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Albion Chambers REGULATORY NEWSLETTER

Construction (Design and Management) Regulations 2015

In just same way that everyone controlling site work has health and safety responsibilities, anyone advising clients in health and safety matters knows how important the Construction (Design and Management) Regulations 2007 (CDM) have become. At the time of their introduction the Health and Safety Executive (HSE) assured the construction industry that they would help:

- Improve health and safety;
- Have the right people for the right job at the right time to manage the risks on site;
- Focus on effective planning and manage the risk – not the paperwork.

In fairness, they probably have. But this was achieved at a price. The CDM 2007 placed legal duties on virtually everyone involved in construction work: clients, CDM coordinators, designers, principal contractors, contractors and workers. As those who regularly practice in this area can testify, however, this has caught many unsuspecting duty-holders by surprise.

Despite this, seven years after their introduction, few would argue that the CDMs have not had a profound affect; the model of managing risk has now become standard practice in the more organised parts of the construction industry. In contrast, however, a clear case emerged that further changes were needed if this same approach was to be embedded at the smaller end of the industry.

Accordingly, the HSE decreed that minor amendments to CDM 2007 would not achieve the desired affect… significant revisions were needed.

Construction (Design and Management) Regulations 2015

Against this backdrop, on 9 January 2015 the HSE announced that the new Construction (Design and Management) Regulations 2015 would come into force on 6 April 2015 (downloadable at http://www.hse.gov.uk/pubns/priced/l153.pdf). They will apply to all building and construction projects, regardless of the size, duration and nature of the work, and introduce a number of changes:

- Strengthening of client duties;
- Introduction of domestic clients;
- Replacement of CDM Coordinator by a Principal Designer for the planning, managing, monitoring and coordination of pre-construction phase health and safety;
- Principal Designer and Principal Contractor will be required on all projects where there will be more than one contractor working on the project;
- Replacement of explicit requirement for duty-holder competence with need for appropriate information, instruction, training and supervision;
- Change to the HSE's notification level - now only required for projects lasting more than 30 days and involving more than 20 workers simultaneously.

At a glance – key changes

Principal designer. The replacement of CDM coordinator (under CDM 2007) by principal designer means that the responsibility for coordination of the pre-construction phase – which is crucial to the management of any successful construction project – will rest with an existing member of the design team.

Client. The new Regulations recognise the influence and importance of the client as the head of the supply chain and as the party best placed to set standards throughout a project.

Competence. 'Competence' is sub-divided into its component parts of skills, knowledge, training and experience, and - if they are an organisation - organisational capability, in an effort to provide clarity for the industry to assess and demonstrate that construction project teams have the right attributes to deliver a healthy and safe project.

The technical standards set out in Part 4 remain essentially unchanged from CDM 2007 and HSE's targeting and enforcement policy, as a proportionate and modern regulator, also remains unchanged.

Industry guidance

In conjunction with the new CDMs, draft guidance has been produced for the five duty holders under CDM – clients/contractors/designers/principal contractors/principal designers - and one for workers (downloadable at http://www.citb.co.uk/cdmregs). These helpfully set out, in practical terms, what actions are required of any individual fulfilling one those roles in order to deliver a safe and healthy construction project. The Construction Industry Advisory Committee (CONIAC) has written these with small businesses in mind, and it is hard to imagine someone who follows these step-by-step guides not to have a strong case to avoid prosecution, should the unthinkable happen and someone is injured during the construction phase.

Transitional arrangements

The new CDM Regulations were made available before the Regulations came into force on 6 April to help anyone who has duties under the Regulations to prepare in advance. There are transitional arrangements in place that will run for six months from 6 April 2015 to 6 October 2015.

Going forward

According to the consultative document the new CDM Regulations should enable duty holders to "follow the process of a

project more logically" and make the law "simpler and clearer for employers to understand, particularly small businesses". This may well be right. Whether they will "deliver significant savings to businesses" is perhaps more questionable. Either way, the direction that the wind is blowing is clear: managing risk is no longer the preserve of the big players… these new standards are expected to apply across the board. Unless the word gets out, rest assured that we are likely to be encountering many more unsuspecting duty holders amazed that the CDM Regulations applied to them.

