

## Construction and Engineering Works Claims – Civil and Criminal Implications Fact Sheet

Construction is a dangerous industry, and there are many forms that construction and engineering claims can take. Incidents can result in property damage, serious injury or in some cases fatality. For that reason, all construction projects are subject to safety rules and regulations that must be adhered to. The most important are the Construction and Management Regulations 2015 (“CDM Regs”). The CDM Regs were introduced to improve the health and safety of construction sites across all stages of a project’s development, in order to minimise risks to people (workers and visitors) and property.

### Civil Claim Considerations

Incidents arising from negligently executed contract works can give rise to a claim against a contractor and/or subcontractor who is alleged to have been responsible. Civil liability claims tend to be for breach of contract or tort (negligence).

When approaching construction and engineering liability claims, there are some key considerations:

- Does liability insurance cover the claim? Broadly, liability insurance covers an insured’s tortious liability to third parties for property damage or bodily injury caused. Liability insurance will not cover (subject to the terms and conditions of the individual policy):
  - Purely contractual liability that is not concurrent with tort;
  - Damage to the works themselves (as opposed to third party property).
- Alternatively, Contractors All Risk cover may be in place which is more appropriate to cover an incident and/or the contractor may be an insured under that policy.
- Early investigations as to the underlying cause of the loss are key. Proofs of evidence and preservation of documentation evidence is paramount to minimise risks of valuable evidence being lost. The early appointment of an independent expert can also help assess the merits of a successful recovery or defence.

- Identify any potential recovery targets and whether recovery is viable from both a financial and merits perspective. If dealing with a liability claim, understanding the liability risks and whether others may also hold some responsibility may impact overall defence strategy.

### Liability for Subcontractors

A common issue that arises when dealing with contract works claims is the question of whether a contractor can be liable for damage caused by the negligence of its subcontractor that causes damage or injury to a third party.

The first thing to determine is what the underlying contractual documents say as to the relationship between the Principal Contractor and its subcontractor, and whether there are liability or indemnity provisions governing liability.

Thereafter, the general rule is that no liability arises for the negligence or other torts committed by an independent contractor when completing work for which they were engaged<sup>1</sup>. This is called the “Independent Contractor Defence”. However, there are exceptions to this and there can be circumstances where a Contractor will be held responsible for the negligent works it has delegated to others. Much will depend on the specific facts of each claim but an example of where the exception applies is where the works being carried out were said to be inherently dangerous or extra hazardous. This could create a “non-delegable duty” whereby a contractor will be liable for the negligence of its subcontractors.

For something to be “inherently dangerous”, the courts have ruled that it must be exceptionally or unusually dangerous regardless of what precautions are taken beyond what would be expected generally on a construction site<sup>2</sup>. An example is welding works in a location where there is combustible material in the direct vicinity.

<sup>1</sup> D&F Estates Ltd v Church Commissioners for England [1989] AC 177

<sup>2</sup> Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH 2008] EWCA Civ 1257

# CLYDE&Co

Successful risk navigation

## Criminal Implications

When there has been an incident on a construction project it is quite possible that this will result in injury to employees, or members of the public, in the worst case scenario a fatality.

This will result in an investigation by the police or the Health and Safety Executive, or in the case of an incident which causes environmental damage the Environment Agency. The investigation can be into an organisation or an individual and potentially lead to criminal charges being brought.

If the incident has resulted in a fatality, the coroner will open an inquest.

The police / regulator will attend site to collate evidence and take witness statements. A single point of contact should be appointed and copies of all documents that are properly requested by the regulator and provided by the organisation should be retained. Employees asked to provide witness statements should be given appropriate support.

When an incident has occurred, the likelihood is that an organisation will undertake an internal investigation. If this has not been undertaken on the instruction of solicitors, this could become disclosable to a regulator during the course of the investigation. It is therefore important that contact is made with lawyers to protect the organisation and any individuals named within the report and maintain legal privilege. The investigation report must be provided to solicitors to enable legal advice to be given to maintain legal privilege; obtaining legal advice must be the dominant purpose of the investigation report.

Internal communications should be regulated, as these can also become disclosable.

Organisations and or individuals could be invited to attend an interview under the Police and Criminal Evidence Act 1984. Proper consideration as to whether to attend in person, and if so who should attend or alternatively to provide a written statement must be given.

If not handled properly in the immediate aftermath of an incident, it can be significantly harder to defend a criminal prosecution. If convicted, an organisation can be subjected to very large fines and loss of reputation. Individuals can also face large personal fines and in the worst case, imprisonment.

---

If you have any questions, please contact us:



**Kate Dugdale**

Legal Director, London

+44 20 7876 4565

[kate.dugdale@clydeco.com](mailto:kate.dugdale@clydeco.com)



**Angharad Reynolds**

Legal Director, London

+44 20 7876 6585

[angharad.reynolds@clydeco.com](mailto:angharad.reynolds@clydeco.com)



**Lauren Penton**

Senior Associate, London

+44 20 7876 6196

[lauren.penton@clydeco.com](mailto:lauren.penton@clydeco.com)