HOMEBOND/ GUARANTEE

The original scheme known as the National House Building Guarantee Scheme and now known as HomeBond/Guarantee was set up by the Construction Industry Federation with the approval of the Department of the Environment in September 1977.

Broadly the scheme is intended to give the Purchasers of a new dwelling house, purchased within the terms of the scheme a guarantee in respect of "major structural defects" arising within ten years of the completion of the dwelling. Under the old scheme up to the 1st January 1995, the term of the guarantee was six years. There was also introduced on the 1st January 1995 an extension of the guarantee to cover the loss of deposit or stage payments before the house is completed.

To broadly summarise, therefore, HomeBond guarantees

1. The dwelling against major structural defects for ten years.
2. The dwelling against water and smoke penetration for the first two years of the warranty period.
3. Protection against loss of deposit or stage payments before the house is completed.

It must be borne in mind that these guarantees are only available through builders who are HomeBond registered with the National House Building Guarantee Company Limited. HomeBond does not affect contractual and common law rights and in fact is an added protection and further attaches to the property even if the property is sold within the warranty period.

The Structural Defects Indemnity

From enquiries with the guarantee company there appears to be a limit of £30,000 for any one house and £400,000 in respect of any one builder. However, this is an arrangement between the builder and HomeBond but if a purchaser has serious defects in his house, the position appears to be that HomeBond will cover the cost of the repairs even if these repairs are in excess of £30,000. The procedure is that one must first write to the builder setting out the details of the defects requesting the necessary repairs to be carried out and advising how access can be arranged during working hours. The owner should keep a copy of the letter and if the builder does not respond within 14 days he should then write to HomeBond and enclose a copy of the letter sent to the builder. HomeBond will then write formally to the builder and send the owner of the house a special complaints form. When the form is returned together with £50.00 inspection deposit (which will be refunded if the complaint is well founded) a HomeBond technical expert will examine the complaint and visit the site and carry out the inspection where necessary. The owner and the builder will be notified of the result of the investigation and what, if any, specific remedial work is to be carried out. If the builder fails to repair the defect within a reasonable time, the owner must contact

HomeBond who will arrange for another builder to carry out the repairs at no expense to the owner.

If the owner or the builder wish to dispute HomeBond's findings provision is made for independent arbitration to adjudicate on the matter.

The Stage Payment Bond

The Conveyancing Committee was very pleased with the introduction of the Loss of Deposit Cover on the Insolvency of Builders as an extension of the existing structural defects cover. Where a builder has this cover there should be no need to have the stage payments held by the builders solicitors as stakeholder subject to the limits of the scheme (and subject to the limits of the scheme, such money can be paid direct to the registered builder, his auctioneer or sales agent). The only foreseeable risk that can arise in this respect is that some agent might purport to take the deposit on behalf of the builder without any authority. If however the advice with regard to the payments is followed when the builder is registered, it is hard to see how this could happen. The present limit of the scheme is as follows:-

HomeBond will repay lost deposits or contract payments resulting from the bankruptcy or liquidation of registered builders subject to a maximum of 15% of the purchase price or £20,000 whichever is the lower. It operates from the date of registration with HomeBond for a period of two years. The second part of the protection operates from the date of issue of the Final Notice (usually after the main structural inspection) to the completion and handover of the dwelling. Financial indemnity cover for the remainder of the contract period increases to 50% of the purchase price or £50,000 whichever is the lower. This cover is important particularly where there is a drawing down of a mortgage under a stage payments arrangement. It must be made quite clear however, that the only circumstances under which HomeBond would guarantee the refund of the deposit is on the insolvency or fraud of the member builder and it is not the intention of HomeBond to get involved in the type of arguments and disagreements which regularly arise between builders and purchasers in any other matters. The purchaser must satisfy the scheme that he has been unable (having used reasonable endeavours) to obtain reimbursement of the amount of the deposit on the insolvency or fraud of the member. HomeBond has assured the Conveyancing Committee that in cases where their members are in liquidation/receivership or bankruptcy there would be no question of purchasers having to take legal proceedings. The time limits on the cover are, with regard to the initial deposit, two years from the date of registration with HomeBond and, with regard to the additional cover, same expires 6 months after the Final Notice unless the purchaser requests an extension of time. Solicitors should make sure that their clients are aware of the rules and that it is up to the client to

monitor the time limits to seek assistance if the construction of the house does not seem to be proceeding and if time seems to be running out.

Even if deposits are protected under the scheme it is advisable that the solicitor should obtain the client's instructions to pay over the deposit to the builder. The HomeBond scheme have a new form called the HB 10 which includes the guarantee agreement, the stage payment bond and the guarantee certificate and no payments should be made until this document issues. There should also be obtained and made available to the purchaser's lending agency the form HB 47 which is an acknowledgement of the registration of the dwelling under the scheme.

Stage payments outside the HomeBond Protection Scheme

The Conveyancing Committee is concerned that the practice of builders requiring stage payments to be made for the purpose of a new estate type houses still persists in a number of areas. In general the Committee disapproves of the stage payments purchase practice and is making representations to the Construction Industry Federation, the Department of the Environment and the Director of Consumer Affairs.

While the protection afforded by the HomeBond stage payment bond is welcome, it cannot of itself protect purchasers from the difficulties and problems which would arise if a developer were to become insolvent after stage payments were made on or above the limit set out in the scheme and before a transfer of title had been executed in the purchaser's favour.

Accordingly, for so long as the stage payment purchase practice persists the Committee emphatically advises practitioners that in order to protect their purchaser clients they should ensure that title to the site should pass from the developer to the clients on the occasion of the making of any stage payment outside the protection offered by the scheme.

In issuing this recommendation the Committee wishes to state that it is not intended to apply to purchases of once-off new houses where such matters are negotiated by and between the parties involved.

Important points to remember:

1. Make sure the builder is a HomeBond member and if in doubt contact HomeBond at Construction House, Canal Road, Dublin 6.
2. All lenders require that new dwellings are HomeBond protected and registered with the HomeBond scheme. Make sure you receive the HB47 as this will be required by the lender before the loan cheque will issue.

HOMEBOND/ GUARANTEE

(Contd.)

3. Before a solicitor allows his client enter into a building contract with a builder he should ensure that the Form HB10 has issued which incorporates the protection that comes to his client from HomeBond.
4. Before completion and before the balance of purchase monies is paid over the solicitor should ensure that the final Certificate HB11 has issued and he should not accept an undertaking with regard to same.
5. The Rules governing the HomeBond Scheme are entitled "HomeBond HB1 – Rules effective from 1st March 1997" and are published by HomeBond. Every solicitor should have to hand a copy of the Rules.

NEGATIVE SEARCHES

In January 1977 the Conveyancing Committee of the Law Society recommended that the long standing practice of a Vendor furnishing a Negative Search on the sale of property be discontinued.

