DOMESTIC BLISS OR PARADISE LOST? CONSUMER RIGHTS IN CONSTRUCTION IN ENGLAND AND AUSTRALIA

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> '[Rights and remedies for construction defects in England & Wales are] *a particularly complex area of the law which is likely to be difficult to understand for the average homebuyer… access to redress via the court system is unlikely to provide many homebuyers with effective protection*.'[1]

A Introduction

In May 2009, the Society of Construction Law published a paper by Philip Britton and Mark Fairweather: 'The Walk to Paradise Gardens: Flat-Owners and Building Defects'.[2] This outlined the obstacles in the way of flat-owners in a new-build (or newly converted) multi-unit development getting remedies under English law against anyone for original construction defects, especially where these come to light some years after the development has been completed. The many-sided difficulties derived in part from the inadequacy (or uncertainty) of the potential claimants' substantive rights – in contract, tort, under statute and under their leases; in part also from procedural issues – the problems, costs and risks of asserting such rights.

The concluding section of the paper summarised the many ways in which English law, at least as in the structures and documents usual for such a development, appeared inadequate, seen from the standpoint of the individual resident. Such residents are typically individuals buying a home for their own personal use, so it seems appropriate to call them 'consumers'. This is, after all, how the European-derived limb of English law on unfair contract terms would classify them.[3]

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1 Office of Fair Trading (OFT) 2008 report: note 17, paras [6.52] and [6.54].

2 SCL Paper 156: a substantially extended and revised version (2011) of this earlier paper, now entitled 'The Walk to Paradise Gardens: Construction Defects in Residential Developments in English Law' can be had by e-mail from Philip Britton: philip.britton@kcl.ac.uk.

3 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L95/29 (21 April 1993), first implemented for the United Kingdom by the Unfair Terms in Consumer Contract Regulations 1994 (UTCCR) (SI 1994/3159), adopted under the European Communities Act 1972 s 2(2), as extended by Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L166/51 (11 June 1998). The current UTCCR 1999 (SI 1999/2083) replaced the 1994 Regulations, but were in turn modified to give effect to the 1998 Directive by The Stop Now Orders (EC Directive) Regulations 2001 (SI 2001/1422) and by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001/1186), which extended standing to the FSA to bring proceedings for an injunction to prevent a body using an unfair contract term. These and separate powers under the Fair

The authors suggested that existing English law provided some possibilities and devices – especially at the initial sale contract and lease stages – which could reduce or avoid some of these inadequacies. However, other common law jurisdictions appeared to tackle residential construction, as well as the legal framework for multi-unit developments, more directly and more comprehensively. Their approach involved sector-specific statutory and/or regulatory intervention, in many situations imposing a minimum (or default) regime of rights and obligations: the very thing which English law on the whole fails to do, including via its little used – because optional – equivalent to strata title systems elsewhere: 'commonhold'.[4]

The 2009 paper was one of the (so far) rare explorations of how general construction law applies to individual residential consumers. It was a first step towards defining why and how 'residential construction law' could be different from general construction law. A compelling reason for the view that it *should* be different was the authors' experience in advising residents with widespread and repetitive defects in their blocks or estates – often safety-critical and expensive to repair. In such situations, English law at present simply fails to meet consumers' reasonable aspirations.

Pursuing the metaphor of that earlier paper in our title, we seek to substantiate further this critical view of English law (section B). We then contrast English law with common law jurisdictions – the Australian States and Territories – which have an altogether more interventionist approach to this important, but under-researched, part of the construction market (section C). We argue at the end (section D) that 'the Australian model' comes much closer than English law to ensuring justice for individual consumers; it therefore provides a blueprint for legislative action within the UK.

B Consumer rights in England & Wales

1 Introduction

Our opening proposition is simple, but perhaps surprising: an individual consumer has almost no special legal protection in English law, simply because s/he has dealings with a 'builder'.[5] We follow the earlier paper in taking as our central focus a new-build (or newly converted) residential development, whose developer sells flats off-plan; we use the words 'buyer' and 'purchase' for the acquisition of a flat, though in strict law such a buyer is

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Trading Act 1973 have now been overtaken by wider powers under Part 8 of the Enterprise Act 2002. A buy-to-let investor, especially via a corporate entity, may not be treated as a 'consumer' in law.

4 Introduced by Part I of the Commonhold and Leasehold Reform Act 2002; see also the Commonhold Regulations 2004 (SI 2004/1829, as amended by SI 2009/2363). There are separate Regulations for the land registration aspects of this form of tenure.

5 In this paper, 'builder' is meant in a generic sense: anyone offering any construction-related services – design, management and/or execution. So it includes a developer (if a separate entity from the main or other building contractor), at least for off-plan sales, where the normal principle in real property transactions of 'caveat emptor' ('let the buyer beware') cannot operate in relation to the quality of something which has not yet been built and therefore cannot be inspected at the buyer's initiative.

usually only the grantee of a long lease at a low ground rent from a landlord (often the same entity as the developer, at least at the start). The first buyer will have acquired that status of tenant (lessee) via a substantial capital payment to the developer; second and later buyers will have made a similar payment to their predecessor as tenant, in order to procure an assignment of the remainder of the lease term. A smaller construction project may be simpler in its legal structures, where construction services are supplied by one individual or entity to one individual consumer; but even this may share some of the same legal difficulties.

Our analysis starts with the common law, since this is what most claimants find they must rely on. Statute (or its equivalent) may of course impose obligations, or offer rights and remedies, which do not exist at all at common law, or not to the same extent. In our field there is the Defective Premises Act 1972,[6] which imposes quality obligations on a 'builder' (generously defined) of a dwelling, enforceable by actions for damages by the present owner of the dwelling (whether its first buyer or not).[7] The DPA is therefore part of the '*almost* no special legal protection' in our proposition: it does modify the common law, in order better to protect those who acquire an interest in residential property. It is therefore 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 (section C below).

Construction as an economic and practical activity is, of course, highly regulated via planning and building control, as well as by specialist regimes of environmental and fire protection. And these statutory systems include within their aims the protection of occupiers and users of buildings. However, they all operate primarily in the public law sphere and in the wider public interest. Their typical legal techniques are authorisations, injunctions and criminal prosecutions (or the threat of them): their aim is not to shift the cost of repairs from an occupier to some other person in some way responsible.

Anyone familiar with the Law Lords' speeches in relation to building control in *Murphy v Brentwood DC*[8] knows that these regimes only exceptionally give

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6 The Defective Premises Act implements the Law Commission report, 'Civil Liability of Vendors and Lessors for Defective Premises' (Law Com No 40, 1970).

7 The common law would imply a term into a construction contract for a dwelling that the dwelling be fit for habitation on completion: note 45. But the Defective Premises Act obligations go potentially further: 'to see that the work is done in a workmanlike or professional manner with proper materials and that, as regards that work, it will be fit for habitation when completed' – see *Bole v Huntsbuild Ltd* [2009] EWCA Civ 1146. Most importantly, they are enforceable by future owners, and potentially against a wider range of parties than the original developer or main contractor.

8 *Murphy v Brentwood DC* [1991] 1 AC 398 (HL). The House of Lords decided that a local authority as Building Control Body owed no duty of care in tort to the current owner of a house for its potential negligence in failing to spot inadequate foundations at the time of construction, where the claim was for the house's reduced value (or the cost of the required repairs) – 'pure economic loss'. It also relied on the existence of the current owner's statutory rights under the Defective Premises Act as a reason for refusing to recognise that a 'builder' owed any similar duty of care in tort in relation to equivalent defects; the opposite argument applied to the duty of a local authority under New Zealand law in *Invercargill City Council v Hamlin* [1996] AC 624 (PC).

rise to private law rights in tort, enforceable in the civil courts by an unhappy consumer wishing to recover a loss or expense. So unless compliance with a relevant regulatory regime also has contractual status, triggers a claim under a third-party warranty, gives rise to a statutory right of action or can be used to base a claim for breach of statutory duty, failure to comply will not usually lead to compensation.

Relations between consumers of construction services and the providers of those services often start out as contractual – as between a developer and first buyer of a flat in a residential development. If not contractual, they may be regulated by the law of tort; exceptionally, they may derive from both contract and tort at the same time. We now consider these areas of law in turn, in order to justify our proposition above.

2 Home buyers and contract formation

The inadequacy of the common law in our field can be seen if we consider its doctrines surrounding the formation of contracts. For obvious practical reasons, English case law makes assumptions, that:

> (a) each party is able to take care of his/her own interest in the negotiations which lead to the making of a contract; and
>
> (b) each understands the rights, obligations and remedies in the contract which they then enter into, as well as any necessary legal background.

