SUPPLEMENTAL OPINION

1. I have already provided an opinion in July 2013 in relation to an earlier version of the Building Control (Amendment) Regulations. \(^1\) Subsequently, in December 2013, I provided further advice in relation to a number of amendments that were then proposed to the 2013 Regulations. Since those advices were given, new Regulations were published in 2014 (“the 2014 Regulations”). I set out my views below in relation to certain aspects of the 2014 Regulations. The views set out below should, however, be read in conjunction with the advice previously given in July and December 2013.

The undertakings to be given by the assigned certifier

2. In the case of both Article 9 and 20A, an undertaking is to be given by the “assigned certifier”. The form of undertaking to be given is in the following terms:-

“In accordance with the Code of Practice for Inspecting and Certifying Buildings and Works, or equivalent, I undertake to use reasonable skill, care and diligence, to inspect the building or works and to coordinate the inspection work of others and to certify, following the implementation of the inspection plan by myself and others, for compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building or works to which the accompanying Commencement Notice together

\(^1\) S.I. No. 80 of 2013.
3. I do not believe that any particular difficulty arises in relation to the first part of this undertaking (under which the certifier undertakes to use reasonable skill, care and diligence to inspect the building or works and coordinate the inspection work of others). It will, of course, be crucial that the certifier should use all reasonable skill, care and diligence in carrying out that element of the task. Otherwise, the certifier may find himself or herself liable for any failure to use reasonable skill, care and diligence.

4. The second part of the undertaking relates to the certification to be given by the certifier. It provides that the certifier will certify compliance with the requirements of the Second Schedule to the Building Regulations. While there is a reference to the implementation of the inspection plan by the certifier “and others”, the certificate that is envisaged is clearly a certificate by the certifier. It is the certifier who is taking the responsibility of certifying compliance with the requirements of the Second Schedule to the Building Regulations. In addition, it would appear that the certifier is undertaking to certify compliance with the “plans, calculations, specifications, ancillary certificates and particulars listed in the Schedule ...”. This is a significant responsibility and there does not appear to be any provision made for the fact that the certifier may have had no input into all of the plans, calculations, specifications and ancillary certificates and particulars referred to. Nonetheless, if I have read the provision correctly, there is a certificate to be given for compliance with such plans, calculations, specifications, certificates and particulars.

5. Furthermore, in paragraph 14 of my December 2013 advice, I drew attention to the breadth of the undertaking which is that the certifier will use reasonable skill, care and diligence to inspect the building or works. This seems to me to go well beyond the scope of the service previously provided by an architect (which traditionally was to carry out periodic inspections and to make clear that such inspections did not extend beyond a visual inspection). As I highlighted in paragraph 14 of my December 2013 advice, there is nothing on the face of the undertaking here to qualify the nature of the
inspection that is to be carried out. I reiterate the advice previously given by me that one can therefore envisage that this will be relied upon by building owners in the future to try to pin liability upon certifiers for a failure to inspect a particular element of the building or works notwithstanding that the certifier may not have physically been able to inspect something that was covered up during the course of construction.

The design certificates

6. Under both Article 9 and Article 20A, a design certificate is to be given by the assigned certifier. The form of certificate in each case is the same. I do not have any observations in relation to the first three paragraphs of the certificate. I note the terms of paragraph 4 as follows:

“I confirm that the plans, calculations, specifications, ancillary certificates and particulars included in the Schedule to the [commencement notice/7DN] to which this certificate is relevant, and which have been prepared exercising reasonable skill, care and diligence by me, and by other members of the 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 insofar as they apply to the building or works concerned”.

7. It seems to me that Clause 4 is providing confirmation not only that the assigned certifier has exercised reasonable skill, care and diligence, but that the other members of the design team and specialist designers have likewise exercised reasonable skill, care and diligence. That seems to me to follow from the language of Clause 4 which refers to the fact that the plans, specifications etc. have been prepared exercising “reasonable skill, care and diligence by me, and by other members of the design team and specialist designers ....”. Those words “have been prepared exercising reasonable skill, care and diligence” appear to me to apply equally to the assigned certifier and to the other members of the design team and specialist designers. The assigned certifier is therefore confirming that the latter have exercised reasonable skill, care and diligence. This clause does not appear to me to limit the confirmation
solely to the exercise of reasonable skill, care and diligence by the certifier himself or herself.

