

CML Certificates: But you said it was fine!
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Consultants who certify properties by signing a Council of Mortgage Lenders standard form could find the owners chasing them for money later if they find anything wrong.

In April 2007 the Council of Mortgage Lenders (CML) produced a standard form certificate that consultants can be asked to sign concerning the condition of a newly built residential property. It was accompanied by '*A Guide to the CML Certificate*'. The Guide ended with this warning: '*If [the consultant] signs the certificate and defects are subsequently found to affect the property, it is highly likely that they will face a claim on their professional indemnity insurance cover some way down the line*'. This is exactly what is happening, with claims under these and similar certificates being notified to insurers.

These sorts of certificates are dangerous.

Generally, new-build residential properties will have the benefit of insurance/warranty schemes, such as the NHBC's. This provides a 10-year warranty and insurance cover designed to protect the owner if problems occur. Lenders on such properties will usually require that it have the benefit of such a scheme. This is not always available: the builder may not be registered for one because it is too expensive or if the residential part is only incidental to a larger commercial scheme.

The CML certificate requires the consultant to certify it visited the property throughout construction to check progress and conformity with drawings approved under the Building Regulations and instructions issued under the contract. The consultant then has to certify that the property as a whole has been constructed to a satisfactory standard and in compliance with the approved drawings. It is not restricted to the elements which the consultant designed or inspected.

The certificate is not equivalent to the NHBC cover but comes close. If a statement made in the certificate is not correct, an action will lie against the consultant for negligent misstatement if it was made without proper care. The courts will expect the consultant not only to have made the inspections, but to have carried them out and had all the information necessary to be able to make the statements in the certificate. If he cannot do so, then he should either qualify the statements so that they express what it can truthfully say or it should refuse to sign it. The consultant's liability has nothing to do with whether the inspections on which it bases its opinion were carried out with reasonable care, but depends only on the correctness of the statements made.

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It can be seen from this that a consultants would find it difficult to defend a claim if the claimant could demonstrate that the construction of the property was in breach of any Building Regulations and/or was not of satisfactory quality, even if the defects arose out of matters for which other consultants or the contractor were responsible.

The claimant will have a claim against the builder, as the person primarily responsible for the defect, but since the builder may well be insolvent or have insufficient assets when the defects appear, it is going to be easier for the claimant to bring a claim against the certifying consultant who is likely to have professional indemnity insurance.

The CML certificate offers no opportunity to the consultant to limit its liability and consultants are finding that although the fee for providing such a certificate is in the hundreds of pounds, the claims are coming in for hundreds of thousands.

The consultant has to confirm in the certificate that it will maintain professional indemnity insurance at a certain level, but this of course does not limit its liability to that amount. The consultant's liability under the certificate is unlimited. It is also possible that professional indemnity insurers could decide that the statements in the certificate amount to warranties for fitness for purpose, which the insurance may not cover.

Further, liability under the CML certificate is stated to be not only to the original owner or purchaser, but to their lender and to all subsequent purchasers and lenders until six years have expired. Without this specific provision it is arguable that the consultant would only be liable to the original owner or purchaser for up to six years.

If the consultant had given a collateral warranty instead of the certificate, their liability would have been based on whether or not they had exercised reasonable skill and care in performing his inspections and not on the objective test of whether the whole property was of a satisfactory standard.

They would also have had an opportunity to limit liability to an amount appropriate to the fees paid, to include a net contribution clause so that the responsibility of others in relation to the defect could be taken into account, and to limit the number of purchasers or lenders to whom it could also be liable.

Consultants therefore should think carefully before giving these sorts of certificates.

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