

**QUERISTS: Michael M. Collins and Eoin O Cofaigh**

**RE: Implications for architects arising from the enactment  
of the Building Control (Amendment) Regulations, 2013**

**OPINION**

**Introduction**

1. On 8 March, 2013, the Minister for the Environment, Community & Local Government (“the Minister”) made the Building Control (Amendment) Regulations, 2013 (“the 2013 Regulations”) <sup>1</sup> which are due to come into effect on 1 March, 2014. The 2013 Regulations amend the Building Control Regulations, 1997 <sup>2</sup>. Among the amendments made by the 2013 Regulations is the insertion of a new regulation in the following terms:-

*“20F(1) Subject to sub-paragraph (2), a Certificate of Compliance on Completion shall be submitted to a building control authority and relevant particulars thereof shall be included on the Register ....before works or a building to which Part II or Part IIIA applies may be opened, occupied or used.*

*(2) The requirement for a Certificate of Compliance on Completion shall apply to the following works and building –*

*(a) the design and construction of a new dwelling,*

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<sup>1</sup> S.I. No. 80 of 2013.

<sup>2</sup> S.I. No. 496 of 1997 as amended by regulations made in 2000 (S.I. No. 10 of 2000), 2004 (S.I. No. 85 of 2004) and 2009 (S.I. No. 351 of 2009).

*(b) an extension to a dwelling involving a total floor area no greater than 40 square metres,*

*(c) works to which Part III applies. ....”.*

### **The Certificate of Compliance on Completion**

2. Under Regulation 20F(3)(a), a Certificate of Compliance must be in the form specified in the Fifth Schedule to the 1997 Regulations<sup>3</sup>. As part of that certificate, the certifier will be required to give a certificate (inter alia) in the following terms:-

*“I now certify that the inspection plan drawn up in accordance with the Code of Practice for Inspecting and Certifying Building Works, or equivalent, has been fulfilled by the under-signed and other individuals nominated therein having exercised reasonable skill, care and diligence and that the building or works is in compliance with the requirements of the Second Schedule of the Building Regulations insofar as they apply to the building works concerned”.*

### **The undertaking to be given by the Assigned Certifier**

3. Regulation 6 of the 2013 Regulations also inserts a new Article 9 in the 1997 Regulations. Article 9(1) as inserted by the 2013 Regulations will require that a Commencement Notice be accompanied by (inter alia) a Certificate of Compliance together with an undertaking by the “Assigned Certifier” in the form set out for that purpose in the Second Schedule. The 2013 Regulations now set out the form of undertaking to be given by the Assigned Certifier. In paragraph 2 of that undertaking, the Certifier will:-

*“Undertake to use reasonable skill, care and diligence, to inspect the works and to coordinate the inspection works of others and to certify, following the implementation of the inspection plan by myself and others, for compliance*

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<sup>3</sup> As inserted by the 2013 Regulations.

*with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the works or buildings to which the accompanying Commencement Notice and plans, specifications, calculations, ancillary certificates and particulars listed in the Schedule thereto refer”.*

### **The rationale for the new Regulations**

4. According to a press release issued on behalf of the Minister on 4 April, 2013, the purpose of the 2013 Regulations is to restore consumer confidence in construction as an industry, and that the regulations “*will for the first time give home-owners clarity, traceability and accountability at all stages of the building process. They will provide consumers with the protection they need and deserve*”.
5. The announcement draws attention to the fact that the Assigned Certifiers will inspect building works at key stages during construction and that both the Assigned Certifier and the builders will both certify that a finished building complies with the requirements of the Building Regulations.<sup>4</sup> The announcement identifies that it will be necessary to submit compliance drawings and documentation to local building control authorities. Significantly, the announcement states:-

*“The mandatory certificates will be clear, unambiguous statements on statutory forms stating that each of the key parties to a project certifies that the work comply with the Building Regulations and that they accept legal responsibility for their work ....”.*

6. The announcement emphasises that if anyone signs a statutory certificate which subsequently proves to be non-compliant, “*they can be held legally liable for the consequences*” and that “*greater onus is now placed on professionals to provide consumers with a more comprehensive service and a failure to do so incurs the risk of being censured, suspended or ultimately removed from their professional body*”.

