

Architects' Briefing
Michael Archer, May 2007

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CDM – Designer's duty regarding the appointment of the CDM co-ordinator

The CDM Regulations 2007 came into force on 6 April this year, bringing with them additional duties for designers. One of them has given rise to more queries than any of the others.

Regulation 18(1) says in relation to a notifiable project that 'no designer shall commence work (other than initial design work) in relation to the project unless a CDM co-ordinator has been appointed for the project'.

First, there has to have been an actual appointment of a CDM co-ordinator. The designer cannot rely on the deemed appointment of the client of himself under Regulation 14(4). This is because Regulation 14(4) specifically excludes Regulation 18(1).

Thus, designers will have to take steps to find out from the client for the project whether a CDM co-ordinator has been appointed if there is any doubt about this.

Secondly, there is some confusion over what could constitute 'initial design'. There is no definition of this. The HSE has expressed a view that work within and beyond RIBA stage C is beyond preliminary design. Stage C covers a fairly broad range of work: 'Commencement of development of Strategic Brief into full Project Brief. Preparation of outline proposals. Review of procurement route'

We think a pragmatic view has to be taken. The aim is to allow the client to appraise their project needs and objectives to decide whether or not to proceed with the project before the CDM co-ordinator is appointed, but the CDM co-ordinator needs to be able to advise on the suitability and compatibility of designs and co-ordinate the design work before significant detailed design work begins and the design requirements become settled. So preparation of outline proposals is probably going to be 'initial design' but beyond the preparation of the strategic brief, when the design is becoming settled, is probably not 'initial design'.

The best approach is to err on the side of caution and ask the client at an early stage whether he has appointed a CDM co-ordinator. If he has not, you must stop work or you will risk prosecution.

Age discrimination and compulsory retirement dates

The Employment Equality (Age) Regulations 2006 (the 'Regulations') came into force on 1 October 2006. A number of clients have sought our advice on the validity of compulsory retirement dates on partners and members of partnerships and LLPs.

The Regulations make it unlawful for a firm or LLP to discriminate against a partner or member on the ground of age. An exception allowing a compulsory retirement age at 65 applies to employees, but there is no such exception for partners or members. Any provision in a partnership or LLP agreement that requires a partner or member to retire at a fixed age is potentially discriminatory, unless it can be objectively justified.

Many solicitors are advising partnerships and LLPs to make radical changes by amending completely their partnership and LLP agreements, changing lock-step profit share arrangements and introducing

firm-wide partners' performance appraisals. Our view is that for smaller firms, such changes will put at risk something more important about the firm or LLP – partnership cohesion.

If you consider that you can objectively justify a compulsory retirement age for your partners and members, then you should take the following steps:

- Discuss, agree and record the justification arguments that you will want to raise later;
- Ensure that all partners and members who are affected by the compulsory retirement age take part in the discussions and endorse the need for the provision; and
- Formalise the justifications in an Age Equality Policy document which addresses the reasons for having a compulsory retirement age.

Let us know if you would like help preparing the Meeting Agenda in order that your partners and members can discuss and agree the justifications for the compulsory retirement age and help drafting the equality policy that results from this.

RIBA contractual time bar

In the recent case of *Oxford Architects Partnership v Cheltenham Ladies College*, the court considered the contractual time bar in Article 5 of the RIBA Conditions of Engagement for the Appointment of an Architect, CE/95.

The College had engaged the Partnership to provide architectural services at the College and practical completion of the works took place on 25 November 1998. On 24 November 2004, the College served an arbitration notice on the Partnership alleging breach of contract and negligence. The Partnership defended the claim by contending that the claim was statute barred under the Limitation Act 1980. The Limitation Act states that claims in contract or tort must be commenced within 6 years of the cause of action accruing.

The College replied to this defence on the basis of Article 5, which stated that no action or proceedings for any breach could be brought after the expiry of six years from practical completion. The Partnership argued that the causes of action in contract and tort had accrued before practical completion and therefore the claim was statute barred. The arbitrator found in the College's favour and the Partnership sought to challenge the arbitration award.

The court found that the arbitration award was wrong in law. Article 5 did not prevent the Partnership from relying on a statutory limitation defence. The purpose of Article 5 was to provide certainty for architects to know their potential liabilities for the purpose of such things as professional indemnity insurance.

This case is a reminder that clear words are needed if the statutory limitation periods are to be excluded. If clear words are not used, then the courts are likely to consider a contractual limitation period alongside the Limitation Act 1980.

Article 5 has been revised in the latest version of the Conditions of Engagement for the Appointment of an Architect (CE/99, revised April 2004). Article 7.1 now states:

'No action or proceedings . . . shall be commenced after the expiry of the period stated in the Letter of Appointment from the date of the last Services performed under the Agreement or, if earlier, the date of practical completion of the construction of the Project.'

This wording is slightly different to that found in Article 5, but the decision in *Oxford Architects Partnership v Cheltenham Ladies College* is likely to apply.

Protect your copyright and moral rights

As an architect, copyright is one of your most valuable possessions. Whenever entering into an appointment you should ask yourself the question 'Is copyright to remain with me or is it to be vested in the client?' The latter should be resisted if possible. If copyright is vested in another party, all the rights belonging to you pass to that party who can then copy and as a consequence use your drawings and documents for any purpose, and not necessarily for the project for which they were prepared.

In the majority of cases, you should retain copyright in your drawings and documents. This is the principle set out in the RIBA's Standard Form of Agreement (SFA/99). Try to be as specific as possible about what you are retaining copyright in (e.g. drawings, reports, specifications, calculations etc) so that there can be no misunderstanding as to the extent of the copyright claimed.

In addition to copyright in drawings and documents, you have the benefit of moral rights. In summary, these are:

- The right to be identified as the author of the copyright work.
- The right to object to derogatory treatment of a copyright work.
- The right not to suffer false attribution of a copyright work.

Great care should be taken before agreeing to a waiver of your moral rights. The RIBA's SFA/99 reiterates to the client that you have the 'right to be identified as the author of the artistic work/work of architecture.' Only agree to a waiver if it is likely to cause particular administrative problems for a client or if you have agreed a specific fee for the loss of these important, but often overlooked, rights.

If you have any queries about the issues raised in this Briefing, please contact:

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