8. As stated in paragraph 4 of my advice of December 2013, if an architect is to give confirmation that the other members of the design team and the specialist designers have exercised reasonable skill, care and diligence, then the architect is taking responsibility for the work of others, and is exposing himself or herself to liability in respect of the works of others where it subsequently transpires that reasonable skill, care and diligence was not, in fact, exercised by other members of the design team. The failure of the certifier to identify that there was a lack of reasonable skill, care and diligence exercised by another member of the design team could be used in the future as a hook to impose liability on the architect as certifier.

9. Paragraph 9 of the certificate contains a certification by the assigned certifier in the following terms:-

“I certify, having exercised reasonable skill, care and diligence, that, having regard to the plans, calculations, specifications, and particulars which have been prepared by me and others, and having relied on ancillary certificates and particulars referred to at 4 above, the proposed design for the building or works is in compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building or works concerned”.

10. It is important to bear in mind that under Clause 5, the certifier is still certifying that the plans, calculations, specifications and particulars which have been prepared not only by the certifier but also “and others” the design for the building or works is in compliance with the requirements of the Second Schedule to the Building Regulations. While Clause 5 somewhat helpfully states that the certifier has relied on ancillary certificates and to particulars referred to in Clause 4, I am not convinced that this represents any significant protection for the certifier (insofar as the work of others is concerned). When the certificate is read as a whole (and that is the way in which a
court would read it), the certificate given in Clause 5 must be read in conjunction with
the confirmation given in Clause 4. As already indicated, it seems to me that Clause 4
contains a confirmation by the certifier that the others involved in the design of the
works have all exercised reasonable skill, care and diligence. When read as a whole,
it therefore does not seem to me that the words “and having relied on ancillary
certificates and particulars referred to at 4 above” adds any significant protection for
the certifier in circumstances where the certifier has already confirmed that those
certificates and particulars have been prepared with reasonable skill, care and
diligence. This conclusion is reinforced by a consideration of the form of undertaking
to be given by the assigned certifier (as set out above) which makes it clear that the
certifier is undertaking to use reasonable skill, care and diligence to inspect the
building or works and to certify for compliance with the requirements of the Second
Schedule to the Building Regulations. There is no “saver” or qualification in that
undertaking to exclude any liability in respect of the work/design of others. Similarly,
if I have read the form of undertaking correctly, it appears to involve the certifier
undertaking to certify for compliance with the plans, calculations, specifications,
ancillary certificates and particulars. Again, there is no “saver” or qualification on
those words.

The certificate of compliance on completion

11. The form of the certificate which the 2014 Regulations envisages will be given by the
assigned certifier is as follows:-

“5. I confirm that I am the Assigned Certifier assigned by the owner to
inspect and certify the building or works concerned.

6. Plans, calculations, specifications and ancillary certificates and
particulars as required for the purposes of .....the Building Control
Regulations are included in the Annex ..... 

7. I now confirm that the inspection plan, drawn up having regard to the
Code of Practice for Inspecting and Certifying Buildings and Works, or
equivalent, has been undertaken by the undersigned having exercised reasonable skill, care and diligence, and by others nominated therein, as appropriate, on the basis that all have exercised reasonable skill, care and diligence in certifying their work in the ancillary certificates scheduled.

8. Based on the above, and relying on the ancillary certificates scheduled, I now certify, having exercised reasonable skill, care and diligence, that the building or work is in compliance with the requirements of the Second Schedule to the Building Regulations, insofar as they apply to the building or works concerned”.

12. I have no difficulty with the first two paragraphs of that certificate. The next paragraph has been changed to remove the reference to “certify”. The paragraph now refers to “confirm” rather than “certify”. What the certifier is doing is confirming that the inspection plan has been undertaken by the certifier having exercised reasonable skill, care and diligence. That element of the paragraph does not appear to me to create a difficulty. The next part of the paragraph contains a confirmation by the certifier that “others” nominated in the Inspection Plan have also undertaken the Inspection Plan “on the basis that all have exercised reasonable skill, care and diligence in certifying their work in the ancillary certificates scheduled”. While this may have been intended to cut down the potential liability which previous versions of this paragraph imposed on the certifier, it nonetheless appears to be the case that the certifier is confirming that the “others” have exercised reasonable skill, care and diligence in certifying their work in the ancillary certificates scheduled. I am not sure that this was the intention but the language actually used appears to me to convey that impression. The certifier therefore appears to have an ongoing obligation to confirm that others have exercised reasonable skill, care and diligence in the way in which they certified their own work.

13. The final paragraph of the certificate allows the certifier to rely on the ancillary certificates scheduled. Insofar as I can see, there is still no definition of an “ancillary certificate”. Quite apart from that difficulty, I have already identified in paragraph 13 of my December 2013 advice that if the certifier is to refer to ancillary certificates in
this way, it will be inevitable that this will require that ancillary certificates be given by every other trade or profession involved in a particular project, and that the ancillary certificates may therefore run into several volumes.

