The Scottish Consumer Council

Regulation of the New House Building Market in Scotland

THIS BRIEFING PAPER LOOKS AT

• the current extent of regulation of the new house building market in Scotland;
• the legislation currently in place;
• the gaps that exist with regard to consumer protection; and
• the implications for the consumer.

Between October 2003 and March 2004, building began on 14,194 new Scottish homes. This is 2111 (17%) more than during the same period of the previous year.¹ The demand for housing is ever increasing. The number of owner-occupied dwellings has risen from 55% in 1993 to 64% in 2001.² Two-thirds of Scottish households (66%) now contain only one or two people, with single person households accounting for just over 30% of the total.³ Moreover, existing homes in areas such as Edinburgh have, in recent years, sold at an average of 25% above the asking price.⁴ Due to such high selling prices, buying a new build home is an attractive option because firstly, it is supposed that the property will be in ‘walk-in’ condition and it will be free of the repair and related cost associated with older homes and secondly, it means that the buyer does not have to enter into the ‘offers-over’ system of Scottish property law, which currently dominates the market in many areas.

This system means that buyers may often have to pay for several surveys or valuations before they are successful in buying a house, resulting in more money being spent on surveys or valuations and also producing a general state of uncertainty among buyers. The single survey pilot, launched by the Scottish Executive in July 2004, seeks to address these difficulties by switching the responsibility for house surveys in the housing market from potential purchasers to the seller. Overall however, SCC research suggests that the majority of consumers are satisfied with the current system in Scotland.⁵

In 2002, Trading Standards departments reported to the Office of Fair Trading (OFT) a total of 3647 complaints from UK consumers about house construction.⁶ Figures for 2003 show a 9.5% rise in complaints from UK consumers.⁷ The OFT has only recently introduced separate figures for Scotland. The second half of 2003 (July to December) shows Scottish Trading Standards departments reporting 185 complaints from Scottish consumers about house construction compared with 2068 complaints over the same period from UK consumers as a whole.

¹ Scottish Executive Statistical Bulletin Housing Series HSG/2004/4
² Housing Trends in Scotland Quarter ending 30 September 2003 Scottish Executive
³ Scottish Household Survey 2001/2002 Scottish Executive
⁴ http://www.scotlandonsunday.com/index.cfm?id=1103332003
⁵ See Home Truths: a report on research into the experiences of recent house buyers in Scotland Scottish Consumer Council (2000)
⁶ NB: This research looked at buyers of both new build and second-hand homes together, therefore there are no separate figures for buyers of new build homes.
Problems in the market

The main problem is the way in which the contract, or missive, is written. This has resulted in two broad areas of concern for consumers, namely:

1. Snagging – problems vary from bad paintwork and plastering to rocky staircases to exposed wires and can also include the builder not rectifying problems within an agreed timescale.

We understand that it used to be common practice for builders’ missives to contain a provision to the effect that snagging items identified and intimated within the first twelve months of ownership would be put right at the builder’s expense. It appears that such clauses have now become the exception rather than the norm and even if ‘snagging periods’ are included in the missives, these are often short.

Many builders have introduced pre-purchase or pre-completion inspections where a snagging list is compiled at the time of inspection. In the case of new build homes however, snagging may not be immediately apparent on one inspection but builders may not treat any item as a ‘snagging’ item unless it is identified at this stage.

Some commercial companies provide private snagging inspections for new build homes. While this may be a solution for some consumers, it is not an option for other disadvantaged consumers, for example those on low incomes. Moreover, buyers should not have to pay a company to find faults in their new home.

2. Delays in the completion of building – which tend to arise as a result of a system where the contract, or ‘builders’ missives’8 favour the builder.