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<sup>4</sup> It should be noted that there are certain certificates to be given by the builder during the course of construction in addition to the certificates by the Assigned Certifier.

7. The announcement also emphasises that while the certificate is likely to add to the overall cost of building projects, the consumer will ultimately benefit “*as at every stage of the project, they in effect will have a rolling set of guarantees from those who can be held responsible for any issues that might arise*”.<sup>5</sup>
  
8. While the Ministerial announcement is in no sense legally binding, it is nonetheless illuminating in identifying the rationale underlying the new Regulations. A consideration of the terms of the certificate to be given by the Assigned Certifier and the terms of the undertaking to be given by the Assigned Certifier supports the view (as expressed by the Minister) that if anyone signs a statutory certificate which subsequently proves to be non-compliant, they can be held legally liable for the consequence. In my view, the terms of the certificate to be given by the Assigned Certifier amply justify the view expressed by the Minister that this will place a greater onus on professionals. While the Minister suggests that a failure to discharge the onus described in paragraph 6 above incur the risk of censure, I believe that these new certificates will also be relied upon by clients or purchasers in litigation against the Certifier in the event that defects are subsequently uncovered in an individual building project. It will be noted that the undertaking provides very clearly that the Assigned Certifier will use “*reasonable skill, care and diligence*” to inspect the works and to certify the works. While the language of that undertaking is consistent with the understanding of the obligations of an architect (or any other professional in the discharge of their professional work), it is to be noted that it is otherwise unqualified in its terms.

### **The unqualified nature of the Certificate**

9. Likewise, the Certificate of Compliance on Completion is unqualified in its terms. It provides for only one form of certificate, namely that the building or works is in compliance with the requirements of the Second Schedule of the Building Regulations. There is no scope for qualifying that certificate in any way. This is in

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<sup>5</sup> Emphasis added.

contrast to the provisions of the certificate to be given by the contractor <sup>6</sup>. The certificate to be signed by the builder expressly provides for a qualification to it. A consideration of the terms of the certificate will readily demonstrate this:-

*“I confirm that I am the Builder assigned by the owner to construct, supervise and certify the works.*

*...I certify that the works or building as completed has been constructed in accordance with the plans, specifications, calculations, ancillary certificates and particulars as certified under the Form of Certificate of Compliance (Design) and listed in the Schedule to the Commencement .....Notice relevant to the above works, together with such further plans, specifications, calculations, ancillary certificates and particulars, if any, as have been subsequently certified and submitted to the Building Control Authority and such other documents relevant to compliance with the requirements of the Second Schedule to the Building Regulations as shall be retained by me as outlined in the Code of Practice for Certifying and Inspecting Building Works.*

*...Reliant on the foregoing, I certify that the works are in compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building works concerned”.* <sup>7</sup>

10. The contrast between the certificate to be given by the builder on the one hand and the Assigned Certifier on the other is immediately obvious. In the case of the builder, it is plain that he is relying on the designs and documents provided by others. It is puzzling why the Assigned Certifier was not given the ability to qualify his certificate insofar as he may be reliant on the work done by others. The fact that one certificate is qualified and the other unqualified is, in my view, indicative of an intention on the part of the legislator that the Assigned Certifier, unlike the builder, is not entitled to rely on others. There is a well known principle of statutory interpretation which is

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<sup>6</sup> It should be noted that the certificate of compliance on completion is divided into two parts. Part A will require to be signed by the builder, while Part B will be required to be signed by the Assigned Certifier.

<sup>7</sup> Emphasis added.

expressed in the Latin maxim *expressio unius est exclusio alterius*. Loosely translated, this means that the expression of one idea suggests the exclusion of others. I believe that this principle will undoubtedly be invoked when it comes to construing the terms and the legal effect of the Certificate to be given by the Assigned Certifier.

