hot topics

employers – asbestos: don’t skimp on the details

contractors beware: asbestos the multi-pronged regulatory attack

consultants beware too

duty to manage asbestos: a survey is not enough
This edition of Building Blocks focuses on the issue of asbestos and its relationship with the construction industry.

This is topical in the light of the Control of Asbestos Regulations 2012, which came into force on 6 April 2012.

Building Blocks looks at asbestos from the viewpoint of the employer in Stuart Thompson’s article, the position of the contractor in Kat Souter’s article and the standpoint of the consultant in Ruth Philips’ article. There is also an ever timely article by Duncan Astill, a specialist in health and safety who has recently been promoted to partner, on the health and safety implications for employers, contractors, sub-contractors and consultants who fail to comply with the legislation.

To keep up to date with changes in asbestos legislation (as well as other health and safety issues in relation to the construction industry), visit our blog at www.practical-completion.co.uk. If you are interested in signing up to the blog please contact Rachel Snow at rachel.snow@mills-reeve.com.
Asbestos surveys
On 29 January 2010 the Health and Safety Executive issued new guidance replacing the previous system on asbestos surveys. There had previously been three survey types: type one covered the location of asbestos containing material; type two where samples were removed from site and analysed in a laboratory; and type three, a more thorough survey which was used to locate all asbestos containing materials on the site where the building was due for demolition or major refurbishment.

This system was changed by the guidance with a management survey replacing types one and two surveys, and a refurbishment and demolition survey replacing the type three survey. For a copy of the guidance go to www.hse.gov.uk/pubns/books/hsg264.htm

The Control of Asbestos Regulations 2012
The Control of Asbestos Regulations 2006 have been repealed and replaced by the Control of Asbestos Regulations 2012, which came into force on 6 April 2012. The changes affect companies carrying out non-licensed work, and require them to:

- Notify non-licensed work to the relevant enforcing authority

Keep records of non-licensed work including a list of workers on each job, plus the level of likely exposure of those workers to asbestos
- Carry out specified, regular medical surveillance of workers by April 2015

There are limited exemptions from these requirements for some types of non-licensed work, which include air monitoring, sample testing and specified works where the asbestos fibres are at low risk of coming unbound.

For further details on the new regulations, go to www.hse.gov.uk/

The Great British Asbestos in Buildings Survey
The Great British Asbestos in Buildings Survey undertaken by the UK Asbestos Inspections Bodies (launched 4 April 2011), has found that a third of building managers and operators required to manage asbestos risk in buildings are not fully aware of what is required of them under the Control of Asbestos Regulations 2012. It also found that up to a fifth of managers had not put in place the asbestos surveys required.

For those managers or property owners amongst you who are feeling slightly nervous reading this and want to make sure that you are actually complying with your legal obligations, the Health and Safety Executive (HSE) has a handy guide in relation to the duty to manage asbestos:
www.hse.gov.uk/asbestos

To view the Great British Asbestos in Buildings Survey go to: http://bit.ly/I8S9Yr

Tax relief for expenditure on asbestos
If you are looking to refurbish your premises or need to carry out remediation work in relation to the re-development of a site you might be able to claim tax relief under the Land Remediation Relief Scheme. For example, if you are looking to refurbish your office which has asbestos insulation boards above the suspended ceiling and you have been informed that the remediation works will put the asbestos in a dangerous state and you are recommended to remove the asbestos, you will be able to claim tax relief on the cost of engaging a specialist contractor to carry out the removal of the asbestos insulating boards. You cannot claim tax relief, however, if you or a connected company were the original polluter, that is, the premises were originally built on your behalf.
employers – asbestos: don’t skimp on the details

If asbestos is present on site it can be expensive and time consuming to deal with but if employers are tempted to take short-cuts, they may face criminal prosecution. Last year Marks & Spencer was fined £1 million for failing to deal with asbestos during the refurbishment of one of its stores. If other employers want to avoid the same fate they must make sure their contracts address the risks of asbestos.

