Executive Summary

In this memorandum, I have summarised the various Counsels’ Opinions in relation to the Building Control (Amendment) Regulations. As I indicated at the outset of this memorandum, I would recommend that any interested party would read the actual Opinions as there is detail and nuance in them which by necessity is not captured in the summary.

You asked that I would include an executive summary identifying in short form the views ultimately reached by the various Counsel in relation to Building Control (Amendment) Regulations 2014. I will do so here. However, I would reiterate what I have said immediately above, which is that people should read the more detailed summary of the Counsels’ Opinions contained in the rest of this document and indeed read the Counsels’ Opinions themselves.

1. Introduction

I have attempted to do that in this note. However, there are a few very important points which I must make at the outset, as follows:

- Each Counsel will have issued the Opinion to their instructing solicitor for the relevant client. As such, although I understand that the respective clients appear to have shared and exchanged the various Counsels’ Opinions, it is still important that I make the point that each Counsel will have given their Opinion only to their instructing solicitor and their own relevant client.

- I am approaching this on the basis of an understanding that each of the respective clients agreed to share the Opinions they had been furnished by their own Counsel and, on that basis, that neither they nor their Counsel would have any objection to this summary note being prepared.

- While I have attempted to summarise key points of the Opinions in this document, the reality is that the only way in which a person can establish and properly understand the actual views of the relevant Counsel is by looking at the actual Opinions themselves. As one would expect, the Opinions all go into some detail in terms of explaining the respective
Counsels’ understanding of matters, relating some of the instructions they have received and explaining the rationale for any conclusions reached. Furthermore, each of the Opinions make clear in their own different ways the fact that these are not necessarily straightforward, black and white issues, which lend themselves to very neat, concise Opinions and conclusions. The Opinions, and the underlying issues, are detailed, nuanced and often complicated. It is simply not possible to replicate that detail, those nuances and those difficulties in this note.

- Where a Counsel gave more than one Opinion, it is necessary to read all of that Counsel’s Opinions together.

- Finally, what I have outlined below is my own assessment of what appear to me to be the key issues in each of the different Counsels’ Opinions. In preparing this note I have focused on what appears to me to be perhaps the key issue for architects, which is the issue as to whether the Regulations (or before that the Building Control (Amendment) Regulations 2013) impose additional liability on architects in the context of providing Statutory Certificates under the Regulations, as compared with the regime which pertained prior to the introduction of the Regulations. I have to say it may well be the case that any of the respective Counsel might disagree that I have identified the key points in that regard, but I have attempted to do so faithfully and objectively.

Gavin Ralston SC

- The 2014 Regulations are not intended to alter the existing common law liability on architects. They do no more than require the building owner to engage suitably qualified property professionals to carry out a “full service”. The real onus of the Regulations is on the building owner. An architect engaged to carry out work under the Regulations undertakes a very serious responsibility and considerably more than the limited qualified Opinions which could be given under the previous regime.

- On the question as to whether the issuance of Certificates under the new regime impose any greater liability on the Assigned Certifier than already exists under the law of negligence, Mr Ralston answers it in two parts. Firstly, the Certificates are actually issued to the Building Control Authority
and the Building Control Authority itself would not suffer any damage in consequence of an inaccurate Certificate. Of course, any third party (such as a purchaser) may be able to make a claim but not as a result of the Certificate but rather upon negligence (including the possibility of negligence in issuing a Certificate). Secondly, in the absence of negligence for which an architect would be liable, the issuance of a Certificate would not in itself be a ground of liability. However, issuing a Certificate in circumstances where the appropriate criteria have not been met may in itself be an act of negligence.

Denis McDonald

- In relation to the undertaking to be given by the Assigned Certifier, the second part of the undertaking (which relates to the certification given by the Assigned Certifier) involves significant responsibilities. The Certifier must certify compliance with plans, calculations, specifications etc when the Certifier may not have had input into those documents. Furthermore, there is nothing in the Certificate to qualify the nature of the inspection to be carried out by the Certifier in the undertaking. One can therefore envisage that building owners may rely upon this in the future to try and pin liability upon Certifiers for failure to inspect a particular element of the building or works notwithstanding that the Certifier may not have physically been able to do so.

