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Construction Review

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Introduction

If 2021 felt challenging for the construction sector, this year to date is proving equally if not more testing – both from a legal and operational perspective.

In this review of key construction industry developments from 2021 and the first quarter of 2022, we start by looking at some of the most important cases decided last year, including *Downs Road Development LLP v Laxmanbhai Construction Limited (2021), Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK (2021),* and *Aviva Investors Ground Rent CP Limited and Aviva Investors Ground Rent Holdco Limited v Shepherd Constructions Limited*, a matter in which we acted for Shepherd.

A decision of the higher court is promised this year in the case of *Toppan Holdings Ltd & Abbey Healthcare (Mill Hill) Limited v Simply Construct*, which we also comment on as being consequential for construction disputes.

We also highlight some of the key issues the sector faces, including construction materials and labour shortages, the hike in fuel prices and the war in Ukraine.

We round off by taking a look at some of the most significant new regulation affecting construction, including new public procurement rules and new restrictions on the use of red diesel in off-road vehicles and machinery. And, of course, no update would be complete without consideration of the much anticipated and much debated Building Safety Bill which is expected to receive Royal Assent today (28 April). In the Building Safety Minister's words, the Bill brings "about the biggest changes in building safety legislation in our history".

Given that the government's building safety measures have continued to evolve, we have also updated our previous article on building safety.

We hope that there will be something of interest for all readers in our Review.

The articles, in order of appearance, are authored by the following:

- Assign of the Times (*Aviva Investors Ground Rent Group GP Limited and Aviva Investors Ground Rent Holdco Limited v Shepherd Construction Limited*) – **Dan Preston, Craig Longhurst (of Fieldfisher LLP) and James Leabeater QC (of 4 Pump Court) who were instructed on behalf of Shepherd in the case**
- Liquidated Damages: An update following Triple Point (*Eco World / Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd [2021] EWHC 2207*) – **Samantha Thompson**

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- Payment in Construction: Downs Road Revisited (*Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441* (TCC)) – **Tyler Fiztpatrick**
- The Appeal of *Toppan Holdings Ltd & Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2021] WEHC 2110 (TCC)* – **Alex Delin**
- *Hirst & Another v Dunbar & Others [2022] EWHC (TCC)* – **Charlotte Gooch**
- Climate Reporting and the Government's "Green Rules" – **Charlotte Gooch**
- Higher Fuel Costs for the Construction Industry: Red Diesel Reforms – **Christina Cheriyan**
- Materials and Labour Shortages – **Craig Longhurst**
- The Continued Squeeze on Contractors – **Alex Hyams**
- Building Safety: Key Points to Note – **David Thorne and Susannah Davis**

Assign of the times

The wording of clause 7.2 of the JCT design and build contract has stood unamended for decades. Its effect has remained largely untested in the Courts until recently, when Mrs Justice Jefford handed down judgment in *Aviva Investors Ground Rent Group GP Limited and Aviva Investors Ground Rent Holdco Limited v Shepherd Construction Limited*, which considered (among other matters) the meaning of clause 7.2 in the context of the Claimants' application to join the original employer as an additional claimant and the Defendant's cross-application to strike out the Claimants' claim. The basis of both applications is set out below.

Background

Shepherd was engaged by Camstead Limited as the 'Contractor' under an amended JCT Design and Build 2005 form of contract to carry out the demolition of an existing building and the construction of new self-contained student apartments in Cambridge. The Works were divided into five sections, with the first two being certified as practically complete in September 2008 and the final section achieving practical completion on 5 April 2009.

Camstead Limited conveyed its freehold interest in 2009 and that interest was sold again in 2021 to the Claimant, Aviva entities ("**Aviva**"). On 24 September 2020, Aviva and Camstead entered into a deed of assignment (**DOA**) and Aviva issued a claim against Shepherd in the TCC seeking recovery of circa £4.5 million of damages arising from alleged defects in the design and/or construction of the Works. Notice of the purported assignment was not given to Shepherd until 13 October 2020.

The claim was served on Shepherd on 19 January 2021 with Aviva accepting there had been no valid legal assignment before the proceedings were commenced for want of notice – legal assignments taking effect on notice.

Notwithstanding this, Aviva claimed there had been a valid equitable assignment and, two weeks before service, on 5 January 2021, Aviva issued an application to add the original Employer (Camstead) as a party to the proceedings.

Shepherd contested the validity of the assignment and, on 10 February 2021, issued a cross-application to strike out Aviva's claim on the basis that the Claim Form and Particulars of Claim disclosed no reasonable grounds for the Claimants to bring the claim as there was no valid assignment and, consequently, Aviva had no cause of action.

The applications were heard together on 10 May 2021.

The assignment clauses

There were two relevant assignment clauses under the Contract.

