

Construction focus: The year ahead

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The impact of Covid-19 may not yet be behind us, but there promises to be a lot to look out for in 2022, from new building safety legislation, to an increased focus on technologies to promote sustainability and tackle climate change in construction projects.

Building Safety Bill

The Building Safety Bill (BSB) has been covered in detail in Forsters' previous articles for the Property Law Journal and it is steadily continuing its passage through Parliament, currently at the Report Stage. Once it becomes law, it should foster 'the biggest change to building safety regulation in a generation', as described by the government.

The BSB is expected to receive Royal Assent in 2022, sometime between April and July, and its provisions will come into force in stages, staggered between two and 18 months.

The first provision which is expected to follow shortly after Royal Assent (two months) is the extension of the limitation period under the Defective Premises Act 1972. In addition, on 10 January 2022, the government announced an immediate amendment to the BSB to retrospectively extend the legal right of building owners and leaseholders to demand compensation from their building's developer for safety defects of up to 30 years old (despite the proposal's original rejection in October 2021).

As currently drafted, the BSB covers defects up to 15 years old. The latest amendment could open up thousands of claims that were thought to be statute-barred, although it remains to be seen whether the potential defendants are still in business or have adequate insurance in place.

It is important to highlight that the BSB may yet be amended further and the timescales may also be subject to change. Anyone likely to be affected by the new measures will, no doubt, be carefully monitoring the progress of the BSB over the coming months.

Unsafe cladding

Nearly five years on from the Grenfell Tower disaster, phase 2 of the Grenfell Enquiry hearings (delayed partly due to Covid-19) are expected to recommence on 24 January 2022. Sadly, the controversy over liability for payments to remediate unsafe cladding does not look likely to end in 2022.

The year has already seen one major government announcement in an attempt to deal with the crisis and offer greater protection to residents. One widely criticised flaw in the government's policy to date has been its offer of central funding to remediate cladding defects on high-rise (in excess of 18 metres) buildings only, leading to a potential 'black hole' for residents of smaller buildings which were no less susceptible to the dangers of defective cladding. In a significant development, the government has begun to redress this and turned its eye to 11-18 metre-high ('medium-rise') buildings which would have fallen outside the scope of government funding.

Michael Gove (Secretary of State for Levelling Up, Housing and Communities) has challenged the industry to:

- agree to a financial contributions scheme to fund the full remediation costs of unsafe cladding on medium-rise buildings, currently estimated at £4bn;
- fund and undertake remediation work to medium-rise buildings which it has played a role in developing; and
- provide comprehensive information on all medium-rise buildings which have historic fire safety defects and which the developer has played a part in constructing within the past 30 years.

The government has given developers until March 2022 to reach a solution and has warned that it will take all steps necessary, including restricting access to government funding and future procurement, and it will even go as far to 'impose a solution in law' if required. While the news will undoubtedly provide some comfort to leaseholders, there still remains a good deal of uncertainty and lack of detail over how these measures will (a) help to expedite the remediation of defective cladding, and (b) ensure that residents are not still left to foot the bill for remediation works.

Development tax

From April 2022, large residential property developers will face a new tax of 4% on operating annual profits in excess of £25m.

The intention of this tax is to ensure that the largest developers make a fair contribution to help pay for building safety remediation, and it is estimated that this new tax is set to raise a further £2bn over the next 10 years.

In addition, as part of the BSB, a new Building Safety Levy is being proposed on all applications for building control approval in respect of higher risk buildings. An update on the outcome of this consultation is expected this year, although the levy is not expected to come into force until 2023.

Retention reform

This year we will be watching the developments of the Construction (Retention Abolition) Bill, which had its First Reading on 25 October 2021, with interest. Over the past few years, there have been a number of attempts by the government to address the contentious issue of payment retentions. Retention is the process by which the client retains a percentage of the total amount due, under the contract, to ensure that the contractor completes the work and remedies any defects. The client will normally pay back 50% after the project is completed, and the following 50% after the expiry of the defect liability period.

The Bill goes one step further than previous proposals and seeks to abolish the concept of retentions completely. The Bill states that any clause in a contract enabling a payer to withhold retentions would have no effect from 1 January 2025 and all retentions held from this date must be paid in full within seven days.

The Bill is at a very early stage and the Second Reading has not yet been scheduled. However, these far-reaching changes, if implemented, would bring considerable changes to construction contracts. There is no doubt that for this drastic change to become law, it would need both government and wide industry support. Regardless of whether or not the Bill is implemented, it will almost certainly prompt further industry debate around the issue of retention reform.

Labour and supply shortages

Brexit has had a significant impact on the construction industry, contributing to labour shortages and supply chain issues. These issues have been further magnified by both the global pandemic and now, the UK's post-pandemic recovery, in which demand continues to outstrip supply.

According to the ONS, since 2017 employment within the UK construction industry has fallen from 2.3 million to 2.1 million in 2020. Furthermore, ONS statistics show a 4% decrease in the number of UK-born workers in the construction industry, and more significantly, a 42% drop in the number of EU-born workers. In 2022, the construction industry will have to adopt new approaches to plug the gap.

Government lobbying to relax requirements for migrant visas for skilled tradespeople remains one option. Another is to focus on up-skilling a new generation of construction workers. However, either option requires the industry to attract many more individuals who would not normally consider a career in construction. Even if the industry were able to attract enough pipeline talent, short- to medium-term issues are likely to remain while the new generation is being trained up. New technologies may allow for workers to be trained in specialist skills more rapidly. However, these require investment and are not cheap, and would require take-up across the industry to have any significant short-term impact.

