Wingrove Law

THE APPG ON THE BUILT ENVIRONMENT

INQUIRY INTO NEW HOME QUALITY

EVIDENCE BY WINGROVE LAW

1. Background to Inquiry

The All Party Parliamentary Group ("APPG") for Excellence in the Built Environment has announced its 4th Inquiry, which will look at the Quality of New Build Housing in England and examine the potential for improving every aspect of the product handed over to new home-owners.

This subject is said to be of special significance in the wake of the government's recently-published National Productivity Plan, which includes the ambition to build more than one million homes in England by 2020.

The APPG called upon organisations, businesses and individuals to submit evidence on how the quality of new build housing might be improved.

The Commission is said to be looking particularly for evidence of practical strategies that:

- improve design quality and spatial standards, both at the level of individual new homes and estates of new housing;
- ensure better quality workmanship;
- ensure the effective control and implementation of regulations impacting on the construction of new homes;
- have the potential for implementing smart housing with interoperable services and the provision of better and smarter information to new homeowners;
- bring forward the opportunities afforded by offsite manufacturing, 3D printing, BIM and other new technologies;
- provide new innovative ideas for design quality improvement;
- cut operational and maintenance costs for the homeowner; and improve new home owner experience; and
- improve customer service.

The issues highlighted above are the ones upon which Wingrove Law considers it may be able to offer a contribution for the purposes of the Inquiry.

2. About WINGROVE LAW

Wingrove law is a law firm registered at Wingrove House, Beech Avenue, Holgate, York YO24 4JJ, authorised and regulated by the Solicitors Regulation Authority under SRA no. 617667.

Wingrove Law was established by Geoffrey Peter, a solicitor with over 10 years' post qualification experience, in September 2014, and specialises in providing contentious legal services to purchasers of (defective) new build homes in England and Wales.

Prior to establishing Wingrove Law, Mr Peter was an employed solicitor in the Commercial Dispute Resolution Department at Nabarro LLP (Sheffield office) between 2004 and 2008, and in the Commercial and Banking Litigation Department of Cobbetts LLP (the team was subsequently transferred to Walker Morris LLP following Cobbetts' insolvency in early 2013) between 2008 and 2013.

During his time at Nabarro LLP, Mr Peter worked with a team of solicitors who acted for many of the largest housebuilders in the UK, and advised on (among other things) defending claims brought by homeowners. Most such homeowners either attempted to pursue claims without legal representation, or with legal advice from firms with only limited experience of acting against housebuilders and/or who were not fully conversant in the key areas of applicable law and procedure. The imbalance in resources and knowledge between housebuilders and homeowners meant that, even with legal advice, the outcome for most homeowners was very poor, and rarely bore any relation to the underlying merits of their claims. Often, homeowners were left in a worse position than where they had started, still with no remedy for the defects complained of, and out of pocket on legal fees, not to mention the additional distress associated with having failed in their claim.

Wingrove Law was established with a view to providing buyers of defective new build homes access to high quality, specialist legal services as cost-effectively as possible. To the best of our knowledge, Wingrove Law is the only firm in England and Wales to specialise exclusively in this area of law and to act only for homebuyers rather than housebuilders.

2.1. Examples of present cases

Wingrove Law has been trading for just over a year, so almost all of the claims on which we have been instructed to date are presently ongoing, hence we do not have a body of decided or settled cases from which to draw. Our ongoing claims do, nevertheless, reveal strong themes by reference to which we consider we are able to make a useful contribution to the evidence being considered by the Inquiry.

Our current caseload includes the following (not an exhaustive list):

- A large group claim (circa one quarter of the homeowners on an estate that was constructed between 2007-2012) against a national housebuilder in relation to defects rendering all properties on the estate uninhabitable;
- A small group claim (acting for all homeowners on the development) against a builder which instructed its contractors to ignore drainage plans entirely, and to bury rather than remove large parts of the foundations and driveway of the original building on the site, leaving the properties with surface flooding issues. Other major defects include structurally unsound roofs and defective DPCs, rendering the properties unfit for habitation. The cheapest property on this development was £1.6 million;
- A claim against a builder which has refused to (among other things) reposition a garden fence at the legal boundary to the property, reducing the area of garden enclosed by the fence by around half;
- A claim by "shared ownership" tenants whose landlord (a housing association) has a legal right to pursue a full remedy against the builder but is threatening to force the tenants to pay for the works themselves under a clause of their leases. Their leases (in common, it would appear, with most shared-ownership leases) contain no provisions on which the tenants can rely to compel the landlord to pursue its own legal remedies against the builder;
- A claim by homeowners who were refused access to carry out a survey before legal completion only to find that the floors in their property had been constructed so poorly that several months' remedial works will need to be undertaken. The builder has since admitted knowing about this before completion, and to attempting to conceal the defects. Notwithstanding, the builder is presently refusing to do anything about the defects until the homeowners sign a confidentiality agreement and agree to forego