- In relation to the Design Certificate and the Ancillary Certificate, it appears that the architect is certifying not just that he or she has exercised reasonable skill, care and diligence but that other members of the design team have too. As such, the architect is taking responsibility for the work of others onto himself or herself and therefore exposed to liability.

- Mr McDonald is not convinced that the reference to reliance on Ancillary Certificates in the Design Certificate represents any significant protection for the Certifier.

- The reference to reliance upon Ancillary Certificates in the Completion Certificate means that the Assigned Certifier will require that Ancillary Certificates be given by every other trade or profession involved in a particular project and the Ancillary Certificates may therefore run into several volumes.

- There may well be insurance implications, with a significant prospect that at the very least insurance companies will wish to reflect the increased risk in premium.

Peter Bland SC

- In the Certificate of Compliance on Completion, the Assigned Certifier does no more than confirm the exercise of his own skill, care and diligence. It does not constitute a warranty as to the accuracy of the Ancillary Certificates of others.

- The Assigned Certifier is entitled to rely on the exercise of reasonable skill, care and diligence by the Ancillary Certifiers in the context of the reference
in the Completion Certificate to the Inspection Plan.
• It is implicit in the Certificate of the Assigned Certifier that the Assigned Certifier must have satisfied himself or herself as to the general competency of the Ancillary Certifiers and the Assigned Certifier is responsible to procure and annex the Ancillary Certificates to the Completion Certificate.

• The modifications to the form of the Completion Certificate (as compared to the 2013 Regulations) are reasonably effective in addressing the concern as to whether the 2014 Regulations extend the potential liability of the architect who signs the Certificate so as to amount to a warranty in respect of the works of others. The wording of the Certificate may still be less than perfect, but the Assigned Certifier should not fear being found liable for the negligence of an Ancillary Certifier.

David Nolan SC

• The final Certificates in the 2014 Regulations are a significant modification of the previous Certificates.

• The final draft Certificate of Compliance on Completion (the one in the 2014 Regulations) qualifies the role of the Assigned Certifier having regard to the work of others. The Assigned Certifier is no longer certifying the work of others, although it does have a role in co-ordinating the inspection activities of others and co-ordinating procurement of ancillary certification. Failure to so co-ordinate will give rise to a legal liability.

• The final Certificate of the Assigned Certifier is based upon he or she exercising reasonable skill, care and diligence at all times and so long as the Assigned Certifier has exercised reasonable skill, care and diligence, legal liability has been tempered.

• The new wording of the Certificates in the 2014 Regulations are a very significant improvement from those appended to the 2013 Regulations. Necessary modification and improvement and clarifications have been achieved so as to lessen the broad legal liability previously imposed.

John Trainor SC and Sadhbhanna Ni Fhloinn

• Their Opinion, from September 2013, relates to the 2013 Regulations.

• They consider whether in the future third parties might seek to hold builders liable by reason of a certification error.

• A failure to comply with the undertaking and/or an error in certification in the Completion Certificate would not per say appear to impose any additional statutory liability on the builder for which he/she could not have previously been pursued.

• In considering whether in the future third parties might seek to hold builders liable by reason of a certification error, they conclude that an argument in favour of civil liability is highly stateable and that the risk of a court imposing civil liability in respect of an error in certification is thus very real. They have strong concern that Section 21 of the Building Control Act 1990 would not be sufficiently strong to exclude the possibility of civil liability for
damages for misrepresentation (arising from a certification error) being imposed on a builder.

- The prospect arises that in actions against Design Certifiers for errors in certification (against based on negligent misrepresentation) one might see such parties applying to the court for leave to seek contribution or indemnity from builders in appropriate cases.
- The 2013 Regulations did present considerable potential risk to builders who have been subjected to additional potential liabilities over and above those extant under the regime prior to the 2013 Regulations.

