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LAW COMMISSION

FIRST PROGRAMME ITEM VII

LIABILITY OF TRADE VENDORS OF NEW DWELLING HOUSES
TO FIRST AND SUBSEQUENT PURCHASERS

INTRODUCTION

1. In its examination of the civil liability of vendors and lessors of defective premises, the Law Commission has given priority to the question of trade sales of new houses. This paper summarises the factors which appear to warrant consideration in this field and formulates provisional proposals in respect of such sales. Liability for defects, in this context, although springing from a contractual relationship between vendor or builder, on the one side, and house buyer on the other, has consequences which may affect materially the original house owners successors. Further, the existence of a sellers' market for houses creates conditions in which home buyers are prepared not only to accept low standards of construction but also to tolerate the imposition of terms designed to protect sellers who fall short of adherence to fair levels of achievement. For these reasons we have thought it appropriate, in putting forward our proposals for law reform, to a substantial extent to depart from the hitherto accepted method of the statutory implication of terms into contracts. (See further paragraphs 12-13, 18-19 below). The liability in tort of vendors of new houses will be dealt with in a further paper, which is in the course of preparation.

CONTRACTUAL LIABILITY UNDER THE PRESENT LAW

2. In the absence of express provision, on the sale of any premises other than a building to be erected or in the course of erection (see paragraphs 3 and 4 below), the principle of caveat emptor applies with full force. No term is implied that the premises sold are fit for any purpose or are free from physical defect of any kind.

Fraud apart, the vendor is under no duty to disclose such defects even though they be hidden and he may know of their existence.

3. On an agreement for the sale of a dwelling house to be erected or in the course of erection, there is however a term implied that the house when completed shall be fit for its purpose* and shall have been constructed in a workmanlike manner and with fit materials.

4. But the term implied in paragraph 3 above will yield pro tanto to an express term to the contrary effect. Thus where the agreement contains a term that:-

(a) the house will be completed/erected in compliance with particular plans and/or specifications, or by the use of stated methods of work or materials; or

(b) that a third party's certificate of suitability of materials etc. or "fitness for habitation" shall be conclusive,

then the purchaser is without a contractual remedy however "unfit" his house or however unsatisfactory the materials used or workmanship applied to its construction,

in case (a) so far as defects arise from the following or use of those plans, specifications, work methods or materials,

in case (b) when such a certificate is honestly, albeit carelessly, given.

FACTORS FOR CONSIDERATION

5. It is suggested that the existing law summarised above is unsatisfactory so far as it applies to new houses in the following respects:-

(a) caveat emptor ought not to apply to material defects where the vendor is a business seller;

(b) the implied term on the sale of a house to be built or to be completed ought not to be susceptible of exclusion on the ground of contractual

* The decided cases express this implied term in rather different language i.e. "fitness for habitation" or "fitness for the purposes for which, to the knowledge of both parties, the house was required". (See Hancock v. B.W. Brazier (Anerley) Ltd. [1966] 1 W.L.R. 1317 at p. 1326-7). We prefer the latter formulation not only because this comprises what the parties themselves contemplate but also because it steers clear of the statutory test of fitness for habitation now laid down in s.4 of the House Act, 1957.

provisions relating to plans, specifications, certificates of fitness or other matters of this kind.

6. That the law in certain of these respects is unsatisfactory is widely recognised not only by the general public but within the building trade itself. The trade reaction is demonstrated by the growing importance of the National House Builders Registration Council and of its Ten Year Protection Scheme. Features of the voluntary Scheme are that builders concerned are required for two years to assume liability for certain types of defects and that the Council offers itself to guarantee for 10 years against major structural defects. The Council operates an inspectorate for houses under construction and a certifying service designed to secure adherence to good building standards. The Council has recently revised, and has made more stringent the standards to which house building by its registered members is required to conform.

7. Of recent years private members have introduced Bills into Parliament designed to provide protection for purchasers of new dwelling houses. Such a Bill is, at present, before Parliament, but its provisions to an important extent fall short of the protection at present available (subject to contracting out) at Common Law to purchasers of houses to be built or in course of construction.

