

Unmanned Aerial Devices - Drones

Unmanned Aerial Devices, such as drones, are increasingly being used in the construction industry, due to the relatively easy access to large sites, and tall or complex structures.

Drones can gather aerial data, mapping information and images that can be used for surveys, inspections and such like.

In the UK there is a strict legal framework which applies to the use of drones which those in the construction industry may not be familiar with. This note summarises that framework and highlights key risks to be aware of when using a drone for construction purposes.

Aviation Regulations

In 2010 the **Civil Aviation Authority (CAA)** introduced regulations (the Air Navigation Order 2009) for the use of drones, which was supplemented by the Air Navigation Order 2016. These regulations provided that:

- 1) Small drones (a drone having a mass of not more than 20kg without its fuel) must not be flown above 400 feet above the surface, without the explicit permission of the CAA;
- 2) the drone operator must maintain direct, unaided visual contact of the drone;
- 3) drones must not be flown, except with permission:
 - + over or within 150 metres of any congested area;
 - + over or within 150 metres of an organised open-air assembly of more than 1,000 persons;
 - + within 50 metres of any vessel, vehicle or structure which is not under the control of the person in charge of the aircraft; and
 - + within 50 metres of any person except during take-off or landing;
- 4) the drone operator must be in possession of a Permission issued by the CAA before any aerial work for a commercial purpose is

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conducted with the drone. Operators must consider the safety implications and demonstrate piloting competence before permission to fly the drone is granted.

Data Protection

Data that a drone captures may include personal data, which is regulated by the **Data Protection Act 1998** ("DPA"). The DPA requires that personal data:

- + is processed fairly and lawfully;
- + is "adequate, relevant and not excessive" for the purposes for which it has been collected; and
- + is not kept for "longer than is necessary" for the purposes for which it has been obtained.

Such requirements need to be considered carefully if personal data is collected when using drones. The position in the UK in respect of data protection will change under the General Data Protection Regulation (EU Regulation 2016/679). This Regulation is to be applied and implemented into our national law by 25 May 2018. The Regulation is an essential step to strengthen individuals' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the Digital Single Market. Those using drones will therefore need to follow these changes carefully.

The Information Commissioner's Office (ICO) code of practice under the Data Protection Act 1998 (DPA) covering the use of CCTV also restricts the use of drones to record images. The key points include:

- + The recording element of the drone must be capable of being turned off. Unless it is necessary and proportionate, and you have a strong justification for doing so, recording should not be continuous;
- + A privacy impact assessment should be undertaken prior to the use of a drone; and
- + The drone should only be used so far as necessary for the purposes required.

The Information Commissioner's Office has also issued guidance on their website on the use of drones, including:

- + Where possible let people know before you start recording;
- + Place signage notifying that a drone is being used;

- + Adopt mechanisms to protect privacy, such as the ability to stop recording;
- + Store information and data safely, and for the least amount of time possible; and
- + Plan the flight, with view to minimise intrusion.

Consequences of failing to comply

A breach of the Air Navigation Order 2016 is a criminal offence in the UK and may result in fines following an investigation by the Civil Aviation Authority. Additionally, if a drone operator seriously breaches the DPA, the Commissioner is able to impose a fine of up to £500,000.

Trespass, nuisance and third party damage

If a drone is flown low over third party land without permission, there is also a risk of claims in trespass, if the drones interfere with the use and enjoyment of the land.

In addition, successful nuisance claims have previously been made as a result of loud noises and dust. If the drone is hovering near a person's property and being noisy and disruptive, a nuisance claim could arise.

In addition to a potential claim in trespass and nuisance, the use of a drone could also result in a third party negligence claim due to damage to the third party or their property in the event of a collision.

It is therefore vital, as mentioned above, that the flight path of the drone is planned in order to minimise the intrusion of private property, and therefore a claim in trespass or nuisance.

Insurance

In light of the above risks, it is now possible, and also advisable, to obtain construction drone insurance with coverage such as third party liability, produce liability, war all risks and liability insurance and privacy and trespass.

In Europe it is obligatory for all commercial drone operators to purchase third party liability insurance pursuant to EU Regulation 785/2004. Drones will not typically be covered by traditional insurance policies in the construction

industry; if your organisation uses drones you should speak to your broker regarding coverage.

Sub Contracts

The use of drones is also something to bear in mind when appointing sub-consultants/sub-contractors to collect data. When doing so it is important to be clear as to:

- + **Deliverables** – it is very important to clearly specify the expected deliverable. For example, this could include the expected pixels of the images, the standard of the video captured, the height and angle at which the images are to be taken from, the time at which the images are to be taken and the weather conditions the images are to be taken in;
- + **Insurance** – the need for the sub-consultant to maintain drone insurance;
- + **Intellectual property rights** – who owns the rights in the data collected by the drone; and
- + **Regulatory approval** – proof of the legal operation of the drone should be requested.

Drones – Managing the Legal Framework

As highlighted above, there is a fairly complex legal framework surrounding the use of drones and significant risks can arise if this is not understood and managed carefully. It is therefore very important that organisations in the construction industry understand this framework. Furthermore legal departments should be kept informed as to the extent to which their commercial teams are making use of drones and be proactive in addressing the risks.

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