



## SAFETY FILES

**T**he Regulations on foot of which Safety Files must be prepared and kept are the Safety, Health and Welfare at Work (Construction) Regulations 1995 ('the Regulations') which came into effect on 1 March 1996. The Regulations were made on foot of the Safety Health and Welfare at Work Act, 1989 ('the Act'). The words Contractor, Client, Project Supervisor, and Safety File are defined in the Regulations and are intended to have the same meaning in these guidelines where used with capital letters. It should be borne in mind that 'Construction Work' under the Regulations means nearly everything you could think of in relation to a building – conversion, fitting-out, repair, commissioning, upkeep, redecoration etc. 'Structure' is equally widely defined.

These guidelines ignore any possible direct operation of the relevant EU Directive and concentrate solely on the Regulations as introduced in Ireland. There are subtle differences between the 1992 Directive and the Regulations which may give rise to legal argument in the future, but while a commentary on this might be very interesting it is not really appropriate for this document.

A Client who commences a Project after 1 March 1996 is required by the Regulations to appoint a Project Supervisor for the design stage and a Project Supervisor for the construction stage. There is a duty to appoint a competent person as Project Supervisor. Where more than one contractor is engaged in a Project, the Project Supervisor (construction stage) must have a Safety File prepared and on completion of the project must give this to the Client. The Client must keep the Safety File available for inspection by any person who may need information in this Safety File for the purpose of that person complying with duties imposed on them under the relevant statutory provisions. This includes the Act and/or Regulations on Health and Safety made under the Act or the European Communities Act, 1972. The obligation to keep the Safety File is open ended and is not just to keep it for a particular period.

The Safety File is a reference document and must contain relevant health and safety information to be taken into account during any subsequent construction work following completion of the Project. The Safety File is akin to a safety maintenance manual. The intention is that the Client would be given the Safety File on completion of the Project and would arrange to carefully 'keep' it and would transfer the original Safety File to any future purchaser of the completed Project. It is envisaged that the Safety File would be updated as a building is altered but of course the work on the building (such as a fit-out or an extension) may itself be a Project and a new Safety File may have to be prepared for it. It may be thought that any new Safety File which involves the alteration of a building should be retained by the same person who is 'keeping' the Safety File for the original construction of the building. The Regulations do not deal with this. If the new Project is a 'fit-out' and is carried out by a tenant, the owner of a building will be obliged by the Regulations to 'keep' the Safety File prepared in connection



with the construction of the building while the tenant will be obliged by the Regulations to 'keep' the Safety File prepared in connection with the fit-out of the same building.

The Client can give the Safety File in respect of a Project to a successor in title whereby the successor is statutorily obliged to 'keep' the Safety File available in the same way as the Client was. Giving the Safety File to a successor in title discharges a client from the obligation to 'keep' the Safety File available. The Client is not obliged to give the Safety File to a successor in title. That may be what was intended but the Regulations do not require this. Neither it seems is a successor in title obliged to accept delivery of the Safety File. We would expect purchasers to insist on getting the Safety File because it will be an asset which will make it easier to alter the building or its services, and will facilitate the purchaser in fulfilling its duties under the relevant statutory provisions.

There is of course an indirect 'encouragement' to a Client to hand over the Safety File to a successor in title. The Client is obliged to 'keep' the Safety File available forever whereas if it is given to the successor in title the obligation to 'keep' the Safety File is discharged. It remains to be seen how effective this will be where the person charged with 'keeping' the Safety File is a company which has got into financial difficulties and the Safety File cannot be found when the building is being sold.

### **Sanctions**

Where the Act or the Regulations impose a requirement on any person (whether an individual or a body corporate), failure to comply with that requirement leaves the person open to prosecution by the Health and Safety Authority.

A person convicted on foot of a summary prosecution in the District Court can be fined up to £1,500. On indictment there is no limit to the fine and there is power to impose imprisonment of up to two years in certain circumstances.

Section 48(19) of the Act states that where an offence by a Corporate Body 'is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of the director, manager, secretary or other similar officer ... he (or she) as well as the Body Corporate shall be guilty of that offence'.