2. More detailed summary of the various Counsels’ Opinions

To now turn to the various Counsels’ Opinions:

Gavin Ralston SC

- Instructed on behalf of the RIAI.
- Gave written Opinions in September 2013, December 2013 and March 2014.

September 2013 Opinion

- Opined on the Building Control (Amendment) Regulations 2013.
- That Opinion looked at the requirements of the 2013 Regulations and the basis for the Statutory Certificates envisaged by the 2013 Regulations. It contrasted the existing liability of architects (prior to implementation of the 2013 Regulations) with his view of the liability of architects (as Certifiers) under the 2013 Regulations.
- Mr Ralston expressed the opinion that the 2013 Building Regulations do not seek to extend the services of an architect beyond those which an architect providing a “full service” would have undertaken. He states, however, that the problem is that the 2013 Regulations appear to require the architect to provide an unqualified Certificate of Compliance for design and/or construction. The form of Certificates in the 2013 Regulations did not appear to allow reliance upon Certificates, designs or specification of others. As such, modification to the 2013 Regulations was required.

December 2013 Opinion

- Given on foot of the (then) proposed amendments to the 2013 Regulations.
- Mr Ralston said that the modifications to the Design Certificate did not change the primary liability of the designer to have overall responsibility for the design, but did permit the designer to have reliance on the input of others, always subject to the requirement that it is reasonable to do so. He repeats that Reliance on Certificates by a Certifier are subject to principles such as those outlined in the Quinn v Quality Homes case from 1976.
He remarks that significant changes were made to the Certificate of Compliance on Completion. He says that the modifications clarify that the Certifiers' obligations do not go beyond the exercise of reasonable skill, care and diligence and do not provide a warranty as to the accuracy of Certificates provided by others. Similar to the Design Certificate, the Certifier must be satisfied that reliance on the Certificates of others is reasonable. Mr Ralston does state that there are other matters, to which he drew attention in his September 2013 Opinion, which were not addressed and which he believed should be addressed (relating to partial certification, the code of practice and the inspection plan). Mr Ralston states that he does see the inspection plan as a matter of importance.

**March 2014 Opinion**

- Mr Ralston considers the issue as to whether the 2014 Regulations impose any new liability on members who opt to undertake services within the new regime introduced by the 2014 Regulations.

- He agrees with the Opinion of Denis McDonald SC that many aspects of the Regulations are ambiguous, although says that is in his experience likely to be the way with any new law or new Regulation that imposes a new statutory regime on top of the existing common law position.

- His view is that it can be said with some certainty that the 2014 Regulations are not intended to alter the existing common law liability. He says that they do no more than require the building owner to engage suitably qualified property professionals to carry out a “full service”.

- As such, he sees that real onus of the Regulations is on the building owner.

- It is right to say that an architect engaged to carry out such work undertakes a very serious responsibility and considerably more than the limited, qualified Opinions which could be given under the previous regime. As such, the real effect of the Regulations is to dispose of the limited inspection, qualified Opinions of the type previously agreed between the RIAI and the Law Society.

- Mr Ralston considers the question as to whether the issuance of Certificates under the new regime, particularly the Certificate of Completion, impose any greater liability on the Certifier than already exists under the law of negligence. He answers that in two parts. Firstly, he says that the Certificates are actually issued to the Building Control Authority and the Building Control Authority would not itself suffer any damage in consequence of an inaccurate Certificate. Of course, any third party (such as a purchaser) may be able to make a claim but not as a result of the Certificate, but rather in his view in reliance upon negligence (including the possibility of negligence in issuing a Certificate). The second part of his answer is to the effect that in the absence of negligence for which an architect would clearly be liable, the issuance of a Certificate would not in itself be a ground of liability. Having said that, to issue a Certificate in circumstances where the appropriate criteria have not been met may itself be an act of negligence.

- Mr Ralston goes on to consider the Supplemental Opinion of Denis McDonald SC from March 2014 and make various comments upon it.
• He agrees with Mr McDonald that a person acting as Assigned Certifier is obliged to take on a very serious responsibility, but it is one which Mr Ralston says in his experience is well within the competence and training of an architect. Mr Ralston says it is akin to the service historically provided by an architect known as a “full service” as opposed to a more limited form of inspection.