Having monitored the operation of the new system for 18 months and having received representations from a number of members the Committee has now decided to recommend that the previous practice should be resumed. In coming to this decision the Committee has had regard to the following factors:

1. Purchasers' solicitors have not generally arranged to lodge Negative Searches at the contract stage and have usually commissioned hand searches for the closing of purchases, thus necessitating further hand searches being commissioned on the occasion of the closing of subsequent mortgage transactions. Since no hand searches can be kept open to include the registration of the purchase deeds it follows that when the title is subsequently examined it will be necessary to have a further search made against the Vendor from the date of the last hand search to date of registration of the deed.
2. The protection given to solicitors by negative searches cannot readily be discounted particularly since it has been ascertained what the insurance cover which the various firms of Law Searches have in comparison with the totals of the considerations passing in the various transactions in which hand searches are being made.

The Committee would remind members that for the smooth operation of the practice whereby the Vendor furnished the negative search his solicitor should ensure that a draft requisition for negative search be furnished with the draft contract together with all existing searches covering the period contracted for which are in the Vendors possession. The failure to lodge requisitions for search at the contract stage inevitably results in the searches not being ready for the closing and the additional expense of hand searches has to be incurred.

UPDATE: Solicitors should note that Negative Searches are no longer kept open by the Registry. The period covered by the Search is from the date requested in the Requisition for Negative Search to the date of lodgement and the search is then issued by the Registry (but in some cases the search has to be collected from the Registry).
As soon as the search is received by the Vendor or Solicitor from the Registry it should be furnished to the Purchaser's solicitor who can then make a Hand Search from the date of the issue of the Negative Search to the closing. Where there is a closing with the aid of a loan cheque further searches should not be required.

Published in Law Society Gazette, July/August 1978

HOUSES CONSTRUCTED BY DIRECT LABOUR

PRACTICE OF THE IRISH PERMANENT BUILDING SOCIETY

It will be of interest to members to know the requirements of the Irish Permanent Building Society where a house is constructed by direct labour.

The Society requires that the erection of the premises be supervised by an Architect or Engineer, who, on completion of the premises, will complete a Declaration verifying:

(A) That the house was built in accordance with the plans and specifications.

(B) That he supervised the erection of the premises and verifies that same has been completed to his satisfaction.

(C) That the Building Conditions of the Planning Permission have been complied with in full.

(D) That the cost of erection of the premises, including the site cost of £X, is not less than £Y.

A Declaration in the above form, supported by the usual Architect's/Engineer's Declaration required for new houses would satisfy the Society's requirements. The Society will rely on the Declaration to verify the price (construction costs plus site cost), and will not require production of invoices from the Applicant or his Solicitor in respect of construction costs, costs of materials, etc.

Supervision need not be continuous but a minimum of five inspections is felt essential so long as they include an inspection of foundations and, at completion, of roof timbering.

It sometimes happens that potential Borrowers do not advise the Society that the premises will be erected by direct labour and consequently do not find out about the need for this supervision until too late. Members acting for clients purchasing or taking transfers of sites might consider warning clients about this requirement to avoid difficulty at a later stage.

Published in Law Society Gazette, May 1980

UPDATE:
1. The Irish Permanent Building Society is no longer a building society but is now a registered bank and has changed its name.
2. The practice set out above is, as far as the Conveyancing Committee is aware, now applicable in regard to all lenders.

UNREGISTERED TITLES

The Conveyancing Committee has been receiving an increasing number of representations from practitioners about the presentation of sets of title documents to unregistered land. The Committee recommends that as a matter of good professional practice all such sets of title documents should:

(1) Contain an Index or List of Contents.

(2) Have all pages numbered.

(3) Have all maps properly coloured.

(4) Be clearly printed, preferably by the letterpress or litho-method (not stencilled).

(5) Contain a full set of searches against the title.

The Committee is satisfied that a Vendor's solicitor is under an obligation to furnish proper books of title and urges solicitors acting for Purchasers to reject any booklets which do not reach an acceptable standard.

In an increasing number of cases no Registry of Deeds Searches are furnished with or in a Booklet of Title. The Builders solicitors apparently claim that they are basing this practice on a recommendation of this Committee. No such recommendation was ever made. Any practice notes issued by this Committee regarding searches emphasised that the current practice that Registry of Deeds Searches be furnished by Developers' solicitors should continue. When Builders or Developers purchase property for a housing development their solicitors pay extra attention to the investigation of title and to searches knowing that it will be vitally important to be able to explain all queries which will arise in the course of the investigations by the many Purchasers' and Mortgagees' solicitors. The Committee cannot think of any reasonable circumstances where searches are not available and think that it is unreasonable for Builders' solicitors not to furnish copies with the title with suitable explanations.

Solicitors for Builders are reminded that the Land Registry will now give priority to first registrations of development property. There should be no difficulty in any ordinary case in achieving registration in good time and builders' solicitors are urged to avail of this facility.

Published in Law Society Gazette, December 1980

BUILDING DEVELOPMENT

Published in Law Society Gazette, December 1980. JC

A member has drawn the attention of the Conveyancing Committee to the fact that solicitors for some Builders selling houses on developments which comprise unregistered land are refusing to furnish Memorials executed by the Vendor as has always been the practice. The Committee feels that a Purchaser is entitled to have a Memorial executed by the Vendor and can see no good reason for a departure from the practice that in building estates a Memorial duly executed by the Vendor is furnished at his expense.

PROPERTIES ON HOUSING ESTATES

While many of the solicitors acting for the leading building firms are known to be using the agreed Law Society/Construction Industry Federation Contract there are still a small number who are using other forms. The Conveyancing Committee while recognising the right of individual solicitors, or their clients, to use their own contracts points out that the working party which drafted the standard contract when examining a number of the contracts then in use on building estates found that many of them had serious defects. A most common one was that in the event of a dispute the decision of the builder's architect would be final. Provisions of this sort have been deemed unenforceable by the Courts. Accordingly the Committee would urge members acting for the developers of building estates to give serious consideration to using the standard Law Society/Construction Industry Federation form.

Published in Law Society Gazette, October 1983

NEGATIVE SEARCHES AND BUILDERS

The Conveyancing Committee was asked to review the practice of Builders' Solicitors providing negative searches. The Committee made enquiries of the Registry of Deeds and understands that the Registry still operates the system whereby negative searches may be lodged, written-up, taken out and then relodged for updating. The Committee is of the view that the obligation lies on the solicitor acting for the Builder to provide each Purchaser's solicitor with an up-to-date negative search. The Builder's Solicitor should lodge the search before the commencement of the development and provide each purchaser with a copy of the search. On the completion of the development the search should be lodged by the Builder's Solicitor for updating and a certified copy with all acts explained/discharged sent to each Purchaser's Solicitor. Solicitors acting for purchasers of new houses should obtain an undertaking to the above effect from the Builder's Solicitor on closing. [9]

Published in Law Society Gazette, December 1988

ESTATE SERVICES

The Joint Committee has obtained the opinion of Senior Counsel regarding liabilities of purchasers of new houses where the roads and services have not yet been taken in charge and where the bond or security given may have expired or have been inadequate.

