of a registration/licensing system would assist in this regard, as insurance companies would require builders to provide assets as security for bonds, and the company or association administering the guarantee fund would be likely to require personal guarantees in respect of the liabilities of builder's companies.⁸⁴ The bond was never introduced; the Commission had contemplated that insurance companies issuing bonds would require assets as security and that the bonding system would make the problem of builders contracting via limited liability companies and special purpose vehicles less acute. Therefore, the Commission clearly intended that the new duty would have appropriate financial backing.

These proposals were never implemented, despite the fact that the insolvency of builders has presented a particular problem for home owners who cannot recover under home warranty policies or from other potential defendants. The Commission was strongly of the view, however, that the reforms should proceed while efforts were made to introduce the registration scheme, in part due to the concern that the impetus for the reform might be lost if the registration system was introduced.⁸⁵

HomeBond – history and scope of the HomeBond warranty

One of the most significant features of the Irish system of dispute resolution and remedies in residential construction in recent decades has been the reliance on home warranties policies rather than the builder's contractual obligations. This has been the case for the past 40 years since the introduction of the HomeBond home warranty. HomeBond is the principal home defects insurance product for new homes in Ireland and was introduced into the Irish market in 1977.

⁸³ The Commission considered that 'The system would ensure that builders would not only have minimum competence in construction, but would also have some financial stability first, in the form of the bond and second, in the form of the registration (licensing) authority's guarantee fund'. (Law Reform Commission (n 77), 45).

⁸⁴ Ibid 45.

⁸⁵ Ibid 47.

The HomeBond scheme was modelled on the National House Building Company scheme from the UK. Tapping and Rolfe note that at the time of the publication of the first edition of their book in 1974, speculative builders, who were responsible for most private housing in the UK ‘had no responsibility for the finished product (unless their contract specifically provided otherwise’. It was for this reason that ‘the UK government gave its support to the NHBC scheme in the 1960s, at the same time as the Law Commission was considering the liability of house builders.’⁸⁶ Tapping and Rolfe set out the history of the NHBC, which operates a registration scheme, carries out spot inspections of houses, and administers an insurance scheme to deal with defects.⁸⁷

The name HomeBond describes different products that were offered since the establishment of the scheme in 1977.⁸⁸ This may have been partly in response to the publication the 1977 Commission Working Paper with its call for a system of bonding and insurance for builders. The Commission’s follow-on 1982 Report on Defective Premises summarised the outcome of the submissions received by the Commission from various persons and entities in relation to the Working Paper; of particular interest to this chapter’s analysis is that the Construction Industry Federation had proposed HomeBond as an alternative to a statutory warranty of quality.⁸⁹

During the period of the first HomeBond scheme, from September 1977 until 1 January 1995, the Scheme provided cover in respect of ‘major structural defects’ for six years. The second phase of HomeBond covered the period from 1 January 1995 to 30 October 2008. Two significant changes were made in the second phase of the Scheme. Firstly, insurance cover was introduced for stage payments. These are payments made by purchasers in respect of houses to finance the construction. Contractor insolvency was a significant risk to purchasers making such payments, illustrated by the decision of the High Court in *Roche v Peilow*⁹⁰, in which a firm of solicitors was held liable for the loss to the plaintiff house purchaser where the building contractor, to whom stage payments had been made for the construction of a new house, had become insolvent.

⁸⁶ Tapping, A.d.B. and R. Rolfe, *Guarantees for New Homes: a guide to the NHBC scheme*. 1981, London: Oyez Publishing, 5.

⁸⁷ *Ibid* 5.1.

⁸⁸ Law Society of Ireland, *Conveyancing* (8th edn, Oxford University Press 2016), 419-420.

⁸⁹ Law Reform Commission, (n 79), 3.

⁹⁰ [1986] ILRM 189.

Since October 2008, HomeBond has been underwritten by Allianz Insurance. It is now a first-party insurance policy rather than a home warranty policy, but remains subject to significant limitations as set out above. The current HomeBond policy, for example, contains a limit of €50,000 for ‘Latent Defects’ as defined in the policy, for a period of five years, and an aggregate limit of €500,000 for Latent Defects in a continuous unit such as a terrace of houses. There are significant limits on recover of the costs of alternative accommodation and professional fees in connection with repair or rebuilding.⁹¹ The limit for Structural Defects (as defined in the policy) is €200,000; one case from 2016 involving defective foundations included a claim for €277,000 to repair a defective house, and the plaintiff’s quantity surveyor in the case indicated that the cost would be considerably more if the house had to be demolished and rebuilt.⁹²

The standard HomeBond policy provides limited coverage and relatively low caps on liability.⁹³ While it may have a certain value with regard to protection of the asset value of the property, to aid with reinstatement costs in the event of defects (but not on an indemnity basis), it is inappropriate to deal with dangerous defects in particular. The product liability regime has operated for decades on the basis of strict liability⁹⁴ but residential defects, including dangerous defects, continue to be uninsured and underinsured.

The substitution of the builder’s contractual obligation following completion of homes for recourse pursuant to the HomeBond policy has been a consistent theme since its introduction, exacerbated by the principle of privity of contract. The difficulty with this position from the buyer’s perspective is that the HomeBond policy provides a far more limited indemnity than what the buyer could recover under contract law from a solvent builder with the means to meet a claim for damages.

⁹¹ HomeBond policy document, section 3, and see https://www.homebond.ie/home_buyers/

⁹² *McGee v Alcorn* [2016] IEHC 59.

⁹³ The indemnity limit, for example, is €200,000; the equivalent indemnity limit under the NHBC warranty in the UK is £1m. (National House Building Council, *Welcome to NHBC warranty and insurance For homes registered from 1 April 2018* (National House Building Council 2018).

⁹⁴ Following the Liability for Defective Products Act 1991, implementing Directive No. 85/374/EEC of 25 July 1985 of the Council of the European Communities on the approximation of the laws, regulations and administrative provisions of the Member States of the European Communities concerning liability for defective products.

The Law Society noted in a practice note of July 2000 that, the Society drew attention to the limitations of the HomeBond Scheme, noting in particular the overall limit of liability of £30,000 per dwelling, and advised that purchasers should get a structural defects indemnity under seal, or at least that the building agreement should be executed under seal.⁹⁵

A rare discussion of the nature of the HomeBond scheme is contained in *Manning v National House Building Guarantee Company Ltd. & Anor*⁹⁶:

The first defendant operates a guarantee scheme which the construction industry funds for the benefit of purchasers of new houses and apartments. It cannot be gainsaid that the first defendant must ensure that the standards it imposes in relation to the design and construction of the premises in respect of which it issues guarantees to the purchasers are fully compliant with the law. It unquestionably owes a duty of care to the purchasers of the premises to ensure such compliance.⁹⁷

The remarks of Laffoy J. must be regarded as *obiter*, however, as the plaintiff in the case was not a purchaser of premises covered by the HomeBond scheme but rather a supplier claiming that HomeBond had acted wrongfully in refusing to certify his fire-stopping system as compliant with the Building Regulations. There is a fuller discussion about the potential liability of HomeBond in negligence in the more recent case of *Wilkinson & Ors v Ardbrook Homes & Ors*⁹⁸. The plaintiffs had purchased a home which had the benefit of a HomeBond completion certificate and policy, and in which significant defects subsequently emerged.

Baker J. in the High Court rejected the argument that HomeBond should be liable in negligence for the failure of its inspectors to detect the defects, and for its issue of the completion certificate. In a judgment that is based on similar reasoning to *Robinson v Jones*⁹⁹ (albeit that the case is not cited), Baker J. agreed with HomeBond's assertion that any tortious liability could not be greater than the liability arising under the HomeBond agreement, and noted that the plaintiff had 'not pleaded any special relationship or any

⁹⁵ Law Society of Ireland Practice Note, 'HomeBond Warning', 1 July 2000.

⁹⁶ [2011] IEHC 98.

⁹⁷ *Ibid* [5.9]

⁹⁸ [2016] IEHC 434.

⁹⁹ See further the discussion of *Robinson* in chapter 3.

assumption by HomeBond or responsibility outside the contractual relationship, and no reliance is pleaded, for example, on a representation or other extra-contractual nexus that might have grounded a parallel or other duty in negligent misstatement'.¹⁰⁰ The claim in tort accordingly failed as it was 'wholly founded in contract' and the 'contract itself expressly excludes liability for such negligence'¹⁰¹, relying on *Pat O'Donnell & Company Limited v. Truck and Machinery Sales Limited*¹⁰², in which O'Flaherty J. expressed the proposition thus:

...if, for instance, a contract provides, whether expressly or by necessary implication, that the defendant is not liable for a particular risk, then the law of tort should not be allowed to contradict that.¹⁰³

The scope of the HomeBond warranty cover has been considered by the Irish courts on a number of occasions. In *Farrell v Arborlane*¹⁰⁴, the plaintiff apartment owner brought proceedings against the builder and design team responsible for construction of the development in which she owned her apartment, along with HomeBond. Although the defects complained of included cracked walls and water ingress, the court noted that HomeBond 'inspected the development at some point...and decided that the defects arising were non-structural and did not come within the scope of the cover it provides'.¹⁰⁵

This has been attributable in part to the practice whereby the home warranty, but not the original building contract, is assigned as part of the conveyancing transaction for transfers of the home during the limitation period of the building contract.¹⁰⁶ This practice conflates recourse under the contract (against the original builder) with recourse under the home warranty. The offering of a home warranty in place of a continuing contractual obligation has arguably diminished the importance of the contractual obligation over time, particularly in relation to latent defects, and may have contributed to the limited critical analysis or impetus for change to the LSBA.

¹⁰⁰ *Wilkinson*, (n 72), [31].

¹⁰¹ *Ibid* [33].

¹⁰² [1998] 4 IR 191.

¹⁰³ *Ibid* 199.

¹⁰⁴ *Farrell v Arborlane Limited and Ors* [2015] IEHC 535.

¹⁰⁵ *Ibid* [3].

¹⁰⁶ As noted in chapter 5, the LSBA itself contains a restriction on assignment without the contractor's consent, and there is no mention of seeking such consent as part of the conveyancing transaction in the Law Society Conveyancing manual nor in the current edition of the Law Society standard form Requisitions on Title or completion requirements.

International and theoretical perspectives on corporate limited liability

Lopucki discusses various strategies that a party may use to reduce its risk of being made subject to liability, such as judgment-proofing: ‘To judgement proof a company, the strategist must undercapitalize the liability-generating entity.’¹⁰⁷ As discussed earlier in this chapter, the speculative residential construction model used most during the 1990s and 2000s in Ireland was debt finance, which meant that developers and builders could carry on business without having assets or reserves to meet any potential liabilities from buyers.

While banks routinely sought personal guarantees from developers in respect of borrowings, this was by way of security for the lender and could not be relied upon by home owners in defects claims. This provides a strong argument in favour of a bonding requirement for developers and builders similar to that advocated by the Law Reform Commission; without such a requirement, builders may structure their business so that they are never a mark for claims by home buyers.¹⁰⁸

Financial and bonding requirements – the problem of the ‘assetless shell’

The problem identified by the Law Reform Commission in the 1977 Working Paper exposed a gaping hole in the private law remedies paradigm: the assetless defendant, who is not a ‘mark’ for litigation.

Shavell, writing in 2002, argues that minimum capital requirements for potentially harmful activities, including housebuilding, may be both socially desirable and creates a deterrent effect among potential injurers, on the basis that an injurer will ‘choose the optimal level of care’ if their assets are at least equal to the potential harm they may cause.¹⁰⁹

¹⁰⁷ Lynn M. LoPucki, ‘The Death of Liability’ (1996-1997) 106 Yale Law Journal 2, 22.

¹⁰⁸ Discussed further in chapter 7 below.

¹⁰⁹ Steven Shavell, ‘Minimum Asset Requirements’, Discussion Paper No. 389, 11/2002, Harvard John M. Olin Center for Law, Economics and Business, 1.

If their assets are less than the potential for harm, however, they may have too little incentive to take care, but notes that a balance needs to be struck between financial requirements and the inefficiency that could result from smaller firms being driven out of the market by excessive financial requirements.¹¹⁰ Shavell goes on to argue that using minimum asset requirements as a means of ensuring that compensation is available to meet claims from customers may be socially undesirable, on the basis that enforcing customers' rights via litigation is inefficient due to its cost.¹¹¹

Shavell refers to the bonding and insurance requirements of the 2002 Wisconsin Administrative Code. Para. 101.654 of the Code deals with contractor certification and education, and provides that a person may not obtain a building permit unless that person holds both a certificate of financial responsibility and furnishes proof of completion of continuing education requirements. The Code deals with the requirements for the grant of a certificate of financial responsibility:

- (a) a bond endorsed by a surety company authorised to do business in Wisconsin of not less than \$5,000,
- (b) a general liability insurance policy of at least \$250,000 per occurrence for bodily injury or death.

In a further article from 2004, Shavell develops the argument further and considers the interaction between financial capacity to meet claims and compulsory liability insurance. He argues that financial responsibility requirements may be socially undesirable in relationships between firms and their customers, as customers can quantify the expected harm and factor it into their purchase decisions.¹¹²

This analysis does not assist, however, in the home-buying paradigm, where a customer may have very little information, and where the customer's ability to gain further information through engaging a professional is limited to what that professional can investigate, and therefore, quantify. Shavell suggests vicarious liability as an alternative to minimum financial requirements or compulsory liability insurance, for a number of

¹¹⁰ Ibid 2.

¹¹¹ Ibid 12.

¹¹² Ibid 23.

reasons. Firstly, as the combined assets of both parties are at risk, an injurer will exercise greater care before deciding to carry out an activity that may cause injury. Secondly, the vicariously liable party will insist on greater care being taken by the other party.

Other policy responses proposed by Shavell include ‘criminal liability and direct safety regulation’.¹¹³ He concludes that, although asset and liability insurance requirements may be proposed in order to provide compensation to victims, their ultimate benefit (in light of the significant costs of litigation) may be ‘in the beneficial incentives that they generate’ rather than in the actual compensation that they might deliver.¹¹⁴

Merkin and Steel suggest that lawyers and courts have consistently maintained an artificial distinction between liability rules and insurance, and argue that liability should be determined without taking insurance into account, but that there should be a re-positioning of insurance considerations as central to private law and liability analysis.¹¹⁵ The authors refer to Collins’ insight that construction contracts should be treated as networks of inter-related contractual relationships instead of being regarded in the traditional, binary structure.¹¹⁶ Collins refers to *Norwich City Council v Harvey*¹¹⁷ in which the court held that it was not fair, just and reasonable to impose a duty of care to the plaintiff council on a sub-contractor, where that sub-contractor’s employer, the main contractor, had negotiated a limitation on its own liability by contract. Merkin and Steele surmise that all parties would have relied on the council arranging insurance that what motivated the case against the sub-contractors was the insurer’s intention to recover its own losses by way of subrogation against the sub-contractor, ‘in an attempt to shift their loss on to a party who had been led to believe that it was unnecessary to insure against liability’.¹¹⁸

The authors then suggest that questions of the duty of care, when considered in a contractual context, should recognise the existing contractual risk allocation and insurance arrangements to which the parties have agreed, and not seek to undermine that. The argument is similar to that made by Jackson LJ. In *Robinson v P.E. Jones*

¹¹³ Ibid 26.

