



# Guidance Note 6

## Responsibilities and Liabilities

### 1 Introduction

The SER Scheme for Certification of Structural Design (the ‘Scheme’) was introduced by the Institution of Structural Engineers and the Institution of Civil Engineers in response to the introduction of the Building (Scotland) Act 2003 (the ‘Act’). It was the aim of the professional bodies to bring about real improvements in the structural safety of buildings however it was also recognised that the introduction of a new role of Certifier brought with it new responsibilities and professional liabilities.

SER has attempted to develop the Scheme in a manner that apportions responsibility for the design of the building fairly between the Certifier, the client and other members of the design team. Individual Approved Certifiers and the Approved Bodies that employ them must however, as with any professional appointment, give careful consideration to the risks associated with the appointment and how these risks can be properly managed. This Note has been prepared to provide guidance to Approved Bodies, Approved Certifiers and their clients on how the risks and liabilities associated with the certification process may be assessed and managed.

Liabilities can arise in the following circumstances: (i) under contract with the client; (ii) under the common law of delict which deals with injuries and other damage caused by a wrongdoer to a victim; or (iii) from breach of statutory duty.

### 2 Participants

Every building project will have a variety of individuals and organisations that will share responsibility for procurement. The principal participants responsible for the safety of the structure are:

- The Client
- The Applicant
- The Structural Designer
- The Approved Certifier of Design
- The Structural Checker
- The Approved Body
- The Verifier (Local Authority)
- The Contractor
- The Relevant Person

## 2.1 The Client

The Client is the individual or organisation for whom the building is being constructed. The client has a responsibility to employ competent people to undertake the design pursuant to the Construction (Design and Management) Regulations 2015.

## 2.2 The Applicant

The Applicant is the individual who applies to a Local Authority for a building warrant. Anyone may apply for a building warrant but most commonly will be a member of the design team appointed by the Client.

## 2.3 The Structural Designer

The structural designer will normally be appointed by and enter into a contract with the Client to exercise the appropriate standard of care to ensure the building structure complies, amongst other things, with the Building Regulations (as defined by the Act). The liability and scope of involvement of the structural designer with the project will be regulated by the conditions of their appointment. If the structural designer is a Chartered Structural or Chartered Civil Engineer then he or she will have an implied obligation to comply with the professional standards of his or her chartered body (e.g. ICE or IStructE). Several structural designers may be involved with the same project.

## 2.4 The Approved Certifier of Design (Building Structures)

Approved Certifiers of Design (Building Structures) ('Approved Certifiers') are members of the Scheme for Certification of Design (Building Structures) approved by Scottish Ministers and provided by SER. The liabilities of the Approved Certifier, which are quite different from those of the Designer, are set by legislation. They may, or may not be the structural designer on the project. If an Approved Certifier makes a false or misleading statement within a certificate or recklessly issues a certificate then he or she is guilty of a criminal offence under the Act.

## 2.5 The Structural Checker

A structural checker will be involved in the project except in the circumstances detailed in Technical Bulletin No 2. The liability of the checker will be regulated by the conditions of his or her appointment, if there is one such as where the checker works in a separate organisation from the Approved Certifier and the Approved Body. If the structural checker is a Chartered Structural or Chartered Civil Engineer then he or she has an implied obligation to comply with the professional standards of his or her chartered body (e.g. ICE or IStructE).

## 2.6 The Approved Body

Each Approved Body must be registered under the Scheme for Certification of Design (Building Structures) approved by Scottish Ministers and provided by SER. The Approved Body will be appointed by the Client but its obligations and hence liability will be regulated by the conditions of the appointment, any delictual obligations and legislation. The Approved Body should seek to limit its contractual liability in extent and amount. It should restrict the number of parties to whom it owes duties and seek to apportion liability by introducing appropriate conditions to contracts for certification work. It should also try to cap liability. It is recommended that certification is subject

to separate contract conditions to that for the design of the project. ACE has worked with SER to develop ACE Agreement 9: Certification of Structural Design (for use in Scotland).

## 2.7 The Verifier (Local Authority)

Local authorities have thus far been appointed by Scottish Ministers as the sole Verifiers for buildings in their geographical areas.