11. It is instructive to compare the terms of the certificate to be given by the Assigned Certifier under the 2013 Regulations with the typical compliance certificate traditionally given by architects which was usually qualified in a number of significant respects:-

- (a) The opinion was stated to be furnished solely for the purposes of providing evidence for title purposes of the compliance of the relevant works with the requirements of the Building Control Act, 1990 (“the 1990 Act”);
- (b) The opinion usually stated that it did not constitute a report on the condition or structure of the works in question;
- (c) The opinion identified that the design had been prepared by the architect and that the architect was of opinion that the design was in substantial compliance with the Building Regulations;
- (d) The opinion recorded that the architect had received opinions/confirmations from the contractor and any engineers engaged stating that the elements of the works which they had designed had been designed in substantial compliance with the Building Regulations. Significantly, the opinion usually stated that the architect relied solely on those confirmations in respect of such elements;
- (e) It is also important that the form of opinion previously given identified that a visual inspection had been carried out on a particular day for the purposes of comparing the works with the design prepared by the architect, and for the purposes of establishing substantial compliance with the Building Regulations.

However, the opinion contained a definition of “*visual inspection*” which was in the following terms:-

*“The inspection of the relevant works as existed on the inspection date. For the purpose of the inspection, no opening up work was carried out. The inspection was therefore superficial only and took no account of works covered up, inaccessible or otherwise secured from view”*<sup>8</sup>;

- (f) The opinion also stated that it was the responsibility of those concerned with the construction of the relevant works to ensure compliance with the Building Regulations;
- (g) The opinion usually contained an express provision that it did not warrant, represent or take into account any construction carried out or changes made to the works after the inspection date;
- (h) The opinion usually also contained a definition of “*substantial compliance*” which was in quite narrow terms as follows:-

*“...when applied to Construction means that such Construction of the Relevant Works, as is evident by Visual Inspection, is in accordance with the Building Regulations, saving and excepting such deviations as would not in my opinion warrant the issue of enforcement proceedings as provided for in the [1990 Act]”;*

- (i) In the operative part of the opinion, the opinion usually also stated that it relied on visual inspection and on the confirmations from the contractor and any engineers engaged in the project.

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<sup>8</sup> Emphasis added.

12. It will be seen that the form of opinion previously in use was carefully qualified so as to ensure that architects did not assume a liability in respect of elements of a building project which were beyond the scope of the architect's responsibility. Thus, for example, the opinion made clear that it was based on a visual inspection only. The definition of "*visual inspection*" made it clear that the architect was not constantly supervising the works and therefore could not say what defects might exist which have been covered up prior to the visual inspection. The form of opinion was also careful to ensure that the contractor and any other professionals involved (such as consulting engineers or mechanical and electrical engineers) took appropriate responsibility for the scope of those elements of the design and of the works which were within their area of expertise. As noted in paragraph 11(d) above, the opinion usually stated that the architect had relied on confirmation given by the contractor and any engineers engaged.

13. In contrast, as noted in paragraph 9 above, the form of certificate of compliance which will have to be given under the 2013 Regulations<sup>9</sup> is unqualified in its terms. Under Clause 6 of the Certificate of Compliance on Completion ("the Completion Certificate"), the architect will certify that the inspection plan drawn up in accordance with the Code of Practice for Inspecting and Certifying Building Works ("the Code") has been fulfilled not only by the architect but also by the "*other individuals nominated therein*" having exercised reasonable skill, care and diligence and will furthermore certify that the building or works **is in compliance** with the requirements of the Second Schedule to the Building Regulations. Insofar as I can ascertain, only a draft Code has yet been prepared, and until the Code itself is published, it would be impossible to identify the full ambit of the certificate. Nonetheless, it is clear from the terms of the certificate that the architect will certify that the building or works is in compliance with the requirements of the Second Schedule to the Building Regulations, and furthermore, that the inspection plan drawn up with the new Code of Practice has been fulfilled not only by the architect but by the other individuals nominated in the inspection plan. The architect will certify that such fulfilment has been achieved by the architect and the other individuals nominated in the inspection plan having exercised reasonable skill, care and diligence. The architect is therefore

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<sup>9</sup> Once they come into force.



certifying that not only has the architect exercised reasonable skill, care and diligence, but the other individuals nominated in the inspection plan have likewise exercised such skill, care and diligence. In my view, this is very important particularly in circumstances where, after completion of a particular construction project, it may well be only the architect who will have any professional indemnity insurance in place to meet any claim that might be made by a disappointed building owner. If the building owner can demonstrate that reliance was placed on the architect's certificate not only in relation to the architect having exercised reasonable skill, care and diligence, but also on the basis that the architect's certificate had said that the builder had likewise exercised reasonable skill, care and diligence, one could readily see claims being made against the architect when subsequently it emerges that, by way of hypothetical example, a contractor is shown to have not, in fact, exercised appropriate skill, care and diligence in the construction of the building.

