

LEGISLATIVE COMMENT

LOCAL GOVERNMENT (HOME BUILDERS' LIABILITY) ACT 1973

The purchase of a new home represents the largest single capital outlay of the average consumer, but until the *Local Government (Home Builders' Liability) Act 1973* becomes operational this group of consumers has only the limited protection of the common law. This legislation proposes protection for the new home purchaser by requiring the builder to take out insurance against specified defects occurring.

The common law as it now stands provides little redress for the dissatisfied purchaser. He usually must base his claim in contract and in this era of standard form contracts his limited common law rights are generally excluded.

The protection presently afforded by the law depends on the stage of construction reached at the time the contract is completed. In the case of a partly constructed house there may be warranties of proper, workmanlike manner of construction,¹ although this will generally be excluded by the written contract. Even where this is not the case the vague nature of the implied term leads to little real protection. Where there are specifications no other warranties will apply. In the absence of specifications the house must be complete so as to "be fit for human habitation".²

Where the house is completed on purchase the maxim *caveat emptor* applies on the basis that the buyer can see what he is buying. Unfortunately in this area major defects can be invisible to the uninitiated, and some even to the professional builder. Such things as bad structural work can be hidden behind plaster: incorrect mixing of mortar or concrete may only become noticeable at a much later date when bricks start to fall out of walls, or floors begin to crumble. It would seem that these defects will not necessarily make the house unfit for human habitation and may not even be included in warranties of proper, workmanlike construction, when these apply. Hence the only way a new home purchaser can be positive of obtaining the standard of construction he desires is to employ an independent expert to be on site during the entire construction process to ensure the work is properly carried out. This will of course add considerably to the cost of the house, and hence too uneconomical to be a practical solution.

The collateral contract has occasionally been used successfully, especially with the advent of project homes where the agreement relied on is that the contract to purchase the particular house was in consideration of a

¹ *Duncan v. Blundell* (1820) 3 Stark 6. This area is canvassed in an article by G. Dworkin, "Consumer Protection and the Problems of Sub-standard Housing" 28 *Convey (N.S.)* 276 at 280.

² [1931] 2 *K.B.* 113.

promise that it would be substantially identical in workmanship and finish as the displayed home. Project home builders have effectively remedied this loophole by inserting clauses in the contract to the effect that the written agreement embodies the whole agreement between the parties.

Tort law is equally unreceptive to the plight of the new home purchaser with *Bottomly v. Bannister*³ and *Otto v. Bolton*⁴ proclaiming *caveat emptor* in the case of sales of real estate. In *Otto v. Bolton* the defect complained of was patent,⁵ and it is at least arguable that where the defect is latent the case is not authority.⁶ Despite inroads into this principle in other jurisdictions,⁷ the above mentioned cases stand firm against the onslaughts of a *Donoghue v. Stevenson*⁸ type liability extending to the arena of real property.

This lack of effective legal liability combined with the current high demand for housing, which has allowed the disreputable builder to remain in business, has resulted in some sub-standard housing. One of the major aims of the *Local Government (House Builders' Liability) Act 1973* is to protect the consumer from this unscrupulous minority.

The foundation of the Act is the requirement that prior to the commencement of construction the builder must take out insurance covering that particular house. The builder may insure either through an approved guarantor⁹ (envisaged as the Housing Industry Association or the Master Builders Association) or he may take out a private form of approved indemnity insurance.¹⁰ The insurance will cover such things as subsidence or settlement of foundations,¹¹ bankruptcy or liquidation of the builder,¹² faulty or poor workmanship¹³ and buildings not completed to a standard sufficient to receive a certificate of occupancy¹⁴ under s. 929A.

The purpose of the legislation is to provide a sliding scale of compensation over a period of six years. This is of itself a praiseworthy aim. However a major objection is that it is remedial rather than preventative. There is certainly some currency in the argument that a builder who consistently constructs sub-standard housing will eventually be forced out of the industry since he will be unable to obtain the necessary insurance, but in the meantime a number of new home owners will be in the position of having faulty houses, which while covered in most aspects by insurance, is no real substitute for the properly constructed home they expected.

This is the advantage of the registration system (as in N.S.W.¹⁵) where

³ *Perry v. Sharon Development Co. Ltd.* [1937] 4 All E.R. 390.

⁴ *Jennings v. Jennings* [1930] 2 K.B. 83.

⁵ [1932] 1 K.B. 458, 468.

⁶ [1935] 2 K.B. 46.

⁷ *Lock & Lock v. Stibbor* (1962) D.L.R. (2d) 704.

⁸ A further example is *Gallager v. McDowell* [1961] N.I. 26, where the court extended a *Donoghue v. Stevenson* argument to building contractors.

⁹ S. 918E.

¹⁰ S. 918M.

¹¹ S. 918C(1).

¹² S. 918K(1)(a).

¹³ S. 918C(2), 918K(1)(c) and (d).

¹⁴ S. 918K(1)(b).

¹⁵ *Builder's Licensing Act 1971* (N.S.W.).

a builder must be licensed before being able to construct homes, flats or offices. He may only obtain this licence by showing that he is capable both in having the necessary skill and finance to enter the industry. By renewing licences annually a check may be kept that only those properly qualified can gain admittance and remain in the industry. In Victoria under the present legislation any person may call himself a builder and if he can obtain the necessary insurance he may build houses.

A further objection is the lack of any general fund such as contained in the Worker's Compensation¹⁶ legislation to which those whose builders failed to take out the necessary insurance may have recourse in the event of the specified damage occurring. Such a fund is less necessary with the *Local Government (House Builders' Liability Amendment) Act 1974* by which sections 929A(3A) and (3B) require that on application to the relevant local authority for a building permit the builder must furnish a declaration that he has the insurance. The local authority has no obligation to do any more than accept the declaration, made on pain of fine and imprisonment for fraud or misleading statements. While this is plausible in the majority of situations, given a dishonest builder who chooses to forgo insurance on the chance of not being caught, or the builder who needs work but cannot obtain the insurance, fine or imprisonment is of little comfort to the unfortunate purchaser.

A substantial argument against such a fund is that the consumer should check the builder has the prescribed insurance, and will have only himself to blame if he is unable to recover. The insurance requirement will be endorsed on the building permit,¹⁷ but it is probable that the home buyer will not actually examine the permit, and even if he does will probably accept the builder's verbal assurances that he has the necessary cover.

In legislation aimed at protecting the consumer, all measures should be taken to ensure this protection. The onus should not be placed on the consumer to check that his rights are intact or employ a solicitor for this purpose; especially when complete protection can be achieved with little extra expense and trouble—given calls on such a fund to be minimal.

Unfortunately the definition of 'dwelling house'¹⁸ severely restricts the operation of what promised to be a positive step towards ending the exploitation of the new home purchaser. Subsection (a) of that definition appears to exclude home units and villa units, currently a substantial portion of the 'new home' market. Hopefully this defect will be remedied when the Act comes under revision twelve months after it has been in operation.

At present it is still doubtful when the *Local Government (Home Builders' Liability) Act 1973* and amendment will come into operation since problems have arisen in arrangements with insurance companies. It is hoped that the Act will be gazetted in mid-September.

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¹⁶ *Workers Compensation Act 1958* (Vic.) s. 82(1) and (3), s. 83.

¹⁷ S. 929A(3A).

¹⁸ S. 918A.

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