The Verifier is required to grant a Building Warrant except where it is not satisfied that the design meets the requirements of the Building Regulations. Where an application is accompanied by a certificate from an Approved Certifier of Design (Building Structures), the Verifier does not check the structural design in respect of those parts which have been certified, but instead checks that the Approved Certifier and Approved Body signing the certificate are registered at the date of signing. Where an application is not accompanied by a certificate the Verifier is responsible for assessing the design to satisfy itself that the requirements of the regulations are being met.

The Verifier is required to accept or reject the completion certificate submitted by the Relevant Person before the building is occupied. In assessing the certificate they must use reasonable enquiry and this may include confirming that what was specified in the warrant was actually built on site. In order for the Verifier to make such reasonable enquiry it will normally be necessary for them to have copies of the relevant drawings.

## 2.8 The Contractor

Frequently the contractor (or subcontractors) will be responsible for aspects of the design of the building structure.

## 2.9 The Relevant Person

Although anyone may apply for a building warrant, a completion certificate may only be submitted by the Relevant Person. Therefore it is the Relevant Person who is ultimately responsible for ensuring compliance with Building Regulations of the finished building. The Relevant Person is defined in section 17(10) of the Act. It will normally be the building owner. The Relevant Person can be represented by their duly authorised agent, but this does not remove their legal liability for compliance with Building Regulations. If the Relevant Person makes a false or misleading statement within a completion certificate, or recklessly submits a certificate, then they are guilty of a criminal offence under the Act.

If the certificate relating to the structural design and submitted to obtain the building warrant includes Schedule 1, listing elements the detailed design of which is to be undertaken by a subcontractor, the Relevant Person should be made aware that Form Q, confirming that the design of these elements is satisfactory, must be submitted by the Approved Certifier to the Verifier before the completion certificate can be submitted.

# 3 Scheme Limitations

The SER Scheme was introduced solely for the purposes of the Building (Scotland) Act 2003. The regulations to which the design certificates apply are set for purposes stated in the Act which are '*securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings*'. It is necessary for clients to

understand that the regulations are not set for the purpose of protecting them from economic losses. The Certificate of Design (Building Structures) signifies only that the design complies with the requirements of the Building Regulations as defined by the Scheme. The certificate does not imply that the design is adequate in any way which goes beyond Building Regulation compliance.

SER has attempted to ensure that the certification scheme does not alter the balance of responsibility between the design team and those responsible for enforcing building standards. In particular SER has sought to avoid the Approved Certifier and the Approved Body acquiring responsibility for matters that are or should be addressed by contracts between the client and the design / construction team particularly for economic loss.

For this reason a disclaimer has been introduced to the design certificates in the form of the following note:

*'This certificate has been issued in support of an application for building warrant under the Building (Scotland) Act 2003 only and must not be relied upon for any other purpose including under any contract to which the certifier is not a party.'*

The intention of this note is to make clear that the Client should not look to an Approved Certifier to recover losses that it should seek to recover under the terms of their contract with the designer.

The other major limitation on the responsibilities of the Approved Certifier is that the Scheme relates solely to the design of the building. The Approved Certifier has no responsibility for supervising the construction of the building or for ensuring that the design which has been certified for building warrant approval is the one that is constructed. These responsibilities lie with others, principally the Verifier and the Relevant Person. For this reason a second note has been introduced to the design certificate as follows:

*'This certificate relates solely to the design of the building and does not certify any aspects of construction.'*

The wording of the design certificates has been agreed and approved by the Scottish Government Building Standards Division which is the body that approves certification schemes on behalf of Scottish Ministers.

The certificate is issued solely in support of an application for building warrant under the Act and must not be relied upon for any other purpose. Therefore it is not appropriate for the Approved Certifier or the Approved Body to grant third party rights or a collateral warranty to any party who is not a party to the contract with the Approved Certifier or Approved Body. Third party rights or collateral warranties may be granted by the structural designer who would ordinarily have a duty to ensure the building structure complies with the Building Regulations.

## 4 Contractual Relationships

The Client cannot employ an Approved Certifier directly but must enter into a contract with the Approved Body who will appoint one of their registered Approved Certifiers to the project. This will ensure that the Client has a contract with an organisation that is required by the certification scheme to hold appropriate professional indemnity ('PI') insurance.