14. Furthermore, as noted above, the certificate will involve the architect certifying that the building or the works is in compliance with the Building Regulations. There are no qualifications on this latter certificate by reference to the nature of the inspection carried out or by reference to the individual obligations of the contractor or any other professionals involved. There is no ability for the architect to state that the architect is relying on the confirmations provided by the contractor (insofar as the carrying out of the works are concerned), or any confirmations given by any of the other professionals involved (such as engineers etc.). I find it difficult to understand the rationale for requiring the architect or other Assigned Certifier to provide an unqualified certificate while a builder is entitled to provide a certificate in the qualified form discussed in paragraph 10 above.
15. It is very important to bear in mind that opinions given by architects or other construction professionals are routinely relied upon in both court proceedings and in arbitrations in which allegations of negligence and/or breach of contract are made against the construction professionals concerned. One of the main planks of defence in such actions or arbitrations is based upon the qualifications contained in the opinions. My concern is that if the ability to include these qualifications is removed (as the 2013 Regulations envisage), and if the architect is required as the Assigned

Certifier to give a certificate in the form set out above, these certificates will be seized upon by claimants as a basis for contending that, absent appropriate qualifications to the form of the certificate, the Certifiers are liable to the employer in the event that the works are subsequently found not to have been carried out in compliance (inter alia) with the Building Regulations. As the late **David Keane**<sup>10</sup> observed:-

*“To “certify”, after all, means that the certifier is “certain”. ....”.*<sup>11</sup>

16. The explanation given by **Keane** is also consistent with the ordinary meaning of the word “certify”. For example, the **Shorter Oxford English Dictionary**<sup>12</sup> defines the word “certify” as follows:-

- “1. ....make ...certain; guarantee as certain .....*
- 2. ....declare or attest by a formal or legal certificate ....*
- 3. ....make certain of; assure; give (a person) formal or legal attestation of ...”.*

The **Chambers Dictionary**<sup>13</sup> defines “certify” as:

*“To declare as true; ...to declare or confirm in writing ...”.*

17. There is some helpful authority in England to suggest that even when it comes to giving a certificate, such a certificate of an architect or other construction professional does not amount to a warranty that the works are fit for purpose. In **Payne v. John Setchell Ltd**<sup>14</sup>, an engineer was responsible for the design of foundations for houses which were subsequently purchased by the claimants. The claimants alleged that they relied in making their purchases upon certificates issued by the Defendant engineer which stated that he was satisfied that the foundations had been constructed in

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<sup>10</sup> *“Building and the Law”*, 3<sup>rd</sup> edition, 1998, at p 213.

<sup>11</sup> While that observation was made in the context of a certificate under a building contract, it is important to bear in mind that the document to be signed by the Assigned Certifier under the 2013 Regulations is also in the form of a certificate and as noted in the text above, is unqualified in its terms.

<sup>12</sup> **The Shorter Oxford English Dictionary on Historical Principles**, 5<sup>th</sup> edition, 2002, volume 1, at p 372.

<sup>13</sup> 10<sup>th</sup> edition, 2006, at p 249.

<sup>14</sup> [2002] PNLR 7.

accordance with his design and were suitable for support of the dwelling. In the London Technology & Construction Court, Judge Lloyd Q.C. rejected the claimants' contention that the Defendant had certified the fitness of the foundation for its purpose. Judge Lloyd said <sup>15</sup>:-

