Self-certification versus private certification doctrines on the issuance of the Certificate of Completion and Compliance for buildings in Malaysia

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Abstract

The expansion of the scope of self-certification marks the intention of the Malaysian Government to replace the Certificate of Fitness for Occupancy issued by the local authorities (LA) with the Certificate of Completion and Compliance, in the hope that the delivery system can be improved, the unnecessary layers of bureaucracy can be cut and that the alleged rampant acts of gratifications in the LA can be checked. This move can be viewed as a proactive step by the government to reform the system of building control by providing an opportunity for self-regulation by the construction industry. There are, however, unanswered questions to be looked into in sufficient depth as the new system is being adopted. One fuzzy area is the question of independence of the 'principal submitting person' empowered to self-certify completion and compliance of works. Lessons from the UK can be learned in addressing the issue of the independence of certification. The doctrine of private certification practised in the UK is examined and recommended to be adapted in order to complement the self-certification doctrine. It is posited that the LA should still retain the role of approving authorities.

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INTRODUCTION

The Malaysian Government's intention to expand the scope of self-certification by the qualified persons (QP) was announced by the Prime Minister of Malaysia on 26th June, 2004. Under the self-certification doctrine, a principal submitting person (PSP) is empowered to issue the Certificate of Completion and Compliance (CCC) for all building types in lieu of the Certificate of Fitness for Occupation (CFO) that was previously issued

by the local authorities (LA). The practice of issuing the CCC by the PSP for individually built detached houses, however, has been going on since at least 1999.

The Uniform Building By-Laws 1984 (UBBL) under the Street, Drainage and Building Act 1974 (Act 133) restrictively defines a QP as any architect, registered building draughtsman or engineer for the purposes of submitting plans. Hopefully, this definition could be widened to include other competent professionals such as the interior designer or building surveyor.

On the question of the issuance of the CFO by a QP, the UBBL clearly expresses this in Clause 25 (1) as follows:

‘Certificate of fitness for occupation of a building shall be given when

- (a) *the qualified persons during the course of the work have certified in form E as set out in the Second Schedule to these By-laws that they have supervised the erection of the building, that to the best of their knowledge and belief the building has been constructed in accordance with these By-laws and any conditions imposed by the local authority and that they accept full responsibility for those portions which they are respectively concerned with and the local authority or an officer authorized by it in writing for the purpose has inspected the building.*
- (b) all essential services, including access roads, landscape, car parks, drains, sanitary, water and electricity installation ...have been provided’.

In Clause 25 (2), the UBBL states that ‘nothing contained in this by-law shall prevent the local authority or any officer authorised by it in writing for the purpose from *inspecting any building works at any stage thereof and calling attention to any deviation from the approved plan or non-compliance* with any of these By-laws which he may observe and from giving notice in writing ordering such deviation to be rectified’ (UBBL Clause 25 (2)).

The LA, subject to the expressed provisions in the UBBL ‘... may in its discretion grant a partial certificate of fitness for the occupation of any part of a building partially completed... A partial certificate of fitness for occupation once issued shall remain effective until the whole of the building is completed and a certificate of fitness for occupation is issued’ (Clause 27 (1) and (2) of the UBBL).

The expansion of the scope of self-certification may well be interpreted as the resolve of the government to replace the CFO issued by the LA with the CCC, in the hope that the delivery system could be improved, the unnecessary bureaucratic procedures be reduced and that the alleged rampant acts of gratifications in the LA (as claimed by some quarter) be stopped. This move can also be viewed as a proactive step by the government to reform the system of building control by providing opportunity for self-regulation by the construction industry. Are the reasons for such a move justifiable?

The full implementation of the CCC means a requiem is being composed hastily for the now defunct CFO. This implementation will mark the slow death of the building control function within the LA. As stated before, the move to substitute the CFO with the CCC via the self-certification doctrine is designed to address the issue of alleged inefficiency of the LA. It aims to speed up the process of the certification of completed buildings. The parties in the construction industry, however, should also bear some of the responsibilities that contribute to the weaknesses of the process. To a certain extent, the QP may also be blamed for the incomplete submission of development plans and documents, noncompliance with the UBBL and other relevant requirements, and failure to supervise properly, resulting in inferior quality workmanship (CIDB, 2004).

BACKGROUND

Formerly, the CFO for buildings (excluding the individually built detached houses as mentioned earlier) are issued by the LA after the plans and works were duly vetted and approved by 'one-stop centres' (OSCs) led by the LA with members from various technical agencies. Through this rather *ad hoc* mechanism, the LA were given a specified time (of a maximum of 14 days from the date of the submission of Form E and other pertinent documents) to issue the CFO.

Despite the establishment of the OSC, the process of issuing the CFO was still slow because, as alleged by many quarters, the technical agencies involved were fond of sending to the OSC meetings junior officers who were reluctant to make decisions. As such, the deputy prime minister had instructed that only competent and experienced technical officers (who can make decisions) should attend such meetings to expedite the process of issuing the CFO (Utusan Malaysia, 2005, p. 2).