Misrepresentation, fraud, duress or any other 'vitiating factor' apart, to agree to the terms of a contract – agreement being tested objectively – is to be bound by it. So even an individual consumer will have great difficulty in escaping from contractual provisions in a document which s/he has signed.[9]

English law therefore starts with a belief in the rough equality of the two parties and of their access to all necessary information up front (pre-contractual 'due diligence', which may require professional advice). This makes tolerable sense for an 'arm's-length' bespoke commercial contract, drafted by negotiations between the parties or their legal representatives, both sides making contributions towards the final text. It is unsustainable for a standard sale contract drafted by or for a developer, offered to the potential buyer on a 'take it or leave it' basis. But the common law sees no reason to treat the apparent consent of the buyer as less real or effective than if the

9 One of the rare common law arguments truly protective of consumers is contained in the oft-cited dicta of Lord Denning MR in *Spurling v Bradshaw* [1956] 1 WLR 461 (CA), page 466: '… the more unreasonable a clause is, the greater the notice which must be given of it' [for it to successfully form one of the terms of the contract]. This approach was later approved in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA). Perhaps regrettably, signature by the consumer of the document containing the term, whether s/he has read it or not or could have understood it or not, seems still to foreclose all such arguments, at least in English law: *L'Estrange v F Graucob Ltd* [1943] 2 KB 394 (Div Ct KB). In *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 (HL Sc), page 133 Lord Devlin criticised the magical legal impact of signature: '… in truth about as significant as a handshake that marks the formal conclusion of a bargain'.

contract had been individually negotiated. After all, the buyer has an option not to enter into that particular contract at all.[10]

The intervention of general consumer law (none of it specific to the residential construction field) may therefore be vital, especially where contract terms are not negotiated – or are in a standard form – and where the 'builder' deals by way of trade or business but the consumer does not. This is the usual state of affairs for home construction, extension or repair. It is addressed in English law in two ways: by statute (the Unfair Contract Terms Act 1977)[11] and by regulatory intervention of EU origin (the Unfair Terms in Consumer Contracts Regulations 1999, as amended).[12] Each permits, under different conditions, challenges to the enforceability of individual contract terms which are unfair (or not shown to be fair or reasonable).[13]

Beyond that, however, English law does not dictate or control the terms on which construction work may be undertaken for an individual. Echoing the common law, statute does imply basic terms into a contract for the supply of services by a person or entity acting in the course of a business – ie into almost every construction contract or contract for professional services.[14] But these operate only as a convenient short-cut or default: subject to the possible impact of unfair contract terms law, the parties are free to vary or exclude them.[15]

In addition to our intending flat buyer being in fact unable to influence the terms of the purchase contract (or, for that matter, the terms of the lease which will follow), s/he is unlikely to be a 'repeat player' with the same builder or developer. As a result s/he will not usually know – or to be able to find out – reliable answers to a number of key questions:

- What is the track record of the developer in comparable past projects?
- Is the developer solvent, and will it have the cash-flow to carry the project through to completion?
- How reliable is the projected completion date?[16]

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10 Stephen A Smith, *Contract Theory* (Oxford, Clarendon Law Series, 2004), page 331.

11 A major role in the passing of the 1977 Act (and the Supply of Goods and Services Act 1982: note 14) was played by David Tench, legal adviser to the Consumers' Association – obituary in *The Guardian*, 22 March 2011.

12 UTCCR 1999: note 3.

13 For example, there are distinctions (not addressed here) between those protections available only to individuals and those which may also be available to legal entities; and between terms which are always statutorily unenforceable and those which may have to be shown to be unfair. See Philip Britton, 'The Architect, the Banker, his Wife and their Adjudicator: Construction and the Changing Law of Unfair Contract Terms' (2006) 22 Const LJ 23, updated in section D of 'Court Challenges to ADR in Construction: European and English Law' (SCL Paper 152, January 2009) <www.scl.org>.

14 Supply of Goods and Services Act 1982: services to be carried out with reasonable care and skill (s 13); performed within a reasonable time (s 14); and for reasonable remuneration (s 15).

15 Supply of Goods and Services Act 1982, s 16.

16 In an off-plan new-build context, legal completion is often at the developer's initiative and discretion, eg 14 days after the developer gives notice to the buyer that his/her

- What is the likely build quality at handover?
- How responsive will the developer and/or builder be to 'snagging' and early defects issues?
- If the developer is a Special Purpose Vehicle with no assets, will a parent company continue in existence and be available (if necessary) to be sued later on, or to satisfy a judgment reached against the SPV?

A well advised buyer would also want to understand what management structures there will be under the leases for the development: the constitution, membership, powers and duties of the Residents' Management Company (RMC) and the level of the variable service charges. There is no certainty that any of this information will be available, or in adequate detail, before the buyer signs a purchase contract.

As a result, not only does the buyer have no real opportunity to influence the terms on which the new flat is offered; s/he also lacks the background information which would be necessary in order properly to assess and manage the risk which committing to the purchase represents. Economic theory suggests that this structural imbalance between seller and buyer has negative implications for competition – a problem for which it is hard to devise a solution not involving bureaucratic overkill.

The chances of any such intervention are reduced by the power of the supply side's representative bodies to lobby Government and Parliament. Home buyers as such have no equivalent, except generic consumers' groups and the public bodies which are their defenders – notably the Office of Fair Trading, whose exhaustive 2008 market study on housebuilding in the UK makes much of what it calls 'the information asymmetry' between the parties.[17]

This OFT report went on to argue – following earlier such calls, not yet acted on[18] – for an industry-wide code of conduct in relation to new homes. This would go beyond just defects and apply to the whole buying process, including the contractual terms involved and after-sales dispute resolution. If such a code were not operational by the end of March 2010, the OFT

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particular flat is ready for occupation. Although this may have to be within a reasonable time, there may be no firm promise of even a longstop date; and significant categories of events may be excepted, like the contractor's default or weather conditions. Some, but not all, of these will be outside the developer's control; none are within the buyer's control; yet contractually all these risks may be shifted to the buyer. As a result – and leaving aside the possible challenge to such a term as unfair – if a flat is ready for occupation significantly later than expected, the contract gives the buyer little chance of compensation, or of escaping from the bargain without losing his or her deposit.

17 OFT, 'Homebuilding in the UK – a market study' (OFT 1020, September 2008) – downloadable from www.oft.gov.uk. As part of the 'bonfire of the quangos' announced by the UK coalition Government in October 2010, the investigation and enforcement functions of the OFT at a national level in relation to consumer protection appear now to be under threat; the functions of the OFT and Competition Commission may be combined in the new Competition and Markets Authority.

18 Eg the Barker Review of Housing Supply (Final Report, March 2004), downloadable from www.hm-treasury.gov.uk; and the Calcutt Review of Housebuilding Delivery (November 2007), downloadable from www.communities.gov.uk.

threatened to impose a statutory alternative, to which all homebuilders would be required to belong and which would be funded by an industry levy. Eleven homebuilding and related organisations (including the National House Building Council and the Council of Mortgage Lenders) picked up the gauntlet the OFT had thrown down. They devised and adopted a brand-new *Consumer Code for Home Builders*. This led the OFT to lift its threat – though the new *Code* does not have statutorily approved status. It came into effect for any would-be buyer reserving a new, or newly converted, home after 1 April 2010.[19] Its website grandly claims: '[It] adds to the already world beating consumer protection enjoyed by home buyers in the UK'.[20]

However, in reality it does surprisingly little: for example, it does not augment any of the substantive rights enjoyed by a would-be off-plan buyer or curtail the freedoms of the developer in drafting such contracts; nor does it extend the minimum protection available under any of the warranty systems now on the market. It does however provide new guarantees that information will be made available to a potential buyer; and a breach of the *Code* does gives a buyer a right to complain to a new Independent Dispute Resolution Scheme – a form of adjudication which can award up to £15,000 against the seller. The buyer retains the right to assert a breach of the *Code* in court.

In risk terms, the value of the financial commitment an intending home buyer makes in entering a purchase contract is likely to be as great as, if not greater than, any other single transaction s/he will ever undertake. Hence perhaps the heavy – and often exaggerated – emphasis in developers' sales literature and oral 'patter' on the certainty and security offered by commercial third-party warranties, of which the NHBC's *Buildmark* has about an 80% market share.[21]

It seems as if would-be buyers, having few alternatives, rely gratefully on these reassuring claims. Few seem to understand much about the reality, as Professor James Sommerville reports (summarising an OFT survey of home-buyers):

> 'Many of the respondents were unfamiliar with the contents and coverage of their home warranty, were confused as to who actually provided the cover under the warranty and yet, they valued the warranty being available since it provided some form of 'peace of mind'.'[22]

The peace of mind thus induced may be shattered when the buyer later discovers – when it really matters – that the sale contract excludes or limits the

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19 Offering an NHBC, Premier Guarantee or LABC New Home warranty requires compliance with the new Code for the future. These are three broadly comparable commercially available 10-year new home warranties; the fourth is that offered by BLP, underwritten by Allianz, which has a more systematic audit and inspection system during construction and does not expect the insured to look to the builder to remedy defects coming to light in the first two years of the policy (unlike all the other three). Under the Council of Mortgage Lenders 2003 guidelines, funds for purchasing a new home on mortgage will not normally be released unless one of these four warranties is in force in relation to the property: to that extent, third-party warranties are *de facto* compulsory in the UK (and the Isle of Man).

