

The Certificate of Completion and Compliance (CCC) In the Building Industry — Bugbear or Bunkum?

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INTRODUCTION

Delivery of a construction project is a process requiring the involvement of many parties. Apart from the developer and purchasers, there are a host of contractors, consultants and regulatory authorities. There are normally matters of considerable technical difficulties generated in the course of the actual works.

The Certificate Of Fitness for occupation problem

In particular, the housing sector has been plagued by many problems. A perpetual complaint relates to the issue of the Certificate of Fitness for Occupation as issued by local authorities (See s 3, The Street, Drainage & Building Act 1974 (Act 133) and the Uniform Buildings By-Laws for definition of the Certificate of Fitness for Occupation ('CFO')).

It is a normal occurrence that many developers give vacant possession without the CFO being issued. This has caused considerable difficulties to house buyers for such vacant possession does not mean beneficial takeover and ability to use of the relevant building lawfully.

The situation is no better even for commercial buildings and industrial premises. Disgruntled purchasers have complained to the Ministry of Housing & Local Government ('MOHLG') and other governmental authorities whenever there was delay or failure to issue CFO by local authorities. Such complaints have even been directed to activist consumer and non-governmental organisations such as the Consumer Association of Penang and FOMCA. In the

main, most of these complaints are well grounded and not frivolous.

Early initiatives

Such complaints were ignored for the better part of the eighties and the early nineties. The relevant authorities turned either a deaf ear or stonewalled them. They spent more effort in shifting blame and finger pointing instead of taking constructive action. The new millennium saw avowed government policy statement of greater transparency and accountability (as reflected in the *Mesyuarat Panel Memajukan Perkhidmatan Awam* on 18 August 2003 as chaired by the Deputy Prime Minister). This is in tandem with the modern practice in other jurisdictions.

One of the initiatives was the introduction of the One Stop Centre (OSC). It reduced the number of required seven technical certifications from various technical agencies to merely one. Time-wise, it was mandatory for the local authority to issue the CFO within 14 days of the submission of the duly completed Form E by the qualified person provided all other requirements had been met.

CCC implemented on 12 April 2007

However, the situation on the ground did not improve in a material way despite the improvements introduced by the government. There were still unending complaints particularly from developers that the local authorities were not adhering to the directives issued. They brought pressure to bear upon the Government who perhaps was rightly concerned that such inefficiencies would presumably translate into a loss of votes at the ballot box. Also, it was also concerned that potential foreign investments may be lost to other jurisdictions having a much better delivery system.

The Government approached the problem by examining this chronic blot on the public administrative system to formulate an efficient measure. While much can be written on what transpired next but for the sake of brevity, we believe that it is prudent to examine merely the end result.

On 13 April 2007, the honourable Prime Minister announced that as of 12 April 2007 that the CCC would take effect together with other mechanisms such as the One Stop Centre ('OSC') and the Commissioner of Building ('COB'). He stated that all the pertinent laws and regulations had been suitably amended and put in place for the implementation of the said procedure and as of the 12 April 2007, the CCC would replace the CFO and will be issued by professionals.

SOME AREAS OF CONCERN

The CCC has now been officially implemented for more than six months. Much has happened in this period. As part of a programme of familiarisation and learning, governmental agencies and the relevant professional bodies such as Pertubuhan Akitek Malaysia (PAM), Board of Engineers Malaysia (BEM),

Association of Consulting Engineers Malaysia (ACEM) and the Institution of Engineers Malaysia (IEM) have put in some effort and time in updating and educating the parties involved eg the local authorities, professionals, developers, etc in some aspects of the CCC so as to ensure that there is no hitch in its implementation.

Notwithstanding such attempts, we suspect that there are segments of the governmental agencies, professionals and the public at large that are still largely ignorant of this far reaching change brought about by the CCC procedure to the building delivery system. Even more worrying, from the pronouncements made, it appears that even those who have been involved directly in the promoting, updating and appraising the new process are nevertheless largely ignorant of the ramifications of the CCC process in particular vis-à-vis the issue of liability.

Liability Issue

The promoters, it appears, have not scrutinised the liability issue in the apparent haste to implement this novel method of public delivery system. It is not clear if this is because of sheer ignorance or mere inadvertence. This view is reinforced by the fact that the liability issue has not been addressed properly but merely glossed over by the promoters. It is not denied that the individuals and bodies responsible for making the CCC system a practical realisation have been zealous in their approach. There are areas of concern in terms of the professional liability of the CCC certifier when the entire delivery system is examined together with the amended relevant laws. However, exponents and proponents of this system have sold this system on the basis that the professionals carry the same liability as the previous CFO system. This view is a fallacy.

Contractual and Statutory Obligations

In addition to abovementioned 'grey areas', there is also a lacuna on a more practical level where the certifying Principal Submitting Person (PSP) has to contractually tie in his statutory obligations with his professional services agreement and consequently the relevant construction contracts. In a similar vein, the CCC regime has opened up new opportunities for employers, developers, vendors, users, the public at large and the authorities to possibly proceed directly against delinquent certifiers in areas hitherto unavailable under the previous CFO regime. In view of the above, we have formulated this paper to discuss and address these issues. Where possible, we have proposed practical solutions to fill in any lacuna and rectify any deficiencies observed.