¹¹⁴ Shavell, (n 109), 26.

¹¹⁵ Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press 2013).

¹¹⁶ Hugh Collins, ‘Introduction’ in Gunther Teubner, *Networks as connected contracts: edited with an introduction by Hugh Collins* (Bloomsbury Publishing 2011).

¹¹⁷ [1989] 1 WLR 828.

¹¹⁸ Merkin and Steele (n 115), 195.

*Contractors*¹¹⁹, albeit that it is the law of tort itself that threatens the parties' risk allocation where it does not contradict any contractual or other arrangement that explicitly or impliedly limits liability.

Merkin and Steele argue that tortious duties should be analysed by reference to the 'contractual structuring of risks [which] forms the background to the proposed tort duty'¹²⁰ and suggest that 'sensitivity to contract arrangements is not incompatible with protection of consumers or others.'¹²¹

In the case of residential construction defects, the question arises of whether liability rules be abandoned in favour of a system where insurers abandon considerations of causation and fault and simply indemnify against defects in the building. The tenor of the rhetoric from construction industry representatives with regard to the role of home warranty policies is that the primary recourse in the event of defects should be via the home warranty policy, and that this is beneficial to consumers, who do not need to establish liability under the building contract.¹²² The normative difficulty with this position is that it ignores the importance and persistence of the contractual obligation for the duration of the limitation period, with a view to removing the builder from the claims process, and offers no solution to the home buyer whose loss is not covered (wholly or partially) by the home warranty policy.

Hedley argues that tort of negligence is a largely fictional device for attributing liability, as the principal risks for which negligence results in legal liability are covered by various types of insurance (public liability insurance, compulsory motor insurance, etc.).¹²³ A problem with this proposition is that it fails to account for risks that are not, by convention or legal requirement, insured. Building defects constitute a category of loss for which the

¹¹⁹ In *Robinson v P.E. Jones (Contractors) Ltd.* [2011] EWCA Civ 9, Jackson LJ stated at [81]: 'The law does not automatically impose upon every contractor or sub-contractor tortious duties of care co-extensive with the contractual terms and carrying liability for economic loss. Such an approach would involve wholesale subordination of the law of tort to the law of contract.'

¹²⁰ Merkin and Steele (n 115), 207.

¹²¹ *Ibid* 208.

¹²² In a debate by the Oireachtas Joint Committee on Housing, Planning and Local Government, Mr. Brian McKeon, a director of the National House Building Guarantee Company Limited, which administers the HomeBond scheme, commented to the Committee that 'The insurance policy that our company is providing with each property is just like a car insurance policy. People phone the insurance company. They do not go near the warranty company or the builder.' Dáil debates, Joint Committee on Housing, Planning and Local Government debate, Wednesday 5 April 2017.

¹²³ Steve Hedley, 'Making sense of negligence' (2016) *Legal Studies* 491.

courts of various jurisdictions recognise that a duty of care may lie in negligence, but these losses depart significantly from other categories of activity in how they are insured.

Physical injury and damage to property, the two most common categories of recovery in the law of negligence in common law countries, are typically insured by means of liability insurance arranged and paid for by potential defendants. A building contractor will maintain public liability insurance in respect of injury and damage to property (other than the building works) arising from construction operations.

Property developers and building contractors do not, at least in Ireland, England and Wales, arrange any insurance in respect of the consequences of negligence or breach of contract in the carrying out of residential building works. Instead, purchasers of residential units are advised (and may be required by financial institutions that advance loans for the purchase) to take out one of a variety of home warranty policies.

Insurance and its interaction with tort law

Fleming suggested in 1967 that liability insurance fatally undermined the deterrence objective of tort law, which, in his view, had previously created the prospect of a penalty in the minds of would-be tortfeasors, and that the advent of liability insurance meant that wrongdoers no longer had any apprehension of personal civil liability:

Liability insurance cushioned him against its impact in advance, and thus removed the primary incentive toward the observance of care so heavily emphasized in by the champions of the negligence criterion.¹²⁴

Schwartz later took issue with this view.¹²⁵ He pointed out that many large companies and public bodies opt to self-insure rather than carrying liability insurance, and virtually all insurance policies will feature liability caps and exclusions from cover, for which defendants are, therefore, without insurance.¹²⁶ Schwartz also argued that liability insurance conflicts with Weinrib's account of corrective justice in allowing the defendant

¹²⁴ John G. Fleming, 'The Role of Negligence in Modern Tort Law' (1967) 53 *Virginia Law Review* 815, 824.

¹²⁵ Gary T. Schwartz, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 *Cornell Law Review* 313.

¹²⁶ Schwartz refers to examples of self-insured entities including the Ford Motor Company, at least as of 1986, and the cities of New York and Los Angeles. (Schwartz (n 125), 316.).

to pass the entire risk off to the liability insurer, and thus avoid sanction for the injury or loss inflicted on the plaintiff, which Weinrib seems to suggest is acceptable only where the defendant is subjected to an additional sanction such as an increased premium.

Lemann suggests that insurance is capable of producing deterrent effects in a considerably more efficient manner than tort liability, as it can deter certain types of behaviour across all potential wrongdoers by calculating premiums based on risk, and because it imposes a premium for insured losses quickly (for example, at the next policy renewal) rather than after a period of years, as is the case with tort litigation.¹²⁷ Lemann goes on to argue that insurance can be regarded as a liability rule, that would result in quicker, cheaper remedies for victims of wrongdoing than the law of tort. He deals with the argument that insurance prevents tortfeasors from internalising the cost of their wrongdoing but pointing to the evidence that insurance is calculated based on the behaviour of the insured; as such, ‘premiums that are adjusted based on risk can function as a “Pigouvian tax”, a way of forcing individuals to bear the costs of their negative externalities’.¹²⁸

In this way, insurance can become a ‘liability rule’, to use the language of Melamed and Calabresi.¹²⁹ In Lemann’s view, coercive insurance can be seen as ‘a system for assigning costs to behaviours while providing compensation to those who are injured by those behaviours’.¹³⁰ He acknowledges, however, that insurance exists precisely because of the rules established by the law of tort, but suggests that insurance could supplant tort law, in favour of a compensation system in its own right, but raises the question of whether insurance can define ‘a standard of conduct without the help of tort law.’¹³¹

Should insurance follow liability, or should liability follow insurance?

Weinrib, writing in 1985¹³², criticised the decision of the Supreme Court of California in *Escola v Coca-Cola Bottling Co.*¹³³ in which Justice Traynor, in imposing strict liability for injury caused by an exploding bottle of soda, commented that ‘the risk of injury can

¹²⁷ Alexander B. Lemann, 'Coercive Insurance and the Soul of Tort Law' (2016) 105 Georgetown Law Journal 55, 58.

¹²⁸ Ibid 60-61.

¹²⁹ Guido Calabresi and A Douglas Melamed, 'Property rules, liability rules, and inalienability: one view of the cathedral' (1972) Harvard Law Review 1089.

¹³⁰ Lemann (n 127), 60-61

¹³¹ Ibid 67.

¹³² Weinrib, 'The Insurance Justification and Private Law', Journal of Legal Studies, vol. XIV (December 1985).

¹³³ *Escola v Coca-Cola Bottling Co. of Fresno* 24 Cal. 2d 453, 150 P. 2d 436, 441 (1944).

be insured by the manufacturer and distributed among the public as a cost of doing business.’¹³⁴ Despite the significant innovation in liability heralded by the decision, the above dicta embodies the view that the costs arising from defective products should be externalised across the producer’s customers, instead of being borne by producers. Weinrib contrasted this view with that of Stephen J. in *Caltex Oil (Australia) Pty. Ltd. v The Dredger “Willemstad”*¹³⁵, in which Stephen J. stated that the role of the courts was to assign liability:

If loss-inflicting consequences of an act are recently foreseeable and the necessary proximity is shown to exist, the present state of the law of tort, unreformed by any fundamental departure from fault liability, suggests no reason why the tortfeasor should not bear the consequences of his conduct. The task of the courts remains that of loss fixing rather than loss spreading.¹³⁶

In Weinrib’s view, the above statement of Stephen J. encapsulated the proper relationship between tort liability and insurance; that liability insurance should be triggered by the assignment of liability, rather than liability being determined by the fact of insurance, which would result, in his view, in ‘The presence of insurance is transformed into a means for creating the liability to which it is supposed to respond’.¹³⁷

He advocated a re-assertion of the primacy of liability over insurance, in order to preserve the fundamental nature of private law as means of adjudicating between individuals, returning to his conception of the unity of wrong and remedy and the relationship between plaintiff and defendant as the ‘doer and sufferer of the same harm’.¹³⁸

Insurance must be treated as secondary to that relationship, in Weinrib’s view, ‘if liability is to be a judgment on human interaction and not a tax on activity’.¹³⁹ This argument supports the view that the availability of warranty and insurance policies against home defects is not a sufficient remedial response where the liability rules themselves are inadequate.

¹³⁴ (1976) 136 C.L.R. 529.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* 580.

¹³⁷ Weinrib (n 132) 683.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

What relevance should insurance have to tort liability?

Stapleton, in an influential article from 1995, attacked the ‘ideological subtext of the “tort as insurance” fallacy’, noting the trend amongst the American commentators that tort should be seen as insurance and, as such, ‘should be savagely cut back’.¹⁴⁰ She noted that Lord Denning had been the ‘principal champion’ of the view that courts should consider which party should bear the risk of loss, rather than assigning liability based on culpability.¹⁴¹ There is evidence for this view in the judgment of Lord Denning in *Dutton v Bognor Regis Urban District Council*¹⁴², in which he stated that the defendant Council should bear the loss resulting from negligent inspection of foundations:

They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss.

Stapleton points to the fallacy of viewing the insurance of a defendant as a factor in determining that defendant’s liability, arguing that this could result in a defendant being held liable simply because he had liability insurance cover, ‘while an equally culpable but uninsured or uninsurable actor would escape’, which would favour the defendant who failed to insure against the loss that he might cause.¹⁴³

Stapleton acknowledged, in response to the commentators who would argue in favour of taking account of the ‘realities of liability insurance’ that the standard of care in negligence may have expanded in response to availability of liability insurance, but notes that it is ‘hard to know how to test’ the assertion that courts were more readily imposing liability on insured defendants, suggesting that claims against uninsured defendants will not, typically, be resolved by litigation.¹⁴⁴

One of the most significant insights in Stapleton’s article relates to the normative difference between first and third party insurances, which she develops in response to the claim of the writers that she refers to as the ‘Yale lawyers’.¹⁴⁵ She criticises two versions of the ‘retrenchment’ against tort liability articulated by the Yale lawyers. The first can

¹⁴⁰ Jane Stapleton, ‘Tort, insurance and ideology’ (1995) 58 *The Modern Law Review* 820, 821-823.

¹⁴¹ Stapleton, (n 140), 824.

¹⁴² *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.

¹⁴³ Stapleton (n 140), 825.

¹⁴⁴ *Ibid* 842.

¹⁴⁵ *Ibid* 833.

be expressed by the view a potential plaintiff's capacity to have arranged first-party insurance against the loss or injury suffered should be a factor in determining liability for that loss or injury, such that the first party cover that a plaintiff would have chosen in respect of particular loss or injury should limit what they can subsequently recover in tort for that loss or injury, if it occurs. The second is that the injured party should not recover in respect of loss or injury for which first party insurance was available.¹⁴⁶

In first-party insurance arrangements, the insured is part of a pool of insureds who benefit from the aggregate contributions to the pool where they call on the insurer to provide an indemnity; if the scheme ran for long enough, the premiums paid by each insured would eventually match the amounts paid out to the pool, and the pool of potential injurers and potential victims are roughly the same (for example, in relation to losses arising from traffic accidents, where there is an approximate numerical equivalence between drivers causing injury and loss and drivers and other road users suffering injury and loss).¹⁴⁷

Risks such as employer's liability or the supply of products, by contrast, do not involve equivalent classes of potential plaintiffs and defendants; in these relationships, Stapleton argues:

Replacement of tort by first party insurance will enrich the class of relevant business defendants, remove whatever deterrence incentives tort liability generates, and burden potential victims with the need to buy insurance cover for the relevant risk...¹⁴⁸

Should home buyers be bound by pre-determined risk arrangements governing sale of their home?

Merkin and Steele contend that contract and tort each allocate risk in different ways, and reject the argument put forward by Stapleton that road traffic accidents represent the paradigm of tort claims.¹⁴⁹ Instead, they commence their analysis at the other end of the spectrum, with parties who in a contractual risk arrangement, either by the background contractual structure, which provides the context for their relationship, or by their direct contractual relationship, in which they claim that insurance considerations are typically

¹⁴⁶ Ibid, 836.

¹⁴⁷ Ibid, 842.

¹⁴⁸ Ibid.

¹⁴⁹ Merkin and Steele (n 115), 210.

barely considered.¹⁵⁰ The authors take issue with Stapleton’s view of tort law as comprised of the duty to take care, in part because it fails to recognize tort’s role in risk allocation prior to loss:

...we suggest the courts use the idea of “duty of care” to mean a duty to take care of *certain interests*, while Stapleton continues to maintain that the *ex ante* role of negligence in particular is simply to offer guidance to act...with due care.¹⁵¹

It is submitted that the argument made in chapter 3 for the continued and essential role of the law of negligence in building defects cases is consistent with the desire of Merkin and Steele to align tortious duties, insurance arrangements, and contractual risk allocation. In the LSBA, there is no provision for some of the main features of a traditional commercial construction contract that would typically allocate risks to the employer or contractor as they eventuate; for example, by allowing the contractor to claim for loss and expense consequent upon variations to the works by the employer.¹⁵²

The primary risk allocation in the LSBA is in respect of defects, explicitly (by means of the contractor’s warranty and obligation carry out and complete the works¹⁵³), and implicitly (by the procedural rules described in chapter 5). It is true that a concurrent duty of care in negligence would deprive the builder of the benefit of this risk allocation. It is submitted, however, that concurrency is a well-established principle of Irish law, endorsed by the Irish Supreme Court¹⁵⁴ well before it was similarly affirmed in the decision of the House of Lords in *Henderson v Merrett Syndicates*¹⁵⁵. Secondly, the criticism of the LSBA and of the privity rule in chapters 2 and 5 casts serious doubt on the overall fairness of the LSBA, exemplified by the High Court order of 2001 regarding unfair terms.¹⁵⁶

Finally, as argued in chapter 3, the finding in *Ward v McMaster* of a duty of care by a builder to a home buyer has never been overruled, and would not suffer from the

¹⁵⁰ Ibid.

¹⁵¹ Ibid 213.

¹⁵² Royal Institute of Architects of Ireland, *Agreement and Schedule of Conditions of Building Contract* (2017), clauses 2 and 29.

¹⁵³ Law Society of Ireland and Construction Industry Federation, *Building Agreement* (2001), clauses 1 and 8.

¹⁵⁴ *Finlay v Murtagh* [1979] IR 259.

¹⁵⁵ *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5; 2 AC 145.