20 See the Code's second edition at www.consumercodeforhomebuilders.com.

21 See www.nhbc.co.uk; for the alternative approach, see www.blpinsurance.com.

22 OFT 2008 report: note 17, Annexe J, para [1.5].

developer's liability for oral or written pre-contractual representations,[23] as well as that the scope of cover of the warranty is severely limited. None of the existing commercial warranties is a real substitute for adequate remedies at common law against a solvent original construction party, save that a claim under a warranty, provided it fits within the cover, does not require proof of any other party's legal liability; and that a warranty claim may be available after it is already too late to start a claim in court.

For smaller pieces of construction work (repairs, refurbishment, improvement or extensions), the risks and dangers for the consumer may not be so large, nor the extent of his/her financial commitment; and s/he may have a real choice between suppliers of services. This could lead to selection procedures (requests for quotations and other information from potential suppliers) comparable in function to formal tendering in the commercial construction world. These may reduce, though not necessarily eliminate, the information asymmetry between 'builder' and consumer; but the supplier of construction services may still attempt to impose a standard form contract, which may have been drafted by his or her own professional association.[24]

3 Substantive rights of home buyers: contract, tort and statute

Tables A and B, forming Appendix 1, summarise home buyers' rights in relation to original construction defects under current English law, together with the time-limits which apply to the different possibilities for legal action. [The tables also include possible challenges to contract terms as unfair, mentioned at B2 above.] What picture emerges from this summary?

1. First buyers of homes are likely to have some protection in law (in contract, and under the DPA) against defects in construction for which their sellers are responsible, rights in contract sometimes also bringing concurrent rights of action in tort (negligence);[25]
2. However, the bespoke nature of sale contracts and leases for a multi-unit development can mean that there is a distinction between what is comprised in a flat or other domestic unit (legally speaking) and the (other) 'common parts' of a development; this often makes it hard for individual buyers to assert rights in relation to defects in the common parts, or even for the RMC to make any claim in relation to these.

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23 OFT 2008 report: note 17, para [6.59].

24 As in *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), [2003] BLR 487; and see Philip Britton: note 13.

25 *Robinson v PE Jones (Contractors) Ltd* [2010] EWHC 102 (TCC), on appeal at [2011] EWCA Civ 9. A duty of care in tort can be of real value because in case of latent defects it opens up the possibility – under the precise statutory conditions of the Limitation Act 1980 ss 14A and B – of the more generous statutory extra three-year period within which legal action must be started (subject to an overall 15-year longstop); this may then give a later buyer a fresh right of action s/he would not otherwise have had. But Jackson LJ in the Court of Appeal (with whom Stanley Burnton and Maurice Kay LJJ concurred) held that in the normal build-and-sell situation a builder does not owe a concurrent duty in tort: contract alone rules their relationship. See sections C1 and D1 of the revised 'Paradise Gardens' paper: note 2.

3. First buyers of flats are likely to have no rights of action under their leases against the RMC or against the overall landlord of the development for construction defects.

4. Nor are first buyers likely to have any rights in contract or tort against those construction parties other than the seller who are responsible for construction defects, or against Building Control Bodies implicated in the occurrence of those defects.

5. Anyone wishing to take – or threaten – legal action under 1 or 2 above may be caught by the relevant limitation period, whose starting point may be unclear, and which except for claims based in tortious negligence takes no account of the time taken by residents or RMC, however reasonably, to become aware of defects originally latent.

6. Second or later buyers of homes can be in no better position than first buyers (so point 3 applies equally to them); they are in fact in a much weaker position since they will have no collateral warranties direct from any of the parties to the original construction, nor will they necessarily be able to exercise the same rights against the original seller as first buyers could have done – they may have only the DPA, whose obligations on a 'builder' are limited in scope.[26]

7. A third-party commercial warranty may make possible a claim for the repair costs of construction defects against the warranty provider (insurer), usually available equally to first and later buyers; but the policy cover will be relatively narrow (as to classes of defects, the need for 'actual damage' and the claimable associated costs and expenses); under the NHBC *Buildmark* market leader (and its clones) a claim in the first two years must first be made to the original builder, though the cover itself lasts for 10 years from completion.

4 Contrasts with commercial or infrastructure construction projects

The final part of this analysis sets the legal and economic framework for a residential project, as described above, in a broader context: in what ways does it differ from a project to construct a commercial building or a piece of infrastructure, like a bridge or road?

- In a residential development (other than a house designed and built to the order of an individual), the ultimate consumer will have no voice or role in the set-up or actual construction of the project, nor in the drafting of the key legal documents; this will rarely also be true of a commercial building or infrastructure project.

- It is far more reasonable to assume in relation to non-residential construction work than in relation to residential construction that both parties are 'repeat players' or have adequate and equal access

26 See note 7.

to legal and other professional advice about the obligations and rights they will acquire; and can protect their respective positions in what they ultimately agree together.

- A residential consumer will have much less hard information about a developer or builder than a commercial employer for construction would have, even though the extent of the consumer's financial stake in the successful outcome of the project (as a fraction of his/her total resources) may be much greater than a commercial employer's would be in an individual office building or piece of infrastructure.
- In a residential development, the marketability of a house or flat can easily mean that the owner, at the moment when defects come to light, is no longer the first buyer, with as a result fewer legal rights (in Appendix 1, contrast Table A with Table B); with a commercial building or a piece of infrastructure a new buyer may have the benefit of a collateral warranty, extracted for his benefit from a project party at an early stage in construction.[27]
- Residential claimants usually have to live in the defective buildings or developments until the problems can be sorted; they therefore suffer more personally and psychologically from the difficulties caused by the defects, and by delays in getting a solution, than a corporate claimant would do. The lack of generosity of English law (mirrored by most commercial third-party warranties) towards claims for inconvenience and distress caused by unrepaired construction defects therefore hits them especially hard.[28]

C Consumer rights in Australia

1 Introduction

The saying that 'a man's home is his castle' rings true in many countries, especially in Australia.[29] Homes, and home ownership, are the very essence

27 This scenario will remind construction law specialists of the attempts by an *original* construction employer to sue in contract for the losses now suffered (or about to be suffered) in repair bills by his or her successor as building owner, under the quartet of building defect cases culminating in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), following *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* and *St Martin's Property Corporation v Sir Robert McAlpine Ltd* [1994] 1 AC 85 (HL) and *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 (CA).

28 See section F2 of the original 'Paradise Gardens' paper: note 2.

29 This notion was satirised in the successful Australian film 'The Castle' (directed by Rob Sitch, 1997), concerning a homeowner's legal challenge under Australian constitutional law to the compulsory purchase of his home. The home was to be demolished to accommodate an expansion of the adjacent airport (a prospect that resonates in real life in certain parts of England). At first instance the challenge is unsuccessful, the homeowner's legal representative making a somewhat inept attempt to identify the legal basis for the challenge. When asked which provision of the Australian Constitution he relied upon to justify the quashing of the order for compulsory acquisition, he answers: 'It's the vibe of the thing, your Honour'. Despite this setback at first instance, the homeowner successfully appeals the decision, using different legal counsel.

of the 'Great Australian Dream'. It is perhaps a reflection of the value Australians place on their homes, and the tranquillity of urban existence generally, that every State and Territory in Australia has passed specific legislation to try to ensure that home building work is performed to acceptable standards, and that consumers receive the building work that they expect – and to which they are, as an almost concomitant right of home ownership, entitled.[30] In addition there is now federal legislation, in the form of the 'Australian Consumer Law', which seeks to confer protection on consumers to certain types of contract.[31]

One of the regrettable features of Australian statute law is that it often varies from jurisdiction to jurisdiction: hence the laws that apply to home building contracts are not uniform in their scope or detail. Nevertheless, they do have much in common; for simplicity, the scheme prevailing in New South Wales will be discussed here as broadly representative of the others.

2 The Home Building Act 1989 (NSW)

The HBA is directed specifically at the performance of 'residential building work' and other 'specialist work'.[32] 'Residential building work' is any work involved in, or involved in co-ordinating or supervising any work involved in, the construction, alteration or repair of a 'dwelling'.[33] A 'dwelling' is a

30 The principal legislation (all amended since original enactment) is: HBA 1989 (NSW); Domestic Building Contracts Act 1995 (Vic); Domestic Building Contracts Act 2000 (Qld); Home Building Contracts Act 1991 (WA); Building Work Contractors Act 1995 (SA); Housing Indemnity Act 1992 (Tas); Building Act 2004 (ACT) Part 6; Building Act 1993 (NT).