• He notes that Mr McDonald says that he can envisage that the Certificate of Completion will be relied upon by building owners in the future to try to pin liability upon Certifiers for failure to inspect a particular element of the building. In Mr Ralston’s view, that is a liability that has always existed, independently of the new regime.

• Mr Ralston considers some of Mr McDonnell’s comments in relation to the Certificates in relation to design and states that he does not see the requirement to certify the design as complying with Building Regulations as imposing any additional obligations on designers.

• Mr Ralston considers Mr McDonnell’s comments regarding the modified wording of the Certificate of Compliance on completion where Mr McDonald highlights the difficulties in adequately obtaining and identifying the Ancillary Certificates. Mr Ralston’s shares those views, but restates that he does not think that the issuance of a Certificate in itself will found a cause of action. Mr Ralston says, with regard to the nature of Ancillary Certificates, that he thinks it would be very important for such Ancillary Certificates to be expressly notified and to acknowledge that they are required to certify in so far as their work is concerned that it complies with the Building Regulations. He says it is of huge importance to the Assigned Certifier that each and every one of the Sub-Certifiers acknowledges the purpose for which they are giving such Certificates.

• Mr Ralston also says that he fully agrees with Mr McDonnell’s observations on the lack of precision in wording of the Regulations. He does not agree however that those concerns will necessarily lead to the proliferation of litigation referred to by Mr McDonald. Mr Ralston restates his view that an architect or other property professional will be liable in negligence should something go wrong with a building, and that will in all likelihood involve the builder also. The issue in any such case will be the conduct of the builder and architect and whether the buildings have been appropriately constructed. Mr Ralston does not see the issue of the Certificate or its form of worth as being the primary focus. Mr Ralston restates that an architect will, in his view, in all probability be liable for such shortcomings.

Denis McDonald SC

• Instructed on behalf of Michael M Collins and Eoin O’Cofaigh.

• Mr McDonald issued Opinions in July 2013, December 2013 and March 2014.

July 2013 Opinion

• Mr McDonald considers the 2013 Regulations and says that they 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 his Opinion that the Certificates to be given by architects would lead to increased claims against architects.

- In that Opinion, Mr McDonald considers the unqualified nature of the Certificates in the 2013 Regulations with the regime which existed at that time (prior to the implementation of the 2013 Regulations). In reaching the conclusion identified above, Mr McDonald places some emphasis on the press release issued on behalf of the Minister in April 2013 and his understanding of the underlying rationale for the 2013 Regulations.

- He also considers the form of the Certificate on Completion and Design Certificate. In relation to the Certificate of Completion, he draws contrast between the part of the Certificate to be given by the builder on the one hand and the Assigned Certifier on the other hand. He states that the Assigned Certifier is not given the ability to qualify his Certificate in so far as he may be reliant on the work done by others. On the other hand, the builder’s part of the Certificate does allow for such reliance. He contrasts the Assigned Certifier’s part of the Certificate of Completion under the 2013 Regulations with the typical Compliance Certificate traditionally given by architects (prior to the implementation of the 2013 Regulations).

December 2013 Opinion

- Mr McDonald considers the amendments which were then being suggested to the 2013 Regulations.

- He states that the language in the proposed amendments is extraordinarily loose and vague, with the result that the Certificates in their amended form would be very unclear and that any lack of clarity in the Certificates is a recipe for disaster. It would also increase the likelihood of litigation. This is likely to dissuade insurers from providing appropriate insurance to architects (or other professionals who may act as Assigned Certifiers).

- If acting as Certifier, under some of the Certificates the architect would be taking on very extensive additional liability over and above the liability to which architects have traditionally been exposed. This would have the inevitable consequence of that claims against architects will increase.

- One of the principal concerns is in relation to the proposed amended Design Certificate and the fact that it 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. If the architect confirms that, he or she is taking responsibility for the work of others and exposing himself or herself to liability in respect of those other works where it subsequently transpires that reasonable skill, care and diligence was not in fact exercised by those other members of the design team.