There are two main differences between missives for new builds and missives for second-hand properties. Firstly, in the cases of new builds, missives usually provide for a deposit payable at an early stage. Secondly, with the sale of a new build, there is an offer to sell by the builder, as opposed to an offer to buy from the buyer, as is the case with second-hand properties. Buyers of new build homes usually suffer a weakened bargaining position in comparison with those buying second-hand homes in that the consumer and the developer are in this different relationship. Of equal concern, however, is the lack of a specific target date in most cases. Most builders’ missives simply define the date of entry as being a certain number of days after the date that the property has been granted a Completion Certificate by the Local Authority. It can be extremely frustrating for new build buyers, when trying to conclude a deal, to be advised that the target date of entry is not guaranteed and that actual completion of the property could be sooner or later than that date. This is particularly so in situations where the new house buyer has their own property to sell and the purchaser of that property will expect a fixed date of entry. Even if the target date is met by the builder (and therefore, there is no ‘delay’ as such), the new build buyer will still have faced weeks or months of uncertainty. Delays in the entry date appear to be a central problem where delays of up to several months are widely reported, with much longer delays also evident.

The Scottish Executive would prefer to adopt a voluntary approach but has advised us that it is awaiting the outcome of discussions between the Law Society of Scotland and Homes for Scotland regarding a possible standard builders’ missive. A standard missive has recently been approved by both organisations and a pilot is planned for the near future. The Housing Improvement Task Force recommended that:

*The Scottish Executive should undertake a specific review of this matter with the aim, if possible, of brokering an agreement that might be required between the various parties.*

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8 Missives are the formal letters passing between the seller’s and the buyer’s solicitors dealing with the finer points of the contract which will be finally concluded.

However, if a voluntary solution cannot be agreed, ultimately, legislation may have to be considered. The Housing Improvement Task Force also made the following recommendation:

*If it proves to be impossible to broker such an agreement that adequately addresses the interest of consumers, then the consideration should be given to legislation that would put in place minimum safeguards for buyers.*

### Existing regulatory controls

New build homes are exempt from the protections provided by the Sale of Goods Act 1979, so effectively the consumer has more statutory rights when buying a loaf of bread. Under the Sale of Goods Act, goods must be:

- of satisfactory quality;
- reasonably fit for the particular purpose for which they are sought; and
- must correspond with their description.

The purchase of property in Scotland, whether new build or second-hand, has traditionally been governed by the private law of property, and the common law rule of *caveat emptor* has always applied. With such basic consumer protection lacking, it is clear that new build homebuyers are significantly disadvantaged from the outset. Recognising this, the Housing Improvement Task Force stated:

*We believe that *caveat emptor* may need to be qualified in respect of new build developments, where the sale is not between two private individuals and where the builder is in a similar position to other commercial providers of goods and services who are expected to comply with consumer protection legislation.*

An important point to note is that the legal position in relation to consumer protection in this area is clouded somewhat by the fact that it is not clear where responsibility lies for some of the areas mentioned. Under the Scotland Act 1998, consumer protection is a matter reserved to Westminster, while the law of property is devolved to the Scottish Parliament.

There are, at present, various pieces of UK and Scottish legislation which are relevant to the buying of new build homes, as detailed below.

#### 1. UK legislation

**Property Misdescriptions Act 1991**

The Property Misdescriptions Act 1991 makes it an offence to make false or misleading statements about specified aspects of land (which includes buildings) offered for sale by those in estate agency or property development business. The Act applies only in relation to statements made about the property prior to the start of the conveyancing process.

**Unfair Terms in Consumer Contracts Regulations 1999**

The Unfair Terms in Consumer Contracts Regulations 1999 require traders not to use unfair terms in their standard contracts. Builders generally use standard missives when selling a property; therefore, the Regulations apply to the selling of new build homes.

#### 2. Scottish legislation

**The Building Standards (Scotland) Regulations 1990**

A local authority’s role in the satisfactory construction of houses is to ensure the health and safety of people using the building and of the public generally. The current Building Standards (Scotland) Regulations provide no scope for a local authority to take action in respect of quality of materials or workmanship.