¹⁵⁶ *In the matter of an application pursuant to Regulations 8 (1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* unreported, High Court, 20 December 2001.

boundaries of the Defective Premises Act 1972 which confined the scope of the duty of care in negligence according to the House of Lords in *D&F Estates v Church Commissioners for England and others*.¹⁵⁷ The home buyer seeking to assert a tort claim in these circumstances is in a vastly different position to the opportunistic insurer referred to by Merkin and Steele seeking to undermine the insurance arrangements on which the parties to the contractual structure had relied; the home owner, instead, is in a remedial 'no man's land', where the only insurance applicable to defects in his home may fail to provide an indemnity.

Corrective justice and personal responsibility - the Irish system of new home warranties

Two aspects of conveyancing practice with regard to the sale of new houses and apartments suggest an intention to sever defects insurance policies from the underlying contractual obligations applicable to those sales.

Firstly, there is a restriction on assignment in the standard Law Society / Construction Industry Federation building agreement used for the sale of most new homes and apartments; buyers enter into one agreement for transfer of the land, or for lease of the unit, in the case of apartments, and a separate building agreement for the construction of the unit. The building agreement may not be assigned without consent, with the effect that if the unit is sold within the limitation period, the outstanding contractual obligations remain with the original purchaser.

Secondly, the main home warranty policy product taken out by purchasers of new homes is assignable; the warranty is a first-party policy, which is not conditional on the purchaser establishing that the contractor is in default of its contractual obligations. However, the warranty is subject to significant limitations and is considerably less broad than what a purchaser could recover in an action for breach of contract, assuming that the builder was solvent. The indemnity limit under the policy, at €200,000, is less than 20% of the value of the indemnity limit of £1,000,000 in the equivalent home warranty policy marketed in the UK.

In the Law Reform Commission Report of 1982 on Defective Premises, the Commission summarised the submissions that had been made to it by the Construction Industry Federation in relation to its Working Paper of 1977, in which the Commission had

¹⁵⁷ *D&F Estates v Church Commissioners for England and others* [1988] 2 All ER 992.

recommended creation of a statutory duty to build premises properly that would bind builders and developers, and that would be actionable by first and subsequent owners of premises.¹⁵⁸

The Construction Industry Federation suggested, following the Working Paper, that the draft legislation contained in the Working Paper was not necessary in light of the National House Building Guarantee Scheme, which had been established in September 1977, shortly prior to publication of the Working Paper in November 1977. The Commission rejected the proposal on the basis that the Scheme was no substitute for the legislation itself.¹⁵⁹ It is unfortunate, given the shortcomings that emerged in subsequent years with the National House Building Guarantee Scheme, that the Scheme persisted, while the legislation was never implemented.

The Commission, although it did not articulate its objection in those terms, had identified the relationship between liability and insurance, and had expressed the view, consistent with the arguments of Stapleton and Morgan discussed above, that insurance cannot operate without a coherent system of liability rules.

The Construction Industry Federation had sought to replace liability with its own guarantee scheme, which had no statutory footing and which proved inadequate in a number of instances of significant building failures in subsequent years. Perhaps the most significant example of the limitations of successive iterations of the HomeBond policies ceased to provide cover in respect of damage attributable to reactive pyrite in hardcore, following the decision of the Irish High Court in *James Elliott Construction Limited v Irish Asphalt* in 2011.¹⁶⁰

There is an important parallel in Stapleton's analysis of the favouring of first party insurance cover over tort liability (and of Hedley's suggestion that first party insurance cover could be an acceptable substitute for tort liability) with the home warranty insurance market in Ireland.

Notwithstanding the judicial rejection of recovery in tort against builders by the courts of England and Wales in *Murphy v Brentwood*¹⁶¹ in 1991, and again *Robinson v Jones*¹⁶² in

¹⁵⁸ Law Reform Commission, *The Law relating to the Liability of Vendors and Lessors for the Quality and Fitness of Premises*, LRC WP 1-1977); Law Reform Commission, *Report on Defective Premises*, LRC 3 - 1982)

¹⁵⁹ Law Reform Commission (1982), 3.

¹⁶⁰ Pyrite Panel, *Report of the Pyrite Panel*, (2012) Appendix 14, sample HomeBond letter to claimants, dated 31 August 2011.

¹⁶¹ *Murphy v Brentwood District Council* [1991] 1 AC 398.

¹⁶² [2011] EWCA Civ 9 and see further Ní Fhloinn, 'Recovery of economic loss for building defects: where statute

2011, the Irish courts have yet to rule out such claims. The combination of builder insolvencies and the use of limited liability companies as vehicles for construction of new homes has resulted in only a handful of cases coming before the Irish courts since the decision of the High Court in *Ward v McMaster*¹⁶³, which adopted *Junior Books v Veitchi* and allowed recovery in negligence against a builder. Therefore, an action in negligence for building defects remains a theoretical avenue of recovery for a home owner dealing with defects.

In practice, however, home owners are more likely to sue professional teams involved in inspection and certification, as well as the home warranty provider with whom the first purchaser of the unit contracted, if a home warranty policy was arranged. Where new homes are covered by HomeBond, the first purchaser pays a fee for the policy; as such, it can be seen as the result that Stapleton criticised and predicted, if tort liability were to be displaced on the basis that victims could protect themselves by means of first party insurance.

In the HomeBond system, owners buy their own first party liability policy. Applying Stapleton's formulation, the system can be seen as a form of advance premium, paid by the pool of potential victims of housing defects, to cover the future losses arises from the defects that will be suffered by a proportion of them. The limited liability company or sole trader that originally assumed responsibility for the construction of the unit pays nothing towards the rectification of the defects.

Substitution of insurance for liability?

Morgan takes issue with Stapleton's claim in relation to the influence of insurance on tort liability, pointing to two decisions of the Court of Appeal of England and Wales that demonstrated the central role of insurance in the court's reasoning, including *Gwilliam v West Hertfordshire NHS Trust*, in which the Court of Appeal accepted that the defendant hospital trust could be liable in negligence for failure to check that an independent contractor carried public liability insurance.¹⁶⁴ Morgan re-asserts Stapleton's view that regarding insurance as equivalent to remedies in tort amounts to an existential attack on the normative features of private law and corrective justice:

speaks, must common law be silent?' *International Journal of Law in the Built Environment*, Vol. 9, Issue 3, pp 178-192.

¹⁶³ *Ward v McMaster & Ors* [1986] ILRM 43

¹⁶⁴ Morgan, 'Tort, Insurance, and Incoherence', 67 *MLR* 384 (2000).

That corrective justice and personal responsibility form the basis for tort law, historically, has been stated more than once in the above. Whether or not this is a good thing, it is a fact...the rules of tort...show a high degree of coherence with the paradigm of personal responsibility.¹⁶⁵

Hedley, however, is significantly less concerned about the demise of negligence, arguing that the view that negligence itself can be coherent is itself a fiction, which can admit of ‘some master theory or value that ‘explains’ negligence, and that, once understood, will justify it’¹⁶⁶, and which is simply a distraction from the reality that ‘Negligence appears merely to distribute compensation without providing any principled basis for doing so’.¹⁶⁷ His suggestion, however, that first-party cover should be encouraged in order to fill the gap left by the abolition of negligence does not answer Stapleton’s critique that this will simply enrich commercial defendants and obliterate any deterrent effect that the risk of tortious liability could produce.

The example given of the origins and operation of new home warranties in Ireland suggests that the dominant scheme, HomeBond, was introduced partly to avoid the imposition of a regime that would have been considerably more onerous for builders, including minimum financial requirements and personal guarantees in respect of the liabilities of private limited companies used as vehicles for residential construction.

The substitution of insurance or warranty products for the imposition of liability may reflect the reality of much litigation in tort (and, for some spheres of activity, in contract). The HomeBond example, however, demonstrates that the warranty policy may offer significantly less protection than a plaintiff could recover at common law from a defendant of substance. The prevalence of such products in a particular market may also have the effect (as it apparently does in the Irish residential construction market) of propagating the view that it is acceptable for builders to incorporate limited liability companies and absolve themselves of any responsibility for their negligence or breach of contract thereafter.

The decision of the Court of Appeal in *Brennan v Flannery*¹⁶⁸ is an example of this; the first two defendants sold land to the plaintiff. The company that they owned contracted with the plaintiff for the construction of a house on the land; the house was later found to

¹⁶⁵ Ibid 397.

¹⁶⁶ Hedley, (n 123), 508.

¹⁶⁷ Hedley, (n 123), 509.

¹⁶⁸ [2015] IECA 78.

have significant defects. HomeBond successfully relied on the limitation clause in its policy, and was found liable only for the first €38,000 of damage. The Court of Appeal overturned the decision of the High Court holding the first defendants liable personally:

The judgment...failed to make any distinction between the two quite separate agreements that were entered into. The only agreement that Mr. and Mrs. Flannery entered into was for the purchase of land. The agreement with the company was for the building of the house. The house was found by the High Court judge to be defective. Any remedy in respect of that lies against the company and not against Mr. and Mrs. Flannery.

Although the case involved a claim for breach of contract, rather than tort, it illustrates the means by which a builder may contract with a purchaser, offer a third party warranty in respect of the risk of future defects, which may not be sufficient to cover that risk.

The principles underpinning the system of tort liability, incoherent as they may be, at least offer a philosophy of responsibility and redress for wrongdoing, in which insurance should follow, rather than lead.

Should home builders be liable on the basis of strict liability?

McKernan argues that home builders should be liable in respect of latent defects on a strict liability basis, citing the New Jersey case of *Schipper v Levitt & Sons, Inc.*¹⁶⁹ in which the defendant homebuilder was held strictly liable for injury to the plaintiff's son from a dangerous bathroom tap.¹⁷⁰ She notes that builders are in a better position to manage construction risk than home buyers:

Developers can more easily spread the costs of consumer harm among their purchasers through appropriate pricing schemes... the imposition of strict liability on developers will assign the risk to the party most capable of avoiding the problem in the first place – the developer who possesses superior sophistication and knowledge regarding the home's construction.¹⁷¹

¹⁶⁹ *Schipper v Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965).

¹⁷⁰ Lynn Y. McKernan, 'Strict Liability Against Homebuilders for Material Latent Defects: It's Time, Arizona' (1996) 38 *Arizona Law Review* 373. McKernan argues that 'Strict liability insurances that the costs of injuries which result from defective products are borne by those most capable of sustaining the loss – the culpable manufacturers, rather than the injured consumers, who are often powerless to protect themselves. Such costs can then be distributed by the manufacturer throughout the marketplace, via his pricing policies'. (391).

¹⁷¹ *Ibid* 393.

It is submitted that a second potential benefit of imposing strict liability in respect of latent defects is that home builders would have an incentive to minimise their risk and potential liability by adopting appropriate risk management procedures throughout the construction process. Structures, such as those described above, which tend to limit the builder's liability also reduce the builder's incentive to minimise defects. By contrast, the procedures adopted by latent defects insurers, discussed further below, provide a model for how risk is managed in projects where the party that bears the risk of defects plays an active role in managing and minimising such defects.

Frilet and Karila comment that the decennial liability prescribed by Articles 1792 and 2270 of the French Civil Code imposes strict liability on builders for a period of 10 years from acceptance of the works with regard to damage that renders the works 'unfit for their intended purpose', with more limited provision for liability by technical advisers to construction works.¹⁷² There is an accompanying requirement for insurance to be taken out by any person who may be subject to decennial liability, which may give rise to criminal sanctions for default in doing so.¹⁷³

In Ireland, builders and developers are not required to carry insurance in respect of risks arising following completion. Rather, the model that emerged from the 1970s onwards was of home warranty policies taken out by purchasers of units, which were transferable on subsequent sales of the unit.

Law Reform Commission – recommendations from 1982 Report on Defective Premises

In its 1982 Report on Defective Premises, the Law Reform Commission summarised the submissions that had been made to it by the Construction Industry Federation in relation to the 1977 Working Paper. The Federation had suggested that the draft legislation contained in the Working Paper was not necessary in light of the National House Building Guarantee Scheme, which had been established in September 1977, shortly prior to publication of the Working Paper in November 1977. The Commission rejected the

¹⁷² Marc Frilet and Laurent Karila, 'Contractors', Engineers' and Architects' Duty to Advise and Decennial Liability in Civil Law Countries: Highlights of Some Prevailing Principles' (June 2012) 7 *Construction Law International* 21, 23.

¹⁷³ *Ibid.*

proposal on the basis that the Scheme was no substitute for the legislation itself.¹⁷⁴ It is unfortunate, given the shortcomings that emerged in subsequent years with the National House Building Guarantee Scheme (known as HomeBond), that the Scheme persisted, while the legislation was never implemented.

The Commission, although it did not articulate its objection in those terms, had correctly identified the relationship between liability and insurance; insurance cannot operate without a coherent system of liability rules. The proposal of the Federation had essentially sought to replace liability with the Federation's own guarantee scheme, which had no statutory footing and which proved inadequate in a number of instances of significant building failures in subsequent years.¹⁷⁵ The Commission noted the Construction Industry Federation requirement that its members should provide a two – year structural guarantee for new houses and not exclude the purchaser's common law rights by contract, but the Commission commented in this regard that 'from the point of view of the purchaser, however, such efforts by the Construction Industry Federation have no consequence in law.'¹⁷⁶

D: DEFECTS INSURANCE MODELS

Latent defects insurance is periodically proposed by various commentators and industry actors as a solution to deficiencies in legal recourse.¹⁷⁷ Traditionally, building contractors do not carry insurance in respect of defects in their own work and that of sub-contractors. The typical insurances carried by builders during construction works are public liability insurance (to cover injury to third parties and damage to property other than the building works), contractors' all-risks insurance (to cover damage to the works during construction, and loss/damage to construction plant and materials) and employer's

¹⁷⁴ Law Reform Commission, *Report on Defective Premises*, LRC 3 - 1982, 3.

¹⁷⁵ Notably, and perhaps now notoriously, when the House Building Guarantee Scheme ceased to provide cover in respect of damage attributable to reactive pyrite in hardcore, following the decision of the Irish High Court in *James Elliott Construction Limited v Irish Asphalt* [2011] IEHC 269.

¹⁷⁶ Law Reform Commission (n 174), 35.

¹⁷⁷ In its presentation to the Oireachtas Joint Committee on Housing, Planning and Local Government on 4 October 2017, the Royal Institute of Architects in Ireland, the Institute's chief executive officer stated as follows: 'Average home buyers should not have to decide whether to take a case against the builder, the material supplier, the contractor, the architect or the engineer. They should have an insurance product that enables them to get their house or home fixed in order that they can continue to live in it or move back into it quickly and then, if needs be, the insurance company can decide to take court cases against all the various participants.' (Dail debates, 4 October 2017).

liability insurance.¹⁷⁸ Some (but not all) building contractors will carry professional indemnity insurance.¹⁷⁹

The introduction of defects insurance into building projects tends to have a controlling effect on building quality as insurers are in a significantly better position than consumers with regard to understanding the risk of builder default/building failure. Such insurers incorporate conditions into insurance policies that include control mechanisms such as design reviews and approvals, and the entitlement of a representative of the insurer to access the site or workshops where work is being prepared.

How does defects insurance in Ireland differ from other jurisdictions?

