Compliance with the Building Regulations and Liability

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1. The Building Control (Amendment) Regulations of 2014 ('the 2014 Regulations') came into effect on 1 March 2014 and apply to developments for which Commencement Notices were lodged with building control authorities ('BCAs') on or after that date. The 2014 Regulations made significant changes to the procedures for administration and enforcement of building control in Ireland, including the introduction of a series of certificates to be submitted in connection with new buildings.

2. This paper provides an overview of the provisions of the 2014 Regulations, and then considers the two parts of the Certificate of Compliance on Completion prescribed by the 2014 Regulations ('the Completion Certificate'), drawing attention to elements of the legal environment applicable to each. The Certificate of Compliance (Design) also required by the 2014 Regulations is not separately considered, as I use the Completion Certificate to compare the liability arising as between the Builder and the Assigned Certifier under the 2014 Regulations. There is also duplication of issues and risk between Designers and Assigned Certifiers, and there is arguably more fluidity between negligence and negligent misstatement under Irish law than is the case under the law of England and Wales, as will become apparent from the discussion of the authorities. I consider in this respect the recent decision of O'Malley J. in *McGee v Alcorn*[2], considering in particular whether the outcome of that case would have been different under the régime established by the 2014 Regulations.

Building Control (Amendment) Regulations 2014

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[2] *McGee & Anor v Alcorn & Anor* [2016] IEHC 59

3. Building control is the means by which the administration and enforcement of the Building Regulations is carried out by Building Control Authorities ('BCAs') in accordance with the Building Control Acts 1990 and 2007. The 1990 Act designated local authorities as BCAs, provided for the making of Building Regulations and Building Control Regulations, and set out the powers of BCAs with regard to inspection and enforcement. The Acts are the legal basis for the Building Regulations 1997-2014 and the Building Control Regulations 1997-2014. The Building Control Regulations 1997 were amended substantially by the 2014 Regulations; this paper refers to the 1997 Regulations as the 'Principal Regulations'.

4. BCAs are given extensive powers to inspect sites for compliance with the Building Regulations, and are required to maintain a register ('the Part IV Register') of information and certificates of compliance submitted to it by building owners and their advisers in accordance with the 2014 Regulations.

5. Section 6 of the 1990 Act allows the Minister for prescribe the form of certificates of compliance. This may explain why the obligations imposed on the various parties identified in the Regulations are expressed only in oblique terms; there is no provision requiring an owner to appoint an Assigned Certifier, a Designer, or a competent Builder, in similar terms to the obligations in the Safety, Health and Welfare at Work (Construction) Regulations 2013. The obligations must be divined from the text of the certificates themselves, which are drafted on the basis that each of these steps must be taken before the certificate can be signed and submitted.

6. Roles are assigned to various parties by the 2014 Regulations: Owners, Designers, Builders, Assigned Certifiers, and Ancillary Certifiers. The Assigned Certifier implements an inspection plan and signs the Certificate of Compliance on Completion ('the Completion Certificate'). Ancillary Certifiers include specialist designers and subcontractors, on whose certificates the Assigned Certifier relies in signing the Completion Certificate.

7. The Assigned Certifier must be a construction professional[3], must undertake to carry out inspections (in accordance with an inspection plan), co-ordinate inspections by others (the

[3] Either an architect or a building surveyor registered under the 2007 Act, or a chartered engineer for the purposes of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969

Ancillary Certifiers) and must certify compliance with the Building Regulations in the Completion Certificate. The 2014 Regulations require a number of certificates of compliance to be furnished on commencement and completion of works. Both the Assigned Certifier and the Builder must sign the Completion Certificate, in which they each certify that the building complies with the Building Regulations, albeit that their certificates are not identical in their terms. A building may not be opened, used or occupied until a Completion Certificate is on the Part IV Register[4].

8. The system of building control established under the Building Control Act 1990 prescribes a comprehensive list of requirements to be met in the construction of new buildings (including dwellings) but relies on developers and their appointees to ensure that those requirements are met. There is no requirement on BCAs to inspect sites for compliance with the Building Regulations. Section 6 (4) of the 1990 Act is of particular note to certifiers, as it provides that a building control authority shall not be under a duty to any person to verify the accuracy of any certificate, nor to verify that the design or construction of a building is in compliance with the Building Regulations. The Building Control Act 1990 makes clear that the BCA's main function is to receive and record certain information in order to decide on the appropriate exercise of its powers of inspection and enforcement, and to maintain the Part IV Register, rather than to issue approvals of design or workmanship; its role is characterised in terms of powers rather than duties.

9. One of the consistent criticisms of the 2014 Regulations that have been made by professionals since the original drafts of the Regulations is that the system imposes a disproportionate liability on professionals in light of the civil liability regime in Ireland by which each of a group of concurrent wrongdoers/tortfeasors can be held liable for the entirety of the loss suffered as a result of their concurrent default.

10. Another limb to this view is that professionals involved in design, contract administration and inspection, by contrast with builders, usually carry post-completion liability insurance, and as such are regarded as the 'last man standing' when defects emerge; it is noteworthy in this respect that in the early drafts of the Regulations, the Builder was not required to sign the Completion Certificates.

[4] Paragraph 20F(1), Principal Regulations

11. The Department of the Environment, during its consultation process on amendments to the 2014 Regulations in 2015, took the unusual step of publishing an 'Information Note' intended to deal with these criticisms, which is analysed in an article from the Bar Review of February 2016 by Sanfey[5], who suggests that the information note does not provide much in the way of comfort for professionals. There remains a strong body of opinion amongst lawyers that the new statutory certificates create additional liabilities for professionals.

Builders and liability in tort

12. The 1980 decision of the High Court in *Colgan v. Connolly Construction Company (Ireland) Ltd.*[6] established that a second purchaser of a property (who had no contract with the builder) could recover damages in respect of dangerous defects that presented a risk of personal injury, but that damages in respect of defects of quality were not recoverable in negligence.

13. In *Ward v. McMaster*[7], the plaintiff had purchased a house from an amateur builder, with the assistance of a loan from a local authority. The local authority was empowered under the 1966 Housing Act to make the loan, and was required under the Act to satisfy itself by means of a valuer's report as to (i) the value of the house and (ii) that the house represented adequate security for the loan. The house contained serious defects, and ultimately, the plaintiff and his family vacated the house and sued the builder, the local authority and the firm of auctioneers retained by the local authority to provide a valuation for the house.