their right to retain legal representation on threat of defending liability by reference to an ambiguously-drafted sale contract and forcing the homeowners to go to trial if they do not agree.

3. Imbalance in bargaining positions

In our experience, homebuyers do not seek legal advice because of the *existence* of defects, nor do many homeowners have a particular problem with the existence of defects *per se*. They seek advice when builders unreasonably fail or refuse to put those defects right.

Almost every enquiry we receive is predicted on homeowners having already become frustrated with builders denying liability for things that are obvious, delaying resolving things that are agreed, failing to carry out repairs or remedial works with proper care or in ways that resolve the original issue, not turning up to appointments when homeowners have taken time off work (sometimes unpaid) to be there, insisting on cheap fixes rather than proper ones, and generally minimising or avoiding their liability to homeowners.

In our view, the excessive imbalance in the parties' relative bargaining positions is what lays the foundations (so to speak) for builders to operate with relative impunity in relation to defects rectification post-completion, and what also engenders tolerance of poor construction standards.

The obvious question that occurs to us is, why? Why do builders feel (as it appears they do) that they can simply deny liability, or choose whether they should fix something and if so how and when they should fix it, no matter how unreasonable or unacceptable that might be to the homeowner? The answer seems to us to be equally obvious: because they can, because they know they can get away with it, because few homeowners realistically have any chance of holding them fully to account.

The imbalance in the relative bargaining positions of housebuilders and homeowners, particularly post-completion, is in our view the single most significant factor underlying the well-known[1] problems faced by so many homeowners and the cause of so much frustration and discontent post-completion. This goes beyond the relative financial position of the parties (although this is a significant factor), but also emanates from more subtle aspects of the sales and conveyancing processes that are not as widely recognised or understood.

Of particular relevance in this regard are builders' standard form sales contracts, and what appears to be the common practice of refusing access to inspect or survey homes before completion.

3.1. Sale Contracts

Builders invariably prepare their own standard form sale contracts, and homeowners, even with legal representation, have little chance of renegotiating most of the terms. What they are left with can, and frequently does, give rise to potential difficulties when it comes to seeking to enforce the terms of the contract. A key determinant in whether a homeowner pursues a claim against a builder is the degree of uncertainty over the meaning and effect of terms in their contracts. The more uncertainty there is over the outcome of a claim, the less likely a homeowner will be to pursue it.

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[1] See, for example, the research underpinning the findings and recommendations of the Barker Review on Housing Supply 2004 and the OFT Housebuilding Market Study 2008.

3.1.1. Exclusion clauses

The Consumer Code for Home Builders requires that builders' sale contracts "comply with the Unfair Terms in Consumer Contracts Regulations 1999" ("1999 Regulations"), which essentially provides that exclusion and limitation of liability clauses which cause a significant imbalance in the rights of the parties to the detriment of the consumer, and which are not individually negotiated, are unenforceable.

The problem is, if the terms of a particular sale contract do not comply with the 1999 Regulations, (which, in our experience, very few appear to), and if the builder chooses (as, in our experience, they routinely do) to rely upon the clause to deny liability for defects or other issues, it is for the homeowner to take the matter to trial and get a judicial decision on the point.

Even if a homeowner gets a favourable court decision on the enforceability of a particular clause, the value of the precedent so created by the Court is limited to others with that specific form of contract. Builders frequently change the wording of their contracts over time thus rendering a Court decision on one form of contract all but irrelevant for the purposes of all other homeowners, even though the same basic issue arises time and time again.

In effect, every homeowner who wants to challenge the enforceability of an exclusion clause has to go to trial themselves. Naturally, very few ever do, to the undoubted detriment of many.