The Minister of Housing and Local Government on 3rd October, 2005 announced the creation of 334 posts at all LA (presumably to be filled by competent technical persons for building control purposes) to '...help cut red tape and bureaucracy in the processing and approval of development plans and Certificates of Fitness for Occupation (CF)...' (The Star, 2005, p. 6). The increase in the number of posts, according to the minister, would '...resolve all problems pertaining to the CFs (*sic*) before the implementation of the Certificate of Completion and Compliance which will replace the CF' (The Star, *op. cit.*).

What is the CCC? Simply put, it is a certificate under the self-certification doctrine, issued by PSP when all building works are substantially completed according to the design, plans and documents deposited earlier with the LA (which according to LAM-PAM are for record purposes only). Presumably, the substantially completed works must have complied with various pertinent laws, regulations and requirements by the relevant agencies. Furthermore, the issuance of a CCC may well imply that the completed buildings are

- 'fit for purpose';
- sustainable and energy efficient;
- structurally sound;
- of acceptable quality both overall and in details, benchmarked against best practices known;
- in strict compliance with the stipulated health, safety and security needs;
- easily maintained, refurbished and altered; and
- that the services are duly commissioned.

Questions arise:

- Has a thorough study been carried out to identify the constraints that impede the smooth approval of development plans and issuance of the CFO by the LA?
- If the CCC via the self-certification doctrine is a recommended solution (despite it not having been studied thoroughly with regard to its legal implications for instance), will it provide the much-awaited panacea that warrants it terminating the CFO issuance process?
- Will the CCC via the self-certification doctrine be merely an *ad hoc* and simplistic solution to speed up the delivery system until a more efficacious mechanism is found?
- How can one justify one's belief and expectation that by empowering the PSP to self-certify (without the intervention of a third party as an auditor) the CCC, one can be assured of obtaining quality buildings?

- How independent are the PSPs entrusted in the issuance the CCC? Will the CCC self-certified by PSPs who are not independent reflect the true state of completion, compliance, quality of building works and value for money of the finished products?
- Is the move to replace the CFO with the CCC tantamount to a complete substitute for LA control? Who then will be responsible for taking any enforcement actions?
- What remedies are available to aggrieved buyers and end-users after the statutory limitation period of professional liabilities of the PSP has ended, despite having initially issued the CCC themselves? Can the aggrieved party sue the relevant LA instead? If not, what is the use of the CCC at all?

These questions have not been addressed properly until now.

MILESTONES IN THE PROCESS OF ISSUING THE CCC

Although the issuance of the CCC occurs towards the end of the building development process, the steps towards its issuance should be made transparent to all interested parties. It has been stipulated that the risks are to be distributed among the players in the development process, instead of resting only on the shoulders of the PSP. This is made manifest by the issuance of various certificates of warranty by the players during the stages of development. For instance, the suppliers are expected to give warranties for the materials and components supplied. It is expected that between 20 and 30 certificates of warranty must be in place before the PSP is ready to issue the CCC (The Starspecial, 2007).

After the development order for the construction of a building has been obtained from the LA, a PSP will have to deposit all the necessary plans and documents in compliance with the UBBL codes and standards with the LA for record purposes only (LAM-PAM, 2004). This may well mean that the building control unit within the LA will be reduced to a sheer archival unit, as the role of building control is now being entrusted with the PSP. If this is the case, then it could be a dangerous step, as errors and cases of noncompliance with the relevant codes and standards may occur if unchecked by a third party.

At the outset, it must be posited that the role of building control should continue to rest on the shoulders of the LA. Therefore, plans and documents submitted by the PSP must not be treated for the purposes of record only. They must be deposited with the relevant building control department for the purposes of vetting and obtaining approval before a development order can be issued and the ensuing construction can proceed. This means that the existing milestones in the building delivery system will have to stay put.

During the construction phase, the PSP's role should not be restricted to supervising the works only as required in Clause 25 (a). The PSP (especially the one playing the role of lead consultant) must be actively engaged in all aspects of building control. That means that the PSP should also be a qualified inspector — continually inspecting the works and issuing certificates at each stage of completion. Again, during the construction phase, the PSP should collate certification and warranties by all parties (main contractor, sub-contractors, specialist contractors, manufacturers, suppliers and supporting consultants as well involved in the production process. Towards the completion stage, the PSP is expected to coordinate the clearance from various agencies such as BOMBA (the Fire Services Department), Tenaga Nasional or TEN (the National Energy Company), Telekom (the National Telecommunication Company) and the waterworks authority. He/she is also responsible for arranging for the amenities to be tested and commissioned, and for ensuring that health, safety and environmental requirements are complied with. Only then can the PSP issue the CCC.

Questions arise: At what specific stage should the CCC be issued in order to reflect the substantial completion of the works and compliance with the UBBL codes and standards? Will the final certificate issued to the contractor be construed as equivalent evidence as to the practical completion of the works? or Should the PSP issue an interim CCC first and a final one at the end of the defects liability period (assuming that all defects are made good satisfactorily)?