14. Costello J. delivered the decision for the High Court[8], and held that the builder of a house on his own land owes a duty of care to a subsequent purchaser of that house, based on the principle of *Donoghue v. Stevenson*[9], to avoid dangerous hidden defects and consequential financial loss and inconvenience. The Court notably followed the decision in *Junior Books*

[5] Sanfey, 'Certifiable Liability', *The Bar Review* 21 (1) 25
[6] *Colgan v Connolly Construction (Ireland) Ltd.* [1980] ILRM 33 (HC); *McMahon & Binchy*, para. 13.54.
[7] *Ward v McMaster* [1986] ILRM 43
[8] See footnote 7
[9] [1932] AC 562

v Veitchi[10] which, although it has not been specifically overruled by the English courts, has been repeatedly distinguished in subsequent jurisprudence.[11]

15. Costello J distinguished a line of cases in which it had been held that a builder who owned land on which he constructed a dwelling, who subsequently sold or let that dwelling, was immune from liability in tort, and found that the builder owed a duty of care to a purchaser of the house in relation to defects not discoverable by the kind of examination which the builder could reasonably expect the purchaser to make, and that the duty:

> '…was not limited to avoiding foreseeable harm to persons or property other than the bungalow itself…but extended to a duty to avoid causing the purchaser consequential financial loss arising from hidden defects in the bungalow itself (that is, duty to avoid defects in the quality of the work.'[12]

16. Costello J. therefore found that the builder was in breach of duty in causing defects resulted in a danger to the health and safety of the plaintiffs, in causing defects in the workmanship when then needed to be remedied, and in causing defects which resulted inconvenience and discomfort to the plaintiff and his wife, and that the plaintiffs were entitled to damages under each heading. The finding against the builder was not appealed[13], and (although this issue has been the subject of some argument in the cases since[14]) still represents the Irish position with regard to the liability of a builder in tort in respect of defects of quality in a house.

17. In the 2002 decision of the Supreme Court in *Glencar Exploration v. Mayo County Council (No.2)*[15] in 2002, Keane C.J. expressly reserved the question of whether

[10] [1983] 1 AC 520
[11] A search against *Junior Books* in JustCite reveals that the case has not been followed in any subsequent decision of the Courts of England and Wales, although it has been followed in Singapore, Malaysia, and Ireland.
12 In *Simaan General Contracting v. Pilkington Glass* [1988] EWCA Civ J0217-4, Bingham LJ commented with regard to *Junior Books: 'Plainly this decision contained within it the seeds of a major development of the law of negligence…It remained to be seen whether those seeds would be encouraged or permitted to germinate. The clear trend of authority since Junior Books indicated that…they will not'*.
[13] The 1988 Supreme Court decision in *Ward* dealt with an appeal from Louth County Council, and upheld the finding of negligence against it; *Ward v McMaster* [1988] IR 337 (SC).
[14] The 2001 case of *O'Donnell v Kilsaran Concrete* [2001] IEHC 155 and the 2015 decision in *SSE Renewables (Ireland) Limited v William and Henry Alexander (Civil Engineering) Limited* [2015] IEHC 786 each involved unsuccessful attempts to have proceedings struck out on the basis that the loss claimed was economic loss and thus irrecoverable under Irish law.
[15] *Glencar Exploration v Mayo County Council (No.2)* [2002] IR 84

economic loss was recoverable and did not overrule the earlier cases of *Ward v McMaster* and *Siney v. Dublin Corporation*[16]:

> 'I would expressly reserve for another occasion the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement and those falling within the categories identified in *Siney* and *Ward v. McMaster* and whether the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.* should be followed in this jurisdiction.'

18. McMahon and Binchy, however, appear to take the view that a general principle of recovery is not supported by the existing jurisprudence of the Irish courts:

> '…it would only be prudent to reiterate that *Glencar* has cast a very dark shadow for recovery of damages for negligently caused pure economic loss and that qualitative defects savour strongly of contract'. [17]

19. There is arguably a significant divergence between Irish and English law in relation to liability of building contractors in tort for defects of quality. A number of decisions of the courts of England and Wales in the 1970s and 1980s suggested that local authorities who had approved defective building works, or failed to detect defects upon inspections, could be liable in tort in respect of the cost of rectification: *Dutton v. Bognor Regis UDC*[18] and *Anns v. Merton LBC*[19]. The House of Lords, in its 1983 decision in *Junior Books v Veitchi*[20], then held that the cost of rectifying a defective floor could be recovered in tort by an employer against a sub-contractor. The decisions of the House of Lords in *D&F Estates Ltd v Church Commissioners for England and Wales*[21] and *Murphy v. Brentwood District Council*[22] in 1991, however, largely foreclosed any avenue of recovery against builders under this heading.

[16] *Siney v Dublin Corporation* [1980] IR 400. The Supreme Court had held the defendant local authority liable in negligence in respect of a flat provided under the Housing Act 1966, which contained defects rendering it unfit for human habitation. The damages claimed related to damage to the plaintiff's possessions in the flat, however, and did not include damages for rectifying defects to the property.
[17] McMahon and Binchy, *Law of Torts*, Fourth ed. 2013
[18] *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, CA
[19] *Anns v Merton London Borough Council* [1978] AC 728, HL at p. 751H
[20] *Junior Books v Veitchi* [1983] 1 AC 520
[21] *D&F Estates Ltd v Church Commissioners for England and Wale* [1989] AC 177; [1988] 2 All ER 992
[22] *Murphy v Brentwood District Council* [1991] UKHL 2

20. In *D & F Estates*[23], the House of Lords held that the cost of repairing a defective structure before it had caused personal injury or damage to property other than the structure itself was economic loss, and thus not recoverable in tort. In *Murphy v Brentwood*[24], the House of Lords held that the defendant local authority was not liable for the diminution in value of houses for which it had approved plans, where defects subsequently emerged. The loss was characterised as economic loss, and the local authority was held not to be under any duty to avoid loss of this nature to the plaintiffs. Lord Bridge stated that the loss arising from a defective chattel is a defect of quality. The cost of repair was regarded as economic loss, not recoverable in the absence of a '*special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss'*, which is similar in scope and language to the liability established under *Hedley Byrne v. Heller and Partners*[25] and the cases that followed it. His Lordship characterised a defect, which has not caused any injury or damage to property, as giving rise to economic loss, recoverable in contract but not in tort, absent a special relationship of proximity.

