



Advising on asbestos

The hazards of asbestos have been known for many years and there has been relevant legislation in place for some time designed to safeguard against those hazards. In May 2004, an important piece of new asbestos legislation comes into effect which all solicitors will need to know about. This newsletter looks at Regulation 4 of the Control of Asbestos at Work Regulations 2002 which comes into force on 21 May next year and warns against the possibility of future claims against solicitors from clients for failing to advise them properly, or at all, on Regulation 4.

Obligations of Dutyholder

After May 2004, Regulation 4 will impose a new statutory duty on any party with responsibility for repairing and maintaining non-domestic premises (called a "dutyholder").

All dutyholders will be required:

- to ascertain whether there is asbestos within the premises;
- record the location and condition of the asbestos;
- assess the risk that the asbestos presents;
- decide on measures for managing the risk;
- carry out those measures;
- record all of the above in writing.

The regulation is made under the Health & Safety at Work Act 1974. A breach can lead to a criminal prosecution or a civil claim.

As the dutyholder is someone who has an obligation to repair or maintain a property, rather than simply being an owner or occupier, the dutyholder could be a tenant. It is also worth noting that common parts of flats, such as entrance foyers, corridors and lifts, count as "non-domestic premises" covered by the Regulation.

Although there has been asbestos legislation in the past, and although the Regulation does not apply to domestic properties, this is still an important development affecting all clients of solicitors in one way or another. Existing legislation already imposes duties to deal with asbestos known to exist. A significant feature of this Regulation is that it forces dutyholders to investigate whether asbestos is present. This will require new assessments where none have been carried out before, or reviewing existing assessments to see if they are still accurate.

Asbestos in the UK

Regulation 4 is significant for the fact that by imposing a new statutory duty upon a section of the population it also creates a right which, in theory at least, anybody will be able to rely upon if they are exposed to asbestos in non-domestic premises. Clients with potential claims against dutyholders will, inevitably, seek advice from solicitors on their rights.

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It is worth mentioning that although asbestos is no longer used in new construction, it is still found in a large number of properties. It can be found in roofing in garages, sheds or agricultural buildings but is also a common component of a wide range of wall and ceiling coverings, floorings and insulation. The message is clear. The potential for exposure to asbestos is still a high one, which is why Regulation 4 is so significant.

Extent of Duty

As with much new legislation the full extent of the duty which has been created is not going to be known until the Regulation has been operating for a while. It will take some time to see how the Regulation works in practice and for it to be considered and interpreted by the Courts. For example, the Regulation states that the dutyholder has to take "such steps that are reasonable under the circumstances" to assess whether asbestos is present. There are certain to be arguments about what "circumstances" are relevant and whether a dutyholder did everything that was "reasonable" in those circumstances. Nor is it clear from the Regulation if different duties will be owed to different groups such as, on the one hand, occupiers and, on the other, visitors to the premises. It also remains to be seen what remedies the Courts will be prepared to give for a breach of the duty. The client's claim could be for repayment of a fine and costs arising out of a prosecution for breach of the Regulation.

Assisting the Dutyholder

The Regulation also contains a general requirement that "Every person shall co-operate with the dutyholder so far as is necessary to enable the dutyholder to comply with his duties under this Regulation". There are no clues in the Regulation about who is likely to be subject to this obligation to assist, nor is there any guidance to deciding what would be "necessary". As with the issue of what steps by a dutyholder are "reasonable", the word "necessary" is going to generate a good deal of argument. An added dimension is that whereas it is going to be easy, relatively speaking, to define in most cases who the dutyholder is, working out exactly who has an obligation to help the dutyholder carry out his duties is likely to prove quite difficult.

Professional Negligence Claims

It is also too early to say exactly what the implications of this new statutory duty will be for solicitors generally and professional negligence claims in particular. It is premature to predict exactly what solicitors will be expected to know about the Regulation and what advice they should be giving but it is already possible to speculate about the type of claims that may arise.

We expect, at some point, to see claims from conveyancing clients against solicitors arguing that they did not know that they were taking on a statutory duty when buying non-domestic premises. If an owner or tenant incurs expense carrying out their obligations as dutyholders, they may try to recover those expenses from the solicitors who acted for them on the purchase. Likewise if clients do not carry out their duty and end up with significant asbestos liability claims against them they may try to be indemnified by their solicitors who they say never advised them at all, or advised them wrongly, about their duty under the Regulation.

Claims may also be made against litigation solicitors who incorrectly advise clients with potential liability claims against dutyholders for allowing them to be exposed to asbestos.

We believe it will be important for solicitors to follow the progress of the Regulation and to develop a working knowledge of it. If clients ask for advice on the Regulation, it should be given with extreme caution especially in the first few months after May 2004.



Please note that this information is not intended to constitute advice or a complete statement of relevant law.

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