8. On Monday March, 7th Mr. Crossman the then Minister of Housing announced the Government's approval of the Building Societies Associations recommendation to its member-societies, that all newly built houses on which mortgages are granted, should be constructed by a house builder registered with the National House-Builders' Registration Council. The Minister recommended that Local Authorities should apply the same principle to their own house purchase schemes. Assuming that the Building Societies Association's recommendation is accepted it is anticipated that within a year 80% of the new houses to be constructed in the private sector will carry the Council's certificates.

9. An important new development in this field is provided by the Building Regulations 1965 S.I. No. 1373, made on July 6th 1965, which came into

operation on 1st February 1966. These Regulations, which apply throughout England and Wales (except in inner London), supersede local building bye-laws and provide minimum standards of materials, methods and construction etc. to be used in buildings. To some extent these may offer better minimum standards, in the interests of purchasers than hitherto. But of themselves, they do not provide effective legal protection, because they do not give a remedy to the purchaser of defective premises.

10. Notwithstanding the matters referred to in Paragraphs 6-9 above, it is considered that legislative provision is necessary to protect the interests of house purchasers. Purchasers of other premises can, it is felt, be reasonably left, with professional advice when appropriate, to protect their own interests by specific contractual provisions as they invariably do in practice. Present trends in house-ownership suggest that the vast bulk of new house construction in the private sector will be intended for sale to owner-occupiers. Although the National House Builders Registration Council scheme has many attractive features, offering purchasers greater benefits than could be provided by legislation (e.g. the Ten Year guarantee, the system of inspection of work in progress, protection against builders' insolvency before completion and insurance backing), it will not, and of its nature cannot, be comprehensive and it lacks the background of legislative provisions which would safeguard purchasers against attempts to evade the full obligation of the scheme or to escape its impact.

11. From time to time proposals have been made for a national registration authority for builders, empowered to lay down and secure the observance of minimum standards of construction (e.g. the proposals contained in Mr. Wise M.P.'s Housingbuilding (Protection of Purchasers) Bill presented to the last Parliament). Legislation on such lines poses many problems of principle and of detail which, if the National House Builders Registration Council's scheme attains its target, could be avoided. The present rate of progress of the scheme is encouraging* and the

* Building Firms Registered: 1951 – 653
March 1966 – 3,345
July 1966 – 3,800 + 500 pending
Houses subject to inspection
under the Scheme: 1951 - 843

Law Commission would not, at the present time, favour the establishment of a system of compulsory registration of housebuilders. Yet the Commission, for the reasons indicated above, does favour legislation upon the lines later indicated (see paragraph 21). It sees such legislation as providing a basis upon which the Council's scheme could operate more effectively and as re-inforcing the substantial pressures which are at present being exerted to persuade housebuilders to adhere to its requirements. The legislation contemplated would also serve the protective purposes indicated in Paragraph 10 above.

BASIS OF PROPOSED OBLIGATIONS

12. We believe that the substance of the obligations implied by the Common Law in the case of agreements to sell a house to be built or in the course of construction is generally acceptable both to the public and to the building trade. We think that these obligations viz: that proper materials and workmanship should be used and exercised in house building and that when completed a house should be fit for its intended purpose, should in the public interest be extended to all agreements to build or to sell new houses. We therefore propose that trade vendors and builders should in respect of all new houses be placed under statutory duties expressed in the terms of these existing Common Law obligations. In view of the general permissibility under the present law of "contracting out" of terms implied into agreements by Statute and because of the artificiality in many cases of the implication of contractual terms, we think it preferable to avoid the device of treating the statutory obligations as "implied terms". This approach has the further advantage of establishing a concept of liability which is not dependent upon the existence of a contractual tie between the trade seller and the person who suffers loss by the sellers default in adherence to proper standards of construction. In this context it is to be observed that the National House Builders Registration Council's Scheme (See Paragraph 6) contemplates that purchasers of houses covered by the scheme obtain protection for up to 10 years from completion, even though they may not have been the first purchaser.

1965 – 44,090
March 1966 – 63,800
July 1966 – 110,000

13. In the area of relationships under consideration, this approach is all the more warranted on account of the diverse forms that trade sales of new houses may take. It is not uncommon, for example, for associated companies to be concerned with a purchaser, one company being the plot vendor and the other the house builder. Nor is it unusual to find estate developers engaging an independent builder to construct houses on sold-off plots either under a main building contract with the developer or under separate agreements with individual purchasers. Attracting a statutory obligation to observe proper standards to the sale or building of new houses, whether erected or to be constructed, avoids the complications which would arise by the device of “implying terms” in contracts which as indicated, take so many different forms.

