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# Liability Briefing

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## ***CML Certificates***

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Lenders will generally lend on a newly built (or newly converted) property only when the property is covered by a warranty scheme (for example, the National House-Building Council (NHBC) Buildmark scheme) or by a Council of Mortgage Lenders (CML) Professional Consultant's Certificate.<sup>1</sup> However, there are fundamental differences between the two options, as this *Briefing* explains.

### **NHBC Buildmark**

NHBC Buildmark is taken as an example of the warranty schemes available: other schemes offer broadly similar cover. Buildmark is an insurance and warranty scheme designed to protect home owners should a problem occur with their home both before and after completion of construction. It is transferable if a home is sold.<sup>2</sup> There are similar NHBC schemes for social housing and self build homes.

Before completion of the purchase, Buildmark provides protection against the builder failing to complete the construction of the home (for instance due to insolvency).

During the first two years after completion of the purchase, the first recourse should be to the builder who will be responsible for rectifying any defects or damage reported to it. If it fails to put things right, NHBC offers a resolution service, which is effective in resolving the majority of disputes between builder and home owner that arise at this stage. When the service is provided, NHBC will investigate the reported problems and if it finds in favour of the home owner, the builder will be required to carry out appropriate repairs. If the builder fails to do so, NHBC will either arrange to carry out the repairs or pay for them to be done by others. Buildmark also provides protection if a builder fails to fulfil its obligations due to insolvency, or fails to pay the damages it is ordered to pay to the home owner in legal proceedings.

After the first two years and up to ten years after completion of the purchase (when the policy expires), NHBC will be responsible for rectifying damage in key (mainly structural) parts of the home, contamination and (if NHBC provided the building control service) non-compliance with certain building regulations.

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- 1 The Council of Mortgage Lenders is the trade association for the mortgage lending industry and its members account for around 98% of UK residential mortgage lending.
  - 2 Details can be found on NHBC's website at [www.nhbc.co.uk](http://www.nhbc.co.uk).

To be in a position to offer Buildmark, a builder has to be registered with NHBC, which involves showing that it has adequate financial and technical standing. The builder pays the premium for the Buildmark cover.

Like all insurance policies, Buildmark is subject to certain exclusions and limitations and the policy document should be referred to for its full terms and conditions. As with all other UK insurance companies, NHBC is regulated by the Financial Services Authority which requires NHBC to maintain financial reserves.

## **A CML Certificate**

Unlike NHBC's Buildmark, a CML Certificate is not an insurance policy. It is a single page document signed by a professional construction consultant, certifying (in summary) that he or she has visited the building site from time to time and that the property has been generally constructed to a satisfactory standard and in general compliance with the drawings.<sup>3</sup> The professional also states the amount of professional indemnity insurance that he or she will maintain. That insurance however covers the professional, not the home owner.

### **Comparing the two in practice**

Taking an example, say that 18 months after moving into a newly built house, the owners find cracks appearing in an external wall, which apparently result from the foundations being inadequate.

#### ***Buildmark***

If the owners are covered by NHBC's Buildmark, they should first look to the builder to put the matter right. If the builder does not do so, NHBC will investigate; if it finds that the problems identified by the owners result from non-compliance with NHBC technical standards, it will encourage the builder to carry out repairs. If the builder does not do so, it will arrange to have the work done by others, or cover the cost of others doing so. This operates on a 'no fault' basis. The owners do not need to retain consultants to investigate the problem, and do not need to prove that the builder was at fault.

#### ***CML Certificate***

If the owners have a CML Certificate, in the first instance, they can look to the builder to put the matter right: if it is at fault they might have a claim against it in contract, tort (negligence) or under the Defective Premises Act. They would have to prove their case. They can also, or alternatively, look to the professional who signed the Certificate. They would need to show that the statements made in the Certificate were not made with the proper care and therefore did not accurately describe the condition of the property; the test is not whether the inspections were carried out with reasonable care, but whether, in effect, the statements are correct. As in the case of a claim against the builder, this could mean taking legal action, which is a costly, time consuming and uncertain process. When professionals are liable, they may be able to recover the amount they have to pay the owners from their professional indemnity insurers.

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3 A sample CML Certificate can be found at [www.cml.org.uk/cml/handbook/certificates](http://www.cml.org.uk/cml/handbook/certificates).