There are various examples from international practice that would be of assistance in devising appropriate insurance requirements; for example, in New South Wales, residential construction work above a certain value cannot be carried out without home warranty insurance, and certain limitations in home warranty insurance policies are set by law.¹⁸⁰ In Western Australia, builders are required to arrange insurance in respect of defective work, and to provide a certificate confirming that such insurance is in place to a residential employer.¹⁸¹

It is noteworthy that the All-Party Parliamentary Group for Excellence in the Built Environment Group also reported that there was a significant difference between the scope of housing defects warranties and the expectations of consumers with regard to those warranties.¹⁸²

A crucial gap in coverage offered by home warranty providers in Ireland is that such products are not available in respect of renovation or repair of existing homes. As home extensions can be a significant investment on the part of the home owner, this constitutes a significant risk transfer from home builders to home owners, where defects arise from

¹⁷⁸ Nael Bunni, *Risk and Insurance in Construction*, 2nd ed. (Spon Press 2003), 196.

¹⁷⁹ Bunni opines that contractors will carry professional indemnity insurance 'if design work is carried out by Contractor'; Bunni (n 178), 197.

¹⁸⁰ Home Building Act 1989, Part 6. (New South Wales).

¹⁸¹ Building Work Contractors Act 1995, s 34. (Western Australia).

¹⁸² All Party Parliamentary Group for Excellence in the Built Environment, *More Homes, Fewer Complaints*, Report from the Commission of Inquiry into the quality and workmanship of new housing in England, (July 2016), 8.

sub-standard materials or poor workmanship.¹⁸³ This is at variance with the position in other jurisdictions. In New South Wales, for example, the vendor of a home must attach a certificate of insurance to the contract for sale where residential building work has been performed.¹⁸⁴

France – decennial liability and latent defects insurance

One of the best-known systems of redress for residential defects is the French system of decennial liability and insurance. The French Loi Spinetta of 1978 introduced a transmissible warranty of quality in residential construction, supported by a 10-year insurance in respect of major structural defects.

Insurance in respect of construction defects has been a feature of the French building industry since at least the 19th century.¹⁸⁵ Honig describes the establishment of a commission to examine building insurance in the 1970s, which led to the publication of the Spinetta Report in 1975, and the passage of the Spinetta Act (Loi Spinetta) in 1978¹⁸⁶, which introduced article 1792 into the French Civil Code. The Loi Spinetta creates a system of strict liability in respect of losses arising from the structure and fittings of a building for a period of 10 years from the ‘reception date’.¹⁸⁷

Article 1792 provides as follows:

‘Every constructor of a structure is legally responsible to the owner or those deriving title from him for any damage (including damage resulting from sub-soil conditions) which jeopardises the integrity of the structure or which by affecting one of its component elements or one of the equipment elements renders the structure unfit for its intended purpose’.¹⁸⁸

¹⁸³ Defects arising from design of home renovation works may be covered by a professional indemnity insurance policy which would typically be carried by architects and engineers.

¹⁸⁴ Home Building Act 1989, S 96A (1).

¹⁸⁵ Gérard Honig, ‘Decennial Insurance in France’ (Joint meeting of Society of Construction Law and Association Des Juristes Franco-Britanniques 21 October 1997).

¹⁸⁶ Ibid 3.

¹⁸⁷ Bunni (n 178) 202.

¹⁸⁸ Translation from the French in Bunni (n 178), 201.

The liability imposed by Article 1792 applies to architects, contractors, technicians engaged by the building owner, as well as vendors who have commissioned the construction of the building.¹⁸⁹ Manufacturers of structures or components of a structure are also liable in like terms to persons engaged by the owner.¹⁹⁰

Article L241-1 requires that any natural or legal person, whose ten-year liability may be incurred on the basis of the presumption established by Articles 1792 et seq. of the Civil Code, must be covered by insurance. At the opening of any construction site, that person must prove that it has taken out an insurance policy covering it for this liability. Any candidate seeking a public contract must be able to prove that he has taken out an insurance policy covering him for this liability. Every insurance contract entered into under this article shall, notwithstanding any stipulation to the contrary, be deemed to contain a clause ensuring the continuation of the guarantee for the term of the ten-year liability of the person subject to the insurance obligation.¹⁹¹

Article L242-1 goes on to provide that a person who commissions building work on behalf of another party, including building work carried out for sale, must also be covered by liability insurance guaranteeing the damages referred to in Articles 1792 and 1792-2 of the Civil Code.

Bunni notes that a number of other civil law jurisdictions operate similar decennial liability regimes, including Iraq, Egypt, Saudi Arabia, Italy, Spain, Belgium, the Netherlands, and Venezuela.¹⁹² Decennial liability has been a feature of the Egyptian Civil Code since its adoption in 1948.¹⁹³ Architects and builders are subject to the same liability for failure of buildings or parts of buildings for 10 years following delivery of the works.¹⁹⁴ Attia notes that architects are liable in respect of the work of civil engineers or other members of the professional team, although engineers who carried out design could be sued in their own right as ‘architects’ as professionals engaged directly by the ‘architect’ or the constructor are not subject to the decennial liability.¹⁹⁵

¹⁸⁹ French Civil Code, Article 1792-1.

¹⁹⁰ French Civil Code, Article 1792-4.

¹⁹¹ Bunni (n 178) 201-202.

¹⁹² Bunni (n 178) 202.

¹⁹³ For a comprehensive account of decennial liability and insurance requirements in Egypt see Attia, NG, ‘Decennial Liability and Insurance under Egyptian Law’, (1986) 1 Arab Law Quarterly 504.

¹⁹⁴ Egyptian Civil Code, Articles 651-654; Attia, (n 154), 504.

¹⁹⁵ *Ibid*, 506.

An important feature of decennial insurance cover is the risk management and mitigation measures which are required by insurers as a condition of providing such cover. Bunni describes the ‘technical control service’ typically provided by insurers as part of the decennial insurance cover, which usually include the following:

- (i) Review of design assumptions, calculations and specifications
- (ii) Periodic inspections of the site to ensure compliance with the plans and specifications approved by the insurer’s technical advisers
- (iii) Periodic testing and quality control of construction products, and
- (iv) Reporting and certification to insurer, including a certificate of risk assessment upon completion.¹⁹⁶

New South Wales – Strata building bond

Since 1 January 2018, it has been a requirement that developers of ‘strata’ schemes in New South Wales should lodge a bond with NSW Fair Trading with a value of 2% of the contract price for the scheme, towards the cost of rectifying any defects in the scheme.¹⁹⁷ Owners corporations of strata schemes may apply for release of the bond in order to meet the costs of rectifying of defects in the scheme,¹⁹⁸

Conclusion

This chapter commenced with an overview of defects risks in residential construction, both in Ireland and in the international literature, examining the management of risk in Irish construction contracts for residential and commercial construction. The position of the Irish home buyer was contrasted with that of a commercial employer by reference to typical provisions in commercial construction contracts. Empirical research conducted in other jurisdictions suggests that investigation of causes of home defects is an essential part of risk management, in order to learn from failures; it is submitted that investigation of the causes of Irish building failures is necessary in order to improve risk management

¹⁹⁶ Bunni (n 178) 203.

¹⁹⁷ Strata Schemes Management Act 2015 (New South Wales), s 207.

¹⁹⁸ Strata Schemes Management Act 2015 (New South Wales), s 209.

and minimise defects in future projects.

Contracts have a role to play in risk allocation, but risk management must be done by construction professionals acting with a view to protecting the home buyer's future interest in the asset. Assigned certifiers, therefore, straddle an uneasy dividing line between the developer/owner's interest in securing completion and sale of homes and the home buyer's interest in obtaining a well-built home largely free from defects.

The law of tort, as it allocates risk only after the occurrence of damage and loss, is a very poor tool of risk allocation. Even if it could be demonstrated that the prospect of tort liability has an influence on how risk is managed in Irish residential construction, the reluctance of the Irish courts to clarify whether building defects can in fact give rise to tortious liabilities for builders would suggest that this is not a risk that developers and builders would regard as significant.

The theme of risk transfer is developed in section C of the chapter, which discussed the use of limited liability corporate structures by builders to avoid liability to home buyers. The bonding and insurance recommendations of the Law Reform Commission's 1977 Working Paper are considered; it is noted that this appears to have led to the creation of the HomeBond policy, the limitations of which are then discussed by reference to the current policy wording and limited jurisprudence on the interpretation of the policy.

The decennial liability regime of the French civil code is considered, together with mandatory insurance and home warranty requirements from British Columbia and Australia. While no insurance will provide a complete indemnity to the home owner dealing with defects, it is concluded that the current main warranty policy falls well short of what is covered by international examples, such as the NHBC warranty often available with the purchase of new homes in the United Kingdom.

The lack of any requirement for financial security, capitalisation or insurance against defects by builders under Irish law entirely undermines the current system of legal remedies, and any future system of remedies. It is proposed, therefore, that a requirement be introduced by law for minimum defects coverage along with minimum financial requirements for builders, who should be expected to take some measure of risk in respect

of their activities.

A system of defects insurance with common features across all products could deal with issues in relation to denial of cover and lack of financial remedies for defects, both due to exclusions from cover and due to the fact that some residential construction has no insurance coverage at all at present, even limited (for example, domestic works and one-off houses where 'self' builders may decide not to incur the expense of a home warranty).

Chapter 7 – Conclusion

This concluding chapter is divided into three parts. Part 1 deals with insights from research, reflecting on the research themes identified in chapter 1 and developed in the preceding chapters of this thesis. Part 2 outlines options for law reform, drawing on the analysis in the thesis. Part 3 includes recommendations for reform and concluding remarks.¹

Part 1: INSIGHTS FROM RESEARCH

Five main research themes were identified in chapter 1 of this thesis: the question of who, or what, should be protected; risk transfers to home buyers and owners; regulatory failure and reform; the role of gatekeepers; power transfers from the public to the private sphere; and the role of the State in regulation of residential construction and in providing or facilitating redress. The insights and conclusions from the research are summarised below.

Who, or what, should be protected?

The analysis of private law remedies in chapters 2 and 3 demonstrates that consumers are at a significant disadvantage in purchasing both new and used homes by comparison with the legal position of the builder or developer of the home. Contract law offers some protection to the first buyer only as against the builder, and provides protection to second and subsequent buyers only via the home warranty policy, if one is provided with the purchase. It is argued in chapter 3 that the law of negligence should provide a remedy from the builder of the home, but the limited jurisprudence from the Irish courts on this issue in the past thirty years is inconclusive. European Union law, which is a rich source of consumer protection in other areas, has made few incursions into remedies for residential construction defects. The combination of these limitations in remedies provides the normative justification for a robust regime of legal remedies aimed at

¹ Parts are used in this chapter only so that the alphabetical ‘section’ structure of previous chapters can be used in order to link the concluding observations and proposals in this chapter to the corresponding sections of the earlier chapters.

protecting consumers.

In chapter 2, the argument is made that the remedies should attach to the home itself, rather than depending on the status of the first or subsequent purchaser; in this, the regime would depart from the usual focus of consumer law, with its preoccupation with the consumer's position. The unusual nature of residential construction, however, warrants such an approach; as Quill has pointed out, a home is not simply a big product.² It is designed and built to last for decades and will usually be transferred several times during its life-span; and defects cause significant financial and personal distress for owners and tenants. The particular impact of housing defects, therefore, warrants a dedicated protective regime.

Risk transfers to home buyers and owners

The analysis in this thesis provides evidence of risk transfer to home buyers and home owners from various actors involved in the construction of the home. Where a home is built with latent defects, the risk will usually crystallise within a number of years of completion; the combination of the private law rules discussed in chapters 2 and 3 and the regulatory regime discussed at chapter 4 results in the risk of defects being largely borne by the home owner.

The original builder and developer can transfer this risk by means of the common law immunity of a vendor of land, which will protect a developer who sells the unit. The limitation of the builder's liability contained in the LSBA, together with the procedural constraints in that agreement such as the prohibition on assignment and the arbitration agreement, insulate the builder from civil liability to a significant extent.

The means by which a single unit or development of tens or hundreds of units can be constructed by a limited liability company without assets, capital reserves or insurance is a further risk transfer to home buyers, who have no option but to contract with an 'assetless shell', as discussed in Chapter 5.

² '...to say that a building is just a big product fails to recognise the greater practical and economic significance that building purchases entail, particularly in the case of the purchase of one's home.' Eoin Quill, 'Consumer protection in respect of defective buildings' (2006) 14 Tort Law Review 1, 13.

The disconnection of risk creation from the financial consequences of risk is discussed in chapter 6, in which it is argued that the creators of the risk of housing defects, such as builders, employ various means to protect themselves against that risk. As Kunreuther and Ely argue, this disconnection results in a ‘risk subsidy’ from the home buyer and the wider society to the builders and others responsible for defects, who therefore have little incentive to minimise risks.

C: Privity of contract

In chapter 2, the recommendations of the Law Reform Commission in its report on Privity were described and analysed. It is submitted that the proposals should be implemented, with the caveat that the parties to the contracts for purchase of a new home should not be entitled to opt out of the legislation, as was proposed by the Commission.

If the legislative reform advocated in this thesis took the recommended form of a statutory duty, this would deal with the problem of privity of contract by specifying a class of beneficiaries – the owners for the time being of the dwelling, over time – to whom the new duties would be owed. This is an essential procedural change that would address the injustice whereby successors in title to the original purchaser, who take a transfer of a home during the limitation period under the original contract, may not enforce that contract.

It is submitted that the builder is not prejudiced by allowing the second and subsequent purchaser enforce the contract, as the second purchaser’s contractual rights will be limited to those that would have been available to the first purchaser.

Regulatory failure and reform

Chapter 4 describes the regulatory regime for residential construction in Ireland, and critically evaluates both the building control regime and the response of the Irish State to the many residential building failures that have emerged in recent years. A case study is presented of the State’s response to the Millfield Manor fire in 2015 by contrast with

international examples of the Library Gardens balcony collapse in Berkeley, California, and the fire in Grenfell Tower, London, in 2017.

The principal insight from the research carried out for this thesis with regard to the regulatory regime is that models of external oversight and monitoring regarded as essential in other areas of activity are entirely absent in Irish construction regulation. As noted in chapter 4, a 1983 memorandum to Government released in 2013 demonstrates that the building control system was designed in order to minimise the risk of civil liability to the Minister for the Environment and local authorities, in light of the line of jurisprudence from the 1970s by which English local authorities had been found liable for failure to detect building defects.

The model, therefore, was designed with no external oversight, which provides some explanation for the virtually complete absence of reporting by building control authorities on their activities, and the extraordinarily low level of enforcement actions taken under the Building Control Act 1990.

Extensive empirical research conducted via enquiries directly to the State's 31 building control authorities demonstrates that the enforcement tools prescribed by the Building Control Act 1990 are seldom used, and that building control authorities report very little information in relation to their activities; this evidence and the accompanying analysis is set out in chapter 4.

This regulatory failure is likely to be compounded in the event that legislation is passed, in the form of the model discussed in chapter 4, requiring virtually all persons involved in construction activities to register with a private registration body, Construction Industry Register Ireland. The scheme of the draft legislation to give effect to this proposal is critically evaluated in chapter 4, which concludes that the proposed registration system would sever the public regulatory regime for construction works from the people engaged in carrying out those works, to the detriment of coherent and effective regulation of construction.

