



**Sheena Sood** previews the year ahead in construction law, with ongoing economic uncertainty likely to mean increased disputes

# WHAT TO EXPECT IN THE YEAR AHEAD

A year ago, when I looked ahead to 2022, no one could have foreseen that Russia would invade Ukraine, nor that a new government would come in and cause utter chaos in the financial markets in barely two months in power. While these events, of course, had much wider repercussions for society, the reality is that they have strengthened the economic headwinds the construction sector will face during 2023.

Construction output was relatively strong throughout 2022, as the industry bounced back from the pandemic and other challenges. ONS figures released in December 2022 record multiple consecutive months of growth since the middle of the year. However, while order books remain strong, high product prices, materials and labour shortages, and climate change effects are set to continue in 2023 and have a real impact on projects: the Construction Products Association forecasts a 3.9% fall in construction output in 2023. Private housing output in particular is predicted to fall by 9%. The strain to the sector will be significant. It is likely we will see projects delayed and run over budget, leading to an uptick in disputes, particularly adjudications.

Given the ongoing uncertainty and the likely increase in disputes, it is ever more important to understand the balance of risk and take care to negotiate contractual terms that deal with adjustments to contract duration and costs, along with appropriate liability limits and contribution clauses. The latter is particularly important given the likelihood that the economic headwinds will bring increased insolvencies: having no net contribution clause means a successful company may end up paying for someone else's mistakes.

The emphasis on climate change and environmental, societal, and governance (ESG) issues will gather pace. At present, the built environment generates 30% of total greenhouse gas emissions and 40% of energy use, while construction uses 32% of the world's natural resources. The Environment Act received royal

## UNDERSTAND THE BALANCE OF RISK AND TAKE CARE TO NEGOTIATE CONTRACTUAL TERMS THAT DEAL WITH ADJUSTMENTS TO CONTRACT DURATION AND COSTS, ALONG WITH APPROPRIATE LIABILITY LIMITS AND CONTRIBUTION CLAUSES

assent in November 2021, and we are already seeing concrete steps being taken by the sector to improve air quality, reduce pollution and waste, increase biodiversity and boost resource efficiency. This is coupled with the Future Homes Standard, which will require carbon emissions produced by new homes to be 75%-80% lower than those built to current standards.

Within construction projects, the focus will be on future-proofing designs against climate change, appropriate material selection (such as using components produced using less energy and harvested in a sustainable way that encourages adaptation and reuse) and using modern methods of construction that are less carbon-intensive and more environmentally efficient. Various standard form contracts including NEC4 have already started introducing clauses to incentivise and tangibly demonstrate carbon reduction initiatives on future builds.

ESG considerations will also be a major issue at boardroom level. Financial institutions are looking to ESG performance as a marker of sustainable businesses, which is in turn informing investment decision-making. Insurers are also

looking at ESG and the environmental impact of projects: entities unable to demonstrate an appropriate and viable ESG strategy may be putting their businesses at risk.

The Phase 2 report from the Grenfell Inquiry is expected to be published in late 2023 and contain findings as to how Grenfell Tower came to be in a condition which allowed the fire to spread. The inquiry's report will supplement the work done already by the Hackitt review and in the Building Safety Act 2022 and may result in further legislation or other government action to bolster standards and enforcement mechanisms.

In addition to the Building Safety Fund, the government has recently announced it will be providing £8m for local authorities to recruit dedicated enforcement teams to ensure owners undertake necessary building safety works, with powers to pursue them through legal channels if necessary. While this is a welcome development, it must be asked why the government took so long to provide this funding and whether the initial outlay is enough. It is also a question why the government is leaving it to third parties to take these steps.

There are signs that the insurance market is softening: the wide exclusions for fire safety that became common post Grenfell are narrowing, and some insurers are offering higher levels of cover. This may be uneven across the sector, but it is a welcome development for all concerned. Hopefully it also leads to a more even-handed approach to risk allocation in contracts than we have seen over the past five years.

Despite the ongoing challenges, increasing use of technology and modern methods of construction means the sector continues to be at the forefront of innovation. The completion in 2022 of Battersea Power Station and the tunnelling for London's Thames Tideway Tunnel are testament to this - and whet our appetite for what's to come in 2023!

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