31 The Australian Consumer Law is set out in Schedule 2 to the Trade Practices Act 1974 (Cth) (now renamed as the Competition and Consumer Act 2010 (Cth)), taking effect on 1 January 2011 and applying to 'consumer contracts': a contract for a supply of goods or services, or a sale or grant of an interest in land, to an individual whose acquisition of the goods, service or interest is wholly or predominantly for personal, domestic or household use or consumption. This would, of course, include contracts for the performance of residential building work. Among other things, the Australian Consumer Law renders a term of a consumer contract void if (a) the term is 'unfair'; and (b) the contract is a standard form contract: Schedule 2 s 2(1). In this respect, the Australian Consumer Law is broadly consistent with the Unfair Terms in Consumer Contracts Regulations 1999: note 3.

32 'Specialist work' essentially includes mechanical and electrical work, such as plumbing and work involving electrical wiring. For simplicity, 'specialist work' will not be considered further here.

33 The HBA 1989 (NSW) s 3 (definitions). 'Residential building work' is not restricted to work that is performed for a person who intends to live in the relevant dwelling. Hence it may include work performed by a contractor for a developer who is constructing a house or unit. This may be contrasted with Building and Construction Industry Security of Payment Act 1999 (NSW) s 7(2)(b) (the Security of Payment Act is the NSW equivalent of Part II of the Housing Grants, Construction and Regeneration Act 1996 (UK)), which provides that the Security of Payment Act does not apply to 'residential building work' as defined by the HBA, but only where the 'residential building work' is performed on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in. (In contrast, the security of payment legislation in Western Australia, Tasmania and the Northern Territory does apply in the context of residential owners who enter into contracts for the performance of building work). See also *Advance Earthmovers Pty Ltd v Fubew Pty Ltd* [2009] NSWCA 337.

building or a portion of a building[34] that is designed, constructed or adapted for use as a dwelling (including houses, villas, apartments etc).[35] In other words, 'residential building work' will embrace most types of building or engineering work performed at a person's place of residence, whether in building a new home, or in making improvements to the home.

The HBA operates to regulate contracts entered into for the performance of residential building work. Two points may be noted. First, the Act is not, save in limited respects, expressed to apply where a builder undertakes to perform work on a non-contractual basis, ie on a *quantum meruit*. In practice it is probably uncommon for residential building work to be undertaken on a non-contractual basis, so this blind spot in the legislation is unlikely to have a major impact on the rights of consumers. Secondly, the determinant for the Act's application is whether a contract is entered into to perform 'residential building work'. It does not matter *who* enters into the contract. So although the Act will apply where a consumer wishes to engage a builder to perform building work on his land, the Act will also apply to any contract entered into by the builder with subcontractors who might perform work on the land.

This is not as pointless as it may appear at first blush. As we shall see, the Act implies a number of warranties of performance in residential building contracts. If a subcontractor performs defective work, the main contractor will be entitled to take action against the subcontractor for breach of warranty, if the effect of the subcontractor's breach is to put the main contractor into breach of warranty vis-à-vis the owner. In this way, the HBA permits the stepping down of obligations implied by the Act.

So we now come to the critical questions. What benefits does the Act actually confer upon consumers? What rights do they obtain that they would not obtain (or not as clearly and uncontroversially) if the Act had never been passed?

(a) Certainty of terms

The HBA, like other consumer protection legislation, recognises that in order for consumers to be able to enforce their rights, they need to know what those rights are. The Act therefore lays down certain requirements as to the content and form of residential building contracts.

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34 Hence, where a building contains more than one dwelling, work in respect of each will constitute residential building work: Basten JA in *Shorten v David Hurst Constructions Pty Ltd* [2008] NSWCA 134, paras [6]-[7] (25 BCL 399).

35 Certain structures are specifically excluded from the definition of 'dwelling', including homes for the elderly and boarding houses (see Home Building Regulations 2004 (NSW) reg 6 and *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559); and any work on the manufacture of moveable dwellings (Home Building Regulations reg 9).

First, the Act requires that every contract to do residential building work must be in writing and be dated and signed by (or on behalf of) each of the parties to it.[36]

Secondly, the Act requires every regulated contract to do residential building work to set out:[37]

1. The names of the parties, including the name of the holder of the contractor licence shown on the contractor licence (and the licence number);[38]
2. A sufficient description of the work to which the contract relates;
3. Any plans and specifications for the work;
4. The contract price (if known);[39]
5. Any statutory warranties applicable to the work;[40] and
6. A conspicuous statement setting out the cooling-off period that applies to the contract.[41]

The principal consequence of a contractor carrying out residential building work pursuant to a contract that is not in writing, or does not contain a sufficient description of the work to be performed, is that the contractor is not entitled to damages or any other remedy for breach of contract by the owner.[42] On its face this may seem like quite a drastic consequence. However, even if the residential building work contract is not in writing, or does not adequately describe the work to be performed under the contract, the contractor may be able to recover a *quantum meruit* for work the benefit of which has been accepted by the owner.[43] So a contractor may still be able to obtain payment for work performed even if it has not complied with the Act's requirements. Furthermore, if there was *no* contract in place (written or verbal), ie the contractor performed its work on a non-contractual basis, the Act will not (save in limited respects) apply to such work, and the contractor will be entitled to payment for work performed on a *quantum meruit* basis.

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36 HBA s 7(1).

37 HBA s 7(2). The requirements of s 7 do not, however, apply to any variation to the terms of a home building contract: Tobias JA in *Zhao v Goodman* [2010] NSWCA 2, para [142].

38 On contractor licences, see (c) below.

39 If the contract price is known, it must be stated in a prominent position on the first page of the contract: HBA 1989 s 7(4).

40 On these, see (b) below.

41 Consumers have a statutory right of cooling-off, whereby they may rescind a contract without penalty by giving notice within 5 business days of entering into the contract HBA 1989 s 7BA.

42 HBA 1989 s 10(1). However, even though the contract is not enforceable by the contractor against the owner, it may nevertheless be enforced by the owner against the builder: Bryson JA in *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312, para [34].

43 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; McHugh and Gummow JJ in *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, page 230; *O'Connor v Leaw Pty Ltd* (1997) 42 NSWLR 285; *Vimblue Pty Ltd v Toweel* [2009] NSWSC 494.

Although the HBA is commendable in laying down requirements for the content of contracts to perform residential building work, there is clearly scope for it to be toughened up in order to yield a greater degree of consumer protection. Two obvious measures could be taken to do this. First, the Act could provide that any person who performs residential building work must do so pursuant to a contract, and that the contract must be in the prescribed form. Secondly, the Act could provide that the 'penalty' for non-compliance is that a contractor who performs residential building work otherwise than pursuant to a contract that complies with the Act shall be entitled to *no* payment or other remedy against the person for whom the work was performed. Such a measure would, of course, have the potential to confer a windfall gain on an owner of residential property, ie the owner could escape liability to the contractor through want of form in their contract.[44] But equally such a measure would, given the unpalatable alternative, ensure sedulous compliance by contractors with the contractual requirements of the Act.

(b) Implied warranties

The common law implies certain warranties into construction contracts, including contracts for the performance of residential building work. In the consumer context, one of the most important of these implied warranties is that where there is a contract for the construction of a dwelling, the dwelling – when completed – will be fit for human habitation.[45] There are a number of warranties implied by the HBA into contracts for the performance of residential building work which, to a large extent, reflect the warranties that would be implied at common law. The statutory implication of these warranties (which cannot be negated by agreement),[46] and the requirement that they be set out in any contract for the performance of residential building work, means that consumers are (if they trouble themselves to read the terms of their contract) apprised of their rights, and what to expect from their builder.

The following warranties are implied by the HBA:

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44 Although, to avoid hardship in certain cases, it may be appropriate for there to be an escape valve, conferring upon the court a discretion (to be used sparingly) to permit contractors who fail to comply with the Act to recover a *quantum meruit*. The central point is that the way the law currently works, it is all too easy for a contractor to ignore the requirements of the Act and seek payment on a *quantum meruit*.

45 *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 (Div Ct KB), pages 120-121 (Swift J) and 123-124 (Macnaghten J); Lord Denning MR in *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 WLR 1317 (CA),page 1332; Edmund Davies LJ in *Billyack v Leyland Construction Co Ltd* [1968] 1 WLR 471 (QB)page 478; Lord Denning MR in *Greaves & Co (Contractors) Ltd v Baynham Meikle* [1975] 1 WLR 1095 (CA), page 1098-1099; *Test Valley BC v Greater London Council* (1979) 13 BLR 63 (QBD); *Hampshire CC v Stanley Hugh Leach* (1990) 8 Const LJ 174 (QB (OR)); Longmore LJ in *Alderson v Beetham Organisation Ltd* [2003] EWCA Civ 408, [2003] 1 WLR 1686, para [40].