The role of gatekeepers

Throughout this thesis, the discharge of various roles by persons involved in construction is characterised as ‘gatekeeping’. Assigned certifiers³ are required to carry out periodic inspections of works during construction, following which they sign certificates of compliance on completion. As these certificates are required to be lodged with the local building control authority before a building is opened, occupied or used, the assigned certifier plays a crucial gatekeeping role, by deciding whether or not a building complies with the Building Regulations. There is a potential conflict of interest associated with that role, as the assigned certifier is employed and paid by, and acts on behalf of, the developer of the building, and does not represent the interests of the home buyer or of the public generally.

Solicitors involved in the conveyancing process also play a ‘gatekeeper’ role; firstly, by representing the client in the purchase transaction, and, secondly, by the work of the Law Society in deciding the terms of the LSBA (in conjunction with the Construction Industry Federation) and in controlling the structure of the purchase transaction. For example, the Law Society also prepares and publishes Requisitions on Title which are then adopted by solicitors nationwide; the choices made by the Law Society in this respect have had significant consequences for consumers, both due to the terms of the LSBA itself, and in light of the scope of the Requisitions themselves. One simple question that does not appear in the Requisitions on Title is whether the vendor is aware of any defects or potential defects in the property; the purchaser, then, is left with the ‘full chill’ of *caveat emptor*.⁴

A further insight, therefore, is that the combination of the common law position regarding the vendor’s liability, coupled with conveyancing practice in which the vendor need provide no information regarding possible defects, exposes home buyers to significant defects risk.

³ Assigned certifiers, as discussed in chapter 4, are appointed pursuant to the Building Control (Amendment) Regulations, 2014.

⁴ The Law Reform Commission, in the 1977 Working Paper, opened its analysis with the following summary: ‘The vendor of real property is under no duty to the purchaser to see that the premises are free from defects of quality. This is one area where the full chill of Caveat Emptor still prevails. Apart from express contractual terms to the contrary the purchaser must look out for himself.’ Law Reform Commission, *Civil Liability of Vendors and Lessors for Defective Premises*, (1977), 2.

Power transfers from the public to the private sphere

The critique of the system of inspection and certification established by the Building Control (Amendment) Regulations 2014 in chapter 4 considers the implication of the introduction of private inspection and certification of compliance with Building Regulations as the primary model for monitoring and attestation of construction quality in Irish residential construction. The argument is made in chapter 4 that the system as devised embodies a significant transfer of power from the public to the private sphere, as a private entity appointed by the landowner/developer, the assigned certifier, essentially decides whether, and when, a building is complete and in compliance with the Building Regulations.

The unusual system for dealing with certificates of compliance on completion situates the building control authority in an observational capacity, subject to its powers to intervene. The ability of a building control authority to withhold the ‘validation’ of the certificate of compliance on completion essentially replicates a process that exists in other jurisdictions, where the local building control body itself issues a certificate confirming compliance with the local building code, such as the occupancy permit issued by the Victorian Building Authority in Australia. Irish building control authorities have the power to accept or reject completion certificates submitted on behalf of builder/developers, but do not routinely inspect completed works and are not empowered to issue certificates of completion or occupancy themselves. In this way, the system has entrenched the role of building control authority as external auditor rather than active regulatory body.⁵

As discussed in chapter 4, the Construction Industry Register Ireland model also amounts to a significant transfer of public power to a private body. The proposed system is criticised for its failure to reflect norms of governance that apply to other regulatory bodies, such as the requirement for the body’s boards to declare personal and financial

⁵ This was clearly the intention of the Minister for the Environment originally charged with acting upon the recommendations of the Stardust Tribunal; a memorandum to the Taoiseach from December 1983 responding to the Tribunal’s recommendations states that ‘The proposals being developed for the enforcement of the building regulations propose the use of a ‘certification’ system based on approved certifiers, with spot checks by local authorities, and the Tanaiste considers such a system is the most appropriate way (and given the scarcity of skilled personnel the only feasible way) of administering the regulations.’ Minister for the Environment, *Memorandum to Government on Report of Tribunal of Inquiry into fire at Stardust Club, Artane, Dublin 1 November 1983* (1983), 11.

interests. The proposed body will not, on the current draft scheme of legislation, be subject to the Ethics in Public Office Acts 1995 and 2001, the Freedom of Information Act 2014, nor to the jurisdiction of the Ombudsman.

The conclusion reached is that the design of the scheme is evidence of the gradual retreat of the State from regulation of the construction process, of which the other significant development is the Building Control Act 1990, which imposes few active regulatory duties on building control authorities, and specifically limits their civil liability for failure to act.

The role of the State in regulation and redress

It is suggested in chapter 2 that the Irish State is arguably in breach of Article 7 (1) of the Unfair Contract Terms Directive in light of the failure of the efforts of the Law Society and Director of Consumer Affairs to prevent the continued use of unfair terms in the LSBA:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

A related point to that discussed above with regard to building control authorities is the concern raised in chapter 4 with regard to the relationship between building control authorities and the Department of Housing, Planning and Local Government. Successive Ministers for the Environment and Housing have pointed to the independence of building control authorities from Government, which evidences the failure of the State to provide the means of oversight of the regulatory regime for a vitally important sector of the economy and an asset which is fundamental to the lives of every person living in Ireland.

A key finding of this research is that the Irish building control system was deliberately designed without external oversight, apparently motivated by the fear of civil liability for regulatory failure. The literature examined in chapter 4 with regard to regulatory theory, however, supports the argument that external oversight, together with a mechanism for assessing the effectiveness of the system, is a vital part of any regulatory

regime. The comparative exercise between construction regulation and food safety regulation presented in chapter 4 provides evidence of the role of oversight in a robust regulatory regime, and suggests that the lack of oversight mechanisms for the Irish building control system constitute a significant system failure.

The argument is made in chapter 4 that the State's response to building failures has been incoherent and reactive, and that the decision to finance remediation selectively⁶ lacked a coherent legal basis that might assist other home owners elsewhere who continue to deal with significant defects without any financial or other assistance from Government.

Part 2: OPTIONS FOR REFORM

The research carried out for this thesis supports the principle of the recommendations of the Law Reform Commission contained in a number of its reports, that primary legislation be passed to provide for a civil legal remedy against the original builder of the residential construction unit, within a limitation period that allows a reasonable period for bringing proceedings following the discovery of defects. The proposed reform described below departs from the proposals of the Law Reform Commission in a number of key respects, however; for example, it is argued below that a term should be implied into contracts for sale of homes to the effect that the vendor is not aware of any defects or potential defects.

The Building Control Acts 1990 to 2007 should be assessed from experience of administration of the legislation in practice, particularly with a view to the improvement of enforcement tools for building control authorities such as those discussed in chapter 4.

Primary legislation would be required to provide for the establishment of an external public regulator of construction to discharge an oversight and supervisory role in relation to building control authorities, as proposed in chapter 4. Such a body could also establish and administer a complaints and dispute resolution scheme to address the concerns raised in chapter 5 regarding procedural justice in business-to-consumer residential construction disputes, and could provide a supervisory role in relation to the disparate registration systems that currently exist for construction practitioners including builders, architects,

⁶ Examples include the Pyrite Resolution Scheme, the State's financing of completion and rectification of unfinished estates, and the State and Dublin City Council's financing of the remediation works at the Priory Hall development.

engineers and surveyors.⁷

Models for the proposed design of the regulatory authority include the Commission for Energy Regulation, which exercises a supervisory role with regard to the registration systems for electrical and gas installers, and the Food Safety Authority, which provides oversight and enforcement support for food safety inspectors and official agencies carrying out inspections of food businesses.

Proposal for civil liability reform

The English Defective Premises Act 1972 established a statutory duty of care on builders and others involved in construction, to carry out building work in a workmanlike manner using proper materials. Legislation in various Australian territories take a different approach and imply warranties in relation to materials and workmanship into all residential building contracts, which must be supported by home warranty insurance.⁸ The two models are now considered as options for Irish civil liability reform.

Option 1: A statutory warranty using the mechanism of the implied term

A transmissible, statutory warranty of quality would solve two problems with the existing Irish contractual remedy for housing defects. Firstly, the legislation could provide that the warranty could apply to all residential construction contracts and could not be modified by agreement between the parties. It is arguable that the implied warranty of quality of goods contained in section 39 of the Sale of Goods and Supply of Services Act 1980 is sufficient for this purpose.⁹ It is submitted, however, that Section 39, while clearly important as a source of remedies for the first purchaser of a unit, is generic, and is drafted in more general terms than would be desirable for a warranty that is specific to residential

⁷ As noted in chapter 4, architects and surveyors are subject to registration requirements in accordance with the Building Control Act 2007; engineers are subject to the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969; and it is proposed that builders will be required to register with Construction Industry Register Ireland.

⁸ Home Building Contracts Act 1991, Part 1A (Western Australia); Home Building Act 1989, s 92 (New South Wales).

⁹ It will be recalled from the discussion in chapter 2 that section 39 implies a term into services contracts that the supplier has the necessary skill to provide the service, that the service will be rendered with due skill, care, and diligence, that any materials used in the supply of the service will be sound and reasonably fit for the purpose for which they are required and that any goods supplied as part of the service will be of 'merchantable quality' for the purposes of s 14 of the Sale of Goods Act 1893.

construction.¹⁰

Secondly, the warranty would apply for the benefit of every person who acquired an interest in the property during the limitation period. A transmissible warranty of quality would avoid gaps in liability and recourse due to failure to assign residential building contracts, statute should provide for transmission by operation of law with transfers of property.

An implied term would ensure consistency of protection across all residential building contracts. The risk of residential building failure extends beyond the parties to the original building contract (and even subsequent purchasers), justifying the statutory imposition of a warranty of quality.

The Domestic Building Contracts Act 1995 of the state of Victoria, Australia, is an example of the 'implied terms' model. Section 8 of the 1995 Act implies warranties in relation to materials and workmanship into all residential building contracts, which must be supported by home warranty insurance.

It is noteworthy that section 8 is silent on whether the builder could raise a counterclaim under the original contract against a section 8 claim; the wording and legal effect of sections 8 and 9 are broad enough that the warranties set out in the section could be seen as either implied terms in the tradition of Irish and English law, or as a stand-alone independent statutory duty such as that created by the Defective Premises Act 1972.¹¹ Section 8 provides that the warranties listed 'are part of every domestic building contract', suggesting that the warranties operate as implied terms in the same manner as s 39 of the Sale of Goods and Supply of Services Act 1980, by becoming part of the contract. Section

¹⁰ Examples from international legislation, for example, require the construction work to be done 'with due care and skill and in accordance with the plans and specifications set out in the contract', (Home Building Act 1989 s 18B (New South Wales)), and that the new home should be 'free from defects in the building envelope' (, Homeowner Protection Act 1989, s 23 (1)(a) (British Columbia).

¹¹ Section 9 provides that 'In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract.' Therefore, the second and subsequent purchaser appears to be granted a statutory right independent of the assignment of the original building contract and without assuming any liability under that contract, which suggests that the s 8 warranties, while cast as being contractual in nature (S 8 provides that 'The following warranties...are part of every domestic building contract...') are in fact more in the nature of an independent statutory duty owed to any owner for the time being of the home, during the limitation period of 10 years from the date of the occupancy certificate. (Building Act 1993, s 134).

9, however, allows any person who is the owner for the time being of land on which domestic building work has been carried out as if that person was party to the contract.

The effect of section 9 is similar to the ‘statutory duty’ suite of rights enjoyed by second and subsequent owners under the Defective Premises Act 1972 in England and Wales. There is no indication in either Act that a second purchaser would be treated as synonymous with the original purchaser from the point of view of contract law, merely that the second purchaser could enforce the warranties as if they were the first purchaser. Any obligations not discharged by the first purchaser do not transfer to the second, making the section 9 right similar in character to a statutory right operating outside the law of contract.

Option 2: the statutory duty model

The Defective Premises Act 1972 of England and Wales (in this section referred to as ‘the DPA 1972’) is an example of the ‘statutory duty’ model. The DPA 1972 establishes a statutory duty of care on builders and others involved in construction, to carry out building work in a workmanlike manner using proper materials.¹² The nature of the warranty was considered in the 2011 decision of the Technology and Construction Court of England and Wales in *Harrison & Ors v Shepherd Homes & Ors*.¹³ The case concerned an estate of 94 houses which were built between 2001 and 2004 on the site of a former landfill. Two of the ten claimants were not the original purchasers of the houses; the court held that those claimants were not entitled to rely on the original contracts for sale for the houses (which included conditions dealing with the construction of the houses), but that they were entitled to rely on section 1 (1) of the DPA 1972.

The duty created by the DPA 1972 is considered by the Law Reform Commission in its 1977 Working Paper on the Liability of Vendors and Lessors.¹⁴ The Commission’s 1982 Report included the scheme of a Defective Premises Bill, which included a statutory duty on a person undertaking or executing work, in favour of the person who commissioned the work and any person who acquired an interest in it, to see that the work

¹² Defective Premises Act 1972, S 1 (1).

¹³ *Harrison & Ors v Shepherd Homes & Ors* [2011] EWHC 1811.

¹⁴ Law Reform Commission, *The Law relating to the Liability of Vendors and Lessors for the Quality and Fitness of Premises*, 1977), 48-57.

was undertaken in a good and workmanlike manner with suitable and proper materials. The Bill also provided that damages recoverable for breach of the duty should include an amount for economic loss (if any) suffered by the plaintiff. The Commission noted that section 72 of the 1974 Health and Safety at Work Act in England and Wales provided a remedy for breach of statutory duty for a breach of building regulations, and that it would be possible to provide for such a remedy in Ireland.

The preferred mode of the creation of the new statutory rights was, in the view of the Law Reform Commission, the statutory duty.¹⁵ Firstly, the Commission considered that this model could ensure that a number of potential defendants could be subject to the duty. The implied terms model, by contrast, takes effect in an existing contractual relationship, and can only apply where there is a contract; for example, as noted above in chapter 2, there may be no contract between the home buyer and the developer, unless the developer is selling the land. The implied term assumes the characteristics of a term expressly agreed by the parties and included in the contract. It also, by this means, becomes subject to the law of contract, which is based on the principle as a contract has parties, who agree to be bound by it, and that third parties cannot generally rely on that contract.¹⁶

The creation of a statutory duty would allow the duty to apply to persons with whom a home buyer might have separate contracts (the builder, with whom the buyer would usually have a construction contract, and the developer, with whom the buyer might enter into a contract for the sale of the land on which the works are to be built). The duty could also apply to sub-contractors, with whom the buyer typically would have no contract, but whose work could constitute a significant part of the residential construction works.

An implied term of quality, for example, might be implied by operation of law into a building agreement, but would remain in that agreement if the building were sold or transferred. The necessity to ensure that the correct person is within the scope of the new duty was, therefore, an important aspect of the Commission's reasoning. Secondly, the Commission wished to avoid undermining the duty by making it subject to the doctrine of privity of contract, which would have confined the duty to the original parties to the

¹⁵ Law Reform Commission, *The Law relating to the Liability of Vendors and Lessors for the Quality and Fitness of Premises*, 1977), Law Reform Commission, *Report on Defective Premises* (LRC 3, 1982).