Jason Taylor

The new golden ticket

The new cigarette fraud

There is a queue of people trailing out of an unassuming newsagent shop in an unassuming city street. Possibly a scene from Charlie and the Chocolate Factory, but in modern day Britain more likely to indicate that there has been a fresh delivery of cheap, illegal tobacco.

The crowds would indicate a large and ready supply, but when the local Trading Standards team descend upon the shop, under the till they find just a few stray packets of "Jin Ling" cigarettes and a pouch of "Amber Leaf" tobacco with a Polish health warning. So what is the story?

Illegal tobacco is big business, we have known that for many years and whilst the Crown Courts of Kent and beyond may still be dealing with the "classic" cigarette importation frauds, throughout the country a different manifestation of this illegal trade has established itself; in response to which HMRC seem reluctant to litigate.

Illegal tobacco now means much more than a van load of cheap cigarettes from Calais. Counterfeit copies of leading brands baring unauthorised copies of trade marks such as Marlboro, Golden Virginia and Regal, genuine tobacco products smuggled in from Eastern Europe with incomprehensible health warnings and Chinese and Russian cigarettes failing important British Standard safety tests.

As ever, the trade in such products strikes at the Chancellor's pocket and takes trade away from genuine traders. But this wider pool of illegal tobacco brings with it new dangers. For whilst all cigarettes are toxic products, those sold legitimately are at least made under strict manufacturing controls - controls that are missing when the product is manufactured by a counterfeiter or similar; whose only objective is profit. Analysis of counterfeit cigarettes has found them to contain cyanide, plastic, sand, insects and rat droppings! Furthermore, the "new" smugglers' favourite "Gin Ling", a Chinese creation, and Russian brands including "Minsk" fail the British standard propensity test – when left burning unattended a UK cigarette will self extinguish within a set time, these illegal brands just carry on burning, the possible consequences of which formed the inspiration of many 1970's public safety films.

Despite these disincentives, as the tax burden on UK tobacco sales is ever increasing, the demand for cheap products remains ever strong, and the enthusiasm to service that demand grows with it. The task of policing this has fallen on local authority trading standards departments as (in the experience of this writer) HMRC regards a single shop, or even a number of shops, as a "small scale" enforcement issue. And so it is Trading Standards that have to tackle the problem of finding the products for which the queues form.

Regardless of whether it is HMRC or Trading Standards policing the issue, those involved do not want to get caught. The first line of defence is to be ingenious in their storage solutions. Whilst a hidden cupboard near the tills is a necessity to ensure that products are at hand to sell, the storeroom demands more thought. An old storage heater where heat blocks are replaced with sleeves of cigarettes, a hollowed-out CRT television, and the area above suspended ceiling tiles are just some possible hiding places. So it is, that the use (and expense) of tobacco-sniffer dogs is often necessary. But sometimes, demand is such that even greater imagination is needed. In 2014, a group working in Gloucester city centre were sentenced in respect of an operation that required significant planning and vigilance. In order to keep the shop supplied, a number of vehicles were parked around the city centre in which the illegal tobacco was stored. Every couple of hours one of the shop assistants would take a sports bag and visit one of the vehicles. Thus, stocks in the shop were low but demand was always served. Only with a lengthy set of covert observations could this be uncovered. Even then the same gang chose to rent a property that backed on to the shop, drilled a hole through the shop's rear wall and constructed a child's wendy house on the outside of the hole, where a (small) member of the gang would sit to push sleeves of cigarettes through on demand.

Of course, the best line of defence for those organising the operation is to remain as distant as possible from the action. Cases of this type often involve responsibility for the shop regularly changing hands, denying knowledge of hiding places within the stores or previous enforcement visits. Equally, depending on the size and location of the seizure, store owners are content to place all responsibility on the shoulders of their allegedly errant staff.

In terms of enforcement, in the absence of assistance from HMRC, or the desire to pursue the DPP for authority to prosecute offences under the Customs and Excise Management Act 1979; the Trade Marks Act 1994, is the strongest weapon in cases where there are products which can be proven to bare unauthorised copies of trade marks. In such a case, both the owner and staff (if deemed appropriate) can be prosecuted for offences which carry a maximum sentence of ten years imprisonment.