The Act obliges all employers to identify the hazards and assess the risks to safety and health in the workplace as part of a Safety Statement which they are obliged to prepare. Section 12 of the Act also requires that the Directors' Report under section 158 of the Companies Act, 1963 must contain an evaluation of the extent to which the policy in a Safety Statement has been fulfilled during the period of time covered by the Report. The detailed provisions included in the Regulations under the Act clarifies the obligation on the directors, and

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directors should note that, apart from criminal prosecution for non-compliance with the Act or Regulations, there is also the possibility of disqualification under the Companies Act, 1990 for breaches of health and safety laws. A director has been disqualified under similar UK legislation.

In our opinion, developers and builders who neglect to prepare and keep a Safety File for a Project are unlikely to receive sympathetic treatment by the courts.

A typical Safety File will contain:

1. The most recent revisions of construction drawings of the structure or structures
2. Specification detailing methods of construction
3. Specification detailing fire safety features
4. As built drawings showing services in the structure or structures including wiring, plumbing, gas etc
5. As built drawings of the layout of services outside the structures including wiring, plumbing, gas etc
6. Any information available on materials used which are known to be hazardous
7. Instructions for routine maintenance especially where it may require particular safety measures
8. Maintenance manuals for all plant and equipment installed
9. Names and addresses of suppliers of plant and equipment installed
10. Names and addresses of contractors or suppliers of various important elements in structures (such as windows, balconies, handrails, fire alarm etc).

Solicitors should bear in mind that a typical Safety File for a substantial office building may be large enough to fill a large suitcase and may present certain logistical problems if the Safety File is being handed over on the closing of a sale. It is important however that solicitors ensure that the handover of the Safety File is dealt with correctly and that the handover is documented.

The arrangements envisaged by the Regulations are fine in relation to a self-contained commercial property such as an office block or factory building and in relation to those developments the Regulations are working quite satisfactorily. This is the first attempt to set out guidelines for practitioners.

**New commercial buildings**

A solicitor acting in connection with a new commercial building should:

1. Check if the Regulations apply
2. If they do, should make sure that a Safety File is going to be available to be handed over to the purchaser



3. Try to arrange to have the Safety File handed over by the 'Client' to the purchaser on the completion of the purchase. Make sure that a documentary record is made of the fact that the Safety File was handed over so as to be able to establish this as a fact should it ever become an issue; advise the purchaser as to the obligations to keep the Safety File available and to ensure that it is updated to reflect all relevant alterations to the building. A specimen document to record the handover is set out in the appendix. This document envisages a handover from the Project Supervisor (construction stage) to the Client and then on to a purchaser at one meeting. The handover may take place on separate occasions and the specimen can be easily adapted to meet the particular circumstances. Some solicitors may prefer to deal with each handover separately
4. If the entire building is being leased include provisions in the lease obliging the lessee to:
  - a) provide updates for the Safety File in relation to all relevant alterations to the building – including fit-outs
  - b) provide a duplicate copy of a Safety File in respect of any work which is itself a Project carried out to the building by the lessee in respect of which the lessee is obliged to keep the Safety File
  - c) hand over any copy Safety File given to the lessee by the owner together with any updates to the same and any original Safety File in respect of any Project carried out to the building by the lessee to a successor in title – ie, on a surrender, assignment or forfeiture of the lessee's interest in the lease

A solicitor acting for a lessee may seek to amend the lease to oblige the lessor to make the Safety File available when required. It can do no harm to include this provision but this is not really necessary as a lessor is obliged by the Regulations to make the Safety File available to anyone who needs information from it. A lessor may deliver the Safety File to a lessee on the granting of a lease although it is felt that most owners will not do this because of the risk of it not being available when the owner needs it in connection with a sale. For example, if the lessee is a company and goes into liquidation it may be difficult for an owner to get anyone to take an interest in delivering back the Safety File. If, however, a lessor does deliver the Safety File to a lessee it would seem reasonable to provide in the lease, or in a separate undertaking for safe custody, an obligation on the lessee to update the Safety File to reflect all relevant alterations to the building, to 'keep' it safe and to make it available to the lessor on any change of ownership so that the lessor can hand it over to a successor in title thereby discharging the obligation to 'keep' the Safety File. It should also oblige the lessee to make the Safety File available to any other person entitled to information from the file for the purpose of complying with duties imposed under the Regulations. It is unlikely that a lessee would be prepared to keep a lessor indemnified against any failure to do any of this. Also it should be borne in mind that delegating the task to the

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lessee (on the basis that it may perhaps be the logical person to look after the Safety File) does not remove the obligation from the person charged with the responsibility for the time being to 'keep' the Safety File.