¹⁶ As discussed in chapter 5.

building agreement.

It is vital that second and subsequent purchasers, in addition to the original home buyer, should be able to rely on any new statutory remedies. Many defects take a number of years to appear, and the home may have passed through multiple owners during the 6 or 12-year limitation period applicable to the original building contract pursuant to which the home was built.

In addition to providing for a statutory duty in an updated form to that proposed in 1982 by the Law Reform Commission, legislative reform could also address the problem of unfair contracting practices that have developed in the years since the introduction of the LSBA by the Law Society in conjunction with the Construction Industry Federation.¹⁷

The proposed statutory duties could incorporate the terms implied into services contracts pursuant to section 39 of the Sale of Goods and Supply of Services Act 1980, as well as providing certain other duties such as the duty to comply with the law in carrying out the residential construction works. This would create a statutory duty on builders and developers to ensure that residential construction works are carried out in compliance with law and, as such, provides a remedy for owners for breach of the Building Regulations¹⁸ that will not be subject to the limited criteria applicable to an action for breach of statutory duty based solely on an infringement of the Regulations themselves.

Finally, it is submitted that the duty should apply to ‘residential construction works’ in order to cover both works to construct a new dwelling and works to existing dwellings.

Alternative model – British Columbia Homeowner Protection Act

An alternative approach to the formulation of the statutory duty can be seen in section 23 of the Homeowner Protection Act 1989 of British Columbia, Canada. Section 23 provides that a residential builder, an owner builder and a vendor of a new home are deemed to have agreed with the owner of the new home to the extent of labour, materials and design supplied, used or arranged by the residential builder, owner-builder or vendor, that the

¹⁷ See chapter 2 for discussion of the order of the High Court regarding unfair terms in the LSBA.

¹⁸ The Building Regulations 1997-2017.

new home is:

free from defect in materials and labour for a period of at least two years

free from defects in the building envelope, including defects resulting from water penetration, and will remain so for a period of at least five years, and

free from structural defects, and will remain so for a period of at least 10 years,

in each case from the date of the occupancy permit or the date of first occupation of the home, as applicable.¹⁹

Section 22 of the Act provides that a person may not build a new home unless the new home is registered for coverage by home warranty insurance provided by a warranty provider. Note that the Homeowner Protection Act also provides for actions to be brought against developers, contractors and home warranty providers.

Should a home be fit for habitation or free from defects?

The question also arises of whether the standard used in the section 3 duty by the Law Reform Commission is appropriate and sufficient. It is submitted that duty should depart from the standard suggested by the Law Reform Commission of ‘fitness for habitation’. This concept was originally developed as a requirement applicable to lettings of housing from housing and local authorities in the 19th century, and subsequent caselaw in Ireland, England and Wales and other common law jurisdictions suggests that the requirement is principally concerned with whether a dwelling poses a risk to health or safety of occupants. As such, it goes no further than the modern duty of care in negligence to avoid injury to persons or damage to their property, which is already actionable against a builder and landlord under Irish law.²⁰

For this reason, it is submitted that the proposed new statutory duty be expressed as a

¹⁹ Note that the section does not apply to a new home covered by home warranty insurance, but minimum home warranty insurance terms are prescribed by law. <https://www.bchousing.org/licensing-consumer-services/new-homes/home-warranty-insurance-new-homes> (accessed 31 August 2018).

²⁰ *Siney v Dublin Corporation* [1980] IR 400; *Colgan v Connolly Construction (Ireland) Ltd.* [1980] ILRM 33.

positive obligation that the dwelling should be ‘substantially free from defects’, based on the Homeowner Protection Act 1989 of British Columbia, which requires dwellings to be ‘free from defects’ in a number of different respects (for which varying limitation periods apply to claims under the Act). The concept of freedom from defects is a new concept in Irish law, but in light of the relatively low bar set by the standard of ‘fitness for habitation’ it is proposed as a new, positive standard to be achieved in residential construction works with regard to non-dangerous defects or defects of quality.

The requirement that works be ‘safe and fit for habitation’ would address defects that could pose a risk of injury or damage to health. The duty could be confined to persons with a legal interest in the property, as the law of negligence and occupiers’ liability would be available to provide a remedy for persons other than owners who may be injured or suffer damage to their health as a result of defects in a dwelling.

The current practice with regard to new homes is that the LSBA provides for expert determination where the purchaser/employer under the Agreement considers that the works have not been properly completed, by reason of the presence of defects.²¹ If an expert determines that a defect is ‘of a minor nature’, the employer must complete the purchase. There is no guidance or definition in the contract of what ‘of a minor nature’ means. It is submitted, therefore, that the standard of ‘substantially free from defects’ is analogous to the requirement to complete the purchase of a new home which may have ‘minor’ defects.

It is also submitted that the new duty should be imposed on both builders and developers, as well as sub-contractors involved in residential construction. Law Society guidance describes the practice whereby, in the sale of certain new homes, the person who enters into the building agreement is not the owner of the land; instead, the builder may have entered into an agreement, with the landowner whereby the landowner agrees to transfer the site to ultimate purchasers when called upon to do so by the builder.²² It is also possible that no separate building agreement is entered into with the home buyer, and the

²¹ Law Society Building Agreement, clause 12.

²² The 2017 Standard Conditions of Sale make no provision for the developer or landowner to procure the completion of the building works pursuant to the Building Agreement. It is possible, therefore, since the two agreements are not expressed to be dependent on each other, that the purchaser could be required to complete the purchase of the property before the house has been completed, as the completion of the house is not a pre-condition to transfer of the land pursuant to the deed of transfer. Law Society of Ireland, *Conveyancing* (8th edn, Oxford University Press 2016), 382.

Law Society recommends that at least a covenant to complete the house should be included in the contract for sale.²³

This is another reason why the implied terms model is an unsatisfactory one for the new legal duty, as it relies on a contractual structure that may not be in place with the person responsible for the construction works, and would make the new duty subject to the law of contract generally. Even if the privity of contract rule²⁴ were addressed, questions would remain about whether the second purchaser could be bound by the obligations undertaken by the first purchaser, for example if there were grounds for a counter-claim by the builder.

It is arguable that the developers/landowners, to whom part of the purchase price has been paid by the purchaser, should bear some of the risk for the builder's breach of duty. This was the intention of the Law Reform Commission. It is submitted that any person to whom consideration has been paid by or on behalf of the first purchaser of the dwelling should be subject to the like duty, in respect of the purchaser or anyone taking an interest in the dwelling during the limitation period as if the person had undertaken the building work carried out in order to provide the dwelling.

Proposed scope of law reform - should sub-contractors owe a duty?

The LSBA at condition 9 (b) allows subcontracting of the Works, and the Employer's consent is not required unless the Contractor sub-contracts the entirety of the Works.

The Defective Premises Act 1972 and the 1982 draft Bill both contemplate that subcontractors would owe a duty to both the person who commissioned the work (the main contractor for another subcontractor, in this case) and to a person who requires an interest in the premises.²⁵

As the LSBA does not require the builder to pass on the benefits of any warranties from subcontractors, it is appropriate, in considering the scope of any statutory duties, for

²³ Ibid 382.

²⁴ As discussed in chapter 5.

²⁵ The Defective Premises Act 1972 refers to 'A person taking on work for or in connection with the provision of a dwelling' (s 1 (1)) without distinguishing between contractors and sub-contractors.

subcontractors to be subject a similar duty as a builder.

Should vendors be required to disclose known defects?

A vendor may be aware of defects in a property that are not disclosed to purchasers; in order to remove any incentive for such vendors or lessors to withhold that information from purchasers, legislation could provide for an obligation of disclosure with regard to known defects. At present, there is no legal obligation on vendors and lessors to volunteer details of defects of which they are aware, and the standard form Law Society contract for sale contains no warranty or representation with regard to the condition of the property or the state of the vendor's knowledge.²⁶

It is argued in chapter 2 that vendors of homes could be required to provide a warranty to the effect that they are not aware of any defects or potential defects not disclosed to the purchaser. While a vendor might not have the means to discharge the full cost of the remedial works, a calculation might be possible that estimated the depreciation in value of the house attributable to the defect.²⁷

Regulatory reform

In chapter 4, the response of the Irish State to a number of building failures was criticised as incoherent and lacking in transparency; examples were discussed of developments and categories of defects where the Government had opted to provide financial assistance for repair works, without establishing a scheme of general application to assist all home owners with defects. The building control regime was criticised in light of the limited history of enforcement activity undertaken by building control authorities and the dearth of information in relation to their activities.

²⁶ The Law Society precedent pre-contract enquiries in relation to multi-unit developments seek confirmation of whether 'the Vendor of the OMC [owners' management company] is aware of any proposal by the OMC to carry out any repair work or incur other expenditure which would substantially affect the service charge payable at present', which would require the vendor /OMC to furnish information of any proposed repair works if there was a proposal to carry them out. However, if the OMC had commissioned a survey to determine the extent of known defects, but did not have a proposal to carry out repairs, this query would not require disclosure of such a survey. (Law Society of Ireland Precedent Pre-Contract Enquiries, June 2015).

²⁷ In *McGee v Alcorn* [2016] IEHC 59, for example, the High Court, in addition to amounts awarded in respect of remedial works, awarded €75,000 in respect of the depreciation in value of a house that would be left with a permanent tilt following remediation works.

It is submitted that regulatory reform should include the establishment of a system for oversight and supervision of building control, residential construction and building practitioners. Current proposals for a private registration body for builders are likely to lead to further regulatory incoherence, and will make it easier for gaps in the systems to be exploited. For example, a builder could fail to disclose a conviction under the Building Control Act 1990 to the CIRI registration board, in the knowledge that there is no national database of such convictions.²⁸ Combining the public and private regulatory systems would allow the regulatory body or bodies to assess the suitability of an applicant for registration as a builder by reference to the regulator's own compliance records.

Procedural reform

A: Dispute resolution

It is hoped that the enactment of the Mediation Act 2017 will have a beneficial effect pending the introduction of a dedicated dispute resolution system for resolution of domestic building disputes, although, as noted in the discussion in chapter 5, it is possible that mediation of residential dispute may simply delay resolution of the matter; for this reason, an inspector-mediator/conciliator model²⁹ is proposed in order to allow for a relatively swift assessment of effects and rectification costs by an expert who could issue a recommendation to the parties.

The concerns raised in relation to pre-dispute arbitration agreements in chapter 5 could be dealt with by an amendment to the Arbitration Act 2010 to the effect that an arbitration clause in an agreement with a consumer for the carrying out of residential construction works shall not be binding on the consumer unless it is agreed to following the commencement of the dispute.

Many disputes relate to completion and defects rectification. The LSBA provides for an

²⁸ Empirical evidence from extensive research into building control authority registers by the author is described at chapter 4, and suggests that there is no arrangement for sharing of enforcement information across building control authorities and no centralised register of such information.

²⁹ As discussed in chapter 5, this model incorporates parts of the dispute resolution model used by New South Wales Fair Trading.

expert to be appointed if the parties disagree about whether the works are complete, and if the expert determines that outstanding defects are ‘of a minor nature’ the Employer must complete and may not seek abatement of the contract price or postponement of the closing date.³⁰

Empirical evidence is not available for Ireland as to the incidence of ‘minor defects’ in new homes, but the report of the English All-Party Parliamentary Inquiry into the state of new housing of July 2016 suggests very high levels of consumer dissatisfaction with aesthetic and non-structural defects in new housing. A National Consumer Agency report published in 2008 reported similar levels of dissatisfaction amongst Irish home buyers.³¹

This suggests that there should be an obligation on the contractor to rectify those defects within a reasonable time of completion, and provision for withholding of a percentage of the contract price until this has been done.

With regard to models for dispute resolution in residential construction, it is argued in chapter 5 that pre-dispute arbitration agreements are potentially prejudicial to consumers and that a cost-effective and accessible model is needed. The residential dispute resolution system administered by New South Wales Fair Trading was discussed in chapter 5 as a possible option for Ireland. The potential for the ‘multi-party’ action proposed by the Law Reform Commission is also assessed in chapter 5 as a suitable model for groups of home owners, for example in large apartment developments and housing estates, although the problems of contractor insolvency and inadequacies of defects insurance would remain regardless of the method of dispute resolution adopted.

B: Limitation of actions

The draft Defective Premises Bill proposed by the Law Reform Commission in its 1982 Report provided that a cause of action in respect of the breach of the duty imposed by section 3 shall be deemed to have accrued on the later of (i) the date on which the premises were completed, or (ii) the date when any person entitled to occupy the premises knew, or what reasonably to have known, of any defect in the building work attributable to a

³⁰ Law Society of Ireland and Construction Industry Federation, *Building Agreement* (2001), (condition 12 (B)).

³¹ Jason Michael, 'Consumer study shows construction problems' *The Irish Times* (Dublin 25 November 2008).

breach of the duty.³²

A modification of this proposal could provide that where a person who has done work in connection with the building returns to the site to rectify defects of work, any cause of action in respect of that further work shall be deemed to have accrued on the later of the following dates:

- (a) on the date on which the further work was finished; or
- (b) on the date on which any person entitled to occupy the premises, whether as first or subsequent owner or occupier, knew, or ought reasonably to have known, of any defect in the further work attributable to a breach of that duty imposed by section 3.

The Commission's 2001 Report in relation to latent damage highlighted the potential problem with having concurrent courses of action in total contract, each of which would have different dates for the commencement of the limitation period.³³ The Commission suggested that this difficulty could be dealt with 'by harmonising the dates of accrual of a cause of action based upon a breach of duty of care in contract and tort', and that one solution would be to provide the cause of action based on a breach of duty of care in contract or tort, which was considered potentially unjust to plaintiffs. The alternative solution proposed was that the limitation period would run from the date of the damage regardless of whether the action was in tort or in contract. The draft legislation provided at section 2 that the construction claim in contract would accrue on either the date of the issue of the certificate of practical completion, or, where no certificate was issued, on the date of 'completion or purported completion of the building work'.³⁴

The Commission went on to recommend limitation periods of six years from the date on which the cause of action accrued, or three years from the date on which a person first knew or in the circumstances ought reasonably to have known of certain matters. The draft legislation provided for long-stop date of 10 years of the date on which the cause of action accrued. The 2011 Report of the Commission proposes a basic limitation period

³² Law Reform Commission, *Report on Defective Premises* (LRC 3, 1982), 29-34; draft Defective Premises Bill, section 5.

³³ Law Reform Commission, *Consultation Paper on the Statutes of Limitation: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury)*, LRC 64- 2001), [6.53], 73.

³⁴ *Ibid* 95.

for civil claims of two years from the date of knowledge of the person who initiates the claim, subject to a long stop date of 15 years from the date of the act or omission giving rise to the cause of action.³⁵

The recent decision of the Supreme Court in *Brandley v Deane*³⁶ affirmed the principle that the cause of action in tort, in latent damage cases, accrues when the damage becomes manifest. The difficulty with this holding is that the courts are seldom in a position, on the evidence presented in defects cases, to ascribe a calendar date to the point at which the damage became ‘manifest’. It is, therefore, a very uncertain starting – point for a limitation period which, at its other extreme, will bar an action immediately upon expiry of that period.

