OPINION

RE: IN THE MATTER OF THE BUILDING CONTROL (AMENDMENT) REGULATIONS 2013
S.I. NO 80 OF 2013

QUERIST: THE ASSOCIATION OF CONSULTING ENGINEERS OF IRELAND (ACEI)

AGENT: STEPHEN CHESSHER SOLICITOR
BEALE & COMPANY SOLICITORS

1. INTRODUCTION

I have been asked for my Opinion in relation to the above Regulations which include Forms of Mandatory Certification which are appended to the Regulations. In particular I have been asked a number of questions which I will set out below, and answer.

2. THE BACKGROUND

The Building Control (Amendment) Regulations of 2013, are made by the Minister for the Environment Community and Local Government following consultation with interested parties and are to be read with similar Building Regulations and are cited as the Building Control Regulations 1997 to 2013.

In April of 2013 the Minister for Environment, Community and Local Government announced new measures stating that they would prevent disastrous building failures in the future. Their stated purpose is to prevent the future recurrence of poorly constructed dwellings, pyrite damage and structures breaching Fire Regulations which were left as a legacy of the poorly regulated housing boom in the 1990s and 2000s.
The Minister was reported as saying the purpose of the Regulations was to restore consumer confidence in construction as an industry and that the Regulations were "a major step forward and will for the first time give home owners clarity, traceability and accountability at all stage of the building process. They will provide consumers with the protection they need and deserve".

It is clear from the Regulations, the Explanatory Note, the Minister’s Press Statement and from instructions that the new Regulations create a number of new roles and responsibilities including that of a “Assigned Certifier” as well as direct Statutory responsibilities which are to be undertaken by builders.

Querist’s role in this, arises directly from the Regulations in that Assigned Certifiers can be Registered Architects, Chartered Engineers or Building Surveyors.

The Regulations envisage a six stage approach which I will set out as follows:

1. A Commencement Notice or a 7 Day Notice. (Article 9 and Article 20 A (2), set out alternatives). The 7 Day Notice procedure set out in Article 20 A (2) may be used if it is proposed to start work before the Grant of a Fire Safety Certificate. The Article 9 and Article 20 A (2) procedures each have their own notices of assignment, undertakings and design certificates albeit the forms are almost identical, which should be filed with the Building Control Authority either of which should be accompanied by a number of Certificates.

2. A Design Certificate called a Certificate of Compliance (Design), to be filled out by the Designer who confirms that he has been commissioned by the building owner to design in conjunction with others the works described and to Certify such design, in accordance with the Code of Practice for inspecting and certifying Building Works.

3. A Notice of Assignment of person to inspect and Certify works (Assigned Certifier). This is a document to be signed by the building owner that he has assigned a named Assigned Certifier, being a person named on a Register
maintained pursuant to Part 3 or Part 5 of the Building Control Act 2007 or Section 7 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969, so that that person can inspect the works and co-ordinate the inspection works undertaken by others and Certify that the works are compliant pursuant to the Second Schedule of the Building Regulations.

4. An Undertaking by the Assigned Certifier that they will use reasonable skill, care and diligence to inspect the works and to co-ordinate the inspection work of others and to Certify following the implementation of the Inspection Plan by the Assigned Certifier and others that the works are in compliance with the requirements of the Building Regulation.

5. A Notice of Assignment of the named person assigned to be the Builder. It is noted that the building owner requires to be satisfied that the builder is competent to undertake the works assigned.

6. An Undertaking by the builder that he is competent to undertake the works and construct the buildings in accordance with the design and the Code of Practice.

The thrust of this Opinion, is to ascertain the legal responsibilities which flow from the role of the Assigned Certifier and the legal obligations which flow from the Design and Completion Certificates created and the obligations which flow.

3. **ARTICLE 20(G) and 20 (F)**

These Articles create the Statutory structure for the proposed Regulations.

The Regulations themselves, do not specify whether or not the Assigned Certifier, is the same person as the Design Certifier, i.e., the person who signed the Design Certificate required to be submitted with the Commencement Notice.
Indeed it is possible, that the Assigned Certifier will not be such a person and therefore, will come to the role fresh without necessarily having the benefit of the knowledge of any of the designers.

4. THE ROLE OF THE ASSIGNED CERTIFIER

It is worth setting out in full, the Form of Undertaking which is required under the Regulations (Articles 9(1)(b)(iv) and 20A(2)(a)(ii)(VI). The material part reads as follows:

"In accordance with the Code of Practice for Inspecting and Certifying Building Works, or equivalent, I undertake to use reasonable skill, care and diligence to inspect the 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 of the Building Regulations in-so-far as they apply to the works or building to which the accompanying Commencement Notice and Plans, Specifications, Calculations, Ancillary Certificate and Particulars listed in the Schedule thereto refer."

