



Sheena Sood previews what 2022 will hold for the construction industry from a legal point of view

THE YEAR AHEAD IN CONSTRUCTION

The end of 2021 saw the ONS report a 1.8% fall in construction output, the largest monthly decline since April 2020 when the country first locked down – suggesting the industry’s challenges will continue into 2022.

Contractual disputes will continue to be fuelled by supply difficulties. We saw a rise in adjudications through 2021 as contractors sought quick recovery of payments to urgently aid cash flow. When the Technology and Construction Court (TCC) publishes its annual report for 2020/21, it will be interesting to see whether the decline in the use of the courts we saw the preceding year has continued.

The Building Safety Bill continues to make its way through parliament and is on track to become law before summer 2022. The bill has been amended in several significant ways including the proposal to extend retrospectively the limitation period for claims under section 1 of the Defective Premises Act (the duty to ensure dwellings are fit for habitation) from six years from the cause of action to 15 years.

Sitting next to the bill is the draft secondary legislation as well as formal guidance in relation to building safety. A year ago, when I considered building safety issues into 2021, I stressed that the industry required clarity in relation to the revised regulatory system, the exact building types it will encompass, and who would regulate that system. Some of that clarity was provided. For example, the government has now published a series of draft regulations to accompany the bill including how in practice the “accountable person” satisfies their duty under the bill and in respect of the regulation of safety in construction products.

However, the industry is still faced with having to deal with a patchwork of changes, and keeping on top of the legislation and guidance will be a continuing challenge for businesses in 2022. Furthermore, it is apparent that the solution to certain issues is far from perfect, as shown by the £5.1bn loan scheme for ACM remedial works introduced by the Fire

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Safety Act 2021. The imminent announcement that more funding will be made available and that developers will be held to account is promising, but will it result in meaningful action? Let’s not forget, the government have their part to play in this sorry regulatory saga.

The “hard” insurance market is complicating the process of securing coverage for typical and atypical project risks. This, alongside the blatant risk transfer we are seeing at contract procurement and contract negotiation stages, is creating a perfect storm. Uninsurable risks are being placed on those the industry is reliant on to deliver safe buildings. Consultants are faced with delivering their services without adequate insurance. How is that sustainable?

It is ever more important to understand any imbalance of potential risk and take care to negotiate the best terms possible, with provisions to deal with any adjustments to contract duration and project costs built in. We have seen projects suspended for months, even years, with contractors and consultants expected to pick up their tools and carry on without any additional recompense.

It is also ever more vital to include in your contracts appropriate limits of liability and net contribution clauses (to protect against the insolvencies of other project participants). Having no net contribution clause means you face carrying the can for another’s mistakes. We are still having to advise clients that limitations

of liability are entirely separate from the insurance provisions in their contracts. Your insurance cover will be what it will be, but do use contractual limits to protect your business.

The urgent need for progress in relation to climate action took centre stage last year. The COP26 conference in Glasgow came in the wake of the summer publication of the UN’s Intergovernmental Panel on Climate Change report, which declared a “code red for humanity”. The UK Green Construction Board estimates the built environment contributes 40% of the UK’s carbon footprint and, in that context, it is little wonder that we are seeing a myriad of government proposals to grapple with the issue. In January 2021 the government set out its plans and timeframe for its new Future Homes Standard which aims to radically improve the energy performance of new homes, making them “zero carbon ready” by 2025. Proposed reforms to cut emissions and help meet net zero targets will continue to gather pace in 2022 – hopefully at more of a sprint than a canter.

One positive that has emerged from the challenges faced by construction in relation to the supply chain, building safety and the new environmental agenda is that innovation within the industry is flourishing. New technologies such as modular construction and virtual and augmented reality are being used to keep projects on budget and overcome supply and labour shortages. Innovation in green building technologies is rapidly developing to reduce carbon footprints. The use of bamboo as a structural material is one such example.

The construction industry holds a key to unlocking some of the world’s biggest present challenges, and it will rise to that just as it always does to a challenge. But the lawyer in me feels bound to warn that it is vital to do so with the best contractual and insurance protections possible and with your intellectual know-how protected. Then go forth and innovate!

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