PRIVATE CERTIFICATION AS AN ALTERNATIVE DOCTRINE TO SELF-CERTIFICATION

It can be inferred that the self-certification doctrine bestows upon the PSP the total freedom to design, produce plans and documents for the purposes of production (without having to obtain prior approval from the LA), control the building development process at various stages, and certify that the building is complete and in compliance with the relevant laws and regulations on his/her own. In theory, he/she is likened to a lawmaker, a judge and an executioner all in one. While the doctrine may well satisfy the objective of ensuring a speedier issuance of the CCC, what avenues are open to buyers or end-users to air their grievances if they are not satisfied with the products that they commissioned or purchased?

Despite the assurance by the PSP that they can act independently (vide LAM-PAM, *op. cit.*), there is no certainty that they cannot be pressured or coerced by their employers to act delinquently. Of course, there are measures available to act against a delinquent PSP. These measures, however, may have arrived too late to be implemented, as the delinquent acts may have already been committed. At the end of the day, the buyers and end-users will suffer and will have to pick up the pieces themselves.

It is proposed that the CCC should be processed under the doctrine of check and balance to ensure that the principles of disclosure, transparency, accountability, liability, neutrality and fairness in decision making are adhered to by all stakeholders. For this purpose, the elements of the doctrine of private certification practised in the UK may well be adopted in the process of issuing the CCC.

In the UK, a statutory framework is contained in Part 11 of the Building Act 1984. It passes on the responsibility for ensuring compliance with building regulations to an independent 'approved inspector' (AI). An AI is a person approved by the Secretary of State or a body designated by him for that particular purpose (Section 49 of the Building Act 1984). This is a private certification mechanism enshrined in the Building (AIs, etc) Regulations 1985. The full operation of private certification depends on

- (a) the availability of adequate insurance cover, and
- (b) the qualifications of AI.

An AI must have

- (a) professional qualification approved under the Act, such as the CIOB, RIBA, RICS, ABE (IAAS) or ICSE;
- (b) ample practical experience;
- (c) indemnity insurance; and
- (d) knowledge of the building regulations.

An AI cannot supervise work in which he/she has a professional or financial interest unless it is deemed to be a 'minor work' (Powell-Smith and Billington, 1986, p. 46). There is a general definition of what is meant by having a professional or financial interest in the work. The following persons are considered to have such interest:

- (a) 'Anyone who is or has been responsible for the design or construction of the work in any capacity.
- (b) Anyone who or whose nominee is a member, officer or employee of a company or other body which has a professional or financial interest in the work, eg a shareholder in a building company.
- (c) Anyone who is a partner or employee of someone who has a professional or financial interest in the work.

However, involvement in the work as an approved inspector on a fee basis is not a debarring interest' (Powell-Smith and Billington, *op. cit.*).

An AI may arrange for the work to be inspected on his behalf by someone else, but he remains responsible for such inspection. An AI can also issue a plan certificate to both the LA and the building owner, certifying that the design has been checked and that the plans comply with the Building Regulation 1985. He/she should issue the final certificate when the work is completed. If the LA does not reject the certificate within ten working days, it is deemed to have been accepted. Self-certification by an approved person with an interest in the work is allowable in certain specialised works such as ensuring structural stability of and determining energy requirements in buildings (Powell-Smith and Billington, *op. cit.*).

CONCLUSION

The expansion of the scope of self-certification marks the intention of the government to replace the CFO issued by the LA with the CCC, in the hope that the delivery system can be improved, the unnecessary layers of bureaucracy can be cut and that the alleged rampant acts of gratifications in the LA can be checked. This move can be viewed generally as a proactive step by the government to reform the system of building control by providing an opportunity for self-regulation by the construction industry.

There are, however, unanswered questions to be looked into in sufficient depth before the new system can be practised effectively. One fuzzy area that could manifest itself as a potential problem later is the question of the independence of the PSP empowered to self-certify completion and compliance of works.

Lessons from other developed countries, especially the UK, can be learned in addressing the issue of the independence of certification (Reddin, 2005). The doctrine of private certification practised in the UK could be studied thoroughly and, if need be, could be replicated and customised to suit the needs of Malaysia. As such, the CCC can be done both via self-certification by the PSP (to a limited extent — as practised currently) and via private certification by independent AI. The LA should, however, still retain the role as an approving authority in ensuring that building plans comply with the stipulated codes and standards. Only building inspection function is to be empowered to the professionals.

Another area that can be studied is the implementation of health, safety and welfare measures during the construction process (Murdoch and Hughes, 2002). The measures should form part of the final certification of works. The Construction (Design and Management) Regulations 1994 enforced in the UK (Coniac-Bone, 2003) could be studied and adapted in Malaysia in the future.

Finally, to safeguard the interests of the buyers and end-users, we may well want to examine the recently passed 'Home Inspection Act' in the UK. The Act ensures that houses delivered to buyers and end-users are inspected by independent home inspectors even if the CCC of such houses have been obtained. As such, the buyers and end-users are given the opportunity to solicit professional opinions of third persons before making any decision. One such party could well be the building surveyor.

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