

How to avoid Litigation in the Current Construction Climate - from an Engineer's Perspective

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Litigation Trends

- Rise of Professional Indemnity Claims during Construction Boom - shoddy Building - Priory Hall & others - the powder kegs that lead to a litigation culture and the rise of UK & Irish Professional indemnity specialist legal services. The construction industry was responsible for a turnover in the region of €37 billion in 2007, but back to approximately €8 billion in 2012 ;
- Many of the larger claims (such as those involving multiple Pyrite claims), have settled, but claims involving domestic dwellings are still coming in as a result of the litigation culture - Claimants are suing engineers and architects directly -given that many developers/contractors are impecunious or insolvent/without insurance. We can still expect payment disputes but Construction Act 2013 provides for adjudication which will prevent more projects breaking down as a result.

BUILDING CONTROL (AMENDMENT) REGULATIONS 2013 & CHANGES FOR THE CONSUMER

- Signed by Minister Hogan earlier this year in response to the disastrous developments that were built and poor enforcement of Building Regulations across the board during Celtic Tiger, poorly regulated house boom, legacy of poorly constructed dwellings, breach of Fire Safety Regulations;
- Will come into force on 1 March 2014 - or will the Professional Bodies be successful in lobbying the Government to prevent it going through in it's current format ? ACEI & the RIAI are all putting pressure on the government with suggestions on how to prevent the construction professional being left totally exposed ;
- If they go ahead in current format - will effect most new Buildings ; where floor area is over 40 sq meters.

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Objective of Regulations

- The Celtic Tiger Hangover - government want to see restoration of consumer confidence in the Construction Industry and more building - this means improvement of Construction Standards in the backdrop of economic recession;
- To create a clear chain of responsibility for Building Works prior to Commencement through to Completion (The Building Control Authority, The Building Owner, The Builder, The Designer, The assigned certifier).
- Easy Access by Consumer to documentation but potentially at a greater cost as professional fees will rise as may insurance premiums subject to the response of the Insurance industry.

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Current Requirements

- Commencement Notice ;
- Opinions on Compliance - Non Statutory.
- Law Society Contract for Sale - General Condition 36 - Warranty that Conditions of Planning Permissions and Building Bye Law Approvals '*complied with substantially*'

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The New Requirements

Changes to Current system of Certification of Compliance with Building Regulations

- New Commencement Notice (to be accompanied by specified documents) - supposed to be a collaborative approach with more "checks and balances" - but a lot of grey areas and uncertainties as to how they would work in practice ;
- New Mandatory Certificates with Clear Unambiguous Statements ;

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- Role of '*Assigned Certifiers*' ;
- Code of Practice for Inspection and Certification ;
- Submission of Documentation to Building Control Authorities.

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New Form of Commencement Notice to be accompanied by

- Certificate of Compliance (Design) - by Architect/Building Surveyor/Engineer certifying that the design is in accordance with the Regulations ;
- Plans and Documentation showing how proposed work will comply with Regulations ;
- Notice of Assignment of '*Assigned Certifier*' - who will Inspect and Certify the Works - how will this work in practice ? NB of inspection plan & considerations of degree of responsibility of each party, in particular the assigned certifier who may bear responsibility for ancillary designs ;

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- Undertaking by the *Assigned Certifier* to carry out role in accordance with the Regulations ;
- Notice of Assignment of Builder who will carry out the Works ;
- Undertaking by Builder to carry out role in accordance with the Regulations.

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Inspection and Certification of Works

- ‘*Assigned Certifiers*’ (Architect/Engineer/Surveyor) (Higher degree of care than “Approved Inspectors” in England and Wales).
- Undertake to Inspect and Certify the Works on Completion ;
- Coordinate the Ancillary Certification ;
- Plan and Oversee the implementation of the Inspection Plan during Construction.

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Completion Certificates (Unqualified)

- Signed by both Assigned Certifier and Builder - both must certify that works are in compliance with requirements of Regulations/ Inspection Plan ;
- Assigned Certifier must certify that Inspection Plan has been carried out using reasonable skill, care and diligence - if a different designer than original designer - AC will certify design of others - a second layer of protection and inspection.

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Building Control Authorities

- *'Will concentrate on applying a risk based approach to inspection and compliance checking'*
- Will retain all drawings and documentation on Statutory Register open to Public inspection.
- Building Control may also be a mark for litigation in the current culture.