46 However, the application of these warranties would appear to be subject to proportionate liability legislation: *Owners Corporation SP 72357 v Dasco Constructions Pty Ltd* [2010] NSWSC 819.

1. The work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;[47]
2. The materials supplied will be good and suitable for the purpose for which they are used and, unless otherwise stated in the contract, those materials will be new;[48]
3. The work will be done in accordance with and comply with the HBA and any other law;[49]
4. The work will be done with due diligence and within the time stipulated in the contract, or (if no time is stipulated) within a reasonable time;[50]
5. Where, among other things, the work relates to a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling;[51] and
6. The work and any materials will be reasonably fit for their specified purpose or result, if the purpose of the work is made known, ie the owner has shown that it is relying on the builder's skill and judgment.[52]

As is evident, there is nothing particularly remarkable or onerous about these warranties, which essentially reflect the warranties that would ordinarily be implied at common law.[53] Significantly, however, the Act provides that these warranties accrue not only for the benefit of the owner of land who arranges for residential building work to be carried out, but for the benefit of any subsequent owner/s of the land.[54] The limitation period for bringing an action

47 HBA s 18B(a). This warranty is better viewed as two warranties: the first to perform the work in a proper and workmanlike manner, and the second to ensure that the work conforms to relevant plans and specifications: see McColl JA in *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303, page [158].

48 HBA s 18B(b).

49 HBA s 18B(c).

50 HBA s 18B(d). A breach of this warranty may entitle the owner to terminate the building contract. Where, however, the date for completion passes, and the owner does not terminate, the owner may be taken to have elected to affirm the contract, and possibly also to have accepted a revised completion date, although it will not be precluded from contending that the builder was in breach of contract by failing to complete its works by the contract date for completion: Ward J in *Wabbits Pty Ltd v Godfrey* [2009] NSWSC 1299, paras [38] and [97].

51 HBA s 18B(e). This means (at the very least) that the dwelling, as constructed, must not be in such a state that it is injurious to the health of the occupants: Ward J in *Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612, para [100].

52 HBA s 18B(f).

53 However, these warranties go significantly further than the obligations in English law under the Defective Premises Act 1972: see note 7 and linked main text.

54 HBA s 18D(1). However, s 18D(2) qualifies the right of a successor in title, so that such a person will not acquire any right to enforce a statutory warranty in proceedings relating to a deficiency in work or materials if the warranty was already enforced by that person's predecessor in title.

under a statutory warranty is seven years after completion.[55] Thus, the Act gives rise to a transmissible warranty of quality,[56] which does away with the need for any collateral warranty in favour of subsequent purchasers.[57] An owner of a new house may therefore be able to sell a house that is still 'under warranty', and obtain what may be a better price than if there were no such warranty.

(c) Licensing of contractors

One of the most significant differences between construction law as it applies to consumers in England and Australia concerns the supply side of the construction industry.

In England, professional regulation aside, there are no State-imposed legal or bureaucratic obstacles in the way of an individual or legal entity setting up in business to take on residential construction work.[58] As a result, *anyone* may perform building work (or offer construction-related services) in England, however inept or unscrupulous. As many people know from their own experience, finding a good builder is often a matter of personal recommendation, or pot luck. If a builder makes a bad job of a project, the builder may be able to be sued in the courts,[59] if the consumer has the resources and the willpower to seek a monetary remedy for the builder's poor performance, and if there is some prospect of actually getting money out of the builder, as damages or in restitution (if there is a total failure of consideration). Otherwise a consumer may let the matter lie where it is, and get on with their life, leaving the builder to go on to its next project, to perpetuate its incompetence.

In Australia the position is different. Contractors who perform residential building work are required to be licensed by the government in order to perform such work. In NSW, section 4 of the HBA prohibits a person from contracting to do any residential building work unless that person is the holder of a statutory contractor licence which authorises the person to contract to

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55 HBA s 18E. It would appear that 'completion' in this context means practical completion of the works: Ward J in *Owners Strata Plan 62930 v Kell & Rigby*: note 51, paras [50]-[51] and [116].

56 Cf Lord Keith in *Murphy v Brentwood DC*: note 8, page 469.

57 As a further matter, a subsequent owner may, independently of such statutory rights against a contractor, have rights in tort under Australian common law, at least where the subsequent owner is sufficiently 'vulnerable' and could not reasonably be expected to have detected defects in the builder's work: see *Bryan v Maloney* (1995) 182 CLR 609, 74 BLR 35, 11 Const LJ 274 (HCA).

58 Individual construction professions and activities are mostly self-regulated in the UK. However, statutory regulation does apply to architects under the Architects Act 1997 (bringing with it a requirement under the Architects Registration Board's 2010 *Standards of Conduct and Practice* for 'adequate and appropriate insurance cover'): see www.arb.org.uk; and to gas installers under the Gas Safety (Installation and Use) Regulations 1998 (SI 1998/2451): see www.gassaferegister.co.uk.

59 Or (if agreed) an adjudication or arbitration may be brought against the builder. However, such forms of dispute resolution can be unattractive in a consumer environment, as they require private funding for their legal infrastructure (unlike the courts, which are funded to a large extent by the State).

perform that work.[60] It is an offence for a contractor to perform residential building work without a licence, and a contractor may be fined for doing so. Additionally, a person who contracts to perform residential building work without a licence is prevented from enforcing the contract against the owner,[61] although such a person may be entitled to recover a *quantum meruit* for work performed.[62] Yet a further restraint on unlicensed contractors may come in the form of an injunction, to stop an unlicensed contractor from holding itself out as a person able to perform residential building work, or from actually performing or arranging for such work to be performed.[63] In one recent case a builder was jailed for breaching such an injunction.[64]

The details of the licensing procedure will not be covered here.[65] Suffice to say that the initial and ongoing requirements for obtaining and renewing a licence require a contractor to be of sufficient financial means that it will (or appear to) be able to carry out residential building work which it undertakes to completion, and there has not been an unreasonable level of justified complaints against the contractor. Builders who perform residential building work are also required (like members of the legal profession) to undertake continuing professional development on an annual basis, in order to maintain their contractor licences.[66] Disciplinary action may be taken against a holder of a building licence who commits an offence, and a builder's licence may be suspended if the builder is being investigated by the NSW Fair Trading office. A contractor will not necessarily be struck off if it performs work badly or not at all, but the licensing regime at least ensures that there is mechanism for preventing seriously substandard builders from trading.

Licensing regimes may be set up for a number of reasons. During and after the First and Second World Wars, building work in Britain was licensed in order to keep a lid on market forces (and inflation) during a time of an acute shortage of resources in the building industry. In Australia, licensing is used as a quality control measure to protect consumers. It does not operate to guarantee that every builder will perform a perfect job every time. Defective works, late completion, builder insolvency and general aggravation are an unavoidable part of the building industry in any country. But what licensing does is to ensure that what might be described as the 'undesirable element' of the building industry (or at least some part of it) can be prevented from trading. The effect, therefore, is to protect consumers from the detriment they would inevitably suffer at the hands of such builders.

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60 The obligation to hold a licence falls not only on the builder who has a contract with the home owner to perform residential building work, but also any subcontractor of the builder: *De More Constructions Pty Ltd v Garpace Pty Ltd* (2001) 53 NSWLR 132. Licences are issued by the Commissioner for Fair Trading pursuant to s 19 of the HBA.

61 HBA s 10(1).

62 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Zavodnyik v Alex Constructions Pty Ltd* (2005) 67 NSWLR 457.

63 HBA s 138.

64 *Commissioner for Fair Trading v Garay* [2009] NSWSC 1196, [2010] NSWSC 218.

65 The primary licensing provisions are to be found in HBA Part 3 and the Home Building Regulations 2004 (NSW) Part 4.

66 Details of these CPD requirements may be found at www.fairtrading.nsw.gov.au.

(d) Limits on deposits and on security over consumer's land

The HBA proscribes the demanding of deposits by a builder of greater than 10% where the contract price is up to or equal to A$20,000 (ie around £11,000), or 5% where the contract price exceeds A$20,000.[67] The evident purpose of these prohibitions is to ensure that owners are not left in the invidious position of having paid a large sum of money up front, only for the builder to disappear, or to have less of an incentive to prosecute the works because its cash flow position is front-loaded. The Act recognises that builders may require a deposit to be paid so that, among other things, the builder has funds to place necessary orders for the work, and to pay fees for permits and other matters. But it, in effect, seeks to confine builders to claiming up-front payments only for such purposes – not for the purpose of maintaining the builder's cash flow for its general business operations.

The Act also renders void, save in limited cases, contractual provisions that purport to confer a charge over land in respect of moneys owing to the builder.[68] Such charges are virtually unheard of in England, but in Australia it was (prior to statutory intervention), and in some jurisdictions still is, common for standard forms of residential building contract to create a charge over the owner's property to secure moneys owing to the builder.