- In relation to the proposed amended Completion Certificate, it was hopelessly unclear.
• The same concern arises with the Completion Certificate as identified above in relation to the Design Certificate, in terms of the Assigned Certifier confirming that others have exercised reasonable skill, care and diligence.

• Paragraph 7 of the proposed amended Completion Certificate is difficult to understand and unclear. While paragraph 7 of the Completion Certificate appears to have been designed to allow the Certifier to rely upon others exercising reasonable skill, care and diligence, in Mr McDonald’s view the way in which the paragraph was amended made matters even worse because of the very significant uncertainty created by the language used.

• Paragraph 8 of the amended Completion Certificate is also unclear. The phrase “based on the above” means that all of the lack of clarity in the preceding parts of the Certificate are relevant to paragraph 8.

• The form of undertaking to be given is also unclear in that it makes reference to the Certifier undertaking to use reasonable skill, care and diligence to “inspect the building or works”. Does this mean that the Certifier has to inspect every element of the building or works? Also in relation to the undertaking, the Certifier undertakes to co-ordinate the inspection work of others. How in practice would an architect do this.

• In light of the views expressed in the Opinion, the amendments proposed to the 2013 Regulations would not deal with the concerns he has previously identified and, if anything, the lack of clarity will make matters worse and are likely to encourage litigation.

March 2014 Opinion

• Mr McDonald opines on the 2014 Regulations.

• In relation to the undertaking to be given by the Assigned Certifier, Mr McDonald does not believe that any particular difficulty arises in relation to the first part of the undertaking under which the Certifier undertakes to use reasonable skill, care and diligence to inspect the building or works and co-ordinate the inspection work of others (although states of course that it is crucial that the Certifier should use all reasonable skill, care and diligence in carrying out that element of the task). The second part of the undertaking (which relates to the certification to be given by the Certifier) involves significant responsibilities. For example, the Certifier is undertaking to certify compliance with the “plans, calculations, specifications, ancillary certificates and particulars listed in the Schedule”, when there does not appear to be any provision made for the fact that the Certifier may have had no input into those documents. Furthermore, there is nothing to qualify the nature of the inspection to be carried out by the Certifier in the undertaking. 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 do so.

• In relation to the Design Certificate, it appears that the architect is certifying not just that he or she has exercised reasonable skill, care and diligence but that other members of the design team and specialist designers have also
done so. As such, the architect is taking responsibility for the work of others onto himself or herself and therefore exposing himself or herself to liability.

- While clause 5 of the Design Certificate somewhat helpfully states that the Certifier has relied on Ancillary Certificates and to other particulars, Mr McDonald is not convinced that this represents any significant protection for the Certifier in circumstances where the Certifier is still certifying that the plans, calculations, specifications and particulars which have been prepared not only by the Certifier but by others are in compliance.

- In relation to the Certificate of Compliance on Completion again it appears that the wording means that the Assigned Certifier is confirming that the “others” involved in the work have exercised reasonable skill, care and diligence. This may not have been the intention, but it is what the language appears to convey.

- The final paragraph of the Completion Certificate allows the Certifier to rely upon Ancillary Certificates scheduled, however there is no definition of an “Ancillary Certificate”. Apart from that issue, 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.

- In light of the difficulties outlined in the Opinion, there may well be insurance implications for Certifiers. 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.

**Peter Bland SC**

- Retained for O’Connell Mahon Architects

- **Mr Bland’s Opinion is dated the 1 February 2014 and in it he opines on the 2014 Regulations.**

- **Mr Bland considers the Certificate of Compliance on Completion.** He states that the Assigned Certifier does no more than confirm the exercise of his own skill, care and diligence. He says the new form of Certificate does not represent a warranty as to the accuracy of the Ancillary Certificates of others. It is predicated on the Assigned Certifier’s reliance on the scheduled Ancillary Certificates.