> 'If a builder erects a structure containing latent defects which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from the dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the builder owner is purely economic.'[26]

21. There has been no Irish decision that has followed *Murphy v Brentwood*[27], and very little jurisprudence since *Ward v McMaster*[28] in relation to the liability of a builder in tort in respect of non-dangerous defects, nor in relation to the broader question of whether economic loss is recoverable in tort. In *O'Donnell v Kilsaran Concrete*[29], proceedings were issued against a concrete supplier and a builder where defects appeared in a house built using defective concrete blocks. The defendants claimed that the plaintiffs' case was statute-barred and that the damages sought were irrecoverable in any event as they amounted to economic loss. Herbert J. confined his judgment to the limitation point,

[23] See footnote 21
[24] See footnote 22
[25] *Hedley Byrne v Heller & Partners* [1964] AC 465
[26] See footnote 22, at p.5, para. 31.
[27] See footnote 22
[28] See footnote 7
[29] *O'Donnell v Kilsaran Concrete Limited* [2001] IEHC 155

however, expressly declining to express a view on whether the plaintiffs' claims would be successful on the merits.[30]

22. In the more recent decision in *SSE Renewables (Ireland) Limited v. William and Henry Alexander (Civil Engineer) Limited and Aecom Limited*[31], one of the defendants sought the trial of a number of preliminary issues, including whether the plaintiff's claim was bound to fail on the grounds that the pleaded loss and damage constituted economic loss, and whether it was also bound to fail on the basis that the communications alleged to give rise to an assumption of responsibility to the plaintiff were issued following completion of the design of the works. Hedigan J. observed that there was 'no clear answer as to whether there can be a remedy in tort for [economic loss], and that it could not, therefore, be regarded as a discrete legal issue appropriate for trial as a preliminary issue.[32]

23. Given that the building contractor who had constructed the house at issue in *McGee v Alcorn*[33] did not defend the proceedings, the case was decided by reference only the liability of the defendant architectural technician who had provided the certificates. O'Malley J. commented in her judgment that *Glencar*[34] did not appear to be authority for the proposition that either *Siney* or *Ward*[35] had been incorrectly decided, but appears to refer to the decision of the Supreme Court in *Ward*[36] (and to the criteria for negligence outlined by McCarthy J.) rather than to the decision of Costello J. at first instance in respect of the builder's liability.

24. Irish and English law, then, seem to diverge in this respect. The 1990 decision of the House of Lords in *Murphy*[37] and the 2011 Court of Appeal decision in *Robinson v Jones*[38] makes clear that economic loss arising from building defects is not recoverable against a builder, absent a 'special relationship of proximity' consistent with the parameters of *Hedley Byrne*[39]. In *Robinson*[40], Jackson LJ stated as follows:

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[30] at para. 23
[31] [2015] IEHC 786
[32] at para. 6.
[33] See footnote 2
[34] See footnote 15
[35] See footnote 7
[36] See footnote 13
[37] See footnote 22
[38] *Robinson v. P.E. Jones (Contractors) Ltd.* [2011] EWCA Civ 9
[39] See footnote 25
[40] See footnote 38

'Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder to take reasonable care to protect the client against suffering personal injury or damage to other property'.[41]

25. However, in both *D&F Estates*[42] and *Murphy*[43], reference is made to the 1972 Defective Premises Act, which provides a statutory warranty of quality in favour of the first purchaser of a dwelling and of any person who subsequently acquires an interest in it[44]. Lord Bridge of in *D & F Estates*[45] rejected the argument that a builder should be liable in negligence for the cost of replacing the defective plaster at issue in that case, on the basis, firstly, that to make the builder so liable 'would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship, and fitness for purpose'[46]. His Lordship then went on to suggest that to hold the builder liable in such circumstances would mean that the courts, in developing the common law,

'…had gone much farther than the legislature were prepared to go in 1972, after comprehensive examination of the subject by the Law Commission, in making builders liable for defects in the quality of their work to all who subsequently acquire interests in buildings they have erected. The common law duty…could not be so confined or limited. I cannot help feeling that consumer protection is an area of law where legislation is much better left to the legislators' '.[47]

[41] Para. 68
[42] See footnote 18
[43] See footnote 22
[44] Section 1 (1) of the Defective Premises Act 1972 provides as follows:

> A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
> (a) if the dwelling is provided to the order of any person, to that person; and
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;
> to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

[45] See footnote 18
[46] At p. 1007
[47] At p. 1007

26. Lord Keith of Kinkel made a similar point in *Murphy*[48], noting that the decision in *Anns*[49] imposed a liability on the builder beyond that provided for in the Defective Premises Act 1972, and commenting that 'the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature.'[50]

27. In Ireland, by contrast, there is no equivalent to the Defective Premises Act 1972, nor to the Latent Damage Act of 1986, each of which provide significant protection to building owners where defects emerge. A plaintiff bringing an action in tort in the Irish courts against a builder would doubtless make the point that various aspects of Irish law differ significantly from the law of England and Wales, to the detriment of house purchasers, and that the Irish courts should, therefore, recognise that the *D & F Estates*[51] and *Murphy* decisions are very much a product of their legal environment, which differs from the Irish legal environment in certain key respects:

    a. As was mentioned by Lord Bridge in *D & F Estates*[52], the Defective Premises Act 1972 establishes a statutory duty on builders and others involved in construction of a dwelling, to see that the work taken on is done in a workmanlike, or, as the case may be, professional manner using proper materials and so that as regards that work the dwelling will be fit for habitation when completed.[53] The cause of action is deemed to have accrued at the time when the dwelling as completed, or at a later date upon which the person who originally carried out the construction work for the dwelling does further work to rectify any defects.[54]

    b. Under Irish law, an action for breach of contract can only be brought by the parties to that contract. The Law Society standard form building contract used for new dwellings in Ireland contains a prohibition on assignment; if the dwelling is sold within the limitation period, the remedy in contract disappears

[48] See footnote 22
[49] See footnote 17
[50] at p. 16
[51] See footnote 18
[52] See footnote 18
[53] Defective Premises Act 1972, Section 1 (1) [England and Wales]
[54] Defective Premises Act 1972, Section 1 (5) [England and Wales]

into a legal 'black hole'. The privity of contract rule has been relaxed somewhat in England and Wales with the introduction of the Contract (Rights of Third Parties) Act 1999;

c. Under s. 3 (1) of the Latent Damage Act 1986 in England, a cause of action in negligence accrues by operation of law to a person acquiring an interest in a property in respect of which a cause of action has accrued in relation to latent damage to the property. The Law Reform Commission in its report on Claims in Contract in respect of Latent Damage (other than Personal Injury)[55] draws attention to the common law rule that, where property is transferred subsequent to the accrual of a cause of action in tort (which, under Irish law, accrues when the damage is caused to the building by the defect), that cause of action will not transfer without a specific assignment. The LRC noted that the rule 'had to be uprooted in England, by s.3 of the *Latent Damage Act, 1986*….'.

d. The Limitation Act 1980, which was amended by the Latent Damage Act 1986, allows negligence claims to be brought in respect of defects within three years from the date on which the claimant knew, or ought reasonably to have known of the defect, up to a long-stop of fifteen years.