THE CFO PROCEDURE IN BRIEF

To appreciate the new CCC procedure, it is pertinent to look at and compare it with the CFO procedure that was employed before 12 April 2007. The latter procedure in brief is as spelt-out as here below:

Building plan approval

Following the procurement of the Development Order (DO) approval, for buildings, the next approval under the CFO procedure in order of precedence was the Building Plan approval. This stage of the approval process spanned a whole range of legislative and procedural rules, in particular, the Street, Drainage & Building Act 1974 ('SDBA'), the Uniform Building By-Laws ('UBBL') and necessitated the input of a host of professionals, authorities, etc. While there were some variations in the submission and approval procedures between different local authorities, in the final analysis, the basic requirements and steps were quite similar.

Plan submission by Qualified Person

Essentially, a qualified person (QP) whose signature or endorsement was required on all plans, such plans for building plan approval. (See By-Law 4, *UBBL*; QP defined in By-Law 3, *UBBL* as 'any architect, registered building draughtsman or engineer'). In so doing, the qualified person submitting the plans was held to be responsible for the proper execution of the works until completion, unless the said qualified person was replaced with the consent of the commissioner or local authority under the circumstances permitted by the by-laws (see By-Law 8, *UBBL*).

Where earthworks were involved, the qualified person concerned (who in all instances was the engineer) would have had to submit and obtain the relevant Earthworks Approval before such works could commence. In a similar vein, the infrastructure approval submissions would have had to be made and the necessary approvals obtained.

Notification prior to commencement of work

Prior to the commencement of any work, the qualified person, even after having obtained the necessary approvals on record, had to duly notify the relevant authority through the issuance of the prescribed forms (see, for eg Forms A, B, C & D for Building Works). The failure to do so would possibly have attracted applicable sanctions.

Obligations of the Qualified Person

However, the obligations of the qualified person did not stop here. He was mandated to undertake the attendant supervision of works under his ambit throughout the duration of the execution of the said works; be these earthworks, building works or the like. Any breach of these obligations by the qualified person would possibly have attracted the application of the prescribed sanctions like fines by the local authorities on either the qualified person, or in addition, on the owner/employer.

Authority Inspection

Upon the completion of the works, the relevant technical agencies inclusive of the local authority had to carry their respective inspections. They had to be

satisfied that the relevant conditions of the plans approval had been met before the next step in the completion certification could be proceeded with.

Certification by Qualified Person

The qualified person was obliged to provide particular certifications as encapsulated in particular in the applicable by-laws, a notable example being by-law 23(1)(b) of the UBBL. Under by-law 23(1) of the UBBL, it was stipulated that the Certificate for Occupation of a building could only be given if, the following pre-conditions were met ie if the qualified person had certified in Form E that he had supervised the erection of the building and that to the best of his knowledge and belief the building had been constructed in accordance with the by-laws and any conditions imposed by the local authority and that he accepted full responsibility for those portions which he was respectively concerned with.

Similarly under the Housing Development (Control & Licensing Regulations) 1989 in particular, Schedules G and H, it was provided that the delivery of vacant possession by the developer or vendor must be supported by a certificate signed by the developer's architect as the qualified person certifying that the building involved had been duly constructed and completed in accordance with all relevant Acts, by-laws and regulations and that all conditions imposed by the relevant authority in respect of the issuance of the Certificate For Occupation (CFO) had been duly complied with (see cll 24 and 27 of Schedules G & H).

Confirmation from Local Authority

The developer was only permitted to hand over vacant possession of a dwelling to a purchaser when a letter of confirmation from the local authority involved certifying that the Form E of the Second Schedule of the UBBL had been duly submitted by the developer and accepted by the local authority (see *By-Law 25(1), UBBL*). Once all the above conditions had been satisfied, the local authority had to issue the CFO within a reasonable time of the submission of Form E by the qualified person; this being prescribed at 14 days for housing projects (see *By-Law 25(1)(c), UBBL (Amendment 1999)*).

Certificate of fitness and occupation

In addition to the issuance of the full CFO, the local authorities were empowered to issue Temporary Certificate for Occupation (TCFO) and Partial Certificate for Occupation (PCFO). The TCFO was granted for a maximum duration of six (6) months at the discretion of the local authority where there were only minor deviations from the approved building plan and pending full compliance for the issue of the CFO (see *By-Law 24, UBBL*).

On the other hand, where any part of a building had been completed inclusive of all essential services, access roads, car parks, drains, sanitary, water and electricity installations, fire lifts where required, sewerage and refuse disposal facilities and whose occupation would not prejudice public health or

safety, the local authority had also a discretion to grant PCFO with the imposition of any conditions that were deemed necessary for public interest (see By-Law 25(1), UBBL). Such a certificate once issued was effective until the whole of the building was completed and a Certificate for Occupation issued (see By-Law 26(1), UBBL).