Counsel has advised the Committee that it does not lie as a matter of right for a Planning Authority, having accepted a bond or cash lodgment as security for the completion of an estate, to look elsewhere at a later date for further or other security. It is incumbent on the Planning Authority to ensure, where the bond is for a limited time, that the works are satisfactorily completed within that time. Counsel states that he cannot envisage any Court exercising its discretion against an individual house holder on an estate under Section 27 of the Act to ensure compliance with the conditions in a Planning Permission which is the obligation of the developer. Counsel also advises that the Local Authority does not have a right to levy individual house holders for a contribution towards the cost of finishing off an estate. Whilst Counsel has doubts as to whether the Local Authority could be compelled to take an estate in charge he is satisfied that the Local Authority is obliged to complete the works even if the security is insufficient. It lies with the Planning Authority at the time of imposing the condition to provide adequately for such works.

The Committee feels therefore that there is no necessity for practitioners to inquire into the length of a bond or adequacy of a bond or other security when acting for a subsequent purchaser of a new house on a housing estate. It is sufficient for the first purchaser of a new house to assume that all of the financial conditions contained in the planning have been complied with at the date of completion of the purchase.

Originally published in First Edition of the Conveyancing Handbook

CERTIFICATES OF TITLE IN RELATION TO HOUSES IN THE COURSE OF CONSTRUCTION

Published in Law Society Gazette, November 1990

A solicitor who is giving a Certificate of Title undertakes to furnish an Engineer's or Architect's Declaration that the property in question has been erected in accordance with the Planning Permission granted.

In the case of a house in the course of construction a solicitor cannot undertake this and where the lending institution is paying out the loan by instalments the solicitor's Undertaking to the lending institution should be amended accordingly.

If the undertaking to the lending institution is not amended and if a practitioner pays out a loan cheque or any instalment of a loan to his client before the house is completed he is at risk if there is a failure by his client to comply with the planning permission granted.

NEW HOUSE GRANTS

Published in Law Society Gazette, December 1990

The Conveyancing Committee's attention has been drawn to the fact that under the 1990 Housing (New House Grant) Regulations (Statutory Instrument No. 34 of April 1990) it is an integral condition of the scheme that the house in respect of which a Grant is being paid to a first time purchaser of a new house must be built by a contractor holding a Tax Clearance Certificate or a current Form C2. When solicitors are advising first time purchasers of new houses who would be eligible for the grant, they should alert them to the above conditions.

The clients should be advised that the conditions are set out in the explanatory memorandum which is issued to each applicant with the new house grant application form. Bearing in mind that most purchasers will be relying on the payment of the grant to enable them to complete the purchase, it would appear that a solicitor must advise a purchaser to check that the builder has the necessary documentation before entering into the contract. If the builder does not, then the purchaser should insist that the contract is conditional on the builder getting the necessary documentation to enable them to get provisional approval and payment of the grant prior to completion of the purchase.

DOCTRINE OF CAVEAT EMPTOR WITH REGARD TO THE STRUCTURE OF A PROPERTY

The attention of practitioners is drawn to the Practice Note on this topic published by the Conveyancing Committee in the March,1992 edition of the Gazette (and which is reproduced at page 13.39 hereof)

BUILDING CONTRACT FOR "ONCE-OFF" HOUSES

The Conveyancing Committee had considered preparing a standard building contract for "once-off" houses but decided that the existing building contract with amendments is sufficient to deal with the "once-off" house.

The Committee suggests that the contract be amended by attaching a separate page to the existing document in the following form:-

1. The provisions of Condition 6 herein and Condition 10 herein shall not apply to this contract.
2. If notice has been served on the Contractor by the employer pursuant to Condition 5 hereof, then and in any such case, the following provisions shall take effect, without prejudice to any other remedies the employer may have against the Contractor pursuant to the terms of this agreement, at Common Law, or by statute:-
   a. the employer may employ and pay any workman or other person or persons to carry out and complete the works and to use all materials, temporary buildings and plant then at the works necessary for the purpose;
   b. the Contractor shall if so required by the employer assign to the employer, without payment, the benefit of any contract or contracts he may have made with any person or persons firm or corporation for the supply of any materials or for the execution of any of the works.
3. The following special conditions shall also apply to this contract:-

   Care should be taken by solicitors acting for the employer to ensure that the matters here have been carefully considered before the contract is entered into.

   1. *Plans and Specification*

      Plans in this context mean at least a house plan and a site layout plan. They should include sections and elevations as well. The specification should set out in writing in exact detail what materials, fittings and standards the builder is to use in the construction of the house. Plans and specification of a very general nature are not suitable for a once-off house. The sort of items that require to be detailed include:-

      (a) finishes;
      (b) allowances for wallpaper, sanitary ware and fireplaces;
      (c) extent of tiling in bathroom and kitchen;
      (d) boundary wall, fences, site works;
      (e) central heating or back boiler;
      (f) immersion heater;
      (g) insulation;
      (h) septic tank/soak pit.

      The plans and specification should be in duplicate. Both should be dated, signed and initialled by both parties for the purposes of identification. One

BUILDING CONTRACT FOR "ONCE-OFF" HOUSES

(Contd.)

copy of each is then retained by each party. If plans and/or specification are not in order and the facilities to have the plans revised or the specification redone are not readily available then the best way of dealing with the matter is to add a list of the points giving as clear and accurate a description of the corrections as is possible and this note should be signed or initialled by both parties.

2. It must be clearly specified who is responsible for seeing that the site layout and the position of the dwelling and septic tank are in accordance with the plans approved by the Planning Authority. A standard requirement on any mortgage or house purchase is a certificate from an architect or engineer that the house has been built in accordance with the planning permission. Some banks and buildings societies also have special requirements that a suitably qualified architect or engineer must check the house in the course of construction at certain crucial stages. For example they require that the foundations be checked before the concrete is poured etc. It must not be assumed that all architects or engineers will automatically give these certificates. The form the building society requires should be obtained and a copy given to the architect or engineer before work starts to make sure he or she is willing to undertake this commitment.

3. If the builder is arranging for the planning permission (and if relevant the building bye laws approval) then it would be normal for him to procure a certificate of compliance with the planning permission and to furnish the necessary certificate after completion.

4. *Possession*

   Condition 1 of the agreement provides that the employer will give the contractor possession of the site. It is vitally important than an employer should not commit himself in an agreement to do this unless he is already the owner of the property.

5. *Site Conditions*

   It must be clear what site works the contract price includes. If a lot of earth removal has to take place before building can commence is this included in the price? If the contractor encounters unexpectedly difficult ground conditions such as a soft spot and has to go down seven foot into the ground for foundations it should be clear who is to pay for the extra cost of this work. Contractors, particularly those who construct a large proportion of the building off site, frequently give a quotation without inspecting the site on the basis of a site being reasonably level and soil conditions being normal. Both parties to a building agreement should take great care that the position in relation to the costs of such works is clearly set out in writing.

