



Law Society
of Scotland

Consultation Response

Strengthening consumer redress in the housing
market

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the United Kingdom and Scottish Governments, Parliaments, wider stakeholders and our membership.

The Society's Property Law Committee welcomes the opportunity to consider and respond to the Ministry of Housing, Communities, and Local Government's consultation: *Strengthening consumer redress in the housing market*.¹

The Committee does not seek to respond to the questions detailed in the consultation but has the following comments to put forward for consideration.

General comments

New build properties

We note that the consultation document cites a decline in consumer satisfaction and gaps in protections for buyers of new build homes.² This is a concern as consumers may not be sufficiently protected under current arrangements if a problem arises with their property through no fault of their own.

With regards to new build properties, we note that the building of new properties is subject to regulation by the system of planning permission, building warrants and completion certificates. A building warrant is the legal permission to start building work. Once building work is completed, the property owner (or their agent) must submit a completion certificate to the local authority. This certificate is required to confirm that the building work has been carried out in accordance with Building (Scotland) Regulations 2004 and the building warrant. An inspection of the property will be carried out and if the building work is satisfactory, a notice of acceptance of completion certificate will be issued. Only at that stage may the property be used.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684843/Stregthening_Redress_in_Housing_Consultation.pdf

² Paragraph 31.

We note however, that there are a number of key limitations with this process. Firstly, completion certificates carry the limitation “so far as can be ascertained from a visual inspection”. This means that anything which is not visible cannot be commented upon. Completion certificates are generally relied upon as *prima facie* evidence that the property has been built in accordance with the regulations, but that cannot be guaranteed.

Secondly, in respect of a new build estate, it is likely that only a sample of properties will be inspected rather than all new build properties. This means that not all properties can be guaranteed to meet the required standards.

The third issue with relying upon building regulations for consumer protection, is that the regulations are built around safety, rather than finishes. For snagging and quality issues, the building regulations generally do not provide a sufficient level of protection.

The fourth issue is that it is not open to the consumer to pursue any remedies in respect of a breach of building regulations. If the consumer’s ultimate aim is to have a problem-free property, this does not necessarily deliver this. On the basis that the building regulations system has far wider application than just to new build properties, we believe that any reform of this system is too big a step, when the focus appears to be on the delivery of housing.

There is currently no statutory framework in place to regulate builders and provide redress to consumers who face issues with new build housing, although voluntary schemes are available.

The National House Building Council (NHBC) warranty and insurance policy, known as Buildmark, is widely used³. This warranty cover is generally requested by lenders in purchase transactions in Scotland. The warranty lasts for a period of ten years. Higher levels of protection are offered within the first two years of the warranty, with lower levels offered for the remainder of the policy duration, ie between two and ten years. Other warranty schemes are available.

If matters cannot be resolved by way of a warranty and insurance policy, a consumer may be able to seek redress via the Consumer Code for Home Builders’ Independent Dispute Resolution Scheme. We note that there is a fee for home buyers to lodge a complaint with the Scheme. Where a case is upheld however, the home buyer may receive a full refund of the fee – at the Adjudicator’s discretion – in addition to any compensation which may be awarded. We do consider that this raises a question of consumer accessibility, however appreciate that it may serve a role in reducing the incidence of frivolous complaints.

It should be noted that the Consumer Code for Home Builders does not cover all new homes. For new homes that are not covered by the Consumer Code for Home Builders, the new home will almost certainly not benefit from the NHBC Buildmark Scheme or other warranty scheme either. For new homes which

³ NHBC’s Buildmark covers around 80% of new homes built in the UK and currently protects over 1.6 million homes. See <http://www.nhbc.co.uk/Warrantiesandcover/>

proceed on the basis of an architect's certificate, for example, instead of NHBC Buildmark Scheme, the level of protection is likely to be different.

It must be recognised that builders' missives are generally on a 'take it or leave it' basis, weighted in favour of the builder. The contractual relationship between the parties is therefore asymmetrical. Better balance in this relationship is needed. In addition, builders may have delictual obligations towards consumers, based on the principle that there should be liability for loss caused due to a failure in the duty of care, whether the actions are deliberate or accidental.

We believe that there should be a focus on engagement between the consumer and builders to include:

- Encouraging builders to offer the Consumer Code and NHBC or other warranty cover
- Better education of consumers by appropriate consumer protection bodies about the protections offered by NHBC, other warranty providers and the Consumer Code and, just as importantly, what is not covered and other ways consumers might protect themselves if they have concerns
- Warranty providers and architects should be under an obligation to inform consumers about the differences between the cover offered by NHBC and other warranty providers, and the cover provided by an architect's certificate
- Many builders are limited companies or companies created for specific developments only (and otherwise assetless) and therefore remedies against the builders, where there are any, may be limited. The house building company should provide information to the consumer about their rights and remedies before any contract is concluded, including their right to seek advice from a solicitor before entering into any contract. In the experience of our members, consumers generally seek advice from solicitors prior to concluding missives but this may not always be the case.

Ombudsman

We note that question 18 of the consultation asks "should new build purchasers have access to an ombudsman?" We believe this requires further consideration. We do not believe it is clear from the consultation exactly what the underlying principle is for creating an ombuds for new build purchasers. It would be useful to understand the underlying issues before commenting further.