Approved Bodies have a duty to provide an environment that supports their Certifiers. SER strongly encourages Approved Bodies to ensure that their Certifiers are protected by the terms of contracts

that the body enters into with its clients. Information of how this may be achieved is provided in section 5 of this guidance. In situations where contractual arrangements are insufficient or may not be enforced SER expects Approved Bodies to make appropriate arrangements to ensure that Approved Certifiers are suitably indemnified against any actions or claims against their certifier that may arise from certificates signed by the certifier while in the employment of the Approved Body.

The Approved Body may also have a design responsibility for the project but may not be the only design organisation with responsibility for structural aspects of the design. The Approved Certifier has responsibilities for certifying the whole of the work described in the application for building warrant, including any component parts of the structure designed by others. The risks associated with certification may therefore be wider than those carried by the designer.

SER consider the use of a separate contract for the certification services may provide a better opportunity for the Approved Body to manage the certification risks. Use of the ACE Agreement 9: Certification of Structural Design (for use in Scotland) would be appropriate. This separates design from certification and defines liability and obligations of certification as separate from design.

However, SER recognises the commercial reality is that some Clients will require an Approved Body to enter into a single appointment covering both the certifying and designing roles which may be based on an industry standard form such as ACE 1: Design (Scotland) 2011 or may be bespoke. In which case, SER recommends that Approved Bodies vary the terms and conditions of contract with the Client to reflect the different obligations that apply to each role the structural engineer is fulfilling. The services of the Certifier and designer should be separately identified and certain obligations restricted to the services provided by each of them. Accordingly the obligation to grant a collateral warranty should be in respect of the designer alone. There may be other clauses which do not apply to the Certifier.

## 5 Personal Liability of Approved Certifiers

The contractual appointment is between the Approved Body and the Client. Individual Approved Certifiers have no contractual relationship with the Client however, by signing the certificate, the Approved Certifier will attract personal liability for his or her decisions. The SER Scheme places limits on the scope of liability covered by the certificate however the Certifier should also look to the employing Approved Body to provide protection through maintenance of PI insurance cover and appropriate terms and conditions for certification appointments.

SER recommends that Approved Bodies introduce a condition to their contract for certification services that would prevent a Client seeking to recover loss directly from the Approved Certifier. An appropriate clause should be inserted into the Approved Body's appointment with the Client which makes it clear that the Client cannot pursue the Approved Certifier personally for any losses suffered by it. The only course of action the Client would have is to bring an action against the Approved Body. This should also provide the Approved Certifier with protection from personal claims in circumstances where the Approved Body has ceased trading.

An example of how this might be achieved is to be found in the wording of Clauses E5.7 of the ACE Agreement 9: Certification of Structural Design (Scotland) 2011 and/or F7.7 of the ACE Agreement 1: Design (Scotland) 2011. These clauses state:

*'Save in respect of death or personal injury the Client shall look only to the Consultant (and not to any of the Consultant's personnel) for redress if the Client considers that there has been any breach of this Agreement. The Client agrees not to pursue any claims in contract, delict or statute*

*(including negligence) against any of the Consultant's personnel as a result of carrying out its obligations under or in connection with this Agreement at any time and whether named expressly in this Agreement or not.*

*Note: "Consultant's Personnel" is defined in ACE Agreement 1 as "Any employee or member of the Consultant, including any officer or director of a company or a member of a limited liability partnership or self-employed or agency personnel working for the Consultant."*

Additionally at clause E5.1 of ACE Agreement 9 and clause F7.1 of ACE Agreement 1, there is a clause capping liability to the amount stated in Part B: The Particulars of the Agreement. Parties are free to agree an appropriate amount on a case by case basis. Under ACE Agreement 1, the cap is the lesser of the stated sum or ten times the total fees payable. Parties should take care to agree an appropriate amount of cap commensurate with the certification fee (and consider separate caps for the design work and certification work where a single appointment is used). It should be noted however that clauses that seek to exclude or limit liability in commercial contracts may be held not to meet the fair and reasonable test under the Unfair Contract Terms Act 1977 and be unenforceable.

There are similar protections in the ACE Agreement 3 Design and Construct (Scotland) 2009 (for the appointment of a consultant by a contractor) and ACE Agreement 4: Sub-Consultancy (Scotland) 2009 for the appointment of a sub-consultant.

