

HEWITSONS

NEWBUILD WARRANTIES



Introduction

Any newly built (and most recently converted) residential properties will require either a Newbuild Warranty (“NW”) or Architect’s Certificate (“AC”) if they are to be freely saleable or acceptable as security for a mortgage loan. This guide aims to explain the differences between NWs and ACs and the inadequacies in the way ACs are presently used, as highlighted by a recent case: *Hunt and Other -v- Optima (Cambridge) Limited of 2014*.

1. What are NWs?

They are a guarantee against which owners of the new property can claim should they have problems resulting from inadequate design, build or construction by the builder/developer. A limited number of providers supply these guarantees, of which the National House Building Council (“NHBC”) is the best known. The builder/developer pays the provider a premium at the outset of the development, in return for which the provider inspects the project throughout its construction, issues a certificate as to its adequate completion and then a ten year guarantee.

During the initial two year period of this guarantee, most defects which derive from inadequate work by the builder/developer will be covered (and the builder/developer will be required by the provider to remedy them). For the remaining 8 years of the guarantee only major structural defects will be covered.

All major developers will provide a NW with houses they build, as will many smaller ones. From a buyer’s point of view, this is by far the best option since NWs represent an enforceable warranty backed up by a financial guarantee and, most importantly, any future buyer and mortgage lender will accept this.

2. What are ACs?

2.1 The term “Architect’s Certificate” is used to describe a certificate given by a suitably qualified professional (typically an architect, surveyor or chartered engineer) that works have been inspected and completed satisfactorily in their professional opinion. Thus, if it turns out the works were not done satisfactorily and the expert negligently certified that they had been, the expert could be liable to the person who relied on the certificate for the cost of putting the works right.



2.2 Where a NW has not been provided for a newly built or converted residential property, an AC is usually offered. This has generally been accepted by buyers and their lawyers without difficulty. In accepting ACs the benchmark has generally been taken as the requirements of the Council of Mortgage Lenders ("the CML") set out in their standard instructions to solicitors. In those standard instructions the CML indicates that an AC will be acceptable so long as the person giving it is suitably qualified and it follows a particular format. Those instructions actually set out the format of what is acceptable as a "Professional Consultant's certificate" ("PCC").

3. Why are AC's Inadequate

The established practice for acceptance of ACs has ignored some fundamental legal principles as to the enforceability of consultant warranties. The recent case referred to above has now highlighted these inadequacies which can no longer be ignored.

They are:

3.1 Whilst the consultant may owe the developer/builder contractual obligations to carry out services with reasonable skill and care, it will seldom have any contractual relationship with the buyer at all. Consequently, unless the warranty confirming that the services have been carried out with reasonable skill and care is in favour of the buyer and executed as a Deed, no effective warranty has been given to the buyer. ACs have not generally been executed as Deeds and, in particular, the PCC referred to above (which was itself the subject matter of this case) does not provide for execution as a Deed.

3.2 In the absence of an effective contractual warranty, the consultant in this case might still have been liable directly to the buyer for negligent mis-statement. However, for that to be the case, its warranty must have been given BEFORE THE BUYER CONTRACTED TO BUY THE HOUSE i.e. so the buyer could say it had relied on the warranty given by the consultant in deciding to buy. In practice such warranties are always given after exchange of contracts.

4. The Future for ACs

Until the CML changes its instructions regarding the acceptability of ACs, it is unlikely that the present position will change, notwithstanding the case referred to above. However, the advice which Hewitsons gives to its clients will now be as follows:

4.1 To any builder/developer of a newly built or converted residential property who is not offering a NW, we shall advise that they should arrange for a suitable professional consultant to provide an acceptable form of warranty which will be executed as a Deed in favour of future buyers.

4.2 We shall advise such buyers that they must insist on such a warranty regardless of the CML.

Given that it is in the interests of builders/developers to offer as little as they can in terms of an acceptable warranty, there will be cases where it is not possible for buyers to obtain what it is clear they should now insist on having. That being so, if you are buying a newly built or converted residential property where an AC is all that is offered, it would be as well to ensure at the outset that it will meet the necessary requirements by the obtaining of an independent survey for example.

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