

# Buying a House – Is the Buyer Protected? Some Reflections from a Legal Perspective

*Patrick Hume SJ*

## Introduction

Consumer law covers most of the products we buy today. We presume that what we buy is regulated by certain minimum standards. Furniture must meet some minimum health and safety requirements. Electrical goods must work, must not be a danger to the consumer, and must last a minimum period. Cars must meet mechanical, electrical, design and other minimum standards. Several laws and regulations govern the manufacture, transport and sale of goods. Most of the time, the goods we purchase ‘work’: the chair does not collapse, the kettle boils, and the car stays on the road. However, if faults are discovered, purchasers can, and do, return to the shop with the defective goods and so it is not unusual for kettles, shoes, and even cars to be exchanged.

The purchase of most goods can be done without any legal advice. It would seem reasonable to presume that if goods and services purchased without the aid of a lawyer are protected by consumer legislation then what we buy with the aid of a lawyer would be protected to an even higher standard.

Yet the reality is that buying a house – a purchase which, for most people, will be the most significant one they will ever make and which invariably involves obtaining legal advice – comes without the kind of consumer protection routinely provided in the purchase of other goods. In effect, buying a house appears to fall outside the remit of legislation covering the sale of goods and services.

Concerns about the inadequacies of the protection offered to purchasers of housing have been thrown into sharp relief by the enforced vacating, on safety grounds, of the Priory Hall apartments in Dublin in October 2011, and the legal action initiated to require that the serious defects in the building be rectified. There is now widespread concern not only about the quality of construction of many of the houses and apartments built during Ireland’s building boom but about the exposure to prohibitively expensive repairs of those who have had the misfortune to become the owners of houses or apartments that are fundamentally defective.

## What Protection Can the Lawyer Offer the Buyer?

Lawyers are hired to give the potential house buyer a sense of security concerning their purchase, but the reality is that, in effect, there is very inadequate protection in house buying, and the classic defence of *caveat emptor* (‘let the buyer beware’) continues to rule supreme in the property market.

The job of the lawyer in the sale or purchase of a house or flat can be summed up as: ‘Title, title, and title’! Does the seller have title or ownership? Does the seller hold a title to sell? Can the title be transferred to the buyer?

But can a solicitor be responsible for issues regarding the plumbing, wiring, energy consumption, building standards, and materials used in construction? The blunt answer is: ‘No’. Lawyers have no building skills, no knowledge of wiring, plumbing, brick-laying, or insulation. Comments on building regulations, planning regulations, fire regulations, energy ratings are all done by the relevant experts – for example, an engineer, architect, or quantity surveyor – on whom the buyer and his or her solicitor depend. These matters are relevant to the lawyer only in so far as they apply to title.

The main role of the solicitor for the buyer is to check that the seller owns the house, that the seller can sell the house, that the buyer is credit-worthy and will, on completion of the purchase, own the house – or at least own it with the ordinary restrictions which apply when a mortgage is used to purchase a house.

Of course, the lawyer will recommend that the buyer gets independent expert reports as a check for possible building faults in the house. Reports produced by the seller may be useful but the buyer must be warned that these reports cannot be relied on as a guarantee or warranty as to materials used or the soundness of structure of the building.

It might be assumed that since a series of building regulations have been put in place, following on from the *Building Control Act, 1990*, the

consumer would at least have the protection of these minimum standards. However, the reality is that the mechanisms to ensure compliance with the standards are extraordinarily weak. Under the legislation, 'Building Control Authorities' (that is, the country's County and City Councils), are empowered to carry out inspections of new buildings. However, in the early 1990s the Department of the Environment set a guideline target for inspections levels of just 12 to 15 per cent of new developments; this was later amended to the even lower rate of 12 to 15 per cent of new buildings.

In the absence of 100 per cent inspections (as is the case in Northern Ireland), other systems, such as the 'opinions of compliance' issued by professionals, and reports of inspections carried out on behalf of some financial institutions, are often relied on by consumers. However, the National Consumer Agency, in a report in 2008, concluded: 'none of the systems outlined provide the consumer with a substantive assurance that their new dwelling is constructed in compliance with the building regulations'.<sup>1</sup>

What tests are applied by lawyers to the certificates or expert opinions provided by sellers in regard to, for example, compliance with building regulations, fire regulations and building energy requirements? Basically three tests are applied:

- Are they in keeping with good conveyancing practice?
- Are they in line with the rules or guidelines of banks or other lending institutions?
- Would they be acceptable to most other solicitors?<sup>2</sup>

The solicitor does not second-guess the relevant experts, and the experts do not second-guess the various sub-contractors.