5. Where a number of leases are being made (for example in the case of a shopping centre) it will probably be impractical to give a copy of the Safety File to each lessee and the suggested provisions to be included in the leases will require to be altered accordingly.

A solicitor acting for a vendor of a new building should immediately check whether the vendor wishes to deliver the Safety File to the purchaser and if so that he will be able to deal with any of the above requirements which are relevant and should provide in the contract that the purchaser will accept delivery of the Safety File.

**New apartment block**

The usual contract providing for the sale of the freehold of the entire development and the common areas when the last apartment is sold should include a provision that a Safety File will be handed over to the management company on completion of the sale. It should go on to impose an obligation on the management company to accept delivery of the Safety File. At contract stage solicitors for purchasers should ask for confirmation that a Safety File is being kept and will be handed over to the management company in due course. The location of the Safety File at the date of completion is not important because during the course of construction it would normally be kept in a site office which will usually disappear when the building work is finished. Solicitors should however insist on being told who the Client is and where the Safety File will be kept by the Client until it is handed over to the management company. The Client will normally be the developer.

**New housing**

In our opinion it is clear that the development of one hundred houses is one 'Project' within the meaning of the Regulations. It has been argued that a development can comprise a number of different 'Projects'. We agree that this may be possible in some situations but we do not accept that it could relate to each house in a housing development.

Take for example a typical house building project. A house builder we will call Surebild Limited is involved in the development of a site by building 100 houses thereon and selling the same. In our opinion, the Project is the overall development – that is, the building of 100 houses and their infrastructure. The Client is Surebild Limited and the Project Supervisor it is obliged to appoint will prepare the Safety File and give it to Surebild Limited which is obliged by the Regulations to 'keep' the Safety File available. A typical housing project (of 100 houses) would include the following:

1. The house plots which will be individually conveyed to house purchasers
2. Roads, footpaths, grass margins
3. Public open space.



The public open space is often just dedicated to the public with the freehold remaining with the developer. The roads, footpaths, kerbs and grass margins are 'taken in charge' by the local authority and the freehold interest often remains in the developer also. There is therefore no 'successor in title' of the entire Project.

We can see no basis on which a purchaser of one house of the 100 houses forming part of the Project is entitled to a copy of the Safety File nor is Surebild Limited obliged to give it to a house purchaser. A house purchaser should clearly be entitled to see the file that Surebild Limited is obliged to keep provided that they 'need information' from the Safety File.

How can Surebild Limited discharge its liability to 'keep' the Safety File by giving it to someone else? Clearly if it gave every house purchaser a copy of the entire file and also gave a copy to the local authority as successor in title to the roads, footpaths, grass margins and open spaces it should be regarded as having discharged its obligations. This may not be practical. It certainly should be considered, because the obligation to 'keep' a proper Safety File and have it available for inspection is quite unattractive to a developer (and perhaps also to the other parties concerned) on a long-term basis.

From a common-sense point of view one could argue that a house purchaser should get a 'mini-safety file' containing a copy of all the relevant information regarding his own house and so much of the roads and common areas as may be used for providing relevant services to the house. This is in effect what is suggested by the Health and Safety Authority in their guidance notes dated October 1996 (page 48). However, this almost certainly does not discharge Surebild Limited from its obligation to 'keep' the Safety File. There is little point in going to the trouble of giving these mini-files to house purchasers unless it is going to remove the obligation from Surebild Limited to 'keep the Safety File' as well. It could be argued that if a mini file is given to purchasers it will save the Client having to produce the Safety File for that person when they want to alter the house. However, it is just as likely that the purchaser will have lost the mini-file by the time it is needed and the fact that a developer who is a Client could demonstrate that he had given all the necessary information to the purchaser already would not discharge the obligation to keep the original Safety File, and make it available to any purchaser or subsequent owner of a house who needs information from it.

In our opinion the Regulations need to be changed to enable a housebuilder to discharge itself from its obligations to 'keep' the Safety File if it gives each house purchaser anything a house purchaser should reasonably require to know regarding the house they purchased which should contain and gives the local authority such details as it should reasonably require to know regarding the roads, footpaths, open spaces etc such as 'as built' drawings of the layout of services or suchlike.

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For the moment solicitors acting for house purchasers should try to establish at contract stage that they will be given on closing a letter confirming who the 'Client' is and where the Safety File will be kept and may be inspected. A letter confirming this should be obtained on closing.