28. These factors might well influence an Irish court to maintain the position with regard to the liability of builders for economic loss that is set out in the judgment of Costello J in *Ward v McMaster*[56]. The Law Reform Commission's 1982 Report on Defective Premises[57] included the scheme of a Defective Premises Bill, which was not introduced into Irish law. The Bill included a statutory duty on a person undertaking or executing work, in favour of the person who commissioned the work and any person who acquired an interest in it, to see that the work was undertaken in a good and workmanlike manner with suitable and proper materials. The Bill provided that damages recoverable for breach of the duty should include an amount for economic loss (if any) suffered by the plaintiff.

[55]The Law Reform Commission, Report on the Statutes of Limitations: Claims in Contract and Tort in respect of Latent Damage (other than Personal Injury) (LRC 64 – 2001)
[56] See footnote 7
[57] Report on Defective Premises (LRC – 3 – 1982)

29. In an article written before his appointment to the Bench, Peart J. of the Court of Appeal recognised the same divergence that occurred with *Murphy*[58], but opined that Irish and English law had been reconciled with the judgment in *Glencar*[59]*:*

> 'Until the late 1980s, there was much convergence between the two jurisdictions. However, with the 1991 overruling of previous decisions, the law in England was revised. We, however, did not follow suit. We now appear to have reconverged following the *Glencar* judgment, not so much by an overruling of *Ward v McMaster*, but by a reinterpretation of it.'[60]

30. The author goes on to note that the third limb of the *Glencar*[61] formulation, of whether it is 'just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff', is an endorsement of the judgment of Costello J. at first instance in *Ward*. This is of considerable significance to the question of the builder's liability in tort, as the finding against the builder in *Ward*[62] is confined to the judgment of Costello J. and is not considered in the Supreme Court judgment of McCarthy J., supporting the view that the finding of Costello J. still represents the legal position under Irish law. Binchy draws attention to the careful language of Costello J. in confining the builder's duty of care to the first purchaser of the house, noting that a subsequent purchaser 'would have the (perhaps easy enough) task of calling on a court to articulate this duty expressly'. [63]

Completion Certificate Part A – Signed by Builder

[58] See footnote 22
[59] See footnote 15
[60] Peart, 'Neighbourhood watch', Law Society Gazette, December 2001, pp. 22-25.
[61] See footnote 15
[62] See footnote 7
[63] Binchy, 'Builders, Defective Houses and Public Authorities: The Old Immunities Crumble', (1986) 4 I.L.T. 76

Part A — Certificate signed by Builder

2. I confirm that I am the Builder assigned by the owner to construct, supervise and certify the building or works.

3. I certify, having exercised reasonable skill, care and diligence, that the building or works as completed has been constructed in accordance with the plans, calculations, specifications, ancillary certificates and particulars as certified under the Form of Certificate of Compliance (Design) and listed in the schedule to the Commencement / 7 Day Notice relevant to the above building or works, together with such further plans, calculations, specifications, ancillary certificates and particulars, if any, as have been subsequently issued to me and certified and submitted to the Building Control Authority, and such other documents relevant to compliance with the requirements of the Second Schedule to the Building Regulations as shall be retained by me as outlined in the Code of Practice for Inspecting and Certifying Buildings and Works.

4. Reliant on the foregoing, I certify that the works are in compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building or works concerned.

Signature: _____ **Date:** _____
(to be signed by a Principal or Director of a Building Company only)

Name: _____

Address: _____

Tel: _____ Fax: _____ Email: _____
Construction Industry Register Ireland registration number (where applicable): _____

31. On the face of the Completion Certificate, the Builder appears to carry a similar risk to the Assigned Certifier in respect of ancillary certifiers. The legal environment applicable to builders, however, stands in contrast to the potential liability of the Assigned Certifier:

    a. it is possible that if a case came before an Irish court on the question of the builder's liability in respect of building defects under the law of tort (noting that this issue was not considered in *Mitchell v Mulvey Developments*[64] or *McGee*[65] cases as the builders in those cases did not defend those claims), that the court would follow the jurisprudence of the English courts (particularly *Robinson v Jones*) and reject such a claim, absent a 'special relationship of proximity'.

    b. As against this, as noted above, a plaintiff could make a strong argument to the effect that the divergence between Irish and English law in this respect goes well beyond the discrete issue of whether economic loss is recoverable for defects of quality, and that the English authorities must be read in the context of the

[64] *Mitchell v Mulvey Developments* [2012] IEHC 561
[65] See footnote 2

relevant legislation that provides substantial protection and alternative remedies for plaintiffs;

c. The builder will often have contracts with the ancillary certifiers, as many will be sub-contractors, allowing the builder to bring actions in respect of any default for breach of contract, rather than having to seek contribution from the ancillary certifiers under the Civil Liability Act 1961, as the Assigned Certifier would have to do.

Liability of inspectors and certifiers

32. The legal basis for liability for negligent inspection and certification was recently considered by the High Court *in McGee v Alcorn & Friel*[66]. The plaintiffs, Mr. and Mrs. McGee, bought a house in 2008 for €430,000. Alcorn was the building contractor, and Friel was the architectural technician who issued certificates confirming that he had inspected the construction of the house, that the foundations and ground conditions were satisfactory and suitable, and that the house complied with the Building Regulations.

33. The foundations, in fact, had been built so badly that the house began to crack and tilt. The engineer retained by the plaintiffs to inspect the damage to their house described the workmanship as 'pathetically bad'; the court described the house as having been built on a 'bizarrely defective' foundation; two of the house's windows were not built on any foundation, and the house was built on 'made-up' ground, not suitable for building.