### ***Language of Reports***

A close look at the language commonly used and accepted in the reports of experts may shed some light on the poor protection offered to house buyers. A buyer's expert may see beyond the basic language used in the reports supplied by sellers to satisfy title. This expert may warn the buyer but can in no way guarantee the safety or the suitability of the residence for purpose, into the future.

The reports or opinions produced by the relevant

experts for the builder/seller will typically include a statement along the following lines:

*This opinion is issued solely for the purposes of providing evidence **for title purposes** of the compliance of the Relevant Building or Works with the requirement of the Building Control Act. Except insofar as it relates to such **it does not include any opinion on the condition or structure of the Relevant Building** compliance, or Works. (Emphasis added).*

In other words, this is not a guarantee or warranty of materials used, of the construction methods employed or the end structure. All further statements issued are conditioned by this fundamental limitation of the opinion.

The opinions are quite explicit and leave little doubt as to what is entailed in the 'visual inspections' carried out on buildings. For example:

... the **Inspection** of the completed **relevant building or works** as existed on the Inspection date which inspection was **limited to**:

- *Visual inspection of the **House/Apartment***
- *Visual inspection ... of the **common and amenity areas** ...*
- *Visual inspection of **external areas**.*

*For the purposes of the Inspection **no opening up was carried out**. The inspection was therefore **superficial only and took no account of works covered up, inaccessible or otherwise obscured from view**.*

Imagine buying a second-hand car, on the basis of a mechanical report carried out on behalf of the seller which depended on a visual inspection, where no opening of the bonnet was carried out, there was no checking of tyre pressure or oil or odometer and no checking of electrics, but instead just a superficial visual examination and written report that confirmed the examination had been carried out – and where the report also explicitly stated that this examination was superficial. Could a buyer of a second-hand car depend on such a report? *Would a buyer depend on such a report?*

This is why lawyers for purchasers of houses would request that buyers commission their own experts' opinions before purchase.

The opinions produced by the sellers' architects and/or engineers will typically state:

*... a site inspection service was not provided nor have I administered the Building Contract. I am therefore unable to comment on, methods of construction, materials used, and elements of the Relevant Building or Works not evident by Visual Inspection.*

*I am of the opinion, based solely on the service described at 'architectural services' [as limited to 'visual inspection'] that such construction of the Relevant Building or Works is in substantial compliance with the Building Regulations. In preparing this Opinion on Compliance I have relied on such Visual Inspection and Confirmations from the contractors ...*

The value of such opinions are at best limited and at worst useless except that they meet a minimal legal requirement with respect to title and the ability of the seller to transfer title to the buyer. Any reliance on these documents with respect to materials used or structure is misplaced.

### National Consumer Agency Report

The National Consumer Agency Report, *The Home Construction Industry and the Consumer in Ireland*, set out to provide an overview and 'in-depth assessment' of the home construction sector in Ireland from a consumer perspective.<sup>3</sup>

The study extended to several volumes, covering a wide range of issues, including consumer information; legal aspects of the relationships between consumers and the construction industry; and the State's building regulations and their enforcement.

The report found serious shortfalls in the provision of consumer information – pointing, for example, to 'a lack of information that is readily understandable to the average consumer about the more technical matters of the construction sector' and the limited information available to consumers about their rights and how they might seek redress. It called for measures to ensure that information would be readily accessible and presented in a consumer-friendly manner, and made recommendations regarding action on these issues which should be taken by the Department of the Environment, the various bodies within the construction industry, and the National Consumer Agency itself.<sup>4</sup>

In relation to legal issues, the report considered there was need for education and information for consumers in regard to the contracts entered into with trades people and professionals in the construction industry, and a need to address 'unfair terms and conditions' in some contracts which gave the seller/builder advantages to the detriment of the consumer. It drew attention to the reality that, where problems arise, consumers may be deterred from attempting to obtain redress, since many such problems would lead to claims that exceed the limits for redress provided through the Small Claims Court and therefore necessitate an application to a higher court. The potential costs involved would, for many people, represent an insurmountable obstacle to taking any action. Furthermore, the application of the Statute of Limitations works to the advantage of builders. The report urged changes that would allow for less expensive and more consumer-friendly ways to resolve disputes, as well as amendments to the limitation periods under the Statute of Limitations.<sup>5</sup>