**What will happen if the Safety File is lost?**

A Safety File is obviously a useful document which the owner of a building will try to keep safely and which a purchaser would like to get. However, it is inevitable that from time to time Safety Files will be lost or not kept up to date. A building should not be unsaleable just because its Safety File is not available, or is deficient. A person who purchases a building in respect of which the Safety File is not forthcoming is not liable to any sanction. A Safety File not being available will result in more care and extra cost having to be taken or incurred in altering the building. There is no obligation on the purchaser to do their best to replace the Safety File although that may be a good idea if it is at all possible. If a Safety File is fully or partly destroyed solicitors should try to record what happened and this record should be placed with the deeds for future reference. The preparation of a Safety Statement may be more difficult in the absence of a Safety File.

**What should solicitors advise purchasers in relation to Safety Files?**

Solicitors should advise purchasers to get the Safety File in relation to a building checked as part of their pre-contract 'due diligence'. The best person to examine the Safety File on behalf of the purchaser would be whoever is going to survey the building for him. The surveyor would need to be briefed with the planning history of the building so as to see if there are any obvious omissions from the Safety File, and the survey should extend to the areas of safety, health and welfare. Solicitors should leave the examination of Safety Files to persons who have the necessary training.

**Should solicitors for purchasers seek certificates of compliance in relation to Safety Files as they do in relation to planning?**

We do not recommend that solicitors should seek 'certificates of compliance' to confirm that Safety Files contain everything they should contain and/or that it has been updated to have regard to all alterations made to the building or its services.

**Should the Law Society General Conditions of Sale be altered to provide a warranty by the vendor as to compliance with the Regulations?**

We do not recommend that the General Conditions of Sale should include a warranty that the Safety File or Safety Files are complete.



**Appendix**

(Specimen memorandum to record handover of Safety File)

Block:

Re: Safety File.

This memorandum is dated the ..... day of ..... 19 .....

Parties:

1. AB of [ ..... ] (hereinafter called “the Project Supervisor (Construction Stage)”)
2. .... LIMITED having its registered office at .....(hereinafter called “CD”)
3. EF of [ ..... ] (hereinafter called “the Purchaser”)

WHEREAS:

1. The Regulations on foot of which Safety Files must be prepared and kept are the Safety, Health and Welfare at Work (Construction) Regulations 1995 (the Regulations) which came into effect on the 6th March 1996. The Regulations were made on foot of the Safety Health and Welfare at Work Act 1989. The words Client, Project, Project Supervisor (Construction Stage), and Safety File are defined in the Regulations and are intended to have the same meaning in this memorandum where prefixed with capital letters.
2. CD is in the course of carrying out a development which includes the erection of an office building with ancillary facilities (the Project) on the site known as Block ..... (the Property).
3. CD is the Client within the meaning of the Regulations and appointed AB to be the Project Supervisor (Construction Stage) on foot of its duty under the Regulations.
4. The Project Supervisor (Construction Stage) in accordance with his duties under the Regulations prepared a Safety File appropriate to the characteristics of the Project containing relevant health & safety information to be taken into account during any subsequent construction work following completion of the Project and made adjustments to the Safety File where required to take account of the progress of the work and any changes which occurred and the Project having been completed wishes to deliver the Safety File to CD as the Client as required by the Regulations which Safety File comprises the documents detailed in the Schedule (The Safety File).
5. CD has agreed to dispose of its interest in the Property involved in the Project and wishes to deliver The Safety File for the Project to the Purchaser so that the Purchaser will be able to keep The Safety File available in accordance with its duties under the Regulations.

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NOW IT IS WITNESSED BY THIS MEMORANDUM:

1. That immediately prior to the execution hereof the Project Supervisor (Construction State) delivered The Safety File for the Project to CD (the receipt whereof CD hereby acknowledges).
2. That immediately after receiving possession of The Safety File CD procured the delivery of The Safety File for the Project to the Purchaser, (the receipt whereof the Purchaser hereby acknowledges).

SCHEDULE

(SET OUT CONTENTS OF THE SAFETY FILE HERE)

IN WITNESS whereof the parties hereto have hereunto set their hands or affixed their seals the day and year first above written.

SIGNED by the PROJECT SUPERVISOR (CONSTRUCTION STAGE) in the presence of:

PRESENT when the Common Seal of CD was affixed hereto:

PRESENT when the Common Seal of THE PURCHASER was affixed hereto: