

Building Regulation Act: A brief overview of the Avoidance of Damage to Third Party Property Regulations - Subsidiary Legislation 513.02

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In this article, Dr Caruana de Brincat takes a look at the recently promulgated regulations, which deal with the excavation, demolishing and construction of buildings which are adjacent to, or near the property of third parties.

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1. Introduction

This article will shed light on how the Avoidance of Damage to Third Party Property Regulations, (the ‘Regulation’) – Legal Notice 136 of 2019 which entered in force on 25th June 2019 – will impact the development of immovable property, primarily three pillars of the building industry, ergo the excavation, demolishing and construction. The impetus behind the drafting of SL 513.02 was the government’s pledge to control and:

*ensure that before the start of any type of works consisting of any demolition, excavation, or construction, methodologies that are technically secure are prepared in order to minimise the risk of damages to third party property or injury to persons that may result through the proposed works.*¹

The legislator emphasised that the provisions of the Regulation shall in no way be construed as having any material bearing on the responsibilities related to the design of buildings and construction activity emanating from other legislative instruments, such as, Article 1638 (1) of the Civil Code², which deals with the duration of liability of contractor and architect, or Article 328 of the Criminal Code³, which deals with criminal liability.

The Regulation defines key terms such as Construction Work ‘*which*

1 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – Article 2.

2 Civil Code Chapter 16 of the Laws of Malta – Article 1638 (1) ‘*If a building or other considerable stone work erected under a building contract shall, in the course of fifteen years from the day on which the construction of the same was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, the architect and the contractor shall be responsible therefor.*’

3 Criminal Code Chapter 9 of the Laws of Malta – Article 328 ‘*Whosoever, through imprudence, negligence or unskilfulness in his trade or profession, or through non-observance of any regulation, shall cause any fire or any damage, spoil or injury as mentioned in this sub-title (a) if the death of any person is caused thereby, to the punishments established in article 225; (b) if any grievous bodily harm with any of the effects mentioned in article 218 is caused thereby, to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37); (c) if any grievous bodily harm without any of the effects aforesaid is caused thereby, to imprisonment for a term not exceeding three months or to a fine (multa) not exceeding one thousand and one hundred and sixty-four euro and sixty-nine cents (1,164.69); (d) in any other case, to imprisonment for a term not exceeding three months or to a fine (multa) or to the punishments established for contraventions: Provided that in the cases referred to in paragraph (d), except where damage is caused to public property, other than a motor vehicle, proceedings may be instituted only on the complaint of the injured party: Provided further that the proceedings referred to in paragraph (d) with respect to damage caused on a motor vehicle, which is public property, on the complaint of the head of the Government department in charge of the said vehicle, the provisions of article 374(d) shall not apply to those proceedings after the complainant will have confirmed his complaint under oath before the court and the absence of the complainant from attendance in court in any stage of the proceedings shall in no way affect the lawfulness of the procedures nor be considered to constitute the withdrawal of the complaint as long as such absence occurs at a stage which is subsequent to the said confirmation on oath of the complaint by the complainant.*’

*means that it includes all construction works carried out on the structure of the fabric of a building or on a civil engineering structure, including alterations on existing buildings, demolition or excavation activities taking place on a development site, streets, open spaces and shall also include tunnelling works’,*⁴ ‘Developer’ ‘means the person in whose name the application had been submitted for a development permit, in accordance with the provisions of the Development Planning Act in accordance with the provisions of the regulations made thereunder’⁵ and ‘Site Technical Officer’ means a person carrying out the duty or duties derived from the provisions of these regulations. Such person shall be: (a) nominated by the contractor and shall be approved by the Perit in Charge of the Project; (b) competent as provided in the Third Schedule; (c) responsible for the enforcement of the method statement covering the works which the contractor who nominates him is responsible for. (d) present on-site whenever decisions are being taken that influence the risk of damage to third party property or injury to persons that may be caused by the works’⁶ and Perit in Charge of the Project ‘means the perit that is going to assume responsibility for the execution of the project approved in the development permit’.⁷ Such definitions are intended to create certainty and avoid doubt.

The legislator provided an exhaustive list as to the scenarios where these regulations shall be applicable. Article 4 of the Regulation explains that the regulation shall apply to any construction works which involve: (a) excavation, that in its affected zone includes third party property; or (b) the demolition or removal of any existing structure, or roof or structure abutting with, or immediately adjacent to, or underlying or overlying any property belonging to or occupied by third parties; or (c) the building of additional storeys or load-bearing walls or structures over any property belonging to or occupied by third parties; or (d) the construction of new buildings or additional storeys adjacent to existing third party property.⁸

4 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – Regulation 3.