*“A certificate expresses the judgment, opinion or skill of the person issuing it, usually, but not always, in relation to a matter called for by a construction contract .... It is not normally a warranty, nor is it to be read as tantamount to a warranty, particularly if issued by a professional person, although it may amount to a warranty. If issued by a contractor who has undertaken full and complete performance of the contract, it may be taken as its formal confirmation that it has duly fulfilled all the obligations undertaken under the contract which will probably include obligations of an absolute nature. To that extent, it might be equivalent to a warranty especially if given to or intended for a third party. The other contracting party will not normally need such a document as it will have its rights under the contract. A professional person however does not normally undertake obligations of an absolute nature but only undertakes to exercise reasonable professional skill and care in the performance of the relevant service ... Thus, the certificate of 20 October, 1988, particularly since it refers to the two visits to the site, can only be read as an expression of the opinion of the Defendant that the result of such inspections the Defendant had reasonable grounds for believing that the construction of the foundation had been satisfactorily carried out to its design and, by implication, that there were no circumstances known to the Defendant as a result of those inspections which cast doubt on the Defendant's original judgment in the production of that design. In turn, since the design was based upon the ground conditions found on the investigation carried out in June 1988, it follows that the certificate is also an expression of opinion by the Defendant that nothing had been seen on the inspections ...that cast doubt on the principle of a raft foundation. .... “.*

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<sup>15</sup> At paragraph 20 of the judgment.

18. Superficially, it might appear that the judgment of Judge Lloyd is of some assistance. However, it is important to bear in mind that the certificate in issue in that case was expressed to be based purely on two visits to the site, and was not therefore unconditional in terms. Furthermore, the issue in that case related to an attempt by a third party purchaser (rather than an employer) to rely on the certificate. It should also be noted that this is the only case which I have been able to identify where this view has been taken. I cannot identify any established body of case law all to the same effect.

19. Until there is an established body of case law, it would be impossible to say that the view expressed by Judge Lloyd will definitely prevail. As noted in paragraph 18 above, the case can probably be distinguished by claimants in any event because the certificate in that case was not unconditional. Quite apart from that consideration, it is, in my view, by no means certain that a similar approach would be taken by a court or arbitrator in Ireland. It should be borne in mind that in **Moran v. Duleek Developments Limited**<sup>16</sup>, the High Court in Ireland found engineers to be liable on foot of a certificate given by an engineer to the effect that all conditions contained in a planning permission had been complied with. There was one qualification to the certificate, namely that the engineer stated that it was given by him to the best of his knowledge and belief. One of the conditions of the planning permission was that the houses should be erected above the maximum flood level and this height was to be agreed with the local authority engineer before development commenced. As it transpired, no maximum flood level was ever agreed with the local authority engineer. Indeed, all of the expert witnesses who gave evidence in the case were in agreement that there was no method of identifying objectively and absolutely a “*maximum flood level*”. The Plaintiffs purchased one of the houses which subsequently flooded and an attempt was made to hold the engineer liable on foot of the certificate. The engineer who gave the certificate had not been involved in overseeing the development in question. Nonetheless, he was found liable on foot of the certificate. Murphy J. said<sup>17</sup>:-

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<sup>16</sup> (1991) Professional Negligence Reports 342.

<sup>17</sup> At pp 349-350.

*“In the result ...the position is that Mr. Hanley certified for the benefit of the Plaintiffs that the house ...was erected above maximum flood level and ...at a height agreed with the Meath County Council’s engineer. The certificate may well be defective simply on the basis that it clearly implies that a maximum flood level had been agreed with the Meath County Council’s engineer when such was not the case. But it certainly purports to establish that the house was erected to what Mr. Hanley himself had prescribed as the maximum flood level ...when it was in fact less than [this]. One can have great sympathy for Mr. Hanley. He was not in the position of an architect or engineer exercising a constant supervision over the development and as such having a full body of knowledge not merely of what had been planned but what had been achieved. In the nature of the information available to him, it probably is true that he would have to make further measurements himself before the certificate could be given. Perhaps it would not be necessary to make additional measurements in respect of every house and for every certificate **but it seems to me to be clear that he had to satisfy himself in an appropriate professional manner that the crucial measurements had been observed.** Whilst evidence was given by engineers as to what they believed was the appropriate standard of care which should be exercised by engineers or architects, I believe that this is essentially a matter for the court. **The nature of the duty can be better seen from the point of view of the purchaser who is invited to rely on the express written certificate of the engineer which is addressed to the particular circumstances of his case and without which it is clear that the transaction would not have proceeded.***