Because of the uncertainty regarding the enforceability of contractual limitations or exclusions in law there is no way to provide absolute guarantees as to the effectiveness of these contractual arrangements. It would seem probable however that the majority of certifiers who are sole practitioners or are employed by large or medium sized organisations who undertake work for commercial clients and that maintain PI cover can be protected by contractual arrangements described in this guidance document.

Where the Approved Certifier is employed by (i.e. is not the principal of) a small practice with a large proportion of work being done for clients who may be unfamiliar with construction work (domestic alterations for example) then it is prudent for the certifier to take steps to check that their employer (and former employer(s) if they have undertaken certification work for a previous firm) continually carries PI insurance that indemnifies employees in respect of any claims that may be brought against such individuals personally.

Where contracts other than ACE Agreements are to be used the following model clause is suggested for inclusion in the appointment of the Approved Body:

*Save in respect of death or personal injury the client shall look only to the Consultant (and not to any individual or consultant's personnel) for redress if the Client considers that there has been any breach of this Agreement. The Client agrees not to pursue any claims in contract, delict or statute against individuals, including without limitation any Approved Certifier employed by the Client pursuant to the Building (Scotland) Act 2003, as a result of the carrying out of its obligations under or in connection with this Agreement at any time and whether named expressly in this Agreement or not.*

The Approved Certifier may also be subject to claims, arising from third parties, that cannot be controlled by the contractual conditions described above. SER does not see these risks as being significantly greater than those acquired by an individual structural designer. An Approved Certifier who has a concern over his/her liability should seek confirmation from his or her employer (i.e. the

Approved Body) that the employer will indemnify them against any economic consequences of any claims that may be made against them in the course of their certification duties both during and after his or her employment by that firm. It would be prudent to seek this assurance whenever the firm changes their PI insurer or the policy though this indemnity is irrespective of the presence of PI insurance.

The primary means for the Approved Certifier to minimise potential exposure to personal litigation is, of course, to take all necessary steps to be satisfied, before signing the certificate, that the structural design meets the requirements of the Building Regulations.

In addition to the possibility of potential litigation against the Approved Certifier, it should be clearly understood that, under the Building (Scotland) Act 2003, it is a criminal offence to sign a Certificate of Design (Building Structures) recklessly. The availability of PI insurance does not affect the individual Approved Certifier's liability to criminal prosecution, either under the Act or health and safety legislation.

## 6 Third Party Liabilities

It is generally accepted that approval of designs by the Verifier does not constitute a sustainable defence for designers should it prove that their designs were defective and Verifier approval does not absolve the original designer of liability. Likewise, the issue of a building warrant by a Verifier does not absolve the Approved Certifier of liability. Where an application for a building warrant is accompanied by a certificate from an Approved Certifier, the Verifier must accept the certificate as conclusive of the facts to which it relates. Therefore if it can be shown that the Approved Certifier's certificate incorrectly states that the design of the building complies with the Building Regulations, the earlier issue of the building warrant does not absolve the Approved Certifier of liability.

The Approved Certifier has the responsibility, in terms of the Certificate, to the Verifier and there will also be a responsibility to the employer or Client.

The Approved Certifier has responsibilities under the Act and may be guilty of a criminal offence for knowingly or recklessly issuing a certificate which is false or misleading. It is also possible that a breach of the requirements of the Building (Scotland) Regulations 2004, in connection with a certification scheme, may give rise to a cause of action of civil liability.

The responsibility to a third party, such as a person who subsequently purchases the building from the original developer or users of the building and people in the vicinity, is less clear.

If there is personal injury or damage to property there may be liability to third parties even where there is no contract. This would be on the basis of a delictual (common law) claim. In such cases, economic loss would be recoverable only in a situation where there is reliance or a close relationship or proximity between the parties which creates a duty of care. That may be difficult to establish in the cases of succeeding purchasers or tenants of buildings. It is impossible to state concisely the circumstances in which recovery of economic loss caused by negligent misstatement will or will not be allowed by the Courts.

The Act defines 'damage' as including death or injury to any person. It is not clear whether damage to property is to be excluded by implication.

As indicated at 3 above it is not appropriate for an Approved Certifier or Approved Body to grant collateral warranties or third party rights.

## 7 Corporate liability issues

As with personal liability issues, the Building Regulations and certification in accordance with the Scheme may have implications on the extent of coverage of the employer's (i.e. the Approved Body's) PI insurance.

