What construction lawyers will be talking about for the rest of 2022

Guest Editors **Will Buckby** and **Tom Howell** of **Beale & Company Solicitors LLP** ask what the 'new normal' will look like for construction. The industry has shown great resilience during the past two Covid years but should continue to expect the unexpected, they warn.

With the government indicating its intention lift all final Covid restrictions towards the end of February, there is cause for optimism across the economy that things will be returning to some sense of a 'new normal'.

Against this backdrop it is worth considering what the 'new normal' is for the construction industry, and the challenges and opportunities this presents in the year ahead.

The Omicron variant and the potential return of Covid disruptions

The first, and arguably the most immediate, challenge is the continued prevalence of the Omicron variant, serving as a reminder that despite the lifting of restrictions Covid-related disruptions may not be done quite yet. Whilst sites on the whole continue to remain open, the early weeks of January have seen disruptions to labour availability not seen since the 'pingdemic' of July and August 2021. There is the potential for disputes to arise as a result in the coming months as the impacts of this labour crunch on programmes becomes apparent. Thorough contract due diligence and negotiation of Covid-specific entitlements to relief may allow firms to get ahead of these issues before they arise. Particular care should be taken by both consultants and contractors alike in assessing prolongation entitlements in contracts, to ensure that any project suspensions do not leave these parties out of pocket. It is hoped that collaboration will see the industry through, as has been the case for much of the pandemic; there has not been the wave of Covid disputes that everyone was expecting.

Supply chain headaches remain

The other significant external force bearing down on project delivery in 2022 is the continued presence of supply chain issues. After demonstrating remarkable resilience throughout 2020, the pace of construction in 2021 was impacted by supply issues. Pressures on logistics networks as well as rising energy prices played a key role in driving up the price and lead times for many materials. Whilst the tide appears to be turning and supply improving slightly from 2021, the Construction Leadership Council ("CLC") has suggested that there will be strong demand for some materials, such as bricks and blocks, that will extend well into 2022. We would expect to see an increase in requests from contractors for price escalation clauses as a result. Users of standard form contracts, like the NEC and JCT, should familiarise themselves with the price fluctuation provisions in these contracts accordingly.

Firing the starting gun on building safety reforms

2022 will also herald a landmark year for building safety. The Building Safety Bill will likely receive Royal Assent this year, setting off a timetable of reforms that will radically reshape residential construction. One of the key changes is the significant extension of the limitation period under section 1 of the *Defective Premises Act 1972*. The Act previously prescribed a six-year limitation period in relation to claims for any breach of the duty to ensure that a dwelling was fit for habitation. The new amendment would see this period more than double to fifteen years. Significantly, this would also apply with retrospective effect, giving contractors limited opportunity to mitigate the exposure arising from historic projects.

Another area set to see change in 2022 is the government's guidance on the controversial EWS1 form. The EWS1 form was originally published by RICS to provide a more consistent basis to record the assessment of external wall systems for combustible material. Its introduction has been problematic for many homeowners. There is a limited group of fire engineers able to issue the form (partly attributable to issues in obtaining suitable PI insurance coverage). Despite this, the EWS1 form has become a prerequisite for many lenders providing mortgages to purchasers.

As part of wider proposals in response to the cladding issues facing homeowners, the government is keen to minimise the usage of EWS1 forms in medium and low-rise residential blocks. Where EWS1 forms are still required, the government is looking to introduce an indemnity scheme for building assessors. This change is long overdue given the 'hard' insurance market, and the onerous nature of the obligations taken on in issuing an EWS1 form. The indemnity scheme proposed by the government will need to be scrutinised thoroughly, but this certainly represents a step in the right direction.

Retentions reform – still in the 'too hard basket'

Despite there being signs towards the end of last year that 2022 would be the year that the UK finally moves towards abolishing cash retentions, the government has already provided an indication that this is unlikely to be the case. Lord Aberdare has recently proposed a private member's bill seeking to eliminate the practice of cash retentions in the industry. This is the latest in a series of bills and initiatives looking to end the practice. However, during a debate in the House of Lords late last year, the government indicated that it would continue to take up its neutral stance on the topic and that it was still working with the CLC and others to reach a consensus on retentions. With only three years to go in order to achieve the goal of zero cash retentions by 2025 as set out in the Construction Supply Chain Payment Charter introduced by the CLC, much is still left to be done in this area. In the absence of clear primary legislation on this topic, it remains to be seen whether this is achievable.

Building towards a greener industry after COP26

With the COP26 Conference held in Glasgow at the end of last year, the green agenda proved to be a key area of focus for many industry players. This looks set to continue in 2022 as many construction firms seek to advance both their goal setting and measurement initiatives in order to reduce their carbon emissions and embrace more sustainable methods of construction in their supply chains.

But it is not just contractors and subcontractors leading the way. Standard form contracts are finally starting to catch up. The NEC will shortly publish a consultative version of a new secondary option clause focussed on incentivising supply chains to meet the client's emissions and sustainability targets. Importantly, it will tie these incentives into core processes of the contract like early warnings and compensation events. We expect to see this trend continue across the standard forms in years to come, with 'green drafting' forming an integral part of the contract and not merely a 'bolt-on' provision.

No sign of a softening in the professional indemnity insurance market

In an age of so much change, one constant that will provide little comfort to many consultants is the continued hardening in the insurance market. Professional indemnity insurance renewals remain an arduous process for many and this is unlikely to change in 2022.

Now more than ever consultants and contractors should be undertaking a thorough due diligence of their terms, given the potentially significant consequences should a PI policy not respond. Given the current PI market, taking a robust approach to negotiating the contract terms not only limits the potential for surprises later in project delivery, it can also be critical to ensuring that services can be provided within the terms of the insurance coverage available.

Where to from here?

If the first two years of this new decade have provided any lessons for the construction industry, the key one would be – 'expect the unexpected'. Despite this, the industry has shown remarkable resilience in navigating these various challenges. No doubt 2022 will have some surprises in store. But if firms can focus on implementing robust due diligence and a more open dialogue with their counterparties when issues arise, there is no reason to believe that the industry cannot continue to thrive in this 'new normal'. **CL**