*As I say, I am sympathetic towards Mr. Hanley. At the very least, he was let down by the workmanship of [the contractor] and the persons having control of [the works]. His professional expertise with regard to the maximum water levels has been ...vindicated. **But I believe I cannot acquit him of negligence in providing a certificate which has been proved to be erroneous and that in an area which falls particularly within the experience of an engineer.***

*In these circumstances, there must be judgment ...against Mr. Hanley ...*.<sup>18</sup>

20. While the judgment of Murphy J. is not especially well articulated, what appears to be clear is that Murphy J. regarded the giving of a certificate as imposing a particular onus on the relevant construction professional (in that case an engineer) to ensure that the certificate given was correct. It appears that liability was imposed in that case purely on the basis that the certificate was not correct notwithstanding that evidence was apparently given by expert engineers that, on the particular facts, Mr. Hanley did not fall below what some of the experts suggested was an appropriate standard of care, and notwithstanding that Mr. Hanley (the engineer) had relied upon information given to him by other parties and had not had an opportunity himself to inspect the works in question as they were constructed.
21. Quite apart from the judgment of Murphy J. in the **Moran case**, I have a concern that it may well be difficult to rely upon the judgment of Judge Lloyd in the **Payne case** in light of the terms of paragraph 2 of the undertaking which, under the 2013 Regulations, every Assigned Certifier will be required to give. While the form of undertaking helpfully begins with an undertaking on the part of the Assigned Certifier to use reasonable skill, care and diligence, this would appear to me to arise only in the context of the inspection of the works and the coordination of the inspection of the works. It is by no means clear to me that the undertaking to use reasonable skill, care and diligence applies also to the words "*to certify*". On my reading of paragraph 2 of the undertaking, the words "*to certify*" are not qualified by the reference to the use of reasonable skill, care and diligence. If I am correct in that construction of the undertaking, this would support the view that the giving of an unqualified certificate by the Assigned Certifier is a statement that the Certifier is, to paraphrase **Keane**<sup>19</sup>, certain that the other individuals named in the inspection plan have exercised reasonable skill, care and diligence, and that the Certifier is certain that the building or the works is in compliance with the Building Regulations. This view is also supported by a consideration of the provisions of the form of the Notice of Assignment of the Assigned Certifier which is required to be issued under Regulation

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<sup>18</sup> Emphasis added.

<sup>19</sup> See paragraph 14 above.

9(1)(b)(iii) of the 1997 Regulations<sup>20</sup>. That notice (which will be issued by the building owner) expressly records that the building owner has:-

*“.....assigned the following person as Assigned Certifier, being a person named on a register maintained pursuant to .....the Building Control Act, 2007 or Section 7 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act, 1969, I am satisfied having regard to the Code of Practice ...that the person so assigned is competent to inspect the works and to coordinate the inspection of the works undertaken by others, and to certify the works for compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building works concerned”.*<sup>21</sup>

22. Moreover, as discussed above, the form of the certificate to be given by the Assigned Certifier expressly certifies that the other individuals nominated in the inspection plan have exercised reasonable skill, care and diligence, and that the building or works is in compliance with the Second Schedule to the Building Regulations. Regrettably, that certificate is not qualified in any way. This seems to me to involve an effective transfer of responsibility (at least insofar as the obligations owed to the client are concerned) from the builder to the Assigned Certifier. This is particularly important in cases where the building contractor (as so often happens) has insufficient resources of its own to meet a claim by a disappointed claimant who has relied upon such a certificate. Given the terms of the certificate, disappointed claimants will inevitably turn their guns in the direction of an insured party such as an architect who has given a certificate in the capacity of Assigned Certifier.

23. Of course, if a certificate is required to be given in unqualified form as envisaged by the 2013 Regulations, a question is likely to arise as to whether insurers will be prepared to provide indemnity cover in respect of claims against certifiers. As I understand it, insurers may not be prepared to provide cover in respect of any claim on foot of a warranty given by an architect. While the observations of Judge Lloyd in

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<sup>20</sup> As inserted by Regulation 6 of the 2013 Regulations.