THE CCC PROCEDURE IN BRIEF

The Certificate of Completion and Compliance (in short 'the CCC') is defined as the certificate given or granted under any by-laws made under the Street, Drainage & Building Act (in short 'the SDBA') and is meant to replace the previous Certificate of Fitness for Occupation (see s 2(b), SDBA (Amendment) Act 2007). As the SDBA has not been extended to East Malaysia as yet, the CCC is only applicable to West Malaysia as of 12 April 2007 (see s 1(2), SDBA (Amendment) Act 2007).

Principal submitting person

Procedure-wise, the initial steps of the approval process ie, for Building Plan Approval, Earthworks Approval, etc are similar to the CFO regime, save for the introduction of the term 'Principal Submitting Person' (or 'PSP') who is defined as a qualified person who submits building plans to the local authority for approval and includes another qualified person who takes over the duties and responsibilities of, or acts for the first mentioned qualified person in particular circumstances permitted by the applicable by-laws (see s 3, SDBA (Amendment) Act 2007 and By-law 2(c), UBBL (Amendment) Act 2007).

As a matter of clarification, a qualified person is meant to be a Professional Architect, Professional Engineer or Building Draughtsman registered under any written law relating to the registration thereof ((see By-law 2(d) UBBL (Amendment) Act 2007; for eg, Architects Act 1967 (Revised 1972), Registration of Engineers Act 1967 (Revised 1974) as applicable).

PSP'S responsibility

In tandem with the CFO procedure, the Principal Submitting Person has a statutory duty and responsibility to supervise the erection of the building to ensure that the erection is in conformance with the approved plans and the requirements of the SBDA and the by-laws and that all the technical conditions that have been imposed by the local authority have been duly complied with and that the building is safe and fit for occupation (see s 70(2), SBDA (Amendment) Act 2007).

PSP'S duty to employer and under statute

Upon the completion of the works, the Principal Submitting Person has a two-pronged duty ie, the first to his employer to ensure that the contractor has executed the works in compliance with the particular building contract and has

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met all his obligations to justify the certification of practical completion (or, sectional completion, or partial possession, as applicable) and the second, his statutory duty necessitating the issuance of the CCC.

For the latter, the form and pre-conditions for the issuance of the CCC are statutorily prescribed. As for the form of the CCC, this has to be in Form F as set out in the Second Schedule (see By-law 25(1), UBBL (Amendment) 2007). The pre-conditions to the issuance of the CCC are as stipulated comprising the following:

Firstly, the PSP has to ensure that all the technical conditions as imposed by the local authority have been complied with and that all the essential services including access roads, landscape, car parks, drains, sanitary, water and electricity installations, fire hydrants, sewerage and refuse disposal requirements and, fire lifts where required have been provided.

Secondly, he has to ensure that all the prescribed Forms G1 to G21 in respect of stage certifications as set out in the Second Schedule of the UBBL have been duly certified by the respective parties and received by him.

PSP issues CCC

Once the pre-conditions as adumbrated above have been met satisfactorily, the PSP then issues the CCC in the form of Form F duly confirming in the process that he has supervised the erection and completion of the building and that to the best of his knowledge and belief the building has been constructed and completed in accordance with the SBDA, the by-laws and the approved plans.

PSP accepts full responsibility

Upon the issuance of the CCC the PSP accepts full responsibility for the issuance of the said certificate and he certifies that the building is safe and fit for occupation (see By-law 25(2), UBBL (Amendment) 2007).

Partial CCC

When any part of a building is partially completed, the PSP is permitted to issue a Partial Certificate of Completion and Compliance (PCCC) in Form F1 as set out in the Second Schedule subject to any conditions imposed by the local authority which it deems necessary for reasons of public health and safety and, provided that all the essential services, including access roads, landscape, car parks, drains, sanitary, water and electricity installations, fire hydrants, sewerage and refuse disposal requirements and, fire lifts, where required serving the partially completed portion of the building have been provided (see By-law 27(1), UBBL (Amendment) 2007).

CCC deposited with professional boards

Upon the issuance of the CCC or the PCCC (as the case may be), the PSP is required, within 14 days of the issuance, to deposit a copy of such certificate and the Forms G1 to G21 with the local authority concerned and the relevant

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professional board ie, either the Board of Architects, Malaysia, or Board of Engineers, Malaysia (see By-law 25(3), UBBL (Amendment) 2007).

DEFAULT POWERS OF LOCAL AUTHORITIES

Though, through the process of self-certification, the very substratum of the authority for the issuance of relevant completion certificate has been shifted from the local authorities to the professionals, the former nevertheless retain a significant statutory power, either on a default or residual basis.

This is exemplified in s 70(22) of the SBDA (Amendment) Act 2007 which stipulates that nothing contained in the Act shall affect the power conferred on the local authority by the Act or any by-laws pertaining to the erection and construction of a building for the purpose of ensuring that the erection and construction of such building are in conformity with the approved plans and the provisions of the Act and any by-laws made thereof.

Local authority notice requiring compliance

If it appears to the local authority that a non-compliance with the approved plans and the provisions of the SBDA or any by-law made thereunder by the PSP has occurred in the erection and construction of the building, the local authority may issue the PSP a notice in writing requiring compliance within the period specified in the notice, as the local authority thinks fit, in order that the non-compliance be rectified and a directive in writing to withhold the issuance of the CCC until such non-compliance has been rectified (see s 70(23) SBDA (Amendment) Act 2007).