6. It frequently arises in relation to once-off houses that the parties agree that

BUILDING CONTRACT FOR "ONCE-OFF" HOUSES

(Contd.)

the employer will arrange to have certain parts of the completion of the house, such as the wiring or plumbing carried out by himself or some other contractor on his behalf. If such an arrangement is made the terms of it should be confirmed either in the agreement or by letter. In particular, it should provide that the contractor shall be entitled to give the employer written notice if the failure to complete any work is causing delay and should provide who is to be responsible for any loss as a result of any such delay.

7. *Payment*

Practices vary as to how payment for the contract is to be made. All that is essential is that whatever payment schedule is agreed between the parties be clearly set out in the schedule of the agreement. Provisions should be made for interest on late payments and for a retention to cover defects appearing after completion.

Published in Law Society Gazette, July/August 1992

BUILDING CONTRACTS

LENDING INSTITUTIONS' REQUIREMENTS

The inclusion of special conditions in building contracts which limit a purchaser's rights may result in the purchaser's solicitor being unable to certify for a lending institution. Many loan approvals contain a condition that only the standard form of building contract may be used. Accordingly, members are advised to check all amendments to the standard building contract to ensure that they do not prevent them issuing a certificate of title in accordance with the lending institutions' requirements.

It has also come to the notice of the Committee that certain contracts are being produced on word processors which claim to be the standard contract but do not include all the clauses.

Where a solicitor has obtained the necessary consent from the Law Society either to reproduce the building contract or to prepare a document which refers to the building contract as being incorporated therein, the following clause must be used in the contract:-

> "This contract shall be read as if it contained unamended all the terms and conditions of the Building Agreement issued jointly by the Incorporated Law Society of Ireland and the Construction Industry Federation in so far as said terms or conditions are not hereinafter altered or varied".

Published in Law Society Gazette, October 1992

NEW HOUSE GRANTS FOR FIRST-TIME PURCHASERS

The following communication has been forwarded to the Conveyancing Committee from the Department of the Environment.

"One of the statutory conditions of the New House Grant Scheme is that either a C2 No. or a Tax Clearance Certificate Expiry Date is provided in respect of the builder. The absence of this documentation renders first-time purchasers of a new house ineligible for the £2,000 grant.

"The Department has insofar as possible taken steps to ensure that applicants are aware of the conditions of the scheme. However, it is our experience that some applicants complete the purchase of their houses before applying for a grant.

"It would be appreciated if in the course of advising clients, your members would ensure that they are aware of this condition, so that they are not deprived of a grant if they are otherwise eligible."

Published in Law Society Gazette, April 1993

NEW HOUSE GRANTS

The Department of the Environment has notified the Conveyancing Committee that, as announced in the recent budget statement, the New House Grant has been increased from £2,000 to £3,000. The Department says that the increased rate will apply to all applicants where:-

a a contract to purchase is made on or after 25 February, 1993; or

b where a contract to build is made on or after 25 February, 1993; or

c in any other case where the required contract or contracts for building services to the value of at least £15,000 is/are made after 25 February, 1993 or the poured concrete and concrete blocks used in the reconstruction of the house are liable to VAT at 21%.

Documentary evidence will be sought so that entitlement to the higher rate of grant can be established. The existing £2,000 grant will continue to be payable in other cases.

Published in Law Society Gazette, May 1993

RETURN OF COMPLETED BUILDING CONTRACT/ AGREEMENT FOR SALE

The Conveyancing Committee has received a complaint from a member that a firm of builders operating in the Dublin area has apparently instructed its solicitors not to return the parts of the building contract and agreement for sale executed by the builder/vendor to the purchaser's solicitors until the closing.

Such a practice is clearly unacceptable. A solicitor acting for a builder/vendor who receives such instructions from his client should firstly advise his client that this practice is deemed unacceptable by the Conveyancing Committee and if the client persists in instructing the solicitor not to return completed contracts until the closing then the builder/vendor's solicitors is under an obligation to advise the purchaser's solicitors when sending out the building agreement and contract for sale, that these documents will not be returned completed by the builder/vendor until the closing date.

A solicitor for a purchaser is in considerable difficulty in preparing a certificate of title for a lending institution if that solicitor is not in possession of parts of the contract completed by the builder/vendor.

Published in Law Society Gazette, August/September 1995

HOMEBOND PROTECTION

STAGE PAYMENTS

The Conveyancing Committee is concerned to note that the practice of Builders requiring stage payments to be made for the purchase of the new estate type houses still persists in a number of areas.

In general, the Committee disapproves of the stage payment purchase practice and is making representations to the Construction Industry Federation for its discontinuance.

While the increased and extended protection afforded by the HomeBond Stage Payment Bond is welcome, it, of itself, cannot protect purchasers from the considerable difficulties and problems which would arise if a Developer were to become insolvent after stage payments had been made and before a transfer of title had been executed in their favour.

Accordingly, for so long as the stage payment purchase practice persists, the Committee emphatically advises practitioners that in order to protect their purchaser clients they should ensure that title to the site should pass from the Developer to their clients on the occasion of the making of the first stage payment.

In issuing its foregoing recommendation, the Committee wishes to state that it is not intended to apply to purchasers of once-off new houses which it considers will be matters of contracts to be negotiated by the parties involved.

Published in Law Society Gazette, June 1996

STATUTORY INSTRUMENT NO 85 OF 1997

SOLICITORS (PROFESSIONAL PRACTICE, CONDUCT AND DISCIPLINE) REGULATIONS 1997

The Law Society of Ireland, in exercise of the powers conferred on them by section 5 of the Solicitors Act, 1954 and section 71 (as amended by section 69 of the Solicitors (Amendment) Act, 1994) of the Solicitors Act, 1954 hereby make the following Regulations:

1. (a) These Regulations may be cited as the Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997

   (b) These Regulations shall come into force on the first day of April 1997

2. (a) In these Regulations:

   'related to the purchaser' means related by blood, adoption or marriage

   'residential unit' means a house or apartment intended for use as a residence

   'solicitor' has the meaning assigned to it in section 3 of the Solicitors (Amendment) Act, 1994 and includes two or more solicitors acting in partnership or association

   (b) Other words and phrases in these Regulations shall have the meanings assigned to them by the Solicitors Acts, 1954 to 1994

3. The Interpretation Act, 1937 shall apply for the purposes of the interpretation of these Regulations, as it applies for the purpose of the interpretation of an Act of the Oireachtas, except insofar as it may be inconsistent with the Act of 1954, the Act of 1960, the Act of 1994 or these Regulations

4. (a) A solicitor shall not act for both vendor and purchaser in the sale and purchase for value of a newly constructed residential unit or a residential unit in course of construction, where the vendor is the builder of that residential unit or is associated with the builder of that residential unit

   (b) The prohibition in sub-clause (a) of this Regulation shall not apply in the following situations unless there is a conflict of interest between the vendor and the purchaser:

      i) where the vendor and the purchaser are associated companies or the purchaser is a member, director or employee of the vendor or an associated company of the vendor

      ii) where the vendor or, where the vendor is a corporate entity, any member or director of the vendor, is related to the purchaser.