34. The builder, at the time of the judgment, had left the country and had a judgment in default marked against him; thus, the decision relates only to the liability of the certifier, and the liability of the builder for the economic loss of rectifying the defect is not considered in the judgment.

35. The judgment is particularly welcome as it contains a summary of the Irish jurisprudence in relation to negligence and negligent misstatement in the context of defective housing. O'Malley J. draws together the various strands emerging from the jurisprudence to elucidate the following principles:

[66] See footnote 2

a. A duty of care was recognised by Costello J. In *Ward v McMaster*[67] to avoid causing economic loss by reason of building defects, the duty applying in that case to both a builder and a local authority (albeit in limited circumstances, in the case of the local authority). O'Malley J. notes, however, that '*Because of the procedural manner in which the appeal had been run, the [Supreme] Court did not consider the question of liability for economic loss';*[68] (the builder in *Ward*, who was found 90% liable for the cost of rectification works, did not appeal the decision of the High Court). Thus, there is no further discussion in the Supreme Court judgment of the builder's liability for economic loss.

b. In *Leahy v Rawson*[69], O'Sullivan J found the defendant engineers liable for negligent inspection and advice on the basis of the *Glencar*[70] formulation of the duty of care, rather than the formulation expressed by McCarthy J. in the Supreme Court decision in *Ward.*

c. The finding in *Glencar* was not, in the court's view, authority for the proposition that either *Siney v Dublin Corporation* or *Ward v McMaster* were incorrectly decided.

36. Applying the various principles to the facts of the case, O'Malley J. held as follows:

a. there was proximity between the certifier and the purchasers of the house, as 'the only conceivable purpose' for supplying the certificates of inspection and compliance to the builder was 'for presentation to a prospective buyer'[71]

b. the question of whether it was just and reasonable to impose liability, the court was led 'in the same direction' on either the *Glencar*[72] or *Ward*[73] formulations, noting that no argument had been made by the defendant that there were any policy considerations against a finding of a duty of care. (*Glencar*, in addition to

[67] See footnote 7
[68] at para. 133
[69] *Leahy v Rawson* [2004] 3 IR 1
[70] See footnote 15
[71] at para. 136
[72] See footnote 15
[73] See footnote 13 (Supreme Court)

casting doubt on recovery of economic loss, departed significantly from the formulation of the duty of care expressed by McCarthy J from *Ward v McMaster*. Keane C.J. opined that, once reasonable foreseeability and proximity had been established, rather than asking whether public policy considerations should exclude the finding of a duty of care in negligence, one should instead consider whether it just and reasonable to impose a duty of a given scope on the defendant for the benefit of the plaintiff.)

c. the court concluded, therefore, that it was fair, just and reasonable to impose a duty of care to purchasers on professionals providing certificates of compliance in relation to construction works:

> 'Most people buying a modern house, and most of the lenders to whom they will go for mortgages, will require such certificates and will rely upon them. Self-certification by a builder does not seem a realistic alternative. It is simply untenable to suggest that the person who holds himself out as professionally qualified to assess, and in a position to certify, the quality of the house and the workmanship of its construction, should not thereby be required to take care in giving such certification'.[74] (*Emphasis added)*

37. It is submitted that the decision in *McGee*[75], with its explicit statement (albeit obiter) to the effect that the duty of care in *Ward*[76] can be reconciled with the comments of the Chief Justice in *Glencar*, suggests that the 'dark shadow' cast by those comments with regard to recovery of economic loss generally may not apply to recovery of damages on the basis set out in *Ward*, which was recognised as its own distinct category of exception to the general rules against recovery for economic loss.

38. The court went on to state, with regard to the claim in negligence, that the claim 'comes within the parameters of the *Ward*[77] category of case, and as such is not subject to the

[74] per O'Malley J, at para. 138
[75] See footnote 2
[76] See footnote 13 (Supreme Court)
[77] See footnote 7 (High Court)

reservations expressed in *Glencar*[78] in relation to economic loss'. This is a significant observation, as the basis for imposing liability on the Council in *Ward* was quite different in character to the liability imposed on the certifier in *McGee*[79]. The survey in *Ward*[80] was carried out on behalf of the Council, which was required to satisfy itself, before providing a loan in respect of the purchase of a house, that the house was 'adequate security' for the loan. The auctioneer who carried out the survey was a defendant in the proceedings, but was found not liable in respect of his failure to detect the defects in the house, on the basis that his retainer required him to value the house but not to carry out a structural survey. The certifier in *McGee*[81], by contrast, had provided certificates of inspection and compliance, and, in the opinion of the court, had thereby undertaken a responsibility to prospective purchasers of the house.

39. There is also an interesting discussion in the judgment about the appropriate pleadings in cases of this nature. The defendant claimed that damages were not recoverable on the basis that the claim had been made in negligence rather than in negligent misstatement, and that liability for negligent misstatement required a statement made to the plaintiff by the defendant, that the defendant intended the plaintiff to rely upon, and that the plaintiff in fact relied upon to his detriment.

40. The court addresses this point, firstly, by noting that a similar issue arose in ***Wildgust v Bank of Ireland***[82], in which the plaintiffs had been directed to amend their statement of claim to include a specific plea of negligent misstatement. The plaintiffs in *McGee*[83] argued that such a claim was implicit from their statement of claim and the opening submissions of counsel. The court took a pragmatic approach to this question, while acknowledging that in *Wildgust,* McGuinness J had held that the plaintiff had failed to set out the normal elements of a claim of negligent misstatement. In this case, however, the court was satisfied that the criteria for negligent misstatement had been made out, noting that the defendants had made an admission of liability, on foot of which the plaintiffs had not called evidence in relation to the standard of care of a professional certifier, and further that the defendants did not appear to have been 'taken by surprise' by the plaintiff's

[78] See footnote 15
[79] See footnote 2
[80] See footnote 7 (High Court)
[81] See footnote 2
[82] [2006] IESC 19
[83] See footnote 2

submissions. Therefore, the court was satisfied that the combination of the statement of claim, notice for particulars and replies thereto was sufficient for the purposes of making a case for negligent misstatement, and commented that 'Damages for economic loss are therefore recoverable'.[84]

41. Could the Builder who signs the Completion Certificate be held liable for negligent misstatement under Irish law? It is useful to recall the position of *Junior Books* under Irish law, a case referred to by Bailey as a decision that '*may, at best, be regarded as a special case where, on the facts, there was an assumption of responsibility by a nominated sub-contractor to an owner*'[85]. It is quite possible that an Irish court would take the view that signature by the Builder of the Completion Certificate amounts to assumption of responsibility to prospective purchasers, particularly in light of the flexible boundaries between negligence and negligent misstatement that are apparent in the *McGee*[86] decision.