14. It is still a practice amongst estate developers to make use of show houses and descriptive brochures as an inducement to prospective purchasers, and it not infrequently occurs that the ensuing contract provides for conformity of the house to be built or sold with the show house or description employed. In such cases it seems to us that terms analogous to those contained in sections 13 and 15 of the Sale of Goods Act, 1893 should be imported into the relevant agreement, providing that “contracting out” be restricted. Since our proposals here deal with cases in which correspondence with show house or description is an integral part of the contract there is no artificiality in using the method of “implying terms.”

TRADE SALES – CONTRACTING OUT

15. The same necessity which dictates the need for statutory obligations of fitness etc. in trade sales of houses, compels the use of provisions directed against contracting-out. Here again a distinction must be drawn between various types of trade sale. In the case of a completely constructed new house it may be that there are defects which a purchaser by reasonable expenditure can remedy and it would be economically wasteful to create a situation in which such a house is virtually withdrawn from the market. It is felt right therefore that in such cases the parties should be free to contract-out of the proposed obligations on the condition and to the extent that the vendor lists the specific matters in respect of which the new house does

not comply with the statutory terms. The existence of the listed defects will therefore be known to the purchaser who can assess the financial commitment involved in their remedy and can bargain for an appropriate reduction of price.

16. Another case in which contracting-out of statutory obligations should be allowed is where, for one reason or another, a purchaser is prepared to buy an uncompleted house. This may be because he desires to install fittings of his choice or to make structural changes. Such transactions also occur when a builder has found himself without the necessary finance to complete, where he has become insolvent, or where a house has been started to the requirements of a particular purchaser who has withdrawn. In all such cases it is also felt that it would be uneconomic by prohibiting the exclusion of statutory obligations to take such a house off the market. Contracting out in such cases should be allowed on similar terms to those proposed in Paragraph 15 above with the additional requirement that the vendor should specify the respects in which the house is incomplete.

17. House purchasers from time to time themselves arrange with builders for the installation of items (e.g. sanitary fittings, space heating installations, kitchen equipment and lighting fittings) and for the application of certain types of finishes (e.g. paints, wallpapers etc.) specified by themselves, in houses under construction. Sometimes the initiative for such specification proceeds from the builder, sometimes from the purchaser himself. In the latter case the question arises whether the vendor's or builder's proposed statutory obligation of fitness for purpose should extend to items specified by the purchaser. We think that it should. In such cases the vendor or builder could in principle treat the transaction as relating to an uncompleted house, leaving the purchaser to contract with the supplier of the specified item, the builder himself taking advantage of the permissible measure of "contracting out" proposed under Paragraph 16 above. Alternatively if the builder himself purchases the specified items from the supplier there is no reason why he should not request such supplier to accept the obligation of fitness for purpose as a term of his order. We believe that to exclude the proposed obligation as to fitness where purchaser's specified items are concerned would create a situation in which

purchasers of houses would be without a remedy for defective installations and finishes which may occasion substantial permanent loss.

EXTENSION OF BENEFIT OF STATUTORY OBLIGATIONS

18. Structural defects in houses often manifest themselves after a substantial passage of time from the original date of construction. It is generally accepted that, in built-up areas, houses on the average change hands every six to seven years. It must, thus, often be the case that the house-owner at the time when serious defects became apparent is one other than the original purchaser of the house when new. Whilst the terms of fitness generally implied by the Common Law (see Paragraph 3) on the sale of new houses or houses to be constructed or completed are in principle susceptible of assignment upon an original purchaser's re-sale, in practice such assignments do not occur. It is proposed, however, that the statutory obligations to be imposed upon a trade sale to the first purchaser (replacing the Common Law implied terms) should be made to enure for the benefit of subsequent purchasers. It has been pointed out (see Paragraph 12) that the National House Builders Registration Council's Scheme does provide for such benefits to subsequent purchasers.