Clause 7.1 provided Camstead with the right "*upon giving the Contractor 14 days' written notice of its intention to do so, to assign the benefit of this contract by absolute assignment to any person (save any to whom the Contractor makes reasonable objection in writing before the expiry of the said period of 14 days)*".

Clause 7.2 (which was unamended from the standard form) provided that:

"*in the event of transfer by the Employer of his freehold or leasehold interest in or of a grant by the Employer of a leasehold interest in the whole of the premises comprising the Works or (if the Contract Particulars so state) any Section, the Employer may at any time after practical completion of the works or of the relevant Section grant or assign to any such transferee or lessee the right to bring proceedings in the name of the Employer (whether by arbitration or litigation whichever applies under this Contract) to enforce any of the terms of this Contract made for the benefit of the Employer ...*"

The clause had been introduced in the 1987 form of contract and despite commentary in the JCT Guidance, there had been no sustained consideration of it in case law.

Assign of the times

The Dispute

Despite the DoA being drafted as a purported assignment of the full benefit of the contract, Aviva accepted that no prior notice had been given to Shepherd and, consequently, argued the assignment was valid under clause 7.2.

In doing so, Aviva relied on leading cases on contractual construction and business common sense to question the meaning of the clause and strive for an interpretation which would have resulted in the DoA effecting a valid assignment (as between Camstead, Aviva and Shepherd).

In response, Shepherd argued, among other matters that:

1. clause 7.2 only envisaged assignment to the immediate (or first) assignee;
2. the clause only allowed proceedings to be commenced in the name of the original Employer (i.e. Camstead); and
3. any proceedings could only be for losses suffered by the original Employer.

Judgment

In agreeing with Shepherd, Mrs Justice Jefford, at paragraph 22 of her judgment, held relevantly:

1. "*all that can be assigned, as the clause [7.2] says, is the right to bring proceedings in the name of the Employer*" and so any claim would have had to have been brought in the name of Camstead; and
2. "*There is no wording that would encompass a subsequent transfer by [the transferee of the original Employer]" as in the clause "[t]he words "any such" plainly refer to the person to whom an interest has been transferred or granted by the Employer*" (i.e. not by any other party). Therefore, only the first transferee/assignee, Hotbed, could bring such a claim in the name of the Employer.

Having found in Shepherd's favour on these points, the Judge did not continue to consider the types of losses that could be recovered under clause 7.2, noting that "*more detailed consideration of this part of the clause must await a case in which it is relevant on the facts*".

Having found there was no claim in contract for Shepherd to answer, Mrs Justice Jefford went on to consider possible claims in tort which were captured by the purported DoA.

Whilst stating that a "*contractor is inherently unlikely to owe a duty of care to the employer to prevent or avoid economic loss*" the Judge found that any tortious claim would have arisen out of the contract and, as such, assignment of the same was caught by clause 7.1.1.

The judgment concludes that Aviva's "*application to join Camstead fails*" and Shepherd's "*application to strike out succeeds*".

Liquidated Damages: An update following Triple Point

Hot on the heels of *Triple Point Technology Inc v PTT Public Company Limited [2021] UK SC 29, the TCC grappled with another case regarding liquidated damages (LADs) provisions.* Eco World / *Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd [2021]* EWHC 2207 concerned a Part 8 claim in the TCC regarding the proper construction of the LAD provisions in a construction contract. This was against a backdrop of partial take-over of the contract works.

The contract provided for Eco World to take over part of the works before practical completion, but the contract did not provide a mechanism to reduce the LADs to account for any partial takeover. Eco World argued that the LAD provisions were invalid and inoperable on the basis they were a penalty and made a claim for general damages for delay, far exceeding the level of LADs.

The court considered the validity and enforceability of the LAD provisions and, alternatively, whether any general damages, if applicable, would be limited to an unenforceable LAD clause.

Dobler's Works comprised the façade and glazing works for Blocks A, B and C, with no provision for sectional completion. In June 2018, Eco World took over Blocks B and C but no completion certificates were issued for those blocks. In December 2018, the entire Works were certified as practically complete.

The LAD clause provided that:

> *"The following rates of liquidated damages will apply for the first 4 weeks (inclusive) of delay in completion to the Works beyond the Date for Completion*
>
> - £nil per week or pro rata for part of a week

Liquidated damages will apply thereafter at the rate of £25,000 per week (or *pro rata for part of a week*) *up to an aggregate maximum of 7% of the final Trade Contract Sum…"*

Accordingly, subject to any extensions of time, Dobler's liability to pay or allow for LADs arose if it failed to complete the Works for all three blocks by the completion date of 30 April 2018.

Liquidated Damages: An update following Triple Point

O'Farrell J referred to the leading case on liquidated damages, the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi [2015]* UKSC 67.

Cavendish Square confirmed that "*the real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal*".

O'Farrell J affirmed that a single rate LAD clause can remain enforceable despite Dobler's argument that such a rate did not reflect Eco World's partial takeover and therefore the reduction in loss that would be incurred.