[Note: there are minor differences between the 2 forms of undertaking]

The Certificate signed by the Assigned Certifier as opposed to the Undertaking, reads as follows:

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

6. 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 undersigned 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 in so far as they apply to
the Building Works concerned.

7. Drawings, specifications, calculations, ancillary certificates and
particulars as required for the purposes of Part IIC of the Building
Control Regulations are included in the Annex (see attached).

Signature ..................... Date: .............Registration No: ..............

(where the Signatory is an employee) on Behalf of
Name and Address .........................................................

It is noted: that Certificates are in a mandatory form and that the final Completion
Certificate is signed firstly by the builder and then by the Assigned Certifier. In regard to
this Certificate, it strikes me that a number of words are of fundamental importance, these
include the words “fulfilled” in the second line where the Assigned Certifier certifies that
he has fulfilled the Inspection Plan drawn up in accordance with the Code of Practice and
more particularly that other nominated individuals have exercised reasonable skill, care
and diligence doing what they are obliged to do.

Secondly, the Assigned Certifier is certifying that the building or works are in
compliance with the requirements of the Second Schedule of the Building Regulation in
so far as they apply to the building concerned. There is no room for doubt, the Assigned
Certifier is certifying two things. Firstly that he and others have fulfilled the Inspection
Plan and secondly, that the Building Works are in compliance with the Regulations.

The wording does not envisage the possibility of the Assigned Certifier being unable or
unwilling to issue a Certificate either because he is of the view that the works are not
compliant with the Building Regulations or for other reasons. This is a most unfortunate
position, and will give rise to uncertainties which will inevitably lead to Litigation and
contrasts with the undertaking to be given by the builder in para 4 of his undertaking
which reads as follows:
"... I further undertake ... to take all reasonable steps to ensure that I shall certify that the works or building is in compliance ..."

5. **THE CERTIFICATE OF COMPLIANCE (DESIGN)**

I have been specifically asked for my Opinion in regard to the Form of Certificate of Compliance (Design) in particular paragraph 5 which reads 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 in so far as they apply to the building works concerned."

This paragraph, is different to its predecessor which read as follows:

"I certify that, having regard to the plans, calculations, specifications which have been prepared by me and having relied on ancillary Certificates and particulars referred to at 4 above, ...."

The deletion of the words “which have been prepared by me” and “having relied on” changes entirely the tone and legal effect of the Certificate of Compliance.

The Design Certifier certifies that the plans, calculations and specifications, (whether or not they were prepared by the Design Certifier) are in compliance with the requirements of the Regulations.

In the event of the Design Certifier not being the person who prepared the plans, calculations or specifications, the Design Certifier would be obliged to carry out a full assessment of all plans, calculations and specifications thus making his job a much more onerous, complicated and expensive one.
Further, the caveat of the words “having relied upon” was removed in relation to ancillary Certificates. It would be perfectly normal and appropriate for a Design Certifier to rely upon ancillary Certificates of another professional, but that is not the import of paragraph 5 as presently drafted. In essence, the Design Certifier is certifying that the ancillary Certificates are in compliance with the requirements of the Building Regulations, even though more than likely they are dealing with areas which are beyond the competence and expertise of the Design Certifier which in my view gives rise to far greater contractual and legal responsibility upon the Design Certifier.

It is unclear to me as to what reason or reasons could be put forward for the significant change in the legal responsibility created by the Design Certificate.

These are formal Certificates upon which Third Parties will rely. Not only is that the Statutory reading of the Certificate, but clearly it was the intention of the Minister that Third Parties will be able so to rely as evidenced by the Explanatory Note and Press Release, enabling Third Parties including Government agencies to rely upon the Certificates, and in the event of there being a breach of the Building Regulations, offences are created, as well as the creation of Tortious, if not contractual liability.

6. **THE ISSUES**

I have been specifically asked for my Opinion in regard to six stated questions which I will set out below.

1. Is the statement made by the Assigned Certifier in paragraph 6 of the Completion Certificate that the Building is in compliance with the Building Regulations qualified by the preceding Clause in paragraph 6 to the effect that it is being given, using “reasonable skill, care and diligence”?

In my opinion the statement made in paragraph 6 signed by the Assigned Certifier is not qualified by the preceding clause in paragraph 6 which makes reference to “reasonable skill, care and diligence”. Indeed, it seems to me that the Assigned
Certifier, is also certifying the role of others nominated. The use of the phrase “reasonable skill, care and diligence” as presently drafted could well be interpreted as applying only to the role of the Assigned Certifier and not to the other individuals nominated. It does not however affect one way or the other, the second part of paragraph 6 which is a bald certification that the building works are built in compliance with the requirements of the Second Schedule of the Building Regulations.