14. While it is certainly helpful that the final paragraph allows the certifier to rely upon the ancillary certificates scheduled, it is important to bear in mind that, as I read the penultimate paragraph, it contains a confirmation on the part of the certifier that the “others” have each exercised reasonable skill, care and diligence in certifying their work as set out in the ancillary certificates. I therefore cannot read the certificate as a whole as permitting the certifier to simply rely on ancillary certificates without investigation. It seems to me that the certifier is undertaking a liability in respect of ancillary certificates in that the certifier is confirming that those certificates have been provided by persons who have exercised skill, care and diligence in certifying their own work. This conclusion is consistent with the observations which I have made in relation to the form of undertaking above, and it is also consistent with the form of design certificates.

**Insurance implications**

15. In light of the difficulties outlined above, there may well be insurance implications for certifiers. In circumstances where the certifier is providing confirmation not only that the certifier himself or herself has exercised reasonable skill, care and diligence but that other members of the design team and specialist designers have likewise exercised reasonable skill, care and diligence, the certifier may find himself or herself liable in the event that there was a lack of reasonable skill, care and diligence on the part of others. It would obviously be essential in those circumstances that the certifier should have appropriate insurance. It will be a matter for the insurance companies to decide on whether insurance will be made available and at what rates of premium. I do not know what approach insurance companies will take, but there must be a significant prospect that, at the very least, insurance companies will wish to reflect the increased risk for certifiers in the premium paid. Whether those premiums will be affordable by certifiers is another matter. One suspects that the proposed new system
relies upon the certifier having professional indemnity insurance. If such insurance is not available to the certifier at acceptable rates, the rationale for the new regime will be entirely undermined.

Nothing further occurs.

Denis McDonald

3 March, 2014
QUERIST: Michael M. Collins and Eoin Ó Cofaigh

RE: Implications for architects arising from the enactment of the Building Control (Amendment) Regulations, 2014

SUPPLEMENTAL OPINION

Matheson, Solicitors, 70 Sir John Rogerson’s Quay, Dublin 2.
Building control regulations.revised supplemental opinion 0303/mm
Re: Building Control (Amendment) Regulations, 2013  
- Proposed amendments

Dear Damien,

I confirm that I have now had an opportunity to review the proposed amendments to the 2013 Regulations. Having done so, the following is a summary of my view:-

1. For reasons which are developed in more detail below, I believe that the language which is used in the proposed amendments is extraordinarily loose and vague. In many cases, the meaning of the certificates in their amended form is very unclear. In my opinion, any lack of clarity in the certificates is a recipe for disaster. It will increase the likelihood of litigation. If there is a debate around the meaning of words, that will encourage litigation.

2. If there has to be litigation (as I believe there will) in order to test the meaning of the certificates and the consequences which flow from the certificates, this is likely to add very significantly to the cost of insurance for certifiers. The ensuing uncertainty (pending the resolution of litigation) is also likely to dissuade insurers from providing appropriate insurance to architects or, for that matter, engineers or building surveyors acting as design or assigned certifiers. When taking on risks, insurers like to know, insofar as possible, the extent of the risk that they are undergoing. If the meaning of the certificates is unclear, then the inevitable consequence will be that insurers will not be keen to take on such risks.

3. Furthermore, for reasons which I again develop in more detail below, it seems to me that, if acting as certifier, under some of the certificates, the architect is taking on very extensive additional liability over and above the liability to which architects have traditionally been exposed. In my view, this will have the inevitable consequence that claims against architects will increase making the professional indemnity insurance market for architects even less attractive to insurers. It should be recalled that a number of years ago, it became very difficult for solicitors in practice to obtain professional indemnity cover when the extent of claims against solicitors increased very significantly. If the amendments are to go forward in their present form, I believe there is a very real risk that architects could face similar difficulties to those experienced by solicitors a number of years
ago when several of the existing insurers providing indemnity cover to solicitors simply withdrew from the market.

4. One of the principal concerns I have about the form of the certificates in the revised form arises in the context of the design certificates. The form of design certificate in respect of Article 9 and in respect of Article 20A involves a confirmation by the certifier that not only have the plans prepared by the certifier been prepared exercising reasonable skill, care and diligence, but it also involves a confirmation by the certifier that the plans, specifications and calculations made by other members of the design team have been prepared by those persons exercising reasonable skill, care and diligence. This seems to me to clearly follow from the language which is used in paragraph 4 as amended. The confirmation is in the following form:-

"I confirm that the plans ............and particulars ............to which this certificate is relevant ............have been prepared exercising reasonable skill, care and diligence by me, and by other members of the design team ............and specialist designers whose activities I have co-ordinated."