The safety (or lack of safety of these products) is typically reflected in charges under the General Product Safety Regulations 2005 and the prohibition of "dangerous" products. Such offences are indictable with a maximum sentence of 12 months imprisonment. There is a "due diligence" defence under Regulation 29 but in the circumstances of these cases that seems an unlikely avenue of defence. It may be that argument is made that given the information in the possession of the defendant he/she should not be presumed to know the products are dangerous (see Regulation 8(1) General Public Safety Regulations 1987).

In the absence of counterfeit and dangerous products, Trading Standards typically rely upon the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002. These require that hand-rolling products and cigarettes are marked with information about the tar, nicotine and carbon monoxide yield of the product in the prescribed format.

Furthermore, the warning "smoking kills" or "smoking seriously harms you or others around you" should appear on the front of the packaging and one of the specified (very graphic) picture warnings must appear on the back of the packaging. Hand-rolling tobacco and cigarettes that do not carry this information, that carry information in any language other than English or otherwise than in the prescribed format, are prohibited from being sold in the UK. A breach of these regulations is a summary offence under Section 12 of the Consumer Protection Act 1987 punishable with up to six months imprisonment.

So it is, that even genuine, safe products, if brought in from another country bearing warnings in a foreign language, can be seized as illegal tobacco. Defendants in these cases should be aware that even in the context of a single shop operation, immediate terms of imprisonment are imposed, and when second offences are committed this can be in excess of the Magistrates' maximum. Accordingly, the golden ticket may well grant access to a very different type of establishment.

Alan Fuller

The MC100 Form

A lack of provisions?

I was recently defending a client in Taunton Magistrates' Court. This gentleman had totted up to 12 points and I had been instructed to make a plea of exceptional hardship on his behalf. While we were waiting to go before the Magistrates he undertook the relatively mundane task of completing an MC100 'Statement of Means' Form.

I imagine that defence lawyers across the country are fairly au fait with these forms. For those who are not, or who only prosecute, they are the forms upon which a defendant who is pleading guilty, or who has been found guilty will summarise his financial situation so that the Magistrates or District Judge can assess how much to fine them and how easily or quickly they can afford to repay them.

It requires the Defendant to give details of their income, who their employer is, or if they are not employed, the state of their benefits. It is upon the total income figure that the quantum of a fine is initially worked out.

The Defendant then goes on to list their outgoings. Here the form provides an example list of expenses. This is clearly an invaluable prompt for defendants, obviously under a lot of stress in unfamiliar surroundings, to ensure, as best they can, that they don't miss any of their outgoings.

For example, the current 2013 version of the form as available on the Ministry of Justice's online database lists the following items:

- Rent, mortgage or lodgings
- Council Tax
- Insurance (home, life, etc.)
- Child Maintenance
- Travel expenses (fuel, car, public transport etc.)
- Utility bills (gas, water, electricity etc.)
- Telephone (inc. mobile)
- Television subscription (license, satellite, etc.)
- Other fines
- County Court Orders
- Loan repayments (credit card, bank etc.)
- Other outgoings (please specify)

A useful list one might think, one that covers all manner of sins and is designed to assist defendants in ensuring that nothing important is missed. (It also does give us a very interesting picture of who the 'average' Magistrates' Court fine is.)

The question I was asked on that day in Court is simple. Where do I put 'food'?

Initially I laughed and thought: "Well, clearly under 'food'." I then rechecked the list, (as I have no doubt you are doing right now).

That's right, 'Food' is not listed as a specified outgoing, therefore, in order for it to be considered it has to be listed as an 'Other outgoing'.

Initially, I just found this amusing. Even more amusing was the fact that the 2011 version of the form that my client was using on that day included additional specified sections for other crucial outgoings such as 'drinking' and 'smoking'.

I then did some research into the MC100 Form. I have found three distinct versions online. Two dating from 2011 and the current one from 2013. The oldest one has 'Food' listed, in addition to other outgoings which no longer appear such as 'Lottery/entertainment', 'Catalogues' and 'Clothing'

What we have building up, therefore, is almost an inverse version of the Office for National Statistics 'Consumer Prices Index Basket of Goods and Services', which is the way in which the ONS measures prices. The contents of the basket famously change as shopping habits develop. Therefore whereas things like 'Smash' Instant Mash Potato and camera film have been removed over the years, things like tablet computers and Bundled Communication Services are in. Statisticians then pore over the contents to gauge the state of the nation's buying habits.