Although the government has introduced incentives to try and help the construction industry bounce back, ie the target of building 300,000 new homes each year, there are signs the industry is contracting to align with the workers that are available. Over 2021, the size of construction industries output fell, falling 1.8% in October alone (ONS). Labour

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The Brexit/pandemic/post-pandemic perfect storm which gave rise to supply chain shortages is now manifesting in price hikes for material supplies. As the impact of Brexit kicked in, materials from Europe became more and more difficult to procure. Covid-19 further added to the problem by disrupting global manufacture and supply chains, and even creating lorry driver shortages. The scarcity of materials drove up supply costs to highest ever levels. Prices increased month-on-month from September 2020 to September 2021 (as per the BEIS Monthly Statistics of Building Material and Components). While there is hope the UK has finally turned a corner in the pandemic, energy supply costs are now soaring - propelling inflation to a 30-year high. The likelihood is that manufacturers will pass these costs on to consumers, further increasing the cost of materials.

Climate change

As a society we are all looking for ways to limit our impact on the environment and shift to a low-carbon economy. The construction industry is no different. In 2022, we are likely to see more obligations placed on the construction industry, both top-down from new legislation, and through self-imposed targets.

Globally, the construction industry accounts for approximately 40% of the total greenhouse gas emissions (WBCSD 2018), and within the UK, the figure is 10%. The government has already put changes in place to try and lower this figure with its National Infrastructure Strategy, as well the industry standards and procurement policies it has introduced. At industry level, there has been an uptake in contract drafting which aims to reduce the environmental impact of a construction project, in part due to the Chancery Lane Project. The UK Green Building Council has launched a Climate Commitment Platform to allow for a unified approach within the industry. This platform will map the commitments made by companies, clients, developers and contractors to reduce their climate impact or carbon emissions. However, there is always a danger of greenwashing and so it is important that those within the industry hold themselves and each other accountable.

We hope that 2022 sees the construction industry make real progress in developing sustainable materials and techniques to help drive down their impact on the climate. Already, new techniques and approaches to building are being taken as new technology is adopted within the industry.

Digital technology

The construction industry appears to be changing to adopt new technology and move towards digitising processes and documents. This shift has been accelerated as a result of flexible or agile working during the pandemic. For example, paper drawings are being replaced by virtual ones, meaning plans can be updated continually so that those on the site are always working with the latest versions, minimising delays and the waste of materials. AI is being utilised to monitor works on site remotely, often more thoroughly and holistically than would be possible if there was one person physically on site. By using AI, the whole site can be monitored, and any issues with productivity or construction can be raised and resolved quickly.

One method which is becoming widely used is building information modelling (BIM); a process which allows for the management of a construction project throughout its whole life cycle. Through BIM construction is becoming faster, more accurate and safer, errors in design information can be simply corrected, over or incorrect ordering can be prevented, and individuals can pool their knowledge without having to be physically together to do so efficiently.

By continuing to shift to a more digital model, the construction industry is likely to become more efficient over the course of 2022 which should benefit both the environment and the industry's productivity. However, there has been some push-back against the digitalisation of construction work from within the industry. Those against digitalisation claim that there needs to be an investigation into what this would mean for the traditional workforce if this technology is adopted. They raise the point that, although technology can be used to tackle inefficiency, it could lead to more problems if its adopters are not taught the skills needed to utilise it properly. It's likely that 2022 will see an increase in the use of technology within the construction industry - only time will tell how effective its implementation will be.

Legal developments

The case of *Toppan Holdings Lt and another v Simply Construct (UK) LLP* [2021] has been given leave to be heard before the Court of Appeal.

In the first instance judgment, the Technology and Construction Court held that a collateral warranty was not a 'construction contract' for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (as amended), and consequently there was no contractual right to adjudicate the dispute relating to the warranty.

The court held the timing of when a collateral warranty is entered into is key to determining whether it is a construction contract for the purposes of the Act. In this case, the warranty was executed:

- four years after practical completion;
- three years after a settlement agreement was entered into; and
- eight months after the completion of works to remedy the latent defects by another contractor.

The judgment highlighted that the timing of the execution of the collateral warranty is just as crucial as its terms.

Permission to appeal the decision has been granted as a matter of wider public importance for the industry and the appeal is expected to be heard in the first quarter of 2022. Clarity on this point will be very much welcomed, as judicial guidance on the application of the Act to collateral warranties has been sparse.

Unless and until the judgment is overturned, those seeking to rely on the right to adjudicate a dispute under a collateral warranty may wish to consider drafting a contractual entitlement to adjudicate to avoid uncertainty, particularly where the warranty is to be executed after the completion of the works.

Could 2022 be the year...

1. *For a new revision of the Technology and Construction Court Guide?* The third revision was published in 2014, and an updated guide is in the pipeline and a working group was set up during 2019. It was originally anticipated that the guide would be available during 2020, but with no new guide yet to be published, it remains to be seen if 2022 could be the year.

2. *For new editions of the JCT contracts?* The last updates were in 2016, and 2011 before that. In November 2020, the JCT stated that it hoped to publish new editions of its contracts in 2022 - in particular, contracts that cater for recent market developments with special reference to modern methods of construction. We will have to wait and see if this will result in the publication of new forms of contract or published amendments to the JCT's existing forms in 2022.

It looks as if 2022 is set to be an uncertain, challenging but exciting year of change ahead for construction.

Cases Referenced

- *Toppan Holdings Lt and another v Simply Construct (UK) LLP* [2021] EWHC 2110 (TCC)

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