

**PROPOSALS FOR LAW REFORM AS SUGGESTED
BY
NATIONAL HOUSE BUILDING COUNCIL (NHBC)**

NHBC suggested law reform is that there should be an amendment to or repeal of Section 51 of the Building (Scotland) Act 2003. The amendment would be to introduce a limit on the liability on private organisations undertaking certification of building control in Scotland and an organisation certifying design or physical work to comply with the Building Regulations and the repeal would be to exclude the current liability.

NHBC's proposal would be suitable for law reform in the Scottish Parliament.

Section 51 of the Building (Scotland) Act 2003 provides for the liability of anyone who breaches duties under Building Regulations and by doing so causes damage, including death, injury etc of any person. Under sub section (2), Regulations may create defences in any action for a breach of such duty. Sub section (3) provides for certain exemptions for buildings which existed before the section came in to force. (Subsequent Building Regulations have not created any defences in any action for breach of the duties).

It is noted that what is Section 51 was initially proposed in Schedule 7 Paragraph 8 to the Health and Safety at Work etc. Act 1974 creating a new Clause 19A in the Building (Scotland) Act 1959 but this new section was never brought into force. Similarly in England and Wales Section 71 of the Health and Safety at Work etc. Act 1974 was never brought into force and likewise with Section 38 of the Building Act 1984. Each of these clauses is in materially the same terms as Section 51 of the Building (Scotland) Act 2003 but it is only Section 51 that is in force.

Under the former building control arrangements there was no contractual nexus and it was generally accepted that the local authority took on no statutory duty of care to third parties in exercising its building control responsibilities. The obvious alternative route, of claiming damages on the basis of delictual liability for breach of statutory duty leading to economic loss was closed by *Murphy v Brentwood DC* [1991] AC398. It is suggested that the reason for the earlier proposed legislation referred to in the preceding paragraph was the case law before the clarification in *Murphy*. However notwithstanding the case law clarification in Scotland alone the section has been brought into force.

In addition, it is possible that when the 2003 Act was enacted there was no intention that Section 51 should be as onerous as it has turned out to be. The Section does state that "regulations may provide for a specified defence to be available" but to date no such regulations have been produced. The omission to impose a cap on liability, or by regulation to limit the effect of the liability, has influenced certain organisations to avoid certifying construction work for Building Regulation purposes. As far as NHBC is concerned if it was given the opportunity to deliver Building Control Services in Scotland Section 51 as it currently is drafted would be restrictive, imposing unlimited liability where there was a breach of duty. If the liability under Section 51 was capped then that would allow private certifiers to obtain full indemnity insurance which is currently

unavailable. Section 51 as drafted has the potential to stifle the private organisations from participating fully in the certification process. It is also clearly inequitable as the provision does not apply to local authorities. An amendment could potentially result in the involvement of the private sector and assist in the creation of economic growth. By contrast in England and Wales, as noted above, the equivalent section to what is Section 51, Section 38 of the Building Act 1984, is not in force. The opening up of building control has occurred and the issue of the limit of liability is a matter of contract between the party wishing the verification and/or certification services and the party who is to provide those services.