CDM 2015 – A lawyer's view

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Topics for today

• Some **old** problems …
  – Is it construction work?
  – Client duties
  – Hiring in help

• Some **new** problems …
  – Competence criteria
  – Lack of paperwork?!

• Some **ongoing** problems …
  – Fee for intervention
Is it construction work?
Is it construction work?

• Press have reported an expansion of construction work

• Definition largely unchanged

• It is VERY wide

• “Grey areas” remain?
Construction v maintenance

- Issues arise from the maintenance of fixed plant
- The definition of “construction” and structure would suggest maintenance of fixed plant falls under CDM
- ACoP said it did not except in limited circumstances – but this has been withdrawn
- HSE guidance is now silent on this point
- It was not the HSE’s intention to widen the application of CDM and redefine what is construction
1. CDM 2015

The Construction (Design and Management) Regulations (CDM 2015) came into force on 6 April 2015.

HSE has received many enquires on CDM 2015 and we will be updating our webpages with further information in due course. In the meantime, here are a couple of answers to some frequently asked questions.

Maintenance & Facilities Management (FM)

Q. Does CDM 2015 apply to all maintenance work?

A. The definition of maintenance work has not changed. If the task in hand looks like construction work, requires construction skills and uses construction materials, it is construction work. General maintenance of fixed plant which mainly involves mechanical adjustments, replacing parts or lubrication is unlikely to be construction work.

If the maintenance work is construction work, and there is only one contractor, no Principal Contractor (PC) or Principal Designer (PD) appointment is required. If more contractors are brought in, then a PC and PD need to be appointed for that particular project.

All construction work under CDM 2015 requires planning, but the plan for smaller jobs should be simple, short and proportionate to the risks.
Client duties more onerous?

**CDM 2007**
- Client must take “reasonable steps to ensure that that the arrangements made for managing the project … … are suitable …”

**CDM 2015**
- Client must take “reasonable steps to ensure that the Principal Designer and the Principal Contractor comply with their duties”
Duty to check PC is providing adequate welfare facilities?
Client duties more onerous?

HSE Guidance provides some comfort:

“most clients, particularly those who only occasionally commission construction work, will not be experts in the construction process and for this reason they are not required to take an active role in managing the work. However, the client is required to make suitable arrangements for managing the project so that health, safety and welfare is secured”
Client duties more onerous?

The arrangements should include:

“how the client will take reasonable steps to ensure that any appointed principal designer and principal contractor comply with their separate duties. This could take place at project progress meetings or via written updates.”

“On larger projects, the client may value an independent review of standards”
Hiring in help – can you do it?

• Be clear about which roles your organisation may be taking on

• Do you have the “skills, knowledge, experience and organisational capability” to fulfil the role?

• If not, you may need to co-opt in the expertise from another organisation or individuals

• Particular issue for the new PD role – design AND safety expertise required
Principal Designer duties: more than a CDMC?

• **Regulation 11**
  – Must plan, manage and monitor the pre-construction phase and co-ordinate H&S matters
  – Plan work stages and estimate the time required to complete them
  – Take account of the general principles of prevention (construction, maintenance & intended use)
  – Ensure other designers comply with their duties
  – Ensure co-operation between parties
  – Must assist the client in the provision of pre-construction information and provide to others
  – Must prepare the H&S file and ensure that it is reviewed and updated
Hiring in help

• From a practical perspective, you have delegated your duties

• From a **LEGAL** perspective, responsibility stays with you
  
  – HSWA: s.2/s.3 General duties
  
  – MHSWR: Reg. 5 (management arrangements) and Reg 11 (cooperation and coordination)
  
  – CDM Reg 8: general duties to co-operate
Hiring in help

• If they fail, you may face enforcement action

• How are you going to assess whether the contractor or other appointees have the skills, knowledge, experience and organisational capability for the role?
Hiring in help

How are you going to monitor and review performance to ensure they are fulfilling their role?
Hiring in help

• Get the contractual terms in place:
  – a right to terminate the contract for poor health and safety performance
  – a right to review documentation and audit performance
  – Reporting of health and safety performance (on other jobs as well as your own)

• Use them!

• Follow up – close out audit actions and document it
Competence – a change of approach?

Regulation 8 frames individual and organisational competence:

“A designer (including a principal designer) or contractor (including a principal contractor) appointed to work on a project must have the skills, knowledge and experience and, if they are an organisation, the organisational capability, necessary to fulfil the role that they are appointed to undertake, in a manner that secures the health and safety of any person affected by the project”
Competence – paperwork bonfire?

- Appendix 4 of the old ACOP (the competency matrix) has been withdrawn.
- Competence is still a key requirement
- For industry to decide what competent looks like
Competence?
Competency – HSE guidance

• Sensible enquiries should be made about organisational capability to carry out “the work involved”
• PAS 91 “a useful aid”
• In addition make additional enquiries that has sufficient experience and a good track record in terms of health and safety risks – not in construction works!
• Due weight should be given to membership of professional bodies
• Can use third party assessors (eg SSIP) but HSE stress this is not the only way
Competency – third party schemes

• SSIP Core Criteria and PAS91 mirror the old ACOP Appendix 4

• Checking that the appointee is a scheme member is not the end of the story - how will you demonstrate competence for your particular project?

• Even if you do not use a third party scheme, you will need some paperwork to show that you assessed competence.
Lawyers like paperwork!
Lawyers like paperwork

- Conflict between “cutting red tape” and legal defence
- Often the paperwork carries more weight than witness testimony
- How can you prove you checked competence, coordinated works, shared information, carried out the site induction?
Lawyers like paperwork

Good record keeping is essential to defending prosecutions and claims for damages
Guidance and enforcement

• ACOPs have a special legal status
• Old ACOP withdrawn. Will we see a slimmed down version?
• Instead we have:
  – HSE L Series Guidance
  – CONIAC Guidance
  – Tailored guidance
• All relevant to enforcement decision and enforcement action – irrespective of “legal” status
• Important to be aware of and give effect to guidance
Fee for Intervention

- HSE panel review – no viable alternative

- HSE’s intensive inspection campaigns in the construction industry generate large numbers of Notices of Contravention, Improvement Notices and Prohibition Notices

- Allocation between duty holders on construction projects remains complex
Enforcement practice

- Number of prosecutions for breach of CDM 2007 was relatively low

- The most serious accidents will continue to be prosecuted as breaches of the Health and Safety at Work Act 1974 or corporate homicide

- Breaches of CDM 2015 have potential to be seen as “lesser” charges, subject to negotiation between defence lawyers and prosecutors
Enforcement practice

- Historically little enforcement attention directed at clients and CDM coordinators
- Will principal designers and clients under CDM 2015 attract increased scrutiny?
Questions

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