5 *ibid* 5.

6 *ibid* 5.

7 *ibid* 5.

8 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 4 – [omissis] ‘(a) excavation which is underlying, or contiguous to or within a distance of 2.5 metres to any existing building, earth-retaining or water-retaining structure belonging to or occupied by third parties; or (b) the demolition or removal of any existing wall, or roof or structure abutting with, or immediately adjacent to, or underlying or overlying any property belonging to or occupied by third parties; or (c) the building of additional storeys or load-bearing walls or structures over any property belonging to or occupied by third parties; or (d) the construction of new buildings or additional storeys adjacent to existing third party property Provided that the Director may decide that, notwithstanding that a construction activity does not fall within any one of the parameters listed in this regulation, it shall still be required to comply with all the requirements of these regulations. Such a decision shall be taken following a request made by a third party whose property may be affected by such construction activity. The decision of the Director is to be communicated to the developer and to the third party making the

2. Duties and Responsibilities of the *Perit* in Charge of the Project

The *Perit* in Charge of the Project is subject to several duties and responsibilities. One of the preliminary tasks entrusted to the *Perit* in Charge of the Project is to analyse, assess and consider whether the proposed construction work falls within the parameters of regulation 26 of the Regulation; if it falls within the parameters of regulation 26, the proposed construction work is exempt from regulations 4, 5, 6, 7 and 8 of the Subsidiary Legislation.⁹ If such construction work is exempt from the latter regime, in practice, the *Perit* in Charge of the Project needs to access the Planning Authority's electronic applications system, download the '*Declaration – Not Affecting Third Party*', fill it and submit it through the same page.

In the event that the construction work is not exempt from these provisions, the *Perit* in Charge of the Project needs to fulfil all obligations arising out of the exempted regulations listed under regulation 26 of the Regulations under discussion. This means that the construction work would qualify to be one of the scenarios mentioned under regulation 4 of the Regulation (above mentioned), moreover the Contractor,¹⁰ in accordance with regulation 5 of the Regulation, shall appoint a '*Site Technical Officer after he has been approved by the Perit in Charge of the Project*'.

The Regulations require the submission of the following documents; (i) a Site Management Responsibility Summary Form also needs to be separately uploaded, as this form needs to be made available to the public, (ii) an insurance cover of €750,000 to cover third parties that may be affected by the works, (iii) a bank guarantee which value thereof shall be of €3,000 for each storey of developed third party property or properties which is or are contiguous to a development site, for the first five properties and a further one €1,000 for each additional contiguous property, up to a maximum €40,000, and (iv) two weeks before the commencement of any works of excavation, demolition or construction, the *Perit* in Charge of the Project shall submit the relative method statement, which may be accompanied by photos/drawings to be uploaded as appendices, duly cross-referenced to

request, by registered mail.

⁹ Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – Article 26 - '*When before the start of works, the perit in charge of the project certifies, after giving clear reasons, that the structural interventions will not affect third party property, the provisions of regulations 4, 5, 6, 7 and 8 do not apply [omissis]*'.

¹⁰ Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 2 – '*“contractor” means the person engaged by the developer in order to execute the works.*'

the main report. Moreover, the latter is to be accompanied by a report on the condition of the property that has been issued in the English language only.¹¹ The method statement can be reviewed by any interested third party, *‘provided the third party submits a detailed report drawn up by a perit indicating the technical reasons which may be of concern to the safety of such third party or his property’*.¹²

Interestingly, *‘the method statement shall be prepared by a perit in collaboration with the site technical officer and the contractor who are responsible for the works covered by such statement’*.¹³

3. Rights of Third Parties

Third parties¹⁴ are the impetus behind the Regulation. The latter have the right to receive a copy of the condition report relating to their property and have the right to view the method statement uploaded by the *Perit* in Charge of the Project onto the Planning Authority’s electronic applications system.

When a third party is in disagreement with the contents of such method statement, the third party is to engage a *perit* or lawyer of his choice who will have the option to submit a Contestation of Works Method Statement or Contestation of Condition Report, as applicable, within the specific permit case.¹⁵

Such contestations will be reviewed by the Building Regulation Office

11 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – Regulation 7(8) *‘Where a third party owner or occupant refuses entry to the developer’s perit, or where the perit in charge of the project is unable to obtain access to contiguous property, or where the identity of the owner or, occupant of contiguous property is unknown or cannot be traced, for the purpose of preparing the condition report, such perit shall make a written declaration giving details of his attempts to be allowed access to the neighbour’s property, including the notification or attempts of notification by registered mail, for the purpose of preparing the condition report and include such details in the method statement’*.