Statutory risks – avoid the long arm of the law
There are a number of laws and regulations to ensure that asbestos containing materials (ACMs) are handled safely. One key regulation is the Control of Asbestos Regulations 2012. The CDM Regulations are also important.

Whilst employers may comply with the various regulations themselves, they need to ensure that their consultants and contractors do the same to reduce the risk of criminal liability. For example, the employer is required to determine whether ACMs are present in its buildings and if so, identify those parts that are affected and provide a written plan for managing the risks. To avoid any nasty surprises later on the employer ought to ensure that its consultants review all relevant information as early as possible to confirm that it is complete and complies with the regulations.

Equally, once on site, the employer should confirm that the contractor is obliged to comply with all relevant legislation as this should result in the contractor putting in place measures to handle and remove ACMs safely. The employer may also wish to go further than this and require the contractor to carry out the works in accordance with good industry practice and any relevant employer policies (such as its asbestos policy). The employer may also insist that the contractor indemnifies the employer against any personal injury claim and any fine the employer is liable to pay which relates to ACMs.

In addition cautious employers also require contracts and warranties to state that no prohibited or deleterious materials (such as ACMs) shall be used or incorporated into the works, even though the use of all ACMs has been banned since 1999.

Commercial risks – who carries the can?
A delay to any project is costly. The contract should clarify who bears the commercial risk if asbestos is present on the site and disrupts the works, delaying completion. Employers should seek to pass this risk on to the contractor on the basis that the contractor is responsible for the site conditions (including the presence and location of asbestos), as it usually has the opportunity to carry out its own due diligence before the contract is signed. The contractor also often has the benefit of a collateral warranty from the asbestos surveyor. Therefore, if the information regarding the presence of asbestos is incorrect, the contractor can pursue the surveyor. The one exception is where it is not possible to survey certain areas of the site (eg under an existing structure) and asbestos is subsequently discovered in those areas. Here employers are usually prepared to grant the contractor an extension of time and allow it to recover its direct loss and expense.

Insurance risks – read the small print
Silent contracts are notorious for leading to disputes. Employers should note that some contracts, such as JCT 2011, no longer refer to inner limits of cover for asbestos. The employer may want to amend the building contract and the appointments to confirm that the contractor and the professional team should have an acceptable level of insurance cover in place for asbestos claims. This should help to avoid a tussle.

Conclusion
Taking a little more time upfront to make asbestos provisions clear in your contract will save you a fight later on.
As a building contractor unless you own, rent or manage the building in question, you are unlikely to be a dutyholder under the Control of Asbestos Regulations 2012 (CAR 2012) but do not let that lull you into a false sense of security. As a contractor you could be subject to a regulatory assault from all angles.

CAR 2012 – your client
Knowing what obligations fall on your client is useful for you to be prepared to ask the right questions. As a dutyholder and where the presence of asbestos is likely, your client is required by law to carry out an assessment to identify whether asbestos is, or is liable to be, in the premises and put in place a plan for managing it. Ask to see it. You will want to know the location or likely location of asbestos containing materials so that you can plan your work safely. If unexpectedly you discover asbestos you will need to stop work and report it to your client immediately.

CAR 2012 – you as an employer
Although unlikely to be a dutyholder you will most certainly be classed as an employer under both the overarching Health and Safety at Work Act 1974 and CAR 2012. Even people who would, for employment law purposes, be classed as self employed, will still be treated as your employees for health and safety purposes. As an employer you will need to comply with the act and the majority of CAR 2012. You, as an employer, should:

- not undertake work in demolition, maintenance or any other work which exposes, or is liable to expose, employees to asbestos unless you have carried out a suitable assessment as to its existence, type, quantity and location
- not carry out work which is liable to expose employees to asbestos unless an assessment has been made of the risk to employees’ health (and risk reduction steps implemented)
- hold a licence before undertaking licensable work with asbestos
- inform, instruct and train employees on the effects of asbestos on health, types of products likely to contain it, safe work practices, emergency procedures, hygiene, waste handling, and medical examination requirements

Construction (Design and Management) Regulations 2007
Before you are asked to bid for construction work the client should provide you with project specific information about the presence of asbestos at the site.