Priory Hall residents demand action

© Fran Veale

The report outlined some of the areas where it was felt there was need to update building regulations, and then focused in particular detail on the inadequacies of the current mechanisms for the enforcement of the regulations. It argued that the national system for building control enforcement 'should be substantially improved', and outlined two possible approaches. One was a system of self-certification 'wherein every contractor and sub-contractor would provide certificates that their work was completed in conformance with current regulations, and providing the basis for the issuance of a Certificate of Compliance for every new dwelling.' This system of self-certification would be accompanied by an audit process carried out by 'Building Control Authorities'. The other option was a system of '100 per cent inspection of

new dwellings by the relevant Building Control Authorities, who would have powers to withhold certificates in cases of non-compliance'.<sup>6</sup>

No doubt there is much debate to be had about the specific recommendations put forward in the National Consumer Agency report. However, the need for action in response to the many gaps and inadequacies in protection for the consumer which it identified is even more clear now than it was when the report was compiled. *The Programme for Government 2011–2016* included a commitment to introduce legislation to ensure 'tougher and clearer rules relating to fire safety in apartment buildings' and to 'introduce a new fire safety inspection and certification'. It also included a commitment to 'improve the quality of information available on the Irish housing market by requiring that the selling price of all dwellings is recorded in a publicly available, national housing price database'.<sup>7</sup> However, in relation to the many other areas of concern regarding protection for the house buyer, the Programme is silent.

## Conclusion

It appears that the situation with respect to buying a house in Ireland is more akin to that pertaining to the purchase of an investment product than to the purchase of goods and services; the classic defence of *caveat emptor* ('let the buyer beware') still prevails in the property market.

Priory Hall has shone a light on the dark side of consumer protection for house buyers. Experts offering opinions on housing meet a minimal requirement of 'visual inspection' to confirm that the house for sale complies with regulations. House buyers enter a market exposed as a result of inadequate regulatory protection.

While any change in law will not be retroactive and cannot address the problems created over the building boom, there is still a need to close the gaps in consumer protection afforded to house buyers. Lawyers, architects, engineers, quantity surveyors, builders and representatives of consumers need to work together to identify how regulations and standards can be strengthened. Minimum cost and maximum profit cannot be allowed to be the only 'building requirement' that has to be obeyed. When building or selling there is no way to reach perfection but a commitment to best practice, when properly regulated by law, protects all involved – the builder/seller and the buyer, the experts and all future interests in the house or apartment.

With so little building currently in progress, this is an opportune time to seek to implement changes – changes that protect builders and buyers, changes that foster trust between builder and buyer, changes that will result in buyers have the assurance that the home they are purchasing comes with the protection of meeting building standards that are adequate in scope and effectively enforced. It is time for action, time to protect house buyers as consumers.

## Notes

1. National Consumer Agency, *The Home Construction Industry and the Consumer in Ireland*, Dublin: National Consumer Agency, 2008.
2. Gabriel Brennan and Nuala Casey (eds.), *Conveyancing*, Vol. 1, Oxford: Oxford University Press, 2003, p. 327.
3. Access to each volume is at National Consumer Agency, Research Zone – Home Construction site. ([http://www.nca.ie/eng/Research\\_Zone/sectoralresearch/Home\\_Construction/introduction.html](http://www.nca.ie/eng/Research_Zone/sectoralresearch/Home_Construction/introduction.html))
4. National Consumer Agency, *The Home Construction Industry and the Consumer in Ireland, Volume 1, Consumer Information, Marketing and Communication Review*, November 2008.
5. Volume 3, *Review of Legal Issues*.
6. Volume 5, *Building Regulations and their Enforcement*.
7. *Programme for National Recovery 2011 –2016*, Dublin, March 2011, p. 46. (Available from: [www.taoiseach.gov.ie/eng/Publications/Publications\\_2011](http://www.taoiseach.gov.ie/eng/Publications/Publications_2011))

**Patrick Hume SJ is a solicitor and works in the Jesuit Centre for Faith and Justice**