(e) Home warranty insurance

Home warranty insurance is perhaps the most important aspect of consumer protection under the HBA and statutes in other Australian jurisdictions. The Act prohibits a person from performing residential building work or demanding the payment of money under a contract, where the contract price is A$12,000 or more,[69] unless that person has taken out insurance – referred to as 'home warranty insurance' – which complies with the Act, and unless a copy of the certificate of insurance has been provided to the other party to the contract.[70] Home warranty insurance is also required where residential building work is done otherwise than under a contract.[71]

What does the insurance cover? It is required to cover the person on whose behalf the work is being done against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor.[72] It is also required to cover a person on whose behalf the work is being done, and that person's successors in title, against the risk of being unable, because of the insolvency, death or disappearance of the contractor, to recover compensation from the contractor for breach of a statutorily implied

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67 HBA s 8. Cf Sully J in *Commissioner for Fair Trading v Pobjie Agencies Pty Ltd* [2005] NSWSC 13, paras [118]-[150].

68 HBA s 7D. See also *Kell & Rigby Pty Ltd v Flurrie Pty Ltd* [2006] NSWSC 906.

69 HBA s 92(3) and Home Building Regulations 2004 (NSW) reg 70.

70 HBA s 92(1) and (2). Details of the construction contract must be provided to the relevant insurer: s 92A.

71 HBA s 96(1). Thus, although the Act does not require a person who performs residential building work for reward to enter into a contract, it does require such a person to have the stipulated insurance in place.

72 HBA s 99(1)(a).

warranty in respect of the work, or to have the contractor rectify the breach.[73] Put in compendious terms: '… [*the insurance provisions of the legislation*] provide significant rights to consumers in an attempt to redress the notorious problems arising from shoddy work performed by bankrupt builders.'[74]

Insurance in respect of non-completion of the work is to be provided for a period of not less than 12 months after a failure to commence work, or a cessation of work.[75] The insurance cover must be provided for a period of six years after the completion of the work in respect of structural defects, and two years in the case of non-structural defects.[76]

As can be seen, home warranty insurance is not intended to cover a residential owner against the risk of his or her builder performing bad work, as latent defects insurance does. It covers the residential owner against the risk of the owner being unable to recover money from the builder, should the builder not be able to pay the owner amounts due to it as damages. Home warranty insurance therefore operates as a backstop. However, it is a backstop that may, under the current required wording of home warranty insurance policies, be activated once it is established in a court of tribunal that the builder has a liability to the consumer.[77]

The consequences of a contractor not taking out the required home warranty insurance for residential building work may be significant, in that the contractor is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by the other party, in relation to the work.[78] Nevertheless, the contractor may still be liable in damages for any breach of contract it has committed, notwithstanding its inability to recover damages or to obtain any other remedy.[79] Furthermore, the fact that the uninsured contractor is unable to seek a remedy for a breach of contract does not prevent it from seeking to recover *any* money for work it has performed for the owner's benefit.

The court or a tribunal may, if it considers it 'just and equitable', allow the contractor to recover money on a *quantum meruit* basis despite the statutory insurance not being in place.[80] However, although the legislation is commendable in imposing sanctions upon contractors who fail to take out the necessary home warranty insurance, it still leaves exposed those home owners who enter into contracts with less desirable builders who have not taken out the required insurance and who subsequently become insolvent, or cease to trade.

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73 HBA s 99(1)(b).

74 McDougall J in *Waterbrook at Yowie Bay Pty Ltd v Allianz Australia Insurance Ltd* [2008] NSWSC 1407, para [58].

75 HBA s 103B(1).

76 HBA s 103B(2).

77 More on dispute resolution below.

78 HBA s 94(1)(a).

79 HBA s 94(2).

80 HBA s 94(1A). Section 94(1C) adverts to some of the matters that a court or tribunal is entitled to take into account in deciding whether it is 'just and equitable' for a contractor to recover money on a *quantum meruit* basis; see also Basten JA in *Grygiel v Baine* [2005] NSWCA 218, para [35].

Two final observations on home warranty insurance:

First, it naturally comes at a cost. Builders in all Australian jurisdictions are required to take out this form of insurance (or its equivalent). They are required to pay for it, and it is therefore a cost ultimately passed on to the consumer. This additional cost to the consumer has to be weighed against the benefit that consumers obtain through having it in place as a backstop. Insurance is often – but not necessarily – a simple outgoing for which there is no return. However, if a contractor's works are seriously defective, and if the contractor is insolvent, the residential owner's only remedy (unless there is insurance in place) is to arrange – at its own cost – for another builder to come in and rectify the works. The statutory insurance operates to defray the cost of engaging others to perform rectification works. Perhaps this additional cost is a price worth paying, if at the very least it gives consumers peace of mind; and it may ultimately lead to a saving of money should the insurance need to be called upon.

Secondly, the home warranty insurance market in NSW (and other parts of Australia) has changed considerably over the last decade, largely due to the collapse of a prominent insurer (HIH) in 2001 and the withdrawal from the market of several private insurers. The position in NSW is that since 1 July 2010 home warranty insurance has been underwritten by the State Government,[81] as it is in some other jurisdictions. This highlights a difficulty that governments face when attempting to regulate the home building market (or indeed any other market) by way of requiring participants in the market to take out insurance. If the market for home warranty insurance is not commercially viable for private insurers, they will not enter, or will leave, the market. This leaves the government in a position where it is acting, in effect as a non-profit-making insurer. This may, however, be publicly acceptable provided that the government's insurance scheme is designed so that the government breaks even, without making a profit or a loss. That way, consumers are able to take the benefit of an insurance scheme 'at cost', and taxpayers are not required to underwrite the losses suffered by private owners of land in relation to residential building work performed on that land. However, achieving this happy equilibrium may be easier said than done.

(f) Informal/relatively inexpensive dispute resolution

The HBA confers jurisdiction upon the Consumer, Trader and Tenancy Tribunal (CTTT) to hear and determine 'building claims', where the amount claimed is A$500,000 (ie around £260,000) or less.[82] Disputes concerning building claims *may* be referred to the CTTT, but equally may be heard by a court of competent jurisdiction.[83] A 'building claim' is a claim in respect of

81 See www.homewarranty.nsw.gov.au.

82 HBA s 48K(1). The CTTT was established by the Consumer, Trader and Tenancy Tribunal Act 2001 (NSW), which consolidated various consumer-protection tribunals: see Shaw J in *Krslovic Homes Pty Ltd v Sparkes* [2004] NSWSC 374, para [10].

83 Where an application is made to the CTTT in respect of an issue that was not, at the time the application was made, the subject of a dispute in proceedings pending before a court, the jurisdiction of the Tribunal over the issue will operate to the exclusion of any court's jurisdiction: Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) s 22(3).

the performance of, *inter alia*, residential building work, whether or not the work was performed pursuant to a contract.[84]

Building claims are heard by the CTTT in a relatively informal manner. The CTTT possesses broad and flexible powers as to the way in which it disposes of building claims.[85] The Tribunal may generally determine the procedure it will apply, and is not bound by the rules of evidence.[86] Proceedings before the CTTT are conducted with less formality (and ideally at a lower cost) than proceedings before a court of law, but the Tribunal is still required to afford procedural fairness to the parties.[87]

In many ways, proceedings before the CTTT bear resemblance to adjudications conducted pursuant to Part II of the Housing Grants, Construction and Regeneration Act 1996 (UK).[88] Parties to proceedings before the Tribunal often represent themselves, although it is also common for parties to be represented by legal counsel (solicitors or barristers). Decisions of the CTTT are reasoned,[89] but deliberately they are not as lengthy in their reasons as court decisions.[90] The usual position is that each party is to bear its own costs of the proceedings before the Tribunal, although there are certain circumstances in which costs may be awarded.[91]

The primary advantage of having a tribunal such as the CTTT in place is that it promotes access to justice to consumers. The Tribunal and its procedures are intended to provide consumers with a forum in which they can have their disputes resolved without having to instruct a lawyer, and without facing a costs burden should they be unsuccessful in the proceedings before the Tribunal. This is not to say that the CTTT delivers perfect justice in every case, but it is a more consumer-friendly environment for an individual to bring or defend a claim, in contrast with court proceedings where a litigant faces an

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Conversely, if court proceedings were on foot in respect of an issue arising under an application to the CTTT, the CTTT ceases to have jurisdiction over the issue upon becoming aware of the court proceedings: s 22(7).

84 The definition of 'building claim' is found in s 48A(1) of the HBA.

85 These powers are set out in HBA Part 3A.

86 Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) ss 28(1) and (2). It is, however, open to the Tribunal to choose to apply the rules of evidence: French CJ in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32, para [15]. However, although the CTTT is not required to apply the rules of evidence, it is required to engage in a rational decision-making process according to law, and this means that it is impermissible for the Tribunal to make critical findings of fact if there is no evidence to support those findings: see *Kostas*, para [16].