Certificates are issued to the person who applied for the building warrant and in the case of new builds this will be the builder. Many people wrongly believe that the certificate of completion relates to quality. People suppose that a house built to meet building standards regulations would be automatically free of

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11. The Sale of Goods Act 1979 applies only to goods, which defined in Section 61 includes moveable property as opposed to heritable property i.e. land and buildings.
13. *Caveat emptor* means ‘buyer beware’ i.e. buyers must take responsibility for the quality of goods that they are buying.
15. See Schedule 5, s.C7 Scotland Act 1998
16. Section 1 (1)
faults and that building control inspectors would ensure it was built correctly. However, building control departments have no control over many finishes and fittings that are the cause of complaints, as these are not controlled in building standards regulations. 17

People also frequently believe that a completion certificate means that the construction is completed when this is often not the case. Previous to the recent introduction of the Council of Mortgage Lenders (CML) initiative (discussed below), most contracts stipulated that the issue of a local authority certificate was the trigger for payment of the full balance; it was not surprising, therefore, that consumers saw it as some form of guarantee. The true position was that in some cases, the builder’s side of the contract was not complete at this point.

**Building (Scotland) Act 2003**

The Building (Scotland) Act 2003 will introduce a new building standards system from 1 May 2005 completely changing the methods for setting and enforcing standards on building work in Scotland. This will include ways of approving certain builders to self-certify selected building works by issuing new completion certificates. It is likely that the approval system will recognise and make use of bodies such as the newly established Construction Licensing Executive (CLE), a regulatory body that acts through a licensing and registration scheme. The CLE does not, however, cover the regulation of new housing building; its remit relates only to domestic repair and maintenance.

The new system will be broadly the same as the current system under the 1990 Regulations. The major difference introduced by the new Act relates to the completion certificate. This will now require to be issued by the owner and in the case of new build homes this will most likely be the builder. The owner has to confirm that the building complies with the warrant and the Act. The verifier (the local authority) makes reasonable checks to establish if the completion certificate is correct and either accepts or rejects it. Only once the completion certificate has been accepted by the local authority, can the building be legally occupied.

**The Scottish Building Standards Agency**

The Scottish Building Standards Agency was established in July 2004 as an executive agency to undertake national functions relating to building standards. The new building standards system will come into force in Scotland on 1 May 2005 (see above).

### 3. Other forms of consumer protection

**New Home Warranty Providers**

New builds are usually covered by insurance, the most common provider of which is the National House Building Council (NHBC). 18 NHBC registers around 85% of new homes in the UK.

NHBC offers an insurance scheme to the owners of newly built or converted homes. This Buildmark Cover lasts for ten years and to a large extent, does provide useful cover, especially for snagging problems. For the first two years, the house builder must put right any defects involving a breach of NHBC’s technical requirements. NHBC itself will deal with cases where, either by default or through bankruptcy, the builder fails to put right faults. From the third to the tenth year, NHBC provides direct insurance cover.

17 The regulations cover only essential matters of health and safety, energy conservation and certain matters of welfare and convenience such as facilities to assist people with disabilities.

18 It should be noted that there are other companies, in addition to NHBC, which also provide warranties for new homes.
The Way Forward

At the end of August 2004, the Council of Mortgage Lenders (CML) announced an initiative in Scotland, now known as the ‘revised finalling procedure’, whereby lenders will not release the mortgage funds for a new property until the buyer’s conveyancer has received confirmation in the form of a cover note that the property has received a satisfactory final inspection and that a full new home warranty will be in place on or before the entry date. A similar initiative introduced in England and Wales in 2003 led to a fall in the number of failed pre-handover inspections by NHBC from 35% in December 2002 to 8% in November 2003. Since the majority of home buyers require a mortgage, this is a welcome move that will hopefully bring similar results to those achieved in England and Wales and offer a form of consumer protection for the new build homebuyer.

While this new procedure should improve the situation for buyers, further action must be taken to redress the buyer-seller balance in the new build property market, to ensure that consumers are effectively protected for what will be, more often than not, their biggest single purchase.

Construction Innovation and Excellence Forum

The Modernising Construction Strategic Group (MCSG) was set up by the Scottish Executive to develop a three-year strategy for the construction industry. The MCSG, which included representatives of the industry, client, and government, made several recommendations, one of which was to create a Construction Innovation and Excellence Forum. Graeme Millar, Chair of SCC, has been appointed as the independent Chair to the Forum. It will act as a point of contact between the Construction sector, the Scottish Executive and the Scottish Parliament to advise at a strategic level on the actions required to raise standards across the sector.