Failure of PSP to comply

If the PSP fails to comply with the directive given, the local authority may itself cause any work to be executed or any measure to be taken of if it considers such work or measure is necessary to rectify the non-compliance (see s 70(24) SBDA (Amendment) Act 2007). The cost of executing such work or taking such measures shall be borne by the owner of the building; such costs shall be ascertained and certified by the local authority (see ss 70(25) and (26) SBDA (Amendment) Act 2007).

CHANGE IN LIABILITIES

Promoters deny that there is change in liabilities

With the move towards self-certification, it is inevitable that there is a parallel shift in liabilities away from the local authorities to the professionals, in particular, the PSP. Although the promoters of the CCC and the respective professional organisations vehemently deny there is any change in the responsibility or liability of the PSP as compared with the previous CFO regime (see Q10, CCC FAQ, www.pam.org.my), it is an undeniable fact, as distilled

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from the various amendments to the applicable laws, that the duties and obligations of the PSP have become more onerous.

Liabilities under the previous CFO Procedure

Under the previous CFO procedure, the liabilities were split between the developer or vendor, qualified person and the local authorities as follows:

The failure of the developer to ensure that the building works were contracted out and/or completed in time owing to any of his other defaults (for eg failure to pay the contractor or the professionals on time, etc) and/or his obligations under the various approvals were met (for eg, under the Building Plan Approval which caused a delay in the issue of the CFO) opened him up to a cause of action in breach of contract to the various purchasers eg under the Sale and Purchase Agreement (though absolving the other parties involved ie, the local authorities and the qualified person in the process).

The qualified person carried a multitude of liabilities anyway; these being categorised under his civil liability, statutory liability and professional liability:

(1) Civil liabilities

With regard to the first category, the qualified person owed a duty of care both under his professional services agreement and the law of tort to his employer to ensure that the works were properly supervised (see *Dr Abdul Hamid Rashid & Anor v Jurusan Malaysia Consultants & 4 Ors* [1997] 4 MLJ 243), the works had been executed in accordance with the applicable laws and by-laws and that Form E had been certified and issued to the local authority concerned in time.

Breach of the said duty of care would presumably have also made him liable to third parties such as the purchasers, lenders, etc under the tort of negligence (see *Chin Sin Motor Works Sdn Bhd v Arosa Development Sdn Bhd & Anor* [1992] 1 MLJ 23). More often than not, this head of liability was usually covered under the Professional Indemnity Insurance taken by most qualified persons.

(2) Statutory liability

Pertaining to the second category of the qualified person's statutory liability this was confined only to wrongful or fraudulent certification of the Form E. For wrongful certification, it merely attracted a monetary sanction in the form of a nominal fine under the UBBL and SBDA (see By-law 26, UBBL and s 127, SBDA). Fraudulent certification, if there were criminal elements involved, could presumably have attracted a custodial sentence under the Criminal Procedure Code (CPC), but in practice was hardly the case.

(3) Professional liability

On a professional level, if a disciplinary offence could have been established arising out of the qualified person's certification process, then the professional involved could have been fined or suspended depending on the gravity of the offence and in a very serious scenario, his registration cancelled (for eg see ss 15(1), 25, Registration of Engineers Act 1967 (Rev. 1987)).

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(3) Local authorities immune from suit

Where the local authority was the defaulting party, there was little recourse for the innocent developers and/or purchasers, as protection against suit had been statutorily given to the local authorities and its officers for personal liability under the SDBA (see ss 95(1) and (2), SDBA). This has been reaffirmed by the Federal Court in the celebrated but much criticised judgement of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 6 MLJ 389 and appears to be the prevailing law (recently affirmed by the Court of Appeal in *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd* [2007] 6 MLJ 530).

Hence, any delay in the issue of the CFO would only have made the qualified person and/or the developer directly liable to the contracting parties and the affected third parties. Be that as it may, the sanctions on these defaulting parties were mainly of a commercial nature and rarely if ever of a custodial form. Since in most instances, the principal defaulting party was the local authority, the parties generally had little or no recourse to it, except for the occasional ‘chest-beating’ and ‘moaning’, as an impregnable shield of statutory provisions and apparently jaundiced decisions of the lofty pinnacles of the palaces of justice seamlessly protected it.

Liabilities under the new CCC Procedure

Local authorities now have additional powers

The new CCC procedure, though shifting the administrative and legal burdens onto the shoulders of the PSP, nevertheless, through the various amendments to the respective Acts and by-laws clothe the local authority with additional powers but without the attendant liabilities.

These amendments, as a start, empower the local authority with an all-encompassing right to ensure that the construction of the buildings conform to the approved plans and the provisions of the SBDA and any by-law made there under (see s 70(22) SBDA (Amendment) Act 2007).

