

A guide to the
CML Certificate

Introduction

The purpose of this leaflet is to assist practitioners to understand the rationale and workings of the CML certificate and thereby assist them in assessing the risks and potential liabilities they assume when they are asked to sign one.

Background

The Council of Mortgage Lenders (CML) represents around 98% of the UK residential mortgage industry from household name building societies and banks to less well known, specialist lenders.

It has always been the case that lenders have needed to know that the security upon which they are lending is sound both structurally and financially. They also want to have the potential for redress (i.e. have someone to sue) beyond the borrower in case the security proves to be worth less than the amount lent. The property owner too requires some comfort as to the quality of the building structure as much for himself as for potential subsequent purchasers of the property

Historically, in the case of longstanding property, lenders and lay purchasers have commissioned surveyors and engineers to report on the structural condition of property. If the surveyor gives the property a clean bill of health and problems subsequently manifest themselves which the surveyor ought to have spotted, the lender can theoretically recover the diminution in value of the property from the surveyor.

Following the property crash of the early 1990's, many lenders had dedicated teams trawling their repossession files with fine tooth combs for instances where the surveyor (or any other professional who owed a duty to them) had not dotted every 'i' or crossed every 't'. Many lenders significantly reduced their losses in this way and one or two almost eliminated them entirely.

In the case of new-build property, the situation is slightly different. Why should you need a survey on a property that has just been built? Surely the developer/contractor should be able to certify the structural integrity of the property without the need for the purchaser/lender to incur the costs of a survey. In the majority of cases, new-build

properties have the benefit of insurance under schemes such as NHBC or Zurich Municipal Newbuild which insure or guarantee the property against specified structural defects even in the event that the contractor has disappeared off the scene.

Not all contractors can provide NHBC or Zurich cover. In the case of properties built by such contractors, CML agree to accept a certificate in a prescribed form (see below) signed by a professional affiliated to at least one of a number of prescribed professional bodies, including CIAT, RIBA and RICS.

These professional bodies have issued their own inspection certificates which are generally recognised by lenders, but in some cases, lenders and purchasers insist upon using the CML certificate to be found at Appendix 1 of the CML handbook (www.cml.org.uk).

These certificates do not have (and are not intended to have) the equivalent standing as NHBC cover or a Zurich guarantee.

Effect of signing a CML certificate

A more detailed discussion of precisely what is certified appears below.

However, in general terms, when providing a CML certificate, the professional is extending his potential liability beyond his client to the following:

1. The first purchaser(s) of the new-build property and their lender(s).
2. Any subsequent purchaser(s) of the property within a period of six years from the date of the certificate and their lender(s).

Clearly, it is therefore important that the Professional has satisfied himself that the conditions he is certifying have been met. If he signs the certificate and defects are subsequently found to affect the property, it is highly likely that he will face a claim on his professional indemnity insurance cover some way down the line.