What lawyers have is the opposite. What we have is an indication of the things people have had to make do without as the MC100 form has evolved with the times. So, catalogues and lottery are out, as apparently are smoking and drinking. (Interestingly with regard to the latter despite the large anecdotal evidence to the contrary…).

By now you may be thinking, (at least those of you who have borne with me this long), this is all very interesting but how does it help me in my practice?

The purpose of the MC100 forms of course is to assist the fining process and ensure that defendants are able to actually pay their fines. Incorrect fine amounts can cause unnecessary financial hardship to the defendant by fining them too much, or by making it too difficult to pay back installments, not to mention the potential to waste court costs in having to hold hearings to amend unfair fine amounts.

Well, the worry I have is this: clients often fill out these forms under pressures of time, circumstances and under considerable stress. As we are all aware we deal with these scenarios every day and perhaps forget that clients may not be thinking clearly when they are forced to write down their entire financial circumstances in tiny boxes on a sheet of A4 in a small room (or more often side of a corridor) in a busy Magistrates' Court and in those circumstances, things are going to get missed.

Therefore, by the forms no longer listing some very basic, but important outgoings, such as food and clothing my concern is that defendants are forgetting to include these outgoings in the calculations and are therefore being fined on a financial basis which doesn't include the most necessary outgoing: food.

The opportunity for these miscalculations is of course compounded in the case of individual or professional defendants facing regulatory crimes, where the fine amounts and incomes can be

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considerably higher than for more run-of-the-mill crimes such as assault or other offences. These clients often own businesses or have good incomes and family food bills which reach into the hundreds of pounds, to forget such a crucial figure may severely impact upon them financially when fines are passed.

Therefore, unless the form changes we must be mindful as defence lawyers to remind our clients not to forget the bare necessities. Therefore we should send them the forms in advance, send them some guidance as to what to include, and if we are meeting them at court, really take the time to ensure that everything is thought of.

Alexander Small

Permitting: the acceptance of undertakings

You may be forgiven for not having noticed that The Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015, were laid before the UK Parliament just before Christmas. Nonetheless, the proposed content of the Regulations does have a potentially significant meaning for any litigator advising a client who is under investigation in respect of, or charged with, any environmental permitting offence.

The Regulations (as they will henceforth be referred to) will amend the Environmental Permitting (England and Wales) (Amendment) Regulations 2010 so as to empower the Environment Agency (EA) to accept enforcement undertakings from operators, instead of prosecuting them. The amendments would mean that when one of the the 90,000+ sites in England which are required to hold environmental permits (including, for example, landfill sites and sewage processing plants) is in breach of a condition of its permit, the operator would have the option of offering to the EA an 'enforcement undertaking' to restore any damage caused. If that undertaking is accepted by the EA and subsequently fulfilled, the business would avoid attracting a criminal record.

The new provisions are based on those in the Regulatory Enforcement and Sanctions Act 2008 (RES Act). The EA already accepts enforcement undertakings in respect of certain offences, especially failure to register for various statutory monitoring schemes and publishes lists of undertakings which have been accepted on their website periodically, which will prove a very useful tool when drafting proposals to resolve matters by way of undertaking.

The Regulations came into force on 6 April 2015.

When the Regulations came before the Lords in February 2015, Lord de Mauley gave an insight into how the new procedures could work in practice. He stated that serious or persistent offenders would still face prosecution. However, those who are generally compliant but fall into error could make an offer of an undertaking to the EA. That offer would need to specify steps which the operator would take to reduce or eradicate the risk of the breach recurring.

His Lordship added that the enforcement undertaking should also seek to quantify the environmental damage that had been caused, and set out how the operator would invest an equal sum in projects or bodies which are working to improve the environment in the specific areas which have been adversely affected.

The government estimate that the amendment could avoid around 50 prosecutions or formal cautions per year. However, where an enforcement undertaking is not complied with, the Regulator will be able to prosecute for the original offence.

The major, practical consequence of the introduction of the Regulations will be that operators should seek legal advice as soon as any breach of permit conditions comes to light, and advisers will need to fully bear in mind the need to formulate, at an early stage, a meaningful set of proposals to divert matters away from criminal sanctions. This will necessitate the identification of the environmental damage caused, locating appropriate restorative schemes to receive donations and the formulation of detailed, practical steps to demonstrate genuine organisational commitment to the avoidance of further breaches.

Edward Hetherington