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Our Ref: DP/LH

27 April 2012

Re: Draft Building Control (Amendment) Regulations 2012

Dear John

I refer to our meeting on Monday. Since then, I have reviewed the draft Building Control (Amendment) Regulations 2012, and the document entitled "Strengthening The Building Control System" issued by the Department of the Environment, Community and local Government this month. I have also reviewed the other documents you left with me.

Having done so, I am concerned at aspects of the content of the draft Undertaking and Certificate set out in the draft 2012 Regulations, for reasons which I will outline here. I am concerned that by signing these documents, an architect could be taking on obligations and liability to exposure which would be extremely inadvisable, and potentially uninsurable. The extent of the obligations and exposure to liability envisaged in the draft Regulations appear to me to be drastically different than the sort of obligation and liability more usually imposed on professionals.

In saying that, I am conscious of the need and importance that professionals (including Architects) be responsible for their work and for views they give. I am also conscious that the aim of the draft Regulations is to strengthen the Building Control system and that the RIAI is supportive of that aim. My concern, however, is that the content of the proposed draft Undertaking and Certificate will cause difficulties, both for Architects and in terms of the ultimate achievement of those objectives.

Existing Obligations

At present, there are industry standard certificates issued by the RIAI in which architects opine on compliance with Building Regulations. I do not intend to deal with those exhaustively here, but suffice to say for present purposes that they generally involve the architect opining that following inspection, construction of relevant works is in "substantial compliance" with the Building Regulations. The certificates provide, amongst other things, a basis upon which the architect should indicate confirmations upon which the architect has relied and expressly acknowledges that it is the responsibility of those concerned with the construction of the building works to ensure the compliance of the construction with the Building Regulations.

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Apart from the standard forms of opinion issued by architects, an architect is (in common with other professionals) liable to suit for negligence, on the basis that the architect did not exercise reasonable skill, care and diligence and also, under the Building Control Act 2007, can be the subject of a complaint to the Professional Conduct Committee of "poor professional performance". Such complaint, if upheld, can lead to a range of sanctions up to and including erasure of the person's name from the Register of Architects.

An architect, in common with other professionals, is also liable to criminal prosecution in certain circumstances.

Concerns with the proposed Undertaking and Certificate

Under the draft Regulations, an architect may be required to sign two documents. The first is an "Undertaking by a person Assigned to Inspect and Certify Works" and the second is a "Certificate of Compliance on Completion".

The concerns which I have, based on a review of the wording of those certificates, are as follows:

- By signing the Undertaking, the architect not only undertakes to carry out an inspection but actually undertakes to certify the works. The undertaking does not envisage a situation where the architect might not be in a position to certify the works. By signing to an undertaking of this form, the architect is arguably not only agreeing to undertake the inspection, but is agreeing to do whatever is necessary in order to get to the stage where the works can be certified. That is clearly impractical and onerous.
- Neither document deals with what will be required, or expected, of an architect in terms of the level or frequency of inspection required. It will perhaps be the case that the proposed "Code of Practice for Inspection and Certification of Building Works" will address that point, but for the moment there is no clarity. That is important in the context of the heavy onus placed on the Architect in the documents (as discussed below).
- As indicated above, the existing opinions of compliance allow for an architect to indicate those confirmations upon which the architect is relying in opining, and also specifically acknowledge that the person responsible for the construction is the person responsible for ensuring compliance of the construction with Building Regulations.

Not only do the proposed Undertaking and Certificate not similarly acknowledge that the architect must rely on others in this way in terms of opining or certifying compliance, in fact they state that the architect must certify compliance "notwithstanding the responsibilities of other person/s or firm/s in relation to the works". In other words, it appears that the architect is specifically and positively being excluded from relying on confirmations from others, or on the fact that work on the building has been carried out by others, in giving a certificate.

- In the Undertaking, the architect agrees that the purpose of the inspection is “to ensure that [the works] are neither defective nor contravene any requirements of the second schedule of the Building Regulations, as applicable to the building works concerned”. In the proposed Certificate, the architect then is required to certify to that effect, that is “that the building or works as completed is neither defective nor contravenes any requirement of the second schedule of the Building Regulations as applicable to the building works concerned”.

The giving of such an Undertaking and subsequently such a Certificate is significantly different than the current regime whereby an architect is required to opine that there is substantial compliance. The Architect is now being required to certify in absolute terms. Whilst I will of course have to defer to expert architects and other building professionals in this regard, from a legal perspective it does seem to me that it may be practically impossible for any professional to certify categorically that a building is not defective and categorically that it does not contravene any requirement of the second schedule of the Building Regulations.

Two specific issues warrant comment, on this point. I have seen no guidance as to what is envisaged by the phrase “defective” in this context. Furthermore, the certificate ultimately requires the architect to certify absolute absence of defect and absolute compliance with regulations, as opposed to “substantial compliance”.

Given that an architect will be issuing the Certificate of Compliance following a visual inspection, it seems to me that a requirement to certify absolutely the absence of defects and absolute compliance with Building Regulations is unrealistic and, as indicated above, that it may be practically impossible.

- In the Undertaking, the architect is required to specifically sign-up to the statement that he or she accepts “responsibility and legal liability for the inspection of all works as necessary to ensure that they are neither defective nor contravene any requirements of the second schedule of the Building Regulations, as applicable to the building works concerned” (my emphasis added).

I believe it would be inadvisable for an architect to sign-up to that acceptance of responsibility and legal liability. The wording is such that it appears to me that the architect is accepting responsibility and legal liability if it subsequently transpires that the building works were not entirely without defect or contravened the relevant requirements of the Building Regulations to any extent. That is very onerous.

In addition to being extremely onerous, I believe it is likely that it would be extremely difficult for architects to obtain professional indemnity insurance which would cover a situation where there has been a positive acceptance of responsibility and legal liability in that way.

Furthermore, the express reference to acceptance of legal liability appears to bring with it the effect that the proofs required of a person suing an architect in civil proceedings, or alternatively the proofs required of a prosecutor prosecuting

an architect for a criminal offence, will have significantly lessened when the proceedings relate to a matter where the Architect has signed the proposed Certificate. The signing of such a certificate by an architect would therefore move the architect closer to a situation of strict liability.

Conclusion

These are the points which strike me following my reading of the draft 2012 Regulations and the proposed Undertaking and Certificate. In so far as I have indicated above the likely meanings of some of the wording of the undertaking and certificate, it may be the case that either those meanings were not intended when the documents were drafted or alternatively that someone would argue that the relevant wording in fact means something different than what I have indicated above. It is nonetheless clearly the case that the wording is capable of the meanings I have identified and discussed, and to me they are the meaning and interpretation of the undertaking and certificate which arise on a plain reading of them.

One final point I would make is that there are two documents which may well be very relevant which it appears have not yet issued. There has been reference to the issuing of a "Code of Practice for Inspection and Certification of Building Works" and also to draft Certificates of Compliance by builders. They may well have some bearing on the various issues which I have raised above, although I cannot see how they can remove all of the concerns I have raised.

I hope that this assists in terms of a review of the proposed undertaking and certificate. Please feel free to revert to me if there is anything I can clarify or upon which I can elaborate.

With kind regards,

Yours sincerely



David Phelan