

A. INTRODUCTION

1. **The 2015 Regs.** The Construction (Design and Management) Regulations 2015 (SI 2015/51; “the 2015 Regs”) came into force on 6 April this year, replacing the 2007 regulations. After this introduction, this article considers:
 - 1.1. What has changed (section B)?
 - 1.2. How might the 2015 Regs now be relevant to construction disputes (section C)?
2. **Why the change?** A principal reason for the new regulations was a perception in the industry that the role of the ‘CDM coordinator’ was an unnecessary and costly one. One of the major reforms is to do away with that role and to share responsibility between the ‘principal designer’, the ‘principal contractor’ and, indeed, the client. The changes are immediate¹ and significant.
3. **Effect of the 2015 Regs.** The 2015 Regulations are health and safety measures. Their main means of enforcement are the power of the Health and Safety Executive to issue improvement and enforcement notices in respect of contraventions,² and ultimately to prosecute offenders or impose civil sanctions.³ However, this article focuses on a more general relevance of the regulations to construction litigators.

4. Thus, the effect of 2015 Regs will be more widespread, because:
 - 4.1. **Standard of care in common law claims.** They are capable, in an appropriate case, of setting or affecting the standard of care expected of designers and contractors in negligence, and other common law claims, e.g. *Re-Source America International Ltd v. Platt Site Services Ltd* (2003) 90 Con LR 139 (TCC).
 - 4.2. **Contractual relevance.** The common form construction suites, and common form designer appointments (e.g. RIBA Standard Agreement 2010), may impose contractual obligations to comply with the regulations. By way of example I consider the JCT Standard Contract below.
 - 4.3. **Breach of statutory duty?** It is unlikely that this adds anything because, if an actionable duty exists, the health and safety purpose of the regulations will probably limit the scope of duty to personal injury and property damage (and most recoverable construction losses will be in the nature of pure economic loss). C.f. *Re-Source America International Ltd*, above, at [26].
5. **An example: JCT Standard contract.** Consider the JCT Standard building contract 2011. (An amendment sheet has been issued by JCT in March 2015,⁴ which update the clauses mentioned here.) Under it:
 - 5.1. **Generally.** the contractor and the employer undertake to each other to comply with applicable CDM regulations (cl. 3.23);⁵

¹ Under transitional provisions in Schedule 4: (i) a client on an existing construction project on which there is no CDM Co-ordinator appointed must, as soon as practicable after 6 April 2015, appoint a principal contractor who is to draw up a construction phase plan; and (ii) for projects where a CDM co-ordinator is appointed, the client must appoint a principal designer before 6 October 2015 (unless the project comes to an end on or before that date).

² Health and Safety at Work Act 1974, ss.21 and 22 respectively.

³ The power to prosecute is contained in Health and Safety at Work Act 1975, s.33. That provision is specified for the purposes of orders under the Regulatory Enforcement and Sanctions Act 2008 Pt 3, enabling the imposition of fixed penalties by way of civil sanction: see s 37, Sch 6

⁴ <http://www.iclttd.co.uk/cdm-amendment-sheets.aspx> (accessed 17 June 2015). The amendment sheet must be expressly incorporated, through the articles of agreement, in order to have effect.

⁵ The amendment sheet expressly clarifies that compliance by the contractor with his duties under the regulations, including any such directions given to him under reg. 15(3), are at no cost to the Employer and without any entitlement to an extension of time.

- 5.2. **The contractor.** the contractor is obliged to carry out and complete the works in compliance with: (i) the construction phase plan; and (ii) statutory requirements affecting the works, which would include the 2015 Regs (cl. 2.1);
- 5.3. **The CDP.** the contractor, in respect of the contractor's design portion, is obliged to comply with the CDM designer obligations, now contained in regs. 8-10 (cl. 2.2.3); and cannot claim an extension of time or compensation for disruption, to the extent that the cause of delay to the works is a failure to comply with those obligations (cl. 2.20.1);
- 5.4. **Completion.** a failure to promptly provide, on request, information required for the health and safety file, may delay the issue of a completion certificate (cll. 2.30, 3.23);
- 5.5. **Terms of sub-contract.** a sub-contract must provide that the parties to it undertake to comply with the 2015 Regs (cl. 3.9.2.3).

B. WHAT HAS CHANGED?

- 6. **The old (2007) scheme.** The general structure of the old scheme was as follows:
 - 6.1. **General duties, and activity-specific duties.** They imposed general duties, applicable to all duty-holders, of: competence, cooperation, co-ordination and prevention (2007 Regs, rr.4-7). In addition, specific regulations in Part 4 dealt with particular risks on construction sites (e.g. demolition and excavation work). Every contractor, and every other person who controlled construction works, was obliged to comply with the regulations in Part 4 insofar as they related to matters which were within his control (2007 Regs, r.25(1)-(2)).
 - 6.2. **More extensive duties for 'notifiable' projects.** A major division was drawn in the 2007 Regs between projects that were notifiable and those that were not. More onerous duties were owed where the project was notifiable. Broadly speaking, whether or not a project was notifiable depended on the anticipated length of the construction phase and,

therefore, its size. A project whose construction phase was likely to exceed 30 days, or 500 person days, was notifiable.