Completion Certificate Part B – the Assigned Certifier

The Assigned Certifier completes and signs Part B of the Completion Certificate, in the form set out below:

[84] at para. 147

[85] Bailey, Construction Law, Informa Law, 2011, at p. 772

[86] See footnote 2

Part B — Certificate signed by Assigned Certifier

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

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

7. I now confirm that the inspection plan, drawn up having regard to the Code of Practice for Inspecting and Certifying Buildings and Works, or equivalent, has been undertaken by the undersigned having exercised reasonable skill, care and diligence, and by others nominated therein, as appropriate, on the basis that all have exercised reasonable skill, care and diligence in certifying their work in the ancillary certificates scheduled.

8. Based on the above, and relying on the ancillary certificates scheduled, I now certify, having exercised reasonable skill, care and diligence, that the building or works is in compliance with the requirements of the Second Schedule to the Building Regulations, insofar as they apply to the building or works concerned.

Signature: _____ **Date:** _____ **Registration No.:** _____
(where the signatory is an employee) On behalf of: _____
Name & Address: _____
Tel: _____ Fax: _____ Email: _____
Practice registration number (where relevant): _____

ANNEX

Table of Plans, Calculations, Specifications, Ancillary Certificates and Particulars used for the purpose of construction and demonstrating compliance with the requirements of the Second Schedule to the Building Regulations and showing, in particular how the completed building or works differ from the design submitted to the Building Control Authority prior to construction.

(Details of relevant plans, etc. may be listed below and attached hereto)

42. The comments of the then Minister for the Environment on the publication of the 2013 version of the Regulations suggested that the certificates were intended to establish a chain of liability on which third parties could rely, without needing to pursue any entity other than the certifiers:

> 'While this is likely to add a relatively small amount to the overall cost of a project, the consumer will ultimately benefit as at every stage they will have a rolling set of guarantees from those who can be held responsible for any issues that might subsequently arise…The new approach establishes a clear chain of responsibility for building works prior to commencement through to completion…'[87]

[87] http://www.independent.ie/opinion/analysis/phil-hogan-the-days-of-dodgy-builders-and-shoddy-homes-a-thing-of-the-past-29230121.html

43. The wording of the Completion Certificate requires the Assigned Certifier to certify compliance with the Building Regulations, and although it refers to the ancillary certifiers, does not provide that the Assigned Certifier is not liable for those parts of the works covered by ancillary certificates. There is a subtle difference between the Builder's certificate, expressed to be 'reliant on the above', and the Assigned Certifier's , which is given 'Based on the above, and relying on the ancillary certificates scheduled...'. The Builder's 'reliant on the above' takes in everything in the previous paragraph (plans, calculations, specifications, ancillary certificates and particulars specified in the Design Certificate). The Assigned Certifier's 'Based on the above' is less of a qualification of the certificate, and only refers to the 'ancillary certificates scheduled', which are neither included in the Completion Certificate uploaded to the Building Control Management System (and thus not subject to FOI) nor required by solicitors for conveyancing purposes. Therefore, the question arises of whether the Assigned Certifier is assuming responsibility (and liability) in signing the Completion Certificate referring to the ancillary certificates.

44. Ancillary certificates have been a controversial feature of the Regulations from the outset, as the Regulations do not prescribe a statutory format. An Assigned Certifier must sign a certificate in a statutory form, and no provision is made to allow the Assigned Certifier to amend the certificate to limit his liability to third parties. The ancillary certifier can include a qualification/limitation on liability in his certificate, which may leave the Assigned Certifier taking the risk of any 'gaps' in liability. The question arises, then, of whether the Assigned Certifier can also amend the Completion Certificate to include a limitation on his liability, in order to avoid, if possible, liability arising to third parties such as prospective purchasers of the building. Anecdotal evidence from practitioners indicates that Completion Certificates are indeed being amended in this way.

45. The Completion Certificate appears to serve two purposes. Firstly, it puts the Building Control Authority on notice that a building has been completed. It is possible that a BCA may have had no communication from the owner/developer of the building since lodgement of the Commencement Notice, which itself puts the BCA on notice that construction to which the Regulations apply is about to commence, thus triggering the inspection and enforcement powers under the 1990 Act.

46. Secondly, the effect of the Completion Certificate being placed on the Register is that it provides a record of the identities of the Builder and Assigned Certifier, and consists of certificates by both parties that the building has been built in accordance with the Building Regulations. It would be difficult for an Assigned Certifier to argue that the certificate was not intended to be relied upon by a prospective purchaser or other party taking an interest in the building, in light of the jurisprudence referred to above with regard to negligent misstatement, and more recently in light of the decision in *McGee*. Therefore, the Builder and the Assigned Certifier by their certificate make a statement to the world at large, based on their skill and knowledge, knowing that the certificate is likely to be relied upon by an identifiable class of persons, which opens the door for claims in negligent misstatement.

47. The Certificate may be rejected, and the opening or use of the building delayed, if the Assigned Certifier seeks to insert qualifications or limitations on its liability in the Certificate. If the Assigned Certifier amends the form of Completion Certificate, and if the amendment is not detected by the Building Control Management System, the certificate may be validated with no-one any the wiser. The building would then be occupied and put into use. There are no grounds under the 1990 Act that would entitle a BCA to require the use of the building to be discontinued on this basis, although the BCA could argue that there had been a breach of the Regulations (which is an offence) by the owner in opening and using the building where the Completion Certificate 'in the form specified' had not been submitted to the BCA. The Assigned Certifier is not in breach of the Regulations, as there is no express requirement on the Assigned Certifier to sign the Completion Certificate.[88]

48. If one assumes that the circumstances in which the Completion Certificate would be sought may well result from the discovery of a defect in the building, it appears that the only party who would be in breach of the 2014 Regulations if the Completion Certificate was not invalidated for non-compliance would be the owner, who had used/occupied the building on the basis of registration of a non-compliant certificate. The building owner, as a vendor, owes no duty of care in tort with regard to latent defects; the Law Reform Commission, in its 1977 working paper on liability for the quality and fitness of premises, commented that

[88] The Assigned Certifier will have undertaken to certify 'compliance with the Building Regulations' in the Certificate of Compliance (Undertaking by Assigned Certifier) lodged with the commencement notice.