87 Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) ss 3 and 28(2). See also Mason P in *Boghossian v Warner* [2000] NSWCA 27, para [45]; Basten JA in *Italiano v Carbone* [2005] NSWCA 177, paras [104]-[115]; *Hutchings v CTTT* [2008] NSWSC 717; and Hon John Basten, 'Jurisdiction and Powers of Tribunals: A Question of Statutory Construction?', Keynote speech to the Council of Australasian Tribunals (NSW) Annual Conference, 7 May 2010, downloadable from www.lawlink.nsw.gov.au.

88 Although unlike with adjudication, the cost of dispute resolution before the CTTT is largely borne by the Government, not the disputants (unless they choose to instruct legal counsel).

89 Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) s 51.

90 The CTTT's decisions are accessible at www.austlii.edu.au/au/cases/nsw/NSWCTTT.

91 See Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) s 53; Consumer, Trader and Tenancy Tribunal Regulation 2009 (NSW) reg 20.

almost impenetrable morass of rules, procedures, practices and terminology, where at all times the litigant is at risk as to costs should his case not be accepted by the court. Not all States and Territories have 'consumer friendly' tribunals like the CTTT that decide consumer disputes (including those over residential building work), but this is essentially a function of the number of such disputes that arise for consideration on a regular basis, being a matter that goes to the viability of any specialist tribunal.

Although the system for dispute resolution in NSW is geared towards ensuring that 'consumer' disputes are resolved in an informal and cost-effective manner, in practice it is not uncommon for disputes that originate in the CTTT to take a considerable amount of time to resolve – especially when appellate processes are factored in. The recent High Court case of *Kostas v HIA Insurance Services Pty Ltd*[92] provides a startling illustration of how proceedings before the CTTT can get out of hand. The following quote from the joint judgment of Hayne, Heydon, Crennan and Kiefel JJ provides a sufficient description of the history of the proceedings:

> 'In August 1999, the appellants contracted with a builder (Sydney Construction Co Pty Ltd – 'the builder') for renovation of their residence in suburban Sydney. The works were to take 30 weeks and were to cost $330,000. Before the works were finished, the contract was terminated. More than 10 years later, the appellants and the first respondent, the insurer of the builder's performance of its contract, continue to litigate about whether it was the appellants or the builder who wrongfully terminated the contract'.[93]

The other aspect of the statutory regime that requires comment is the process that consumers need to go through before they are able to obtain the benefit of their home warranty insurance. Consumers are required to bring proceedings themselves to the point that they establish the liability of their contractor to compensate them for matters covered by their home warranty insurance. It is only when they reach that point that the policy responds. This means that consumers are often forced to bring proceedings themselves, at their own cost, to the point that liability is established. Given, as the *Kostas* case demonstrates, that proceedings and appellate processes can sometimes take years to resolve fundamental issues, it may be fair to say that the CTTT (and the legal processes flowing from it) does not always afford speedy, cost-effective justice to consumers.

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92 *Kostas*: note 86.

93 *Kostas*: note , para [62]. See also *Brincat v CTTT* [2011] NSWSC 82, para [5], per RS Hulme J: "The history I have set out records what is, I think, the most extraordinary litany of failures by a court or tribunal that I have experienced in nearly 50 years in the legal profession. Numerous letters from the solicitor for one of the parties were not answered or even acknowledged and the parties not informed of a decision made until months afterwards. How these failures came about is not my concern but they should be considered by whoever is ultimately responsible for the administration and conduct of the CTTT".

3 Summary

The residential building market in Australia is regulated to a significant extent. There are six key incidents of this in NSW (broadly representative of other Australian jurisdictions):

1. The requirement as to the form of contracts for the performance of residential building work, such as the requirement that such contracts be in writing;
2. The statutory implication of inviolable warranties into contracts for the performance of residential building work, where those warranties accrue not only for the owner of the property but his or her successors in title;
3. The requirement that contractors who carry out residential building work be licensed to do so;
4. The limiting of a contractor's ability to seek advance payments, or to take security over the land of a residential owner;
5. The requirement that contractors take out home warranty insurance in the prescribed form; and
6. The provision by the State of a relatively informal forum for resolving disputes arising under residential building contracts.

4 Strata title structures

The final aspect of Australian law that will be considered here, because as suggested in section B above it presents particular problems under English law, is how claims can be made by a number of owners of properties which form part of a common development, such as an apartment block. Australia can, in this regard, lay claim to having invented a scheme for the regulation of the various property rights immanent in a multi-owner developments that seeks to ensure not only the clear definition of ownership rights between the various owners, but the ability to co-ordinate and manage their respective and collective rights effectively. This scheme of property ownership is referred to as 'strata title'.[94]

In brief, strata title is a scheme, which is given effect through legislation,[95] that divides property ownership in a common development into 'units' or 'lots' that are owned by individual landowners (eg the physical space and elements comprising a person's apartment), and common property that comprises everything else on the property (eg stairs, car parks, gardens etc.). There will be a strata title plan for the development which, when registered, creates a distinct legal person referred to as an 'owners corporation'. One of the principal roles of an owners' corporation is to ensure the upkeep of the property including its common areas. The owners' corporation has a constitution that will usually empower it to do such matters as delegate its

94 Which may also be referred to as 'community title' and other appellations.

95 The principal relevant NSW Act is the Strata Schemes Management Act 1996. There are statutes in other Australian jurisdictions to similar effect.

functions to a strata managing agent. Naturally, the owner's corporation and the strata managing agent will be funded by the owners of the particular units or lots to carry out their respective functions, with their financial contributions determined in accordance with the constitution of the owners' corporation.

One of the key benefits of strata titles legislation is that it permits the owners' corporation to bring proceedings in relation to the common property of the development.[96] The owner's corporation may also take proceedings for the rectification of structural defects in the whole or any part of the building.[97] This certainly makes it easier to bring proceedings against the persons responsible for the presence of defects in a development, as the vehicle of the owner's corporation is used for that purpose, rather than the owners seeking to bring group proceedings against the contractor, architect or other person responsible for the defects.

Although, in this regard, strata titles legislation makes it easier for legal proceedings to be brought against an errant contractor, this is not to say that everything is smooth sailing for owners of units or lots in residential developments which use strata schemes. A study that was undertaken by the University of NSW in 2009 indicated that common sources of difficulties for owners seeking to have defects rectified in their development were poor management of the owners corporation itself and poor co-ordination between the owners corporations and any strata managing agent.[98] So although the owners may not have been the cause of the original problem (the defects), seemingly they often do not do themselves any favours when it comes to finding a solution (correcting the defects).

D Conclusions

1 Contrasts between England and Australia

As section B above shows, England takes what may be described as a 'laissez-faire' or 'free market' approach to the residential building side of the construction industry. Consumers are left to fend for themselves at the pre-contractual 'due diligence' stage, but do so from a very weak bargaining position; and when they enter into contracts have few implied statutory and common law rights.

They therefore seek out builders (or developers) who they hope will do what they promise to do; and there is no licensing or registration system for suppliers of construction services to residential consumers. If a builder/developer does a bad job, or is unscrupulous, the consumer has to take the initiative through the courts if s/he can find a way of making a claim, or (perhaps more often than not) will cut his/her losses and pay the additional

96 Strata Schemes Management Act 1996 (NSW) s 227.
97 Strata Schemes Management Act 1996 (NSW) s 228.
98 Hazel Easthope, Bill Randolph and Sarah Judd, *Managing Strata Repairs* (UNSW, City Futures Research Centre, July 2009): www.fbe.unsw.edu.au/cf/research/cityfuturesprojects/managingmajorrepairs/.

money to do the repair work necessary, bringing in another builder. Meanwhile the builder/developer moves on to its next project.

Some more sophisticated businesses, like house building companies, take a very different approach, and may be more professional than many jobbing builders, but even here claimants may have extreme difficulty mobilising with claims well founded and well evidenced enough to guarantee action in response.

Peculiar problems are also posed in England in developments consisting of a number of residential units, both in terms of marshalling themselves against the common enemy, and then obtaining an effective remedy to their unhappy situation, either in having defects in their development rectified, or obtaining compensation to enable them to do so.

In Australia, by contrast, consumer protection is given specific statutory emphasis. There are four key aspects to the Australian legislation (or certainly that which operates in NSW):

1. *Empowering consumers through knowledge*, ie the requirement that there be written contracts that spell out the most important contractual terms, including the warranties of quality implied by statute;
2. *Quality control*, by ensuring that only licensed builders – who are not insolvent and not seriously incompetent – are able to undertake residential building work;
3. *Compulsory insurance*, to protect the consumer against the risk of its builder becoming insolvent, dying or disappearing; and
4. *Relatively informal dispute resolution* by a specialist publicly funded tribunal.

Additionally, in the context of multi-owner developments, matters are legally simplified, insofar as pursuing errant designers or contractors is concerned for defects, by strata titles legislation, which permits a single corporate vehicle to represent the interests of the owners of a development.

