DENIS McDONALD

Damien Keogh Esq.,
Matheson,
Solicitors,
70 Sir John Rogerson's Quay,
Dublin 2.

4 December, 2013

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

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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.".* [1]

   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

[1] 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*** *.....".* [2] 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

[2] Emphasis added.