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Issues -Debate in the market & Protection for the Engineer

- Increased Liability ? Will certification by the engineer or architect amount to a warranty ? If so, will that be insurable ? How would it all be managed ? Insurance implications ? The system works for the Belgians !
- Conveyancing Implications ? Large booklets of title will be required unless government change current drafting to allow for stand alone certificates as argued by the RIAI and ACE I. The debate is still ongoing.
- Latent Defects Insurance for purchasers ?
- Role of Building Control Authorities - Funding and budgetary constraints ?

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- Registration of Building Contractors ? Indemnity Insurance for contractors surely a must ? Why should architects and Engineers carry the can for everything ? Is this is what is required to get construction back on track ?
- Costs Implications for the Consumer ? If consulted by client as Lead Consultant - a great degree of explanation on the part of the professional - onus on Home Owner to appoint a competent builder negated by the sheer scope of the certification role of architect or engineer ?
- Be informed - Engineer's need to know their own rights and responsibilities to advise the client! Obtain help with drafting terms of engagement pursuant to new changes.

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Claims - Nina Gaston

The letter of claim

On the completion of this Contract, our clients employed the services of XX Consulting Engineers to complete a Certificate of Compliance to certify that said premises was built in accordance with building regulations and pursuant to the Building Control Act 1990.

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Claims

- It subsequently came to light that this house was in **no way built in accordance with building regulations** and our client has expended a **considerable amount of money** in rectifying the defects and in bringing it up to relevant building standards.
- It must be noted that our client **relied on** the Certificate of Compliance issued by you to complete the build and purchase of the property. Your insured completed a **false Certificate of Compliance** which **did not reflect the true defects** of the property.

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Claims

- We are satisfied from our client's instructions and our investigations that **responsibility for these losses rest with you** and that you are **liable to compensate** our client for her out of pocket expenses and losses as a result of **your negligence**. We call on you to write to us within ten days from the date of this letter **admitting full liability** to our client and with your **proposals to compensate** our client.

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Claims

What **not** to do

- Panic!
- Admit liability and offer to make good.
- Ignore.

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Claims

What to do

- Get out your PI policy
- Notify your broker
 - send him copy letter/brief background
- Collate your documents
- Prepare a detailed background

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Claims

What happens next?

Insurers investigate and/or appoint solicitors

Solicitors investigate and/or

Claimant issues/serves proceedings

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Claims

Your PI insurance policy - what does it cover?

- Insured entity
- Limit of indemnity
- Excess (defence costs)
- Claims made

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Claims

Your PI insurance policy - your obligations

- Notify (claims made) + “circumstances”
- *Conditions precedent*
- No admission of liability
- Assist/co-operate - cost to you

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Claims

How to avoid claims?

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Claims

How can you minimise the risk of a claim?

- Do what you were engaged to do
- Certify only when you should
- Provide services within your competence
- Work with competent, solvent, insured team members
- Write more down!

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Claims



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Limitation Issues in Certification - Rachel Lee



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Time Limits

- Reasons for time limits - certainty/public policy;
- Statute of Limitations Act, 1957 governs the time line for commencing proceedings;
- General rule in tort - 6 years from the date when the cause of action accrued. Contract - 6 years;
- When does the cause of action accrue?

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When the Clock is Ticking

- For time to accrue, a Plaintiff needs (i) the wrongful act; and (ii) the damage;
- For time to run against a Plaintiff when damage is “manifest” does not give rise to a “discoverability test”;
- Too late - *Hegarty -v- D&S Flanagan Ballymore Limited & Ors* [2013]

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Examples of the Statute in Operation

- *O'Donnell -v- Kilsaran Concrete Limited* [2001]
- The Defence of “Doomed from the Start”
- *Murphy & Anor -v- McInerney Construction Limited* [2008]

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Certification & Limitation

- Case Example: Foundations which were defective when put in (2001). ‘Damage’ manifests some time later (2004), proceedings issue (2009);
- Expert evidence that the damage first occurred in 2004 (i.e visible damage);
- Claim settled because defence of limitation unlikely to succeed on expert evidence.

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Certification & Limitation



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Reliance & Time Lines

- Not just your client (Employer) that can rely on a Certificate of Compliance - but a subsequent purchaser;
- Time does not stop running because a 'stranger' in contract terms seeks to rely on the Certificate

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