> ‘The vendor of real property is under no duty to the purchaser to see that the premises are free from defects of quality. This is one area where the full chill of Caveat Emptor still prevails. Apart from express contractual terms to the contrary the purchaser must look out for himself.’[89]

49. It is notable also that the Unfair Terms in Consumer Contracts Regulations 1995[90], which can be used to set aside limitations on liability of suppliers of services in certain circumstances, would not apply to the relationship between the Assigned Certifier and a prospective purchaser, as there is no contract.

50. One can expect, therefore, that cases will emerge where prospective purchasers or building owners discover that a Completion Certificate has been submitted containing a disclaimer of the Assigned Certifier’s liability, with predictable consequences for the sale of buildings and for the recovery of damages in respect of defects.

What steps should be taken by the Assigned Certifier in order to manage the risk of certification on behalf of ancillary certifiers?

51. One of the issues that has provoked debate since the introduction of the 2014 Regulations is the nature of the legal relationship between the Assigned Certifier and the ancillary certifiers. One consequence of the failure to set out the roles and obligations in the 2014 Regulations is that such issues must be analysed by reference only to the wording of the certificates themselves, in the context of the legal principles applicable to those relationships and the broader context of the Building Control Acts. The Regulations are silent on the consequences for the Assigned Certifier where an ancillary certifier is in breach of the Building Regulations, and where a defect appears.

52. There is a widespread view that the Assigned Certifier, in certifying compliance with the Building Regulations, is thereby exposed to liability for the default of ancillary certifiers.

[89] Law Reform Commission, ‘The Law relating to Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises’, Working Paper No.-1 1977, p.2,
[90] The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995)

This point is considered in the paper delivered by Mark Sanfey SC to this Association in July 2015[91]:

> '….it will be argued that the purpose of having the Assigned Certifier **certify** compliance with the Building Regulations is to ensure that the individual who is charged under the Regulations with responsibility for inspection…should be liable if there is in fact non-compliance with the Regulations'[92]

53. In a more recent published paper, the same author[93] suggests that the obligation to use reasonable skill and care relates to co-ordination of the <u>inspection</u> of the works by ancillary certifiers, rather than co-ordination of the work of such certifiers. The 2014 Regulations themselves offer little guidance on what steps should be taken in order to ensure that the relevant obligations have been discharged by the ancillary certifiers, such that the assigned certifier may issue the Certificate of Compliance on Completion with some degree of comfort. The Code of Practice[94] merely states that the Builder and the Assigned Certifier sign and submit the Certificate of Compliance on Completion 'supported by Ancillary Certificates from other members of the Building Owner's design team and certificates from specialist sub-contractors.'[95]

54. The Code of Practice does not specify how non-compliances in ancillary works can be resolved as between Assigned and ancillary certifiers; paragraph 7.6 of the Code of Practice requires records of inspections to be maintained by the person and firm responsible, which should be 'sufficient to identify the work inspected and any non-compliance'.

55. What, then, should the Assigned Certifier do in order to satisfy himself that the Ancillary Certifiers have discharged their roles appropriately, and that the Assigned Certifier can rely upon their certificates? It seems reasonable to assume that an Assigned Certifier should use rigorous methods of assurance and quality control for design and inspection. In practical terms, this amounts to a supervisory obligation imposed on the Assigned Certifier in respect of ancillary certifiers.

[91] Sanfey, 'Building Control (Amendment) Regulations 2014: Implications for Dispute Resolution', delivered to a meeting of the Construction Bar Association, 15.07.2015.
[92] para. 6.03
[93] Bar Review article February 2016
[94] Code of Practice for Inspecting and Certifying Buildings, Department of the Environment 2014
[95] Code of Practice, at para. 4.6

56. In the absence of guidance from the 2014 Regulations and Code of Practice, it may be useful to look to practice in another jurisdiction. Two decisions of the Administrative Decisions Tribunal of New South Wales from 2010, *Building Professionals Board v Cohen (No 2)*[96] and *Dix v Building Professionals Board*[97], provide some suggestions as to the appropriate standard of conduct that might be expected of a building certifier relying on sub-contractors and specialists. Both concerned challenges by certifiers to decisions of the Building Professionals Board, which acts as the regulator of certifiers for New South Wales.

57. Regulation 162A of the Environmental Planning and Assessment Regulation 2000[98] specifies the intervals at which 'principal certifying authorities' engaged to carry out inspection of building works are required to carry out stage inspections of works in progress. The New South Wales Building Professionals Act 2005 regulates registration and activities undertaken by building certifiers, and provides for issue of certificates of accreditation to allow certifiers to act as 'accredited certifiers' for the purposes of the Environmental Planning and Assessment Act 1979.[99]

58. The Building Professionals Board imposed a fine upon Mr. Dix, and issued a reprimand, following five allegations of incompetence in his certification of an apartment development. Mr. Dix applied to the Administrative Decisions Tribunal for a review of the Board's decision. Amongst the allegations against Mr. Dix was that he had approved door handles that did not comply with the Building Code of Australia, in reliance upon an installer's certificate and without verifying that they did in fact comply. In his defence to the allegation, Mr. Dix claimed that he had been following industry practice by relying on the certificates in relation to the door handles that were furnished to him by the building owner and the handle supplier. The legislation required certifiers to carry out inspections at specified key stages, including an inspection to be carried out prior to grant of an occupation certificate for the building.

[96] [2010] NSWADT 266
[97] [2010] NSWADT 160
[98] Made pursuant to the Environmental Planning and Assessment Act 1979
[99] It is noteworthy that section 66 of the NSW Building Professionals Act 2005 prohibits an accredited certifier from issuing a compliance certificate in respect of a development for which the certifier has been involved in the design, in which the certifier has a pecuniary interest, or even where the certifier is associated with the council of the area where the development is being carried out.