Asbestos – the building contract
Stipulate in the building contract that the client is under a duty to provide to you a copy of its asbestos reports and surveys. If possible, seek acknowledgement from the client and the surveyor that you can rely on the report (or ask for a collateral warranty from the surveyor). Check whether the building contract requires you to carry out your own asbestos survey. If you are made wholly responsible for site conditions you will want to do this. If asbestos is a risk then check whether you will be entitled to an extension of time/loss and expense, or a compensation event to cover the effect on the works of this discovery. Finally, double check your insurance obligations under the contract and ensure that there is no obligation to insure against asbestos because it is likely that your policy will not cover it (if in doubt speak to your broker).

Compensation Act 2006 and civil claims
Bear in mind that, following a recent Supreme Court decision, you could be liable for damages to an employee or former employee if they have been exposed only once to asbestos while working for you. Further, if you have been negligent or you are in breach of a statutory duty, the Compensation Act 2006 allows a former employee (who is ill as a result) to claim compensation from you. They can claim compensation in full, regardless of how many other contractors that employee has worked for in the past and regardless of how much asbestos they had been exposed to while working for other contractors.

Criminal liability
Failure to comply with health and safety law constitutes a criminal offence and can result in fines and/or imprisonment.
As the issue of asbestos claims continues to raise its ugly head in the industry press, it is not just employers and contractors who need to take care. Consultants, including those who do not actually hold themselves out as providing asbestos advice, will need to ensure that they are complying with the terms of their appointment and are confident that they use an appropriate level of skill and care when advising clients.

For consultants who provide specific advice in relation to asbestos, the recent case of PHH Environmental UK Limited (PHH) being fined £5,000 and ordered to pay £3,000 costs is a sharp reminder of the consequences of the failure to correctly carry out professional services.

PHH was appointed to produce an asbestos survey of the Old Castle Cinema in Merthyr Tydfil. The report was relied on by the demolition contractor, however, PHH failed to pick up and report on asbestos which was subsequently discovered by the demolition workers, putting their health at risk.

The HSE inspector involved stated: "Anyone carrying out refurbishment or demolition work relies upon accurate asbestos surveys to reduce the risk of them being exposed to deadly asbestos fibres. It is essential that those surveys are comprehensive, intrusive and undertaken by competent persons – if not lives are needlessly put at risk."

Consultants must also remember that the majority of clients have limited knowledge of what types of asbestos survey are available and what type of survey are required by law to have been carried out in relation to their premises. The results of the Great British Asbestos in Building Survey, backed by the UK Accreditation Service and industry group Asbestos Inspection Bodies makes interesting reading in relation to this. It has found that a third of building managers and operators who are in charge of asbestos risk are not fully aware of risk, and a fifth did not ensure that the required asbestos surveys have been put in place as required under the Control of Asbestos Regulations 2012 (CAR 2012).

Given these findings, asbestos consultants should be aware when appointed to carry out surveys of their client’s knowledge and requirements. While building owners are duty bound under the regulations to manage asbestos, they will rely on their professional advisors to ensure they are complying with these legal obligations. It is therefore sensible to set out to clients what types of surveys are available and what they do and do not cover. For example, if a landlord of a 1960s office block asks for a management survey, the consultant should find out exactly why the survey is required and clarify to the client that a separate refurbishment/demolition survey would be required where the client is looking to carry out these works at the premises.

Finally, one last thought. If you are a consultant reading this thinking that it doesn’t apply to you as you don’t carry out asbestos surveys, beware. You just might want to check the terms of your professional insurance policy. If your policy excludes asbestos, do you ensure that this exclusion is mirrored in the appointments or collateral warranties you enter into? Also, are you likely to be required to provide advice in relation to asbestos, for example an architect involved in the refurbishment of post war residential property? Not only will you be required to carry out the design, but ensure any suspected asbestos is tested before the contractor carries out any work.