5. Without prejudice to the generality of section 3 (as amended by section 24 of the Act of 1994) of the Act of 1960, any breach of these Regulations may, upon due enquiry by the Disciplinary Tribunal pursuant to section 7 (as substituted by section 17 of the Act of 1994) of the Act of 1960, be found by the Disciplinary Tribunal to be misconduct within the meaning of section 3 (as amended by section 24 of the Act of 1994) of the Act of 1960.

Published in Law Society Gazette, March 1997

NEW HOUSES

HOMEBOND AND DEPOSIT CHEQUES

Practitioners acting for purchasers are reminded that, where it is a condition of the contract that the deposit be released to the vendor, then in order for the purchaser to avail of the protection afforded by HomeBond the deposit cheque should be made payable to the party who is registered under the HomeBond scheme.

Therefore, where booking deposits have already been paid by the purchaser to an agent or to someone other than the party registered with HomeBond, confirmation should be given by the vendor's solicitor that this money has been passed on to the registered party.

Purchasers' solicitors should also ensure that the original HB10 is in their possession before the deposit cheque is passed on to the vendor's solicitor (made payable to the registered party). If the original HB10 is not available, confirmation should be furnished by the vendor's solicitor that any deposit paid will be held by them as stakeholder until the original HB10 (with schedules attached) is in the purchaser's solicitor's possession.

Published in Law Society Gazette, April 1998

RE:CLOSING OF SALES WITHOUT GUARANTEE CERTIFICATES

The Editor,
Gazette.

Dear Editor,

We would like to draw your readers' attention to a concern which has been growing regarding the number of residential property sales that are closed prior to the issue of the N.H.B.G.S. Six Year Guarantee Certificate.

The practice of closing a sale without evidence of our Guarantee Certificate having been issued leaves house purchasers in a position that they may be purchasing an uncertified dwelling either because of the fact that the final inspection has not taken place or that the Certificate has not been issued for reasons of certain additional works that have been specified as a pre-condition for its release.

N.H.B.G.S. procedures are designed to ensure that, subject to a final main structure inspection which takes place well before completion, the Guarantee Certificate is in the hands of the builder for passing on to the purchaser. We would therefore ask practitioners to encourage good practice and ensure that the Certificate is available to purchasers at the closing of sales.

Under normal circumstances there should be no reason whatsoever for the non-observance of the foregoing procedures thereby affording the purchasers the protection intended to be conferred on certification.

Yours sincerely,

Michael Greene
Managing Director
National House Building Guarantee Scheme

Published in Law Society Gazette, November 1994

CLIENT MEMORANDUM ON HOMEBOND

Since January 1995 the former National House Building Guarantee Scheme has been known as HomeBond.

This scheme was first established in January 1978 to guarantee purchasers of new dwellings, defined as "house, bungalow, maisonette or flat", protection against major structural defects for a certain number of years where they could not get satisfaction from the original builder. It has been expanded over the years to protect against major non-structural defects and loss of deposits or stage payments.

The first document a purchaser gets under the scheme is a form HB47. This acknowledges registration of the dwelling under the scheme and must be given by the purchaser to its building society or lending institution when applying for a loan.

When a purchaser enters into a contract to buy a dwelling in the course of construction he/she usually signs two contracts. One is the building contract whereby the builder agrees to build the dwelling in accordance with plans and specifications for a particular price. The other is the agreement for sale which deals with the transfer of ownership of the site on which the dwelling is built to the purchaser. If the builder is registered with HomeBond, in addition to these contracts, the purchaser enters into a guarantee agreement. The guarantee agreement is called "Form HB10". It is two forms in one and it must be signed by both parties. In the guarantee agreement the builder undertakes, at his own expense, to obtain the HomeBond final notice in respect of the dwelling provided the purchaser complies with the rules of the scheme. The final notice, which is called the "Form HB 11", is evidence that the HomeBond cover is in place. Under the scheme as it now exits, this cover lasts for ten years. When the contracts are exchanged the builder's solicitor retains one part of each contract and the guarantee agreement and the purchaser's solicitor retains the other parts.

While the construction work on the dwelling is in progress, two inspections are made by the Department of the Environment inspectors on behalf of HomeBond. Upon receipt of a satisfactory final inspection report, HomeBond will issue the final notice form (HB11). The last inspection on behalf of HomeBond should be arranged by the builder when the property is roofed and watertight, i.e. some time before it is finished, so that the final notice form HB11 should be available by the time the property is finished. The final notice is issued to the builder who passes it on to the purchaser on the closing of the sale. If the final notice is not available on the closing of the sale it may be because the builder was late in arranging the inspection or it may be because there was a problem with the final inspection and the certificate will never issue. **A purchaser should not complete a purchase without getting the final notice** or being satisfied that it is going to issue.

The HomeBond cover guarantees the house against:-

1. Major structural defects for ten years. Such defects are defined as any major defect in the foundations of a dwelling or the load bearing part of its floors, walls and roof or retaining walls necessary for its support which affects the structural stability of the dwelling;
2. Major non-structural defects which might lead to smoke or water penetration of the completed home.

Minor structural defects and other non-structural defects are not covered by the HomeBond scheme. The cover also specifically **excludes** the following:-

1. any defect consequent upon negligence other than that of the Member (i.e. the builder) or a sub-contractor;
2. any defect for which compensation is provided by legislation or which is covered by insurance;
3. any defect arising in consequence of drawings, materials, design or specification provided by or on behalf of the purchaser;
4. any defect caused by or damage to anything not built into the dwelling pursuant to the contract for sale or building contract entered into by the builder and the purchaser;
5. hair cracks, shrinkage, expansion or dampness due to normal drying out of the dwelling or condensation;
6. wear and tear or gradual deterioration;
7. consequential loss whatsoever or howsoever arising;
8. any defect in central heating;
9. any defect consequent upon installation in or upon the dwellinghouse by the builder or otherwise of any lift or swimming pool.

The ceiling on the amount of compensation that will be given by HomeBond (in cases of the defects covered under the Scheme) is now £30,000 per dwelling and in respect of stage payments and defects £400,000 per builder. These limits are important, particularly the latter. A limit of £30,000 per dwelling might be inadequate in a bad case. If a substantial builder became insolvent a limit of £400,000 might be completely inadequate. Some comfort can be obtained from the fact that HomeBond take some precautions and try to limit the number of houses registered for any one builder.

In the event of a problem arising within the first two years of the ten year cover a purchaser must seek redress from the builder in the first instance. After the first two years a purchaser

CLIENT MEMORANDUM ON HOMEBOND

(Contd.)

may apply to HomeBond directly in the event of a claim. Previously under the scheme first recourse had to be to the builder regardless of when the claim was made.

Since 1990 the HomeBond scheme also gives protection to purchasers who lose deposits or stage payments on homes due to the insolvency of a builder who is registered under the scheme.

This deposit protection is in two tiers. In the first tier HomeBond will repay lost deposits and contract payments resulting from the builders' bankruptcy or liquidation subject to a **maximum of 15% of the purchase price or IR£20,000, whichever is the lower**. It operates from the date of registration with HomeBond for a period of two years.