- **In relation to the reference in the Completion Certificate to the inspection plan, Mr Bland is satisfied that the correct interpretation of paragraph 8 is that the confirmation that the inspection plan has been undertaken to a reasonable standard is qualified by the final clause of the Certificates, so that the Assigned Certifier is entitled to rely on the exercise of reasonable skill, care and diligence by the Ancillary Certifiers.**

- **Mr Bland says that it is implicit in the Certificate of the Assigned Certifier that he has satisfied himself as to the general competency of the Ancillary Certifiers and that the responsibility to procure and annex the Ancillary**
Certificates to the Completion Certificate is obviously that of the Assigned Certifier.

- Mr Bland states that the core issue arising is whether the Completion Certificate in the 2014 Regulations will extend the potential liability of the architect who signs a Completion Certificate so as to amount to a warranty in respect of the works of others. He said that the modifications to the form of Certificate (as compared to the 2013 Regulations) are reasonably effective in addressing this concern. Even though the wording of the Certificate may still be less than perfect, the Assigned Certifier should not fear being found liable for the negligence of an Ancillary Certifier.

David Nolan SC

- Retained for ACEI
- Gave Opinions in September 2013 and May 2014

September 2013 Opinion

- In this Opinion, Mr Nolan opines on the 2013 Regulations.
- He considers and discusses the various requirements and provisions of the 2013 Regulations. He then addresses a number of specific questions which appear to have been put to him in the context of the request for his Opinion.
- In answering those questions, Mr Nolan states that the Certificate given by the Assigned Certifier in the Completion Certificate is not qualified by the reference in the previous paragraph to using “reasonable skill, care and diligence”. He states that as drafted in the 2013 Regulations, the Assigned Certifier is not entitled to rely upon other individuals and Ancillary Certificates in giving the Completion Certificate. He says that the Assigned Certifier bears sole responsibility for the Certificate as to compliance. He states that it is a consequence of the unqualified nature of the second clause at paragraph 6 of the Certificate that the Assigned Certifier is certifying that the works have been built in compliance with the Building Regulations.

- Mr Nolan also states that any Certificate is a representation and that the Assigned Certifier would be guilty of negligence and misrepresentation (and/or negligent misstatement in circumstances where the Assigned Certifier fails to ensure that the building in question was built in accordance with the inspection plan and where the Assigned Certifier has not ensured that he/she and other individuals have fulfilled their statutory obligations, but nonetheless certifies the building.

- Mr Nolan also addresses the issue as to whether there could be personal liability where the Assigned Certifier signs the Certificate in his/her own name. He states that the policy of the 2013 Regulations must be to impose a personal responsibility upon the Assigned Certifier.

- Mr Nolan concludes with recommendations about amendments which might be made to the Regulations to address the points raised.
May 2014 Opinion

- This Opinion from Mr Nolan is given in the light of the introduction of the 2014 Regulations.

- Mr Nolan says that representations about the difficulties with the 2013 Regulations have brought about substantial positive changes in the law. He then goes through the changes which arise in the 2014 Regulations. In relation to the Design Certificate, Mr Nolan says that there have been a number of significant changes from the version in the 2013 Regulations. He says that Certifier is confirming that the plans, calculations etc which were prepared “exercising reasonable skill, care and diligence” by him and the plans, calculations, specifications etc of other specialists “whose design activities” he has co-ordinated, have all been prepared to demonstrate compliance with the Building Regulations. That therefore a Certifier is acknowledging that he co-ordinated the work of the others in the design team and specialist designers who have provided Ancillary Certificates.

- In relation to the Completion Certificate he says that it is to be welcomed that new paragraphs which have been added specifically referring to the Code of Practice confirm to third parties that the Assigned Certifier is satisfied that the inspection plan is in compliance with the Code of Practice. Mr Nolan also considers the Code of Practice as it affects the Certificates.

- In addressing concerns raised in the request for the Opinion, Mr Nolan states that the final Certificates in the 2014 Regulations are a significant modification of the previous Certificates. In regards to the Certificate of Compliance certainly, he says they are a significant improvement, modification and clarification. He believes that there has been a modification of the obligations which were placed upon the Assigned Certifier by virtue of the representations made. He states that in any litigation arising out of a Completion Certificate, the court or arbitrator would have regard not only to the Regulations and Certificate but more particularly to the Codes of Practice which he believes have a strong legal basis.