19. We do not think it necessary or appropriate to lay down any limitation of time within which an action must be brought. As already pointed out defects due to faulty construction frequently do not show themselves until years later. If the owner who suffers loss thereby can prove that this was due to the original faulty construction and can trace the builder responsible, he should, in our view, be entitled to recover compensation from him.

NATURE OF THE OBLIGATIONS

20. The Law Commission's main object in formulating the present proposals is to safeguard purchasers of new houses against financial loss arising from defective building. Liability of vendors and builders of new premises for personal injuries arising from structural defects will be dealt with in a further paper, which is in preparation. We propose, as has been explained, that the new duties should take the form of statutory obligations to be imposed upon trade vendors and builders, which will not primarily be of a contractual character. This approach necessarily excludes a

purchaser's right to rescind the contract to sell or to build or complete a new house upon the grounds that, in some respects, it falls short of the standards of fitness required to be observed, although a total failure to comply with such standards might constitute, as at present, a ground of repudiation of the contract. In this area of relationships we feel that generally speaking a right of rescission is only of theoretical value to a purchaser. Purchasers of new houses are normally under substantial pressures to complete their purchases and to occupy their new houses, for these reasons they are in practice prepared to take over premises patently defective in material respects. The important aim in our view, is to ensure that such purchasers are safeguarded against financial loss arising from defective building work and that the principle of "caveat emptor" in this area should cease to apply in this area.

NATURE OF THE OBLIGATIONS

21. For the above reasons the Law Commission has formulated the following propositions to cover the contractual liability of vendors and builders upon the sale or construction of new dwelling houses:-

TRADE SALES – NEW DWELLING

A. Any person who in the course of his business sells a new dwelling house or a house to be constructed or already in the course of construction or agrees to build or to complete the building of a new house shall be under the following obligations:-

1. that the house is or will when constructed or completed be reasonably fit as a dwelling house for the purposes for which to the knowledge of the seller or builder, the house is required;
2. that all the materials supplied for or used in the construction of the house were or will be reasonably fit for the purpose for which such materials were supplied or used;
3. that the construction of the house and all works connected therewith has been or will be carried out in a proper and workmanlike manner.

B. For the purposes of the foregoing obligations a new house means a house which has not previously been inhabited or was substantially completed less than one year before the relevant transaction.

C. When there is a term in the contract expressed or implied to the effect that a house to be sold or built or completed shall conform to a show house or to a particular description, there shall be a further term implied that the materials and workmanship used in its construction or completion are or will be of the same standard as those of the show house or in accordance with the description, as the case may be.

D. The seller or builder may not exclude, modify or restrict the operation of the foregoing obligations except as follows:-

1. on the sale of a new house he may exclude liability in respect of particular defects provided that the other party is given a list of such defects before the contract of sale is entered into and that such list is subsequently incorporated into the contract of sale;
2. on the sale of an uncompleted house or on an agreement to build or complete the building of a house he may exclude liability in respect of particular defects which relate to such work as has been completed prior to the contract, provided that the other party is given a list of such defects before the contract is entered into and that such list is subsequently incorporated into the contract.
3. on the sale of a house expressly sold as uncompleted by may further exclude liability in respect of such work as has not at the time of the contract of sale been completed, provided that a statement in writing of such work as has been completed prior to the sale is delivered to the purchaser prior to the contract of sale being entered into and that such statement is subsequently incorporated into the contract of sale; but in such case the exclusion of liability shall relate only to any work completed after the sale by the purchaser or an independent builder of his choice, not being the seller or any builder engaged in the carrying out of any building work on the premises prior to the sale.

E. General Provisions

For the purpose of the foregoing propositions:-

1. A person selling a new dwelling house in the course of his business shall include any estate developer or other person who has built or caused that house to be built or who has bought that house for the purpose of sale.
2. A sale of a house shall include a grant of a lease thereof otherwise than at a rack rent and without payment of premium.
3. Subject to any permitted exclusion, modification or restriction falling within the above propositions, the obligations imposed upon sellers and builders shall enure for the benefit of any purchaser of the relevant premises irrespective of the absence of any contractual relation between such purchaser and the original vendor or builder.
4. A house includes any premises to be occupied as a separate dwelling.

Law Commission

21 September 1966.