An amendment to the Statutes of Limitations could clarify the starting date for the limitation period by specifying that the cause of action will accrue on the later of the date of completion of the works, the date of the deed by which the home was acquired, or the date on which the Certificate of Compliance on Completion in relation to the residential construction works was included on the register maintained by the building control authority.³⁷

Different options could be specified to take account of the fact that residential construction works will not always result in a new completed dwelling³⁸, may not involve a transfer of land (for example, where a person buys on a site that they already own or that is gifted to them), and may not be subject to the mandatory certification requirements of the Building Control (Amendment) Regulations 2014. It is submitted that it would simplify the determination of the commencement of the limitation period by providing that the period will start on the later of the dates set out above. The start of the limitation period could be deferred by reference to the state of knowledge of the person entitled to the cause of action.

In addition, the Law Reform Commission Report on the Statutes of Limitations³⁹ drew

³⁵ Law Reform Commission, *Report on Limitation of Actions*, LRC 104-2011 (2011).

³⁶ [2017] IECA 265.

³⁷ In accordance with the requirements of the Building Control (Amendment) Regulations 2014.

³⁸ Domestic extensions, for example.

³⁹ Law Reform Commission Report on the Statutes of Limitations: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury) (LRC 64 – 2001)

attention to the common law rule that, where property is transferred subsequent to the accrual of a cause of action in tort (which, under Irish law, accrues when the damage is caused to the building by the defect), that cause of action will not transfer without a specific assignment. To deal with this point, the cause of action could be treated as having accrued based on the state of knowledge of the first or subsequent owner of the dwelling.

A limitation period of 6 years could be specified from the date on which the cause of action accrued, unless the parties provide for a longer period by contract. A special limitation period of 2 years could apply from the date when an owner of the dwelling to which the residential construction works relates, knew or ought reasonably to have known that injury, loss or damage had arisen from the residential construction works. This is consistent with the recommendation of the 2018 ‘Safe as Houses’ Report, which recommended ‘a new statute of limitations of two years from discovery of defect rather than six years from purchase of property should be introduced via primary legislation’.⁴⁰

Finally, a long-stop limitation period of 12 years should apply from the date on which the cause of action accrued so that the ‘date of knowledge’ test will only apply up to 10 years from the date on which the cause of action accrued.

Insurance

There is a lengthy discussion in Chapter 6 with regard to risk management and insurance. The essence of the finding of this thesis in this regard is that it is imperative that the rules regarding civil liability for building defects be clarified and improved to take account of the various criticisms and recommendations as set out in reports of the Law Reform Commission, decisions of the Irish courts, and finally in this thesis.

In much the same way that the insurance industry followed the development of the law of tort by developing products that mirror tort liability for physical injury and property damage, it is to be expected that new duties on builders and others involved in the construction process would lead to insurance products in order to underwrite that liability.

⁴⁰ Joint Committee on Housing Planning & Local Government, *Safe as Houses? A Report on Building Standards, Building Controls & Consumer Protection*, (Houses of the Oireachtas 2017)

In seeking to achieve this reform it is, therefore, essential to heed the warnings of the Law Reform Commission with its concern for the ‘assetless shell’ defendant. Law reform to improve remedies cannot be considered in isolation from the means of discharging liabilities arising from those legal remedies.

Part 3: CONCLUSION

We return, finally, to the home owner who finds defects in their home.

If the home has been built since the regulatory regime changed in March 2014⁴¹, the unit may be safer to live in and of good quality, in part because of the requirements of that regime. As discussed above in Chapter 3, time will tell whether the 2014 regulatory changes have brought about the ‘culture of compliance’ that is claimed for the system. For now, there is simply little verifiable evidence of quality improvements in housing or greater regulatory effectiveness.

If the regulatory regime has not been sufficient to avoid defects in the unit, however, the home owner is in the same position as a pre-2014 buyer in terms of access to remedies; contract law may curtail a remedy save in favour of the first buyer, the Statutes of Limitations may bar the action on time grounds, the home warranty or insurance policy may not provide an indemnity, and the courts may stop short of allowing recovery in tort against the builder, who may be insolvent.

Both buyers in this scenario – and the wider society, that must bear some of the resulting burden of homelessness, ill-health and financial hardship which can all be a feature of housing defects – incur a significant loss. The conclusion of this thesis is that this loss results from a combination of the legal rules, and how they interact with one another, allied to the existing regulatory structure for residential construction.

The aim of this research has been to discover the interaction between the legal rules and practices that generate this harsh result, in order to describe the environment as a pre-

⁴¹ As discussed in Chapter 3.

cursor to re-designing the regime. The starting-point of this research was a doctrinal and comparative legal enquiry, which became an investigation into human behaviour and decision-making, the nature of risk, and the limits of regulation.

The regulatory regime described in this work is premised on a set of assumptions that have become its creation story: that there will never be sufficient resources to provide a comprehensive public regulatory system; that the use of legal enforcement powers should always be a last resort; that the majority of people wish to comply with the law and that the defects that have appeared in numerous counties around Ireland were, in truth, the work of a few bad eggs.

The system of private law remedies, equally, is premised on a set of assumptions that have been difficult to unpick and to tackle: that it is acceptable for builders to incorporate limited liability companies with no assets, to render themselves judgment-proof in the event of defects claims; that limited warranty policies, rather than the original contractual undertaking, should be the appropriate recourse in the event of defects; and that dispute resolution may take years and be conducted entirely in private, to the detriment of home buyers and to the development of the law in this area.

Each of these assumptions has shaped the choices that have resulted in a virtually complete dismissal of substantive law reform to deal with remedies since it was first posited in 1982 by the Law Reform Commission, and in a regulatory system that is fractured, incoherent, and dominated by conflicts of interest. People living in defective homes are literally inhabiting the consequences of these assumptions and choices.

Although I have identified deficiencies in legal remedies and significant problems in regulation of residential construction, I would not attribute the home owner's plight exclusively to either legal remedial failure or to regulatory failure. The broader perspective on the underlying causes suggests that a combination of strong influences effectively caught home buyers in their cross-winds; the deregulatory agenda of the Irish Government, evidenced in its design of the Building Control system at the end of the 1980s, coupled with the opportunity for certain builders and developers to build sub-standard homes in an environment that was largely free of legal and regulatory risk.

These dynamics, coupled with a relatively long period during which the price of land and housing increased exponentially, created the conditions in which home buyers were largely at the mercy of the unscrupulous and the incompetent. The professional advisers retained to act on behalf of home buyers could not provide a sufficient buffer against this inequality of arms: solicitors found that they were often faced with unfair, non-negotiable, contract terms, and surveyors were given unrealistic timescales for inspection and snagging of new housing, which could not have revealed defects that were already hidden behind internal finishes.

The foregoing analysis of the multiplicity of legal hurdles that continue to confront Irish home buyer evidences an urgent need for reform of law and practice. It is to be hoped that these proposals will not languish for decades as the proposals of the Law Reform Commission have done, and that the lessons in misery described in these pages will, finally, bring about meaningful reform.

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Appendix 1

Case Studies

Case study 1: Home owner – Apartment with defects in the development

a. *Builder default: 1st purchaser with building contract*

The home owner in this case owned an apartment in a development that had significant defects. The cost of rectification works is as yet unascertained. As of December 2018 the board of directors of the management company of the development is involved in litigation with the receiver to the original developer in a bid to secure funding for remedial works necessary to bring the complex into compliance with the Building Regulations.

1.	<p>Did the homeowner pursue the original builder via the arbitration provision in the building contract?</p> <p>P bought the apartment new in 2008, and noticed problems almost immediately. The place was flooding and there was water on the walls. P did an apartment survey. Brought the car park to P’s attention and that it was a mess. They were drying the walls under the basement stairwell when she was in the middle of purchasing.</p> <p>P said:</p> <p>‘Had I been able to get out the purchase at the time, I would have. I had already signed a contract’.</p> <p>P and other apartment owners experienced significant difficulties in removing the managing agent.</p> <p>Did P ever go back to her own conveyancing solicitor?</p> <p>No – shortly after P moved in, a receiver was appointed to the developer’s interest in the development.</p> <p>P never relied on the original building contract. She said her solicitor had said that HomeBond wasn’t worth the paper it was written on.</p> <p>When the owners realised in 2010 that the place was defective and in receivership, they held</p>
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	<p>an AGM and took first steps to determine what to do and whether there were possibilities of recourse against architects etc. The receivers were ignoring the owners, the refuse wasn't being collected, and the 'place was a shambles'. An AGM was called to remove the managing agent and owner-directors were voted on to the board of the owners' management company. The receiver's solicitor threatened to sue the directors personally if they didn't resign immediately and claimed they were invalidly appointed.</p> <p>The directors contacted the Office of the Director of Corporate Enforcement to see if what the receiver's solicitors were claiming was legitimate. The owner stated that the ODCE insisted on proof of their shareholding, and eventually told owners to call their solicitors, after some period of time of being in contact.</p> <p>An agreement with receivers was entered into on foot of commitment of directors' commitment to receiver to resign, as the receiver said that they wouldn't meet the directors until they resigned, and they when they resigned they told the owners that 'they would deal with all the defects.'</p> <p>The receivers blocked the residents from being appointed to the board of the owners' management company, and gave their own managing agent proxies to prevent directors from being appointed. P considered that the receiver's nominees on the board had a conflict of interest.</p> <p>The receivers then appointed advisers to inspect the development and to identify any further problems, and assured the owners that the matter was in hand and would be dealt with. The owners remained engaged with the receivers for 10 years without resolution of defects.</p> <p>Contractors appointed by the receivers undertook various works that were unsatisfactory; for instance, they put in stud walls in front of walls that were wet.</p> <p>The directors took photos 'before and after' of walls in the development, and the owners' management company solicitors sent them into the ultimate owner of the development (the successor to the insolvent, original developer), that had appointed the receiver. The owner stated that the ultimate owner told the management company solicitors that if the directors 'didn't shut up' they would step down the receiver and that they wouldn't do anything further, and 'who did they [the directors] think they were.' Derogatory terms were used by the ultimate owner in respect of directors in correspondence: scurrilous, obnoxious.</p>
2.	<p>If so, what were the grounds for the homeowner's claim? (Breach of contract; breach of statutory duty; negligence)</p>

	n/a
3.	Did the homeowner pursue any other defendants? If so, was this on the basis of a contract, or common law duty? n/a
4.	Did the builder raise the defence that the claim was statute-barred? If so, did the homeowner bring proceedings based on breach of a common law duty? n/a
5.	Did the homeowner successfully enforce the arbitration award? If not, why not? [either (i) because builder is insolvent, or (ii) for another reason (specify).] N/a

All homeowners: availability of defects insurance

1.	Was there a defects policy in place in respect of the property? There was discussion about HomeBond in the early stages but it was accepted that HomeBond would not pay out.
2.	If so, what policy was in place? HomeBond – but it didn't pay out – the owner said that 'HomeBond wouldn't even answer the phone.'
3.	Did the homeowner recover any monies on the basis of that policy? No
4.	If there was a shortfall, what percentage did it bear to the cost of the repairs? No
5.	If the insurer refused to provide cover, what was the basis for the refusal? (e.g. due to pyrite damage). No.

Case Study 2: Home owner – house with pyrite damage

This home owner owed a house in which aggregates contaminated by pyrite had been used in its construction. Following discovery of the defects, the builder sought to engage with HomeBond as is set out below, and ultimately had the remedial works carried out pursuant to the Pyrite Resolution Scheme.

a. *Builder default: 1st purchaser with building contract*

1.	<p>Did the homeowner pursue the original builder via the arbitration provision in the building contract?</p> <p>No. The Builder has gone into insolvency by the time that the pyrite damage to the house was discovered. The house owner believed that the claim would have been statute-barred by the time that the pyrite damage was discovered. The home owner thought that the cracks had taken between 12 and 17 years to become apparent.</p>
2.	<p>If so, what were the grounds for the homeowner's claim? (Breach of contract; breach of statutory duty; negligence)</p> <p>Not applicable.</p>
3.	<p>Did the homeowner pursue any other defendants? If so, was this on the basis of a contract, or common law duty?</p> <p>No.</p>
4.	<p>Did the builder raise the defence that the claim was statute-barred? If so, did the homeowner bring proceedings based on breach of a common law duty?</p> <p>No.</p>
5.	<p>Did the homeowner successfully enforce the arbitration award? If not, why not? [either (i) because builder is insolvent, or (ii) for another reason (specify).]</p> <p>Not applicable – house owner did not take proceedings or refer the claim to arbitration in light of the builder's insolvency.</p>

All homeowners: availability of defects insurance

1.	<p>Was there a defects policy in place in respect of the property?</p> <p>Yes.</p>
2.	<p>If so, what policy was in place?</p>

	HomeBond.
3.	Did the homeowner recover any monies on the basis of that policy? No.
4.	If there was a shortfall, what percentage did it bear to the cost of the repairs? Not applicable.
5.	If the insurer refused to provide cover, what was the basis for the refusal? (e.g. due to pyrite damage). The home warranty provider declined cover on the basis that pyrite damage was excluded from the warranty.

Case Study 3: Complaints to regulatory bodies against designer/certifier e.g. RIAI Professional Conduct Committee

The home owners in this case engaged architects to design a refurbishment of two cottages adjacent to their home in rural Ireland, together with an extension that was intended to connect the buildings. The home owners advised that the architects had been in substantial default of their obligations of supervision and contract administration of the building works and resigned from the works without notice. The home owners subsequently discovered that one of the architects whom they had engaged was not in fact a registered architect pursuant to the Building Control Act 2007, although the person had described themselves as such. The home identified multiple breaches of the code of conduct of the Royal Institute of Architects in Ireland (RIAI) in a complaint to the body.

The RIAI is the registration body for architects established pursuant to the Building Control Act 2007. It is not answerable to any regulatory body or to any Minister of Government, although its decisions could be judicially reviewed, in principle.

The home owners made a number of complaints to the RIAI in 2015, including a complaint that the architects had failed to furnish the appropriate contract documentation to the home owner, and had resigned from the project without notice, and that one of the architects in the practice had misused the term ‘architect’ in breach of the Building Control Act 2007.

The RIAI, by a decision of its Professional Conduct Committee decided not to prosecute the architect concerned for practising while unregistered, as the architect had been registered since the initial complaint. The home owner appealed this decision to Investigation Committee of the RIAI, which decided, via two decisions dealing with numerous complaints from the home owner, that a prima facie case had not been established for the holding of an inquiry. The home owners appealed against these decisions to the

registration body's Appeal Board. The home owner considered that the architect had repeatedly been afforded additional time during the process that was not allowed to the home owner.

An inquiry was convened in relation to complaints against one of the architects in the practice concerned. Following the decisions of the Investigation Committee of the Professional Practices Committee of the registration body, the body refused to countenance any further appeal by the home owner.

The home owner ultimately had a complaint partially upheld against the registration body by the Ombudsman in 2018.