- 6.3. **Specific roles and duties for client, designer, contractor.** In all projects (notifiable or not) the 2007 Regs set out prescriptive obligations that defined the roles of the client, designers and contractors. In notifiable projects each of those persons would owe more extensive duties.
- 6.4. **The CDM Co-ordinator and the principal contractor.** These roles were exclusive to notifiable projects. The CDM Co-ordinator's role was to give suitable and sufficient advice to the client in order to comply with the regulations, and to arrange the coordination of health and safety measures. The principal contractor would plan, manage and monitor the construction phase to ensure that it was carried out without risk to health and safety.
- 7. **Key changes under 2015 Regs.** The general structure of: general duties and risk-specific duties; and specific roles for client, designer and contractor; remain in the 2015 Regs. Significant changes are:
 - 7.1. **Less importance of 'notifiable' status.** The requirement to notify HSE of large projects remains. But the status of notification has been reduced almost to insignificance. Projects large and small carry similar planning and monitoring obligations.
 - 7.2. **No longer CDM Co-ordinator.** This role has been passed, in substance, to the principal designer of the project.
 - 7.3. **Client duties extend to domestic (non-commercial) clients.** Under the 2007 Regs a client was defined as one acting *in the course or furtherance of a business*. That is no longer the case. A 'contractor' and a 'designer' must still be acting in the course or furtherance of a business. It is important to bear in mind when considering the duties below that:
 - 7.3.1. a client—but not a domestic client—will be treated as a contractor if he carries out, manages or (now) controls construction work; and

7.3.2. a client—including a domestic client—will be treated as a designer if he prepares or modifies a (structure or system) design, or arranges for or instructs any person under his control to do so;

7.3.3. a contractor can also be a designer if he fulfils that same description.⁶

The impact of these changes is less marked than it may seem because, under reg. 7, a *domestic* client's duties, except the duty to appoint a principal designer and principal contractor, are to be performed by the contractor.

7.4. **The roles** of client, designer and contractor have been re-cast and are less prescribed. The practical impact is not likely to be significant.

8. It is worth re-capping what a client's, designer's and contractor's duties now are.

9. **Client's duties.** Under the 2015 Regs, the client must:

9.1. where there is more than one contractor, or if it is reasonably foreseeable that more than one contractor will be working on a project at any time, **appoint in writing** (i) "a designer with control over the pre-construction phase" as principal designer; and (ii) a contractor as principal contractor (r.5). If he fails to do so he must fulfil those duties himself (r. 5(3)-(4)) unless he is a domestic client. If a domestic client fails to do so "the [designer /contractor] in control of the pre-construction phase" will have those roles thrust upon them (r. 7(2)).

9.2. ensure that, before the construction phase begins, a **construction phase plan** is drawn up by the contractor (if there is only one) or by the principal contractor (r.4(5));

9.3. make suitable **arrangements for managing** a project, including the allocation of sufficient time and other resources (r. 4(1)); and must ensure that these arrangements are maintained and reviewed throughout the project (r.4(3));

9.4. provide **pre-construction information** as soon as is practicable to every designer and contractor appointed, or being considered for appointment, to the project (r.4(4));

9.5. ensure that the principal designer prepares a **health and safety file** for the project, which is revised from time to time (r.4(5)); and must take *reasonable steps* to ensure that (a) the principal designer complies with any other principal designer duties in regulations 11 and 12; and (b) the principal contractor complies with any other principal contractor duties in regulations 12 to 14; and

9.6. where the project is notifiable, **give notice** in writing to the HSE in prescribed form before the construction phase begins (r.6).

10. **Designer's duties.** Under the 2015 Regs, a designer:

10.1. must **not commence work** in relation to a project unless satisfied that the client is aware of the duties owed by the client under these Regulations (r.9(1));

10.2. (**design out risk**) must, when preparing or modifying a design take into account the 'general principles of prevention' and any pre-construction information to eliminate (or if that is not possible to reduce or control through the design process and provide information about), so far as is reasonably practicable "*foreseeable risks to the health or safety of any person: (a) carrying out or liable to be affected by construction work; (b) maintaining or cleaning a structure; or (c) using a structure designed as a workplace.*" (r.9)

10.3. must take all reasonable steps to **provide**, with the design, **sufficient information** about the design, construction or maintenance of the structure, to adequately assist the client, other designers and contractors to comply with their duties under the 2015 Regulations (r.9(4)).

11. **Principal designer, and his duties.** Paragraph 9.1 above outlined how he is appointed (sometimes automatically). His core obligation is to "**plan, manage and monitor the pre-construction phase and coordinate matters relating to health and safety during the construction phase to ensure that, so far as reasonably practicable, the project is carried out without risks to health and safety**" (r. 11(1)).

⁶ 2015 Regs, r.2(1), 'client', 'contractor' and 'designer'.

There is a specific focus of performing that duty at the planning and programming stage (r.11(2)). In performing that duty he owes a similar duty to **design out risk** (para. 10.2 above), and he must ensure all designers comply with that obligation (r. 11(4)-(5)).