If the perceived problem is primarily around snagging and delays in resolving snagging issues, then we would question whether reference to an ombuds would resolve this issue satisfactorily. In most cases, the expectation is that problems should be resolved as quickly as possible after completion. It is likely therefore that, by the time the period for direct resolution has passed, and an ombuds has reviewed and reported on the matter, the builder will have fixed the issue. Where the delay is longer, then an ombuds system may be more useful. Where the delay is caused because the builder has become insolvent then we cannot see the benefits of a referral to an ombuds.

We agree that the consumer needs some further protection. A house purchase is the biggest single investment most people make. Although buying a house from a builder can be complex and involves the consumer in issues of law, finance and property ownership the essential issue is that the relationship between the purchaser and builder is not an equal one. Steps should be taken to provide better balance in

the relationship between the builder and the consumer. The matter is complex and the balance of the relationship between builder and consumer depends to some extent on market forces, market demand and the particular circumstances of the purchaser and builder in any case. The nature of the relationship can influence and affect the protections offered to the consumer.

For example, it is generally the case that builders have a wide latitude to trigger the date of entry to the property, 'completion' in Scotland. In those circumstances, provided that the house has been approved by the local authority in terms of building regulations and by the warranty provider, the purchaser cannot reject the house or delay completion. That analysis demonstrates circumstances in which the purchaser is lacking in power. However, there will be cases where the purchaser is keen to move in and where the builder may be behind schedule for reasons not immediately within their control. If the purchaser is in a chain and is selling their own house at the same time, then the purchaser may not want to delay purchasing, even if they had the right to do so. Any greater protection for the purchaser therefore has to work within that background.

Question 30 of the consultation asks "should we streamline redress provision in housing, and if so, what would be the most effective model"? We have concerns about how any ombuds would resource and manage to apply a set of standards to the full spectrum of the housing market, to adequately cover the range of issues that could arise.

We believe that there are very limited overlaps between the issues which arise in relation to new homes and the sort of issues that would arise between a landlord and a tenant. The benefit of having one ombuds would therefore be the simplicity of one housing portal and one set of administration.

Estate Agents

Regulation of estate agents is a reserved matter. We do not seek to comment on the regulation of estate agents generally. However, we would not be in favour of a regulatory system which imposed duties on solicitor estate agents, additional to the current duties incumbent on solicitors in Scotland.

Our members are currently subject to a robust regulatory regime and complaints system. Our professional rules⁴ include provisions on accounts and client funds, anti-money laundering, gazumping and gazundering, and professional indemnity insurance. A system of regulation of solicitor estate agents which does not fall in line with current professional rules will result in dual regulation, likely with additional business burden and expense for solicitors. We do have a general concern that any system of dual regulation would lead to increased costs being passed on to consumers without there being any discernible benefit to them. Dual regulation has the potential to drive people out of working in the sector.

⁴ Law Society of Scotland Practice Rules 2011, available at <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/>

Letting agent regulations⁵ which have recently come into force require agents to have a letting qualification.⁶ This means that solicitors seeking to operate as letting agents are now subject to dual qualification and regulation requirements. This is impacting upon the work of a number of our members.

In certain areas of Scotland, the vast majority of properties are sold and marketed by solicitor estate agents.⁷ It is appreciated that buyers and sellers may have a different experience of buying and selling depending on whether a solicitor estate agent or an estate agent is instructed. In particular, solicitor estate agents will be subject to the professional rules as detailed above, which means that they will not be able to take certain actions in the course of a transaction which could be taken by estate agents. These requirements are generally intended to ensure fairness in the purchase of property from a solicitor estate agent.

If solicitors no longer carry out estate agency work due to additional regulatory requirements, this is likely not only to have a significant impact on legal businesses in Scotland, but also to restrict consumer choice and protection.

We consider it important that there is an open and accessible complaint scheme for consumers using estate agent services. There is a statutory scheme in place for complaints against solicitor estate agents. The Scottish Legal Complaints Commission (SLCC) is the gateway for all complaints against solicitors in Scotland. This scheme is open to complaints against solicitor estate agents as their estate agency work is part of their business. If an individual is not satisfied with a solicitor or a solicitor's firm, they are required to raise their concerns with the firm in the first instance via a nominated client relations manager. If the problem is not resolved with the client relations manager, a formal complaint may be submitted by the complainer to the SLCC. The SLCC determines if a complaint relates to the service provided or the conduct of a solicitor. Complaints relating to service are investigated by the SLCC and we investigate complaints relating to conduct.

For further information, please contact:

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⁵ Letting Agent Registration (Scotland) Regulations 2016

⁶ *Ibid*, regulations 5 and 7.

⁷ Recent research by SPC Scotland found that Edinburgh Solicitors Property Centre sold 94 per cent of properties in 2016 and 84 per cent of properties in 2017, and Glasgow Solicitors Property Centre sold 87 per cent of properties in 2016 and 72 per cent of properties in 2017. The percentage of properties not sold in 2017 also included those that were still under offer. A solicitors property centre (SPC) is a property network of participating member solicitor estate agents, who advertise properties for sale across a geographic region.