

Jersey Guidance Note 6 Responsibilities and Liabilities

1 Introduction

The SER Scheme for Certification of Structural Design (the ‘Scheme’) was introduced in Jersey in 2008 by the Institution of Structural Engineers and the Institution of Civil Engineers in response to a request from the States of Jersey Government to implement a Scheme for the certification of the structural aspects of the Jersey Building Bye-Laws based on the similar scheme which had been operative under the Scottish Building Regulations since 2005. 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.

The guidance distinguishes between those liabilities, arising under the contract with the client, or which may arise under the Law of Tort, from statutory liabilities.

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 Contractor
- The Environment Department as the Regulator

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.

2.2 The Applicant

The Applicant is the individual who applies for a building permit. Anyone may apply for a building permit but most commonly this 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 Bye-laws. 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 Structural Design approved by the Minister for Planning and Environment 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.

2.5 The Structural Checker

A structural checker may be involved in the project. The liability of the checker will be regulated by the conditions of his or her appointment. 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 Structural Design approved by the Minister for Planning and Environment 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, or which may arise under the Law of Tort, from statutory responsibilities. 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.

2.7 The Environment Department.

The Environment Department will grant a Building Permit except in cases where it is not satisfied that the design meets the requirements of the Building Bye-laws. Where relevant, permission will be granted upon condition that a certificate from an Approved Certifier of Design (Building Structures) is to be provided. The Department 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.

For the purposes of securing compliance with the building bye-laws, it is a requirement of the building bye-laws that an application for a building permit contains plans and details which are sufficient to show the work satisfies all relevant requirements of the bye-laws. Where a design certificate is issued under the SER scheme it must list all drawings used for the purposes of issuing that certificate and be submitted along with one copy of all drawings listed.

2.8 The Contractor

Frequently the contractor (or sub-contractors) will be responsible for aspects of the design of the building structure, either directly or through the specification and selection of building components.

3 Scheme Limitations

The SER Scheme has been introduced solely for the purposes of the Building Bye-laws (Jersey) 2007, as amended. The bye-laws to which the design certificates apply are made for the purposes stated in the Planning and Building Law 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 bye-laws are not made 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 Bye-laws as defined by the Scheme. The certificate does not imply that the design is adequate in any way which goes beyond building bye-law 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 permit under the Building Bye-laws (Jersey) 2007 only and must not be used or 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 the purpose of the bye-laws, is the one that is constructed. These responsibilities lie with others, principally the Person undertaking the work. 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 States of Jersey Environment Department.

As the certificate is issued solely for the purposes of discharging conditions attached to a building permit, it should not be relied upon for any other purpose including under any contract with any third party. It is not appropriate for the Approved Certifier or the Approved Body to grant third party rights or a collateral warranty to any party 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 Bye-laws.

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 a building Permit, 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. Where there is a single appointment covering both the certifying and designing roles 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 warranty should be in respect of the designer alone. There may be other clauses which do not apply to the certifier.

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. Following consultation on these issues the Association for Consultancy and Engineering have produced a form of Consultancy Agreement (Agreement 9 Certification of Structural Design (for use in Scotland) for the appointment of a Consultant for the certification of structural designs under the Building (Scotland) Act 2003 and Building (Scotland) Regulations 2004 for use in Scotland.) specifically for appointment in the role of certifier of Approved Certifier of Design. Although this document has been produced with specific reference to the Scottish Building Regulations, and the certification scheme which operates in Scotland, many issues addressed in this document are of equal relevance in Jersey and Bodies are advised to consider the contents of this document when concluding their appointments, and if necessary seek legal advice from their PI insurers.

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 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 employer's appointment contract 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.

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An example of how this might be achieved is to be found in the wording of Clause 8.9 of the ACE Agreement A(1) 2002 as amended in February 2004. This states:

“Save in respect of death or personal injury the client shall look only to the Consultant (and not to any individual) 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 tort or statute (including negligence) against individuals 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: ‘Individual’ is defined as “Any employee or member of the Consultant, including any officer or director of the company or a member of a limited liability partnership.”