RICS Ombudsman

The Royal Institute of Chartered Surveyors (RICS) is currently piloting an Ombudsman scheme in Scotland to provide resolution and closure of individual grievances that have not been settled satisfactorily using the surveyor’s internal complaints handling procedure. This scheme could offer protection to the consumer if they experience difficulties with their home which should have been highlighted in the survey or valuation but were not.

Conclusions

The evidence available suggests that new build home buyers are all too often experiencing the following:

• late completion of houses;
• pressure to accept incomplete houses;
• an after-build service delivered late or in some cases, not at all; and
• inadequate means of redress.

While there are potential improvements shown in the recent developments outlined above, the law still does too little for the consumer. Consumers do not have a key piece of statutory protection, as new build homes are not covered by the Sale of Goods Act. It is also likely that many buyers are unaware of their lack of rights.

19 The surveyor must be a member of RICS.
20 New build homes to be covered by an NHBC warranty must pass a pre-handover inspection before the warranty is granted to the property.
21 NHBC Annual General Meeting of the Scottish Committee 28 November 2003, Agenda and Papers
22 An SCC survey found that 79% of respondents required a mortgage to purchase a property, see Home Truths: a report on the research into the experiences of recent house buyers in Scotland Scottish Consumer Council (2000)
Political responsibility for both regulation and consumer protection in relation to new house building is somewhat clouded, overlapping into the remits of both Westminster and the Scottish Parliament.

It is important that the recommendations of the Housing Improvement Task Force are built upon. The first recommendation is already being taken forward by the Law Society of Scotland and Homes for Scotland, who have agreed the terms of a standard builders’ missive, and the initiative is to be piloted with several major builders in the near future. We welcome this initiative as it aims to redress the balance of power between the buyer and the seller. If the pilot is successful, it could mean that more builders agree to use the standard missive and, thus, more consumers will benefit from the initiative.

The lack of a target entry date continues to be a problem for some consumers. Every effort should be made to make, and keep, a target date. If however, the date is missed for unavoidable reasons, then the onus should be on the builder to keep the buyer informed. We would like to see such a provision written into the wording of the new missive.

In addition to the standard missive, there is a need to introduce statutory protection for consumers, in line with the Task Force’s view that *caveat emptor* may need to be qualified in respect of new build developments. Given the lack of consumer protection in this area, we consider that it is necessary to introduce statutory protection for consumers in relation to new build properties, similar to that provided by the Sale of Goods Act. This may involve joint working between the Scottish Executive and the UK Government.

While statutory protection is essential, it should underpin effective self-regulation by the industry. This will benefit consumers and businesses. Self-regulation or ‘soft law’ involves business itself taking the initiative to improve the situation for consumers and therefore prevents problems from arising in the first place. The advantages of a soft law approach include the following:

- soft law can involve working with the grain of market forces to deliver greater benefits than statutory regulation, where business is prepared to promise more than the law requires;
- the cost of regulation – to the state in enforcing, and to business in complying – is high, and soft law is quicker to develop and more flexible than legislation; and
- soft law is a less expensive alternative.\(^{23}\)

The final report of the Barker Review of housing supply\(^{24}\) highlighted key problems in the house building industry. It included among its recommendations that the house building industry develop a code of practice in line with the requirements of the OFT’s Consumer Codes Approval Scheme (CCAS). In the light of this and given our preferred option of a move to self-regulation, we believe that there is a need for such a code of practice to be developed for the new house building industry in Scotland. The process of developing this code should be led by Homes for Scotland, the body that represents the Scottish house building industry in consultation with consumer and other stakeholder interests.

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\(^{23}\) See *Soft Law in the European Union: a discussion paper by the National Consumer Council* National Consumer Council (2001)

\(^{24}\) See [www.barkerreview.org.uk](http://www.barkerreview.org.uk)