12. He must assist the principal contractor in preparing the **construction phase plan** by providing all information he holds that is relevant to that phase plan (r.12(3)); and must prepare a **health and safety file** appropriate to the characteristics of the project, ensuring that it is appropriately reviewed, updated and revised from time to time (r.12(6)).

13. The principal designer must also: (i) assist the client in **providing pre-construction information** to designers and contractors; (ii) so far as it is within the principal designer's control, provide pre-construction information himself to every designer and contractor (r. 11(6)); and (iii) **liaise with the principal contractor** (r. 11(7)).

14. **Contractor's duties.** Every contractor (not just the principal contractor) owes a core duty to **"plan, manage and monitor construction work carried out either by the contractor or by workers under the contractor's control, to ensure that, so far as reasonably practicable, it is carried out without risks to health and safety"** (r. 15(2)). The more important of his remaining duties are to:

14.1. **comply with directions** given by the principal designer or the principal contractor (r. 15(3)(a));

14.2. **comply** with the parts of the **construction phase plan** that are relevant to that contractor's work on the project (r. 15(3)(b));

14.3. if there is only one contractor: (i) take account of the general principles of prevention when phasing and **planning** the works; and (ii) draw up a **construction phase plan** (or make arrangements for that) (r. 15(4)-(5)); and

14.4. not employ or appoint unskilled or untrained workers, and must provide each worker under his control with appropriate **supervision, instructions** and information (r. 15(7)-(8)).

15. **Principal contractor, and his duties.** The principal contractor must during the pre-construction phase, and before setting up a construction site, draw up a **construction phase plan** (or make arrangements for one to be) (r.12(1)). The phase plan is a key feature of the CDM Regulations (see r. 12(2)):

(2) *The construction phase plan must set out the health and safety arrangements and site rules taking account, where necessary, of the industrial activities taking place on the construction site and, where applicable, must include specific measures concerning work which falls within one or more of the categories set out in Schedule 3.*

He must ensure that the plan is appropriately reviewed, updated and revised throughout the project (r. 12(4)).

16. His key obligations in relation to the works include:

16.1. he must **plan, manage and monitor the construction phase** and coordinate matters relating to health and safety during the construction phase to ensure that, so far as is reasonably practicable, construction work is carried out without risks to health or safety (r. 13(1)). There is, again, a particular focus on that obligation at the planning and programming stage (r. 13(2)).

16.2. he must organise **cooperation between contractors**; and ensure that employers apply the general principles of prevention in a consistent manner, and in particular when complying with activity-specific risk obligations imposed by Part 4 of the 2015 Regs (r.13(3));

16.3. he must ensure that employers follow the **construction phase plan** (r.13(3)(c));

16.4. he must **liaise with the principal designer** for the duration of the principal designer's appointment and share with the principal designer information relevant to planning, management and monitoring of the pre-construction phase (r.13(5)); and

16.5. he must consult and engage with workers (r. 14).

17. Further, he must provide the principal designer with any information in his possession relevant to the **health and**

safety file, for its inclusion (r.12(7)). If the principal designer's appointment concludes before the end of the project the principal contractor will take over responsibility for that file and its contents (r.12(8)-(9)).

C. HOW MIGHT THE 2015 REGS NOW BE RELEVANT TO CONSTRUCTION DISPUTES?

18. **Legal bases.** Paragraph 4 above considered the bases on which the 2015 Regs might be relevant to duties of client', contractors and designers, and to third parties. This section briefly considers the *nature of the disputes* in which a breach of the 2015 Regs is likely to have most relevance.

19. **Activity-specific risks.** The 2015 Regs continue to impose activity-specific duties for particular operations. Under reg. 16:

(2) *A contractor carrying out construction work must comply with the requirements of this Part so far as they affect the contractor or any worker under the control of the contractor or relate to matters within the contractor's control.*

(3) *A domestic⁷ client who controls the way in which any construction work is carried out by a person at work must comply with the requirements of this Part so far as they relate to matters within the client's control.*

20. **What is 'control'?** Under previous regulations the test of control was considered to be fact-sensitive. The requisite level of control needed for a duty to arise was linked to the way in which the construction contract was in fact carried out; the duty was confined to construction work within the individual duty-holder's actual control: McCook v. Lobo [2003] ICR 89 (CA), at [16]. We consider that the same test is likely to apply under the wording of the 2015 Regs.

⁷ The wording of reg. 16 is a little deceptive because it refers only to 'domestic' clients. But that is because a non-domestic client is likely to be a 'contractor': see para. 7.3 above. Recall that contractor status is accorded to anyone who "carries out, manages or controls construction work".

21. Given the focus of the regulations on health and safety, and preventing accidents, their most fruitful application has tended to be where a construction activity has gone wrong, causing physical damage to the employer's or to third party's (for example, neighbouring owners') property. It is worth recalling a number of specific activity risks covered in Part 4:

21.1. demolition and dismantling (r. 20);

21.2. explosives (r.21);

21.3. excavations (r.22);

21.4. fire or explosion; and flooding risks (r.29).

18 June 2015

This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.



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