Additionally at 8.2 there is a clause capping liability to the amount recoverable under the Consultant’s PI policy. That limitation does not apply if the Consultant is in breach of his insurance obligations under clause 8.11. 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.

The clause stated above would be considered to be reasonable to the extent that the Consultant maintains PI cover in particular as the contract is with the Consultant/Approved Body and not the individual Approved Certifier. However in the event that:

- (i) PI cover is not maintained by the Consultant/Approved Body; and
- (ii) The Consultant/Approved Body is no longer solvent at the time of a claim being intimated; and.
- (iii) The individual Certifier has excluded personal liability by way of a clause similar to clause 8.9 of the ACE agreement;

then the client would potentially have no opportunity to claim against any party in respect of its loss as a result of clause 8.9. In these circumstances, there is a possibility that the courts might hold that clause 8.9 is unreasonable having regard to the terms of the Unfair Contract Terms Act and, therefore, is unenforceable. Where the Approved Body has maintained PI (which should be the normal situation) or where the claim does not reach the threshold where PI cover is activated then this clause should be enforceable.

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. not the principal) 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 form 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) 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, tort, or statute, against individuals, including without limitation any Approved Certifier employed by the Client pursuant to the Building Bye-laws

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(Jersey) 2007, 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 (ie 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 Bye-laws.

In addition to the possibility of potential litigation against the Approved Certifier, it should be clearly understood that, under the Planning and Building (Jersey) Law it is an 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 Planning and Building Law or health and safety legislation

6 Third Party Liabilities

It is possible that a breach of the requirements of the Building Bye-laws, in connection with a certification scheme, may give rise to a cause of action of civil liability. The right for such action has not been excluded by the Planning and Building Law, or the Bye-laws.

It is generally accepted that, approval of designs by the Environment Department does not constitute a sustainable defence for designers should it prove that their designs were defective and Environment Department approval does not absolve the original designer of liability. The introduction of the Approved Certifier should not alter this position albeit that an Approved Certifier's liability has still to be established.

In signing a Certificate the Approved Certifier accepts responsibilities to:

- (i) The Environment Department in terms of the Certificate;
- (ii) The Employer or Client;
- (iii) A third party who may rely on their Certificate (the most obvious example of that is someone who subsequently purchases a building from the original builder or developer);
- (iv) Users of the building and people in the vicinity of the building who may sustain injury or damage to property.

The Approved Certifier has the responsibility, in terms of the Certificate to the Environment Department and there will also be a responsibility to the employer or Client. The responsibility to a third party is less clear. If there is personal injury or damage to property there may be liability to third parties in the absent of contract but 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 succeeding purchasers or tenants. 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.

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 Bye-laws 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 on the Certificate complies with all relevant requirements of Part 1 of the second schedule to the building bye-laws (Jersey) 2007. This Part states that:

Requirement 1.1. - Loading

- (1) A building must be constructed so that the combined dead, imposed and wind loads to which it may be subjected are sustained and transmitted to the ground –
 - (a) safely; and
 - (b) without causing such deflection or deformation of any part of the building, or such movement of the ground, as will impair the stability of the building or any part of another building.
- (2) In assessing whether a building complies with sub-paragraph (1) regard must be had to the imposed and wind loads to which it is likely to be subjected in the ordinary course of its use for the purpose for which it is intended.

Requirement 1.2. - Ground movement

A building must be constructed so that, in so far as the risk can reasonably be foreseen, movement of the subsoil caused by landslip, swelling or freezing will not impair the stability of any part of the building.

Requirement 1.3. - Disproportionate collapse

- (1) Subject to paragraph (2), a building must be constructed so that in the event of an accident the building will not suffer collapse to an extent disproportionate to the cause.
- (2) This paragraph does not apply to a building with less than 5 storeys.
- (3) In counting those storeys –
 - (a) each basement level is to be counted as 1 storey; and
 - (b) if the roof pitch does not exceed 70 degrees to the horizontal and there is a single storey within the roof space, that storey is not to be counted.

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 Bye-law 8. 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.

None the less, 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 Bye-laws 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 Certification Scheme serves the purposes of the Building Bye-laws 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 their Certifiers will 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 absolves a designer from the responsibility to design a safe building.