The home owner also sought copies of reports and audited accounts in respect of the statutory functions of the RIAI. When the RIAI refused to disclose these, despite the fact that the accounts are required to be maintained in respect of its registration function pursuant to the Building Control Act 2007, the home owner appealed that decision to the Information Commissioner. This appeal was withdrawn and the home owner sought information against pursuant to the Freedom of Information Act from the RIAI, including information relating to its complaints to the registration body. The registration body established that it was not subject to the Freedom of Information Act and not required, therefore, to release information in relation to its registration functions.

It was apparent to the home owners that the registration body's procedures for dealing with consumer complaints were not fit for purpose, and that undue deference was afforded to the registration body's own members, rather than the interests of consumers. It was also apparent from the extensive correspondence between the home owner and the registration body that the home owners found the process of seeking to hold the architects to account extraordinarily frustrating and time-consuming, with no possibility of any remedy in their favour that might come out of the process.

Questionnaire

1.	<p>If the homeowner was unhappy with the design or certification of the house, did the homeowner make a complaint to the regulatory body with responsibility for the relevant professional, such as the RIAI? For example:</p> <ol style="list-style-type: none">1. the issuing of interim payment certificates to the contractor for work that turned out to be defective, or2. the giving of opinions on compliance in relation to developments that turned out to be defective <p>The home owner complained to the Royal Institute of Architects in Ireland in relation to an architect whom the home owner believed to have been negligent in the performance of their</p>
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	<p>services, and whom the home owner discovered had not been registered as an architect at the time that the services were provided.</p> <p>The home owners have yet to receive a satisfactory response from the institute four years following their initial complaint. The complaint has been the subject of a referral to the Ombudsman which has partially upheld a complaint against the registration body.</p>
2.	What response did the homeowner receive to the complaint?
3.	<p>Was the regulatory body in a position to make any compensation award in favour of the homeowner, or to make a payment from a discretionary benevolent fund in favour of the homeowner?</p> <p>No. When the author visited the home owner's property in 2018 in order to conduct the interview, there was a large excavated hole in the ground between the home owner's residence and the two buildings that were to have been renovated as part of the project. The two cottages were in poor condition and the home owner pointed out examples of shoddy workmanship that constituted breaches of the Building Regulations.</p>

Case study 4: 'Self' builder where defective materials used in construction

The home owner in this case study had engaged direct labour for the construction of a home in County Donegal and had purchased construction materials directly from various suppliers. Problems became manifest 10 years following completion of the home. An engineer who inspected the home confirmed that the blocks used in construction of the home were failing due to low levels of cement in the concrete and due to the presence of muscovite mica.

The home owner has brought High Court proceedings against the supplier for breach of contract as they bought directly from them, but has yet to achieve any resolution or remedy. Such proceedings also carry the risk of substantial costs being awarded against the home owner if unsuccessful. The home owner described the house as being ruined and uninhabitable, with a 'spiders' web' of cracking all over the external walls, water ingress, and damage to furniture.

The home owner had not arranged defects insurance in respect of the original construction (and such products are typically not available in any event).

Appendix 2

Dáil Motion on Building Standards and Consumer Protection,
June 2016



DÁIL ÉIREANN

CAIGHDEÁIN **FOIRGNÍOCHTA,**
RIALACHÁIN **FOIRGNÍOCHTA** **AGUS**
COSAINT ÚINÉIRÍ TEAGHAISE.

**BUILDING STANDARDS, REGULATIONS AND
HOMEOWNER PROTECTION.**

Rith Dáil Éireann an Rún seo istigh ag an
gCruinniú de Dháil Éireann a bhí ann an 22ú
lá seo de Mheitheamh, 2017.

The within Resolution was passed by Dáil
Éireann at its Meeting on this 22nd day of
June, 2017.

Cathaoirleach Dháil Éireann

Le cur go dtí:
For transmission to:

Deputy Catherine Martin

Go ndéanann Dáil Éireann:

a thabhairt dá haire:

- go bhfuil droch-chaighdeán tithíochta ag cur as do na mílte daoine in Éirinn de dheasca an bhorrtha tógála le 20 bliana anuas;
- maidir leis an Rialtas reatha agus an Rialtas roimhe sin, gur theip glan orthu tionscal na tógála a rialáil go cuí, agus go bhfacthas meath ag teacht ar chaighdeán tógála lena linn;
- go bhfuil gealltanas sa Chlár do Rialtas Comhpháirtíochta chun tithíocht d'ardchaighdeán a chur ar fáil;
- go dteastaíonn rialálaí neamhspleách chun an tionscal tógála a rialáil go héifeachtach, agus ní lucht tógála iad féin a bheith i mbun rialáil ar thionscal na tógála;
- go bhfuil maíte ag Cónaidhm Thionscal na Foirgníochta (CTF) gurb iad siúd a bheas i mbun an reachtaíochta atá ar na bacáin ón Rialtas a dhréachtú san earnáil seo;
- cés moite den Phainéal Piríte, nár tharla fiosrúchán ná machnamh poiblí ar bith maidir leis na cúiseanna atá leis na fadhbanna forleathana i dtaca le caighdeán na tithíochta, fadhbanna atá fós ag teacht chun solais agus ar tromualach iad ar shaol na ndaoine lena mbaineann siad;
- nach ndearnadh aon athchóiriú dlí chun tabhairt faoin easpa leigheasanna atá ar fáil d'úinéirí tí atá thíos leis an bpirít, le sárúithe ar na rialacháin tógála agus le teipeanna eile i réimse na tithíochta;
- gur cuid riachtanach de chaighdeán na tithíochta leigheasanna éifeachtacha a bheith ar fáil nuair is ann do lochtanna;
- maidir leis na lochtanna sa tithíocht a eascraíonn as an méid thuas, go bhfolaíonn siad lochtanna is cúis le bhaol do bheatha, sláinte agus dea-bhail daoine, go ndéanann siad dochar don chomhshaol agus go gcuireann siad costas an ngeilleagar;
- gur bocht an tseirbhís a thugann an dlí do lucht ceannaithe tithe in Éirinn, san earnáil phoiblí agus san earnáil phríobháideach araon, óir:

That Dáil Éireann:

notes that:

- thousands of people in Ireland have been affected by poor quality housing following the building boom of the past 20 years;
- the record of the current Government and the previous Government is one of clear failure to properly regulate the building industry, and of regression of building standards;
- there is a commitment in the Programme for a Partnership Government to provide quality housing;
- effective building regulation requires an independent regulator and not self-regulation by the building industry;
- claims have been made by the Construction Industry Federation (CIF) that it will draft upcoming Government legislation in this area;
- with the exception of the Pyrite Panel, there has been no public inquiry or reflection on the causes of the widespread quality problems in housing, which continue to emerge and which are a heavy burden on the lives of those affected;
- there has been no law reform that addresses the lack of remedies available to homeowners affected by pyrite, building regulations breaches and other housing failures;
- the availability of effective remedies for defects when they occur is an essential part of the quality of housing;
- the defects in housing resulting from this situation include defects which cause risks to life, health and wellbeing as well as creating environmental damage and economic costs;
- Irish home buyers in both the public and private sectors are poorly served by the law, as it stands:

- d’fhéadfadh an tógálaí a bheith dócmhainneach;
- d’fhéadfadh an conraitheoir tógála gan a bheith ar fáil chun leigheas a chur ar fáil faoin am a thiocfaidh an locht chun solais (mar shampla, i gcás gur díoladh an teach nó an t-árasán);
- d’fhéadfadh cosc a bheith ar an gcaingean mar gheall ar Reacht na dTréimhsí; agus
- d’fhéadfadh gan polasaí árachais maidir le lochtanna a bheith ann chun íoc as an obair dheisiúcháin;
- nár thug na Rialacháin um Rialú Foirgníochta (Leasú), 2014 aghaidh ar na fadhbanna seo, mar cé go ndéantar foráil leis na rialacháin maidir le deimhnitheoirí do dhéanamh iniúchtaí sainordaitheacha, is deimhnitheoirí a bheidh ceaptha ag úinéirí/forbróirí foirgintí, go gceanglaítear leo deimhniú um chomhlíonadh rialachán tógála a thaisceadh leis an údarás rialaithe tógála áitiúil sula n-osclaítear, sula n-áitítear nó sula n-úsáidítear foirgneamh nua agus cé go bhfuil cultúr rialála na tógála ag athrú dá mbarr, ní chruthaítear leo leigheasanna dlíthiúla nua d’úinéirí tithe;
- gur mhol an Coimisiún um Athchóiriú an Dlí reachtaíocht chuí ar roinnt ócáidí chun tabhairt faoi chuid mhaith de na ceistanna seo agus go bhfuil gealltanas i bhFoirgníocht 2020 “modhanna sásaimh ionchasacha a bhreithniú agus tuairisciú ar an gcéanna, is sásamh do thomhaltóirí agus d’úinéirí tithe, lena n-áirítear na féidearthachtaí maidir le hárachas i dtaca le lochtanna neamhfhollasacha” agus nach mór leigheasanna dlíthiúla nua a bheith sa sásamh sin; agus
- gurb ar chostas an Stáit a ceartaíodh go leor lochtanna tithíochta i ndeireadh na dála, seachas ar a gcostas siúd ba chúis leis na lochtanna sin; agus
- the builder may be insolvent;
- the building contractor may not be available to provide a remedy when the defect appears (for example, where the house or apartment has been sold);
- the Statute of Limitations may bar the action; and
- there may be no defects insurance policy available to pay for the repair works;
- these problems have not been addressed by the Building Control (Amendment) Regulations 2014, as while the regulations provide for mandatory inspections by certifiers appointed by building owners/developers and which require a certificate of compliance with building regulations to be lodged with the local building control authority before a new building is opened, occupied or used and are changing the culture of construction regulation, they do not create new legal remedies for home owners;
- the Law Reform Commission has proposed appropriate legislation on several occasions to deal with many of these issues and there is also a commitment in Construction 2020 “to consider and report on potential forms of redress for consumers and homeowners, including the potential for latent defects insurance” and that redress must include new legal remedies; and
- many housing defects have ultimately been rectified at the expense of the State, rather than those responsible for those defects; and

a iarraidh ar an Rialtas:

- reachtaíocht phríomha nua a thabhairt isteach ina mbeidh baránta in-tarchurtha cáilíochta agus sannadh cúiseanna caingne maidir le faillí ó thógálaithe agus uathu siúd atá bainteach leis an bpróiseas tógála, i bhfabhar céadcheannaitheoirí tithe agus na
- introduce new primary legislation to include a transmissible warranty of quality and assignment of causes of action in negligence from builders and those involved in the building process, in favour of the first and subsequent purchasers of houses;

calls on the Government to:

gceannaitheoirí dá n-éis;

- a ordú go seolfar beart féidearthachta agus cás gnó chun Údarás Tógála Éireannach a chruthú a ndéanfaí feidhmeanna na n-údarás reatha um rialáil tógála a aistriú chuige, a dhéanfadh rialáil foirgníochta a riar ar bhonn náisiúnta agus a sholáthródh feidhm mhaoirseachta rialála i ndáil leo siúd atá páirteach sa tionscal foirgníochta, lena n-áirítear conraitheoirí, fochonraitheoirí agus daoine eile atá páirteach sa phróiseas foirgníochta de réir mar is cuí;
 - breithniú a dhéanamh ar fhoirmeacha malartacha conarthaí a fhorbairt agus a úsáid chun tithíocht a sheachadadh;
 - dul i mbun pléití leis an Dlí-Chumann agus le Cónaidhm Thionscal na Foirgníochta chun tús a chur le hathbhreithniú ar fhoirm chaighdeánach an chomhaontaithe foirgníochta a úsáidtear le haghaidh foirgníocht chónaithe, chun leasuithe ar an gcomhaontú a mheas chun cosaint tomhaltóirí a éascú, lena n-áirítear leasú ar an bhforáil maidir le réiteach díospóidí, agus deireadh a chur leis an srian leis an gcomhaontú a aistriú ar an aonad a dhíol;
 - córas chun díospóidí a réiteach a bhunú a bheidh caoithiúil do thomhaltóirí atá ag déileáil le tithíocht lochtach;
 - Reacht na dTréimhsí, 1957 a leasú chun moltaí an Choimisiúin um Athchóiriú an Dlí a chur i bhfeidhm i ndáil le lochtanna foirgníochta;
 - acmhainniú rialála foirgníochta le haghaidh údaráis áitiúla a athbhreithniú agus a mheasúnú, á aithint go bhfuil a ról agus a gcuspóirí éagsúil go maith ó ról agus cuspóirí deimhnitheoirí rialála foirgníochta príobháideacha, ar daoine iad a cheaptar chun leasanna úinéirí foirgneamh a chosaint seachas leasanna an phobail i gcoitinne le linn a chinntiú go gcomhlíontar na hAchtanna um Rialáil Foirgníochta;
 - roghanna a ullmhú agus a fhoilsiú maidir le hoibreacha leasúcháin ar aonaid tithíochta lochtacha a mhaoiniú agus a sheoladh, a bheidh mar bhunús le haghaidh scéim ar fud na tíre,
- direct the carrying out of a feasibility exercise and business case for the creation of an Irish Building Authority, to which the functions of the existing building control authorities would be transferred, that would administer building control on a nationwide basis, and that would provide a supervisory regulatory function in relation to those involved in the construction industry, including contractors, sub-contractors and others involved in the construction process as appropriate;
 - consider the development and use of alternative forms of contract for delivery of housing;
 - engage with the Law Society and the CIF to initiate a review of the standard form building agreement used for residential construction, to consider amendments to the agreement to facilitate consumer protection, including amendment of the dispute resolution provision, and removal of the restriction on transfer of the agreement upon sale of the unit;
 - establish a consumer-friendly system of dispute resolution for homeowners dealing with defective housing;
 - amend the Statute of Limitations 1957 to implement the recommendations of the Law Reform Commission in relation to building defects;
 - review and evaluate the resourcing of building control for local authorities, recognising that their role and objectives are quite different to the role and objectives of private building control certifiers, who are appointed to protect the interests of building owners rather than the interests of the general public in ensuring compliance with the Building Control Acts;
 - prepare and publish options for the financing and carrying out of remedial works to defective housing units, that will form the basis for a nationwide scheme, enshrined in legislation, for the

cumhdaithe sa reachtaíocht, chun lochtanna leagáide i dtithíocht a leigheas ar bhonn ordúil;

- athbhreithniú práinneach a sheoladh ar úsáid ábhar indóite a úsáidtear le linn tithé a thógáil agus a athchóiriú agus, más gá, na rialacháin um shábháilteacht dóiteáin a thabhairt cothrom le dáta; agus
- athbhreithniú práinneach a sheoladh ar na rialacháin um chomhlíonadh agus forghníomhú maidir le sábháilteacht dóiteáin agus rialacháin nua a thabhairt ar aghaidh, más gá, chun a chinntiú go mbeidh na caighdeáin sábháilteachta is airde ann i dteaghaisí cónaithe.

orderly remediation of legacy defects in housing;

- conduct an urgent review of the use of combustible materials used in the construction and refurbishment of homes and to update, if necessary, fire safety regulations; and
- conduct an urgent review of fire safety compliance and enforcement regulations and bring forward new regulations, if necessary, to ensure the highest safety standards in residential dwellings.