If an architect is to give a confirmation that the other members of the design team and the specialist designers have exercised reasonable skill, care and diligence, then the architect is taking responsibility for the work of others and is exposing himself to liability in respect of the works of others where it subsequently transpires that reasonable skill, care and diligence was not in fact exercised by other members of the design team.

5. I note that in paragraph 5 of the design certificate, the words "having exercised reasonable skill, care and diligence" have been inserted immediately after the words "I certify". I understand that these words may have been inserted with a view to mitigating the responsibility placed upon a certifier by the use of the words "I certify". If that is so, I am not at all convinced that the way in which paragraph 5 is drafted (and the same observation applies in relation to each of the other certificates where similar amendments have been made) achieves this purpose. Looking at the language which has been used, it does not seem to me that the insertion of those words "having exercised reasonable skill, care and diligence" in any way cut down or mitigate the use of the words "I certify". If the intention is to mitigate the use of the words "I certify", it seems to me that much clearer language would be required. What might be done is that the meaning of the word "certify" could be defined in a note to the certificate which would make clear that by using the word "certify", the certifier was doing no more than indicating that, having exercised reasonable skill, care and diligence, it appeared to the certifier that, having regard to the plans etc., the proposed design for the building or works appeared to him to be in compliance with the requirements of the Second Schedule to the Building Regulations.

6. Insofar as the Completion Certificate is concerned, this seems to me to be hopelessly unclear. As with paragraph 5 of the design certificate, paragraph 7 has

\[2\] Emphasis added.
been amended to insert the words “having exercised reasonable skill, care and diligence” immediately after the words “I now certify”. For the reasons outlined above, it does not seem to me that the insertion of those words achieves the intended purpose.

7. I find it difficult to understand what paragraph 7 of the Completion Certificate is designed to do. The current language suggests that the certifier is certifying that the inspection plan has been undertaken by the certifier “and others as appropriate”. I do not know what the word “undertaken” means in the context of an Inspection Plan. How does one undertake a plan? Is it intended that the use of the word “undertaken” should mean “fulfilled”? This is entirely unclear.

8. Equally unclear is the reference to “and others as appropriate”. Who is that intended to cover? This seems to me to be hopelessly vague language. When such loose language is used, it is impossible to know who the certifier is supposed to be certifying?

9. A further difficulty arises with regard to the “Inspection Plan”. As I understand it, the Code of Practice is still in the course of development, and no one knows yet what is involved in the Inspection Plan. It seems to me to be very dangerous to draft a certificate before anyone knows what is to be involved in an Inspection Plan.

10. The insertion of the words “and relies on other parties nominated therein” appears to be intended to allow a certifier, in giving a certificate under paragraph 7 of the Completion Certificate, to rely upon others. However, the use of the words “nominated therein” appears to refer back to the Inspection Plan. If it is not known yet what is to be included in an Inspection Plan, it is impossible to know what “other parties nominated therein” might include. Quite apart from that consideration, the use of the words “on other parties nominated therein” appears to me to be hopelessly vague. This vagueness is not improved by the use of the words “as appropriate” immediately after the words “other parties nominated therein”. Those words “as appropriate” leave it entirely unclear who is intended to be covered by the words “other parties nominated therein”. Who is to determine what other parties are “appropriate” in this context? The use of such vague language will inevitably encourage litigation. There could be endless debate as to whether it was appropriate for the certifier to rely upon one or more “other parties nominated” in the Inspection Plan.

11. As I have said, the amendment to paragraph 7 appears to have been designed to allow the certifier to rely upon others exercising reasonable skill, care and diligence but, in my view, the way in which the paragraph has been amended has made matters even worse because of the very significant uncertainty created by the language which has been used.