Remember, if your professional indemnity insurance excludes or limits cover in relation to asbestos and your company is successfully sued in relation to asbestos, then any damages and costs will come out of your company’s pocket rather than your professional indemnity insurers.
The duty to manage asbestos is set out in regulation 4 of the recently updated Control of Asbestos Regulations 2012 (CAR 2012). It was first introduced in May 2004 and yet there are still a number of organisations that are not meeting their obligations.

While the majority of building owners/occupiers have at least undertaken asbestos surveys, they are often filed away physically or electronically. A survey alone is not enough to meet your criminal law obligations.

So what do you have to do?

- Find out whether there are any asbestos containing materials (ACMs) in the building
- Determine what needs to be done about any ACMs found, and do it
- Where ACMs remain, put in place a system (an Asbestos Management Plan) to ensure that they are not disturbed
- Periodically review whether your plan is working

The Asbestos Management Plan

The duty to manage applies to anyone who controls non-domestic premises. The first step is to carry out an asbestos survey to determine whether there are any asbestos containing materials (ACMs) in the building and, if so, what condition these materials are in.

The asbestos survey should be a written record of the ACMs present on the premises or liable to be found in the premises. This record should include where these ACMs are found (ideally using a diagram) and set out the condition they are in. This record needs to be readily available for inspection.

You should then assess the risk that these ACMs pose and decide whether they should be removed, repaired or encapsulated. It will be necessary to decide what steps need to be taken with all ACMs based upon the type of asbestos, the condition it is in and the use that will be made of the relevant location. The HSE website provides helpful tools to do this.

This cannot usually be done by a surveyor alone. While he can assess the material and determine what sort of asbestos it is, he or she does not know how the room is used or how likely it is to be disturbed by people using or maintaining the building. Only with that information can you determine what needs to be done.

Putting the Asbestos Management Plan into action

Once the risk assessment has been completed and a decision made about what is going to be done with each of the ACMs, this needs to be set out clearly in an asbestos management plan which will need to be drafted and then put into action.

It is important to ensure the plan is passed on to any worker or contractor that needs to be aware of the risks. Software is available to help you integrate asbestos information with other systems.

All employees should also be told about the management plan and the decisions made within it, and everyone should be made aware of how to report problems to allow defects to be remedied.

Keeping the asbestos survey and management plan up to date

To keep the asbestos survey up-to-date you will need to re-inspect ACMs, check if they are still sealed or enclosed, or if they have deteriorated or become damaged in any way. Health and Safety Executive (HSE) guidance suggests this review should be yearly.

You should check against your Asbestos Management Plan as to who should carry out these checks, when they will be carried out and ensure they are properly trained to carry out the checks.

You will also need to review the Asbestos Management Plan if there is reason to believe it is no longer valid or if there are significant changes within the building, if different works are being carried out on the premises or if any of the ACMs have been removed.

The reviews should be recorded and dated to evidence the fact that you have kept the asbestos survey and management plan up to date. It is suggested that an electronic copy allows the documents to be updated more easily.

Making sure these steps are followed will help ensure your organisation is fully compliant with the duty under regulation 4, and crucially help prove that all reasonable precautions have been taken should the HSE pay a visit.
Ed Callaghan, a partner in the construction team, retired at the end of May 2012 after 40 years at Mills & Reeve, 33 of which were as a partner. The photograph below shows Ed sporting his much loved Mills & Reeve hard hat. Ed will be remembered with great affection and as a lawyer with true insight. We wish him a long and happy retirement.

The contentious construction team in Cambridge will now be led by associate Stuart Thompson (pictured below). Stuart trained at Beale & Company and worked at Fenwick Elliot before moving to Mills & Reeve in 2007.