## **When are CML Certificates sought?**

As explained, when a property which has been built or converted within the past ten years does not have the benefit of an NHBC (or similar) warranty, lenders will generally proceed only if the building work has been monitored by a professional who has provided a CML Certificate.<sup>4</sup> The vast majority of new dwellings are covered by a warranty scheme. Examples of when they might not be are where the builder is not registered under a scheme because it does not wish to incur the cost or it is considered unsuitable by a warranty provider.

## **Who is asked to provide a CML Certificate?**

A CML Certificate can only be provided by a professional who is a fellow or member of one of a number of specified professional bodies.<sup>5</sup> Such professionals must confirm in the Certificate that they have appropriate experience in the design and monitoring of the construction or conversion of residential buildings.

## **Who can claim under the Certificate?**

The Certificate is for the benefit of the first purchaser and their lender, both of whom can therefore pursue a claim if they suffer loss. The professional remains liable for six years from the date of the Certificate. If the property is sold within that time, the second or subsequent purchasers and their lenders have the benefit of the Certificate for the remaining period.

## **What can you recover under a CML Certificate?**

If the owner can show that the statements made in the Certificate are incorrect and that the professional has not made them with the proper care, the owner could recover the cost of putting the defects right, consequential losses, damages for personal injury and damage to third party property. The professional's liability is unlimited. It should also be noted that giving the benefit of the Certificate to purchasers and funders after the first, extends both the extent of the professional's liability and the time for which he or she is liable. Without this, the professional would cease to be liable once the first purchaser had sold the property within the initial six year period.

## **Amended Certificates**

Some lenders may not accept amended CML Certificates or other certificates in similar terms. What is recoverable will clearly depend on the wording but this *Briefing* is only concerned with unamended CML Certificates.

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4 Section 6.6 of the Handbook, which can be found at [www.cml.org.uk](http://www.cml.org.uk).

5 That is the Architecture and Surveying Institute, Association of Building Engineers, Chartered Institute of Architectural Technologists, Chartered Institute of Building, Institution of Civil Engineers, Institution of Structural Engineers, Royal Incorporation of Architects in Scotland, Royal Institute of British Architects (or an architect registered with the Architects Registration Board) or the Royal Institution of Chartered Surveyors. Which qualifications are acceptable to which lenders can be found in Part 2 of the Handbook, which can be found at [www.cml.org.uk](http://www.cml.org.uk).

## Warnings

In particular: **Purchasers** of new properties who are given a CML Certificate rather than the more usual warranty should be aware of the differences between the two. **Developers and builders** who intend to offer a CML Certificate rather than a warranty should ensure that they engage a professional from the outset of the project.

**Professionals** need to be aware of the liability implications of signing a CML Certificate if the statements in it are not wholly correct. There are a number of difficulties:

1. The professional must have visited the site '*at appropriate periods from the commencement of construction*' and been given sufficient information, copy drawings, details of instructions etc to be able to check generally the necessary conformity. Professionals cannot say this unless they have been engaged throughout the course of the construction.
2. The Certificate covers the whole of the property, not just the elements the professional may have designed or inspected. The professional could therefore become liable in respect of matters outside his or her particular discipline.
3. If the professional cannot say, or cannot know, that the property has been generally constructed to a satisfactory standard and in general compliance with the drawings, he or she must amend the Certificate to state the actual state of affairs, or give his or her actual opinion, or refuse to sign it altogether. There is scope for the professional, when recording the stage the property has reached, to state any limitations there have been to his or her inspections. However, if there are any such limitations, it is not clear how the professional can then make the other statements required concerning the state of the property.
4. The statements in the Certificate could amount to a warranty for fitness for purpose and professionals should check that their professional indemnity insurance will cover their liability in respect of these Certificates.
5. There is no opportunity to limit the amount of the professional's liability under the Certificate – the reference to the amount of professional indemnity insurance to be maintained does not limit liability to that sum.
6. If the contractor has become insolvent and there are problems with the property, claims are more likely to be brought against the professional under the Certificate, as the home owners will have no other recourse.

**This *Liability Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.**

This *Liability Briefing* is available at [www.cic.org.uk/liability](http://www.cic.org.uk/liability).

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