12. Further problems arise in relation to the interpretation of paragraph 8 of the Completion Certificate. What do the words “based on the above” mean? Given the uncertainty and vagueness already inherent in paragraph 7, the use of the words “based on the above” incorporate all of that uncertainty and vagueness into paragraph 8.
13. A further difficulty that arises in relation to paragraph 8 is the reference to reliance on the Ancillary Certificates Schedule. Insofar as I can see, the term "Ancillary Certificates" is not defined in the Regulations. I note that it does appear to be defined in the latest version of the draft Code of Practice where it is defined in very broad terms and is capable of referring to a certificate by any person involved in any element of the building, design or works. If an architect is to protect himself or herself, it seems inevitable that an architect would require that ancillary certificates be given by every other trade or profession involved in a particular project. In large projects, I would expect that this could run into very significant volumes of certificates. It is difficult to know, however, how the certifier can successfully ensure that he or she will be entitled in due course to rely upon Ancillary Certificates and to call for the provision of such Ancillary Certificates from the different trades or professions involved. This is particularly so having regard to the terms of the undertaking to be given by the certifier under Article 9. The form of undertaking to be given by the Assigned Certifier is unqualified in its terms and requires the certifier to undertake that he or she will certify, following the implementation of the Inspection Plan "by myself and others" for compliance with the requirements to the Second Schedule to the Building Regulations. The undertaking is not qualified by any entitlement to call for and rely upon Ancillary Certificates. There is therefore an obvious tension between the terms of the undertaking on the one hand and the terms of the certificate to be given under paragraph 8 of the Completion Certificate.

14. That leads me to a number of other difficulties that arise in relation to the form of undertaking to be given under Article 9. In its current form, it contemplates that the certifier will undertake to use reasonable skill, care and diligence to "inspect the building or works". Does that mean that the certifier has to inspect every element of the building or works? If so, this is going well beyond anything that certifiers have previously undertaken (save by special agreement with a client). On its face, however, there is nothing to qualify the nature of the inspection that is to be carried out. One can therefore envisage that this will be relied upon by building owners in the future to try to pin liability upon certifiers for a failure to inspect the particular element of the building or works notwithstanding that the certifier had not been expressly engaged to oversee the building works on a continuous basis.

15. A second issue that arises in relation to the form of undertaking is that the certifier undertakes to coordinate the inspection work of others. I am not sure how an architect would in practice coordinate the inspection work of others. It is very unclear to me what the coordination of inspection work of others is intended to include. What happens if the inspection work of others falls down? It seems to me that certifiers could well find themselves exposed on the basis of this undertaking in the event that there was a failure to ensure that a particular aspect of work was inspected by an appropriate expert. Again, this seems to me to increase the existing liabilities of certifiers, and therefore, to have potential repercussions both for the availability of insurance and (in the event of additional litigation in the future) the extent of the premia to be paid for such insurance as is available.
16. As noted previously, the form of undertaking also includes an undertaking to certify for compliance with the requirements of the Second Schedule to the Building Regulations. This undertaking is not qualified in any way notwithstanding the fact that it appears to be intended that the form of certificate on completion should be modified to allow the certifier to rely upon the work of others.

17. A similar issue arises in relation to the notice of assignment of the assigned certifier under Article 9. The form which is used for that purpose involves a declaration by the building owner that the person so assigned "is competent to inspect the building or works and to coordinate the inspection work undertaken by others and to certify the building or works for compliance with the requirements of the Second Schedule to the Building Regulations .......". Again, this is unqualified in its terms and does not suggest that the certificate will be subject to any qualifications.

18. In light of the views expressed by me above, I regret to say that I do not believe that the amendments which are now proposed to the Building Regulations will deal with the concerns which I have previously identified in my opinion of July 2013. If anything, the lack of clarity in the way in which the amendments have been drafted will make matters worse and are likely, in my view, to encourage litigation rather than to minimise it.

If you have any further questions, please let me know.

Regards.

Yours sincerely,

Denis McDonald

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2 Emphasis added.
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") \(^1\) which are due to come into effect on 1 March, 2014. The 2013 Regulations amend the Building Control Regulations, 1997 \(^2\). 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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\(^1\) S.I. No. 80 of 2013.

(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 ³. 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

³ 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. 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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4 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".  

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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5 Emphasis added.
contrast to the provisions of the certificate to be given by the contractor. 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".  

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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6 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.

7 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” \(^8\);

(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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\(^8\) 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 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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9 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 10 observed:

“To certify”, after all, means that the certifier is “certain”. ....”. 11

16. The explanation given by Keane is also consistent with the ordinary meaning of the word “certify”. For example, the Shorter Oxford English Dictionary 12 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 13 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 14, 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

11 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.
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 15:-

"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. .... “.

15 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 16, 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 17.-

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17 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 ...”.  

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 19, 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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18 Emphasis added.
19 See paragraph 14 above.
9(1)(b)(iii) of the 1997 Regulations 20. 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". 21

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

20 As inserted by Regulation 6 of the 2013 Regulations.
21 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. 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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22 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" 23.

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

23 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

Matheson, Solicitors, 70 Sir John Rogerson’s Quay, Dublin 2.
Architects liability.revised opinion 1807/mm