12 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 7(2).

13 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 8(1).

14 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 2(1) *‘The scope of these regulations is to ensure that before the start of any type of works consisting of any demolition, excavation, or construction, methodologies that are technically secure are prepared in order to minimise the risk of damages to third party property or injury to persons that may result through the proposed works’*.

15 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 19 – *‘Members of the public or their appointed perit or lawyer may submit to the Director contestations on any method statement, or complaints relating to the lack of safety of a construction activity: Provided that the Director may decide not to consider complaints or contestations which do not provide a technical justification for the contestation or concern’*.

which may request the *Perit* responsible for the Project to carry out any necessary amendments, in collaboration with the *perit* representing the third party.

The third-party is also safeguarded by the Regulation in situations of damage to contiguous properties, which may include damage that may result from the infiltration of water. The Regulation provides that it is the developer that shall take all reasonable precautions to ensure that such matters do not occur. Hence, in case of contestation, the legislator seemed to have shifted the onus of proof on the developer to provide evidence that he did his utmost to safeguarded the contiguous properties.

4. Salient point of SL 513.02

The salient points of this Subsidiary Legislation can be briefly analysed and summarised.¹⁶ One of the shifts is the right to third parties to object to a method statements that were prepared by a *Perit* responsible for the Project.

The enforcement of the method statement rests with the Site Technical Officer which officer shall be nominated by the contractor and shall be approved by the *Perit* in Charge of the Project, competent and be present on-site whenever decisions are being taken that influence the risk of damage to third party property or injury to persons that may be caused by the works. Nevertheless, the implementation of the measures contained in the said method statement rests with the contractor.

Another cardinal point to be highlighted is that not all works might be affected by the Regulations. As explained earlier, in the event that the works fall outside the scope of the regulation, hence subject to regulation 26, the *Perit* in Charge of the Project may elect to issue a declaration in terms of such article ergo the '*Declaration – Not Affecting Third Party*'. This provision might give rise to undue pressure posed on *Perit* in charge of the Project to issue such declaration merely to avoid the scope of the regulation.

Finally, the legislator opted to introduce a hefty punitive financial burden in the form of fines. By way of example, regulation 21 (4) states that:

16 This article cannot be taken or considered as a full illustration of the Building Regulation Act Chapter 513 and Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta. Building and Planning Regulation are two of the areas which are vastly regulated by several legislative Acts. (This article was written on the 25th June 2019). The article is for information purpose only and is not intended as a legal or other professional advice. For further information email natalino@caruanadebrincat.com.

*‘any person who fails to abide by the provisions of an enforcement notice in terms of these regulations or to cease operations as requested in the notice or adopts any interim measures without the permission of the Director or in any other manner acts in contravention of article 14 and 15, shall be guilty of an offence in terms of these regulations and shall be liable, on conviction, to a fine (multa) not exceeding €50,000 and in the case of a continuing offence, to a further fine (multa) of €1,000 for each day the offence continues’.*¹⁷

All fines provided for in this regulation shall be due to the Government as a civil debt and following the service of a judicial act (which can be a mere judicial letter), in terms of Article 466 of the Code of Organization and Civil Procedure Chapter 12 of the Laws of Malta,¹⁸ which unless opposed successfully within the twenty-day limit imposed, constitutes an executive title.. In a nutshell, the person subject to such administrative fines shall, if intending to oppose, must do so *‘within a period of twenty (20) days from service upon him of the said declaration oppose the claim by filing an application demanding that the court declare the claim unfounded’.*¹⁹ The latter application shall be served upon the head of department, who shall be entitled to file a reply within a period of twenty (20) days. The court shall appoint the application for hearing on a date after the lapse of that period.

5. Conclusion

The spirit of the Regulation is to safeguard third parties from situations where their property would be in harm’s way following a number of incidents across Malta.²⁰ It is of paramount importance that those persons involved in demolition, excavation and construction acquaint themselves with these Regulations and their obligations thereunder, and abide by the same in order to remain on the correct side of the law.

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17 Avoidance Of Damage To Third Party Property Regulations, 2019 - SL 513.02 of the Laws of Malta – regulation 21 et seq.

18 Chapter 12 of the Laws of Malta

19 Code of Organization and Civil Procedure Chapter 12 of the Laws of Malta - Article 466

20 Vide article published on the Malta independent on-line Friday, 14 June 2019 <http://www.independent.com.mt/articles/2019-06-14/local-news/Demolition-and-excavation-suspension-is-it-really-so-6736209551>.

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