Some of the issues that may arise are discussed below. The identified issues are not intended as an exhaustive or definitive list. The implications of such issues may vary between individual insurers and also with the passage of time.

Approved Bodies are encouraged to discuss these issues with their insurers prior to accepting commissions which involve certification under the Scheme. Additional legal advice should be sought where necessary.

### 7.1 Fitness for purpose

The Certificate of Design (Building Structures) states that the work described in the application for the building warrant or amendment to warrant complies with Standards 1.1 and 1.2 of Schedule 5 of the Building (Scotland) Regulations 2004. Standard 1.1 states that:

*'Every building must be designed and constructed in such a way that the loadings that are liable to act on it, taking into account the nature of the ground, will not lead to:*

- a) the collapse of the whole or part of the building*
- b) deformations which would make the building unfit for its intended use, unsafe, or cause damage to other parts of the building or to fittings or to installed equipment*
- c) impairment of the stability of any part of another building.'*

This statement should not be interpreted as a 'fitness for purpose' requirement which may extend the consultant's responsibilities beyond the coverage of their PI insurance. See Regulation 8 of the Building (Scotland) Regulations 2004 which refers to 'technically proper and workmanlike manner'. It should be noted that the standard of care stated in the sample certificate is reasonable skill care and diligence.

### 7.2 'Back to back' insurance cover

The certification system covered by the Scheme has been designed to be flexible enough to deal with a wide range of circumstances recognising that in the majority of cases the Approved Certifier will not personally have carried out all of the design and, in some instances, some elements of the proposed works may have been designed by specialist suppliers/contractors/other consultants.

Nonetheless, the Approved Certifier must be satisfied that the design of such elements is adequate (and that all of the components will fit together into a holistic entity) and, by completing the certificate, is taking responsibility for certifying the compliance of the entire structure with the stated requirements of the Building Regulations, although the Approved Body may not be receiving a full design fee for these elements and consequently may be paying a reduced insurance premium relative to the potential risk involved.

In these circumstances some insurers may request some form of 'back to back' insurance provision with the original designers. However this may, in some cases, not be possible (particularly where there is no direct contractual arrangement between the original designer and the Approved



Certifier). It is the responsibility of each individual Approved Body to clarify this situation with their insurers, either on a general or project specific basis as required, and ensure that adequate PI insurance is in place in respect of each project which is undertaken.

## 8 Summary and Recommendations

SER administer a certification scheme that seeks to apportion responsibility for the design of the building fairly between the Certifier, the Client and other members of the design team. Individual Approved Certifiers and the Approved Bodies that employ them must however, as with any professional appointment, give careful consideration to the risks associated with the appointment and how these risks can be properly managed.

The SER Scheme serves the purposes of the Act in relation to health and safety. The design certificates contain a disclaimer to the effect that the Approved Certifier and the Approved Body cannot be responsible for matters that are or should be addressed by contracts between the Client and the design/construction team, particularly for economic loss. The intention of this disclaimer is to make clear that the Client should not look to an Approved Certifier to recover losses that it should seek to recover under the terms of their contract with the designers.

Approved Bodies can protect their Certifiers from actions by Clients by the introduction of appropriate conditions into contracts for certification work. Clients are prevented by the Scheme from entering into contracts directly with individual Certifiers. Approved Bodies and their Certifiers will frequently certify and thereby acquire responsibility for design work that has been done by others. Approved Bodies should seek to limit the level of responsibility in extent and an amount commensurate with the certification fee. It should also seek to limit the number of parties to whom it owes duties. Accordingly SER recommend that certification work is undertaken under separate terms and conditions to any design appointment that the Approved Body may also have with the client.

SER has suggested some standard wording that may be introduced to certification contracts with a view to protecting individual certifiers from the possibility of being pursued by Clients.

Approved Bodies and Approved Certifiers may through the legislation acquire responsibilities to third parties with whom they have no contract. These responsibilities should however be little different to those of a designer. It is unlikely that a court would take the view that a design certificate provided by an Approved Certifier pursuant to the Act, absolves a designer from the responsibility to design a safe building.

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*This guidance has been prepared with the assistance of BTO LLP (who have provided legal advice) and the insurance industry. The advice given is for guidance only. It is recommended that anyone concerned about liability issues should take independent professional advice.*