CML Certificate Routemap

General guidance	
<ul style="list-style-type: none"> • The Council of Mortgage Lenders (CML) has a need that this document is able to stand alone independent of any appointment contract so the standard certificate does not refer to the appointment. This can be inserted at clause four but see note. • Particularly if this certificate is not being completed as a part of an ongoing commission the professional should ensure that the fee to undertake the inspections and prepare the certificate is not dependent on the actual completion of the certificate. There is no facility to specify any outstanding works (no matter how trivial) so in theory a certificate can only be issued for perfectly completed work, but see below. • The certificate should be insurable under the professional's PI insurance in accordance with the policy's terms and conditions but it is recommended that you check with your PI Insurer. • Below is some guidance about the certificate and some suggestions for improvements that are reasonable and that should be acceptable to the applicants and their lenders. 	
Guidance	CML Certificate Clause
No comment	Name of Applicant(s): _____ Full address of property: _____ _____ _____ _____
<p>In the absence of inheriting '<i>normal/reasonable skill and care</i>' as the appropriate standard from the initial appointment one could add it to this clause by inserting '<i>and exercised reasonable skill and care</i>' after the word '<i>stage</i>':</p> <p><i>'I have visited the site at appropriate periods from the commencement of construction to the current stage and exercised reasonable skill and care to check generally:.....'</i></p> <p>It questionable however that the absence of these words in itself would infer any higher duty.</p>	<p>1. I certify that: I have visited the site at appropriate periods from the commencement of construction to the current stage to check generally: (a) progress; and (b) conformity with drawings approved under the building regulations; and (c) conformity with drawings/instructions properly issued under the building contract.</p>
<p>As well as fixing the date of the inspection this clause allows the limitations of any inspection to be highlighted — e.g.:</p> <p>'...the property had reached the stage of practical completion save for the items listed at annex A. The items listed at annex B remained incomplete but by agreement between the applicant and contractor not so as to inhibit occupation. The contractor was unable to provide evidence of testing of the new drainage X -Y and no tests have subsequently been undertaken.'</p> <p>Any invitation to insert text however brings the potential of increasing risk if the drafting is not carefully worded.</p>	<p>2. At the stage of my last inspection on: _____ the property had reached the stage of: _____ _____ _____ _____</p>

Guidance	CML Certificate Clause
<p>Notwithstanding the term 'generally' in this clause, refer to any reservations (as noted above and/or others) that you may have about the work in the context of 'appropriate standards' and 'compliance with the drawings' as reflecting reasonable skill and care.</p>	<p>3. So far as could be determined by each periodic inspection, the property has been generally constructed: (a) to a satisfactory standard; and (b) in general compliance with the drawings approved under the building regulations</p>
<p>Complete and add a specific reference to the appointment contract such as: '<i>J Smith under an unamended RIBA SW99 appointment contract dated 99/99/99</i>'</p> <p>Further, more detailed reference making this certificate back to back with that appointment is difficult to achieve simply but one could try adding: '<i>The duties and liabilities under this certificate do not extend those of the original appointment contract</i>'</p> <p>However this does contradict the CML wish for the certificate to be self standing as to make such a statement would imply the need to annex a copy of the original appointment to the certificate.</p>	<p>4. I was originally retained by _____ _____</p> <p>who is the applicant/builder/developer in this case (delete as appropriate).</p>
<p>This is a confirmation that the professional is aware that the certificate is relied upon by both the first purchaser and the first lender who are named.</p>	<p>5 I am aware this certificate is being relied upon by the first purchaser of the property _____ and also by _____</p> <p>(name of lender) when making a mortgage advance to that purchaser secured on this property.</p>
<p>There has been some concern about this clause in so far as several insurers limit the number of times rights may be assigned. CHECK WITH INSURERS. Many lenders will be happy with limiting the number of further assignees under the PII conditions in which case this can be built-in by modification of the clause to read:- '<i>..... and upon sale of the property the liability for the remaining period shall be transferred the second purchaser and their lender.</i>'</p> <p>in the second part of the clause</p> <p>The intention of this clause is quite reasonable and provides for the passing-over of the benefit of the certificate to subsequent purchasers for the remainder of the 6 year period of its validity.</p>	<p>6. I confirm that I will remain liable for a period of six years from the date of this certificate. Such liability shall be to the first purchasers and their lenders and upon each sale of the property the liability for the remaining period shall be transferred to the subsequent purchasers and their lenders.</p>