3.1.2. No written specifications combined with exclusions of liability for misrepresentations

Almost all housebuilder contracts (and all those of the volume housebuilders) we see include a clause to the effect that the buyer warrants that they have seen the written plans and specifications for their new home in the sales office before exchange of contracts. The written specifications for new homes are rarely, if ever, provided to buyers' conveyancers as part of the standard conveyancing process.

In practice, few homeowners take the time and trouble to inspect plans and specifications held in the sales office and, even if they do, they are – in our experience – generally refused copies. Some homeowners have even told us that they have asked to see these but been told no such documents were available.

What buyers generally rely upon instead are the sales brochures and other marketing material showing the general layout of the property type they are buying, along with an inspection of the show home and verbal representations made by sales staff on other aspects of what they think they are buying.

Meanwhile, the sale contracts also invariably contain clauses that exclude liability for any (mis)representations other than those given in writing by the builders' conveyancer in response to explicit written enquires by the buyers' own conveyancer. Not many buyers realise (or are adequately advised by their conveyancers of) the need to relay via their solicitor to the builder everything they have been told or on which they are relying in the run up to their decision to buy if they want to be sure that they will be able to get what they think they are buying.

The net result is that buyers who find that their homes differ in some significant aspect to what they were told to expect find themselves unable to do anything about it because

they have no way of getting hold of the written plans and specifications to prove if something is in fact different, and/or are barred from relying upon assurances or promises given to them before exchange of contracts that they omitted to get their conveyancers to repeat in writing.

3.2. Refusal to allow pre-completion surveys

We very commonly hear from clients that they were refused access to their property to carry out a pre-completion survey, often on the basis that the buyer does not at that time own the property so has no rights of access, only to find substantial works still to be completed (including, in live examples of which we are aware, kitchens not yet fitted, no front door, no heating, workmen still inside the property doing tiling and decorating on the day of completion and for two week after, etc.), or major defects requiring them to move out for months whilst remedial works are undertaken (or more commonly, being required to live in the house whilst the works are done around them).

The result is that one of the key opportunities homeowners would have to seek to negotiate a postponement of the completion date so as to avoid having to move into an unfinished or defective property, or negotiating a suitable retention pending completion of works, is routinely denied to buyers.

4. Ways to redress the balance

4.1. Sale contracts

Certainty is vital if homeowners are to routinely enforce the terms of their sale contracts.

If **standard form contracts** were in use, conveyancers could advise buyers better on them. Court decisions on the meaning, effect or enforceability of a particular clause would benefit everyone who used that form of contract, and remove much of the uncertainty that presently operates to deter so many from pursuing claims. The knowledge that buyers would be more willing and able to enforce the terms of the contract would force builders to make more of an effort to comply with the terms first time around, leading to improving build standards. The Law Society Standard Conditions of Sale work well for normal conveyancing transactions. Perhaps a version could be introduced for use when buying new build properties?

Builders should be required to provide **prescribed and comprehensive written information** (plans, specifications etc.) to buyers as part of the normal conveyancing process, to make it easier for buyers to take issue if what they get is materially different to what they contracted for.

If verbal representations are to be excluded under the contract, builders should be required to **place notices in their sales offices informing prospective buyers accordingly**, and highlighting the need to get written confirmation of any verbal representations that are given.

4.2. Pre-completion surveys

There should be a mandatory right (which could be introduced by the inclusion of suitable provisions in a standard form contract) for **buyers to be granted access at least three working days before completion to inspect and/or survey their property**. This would give buyers an opportunity to negotiate a retention, or to delay

completion if significant or disruptive works were found to be outstanding. It would be helpful if detailed guidance were published on what might constitute "significant or disruptive works" so as to avoid unnecessary delays to legal completion.

Such a provision would also discourage builders from e.g. serving notices to complete prematurely, or concealing major defects until after they have received the full purchase price, and encourage better quality control and site management pre-completion.

In our view, the above suggestions would be relatively easy to implement, would encourage improvements to construction quality without deterring capital investment or significantly adversely affecting land values for developments already in the pipeline (or at least, could be introduced in a manner that avoided impacting on established schemes).

Thank you for your time in considering these submissions.

Wingrove Law

30 October 2015.