The second tier operates from the date of issue of the final notice for a period of six months and gives similar cover up to a maximum of 50% of the purchase price or £50,000, whichever is the lower.

Where a final notice has issued, any claim under the stage payment cover must be submitted within six months of the date of the issue of the final notice.

A purchaser may request HomeBond to extend either of the above time limits. The request in either case must be made before the time limit runs out. Where such a request is received then the time period will be extended for an additional period of six months.

A purchaser should monitor the construction of the dwelling on a regular basis to make sure that it is proceeding at a satisfactory pace and take action if the time limit on the deposit or stage payment cover is running out. It is important to note that your solicitor will not monitor these time limits. Your solicitor will however advise you if you are not sure what action to take.

Where a deposit is covered under the HomeBond scheme solicitors would normally agree on the purchaser's behalf to the deposit being paid to the builder (as an alternative to requiring it to be held by the builder's solicitor) unless they receive written instructions to the contrary from their clients. Therefore if a purchaser does not wish the deposit or stage payment to be paid to the builder he/she should notify his/her solicitor in writing without delay.

If a purchaser pays a deposit to a selling agent it is of vital importance that the purchaser ascertains on whose behalf the selling agent is accepting the deposit in order to establish whether or not the company or builder on behalf of which the deposit is being received is a registered member of HomeBond.

Membership of HomeBond does not automatically entitle the builder member to deposit cover. In every case therefore it is important to ensure that deposit cover does apply. **Any deposit paid whether to a builder or selling agent, before the house is registered with HomeBond is NOT covered.**

A purchaser paying a deposit or booking deposit before knowing whether the dwelling is registered with HomeBond should ensure that it is held by the solicitor for the builder as stakeholder.

The only circumstances in which HomeBond will guarantee the refund of a deposit is where a purchaser is at a loss due to the insolvency or fraud of the builder member. HomeBond does not cover a situation where a builder refuses to refund a deposit in other circumstances, for example, where a dispute has arisen as to a purchaser's entitlement to a refund.

A purchaser must satisfy HomeBond that he/she has been unable (having used reasonable endeavours) to obtain a refund of the deposit paid and that this arises by reason of the insolvency or fraud of the builder member. Except in very unusual circumstances a purchaser would not be required to take legal proceedings against the builder before HomeBond would deal with this claim.

Stage payments are not usual in the greater Dublin area but elsewhere in the country are very common. In the case of stage payments being made often the total amount paid prior to completion of the transaction may exceed the monetary limit imposed by HomeBond. **In such circumstances while a purchaser would be entitled to the protection of the cover given by HomeBond up to the limit imposed, the excess would not be protected and could be lost in the event of the builder's insolvency or fraud. Once it is paid over to the builder it makes no difference whether this was done through the purchaser's solicitors and/or the builder's solicitors.**

Over two thousand builders are now members of HomeBond. A small percentage of builders are still not covered and it is wise to double check that a builder is registered under the scheme. It is a fact that some builders advertise that houses are covered by HomeBond before they are registered and indeed before they are sure that they will secure registration. **If you phone HomeBond at 1 850 306 300 they will check and tell you if a particular builder and house are registered.**

CLIENT MEMORANDUM ON HOMEBOND

(Contd.)

Our advice is not to buy a new property unless it is covered by HomeBond.

The major advantage of HomeBond is a degree of peace of mind given by the knowledge that it investigates. HomeBond does its best to ensure that its members have the technical know-how necessary to do the job and also check the financial affairs of every builder that joins the scheme.

NOTE

This client memorandum may be copied and given to clients who are buying new homes that are registered with HomeBond

Thanks to Mr. Rory O'Donnell who provided the Conveyancing Committee with this client memorandum on 9th June 2000.

UPDATE: Please consult current HomeBond documentation for any increase in the level of cover provided and for any other changes in terms and conditions.

HOMEBOND WARNING

HomeBond has revised its documentation to incorporate a HomeBond Agreement separate from the HB10 and the HB11 which must be completed by the purchaser and the HomeBond member.

Many of the concerns in relation to the operation of the HomeBond scheme have not been addressed in the new documentation notwithstanding strong representations by the Law Society. The following issues remain the principal concerns:

1. DEPOSITS

Deposits, whether booking or contract, are not secured under the HomeBond scheme if paid before the date of registration of the dwelling in respect of which the payment has been made. Registration of the HomeBond member is not sufficient and subsequent registration is not retrospective.

2. HB10

Ensure that you get the original HB10 and not a copy (the original may have been sent to another prospective purchaser).

3. ADDRESS OF PROPERTY

If the address on the HB10 differs from that in the contract documentation, obtain a certificate from the vendor's solicitor confirming the property is one and the same.

4. BOOKING DEPOSITS

The stage payment cover provided by the HomeBond scheme is available only in respect of payments made to the HomeBond member. If the site vendor and developer are different entities then care should be taken to ensure that any deposits paid are covered by the HomeBond scheme or, if not covered, are held by the vendor's solicitor as stakeholder pending completion.

5. LIMITATION ON DEPOSIT COVER

Notwithstanding the huge increase in the price of new homes, any payments made to the member before the issue of the form HB11 (the Final Notice) are covered only up to the sum of £20,000 or 15% of the purchase price, whichever is the lesser. Where the Final Notice has issued then payments are covered up to the sum of £50,000 or 50% of the purchase price, whichever is the lesser. Again, care should be taken to ensure that any sums paid in excess of these amounts are held by the vendor's solicitor as stakeholder pending completion.

6. LIMIT OF LIABILITY

Clause 4.2 of the HomeBond Agreement provides for an overall limit of liability in respect of any one Member of £400,000 subject to a discretion to HomeBond to increase that amount from time to time. Despite representations made to them, HomeBond have declined to review this figure which in the current market is totally inadequate.

7. HB11

It is essential that on completion of the purchase, the form HB11 is furnished to the purchaser's solicitor.

8. LIMITATIONS OF SCHEME

While the cover provided by HomeBond for major defects over a 10 year period is very valuable, it has many limitations (not least of which being the overall limit of liability in respect of any dwelling of £30,000). It is essential therefore that purchasers get a structural defects indemnity under seal, (or at least ensure that the building agreement is executed under seal, so that they get the benefit of the structural defects cover contained therein), and that the purchaser's common law rights are not prejudiced by the production of the structural defects indemnity.

Published in Law Society Gazette, July 2000

UPDATE: Please consult current HomeBond documentation for any increase in the level of cover provided and for any other changes in terms and conditions.

PREMIER GUARANTEE SCHEME

The Conveyancing Committee does not recommend one product or insurance policy over another where there are competing products or policies in the market place.

The Committee has examined the new Premier Guarantee Scheme, launched as an alternative to HomeBond, and has formed the opinion that it offers an alternative which should be acceptable to conveyancing practitioners. In doing so the Committee repeats that it is not favouring or endorsing the Premier Guarantee Scheme over the HomeBond Scheme. Either is acceptable as a form of cover from a conveyancing perspective.