2. If discrete elements of the building had been inspected by other individuals referred to in the Inspection Plan and those individuals have issued ancillary Certificates as envisaged by the Code of Practice and referred to in paragraph 7 and the annex of the Completion Certificate, is the Assigned Certifier entitled to rely on those other individuals and ancillary Certificates or does he bear sole responsibility for the Certificate as to compliance that he has signed?

In my Opinion, pursuant to the Certificates as presently drafted, the Assigned Certifier is not entitled to rely upon other individuals and ancillary Certificates. He is the Assigned Certifier, and it is the clear intention of the Regulations and more particularly Article 20, that the Assigned Certifier is the person with full responsibility. He simply cannot rely upon what other individuals or ancillary certifiers may have done or not done. As the Certificate is presently drafted, he must satisfy himself.

In my Opinion the Assigned Certifier bears sole responsibility for the Certificate as to compliance that he has signed.

3. Is a consequence of the unqualified nature of the second clause of paragraph 6 that the Assigned Certifier is certifying that the Design of the building, as built, is in compliance with the Building Regulations?

In my Opinion it is a consequence of the unqualified nature of the second clause at paragraph 6, that the Assigned Certifier is certifying that the design of the building as
built is in compliance with Building Regulations. I appreciate, that the Assigned Certifier will not necessarily be a Member of the Design Team and will not necessarily have the competence to assess the design particularly to the extent that there may be specialist elements. In my Opinion, as the Completion Certificate is currently drafted, the Assigned Certifier is not entitled to rely upon the Design Certificate filed with the Commencement Notice unless he happens to be the same person as the design certifier, but even then he would have to carry out a design review in order to issue a Certificate of Compliance on Completion.

4. Will the Assigned Certifier be required to take responsibility for elements of works which are the subject of ancillary Certificates, which by definition, will not have been inspected by himself?

In my Opinion, as the Completion Certificate is currently drafted, the Assigned Certifier is not entitled to rely upon ancillary certificates. He is certifying, that the building or works are in compliance with the requirements of the Second Schedule of the Building Regulations. He is also certifying the Inspection Plan has been fulfilled. This gives rise to much more onerous obligations than any non Statutory form of Opinion which makes reference to “Substantial Compliance” with Building Regulations. The words “Substantial Compliance” does not appear in the Certificate. The Assigned Certifier is certifying that the building is in full compliance with the requirements even in circumstances where there might be some potential breaches of Building Regulations which might not be capable of being ascertained without specialist knowledge.

5. Does the Certificate of Compliance on Completion envisaged by the Regulations, give rise to a potential legal liability to Third Parties?

I am aware of Section 21 of the Building Control Act 1990 which states as follows:
"A person shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any Provision of this Act or any Order or Regulation thereunder."

The terms of Section 21 seem to me to be extraordinarily broad. The concept of granting legal immunity from suit by Statute, is one which does not commend itself to the Courts (See *Byrne v- Ireland IR [1969] 241* and *Maguire v- Ardagh [2002] 1 IR 386*) or pursuant to The European Convention on Human Rights Act, 2003. Therefore I would question, whether or not Section 21 of the Building Control Act 1990 would withstand legal challenge.

Leaving that issue aside, it seems to me, that any Certificate is a representation, and in those circumstances, in the event of a failure by the Assigned Certifier to have ensured that the building in question was built in accordance with the Inspection Plan, and not to have ensured he and other individuals have fulfilled their Statutory obligations, and to proceed to certify that the building was in compliance with the Building Regulations-, when it wasn’t, then in my opinion the Assigned Certifier would clearly be guilty of negligence and misrepresentation and / or negligent misstatement. In those circumstances, it seems to me that any Third Parties who came to rely upon the Certificate such as subsequent purchasers or others such as those envisaged under the Occupiers Liability Act, would have a cause of action against such an Assigned Certifier.

To date, even pursuant to the non Statutory forms of Opinion furnished by appropriate Experts, legal liability has arisen and such actions have been brought to Trial. At the very least, it seems to me that this raises Professional Indemnity issues which would be required to be raised with Indemnifiers on behalf of any party who undertakes the role of an Assigned Certifier. It seems to me, that it was the intention of the Minister to create an obligation upon the Assigned Certifier as well as others, for the purposes of “giving home owners clarity, traceability and accountability at all stages in the building process…. And provide consumers with the protection they need and deserve”.

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Further it seems to me, that the purpose of creating the role of an Assigned Certifier, is in essence to take responsibility away from any Government Agency, and place it upon individuals who are required to be registered and therefore traceable, so as to ensure third parties have the right of recall.

6. In the event of an Assigned Certifier being found liable in Tort or otherwise, does the Assigned Certifier face personal liability because he has signed the Certificate in his own name?