Power to require PSP to comply

If it appears to the local authority that non-compliance with the approved plans and provisions of the SBDA or any by-laws made thereunder by the PSP has occurred, it may issue to the PSP a notice in writing requiring compliance within the period specified in the notice as it thinks fit in order that the non-compliance be rectified and a directive in writing to withhold the issuance of the CCC until such non-compliance has been rectified (see s 70(23) SBDA (Amendment) Act 2007). If the PSP fails to comply with the directive given, the local authority may itself cause any work to be executed or any measure to be taken if it considers such work or measure necessary to rectify the non-compliance (see s 70(211) SBDA (Amendment) Act 2007). The cost of executing such work or taking such measure shall be borne by the owner of the building (see s 70(25)

SBDA (Amendment) Act 2007).

Local authorities still immune from suit

These amendments do not derogate the existing immunities given to the local authority and its officers against suit either statutorily, or per the relevant judicial pronouncements as adverted to hereinbefore (see s 97, SBDA). Hence, the sum total of these is that the local authority carries little or no liability whatsoever should the CCC process be flawed and the ultimate certificate delayed or wrongly or negligently or fraudulently issued.

Neither the developer nor third parties such as purchasers, lenders, etc can look to the local authority for any remedy or recourse, save perhaps for a claim for economic loss premised on the local authorities' breach of the applicable statutory duties ie, if the Court of Appeal's recent judgment in the case of *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd* [2007] 6 MLJ 530 at 561 were to be sustained.

No change of liabilities for developer

As for the developer, owner or vendor, there is no marked change in liabilities either to the purchasers/third parties, or to the authorities, although the sanctions to any breaches of the amended statutory provisions and/or by-laws carry heavier fines and, in rare situations a custodial sentence.

PSP has more liabilities

The bulk of the liabilities apparently fall on the professionals ie, the PSP. With regard to his statutory liability, the recent amendments to the relevant laws and in particular the SBDA, impose additional duties and responsibilities with attendant sanctions which are heavier in terms of nature and content for eg custodial/penal in certain instances (see s 70(27) SBDA (Amendment) Act 2007 where an imprisonment of up to 10 years may be imposed where the PSP permits to be occupied any building without a CCC).

Liabilities arising from CCC issued wrongly

Under these new amendments, if a person who is not the PSP issues a CCC; or if the CCC is issued without all the relevant forms prescribed by the by-laws made under the SBDA; or issues a CCC in contravention of a direction given by the local authority to withhold such issuance pending rectification of any non-compliance; knowingly makes or produces or causes to be made any false or fraudulent declaration, certificate, application or representation of any form prescribed in any by-laws made under the SBDA knowing the declaration, certificate, application or representation has been forged, altered or counterfeited; or permits to be occupied any building or any part of a building without a CCC shall be liable or conviction to a fine not exceeding RM250,000 or to imprisonment for a term not exceeding ten years or both (see s 70(27)(a) to (f), SBDA (Amendment) Act 2007).

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Liabilities arising from failing to deposit CCC

Furthermore under the amended UBBL, where the PSP fails to deposit a copy of the CCC or PCCC (as the case may be) and the Forms G1 to G21 within the period stipulated in by-law 25(3) with the local authority and the Board of Architects, Malaysia or Board of Engineers, Malaysia (as the case may be); or fails to comply with the notice issued by the local authority in respect of the rectification of any failure to the building or non-compliance with the by-law 25(4), shall be guilty of an offence (see By-law 28(1), UBBL (Amendment) 2007).

Liabilities of PSP under other laws

The PSP carries further liabilities under the other laws that have been amended, in particular, the Housing Development (Control and Licensing) Act 1966 ('the HDA'). Under s 22F of the HDA, any architect or engineer, as the case may be, who issues a progress certification knowing that the works therein referred to have not been completed in accordance with the provisions of the Sale and Purchase agreement, shall be guilty of an offence and shall on conviction be liable to a fine which shall not be less than RM10,000.00 but shall not exceed RM100,000.00, or to imprisonment for a term not exceeding 5 years or both.

PSP open to disciplinary action

Quite apart from the statutory liability adverted to hereinbefore, the PSP, being a professional, may also be subjected to disciplinary action by the Board of Architects, Malaysia or the Board of Engineers, Malaysia as the case may be (see ss 17–19, the Architects (Amendment) Act 2007), etc. Should there be wrongful or negligent or false certification by the PSP of the CCC or any other disciplinary offence committed by the PSP in the process of implementing the CCC procedure, under the Architect's Act 1967 (Amendment) Act 2007 or Registration of Engineer's Act 1967 (Amendment) Act 2007, these professional bodies are empowered to investigate and take the necessary disciplinary action against him (for eg under Pt IV and V; ss 17-19, the Architects (Amendment) Act 2007).

Regulatory bodies can impose heavier penalties

The relevant regulatory bodies concerned can mete out heavier penalties in the form of bigger fines, longer periods of suspension of registration and even custodial sentences (*see ss 7A, 5(d), 24 and 25, Registration of Engineers (Amendment) Act 2007*). As part of the 'self-policing' or 'self-regulating' obligation, these professional bodies have been given more clout in the process and ultimately the sanctions they can mete out for disciplinary breaches and offences committed under the respective Acts by a professional of the like of PSP. Presumably, there are avenues for interested and affected parties such as purchasers, lenders, etc and even developers to lodge direct complaints against

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errant PSPs with the respective professional boards.