2 Reform by statutory intervention in England?

Implementing changes in England to follow 'the Australian model' in section D1 above would require far-reaching and complex primary legislation; but would be a positive step – a necessary step – towards remedying many of the difficulties outlined in section B. It would improve the reputation of the residential building market by weeding out undesirable builders, at the same time increasing consumer confidence (at a time when this is at a low ebb). However, we must make two pragmatic qualifications:

First, the level of activity in the residential building market in England is presently at a historic low, so there will in the short to medium term be little stomach for the introduction of any regulation that may be likely (or be perceived as likely) to kill off the first signs of growth. The lobbying power of

the supply side (including the well established warranty providers) should not be underestimated, as the introduction in the March 2011 Budget of the 'FirstBuy' scheme shows: this will assist developers by offering financial support for those first-time buyers who meet individual financial criteria and who wish to buy a new-build home.

Secondly, we should not kid ourselves by thinking that regulation provides the answer to all society's woes. It will not rid the industry of all incompetent builders. It will not lead to all residential building work being performed correctly, without defects. Nor will it prevent building disputes from arising over work performed at people's homes, those disputes being time consuming and possibly costly to resolve. But overall, we suggest, it will lead to an improvement in the quality of work performed in the residential building market, so that achieving residential construction work, a higher proportion of which is without major defects, will not be as chancy as finding that winning lottery ticket.

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CONSTRUCTION DEFECTS IN MULTI-UNIT RESIDENTIAL DEVELOPMENTS: RIGHTS OF ACTION IN ENGLISH LAW

NB These tables are only a summary of the main possibilities. They assume traditional English law structures for a development: a sale contract between the developer and each first buyer, leading to the grant to each of a long lease by a landlord – who may or may not be the same entity as the developer or main contractor; a Residents' Management Company, also a party to each lease, is responsible for the common parts, insurance etc.

TABLE A: POSITION OF FIRST BUYER OF A FLAT (CURRENT OWNER)

FIRST BUYER: RIGHTS AT COMMON LAW			**FIRST BUYER: STATUTORY RIGHTS**
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
Against developer, including where responsible in law for others Express contract terms (whatever they are) of sale contract Term implied at common law that dwelling will be habitable on completion; other implied terms possible depending on context (eg access to flat via common parts) *Limitation period*: 6 years from breach by developer (12 years from breach, if contract in deed form – unlikely)	*Against developer, including where responsible in law for others* Unlikely to be able to argue that developer also owed concurrent duty of care in tort (contract terms may exclude it) – potentially useful for limitation reasons (below) *Limitation period*: 6 years from suffering of damage, but if defect latent, may have extra 3 years from date of reasonable discovery (or actual knowledge, if earlier) by potential claimant of a defect which before then was hidden, subject to ultimate 15-year long-stop from the date when cause of action originally arose	*Against landlord (no rights against developer as such)* Express terms of lease (whatever they are) fix landlord's obligations: no mandatory or default duty on landlord to repair original construction defects *Limitation period*: 6 years from breach of covenant by landlord (12 years from breach, if lease in deed form – normally the case)	SGSA 1982 implies terms into sale contract as to quality, time and price (default only) Buyer can also assert breaches of quality obligations in relation to 'dwelling' imposed on 'builder' by DPA 1972 *Limitation period*: 6 years from completion of dwelling May also be able to challenge in court any unfair terms in purchase contract under UCTA 1977 and/or UTCCR 1999
Against other construction party responsible No contractual link (collateral warranty from any other party to first buyer highly unlikely), so no right of action	*Against other construction party responsible* Unlikely to be owed duty of care in relation to 'pure economic loss' (loss of value, or cost of repairs) caused by defects	*Against other construction party responsible* Lease can give rights only against parties to it, eg the RMC, which usually has obligations in relation to insurance of whole development and maintenance of its 'common parts', but not in relation to original	*Against other construction party responsible* 'Builder' owing duties under DPA 1972 may include construction parties with whom buyer had no contract *Against landlord and RMC*

FIRST BUYER: RIGHTS AT COMMON LAW			FIRST BUYER: STATUTORY RIGHTS
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
		construction defects	Tenants have statutory rights in relation to estate management – RMCs, service charges etc
Against third-party warranty provider – insurer (if any) May have claim under warranty for 10 years from completion of construction – depends on precise terms of cover (may require owner to approach builder in first two years of policy) NB Successful claim against other party may cause warranty provider to trigger subrogation clause, to recoup money paid out under the policy *Time limit for claim*: whatever rules are in the policy *Limitation period for legal action against insurer*: 6 years from its breach of contract (12 years from breach, if contract in deed form – unlikely)	*Against third-party warranty provider – insurer (if any)* Contract law central to rights against warranty provider; tort law unlikely to be relevant	*Against third-party warranty provider – insurer (if any)* None – lease can give rights only against parties to it	*Against third-party warranty provider – insurer (if any)* Right to complain to Financial Ombudsman Service against insurer's determination *Time limit for complaint*: 6 months from final response from insurer (which must mention the 6-month time limit); *and* 6 years from event consumer is complaining about (or – if later – 3 years from when s/he knew, or could reasonably have known, s/he had cause to complain) May also be able to challenge in court any unfair terms in warranty under UCTA 1977 and/or UTCCR 1999

TABLE B: POSITION OF SECOND OR LATER BUYER OF A FLAT (CURRENT OWNER)

SECOND OR LATER BUYER: RIGHTS AT COMMON LAW			SECOND OR LATER BUYER: STATUTORY RIGHTS
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
Against developer, including where responsible in law for other parties Cannot normally assert any of the terms in the original sale contract against the developer Could acquire same rights as first buyer against developer: • if benefit of original sale contract assigned by previous owner, or • if Contracts (Rights of Third Parties) Act 1999 applies NB No certainty of either – terms of original sale contract may exclude both *Limitation period*: 6 years from breach by developer (12 years from breach, if original sale contract in deed form – unlikely)	*Against developer, including where responsible in law for other parties* If developer owed original buyer concurrent duty of care in tort, current owner may acquire own right of action if defects were latent and if the extended limitation period for legal action starts running under Latent Damage Act 1986 while dwelling owned by present owner *Limitation period*: 6 years from suffering of damage, but if defect latent, may have extra 3 years from date of reasonable discovery (or actual knowledge, if earlier) by potential claimant of a defect which before then was hidden, subject to ultimate 15-year long-stop from the date when cause of action originally arose	*Against landlord (no rights against developer as such)* Express terms of lease (whatever they are) fix landlord's obligations: no mandatory or default duty on landlord to repair original construction defects	*Against developer* Can assert breaches of obligations imposed on 'builder' by DPA 1972 *Limitation period*: 6 years from completion of dwelling Cannot challenge any terms in original purchase contract as unfair unless has same rights as first buyer
Against other construction party responsible Same as first buyer: no contractual link (collateral warranty from any other party to first buyer, assignable on to subsequent buyer, highly unlikely), so no right of action	*Against other construction party responsible* Same as first buyer: owner unlikely to be owed duty of care in relation to 'pure economic loss' (loss of value, or cost of repairs) caused by defects	*Against other construction party responsible* Lease can give rights only against parties to it, eg the RMC, which usually has obligations in relation to insurance of whole development and maintenance of its 'common parts'	*Against other construction party responsible* 'Builder' owing duties under DPA 1972 may include construction parties with whom present owner never had any contract *Limitation period*: 6 years from completion of dwelling *Against landlord and RMC* Tenants have statutory rights in relation to estate management –

SECOND OR LATER BUYER: RIGHTS AT COMMON LAW			SECOND OR LATER BUYER: STATUTORY RIGHTS
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
			RMCs, service charges etc
Against third-party warranty provider – insurer (if any) Same as first buyer: may have claim under warranty for 10 years from completion of construction – depends on precise terms of cover (may require owner to approach builder in first two years of policy) NB Successful claim against other party may cause warranty provider to trigger subrogation clause, to recoup money paid out under the policy *Time limit for claim*: whatever rules are in the policy *Limitation period for legal action against insurer*: 6 years from its breach of contract (12 years from breach, if warranty in deed form – unlikely)	*Against third-party warranty provider – insurer (if any)* Same as first buyer: contract law central to rights against warranty provider; tort law unlikely to be relevant	*Against third-party warranty provider – insurer (if any)* None – lease can give rights only against parties to it	*Against third-party warranty provider – insurer (if any)* Same as first buyer: right to complain to Financial Ombudsman Service against insurer's determination *Time limit for complaint*: 6 months from final response from insurer (which must mention the 6-month time limit); *and* 6 years from event consumer is complaining about (or – if later – 3 years from when s/he knew, or could reasonably have known, s/he had cause to complain) Same as first buyer: may also be able to challenge in court any unfair terms in warranty under UCTA 1977 and/or UTCCR 1999

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construction law amongst all those involved
in the construction industry'

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