

NEW DWELLINGS - RESPONSIBILITY FOR BUILDING DEFECTS

**Retirement Views,
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Does a resident holding an occupation licence have the right to require building defects to be remedied in a new dwelling? Who pays for the repair of any defects? Does the Building Act 2004 help? Who has the benefit of building warranties?

With the number of new retirement village units available, questions around these issues are becoming more common.

Residents' rights

Where a resident obtains the right to occupy a dwelling under an occupation licence, the terms relating to the responsibility for the condition of the building at the outset of the contract and on an ongoing basis are set out in the occupation licence, as are also the terms relating to responsibility for payment. Most occupation licences do not deal with responsibility or payment for defects arising from construction. An application form may contain a stipulation that the village owner is responsible for remedying defects and sometimes, legal advisors to a resident raise this as part of their approval of the documents. But more commonly, the documents between village owner and resident are silent on this issue.

However, a resident must look to the owner of the village for comfort in remedying defects as, unless the village owner is itself the builder, the resident will not have a contractual relationship with the builder. What can a resident do if building defects are not remedied within a reasonable time?

The Building Act 2004 will not apply to residents who hold occupation licences for their dwelling. They are not purchasers of a "household unit" in terms of the Building Act. A resident simply pays for the right to

occupy the dwelling and the right to have services provided.

They are therefore not entitled to:

- the mandatory statutory warranties implied under the Building Act;
- require a Code Compliance Certificate to be issued before they settle and move in.

Further, it is far from clear that the Consumer Guarantees Act 1993 and Sale of Goods Act 1908 will apply to residents acquiring the right to live in a dwelling through an occupation licence. However, even if this legislation did apply the requirement is that the goods or services must be reasonably fit for their purpose. Not much comfort to a resident with cupboard doors that don't shut or a leaking pipe in the bathroom.

It is likely that at common law, a warranty would be implied that the dwelling will be suitable for occupation. This also may be cold comfort to a resident where there are reasonably minor defects still to be remedied.

I believe it would be difficult for a resident to obtain relief at law against a village owner where a code compliance certificate has been issued but there are ongoing troublesome defects of a minor nature.

The most obvious courses of action for a resident to obtain resolution will be either to raise the matter with the Statutory Supervisor who may have the ability to take action against the village owner under the deed of supervision, or to raise a complaint through the Village's complaints process. Also a resident may well be entitled to

make a complaint under the new disputes processes provided in the Retirement Villages Act 2003 when the Disputes Resolution part of the Act comes into force on 1 October 2004.

Having said that, I am not aware of any complaints that have been made in relation to retirement village owners failing to address building defects. It would seem that village owners are generally conscientious in their pursuit of remedying such defects with builders.

Village owners rights

The responsibility for remedying defects will usually be a term of any building contract that a village owner has with a builder. There is usually a requirement that the defects must be remedied by a builder and notified to the builder within a specified period of time. The village owner will need to be (and usually is) conscientious about checking with residents in new dwellings as to whether or not there are any such defects. They will probably carry out their own checks as well.

The Building Act sets out mandatory statutory warranties that are implied into every building contract which may be of help to a village owner. These warranties include the obligations for all building work:

- to be done competently;
- to be done with reasonable care and skill;
- to be done in accordance with the plans and consents,
- to comply with relevant laws; and
- to be completed by the date specified in the contract (or if no date is specified, then within a reasonable time).

The warranties also require that all materials used in building work will be suitable for the purpose for

which they are to be used and, unless otherwise stated in the contract, new.

“Household units” intended to be occupied on completion of building work must be suitable for occupation on completion. (A household unit is a building or part of a building that is used for residential purposes and is occupied by not more than one household.)

In addition, there are common law remedies available to an owner and there may well be warranties available under the Sale of Goods Act 1908. It is unlikely that the Consumer Guarantees Act 1993 will apply given that the village owner acquires the services for the purposes of a business.

Time for completion

As an aside, village owners, when entering into building contracts, will need to pay particular attention to the agreed programme for completion of a dwelling. Under the Retirement Villages Act, (when the relevant part comes into force), a resident will be able to cancel any contract to purchase a dwelling or the right to occupy a dwelling if the dwelling is not completed within 6 months of the proposed date for completion of the dwelling.

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