I note, that the Assigned Certifier is obliged to sign his own name, and give his own Registration Number. The Certificate goes on to say as follows:

"(Where the signatory is an employee) on behalf of ...."

It may well have been the intention of the drafters of the Certificate, to give some form of protection to the named Assigned Certifier, but the manner in which the Certificate has been drafted does not give such protection. It simply gives those who may seek legal recourse the option of suing the Assigned Certifier, or his employer, or more likely, both.

The principle of vicarious liability only arises if the employee is negligent. The fact that he may be an employee, does not obviate or negate or reduce his own personal responsibility.

It is interesting to note, that in the new edition of McMahon & Binchy (4th Edition) dealing with the principle of vicarious liability, at no stage do the learned authors consider that an employee could not be liable where an employer was held liable. The whole principle of vicarious liability is based upon the axiom, that the employee is prima facie liable and therefore the questions which arise relate to whether the employer can avoid liability pursuant to the principle of Law.
Pursuant to the Partnership Act of 1890 the Liability for Partners is specifically covered. Section 10 of the Partnership Act of 1890 reads as follows:

"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co partners, loss or injury is caused to any person not being a partner of the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act."

The Liability is joint and several (see Allied Pharmaceutical Distributors Limited and All-Phar Services Limited v Walsh, Unreported December 1990 where Barron J held that partners were liable for investment advice given by another partner in unusual circumstances.

It has been pointed out, that given that an Assigned Certifier must be a natural person with his own personal Registration under the Building Control Act or the Institution of Civil Engineers Act, that the Policy of the Regulation must be to impose a personal responsibility upon him. In my view this is correct. The professional responsibility is personal. Clearly this gives rise to potential conflicts, where an Assigned Certifier is an employee rather than a Principal of a Firm.

This also gives rise to potential difficulties in the event of an Assigned Certifier leaving his employment and a new Assigned Certifier having to take over responsibilities of a predecessor.

7. **AN ALTERNATIVE WORDING**

It seems to me, that the Certificate as presently drafted imposes a far higher legal responsibility upon the Assigned Certifier and in so doing, exposes the Assigned Certifier to legal responsibilities in a myriad of different situations depending upon the facts in each case.
It seems to me, that it was the intention of the Minister to in essence create secondary if not primary liability upon the Professionals whether they be Assigned Certifiers, Architects, Engineers or Building Surveyors pursuant to the Certificate procedure, to carry out inspections.

I have been shown the preceded draft before the final draft appeared in the Statutory Instrument. This reads as follows:

"I now certify that the Inspection Plan drawn up having regard to the Code of Practice for inspecting and certifying building works, or equivalent, has been fulfilled by the undersigned and relies on other individuals nominated therein as appropriate having exercised reasonable skill, care and diligence and that, based on the above, the building or works is in compliance with the Requirements of the Second Schedule of the Building Regulations in so far as they apply to the Building Works concerned."

It seems to me that this is a far more preferable form of Certificate, in that it specifically makes reference to "having regard" to the Code of Practice, and means that the Assigned Certifier is able to rely upon the Certificates of others. Further, the manner in which the words "as appropriate" are inserted clearly ensures that the issue of the exercise of "reasonable skill, care and diligence" applies both to the Assigned Certifier and to other individuals nominated.

It seems to me that the words "Relies on" and the words "Based on the above" means that the Assigned Certifier is able to rely upon everything above those words.

In my view the absence of the words "Having regard to", "relies on" "as appropriate", and "based on the above" places a far more onerous obligations upon the Assigned Certifiers, who, as I have set out above, may not necessarily be a member of the Design Team, and may not necessarily be cognisant with all appropriate matters. Even if he was a member of the Design Team, he may not necessarily be cognisant with all appropriate matters and therefore the importance of introducing the caveats that previously existed.
8. **CONCLUSION**

In my view, the Certificates as presently drafted places onerous obligations as set out above, upon both the Design Certifier and the Assigned Certifier.

The unintended consequences of this is that Professional Indemnity Insurance will become expensive and perhaps extremely difficult to obtain on behalf of both Certifiers.

In my opinion, in the event of the death or the unavailability of the original Design Certifier, there may be circumstances where constructed buildings will not be able to be certified, in that an Assigned Certifier will not be in a position to issue the appropriate Certificate, giving rise to harsh consequences including such constructed buildings remaining uninhabitable and empty.

Further, the manner in which the Certificates have been designed pursuant to the Statutory Instrument, gives rise to the potential of significant Litigation involving multiple parties, in potentially different legal forms. For example an Assigned Certifier’s appointment may well provide for Arbitration, which would have to run in tandem with Court proceedings.

Accordingly I would advise that Querist should re-engage with the Department to ensure that these unintended consequences are avoided.

Nothing further occurs.

Dated 4 September 2013.

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