Liabilities not the same as under previous CFO regime

At first blush, the PSP carries similar responsibilities and liabilities as the qualified person in the previous CFO regime in terms of civil liability. However, it is in fact far from the truth in practice. No doubt that the PSP still owes a duty of care both in contract and the law of the tort to his employer; breach of which would incur similar consequential ramifications but in practice this is not the case.

PSP has more administrative obligations

Under the CCC procedure, the PSP has much more administrative obligations to perform *vis-à-vis* the other building professionals namely, mechanical & electrical engineers and quantity surveyors, main contractors, trade/subcontractors, etc to ensure that statutorily prescribed Forms G1 to G21 are duly signed/endorsed, collated and checked before the CCC is issued, quite apart from his personal duty to supervise the construction process.

PSP reliant on employer for help

Having no direct contractual control over such parties, to fulfill his statutory liability especially in regard to the Forms G1–G21, the PSP has to look to the employer for help in sanctioning delinquent or dilatory third parties so that the CCC procedure is not derailed. Hence, though ultimately directly liable to his employer, the scope of his duty of care is considerably wider by carrying out more duties and liabilities.

PSP liable to other interested parties

Furthermore, as for the previous CFO regime, the PSP is potentially liable to other interested parties such as purchasers, lenders, etc for any breach in his duties *vis-à-vis* the issue of the CCC. Here again he can be subjected to claims under the tort of negligence; a very real possibility in view of the PSP undertaking self-certification. In the event of either the non-issue or late issue of the CFO under the previous procedure, aggrieved parties rarely ever proceeded against the local authority concerned as the latter was protected by immunities granted statutorily and under the relevant case law.

PSP has no immunity

However under the CCC procedure, since the PSP has no such immunity, many an aggrieved party would be tempted to proceed against him either directly or as a joint defendant with the developer or vendor under the law of tort should he default in his prescribed certification duties. It is even more likely when the PSP is seen to have ‘deep pockets’ and/or is adequately covered by a Professional Indemnity Insurance Policy. The sum total of which would be the opening up of

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the ‘flood-gates’ of cases much to the detriment of the professionals, however more to the benefit of long suffering aggrieved parties such as purchasers.

CCC PROCEDURE IS DEFICIENT

Although much touted as the ultimate solution to the contemporary inefficient and unsavory CFO regime, the CCC procedure in its current form, nevertheless is far from perfect and suffers from a host of deficiencies, varying from merely trivial shortcomings at one end of the spectrum right up to very serious lacunae that may render the procedure in practice a minefield of disputes and claims.

CCC Procedure does not resolve non-technical issues

For a start, the very core of the CCC procedure is only meant to deal with technical issues such as health, safety and essential services within the ambit of the PSP’s scope of responsibility. Non-technical issues have to be resolved between the developer/vendor and the local authority concerned, initially at the planning and building approval stage, or through other suitable mechanisms to be worked out between the parties.

It is feared that once the CCC has been issued and vacant possession given to the developer/vendor, there is no effective means for the local authority to ensure that the former meets his obligations *vis-à-vis* the relevant non-technical issues. This is a serious lacuna that needs to be addressed forthwith. Furthermore, just like in the previous CFO regime, quality problems in the finished project are not a matter that can preclude the issuance of the CCC. These have to be resolved at a different forum, perhaps, as a cause of action in breach of contract or tort of negligence through arbitration or litigation.

Lack of flexibility in implementation

It is a recognised fact that in the implementation of a typical building project, owing to changes in circumstances occurring during the duration of the project cycle (which in some instances can span a good number of years), there may be a need to undertake a review of technical and non-technical conditions imposed by the Local Authorities as part of the Building Plan Approval process. Under the previous CFO procedure, the Local Authorities as the ultimate issuers of the relevant CFOs, had the necessary power to review these conditions prior to the issue of the CFOs and, in some cases, grant waivers, exemptions or dispensations as necessary.

With self-certification, the PSP has no such power, even in regard to the technical conditions. For non-technical conditions, perhaps, the Local Authorities still retain some residual power as to the same but its ambit appears to be unclear. Hence, the sum total of this is that the new regime does not afford the flexibility that is so essential to building projects which are subjected to vagaries and ever-changing circumstances over their lifespan from initial approval to ultimate realisation.

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Consultants' site supervisors not included in CCC Procedure

Another area of concern is non-inclusion of the consultants' site supervisors from the matrix of responsibility. It is an undeniable fact in practice that the site supervisors play a crucial role during the execution and construction stage of a building. They are the 'eyes and ears' of the respective consultants who often are able to provide only nominal or part-time supervision. The latter rely heavily on such site staff in carrying out the ultimate certification.

To leave these key personnel out of the matrix of responsibility waters-down the very essence of the CCC procedure which is to make all parties inclusive of the PSP fully responsible and accountable for their respective scope of works. Not only should such parties be included in the matrix of responsibility but steps should be immediately initiated to have them properly registered and regulated either by the particular professional board or the Construction Industry Development Board (in short 'the CIDB'), as appropriate.

