



JONES DAY
COMMENTARY

THE CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2007—SOME KEY CHANGES TO HEALTH AND SAFETY LEGISLATION AFFECTING CONSTRUCTION PROJECTS IN GREAT BRITAIN

Since 31 March 1995, the Construction (Design and Management) ["CDM"] Regulations 1994 (the "Regulations") have applied to health and safety on construction projects in Great Britain. The purpose of the Regulations is to improve the health and safety record on construction sites by requiring all parties involved in the process of design and construction to take responsibility for health and safety standards. The Regulations set out to achieve better planning, design and management of construction projects and thereby reduce the levels of fatalities and accidents that occur on construction sites.

On 6 April 2007, a new set of Regulations ("CDM 2007") came into force which contain some significant changes from CDM 1994. CDM 2007 will be accompanied by a new Approved Code of Practice which helps to explain CDM 2007.

This *Commentary* sets out the main changes brought about by CDM 2007, how these changes impact

upon the key individuals in the CDM regime and the transitional provisions between CDM 1994 and CDM 2007.

CDM 2007—THE KEY CHANGES

The main changes can be summarised as follows:

- CDM 2007 imposes more onerous duties upon clients, who are no longer entitled to appoint a "client's agent";
- the role of "planning supervisor" under CDM 1994 has been amplified, with the effect that this role will now be carried out by the "CDM co-ordinator";
- every duty holder on a project (i.e., clients, designers, CDM co-ordinator and contractors) will be subject to wide-ranging duties of "competence", "co-operation" and "co-ordination";

- the “*health and safety plan*” created under CDM 1994 will now be known as the “*construction phase plan*”; and
- there is greater scope for civil liability (in addition to criminal liability) for breach of CDM 2007.

WHEN IS A PROJECT NOTIFIABLE?

CDM 2007 requires that certain projects are notified to the Health and Safety Executive (“HSE”). The HSE is the government body which enforces health and safety laws in the construction industry.

A project is notifiable to the HSE if the construction phase is likely to involve more than 30 days or 500 person-days of construction work. Notifiable projects require the appointment of a CDM co-ordinator and a principal contractor. However, under CDM 2007, even if a project is not notifiable, the more general requirements of CDM 2007 will still apply.

THE THREE “CS” –COMPETENCE, CO-OPERATION AND CO-ORDINATION

Every duty holder under CDM 2007 must:

- be **competent** to fulfil his duties, meaning that an appointor shall not appoint an appointee unless he has taken reasonable steps to ensure that the appointee is competent. By the same token, an appointee must not accept an appointment unless he is sure of his own competency;
- **co-operate** with everyone else on the same project and seek the co-operation of others; and
- **co-ordinate** their activities with one another in a manner which ensures, so far as is reasonably practicable, the health and safety of those carrying out construction work and those affected by it.

These duties are a further reflection of the collaborative working practices which are being encouraged throughout the construction industry in Great Britain.

THE CLIENT

One of the most important changes is that the client will no longer be able to appoint a client’s agent to assume its liability under CDM. This had caused problems and confusion

in the past, as some clients were accused of trying to use this as a means of discharging their health and safety responsibilities. In addition, a client was entitled to use an agent only in respect of its CDM duties, *not* in respect of its other health and safety duties, *i.e.*, those duties under the Health and Safety Work Act 1994 which cannot be delegated, and this caused confusion for some clients.

The client’s main duties are as follows:

Key Appointments. As soon as practicable after initial design work has commenced (and before any significant design development), the client must appoint the CDM co-ordinator. The client must also appoint a principal contractor as soon as practicable. The CDM co-ordinator and principal contractor must remain in place until the project is completed.

Provision of Information. The client must provide all potential contractors with all relevant health and safety information in its possession or which may reasonably be obtained by the client. This includes:

- any information about or affecting the site or the construction work to be undertaken on it;
- information concerning the proposed use of the structure as a workplace;
- the minimum amount of time prior to the construction phase which will be allowed to contractors for planning and preparation for construction work;
- earlier design work in relation to an existing structure; and
- information in any existing health and safety file.

The information should, to the extent possible, identify hazards, particularly those which a contractor could not reasonably be expected to anticipate or identify. The information should be provided in a “*pre-construction information pack*” which should form part of the tender documentation sent to contractors.

Start of Construction Phase. In respect of notifiable projects, the client must make sure that the construction phase does not start unless:

- (a) the principal contractor has prepared an adequate construction phase plan; and
- (b) the client is satisfied that the requirements as to adequate welfare facilities will be complied with during the construction phase.

Arrangements for Managing Projects. A client should allocate sufficient time and resources and take “reasonable steps” to ensure that suitable arrangements are made for managing the project by each duty holder under CDM 2007.

Additional Responsibilities on Clients. A client who specifies materials or methods of working may also be required to assume liabilities as a designer in relation to those specific matters. If a client manages or carries out construction work, then it may also assume liabilities as a contractor in relation to those specific matters.

The liability for design which is carried out outside Great Britain will rest with the person who commissioned the design, or if he is not established in Great Britain, with the client itself.

THE CDM CO-ORDINATOR

The CDM co-ordinator effectively replaces the planning supervisor who was created under CDM 1994; however, the role has been amplified (although he has been relieved of the duty to prepare the health and safety/construction phase plan, as this is now the responsibility of the principal contractor).

The CDM co-ordinator is a key appointment by the client and his main duties are as follows:

- (a) to notify the HSE about the project;
- (b) to advise and assist the client with its duties, such as the duty to appoint competent designers and contractors; the duty to ensure that adequate arrangements are in place for managing the project; and the duty to ensure that the construction phase does not start until the principal contractor has prepared a suitable construction phase plan and welfare facilities are in place;
- (c) ensure that suitable arrangements are made and implemented for the co-ordination of health and safety measures during planning and preparation for the construction phase;
- (d) take all reasonable steps to identify and collect the pre-construction information needed by designers and contractors, advise the client if surveys need to be commissioned to fill any gaps, and provide the information to designers and contractors;

- (e) liaise with the principal contractor regarding the contents of the health and safety file, the information which the principal contractor needs to prepare the construction phase plan and any design development which may affect planning and management of the construction work;
- (f) take all reasonable steps to ensure that designers comply with their duties;
- (g) take all reasonable steps to ensure co-operation between designers and the principal contractor during the construction phase in relation to any design or change in design;
- (h) prepare, review and update the health and safety file; and
- (i) pass the health and safety file to the client at the end of the construction phase.

The HSE provides useful guidance on how to assess competence when appointing a CDM co-ordinator and there are also organisations, such as the Association for Project Safety, that have a list of trained CDM co-ordinators.

DESIGNERS

Designers are all those who have some input into design issues in respect of a project. This includes architects and engineers who contribute to, or have overall responsibility for the design; surveyors who draw up specifications; contractors who carry out design work as part of a design-and-build contract; and anyone with authority to specify or alter the specification of designs to be used.

Designers must now avoid risks to anyone using a structure designed as a place of work, by reference to the workplace regulations. This should be welcomed by clients, who might otherwise find that their completed building does not comply with the workplace regulations.

THE PRINCIPAL CONTRACTOR

Under CDM 1994, the planning supervisor was responsible for the preparation of the health and safety plan and the principal contractor was responsible for its development. Under CDM 2007, the preparation and development of the “construction phase plan” are now fully the responsibility of the principal contractor. The CDM co-ordinator must liaise

with him regarding information that he needs in order to prepare the construction phase plan and advise the client on the suitability of the initial plan, but responsibility for the construction phase plan rests with the principal contractor. However, what has not changed is that a suitable plan must be in place before any construction work begins.

The duties of a principal contractor do not change materially. They need to be appointed only if the project is notifiable.

TRANSITIONAL PROVISIONS

- Where a planning supervisor and principal contractor have already been appointed under CDM 1994, they will automatically be treated as having been appointed as the CDM co-ordinator and the principal contractor under CDM 2007, unless an alternative arrangement is made.
- A client has until 5 April 2008 to take “reasonable steps” to ensure that its CDM co-ordinator and principal contractor are competent to fulfil the new roles defined in CDM 2007.
- If a client’s agent has been appointed under CDM 1994, the client is obliged to request the agent’s consent (in writing) to act as “client”, and therefore be subject to the duties of a client under CDM 2007 for the remainder of the project. Provided the agent consents, the agent can remain in place until the project is completed, which is subject to a long-stop period of five years from 6 April 2007, which should cover most projects.
- There is no need to re-notify the project to the HSE.

ENFORCEMENT AND LIABILITY

HSE inspectors have various powers, such as informal action when an HSE inspector will explain to a duty holder what is required of him to discharge his health and safety obligations. The inspector may also issue an improvement notice which requires the duty holder to take certain action in order to comply with the applicable law. If an inspector believes that a certain activity will involve a risk of serious personal injury, the inspector may serve a prohibition notice,

prohibiting the activity and not allowing it to be resumed until specified remedial action has been taken. In severe cases this could result in the closure of the site. Finally, in the most serious cases, an inspector may also decide to commence a prosecution. Health and safety is a hot topic and courts are given a wide discretion to punish offenders and deter others. The higher courts have the power to impose unlimited fines and, in some cases, even imprisonment.

SUMMARY

The Approved Code of Practice which accompanies CDM 2007 condemns the excessive paperwork which sadly became a feature of CDM 1994 at the expense of its stated practical objectives. It states:

“Paperwork which adds little to the management of risk is a waste of effort, and can be a dangerous distraction from the real business of risk reduction and management”.

Construction sites are dangerous places and are likely to remain in the public spotlight because of their relatively high incidence of health and safety failures. It is important that clients, contractors and designers are fully up to speed with the duties that CDM 2007 imposes upon them, as CDM 2007 provides for a greater scope for civil liability for breach, in addition to the criminal liability which also exists.

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