- Mr Nolan states that he has no doubt that the final draft Certificate of Compliance on Completion qualifies the role of the Assigned Certifier having regard to the work of others. The Assigned Certifier does have a role in co-ordinating the inspection activities of others and co-ordinating procurement of ancillary certification, and a failure to so co-ordinate will give rise to a legal liability. However, the Assigned Certifier is no longer certifying the work of others.

- He also states that the final Certificate of the Assigned Certifier is based upon he or she exercising reasonable skill, care and diligence at all times and so long as the Assigned Certifier has so exercised reasonable skill, care and diligence, legal liability has been tempered.

- He concludes that the new wording of the Certificates in the 2014 Regulations are a very significant improvement from those appended to the 2013 Regulations. He says that necessary modification and improvement and clarifications have been achieved so as to lessen the broad legal liability previously imposed.
John Trainor SC and Sadhbhanna Ni Fhloinn

- Opinion from September 2013.
- Instructed on behalf of the Construction Industry Federation.
- Mr Trainor and Ms Ni Fhloinn discussed the origin and content of the pre-2013 regulatory regime and then considered the additional requirements of the post 2013 regime.
- They state that the 2013 Regulations impose new duties on builders to provide undertakings in relation to compliance both prior to the commencement of building works and/or in connection with the 7 day notice and in relation to providing a Certificate of Compliance on Completion. They say that it is unclear as to whether a builder, in failing to provide the required undertaking, or to execute the required Certificate of Compliance, would be guilty of an offence under the Building Control Act 1990 as amended.
- They say that where a builder has provided the required undertakings and/or Certificate of Compliance on Completion but it transpires that the building has not in fact been built in accordance with the Building Regulations, the builder’s liability under the Building Control Act 1990 will primarily arise on foot of his failure to comply with the standards of building required by the Building Regulations and not primarily by reason of the fact that his undertaking with regard to compliance was not properly complied with or his Certificate of Compliance not correct. As such, their view is that a failure to comply with the undertaking and/or an error in certification in the Completion Certificate would not per se appear to impose any additional statutory liability on the builder for which he could not have previously been pursued.
- Mr Trainor and Ms Ni Fhloinn consider whether in the future third parties might seek to hold builders liable by reason of a certification error. They say that they feel that there would be a strong argument to be made that liability should not lie in this regard. They have a number of reasons for that, including the fact that the 1990 Act does not appear to have as one of its objects the creation of new forms of civil liability for builders, further that the prescribed forms of Completion Certificate are arguably unreasonable and further that there is an argument that a builder executing a Statutory Certificate is not acting voluntarily and that courts usually require a voluntary assumption of responsibility before a party can be held liable on foot of a representation.
- Having reviewed those arguments, they do say that an argument in favour of civil liability is highly stateable and that the risk of a court imposing civil liability in respect of an error in certification is thus very real. They expressed the view that the builder’s obligation to certify at completion does require the builder to certify the works of nominated/specialist subcontractors. It is arguable that the builder’s obligation in this regard may only be to use reasonable care in doing so.
- They re-state that it is arguable that an error in certification would expose the builder to an action in misrepresentation at the suit of third persons who
can show that they relied upon the Certificate and suffered loss as a result. They have the strong concern that Section 21 of the Building Control Act 1990 would not be sufficiently strong to exclude the possibility of civil liability for damages for misrepresentation being imposed on a builder.

- Mr Trainor and Ms Ni Fhloinn also raise the prospect that in actions against Design Certifiers for errors in certification (again based on negligent misrepresentation), one might see such parties applying to the court for leave to seek contribution or indemnity from builders in appropriate cases.

- They conclude with the view that the 2013 Regulations did present considerable potential risk to builders who have been subjected to additional potential liabilities over and above those extant under the regime prior to the 2013 Regulations.

David Phelan
15 September 2014.