Matrix of responsibility not effective

Furthermore, the instant matrix of responsibility appears to be hastily constituted without having sorted out its effectiveness as to its enforceability. No doubt the professionals are well registered and regulated through the Registration of Engineers Act 1967 and the Architects Act 1967, the same cannot be said of the other parties involved in the matrix of responsibility eg contractors, sub-contractors, etc. It is the current practice for the CIDB to only license contractors as at present under the Construction Industry Development Board Act 1994, however not to regulate their conduct or practice.

Contractors are not statutorily regulated

For the CCC procedure to have a proper 'bite', all such parties, not only contractors should also be statutorily regulated in terms of their registration, conduct and practice; breaches of their obligation being statutorily penalised as for the professionals instead of merely being subject to commercial penalties as is the present practice. Under the current procedure, breaches of such parties' obligations *vis-à-vis* the matrix is met merely by the developer or vendor withholding payments contractually due, imposing liquidated and ascertained damages (LAD), etc In this area, much work needs to be undertaken by the authorities to cure this deficiency, and this has to be expedited, as the CCC procedure is already officially in place as of 12th April 2007.

Possible conflict of interest of PSP and developers

Particular professionals and the developers/vendors have apparently welcomed the launch of the CCC procedure. On the other hand, the public at large would be justified to view this new procedure with suspicion and cynicism as it is tainted with a potential for conflict of interest between the PSP and the developers/vendors.

As the developers/vendors in all instances would be the ultimate pay-

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masters of the PSP, there could be instances when developer/vendors would use 'arm-twisting' tactics or 'economic duress' to ensure that the CCC is issued, perhaps prematurely so as to obviate developers/vendors from defaulting from their obligations of delivering the buildings in time. The PSP will be under considerable pressure in such circumstances. Such conflict of interest can only be overcome if the law imposing the more onerous statutory and disciplinary penalties is enforced without fear or favour and the liabilities more evenly distributed among the various parties. It is not clear if that will be the case in practice.

Professional bodies disciplinary proceedings

On the other hand, professional bodies have pointed out to the recent strengthening of the disciplinary proceedings *vis-à-vis* any complaint pertaining to breach of the CCC procedure as an answer to the public's fears. However, this has not attempted to assuage any of the concerns of the public as they tend to view the disciplinary proceedings, even after the amendments, as a mere internal process comprising the oft suspected 'old-boys' club of a self-serving nature, of which such professionals are perceived as helping each other.

Poor conduct of disciplinary proceedings

This contention is further reinforced by the current unsatisfactory state of disciplinary proceedings conducted by such professional bodies. There is hardly any publicity surrounding the number of professionals charged and disciplined or having proceedings initiated against them. The popular perception is that the professionals, having been given the statutory power to 'self-police' their profession, will be merely paying lip service to the disciplinary provisions and more often than not sweeping complaints under the carpet.

Need for transparency in disciplinary proceedings

Here there is a need for the authorities and the professional bodies concerned to undertake a two-pronged strategy at both educating the public at large on their rights and also making the disciplinary proceedings fair and transparent instead of shrouding these in a veil of secrecy. Perhaps a cue should be taken from the legal profession where there is active lay participation in the disciplinary proceedings and a proper reporting of its proceedings from the initial filing of a complaint right up to its ultimate resolution.

Need for independent complaints body

For this to be effective, there must be a positive political will on the part of authorities and the respective professional boards to reassure the public at large that all complaints are properly investigated and fairly heard in a transparent manner so that the rules of natural justice are not infringed. If public confidence cannot be restored by such mechanisms, it will then be imperative for the authorities to set up an independent auditing body to provide the necessary checks and balances on complaints arising from the certification undertaken by

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the PSP (see Azlinor Sufian, *Certificate of Completion & Compliance: Towards Self-Certification in the Malaysian Housing Industry*. The Law Review 2007 at p 211)

PSP's remuneration need to be increased

On a separate note, as the professional carries sole responsibility for the issue of the CCC, which also entails additional duties and obligations, it is inevitable that there should be a commensurate increase in the quantum of professional fee that he should be remunerated with.

Notwithstanding the assurances given by the authorities and the professional bodies that there will be no additional premiums to be paid by the ultimate purchasers with the implementation of the new CCC procedure, in all fairness this one-sided policy cannot be realised in practice as it is a mere commercial myth. Whatever is intended and has been said, the reality is that the professional fee has to be increased in tandem with the additional and more onerous duties and liabilities shouldered by the professional of the like of the PSP.

It is high time that all parties inclusive of the authorities, developers/vendors and interested parties like purchasers and lenders accept this inevitable reality and give effect to it. Based on such premise, it is the duty of the respective professional boards to ensure that the scale of fees for such professional services is accordingly adjusted to provide a fair and reasonable remuneration to the PSP for his unduly onerous responsibilities and liabilities; failing which many a professional, save, perhaps for the ignorant or altruistic ones, will be deterred from undertaking the role of the PSP, thereby compromising the very purpose and objectives of this new building delivery process.

