In theory--CDM Regulations and novation

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Construction analysis: What effect do the new CDM Regulations 2015 have on a principal designer novated to a contractor? Seb Oram, construction law barrister at 3PB Barristers, considers a hypothetical scenario that addresses the implications of the new CDM Regulations.

Scenario

On 10 April 2015, an architect, ABC & Partners LLP, is engaged by a developer, XYZ Developments Ltd, in respect of a project for the development of a large office building, on the site of a former hospital, in central London. ABC & Partners are appointed on the basis of XYZ's own standard form of consultant appointment. The parties agree that, for the purposes of the Construction (Design and Management) Regulations 2015, SI 2015/51 XYZ is the client and ABC is appointed to act as principal designer. XYZ is an experienced developer but has no in-house health and safety/CDM capabilities.

The project is procured via the JCT Design and Build contract 2011 edition. Upon execution, on 1 July 2015, of the building contract by XYZ and the contractor, PDQ Construction Ltd, ABC is novated to PDQ. The novation agreement entered into by ABC and PDQ is the standard form novation agreement published by the City of London Law Society (unamended). Prior to novation, ABC carried out design up to RIBA stage 2.

As a result of the novation, the principal designer is no longer engaged directly by the client.

Does this situation contravene the requirements of the CDM Regulations 2015? Must a direct relationship be maintained between the client and the principal designer?

In my view the situation does not contravene the CDM Regulations. As long as a principal designer is appointed there is no requirement for a direct relationship between him and the client.

I consider that reg 5(1) clearly requires the client to 'appoint in writing...a designer with control over the pre-construction phase as principal designer'. In the situation we are discussing, there would be a written appointment by virtue of the novation agreement, and indeed the original contract of appointment that is being novated. The critical issue is therefore whether the appointment has to be direct (between client and principal designer) or can be indirect (between the contractor and the principal designer).

In my view 'appoint' in reg. 5(1) is capable of being interpreted as 'secure the appointment of', and would be interpreted in that way. It does not require the client to make a direct appointment. Firstly, guidance on the CDM Regulations inferentially supports this view. Managing Health and Safety in Construction: CDM Regulations 2015--Guidance on Regulations (HSE Publications, L153), provides at para 37 that:

> 'The duration of the principal designer's appointment should take into account any design work which may continue into the construction phase or any issues that may arise during construction involving the need to make suitable modifications to the designs. For projects involving early work by a concept architect or project management company where a design and build contractor or novated designer is subsequently involved, it may be appropriate for the initial principal designer appointment to be ended and a new principal designer appointed.'

It doesn't go so far as to say by whom the new principal designer needs to be appointed. However, the reference to novation is a reasonably clear indication that our scenario was not intended to be contrary to the scheme of the new CDM Regulations.

Secondly, it is of some relevance that the CDM Regulations envisage that the appointment of the principal designer may be terminated (see reg 11(7)). It would be odd if the client could terminate the appointment, but could not transfer it to another. (In my view, however, reg 5(1) would be interpreted as requiring a principal designer throughout the pre-construction phase, as defined in reg 2(1).)

I suspect that the effect of the arrangement that we are discussing would be that PDQ (the design/build contractor) would itself have become a designer under the CDM Regulations--it would be a person who 'arranges for, or instructs, [a] person under [its] control to [prepare or modify a design]' (definition of designer in reg 2(1)). It would therefore owe the duties in reg 9. So we have a situation where there is a contractor who is the designer and the principal designer who is appointed to act for him who is also the designer.

If this situation is contrary to the CDM Regulations 2015, what should the parties do upon novation to continue to satisfy the requirements of the CDM Regulations?

I don't think there needs to be a direct contract or a deed of warranty or anything similar. I think the scheme of regulation is simply to make sure that you have someone there who is looking after the health and safety aspect of the pre-construction phase--I don't think how he or she is appointed is too material so long as they are in post and there is effective control over the performance of their duties.

A cautious contractor would be advised to obtain a contractual indemnity from ABC (the architect) should they fail to fulfil their duties under the regulations. That would require a minor modification to cl 1.4 of the City of London Law Society novation agreement. A cautious employer would want to do the same, particularly because 3.16 of the JCT Design and Bulid contract (as amended by Amendment 1, March 2015) contains an undertaking by the employer (to the contractor) that they will ensure that the principal designer carries out their duties under the CDM Regulations.

Do you envisage any other areas of potential confusion or inadvertent non-compliance arising out of the new CDM Regulations?

One area that I think might be a potential source of considerable difficulty is the application of the CDM Regulations to framework agreements and partnering contracts where you have an overarching agreement under which various projects might be instructed to be carried out. It's unclear whether you can have just one principal designer under the framework contract or whether you would need separate appointments for each of the underlying contracts.

In your view, is further clarification of the new Regulations required?

No, I think they are better drafted than the 2007 ones. They are less prescriptive and in my view the spirit of the regulations are more constructive in approach and practice.

Interviewed by Fran Benson.

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