Practitioners should be alert to the fact that if a developer offers the Premier Guarantee Scheme on the purchase of a new house, the building agreement, undertaking, certificate of title and letter of loan offer should be amended/qualified appropriately with the consent of the lender.

Practitioners should be aware that it appears that a number of lenders have not yet approved the Premier Guarantee Scheme.

Published in Law Society Gazette, May 2002

UUNFAIR TERMS IN BUILDING AGREEMENTS

The Conveyancing Committee has received numerous complaints from practitioners to the general effect that some builders' solicitors still insist not only on inserting terms in building agreements which are in breach of the Unfair Terms in Consumer Contracts Regulations 1995 but persist in refusing to remove such terms when the fact of their being in such breach is pointed out.

Builders' solicitors should be aware that the High Court Order obtained by the Director of Consumer Affairs last year contains a specific prohibition on the use, or continued use, of such terms.

The Committee will be vigilant to ensure that the use of such conditions is eliminated as far as possible, and to this end, practitioners are asked that if they meet a persistent refusal to remove such terms, they should bring the matter to the attention of the Director of Consumer Affairs and / or the Conveyancing Committee.

Colleagues are further advised that the continued use of such terms is in breach of the Regulations and the Order of the High Court. The Director has indicated her willingness to issue High Court proceedings against specific builders and solicitors who continue to use the prohibited terms.

PRACTITIONERS ARE REMINDED OF THE FUTILITY OF INSERTING SUCH TERMS, AS THEY ARE UNENFORCEABLE.

Published in Law Society Gazette, October 2002

HYBRID AGREEMENTS FOR SALE OF NEW HOUSES

Concerns have been expressed to the Conveyancing Committee about the practice of builders' solicitors issuing documents which are an amalgam of excerpts from the standard Building Agreement and Contract for Sale. Practitioners should remember that, while in practical terms the sale of a new dwelling is a single transaction as far as the client is concerned, from the legal point of view, two separate transactions are involved. The committee, in ease of the profession generally, has over the years encouraged universal acceptance of the standard documentation, and is always reluctant to see any departure from it.

The view of the committee is therefore that in an appropriate transaction, the two standard documents should be used. This saves trouble, not only for the purchaser's solicitor, but also for the vendor's, as s/he is not obliged to deal with queries in relation to the minutiae of a non-standard document. It also allows the purchaser's solicitor to give an unqualified certificate of title as the standard certificate of title requires the purchaser's solicitor to certify that the property was acquired "on foot of the current Law Society's Conditions of Sale and/or Building Agreement". The committee has previously confirmed in its practice note published in the March 2001 issue of the Gazette, inter alia, that this phrase is intended to mean, in relation to the purchase of a new dwelling house, that both documents should be used.

As usual, any amendments or additions to the standard documentation should be dealt with by Special Condition.

Published in Law Society Gazette, July / August 2002

INDEMNITY RE ROADS, SERVICES

Queries have arisen recently in relation to the question of whether a separate indemnity in relation to roadways, services, etc. in a new building estate is required, having regard to the provisions of Clause 10(b) of the Law Society / CIF Building Agreement (2001 edition).

The view of the committee is that such an indemnity should be sought and furnished, for the following principal reasons:

All of the relevant issues are contained in one document, the benefit of which may be assigned conveniently.

The document is under seal, while building agreements generally are not.

The normal form of indemnity imposes further obligations on the builder, in that the builder must indemnify the purchaser in relation to any loss arising as a result of his failure to lay or maintain such roads, services, etc.

Published in Law Society Gazette, December 2002

NEW HOUSES AND EXEMPTED DEVELOPMENT

It has been drawn to the attention of the Conveyancing Committee that in a number of instances, developers, in the course of building houses, have been making variations in reliance on the exempted development regulations. Such variations can involve the addition of extensions or conservatories, conversion of attic space, or revision of internal layout (with or without alterations to or additions of windows).

A planning permission must be implemented in its entirety, or not at all. The implementation of the planning permission entails the construction of the dwelling house in according with the plans lodged and on foot of which the planning permission issued. Where a developer seeks to carry out alterations or to add extensions or conservatories in reliance on the exempted development regulations, he will first need to ensure that the house is fully complete in accordance with the planning permission and plans on foot of which the planning permission issued, and that only then the extension or additional work is carried out.

Solicitors acting for purchasers where such extensions or alterations are carried out after the house has been built, should get an architect's opinion of compliance in the usual form and a further opinion confirming that the extension or works comprise exempted development and are in accordance with the Building Control Act and Regulations.

Published in Law Society Gazette, December 2002

LAND REGISTRY APPROVED SCHEME MAPS

It has been brought to the attention of the committee that it is becoming a frequent occurrence that a solicitor acting for the purchaser of a new house or apartment would be required by the contract to accept an undertaking on closing from a builder's solicitor in respect of the Land Registry Scheme Map and close the purchase based only on a copy map provided for identification purposes. It seems that this new practice is designed to limit the builder's exposure to the cost of amending Land Registry scheme maps according as the development progresses.

From a conveyancing point of view this new practice is completely unacceptable and all solicitors are encouraged to ensure that it is stamped out before it gains any further ground in practice. The acceptance of such a condition in a contract means that a purchaser cannot proceed, following closing and stamping, to register the client's title or the lender's mortgage, where applicable. In registration terms it places the client's and the lender's priority in great jeopardy and if accepted by the borrower's solicitor, places that solicitor in breach of his or her obligations under the undertaking given to the lender. It is the view of the committee that no solicitor should expose their client in this manner to the risks associated with a builder going into liquidation or otherwise going out of business in circumstances where a development may be unfinished and where the architect or engineer on a project has not provided Land Registry approved scheme maps for the client's site.

The committee will be urging all the lending institutions that participate in the certificate of title system to refuse to accept proposed qualifications to solicitors' undertakings or certificates of title in this regard.

Published in Law Society Gazette, November 2004

ACTING FOR BOTH VENDOR AND PURCHASER IN SALE AND PURCHASE OF NEW HOUSES AND APARTMENTS: NOTICE TO ALL PRACTISING SOLICITORS

The attention of practising solicitors is drawn to the Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997 (S.I. 85/1997).

Under these regulations a solicitor is prohibited from acting for both vendor and purchaser in the sale and purchase for value of a newly constructed residential unit or a residential unit in course of construction, where the vendor is the builder of that residential unit or is associated with the builder of that residential unit.

This prohibition does not apply in the following situations unless there is a conflict of interest between the vendor and the purchaser:

1. where the vendor and the purchaser are associated companies or the purchaser is a member, director or employee of the vendor or an associated company of the vendor;

2. where the vendor or, where the vendor is a corporate entity, any member or director of the vendor, is related to the purchaser by blood, adoption or marriage.

In the regulations "residential unit" means a house or apartment intended for use as a residence.

Any breach of the regulations may, on due enquiry by the Solicitors Disciplinary Tribunal, be found to be misconduct.

Practitioners from all areas of the country have brought to the attention of the Law Society the fact that some solicitors acting for builders / vendors in the sale of new estate houses or apartments are also routinely acting for purchasers of those new residential units, in apparent breach of the provisions of the above statutory instrument. This activity has been reported both in cases where the solicitor acting for the builder / vendor acts for the occasional purchaser in the development and in cases where the solicitor acting for the builder / vendor systematically acts for all purchasers in the development. It is a source of great concern to the Society that some practitioners continue to act in breach of the provisions of S.I. 85/1997 in this manner, notwithstanding the fact that the Society has previously successfully prosecuted such a breach of the law before the Disciplinary Tribunal, as reported in the November 2004 issue of the Law Society Gazette.

Breaches of S.I. 85/1997 will be referred to the Complaints and Client Relations Committee and may result in referral to the Disciplinary Tribunal.

Any solicitor who may already be in the course of acting for both parties in the sale and purchase of a new residential unit or a residential unit in the course of construction, in

breach of S.I. 85/1997, should immediately make arrangements to cease to so act in cases where the sale has not yet taken place and where a lending institution or other third party has not already acted in reliance upon an undertaking given by the solicitor acting in the transaction.

REGISTRAR OF SOLICITORS and
CONVEYANCING COMMITTEE

Published in Law Society Gazette, December 2005

BREACH OF UNFAIR TERMS ORDER MAY BE DEEMED TO BE MISCONDUCT

HIGH COURT ORDER

On 20th December 2001, the High Court found that certain terms that had been used in building agreements were unfair within the meaning of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 ("the Unfair Terms Regulations"). This Order was based on an application by the Director of Consumer Affairs pursuant to the Unfair Terms Regulations, which application was prompted by numerous complaints by purchasers' solicitors to the Conveyancing Committee. The Order directed that no person should use such terms or terms having a like effect in a building contract.

Despite the making of the said Order, a number of solicitors for builders are still using the prohibited terms and terms having the like effect as those found to be unfair. The Complaints and Client Relations Committee (formerly known as the Registrars Committee), following discussions with the Conveyancing Committee, has indicated that it will consider complaints against solicitors alleging breaches of the High Court Order. Any complaints arising from any such alleged breach that are upheld may be deemed to be misconduct and, if so found, will be dealt with accordingly.

REGISTRAR OF SOLICITORS and
CONVEYANCING COMMITTEE

Published in
Law Society Gazette,
December 2005

RETENTION OF UNITS IN APARTMENT DEVELOPMENT BY DEVELOPER: STAMP DUTY TREATMENT AND PRECEDENT DOCUMENTATION

A solicitor acting for a developer of an apartment development will occasionally be instructed that the developer wishes to retain one or more units in the development. Typically this will occur in a situation where the developer is building a block of apartments that it is selling by way of long leases. It contracts in the usual way to transfer the freehold reversion and the common areas to the management company when the last lease is granted. During the course of development it decides to retain one or more apartments for itself. As the developer cannot grant a lease to itself in respect of the apartment(s) to be retained, issues arise as to how and when the freehold reversion and the common areas will be transferred and as to how the title to the retained unit(s) will be held by the developer and any subsequent purchasers from the developer.

In the past, the practice was for the unsold apartment(s) to be transferred, together with the freehold interest and the common areas, by the developer to the management company and the management company would grant a leaseback of the unsold apartment(s) to the developer. It was Revenue practice in the above circumstances not to pursue a charge to ad valorem stamp duty.

The Conveyancing Committee proposed to Revenue a new way of dealing with this matter and a set of precedent documentation was drafted which accompanied the proposal. Revenue confirmed that the new procedure will not give rise to a charge to ad valorem stamp duty in relation to the retained apartments on the basis that no beneficial interest passes by virtue of any of the instruments executed in connection with the new procedure.

The structure of the new procedure is that the developer grants a lease of the unit it wishes to retain to a nominee reciting the fact that this lease is being granted in trust for the developer, and in order to facilitate the transfer of the freehold reversion and common areas to the management company, and to enable the legal structure for the apartment block to be put in place. Immediately the lease is granted, the nominee/trustee executes a declaration of trust in favour of the developer, the developer transfers the freehold reversion of all the leases, including the one to the nominee/trustee, to the management company and finally the nominee/trustee assigns the lessee's interest under the lease of the unit intended to be retained back to the developer.

More detailed particulars of the exchange of correspondence between the committee and Revenue on the stamp duty treatment of this matter and outlining the new procedure, together with the precedent documentation, is available by logging on to the members' area of the Law Society website and clicking in turn on Society Committees, Conveyancing, and Precedent Documentation.

Published in Law Society Gazette, June 2006

LAND REGISTRY BOOKLETS OF TITLE ON CD-ROM FOR NEW HOUSES

It has come to the notice of both the Technology and Conveyancing Committees that the issue of booklets of title by builders' solicitors on CD ROM / DVD is starting to become prevalent. Both committees agree that the procedure should only be used to issue documentation where the title is Land Registry and relates to new housing estates only.

This practice note is accordingly being issued by the Conveyancing and Technology Committees so that practitioners are aware of the practice recommended by both committees and that the matter is receiving the continuing attention of both committees. It should be emphasised that given the speed of the development of technology and the current e-conveyancing initiative being carried out by the Law Reform Commission, it is likely that the comments in this practice note may not represent the views of the Committees for more than the short term.

The following is a summary of the committees' views on the matter.

1. While the committees are not endorsing the practice, they are aware that it is occurring, and, if it is being adopted, the following matters are considered by the committees to be good practice:
   - The purchasers' solicitors are entitled to obtain the documentation in hard copy at any time.
   - All closing documents must be in hard copy.
   - The procedure is only appropriate to Land Registry cases and particularly new developments.
   - The furnishing of documentation by this method should be by agreement only and should not be imposed.
   - When issuing a booklet of title on CD ROM the vendor's solicitor's initial letter should contain the following sentence "You are entitled to receive a hard copy of this booklet of title immediately on request".

2. It must be borne in mind that even if there is agreement between the builder's solicitor and the purchaser's solicitor in the matter, such agreement may not necessarily extend to the lending institution or a subsequent purchaser's solicitor. It should further be borne in mind that the standard certificate of title envisages the delivery of hard copies of the documentation to the lending institution.

3. The matter remains under review.
   Where a booklet of title is being provided on CD ROM/DVD, the following procedures should be observed:
   - The materials should be accessible in an openly readable format, e.g. Adobe Acrobat.

- The format should also preserve the security of the original documents.
- All materials should be clearly indexed (by way of page number) and the index of documents should comprise the first page of the materials on the CD ROM / DVD. All pages should be numbered.
- The index should indicate the date on which the materials were complied.
- The CD ROM/DVD itself should be physically marked or labelled to generally indicate its contents and the date of its production.
- All materials should be easily printable in their entirety and clearly readable in their printed form.

Practitioners are also reminded of the issues dealt with in the practice note on the storage of documents in electronic format which deals with similar matters (published in the April 2005 issue of the Gazette, p37, and on the Law Society's website at www.lawsociety.ie/newsite/documents/committees/retention.pdf).

Published jointly by the Technology Committee and the Conveyancing Committee in Law Society Gazette, July 2006