RESPONSE TO THE DELEGATED POWERS & LEGAL REFORM COMMITTEE’S CALL FOR EVIDENCE ON THE CONTRACT (THIRD PARTY RIGHTS) (SCOTLAND) BILL

29 March 2017
ABOUT HOMES FOR SCOTLAND

Homes for Scotland is the voice of the home building industry.

With a membership of some 200 organisation together providing 95% of new homes built for sale as well as a significant proportion of affordable housing, we are committed to improving the quality of living in Scotland by providing this and future generations with warm, sustainable homes in places people want to live.

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Homes for Scotland represents members on a wide range of issues affecting their ability to deliver much needed homes.

Our views are endorsed by committees and advisory groups utilising the skills and expertise of key representatives drawn from our member companies.

This consultation response has been endorsed, drafted and approved by the Homes for Scotland Legal Sub Group.
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1. In responding to the Delegated Powers and Legal Reform Committee’s call for evidence on the Contract (Third Party Rights) (Scotland) Bill, Homes for Scotland has consulted with members of our Customer Relations Legal Subgroup (hereafter referred to as the Legal Subgroup).

2. Having sought the advice of members of our Legal Subgroup, our general view is that we do not believe that the subject matter of the Bill will have a significant impact on the interests of Homes for Scotland or its members. If anything, we believe the impact for Homes for Scotland and its members is more likely to be positive. At a general level, we therefore support the passage of the Bill as proposed.

3. In the opinion of our Legal Subgroup, there are likely to be various legal and practical implications if the Bill is passed; one of the biggest being the potential impact a third party rights Act could have on the use of collateral warranties. Collateral warranties are widely used within the construction sector where there are multiple interested parties who require contractual duties of care from people who they do not have a direct contractual relationship with, e.g. an employer from a sub-contractor appointed by the main contractor or a funder from the main contractor who is appointed by the borrower. The requirement for collateral warranties is increasingly prevalent in the purchase and sale of land parcels between housebuilders in relation to infrastructure i.e. roads and services. The requirement for the same can be funder driven and it can be a time consuming and costly exercise to put these arrangements in place, particularly where sub- contractor warranties are required for elements of the work. There is potential here to reduce part of the complexity of these arrangements, saving time and money, which would be a welcome development. Our view is that most housebuilders who have been involved in collateral warranties would welcome their demise.

4. Collateral Warranties can frequently prove problematic because they are:
   - poorly drafted, thereby diminishing their value;
   - incorrectly signed, meaning in fact that they have no value; and
   - simply never delivered at all notwithstanding an agreement to produce the warranty on demand.

Resolving these problems takes time both from a legal and practical perspective and delay has become a common occurrence. There is also often a cost implication in sorting these issues which can become sizeable, particularly on large scale projects with multiple collateral warranties for different interested third parties across the different tiers of construction professional.

5. An Act which enables parties to grant enforceable rights to third parties could negate the need for collateral warranties altogether. England and Wales already have such an act - the Contract (Rights of Third Parties) Act 1999. Similar to the proposals under the Scottish Bill, the English Act enables parties to grant enforceable rights to third parties without the use of collateral warranties and there are various standard form construction contracts which provide for such third party rights as an alternative to stand alone collateral warranties. Procuring collateral warranties for third parties can be very troublesome and we believe that a third party rights Act in Scotland could offer a solution to those issues. However, it remains to be seen whether, in practice, the industry buys into that solution, as our English counterparts do not appear to use third party rights as an alternative to collateral warranties very often and collateral warranties appear to remain the most popular choice south of the border.

6. Given the limited use of collateral warranties in private housing developments, the above may perhaps have less of an impact for private housebuilders than for other members of the property and construction industry, but it should still prove relevant for those involved in mixed use developments or securing third party funding.

7. Another likely legal implication will be the need to refer to the new Act (assuming the Bill is passed) in relevant contracts (so far as any third party rights under relevant contracts should be excluded). Members of Homes for Scotland’s Legal Subgroup advise that they often see a general reference to third party rights being excluded (with or without express reference to the common law principle of *jus quaesitum tertio* (known as JQT)) so, in these circumstances, this should be a simple case of updating these provisions with reference to the new Act. However, this may also mean this provision will become more important in contracts where there is no express reference to third party rights (or the exclusion of third party rights).

8. In summary, given the potential benefits that a Third Party Rights Act could bring in relation to the problematic world of collateral warranties, as well as offering greater certainty in relation to the principal of third party rights in Scotland, Homes for Scotland supports the Contract (Third Party Rights) (Scotland) Bill.