<sup>21</sup> Emphasis added.

the **Payne case** may provide some scope for argument that a certificate given under the 2013 Regulations does not constitute a warranty, I would be pessimistic about the prospects of persuading insurance companies that this is not so. In view of the terms of the certificate to be given under the 2013 Regulations, I believe it is unlikely that insurers would be prepared to take on the risk that a different view would be taken in Ireland to that adopted by Judge Lloyd in that case.

### **The Certificate of Compliance (Design)**

24. In my view, similar issues arise in relation to the form of Certificate of Compliance (Design). Such a certificate will be required under Article 20A(2) of the 1997 Regulations<sup>22</sup>. The form of Certificate of Compliance (Design) will require the Assigned Certifier to provide a certificate in the following form:-

- (a) Paragraph 1 will refer to the relevant building works;
- (b) Paragraph 2 will record that the Certificate has been prepared in accordance with the Code of Practice;
- (c) Paragraph 3 will contain a confirmation that the Assigned Certifier has been commissioned by the building owner to design "*in conjunction with others, the works described above and to certify such design*". The reference to "*such design*" appears clearly to me to refer back to the design not only by the Assigned Certifier but the design prepared by the "*others*";
- (d) Paragraph 3 will also contain a confirmation that the Certifier is a person named in a register maintained pursuant to the 2007 Act or Section 7 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act, 1969, and quite importantly, will positively confirm that the Certifier is:-

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<sup>22</sup> As inserted by Article 8 of the 2013 Regulations.



*“...competent to carry out my design and to coordinate the design of others for the works concerned”.*

While the latter words do not suggest any responsibility for the design of others for the works concerned, the form of certificate (dealt with below) goes considerably further;

- (e) Paragraph 4 of the Certificate will require that the Certifier confirms that the plans, calculations, specifications, ancillary certificates and particulars given in the 7 Day Notice to which the Certificate relates *“have been prepared exercising reasonable skill, care and diligence by me and prepared by other members of the owner’s design team and specialist designers whose design activities I have coordinated, have been prepared to demonstrate compliance with the requirements of the Second Schedule to the Building Regulations ...”*. While that language makes a distinction between the Certifier on the one hand and the remaining members of the design team on the other, this paragraph does not appear to me to qualify the certificate which follows in paragraph 5;
- (f) The difficulty is that the relevant certificate contained at paragraph 5 is entirely unqualified in its terms. It provides as follows:-

*“I certify that, having regard to the plans, calculations, specifications, ancillary certificates and particulars referred to at 4 above, **the proposed design for the works or building is in compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building works concerned**”*<sup>23</sup>.

25. The difficulty with the form of certificate in paragraph 5 (as quoted above) is, I believe, immediately obvious. It raises a similar difficulty as discussed above in relation to the Certificate of Compliance on Completion. The language used in paragraph 5 does not permit the Certifier to qualify the certificate by reference to

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<sup>23</sup> Emphasis added.

reliance upon the work done by other members of the design team. This is so even in relation to specialist designers who may have particular skills or expertise about which an architect might not have a detailed appreciation or understanding. In my view, this raises similar concerns to those which I have discussed above in relation to the Certificate of Compliance on Completion.

## **Conclusion**

26. For the reasons discussed above, it seems to me that the 2013 Regulations impose significant additional responsibilities on architects (or others acting as Assigned Certifiers under the Regulations) including a responsibility to certify the work of others. It is inevitable in my opinion that the certificates to be given by architects will lead to increased claims against architects. I do not understand the rationale for requiring architects to give unqualified certificates not only in relation to their own work but also in relation to the work of others. Again, it seems to me to be inevitable that this will significantly increase the exposure of the Certifier to claims by disgruntled building owners even where the complaints relate to defects in the works carried out by the contractor, or relate to defects in the design by a specialist (in which the Certifier has had no role).

Nothing further occurs.

**Denis McDonald**

18 July, 2013

**QUERISTS: Michael M. Collins and  
Eoin O Cofaigh**

**RE: Implications for architects arising from  
the enactment of the Building Control  
(Amendment) Regulations, 2013**

**OPINION**

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Architects liability.revised opinion 1807/mm