<p>Qualifications</p> <p>'Qualified' to sign the certificate means that one is an architect/architectural technologist/surveyor or otherwise qualified according to the lists available from the CML.</p> <p>Whilst making a positive claim about experience (sometimes considered risky) it can also be limiting in that one is not claiming expertise beyond '<i>residential buildings</i>'. It does not expressly preclude anything out of the ordinary but the presumption in accepting the commission in the first place would be construed to suggest that one is not operating beyond one's expertise. A 'belt and braces' approach might suggest the inclusion of the word '<i>normal</i>' before '<i>residential</i>'.</p>	<p>7. I confirm that I have appropriate experience in design and /or monitoring of the construction or conversion of residential buildings.</p> <p>Name of Certifier: _____</p> <p>Qualifications: _____</p> <p>Address: _____ _____ _____</p> <p>Telephone No. _____</p> <p>Fax No. _____</p>
<p>Amount of PII</p> <p>This is much the same as the wording in the RIBA and similar appointing contracts. The figure should be realistic and not necessarily up to the full level of practice cover.</p> <p>Date of certificate</p> <p>Make sure the certificate is completed, signed and dated as soon as possible. Liability is a complicated issue and strictly speaking the wording at Clause 8 is a compromise for simplicity and potentially already gives away a little time on that which would be required. Any delay in issuing the certificate is gifting time to the building owner and lender.</p> <p>NB</p> <p>There are versions of this certificate that ask for the name of the insurer to be filled-in.</p> <p>This information is simply irrelevant as PII is written on a 'claims made' basis so it is the insurer at the time a claim is made that has an interest in it not the insurer (as it may well be a different one) at the time the certificate is signed. By not filling this in or deleting it one is not trying to hide anything or be difficult. From the purchaser's point of view one can understand perhaps that there is some comfort at the very beginning (when most defects are likely to become evident) that a reputable insurer is involved.</p>	<p>8. The box below shows the minimum amount of professional indemnity insurance the consultant will keep in force to cover his or her liabilities under this certificate for any one claim or series of claims arising out of one event.</p> <p>£</p> <p>Signature: _____</p> <p>Date: _____</p>

Summary

On the basis that the glass is half empty, the signing of a CML certificate does little more for the professional other than expose him to future liabilities in respect of a property he only infrequently visited and whose defects are, in reality, probably the fault of a contractor who will probably have gone out of business or be sunning himself on a Spanish Costa by the time the balloon goes up!

Looking at it from a more positive aspect, with a little foresight and planning, there is no reason why the signing of CML certificates should cause the professional sleepless nights. CML certificates are generally recognised by PI insurers provided the terms of the certificate are not amended. Therefore with the following simple precautions, the risk should be minimised:

1. Find out, as early as possible, whether you will be required to sign a CML certificate at the end of the project.
2. Factor in that you will be assuming a six year liability to one or more third parties when calculating your fee. You should point out this liability to your client and consider whether you need to increase your fee to cover the increased cost of PI cover over the next six years.
3. When dealing with the developer/lay client, ensure that they are aware as early as possible of the limited nature of the certificate. It 'does what it says on the tin' in that it means that a qualified professional has inspected the works periodically during construction has found nothing that departs significantly from the approved plans and drawings. The certificate does not constitute a warranty or insurance policy in respect of the structural integrity of the building as might be the case under NHBC cover or similar.
4. Do compare the certificate you are being asked to sign with the Certificate on the CML website to ensure the certificate wording is standard, unamended.
5. Plan your monitoring visits to the site in conjunction with the contractor if possible. Rather than regular (e.g. weekly) visits, it is more important that they should coincide with the key stages you need to inspect. You should ensure that the Contractor does not cover up such work before you inspect it.
6. Do not rely wholly on the contractor to keep you updated with progress on site. You should visit when you think key stages are being reached, not when the Contractor considers it convenient. If in doubt, chase him and, if necessary and practicable, turn up on site.
7. Do not feel pressured to certify matters you do not feel comfortable certifying. If you have any reservations (e.g. the contractor cannot provide evidence of testing of the drainage system) state them on the form. Similarly, if you have been brought in late in the day and cannot certify the early stages of the project, say so on the face of the certificate and/or, if necessary require works to be opened up or pulled back before you commit your name to the certificate

If the above rules are followed, the risk of problems with CML certificates should be reduced significantly.

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Disclaimer: This note is for general guidance only and legal/professional advice should be sought to cover any particular situation