Professional indemnity insurance

Professionals on the other hand must carefully weigh the risks and rewards of the CCC procedure and make both a political/professional and commercial decision before agreeing to undertake it. As the likelihood of having monetary claims, possibly a multitude, if purchasers of a housing scheme are involved, made against the PSP is relatively higher with the CCC regime, it would be prudent for the PSP to procure adequate Professional Indemnity Insurance, although it is not mandatory at the moment. He should be prepared to pay the premiums involved and if he is not able to recover these as part of his professional fees, he must be ready to absorb these at no additional cost to his employer.

Limitations of professional indemnity insurance

However, he has to be cautioned on two consequential matters. Firstly, the Professional Indemnity Insurance policy may only partly cover him for any claim sustained against him depending on the quantum of cover and the presence of any excess clause; he being liable for the balance. A body corporate will have to pay it from its coffers. However, if it is a partnership or a sole proprietorship then personal liability will be the order of the day. Secondly, the Professional Indemnity Insurance Policy may serve as a 'double-edged' sword; for the

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presence of such a policy may inevitably attract more claims as he is then perceived to have 'deep pockets' and, therefore a capacity to meet such claims. Hence, these matters have to be well thought of and addressed appropriately prior to the acceptance of the role of a PSP.

PSP face practical problems in collating forms

Be that as it may, the PSP has another insurmountable hurdle to overcome on a more practical level. The recent amendments to the SBDA make him solely statutorily liable for ensuring that all the relevant Forms G1–G21 are properly collated and endorsed prior to the issue of the CCC and submitted together with the Form F to the authorities and the professional board concerned within fourteen (14) days of the issue of the CCC (see s 70(27) SBDA (Amendment) Act 2007, By-law 25(3) UBBL (Amendment) 2007).

PSP has no direct contracts with named parties

Since the PSP has no direct contracts with the parties named in the Forms G1 to G21, ie, the other consultants, contractors, sub-contractors, etc, he carries liability apparently vicariously for these parties without having any control or power in the event of their default or omission to act. He has to look to the developer/vendor as the employer of such parties and their ultimate paymaster to sanction them for any of their defaults/omissions (if proven) to ensure that the said Forms G1–G21 could meet the requirements necessary for the issuance of the CCC.

Standard forms of contracts need to be amended

This obligation has to be expressly provided for in the various contracts between the employer and these parties. Currently none of the so-called Standard Forms of Conditions of Contract have such stipulations included (for eg PAM 1998 and 2006 Forms; CIDB 2000 Form; IEM CEI/89 Form, etc). To give clout to the enforcement of the CCC procedure, it is imperative for all the said contracts to be suitably amended or have custom-made clauses to be drafted and expressly incorporated into the terms of such contracts.

Possible contractual sanctions in case of default

These provisions should not only spell out in clear terms the procedure to be adopted but also the contractual sanctions that may be imposed in the event of a default/breach eg withholding of payment due, deduction of liquidated and ascertained damages, holding back of the Certificate of Completion, etc.

Back-to-back indemnity provisions

Such a mechanism may not relieve the PSP of his statutory liability but will certainly help to ameliorate the extent of his civil liability. Taken a bit further, to help in lessening his civil liability to third parties arising out of the breaches/defaults of the other contracting parties for eg delay in endorsing the

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Forms G1 to G21, also, wrongful and negligent certification, the PSP can insist on having ‘indemnity’ provisions on a ‘back-to-back’ basis built into the contracts of all such parties or, failing which he may join them as co-defendants in the event of any litigation. Here the input of the construction lawyers is crucial and the positive cooperation of the developer/vendor essential.

CONCLUSION

CCC Procedure is radical change

The CCC procedure is a radical change in the building industry. It is aimed at removing the perennial complaints of delay in the issuance of the CFO by shifting the responsibility of certifying completion from the administratively inefficient and compromised local authorities to the professionals. On the face, it seems a bold step. Whether it helps to make the building delivery system transparent and efficient is an open verdict.

Virtues of CCC oversold

Exponents and promoters of this new building delivery system have grown hoarse in singing its praises and extolling its virtues. We believe that the virtues have been apparently over-sold as the ultimate solution to the woeful situation that is currently pervading the construction industry vis-à-vis the authorities especially towards the tail end of a typical building project.

Need to address deficiencies

However, the real picture is not all that rosy. It is time to take stock. The CCC regime does have a number of deficiencies and limitations that are material in nature. If these deficiencies are not investigated and addressed in time, they can potentially compromise and derail the very object the CCC was meant to overcome. We have attempted to highlight some of the areas of concern and proposed certain solutions that may be possibly adopted.

It is now left to the various parties involved in the delivery system ie, the government, the local authorities, the professionals, developers/vendors, contractors, sub-contractors, etc to take stock of the situation and objectively review it and rectify its deficiencies. It should be implemented with some sensibility to avoid claims, wastage, disputes and litigation failing which it should be scrapped in lieu of a procedure, which allocates risk according to appropriate parties’ ability to shoulder responsibilities and liabilities. Just because the local authorities are generally perceived to be inefficient does not mean that their core responsibilities be shifted to building professionals. It is not clear if such an approach will reduce the rising plethora of claims and complaints. In the final analysis, it is for the public at large to be the ultimate judge as to its effectiveness as they were stated to be the main beneficiaries for which the CCC procedure was mooted in the first place.

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