59. The Tribunal makes a number of observations that are of interest and relevance to the Irish context:

a. An accredited certifier 'would in our opinion be expected to be sceptical of the reliability of a certificate presented by a trade supplier and installer'. The Tribunal took the view that such a document could be affected by lack of impartiality and could be offered principally to justify payment rather than to certify quality.[100]

b. The Tribunal referred to the practice whereby certifiers relied 'uncritically' on trade supplier's statements 'without undertaking any direct physical inspections or examinations of their own'[101], which had been criticised in the 2002 Parliamentary Report upon the Quality of Buildings[102], and which had resulted in the 2000 legislation requiring inspections at critical stages of construction. The Committee had observed that 'The Committee's concern is that the PCA [Principal Certifying Authority] is not remote and simply a post box collecting pieces of paper at the end of the building process'[103]

c. The Tribunal emphasised that minimum standards of competence were not established by 'industry practice', but rather by the expectations of 'a reasonably informed member of the public'[104]:

> 'In our view, a member of the public, with an understanding of the statutory role performed by an accredited certifier, would not have regarded it as acceptable at least as at 2004 and 2005 for a certifier to rely, blindly, on the word of an installer, without having formed an independent view of what standards should be referenced, making

[100] at para. 36
[101] at para. 37
[102] Report of a Parliamentary Committee, *Report upon the Quality of Buildings*, Joint Select Committee on the Quality of Buildings, Parliament of NSW, July 2002

[103] The language used is striking when one recalls the comments of Dyson J in *Pozzolanic Lytag v Hobson Associates* with regard to the obligation of a project manager to advise the Employer on the necessity for advice on construction insurances: '*If a Project Manager does not have the expertise to advise his client as to the adequacy of the insurance arrangements proposed by the contractor…. What he cannot do is simply act as a 'post box' and send the evidence of the proposed arrangements to the client without comment.*'

[104] at para. 40

> enquiries if the applicable standards were not referenced, and, wherever practical, performing simply, independent checks (for example, visual inspection of items externally exposed) to corroborate the sign-off provided.'

60. In another decision of the Administrative Decisions Tribunal from 2010, *Building Professionals Board v Cohen (No 2)*[105], the Tribunal considered an application for review of a misconduct finding against a certifier who had delegated the final inspection of building works to another approved certifier, and then signed and submitted the [occupation certificate] in reliance on the report of that other certifier. The Tribunal drew attention to the fact that the legislation specifically provides for individuals, rather than companies, to sign the certificates, which is also a feature of the Irish system and which has given rise to considerable concern amongst certifiers, as to their potential liability for signing in their personal capacity. The Tribunal stated that:

> 'The scheme as enacted in 1998 created a new statutory office of private, accredited certifier. The office was a personal office. In our view it follows from the personal nature of the office of accredited certifier that the community would have expected the nominated certifier (and PCA) to attest to compliance, based on his or her own professional skill and expertise. There would be little point in having a system of personal appointments if that was not the case. The legislation could have chosen to have responsibility for accreditation given to private corporations or firms operating in the private sector, replicating perhaps the business model found inside council building inspectorates. Instead it set up a system of personal accreditation.'[106]

61. The Tribunal did acknowledge the practice of reliance upon specialist sub-contractors, commenting that 'the certifier should always make an independent professional judgement as to the quality of specialist certificates' but noted that in this case the certifier had delegated responsibility for an inspection, which could not be justified.

62. The cases must, of course, be seen in context. A building certifier operating in New South Wales is provided with statutory immunity in respect of the default of specialists (who are

[105] [2010] NSWADT 266
[106] at para. 187-188

analogous to ancillary certifiers in the Irish system), provided that the building certifier obtains a 'Part 4A Compliance Certificate' that meets the requirements of the legislation. The immunity is expressed as follows in section 109P of the 1979 Act:

> '(1) A person who exercises functions under this Act in reliance on a Part 4A certificate or complying development certificate is entitled to assume:
>
> (a) that the certificate has been duly issued, and
> (b) that all conditions precedent to the issuing of the certificate have been duly complied with, and
> (c) that all things that are stated in the certificate as existing or having to be done do exist or have been done,
>
> and is not liable for any loss or damage arising from any matter in respect of which the certificate has been issued.' (*emphasis added*)

63. There is no similar provision in the 2014 Regulations to delineate the respective liability of Assigned Certifier and Ancillary Certifiers. It seems likely that this was the intention of the drafters, so that a single point of responsibility could be available as a potential defendant in the event that defects emerged in a building that had been certified. However, the result has been that many competent professionals and reputable firms will not take on the Assigned Certifier role, because of the uncertainty as to the level of risk thereby assumed.

Conclusion

64. It is arguable that Builders signing Part A of a Completion Certificate are in a markedly different position to Assigned Certifiers signing Part B, principally in light of the different duties of care that apply to builders, designers and building inspectors at common law. The 'rolling set of guarantees' promised by the Minister for the Environment may prove to amount to little more than the imposition of further onerous risks on professionals. The Assigned Certifier, in turn, has been described as being 'in the lion's den' by a leading Irish property lawyer.[107]

[107] http://selfbuild.ie/construction/in-the-lions-den/5/

65. It is instructive, therefore, to consider how the outcome of the building works that gave rise to the *McGee* case would have been different, had the 2014 Regulations applied to those works. The defendant architectural technician would not have been appointed as Assigned Certifier, and the defective foundations might well have been detected. The construction of a 'once-off' house is now exempt from building control, however, following the Building Control (Amendment) (No.2) Regulations 2015 (S.I. 365/2015); the then Minister for the Environment commented with regard to the 2015 Regulations that

> '…individuals and families planning to build or extend their home…will no longer be held to ransom by excessive quotes for design and completion certificates'[108].

66. The facts of the *McGee* case, together with reports that banks will not finance one-off houses unless owners opt into building control[109] suggest that the Minister may have underestimated the risk of relaxing building control (and thus quality control) in the construction of new houses.

67. In 1982, the Law Reform Commission recommended the creation of a new statutory duty that a person undertaking construction work would be required to see to it that the work is executed is a good and workmanlike manner with suitable and proper materials. The duty would be owed to the person commissioning the work and to persons who subsequently acquired an interest in it – so the first and subsequent purchasers of an apartment, or house, for instance. The observations received by the Commission from various interested parties in relation to its Working Paper of 1977 that contains the preparatory research for the Report makes for interesting reading. The Construction Industry Federation is said to have suggested 'a modification of the Commission's proposals which would have the effect of excluding from the scope of any proposed legislation building work which was covered by the Guarantee Scheme'; the Commission was 'unable to accept that this scheme, however desirable in itself, would be an adequate substitute for legislation of the kind proposed in the Working Paper', pointing out the substantial limitations on the scheme. The Defective Premises Bill of 1982 contained in the Report has gathered dust ever since.

[108] http://www.alankelly.ie/blog/2015/07/28/major-reform-of-building-regulations-/
[109] http://www.businesspost.ie/banks-ignore-state-codes-on-one-off-houses/

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