Applying Cavendish Square, O'Farrell J held that the LAD clause was not "*unconscionable*" or "*extravagant*" so as to be penal.

In reaching this view, O'Farrell J noted the following:

1. The LAD provisions were negotiated by the parties, who both had the benefit of advice from external lawyers.
2. The court should be cautious to interfere in the freedom of parties to agree commercial terms and allocate risk in their business dealings.
3. Eco World had a legitimate interest in enforcing the primary obligation of Dobler to complete the Works as a whole. Late completion was likely to have an adverse impact on the work of following trade contractors.
4. Quantification of damages would be difficult and by fixing in advance the LADs payable, the parties avoided the difficulty of calculating and proving such loss.
5. There was no evidence before the court that the level of damages was unreasonable or disproportionate to the likely losses.

O'Farrell concluded that the LAD provision was not extravagant, exorbitant or unconscionable but a secondary obligation which imposed a detriment on Dobler which was proportionate to the legitimate interest of Eco World in the enforcement of Dobler's primary obligation to complete the Works.

The court also considered Dobler's alternative arguments that, even were the LAD provision considered to be penal, the level of general damages would in any event be capped at the level of LADs.

The decision in *Eco World* shows the courts' reluctance to interfere in a bargain struck by commercial parties, particularly in circumstances where those parties have received external legal advice and it seems likely that it will remain difficult to challenge LAD provisions as penalties.

Payment in Construction: Downs Road Revisited

Anyone familiar with the Construction sector will know that payment is often an area of contention. Navigating the payment provisions of the Contract can be a minefield, and Contractors and Employers are regularly caught out. A good example of an Employer tripping up is the case of *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC).*

Background

Downs Road Development LLP (the "**Employer**") employed Laxmanbhai Construction (UK) Ltd (the "**Contractor**") to demolish and erect 79 residential units. The form of contract was the JCT Design and Build Contract (2011 edition) (the "**Contract**").

On 26 February 2021 the Contractor sent Payment Application 34 which stated the sum considered due was £1,888,660.70. Five days later, the Employer responded with Payment Notice 34, in which the amount due for payment was stated as £0.97.

In the Employer's covering email he made clear that "a further payment notice will be issued to you in due course". This was because the Employer had been having difficulty "assessing the valuations in a timely manner". Payment Notice 34 was essentially a 'holding' payment notice.

Subsequently (on 9 March 2021) the Employer sent to the Contractor Payment Notice 34a, in which the sum payable was stated as the significantly lesser sum of £657,218.50.

In April 2021, the Contractor referred Payment Application 34 to adjudication. As part of its response, the Employer advanced a cross claim that the Contractor had failed to build a capping beam correctly, which resulted in an estimated loss of £149,000. However, the Adjudicator refused to take the cross claim into account, as he interpreted his jurisdiction narrowly, meaning he would only consider the 'true value' of Payment Application 34.

Therefore, the cross claim fell outside of his jurisdiction and would not be considered.

The Adjudicator's decision was made on 16 June 2021.

Payment in Construction: Downs Road Revisited

Having carried out a 'true value' assessment of Payment Application 34, he held the Contractor was due a further £103,880 after the payment made following Payment Notice 34a was taken into account (£761.098.50 net).

The Employer duly commenced proceedings in the TCC and sought the following declarations:

- The validity or otherwise of Payment Notice 34 ("**Issue 1**");
- The enforceability of the Adjudicator's decision, given the Employer's cross claim was not considered ("**Issue 2**"); and
- Whether, as the Employer claimed, part of the decision (relating to the amount of Interim Application 34) could be safely severed in the event that the full decision was unenforceable ("**Issue 3**").

Issue 1

Section 110A (2)(a) of the Housing Grants, Construction and Regeneration Act 1996 (the "**Construction Act**") states that a payment notice must include *"(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment; and (ii) the basis on which that sum is calculated*".

In this case, HH Judge Eyre QC held that Payment Notice 34 did not constitute a valid payment notice because it did not contain a sum that the Employer genuinely considered to have been due.

On the facts, it was unreasonable for the Employer to claim it had genuinely believed the sum of £0.97 to be due, given that the Employer had already confirmed that a subsequent payment notice was to follow and that it had trouble assessing and responding to valuations in a timely manner.

Also, during previous payment cycles, the Employer had issued initial payment notices of £1 or £0.97 as a holding measure to grant itself more time, which would later be followed by an accurate assessment of what was due. The TCC found this was not an appropriate course of action to adopt, and it was not necessary to find evidence that the Employer was acting in bad faith.

Addressing the second requirement, HH Judge Eyre QC held that Payment Notice 34 did not set out the basis on which the sum had been calculated due to an absence of accompanying material, leaving it unclear how the Employer arrived at the end figure.

Therefore, Payment Notice 34 did not comply with either requirements and was accordingly invalid.

Issue 2

HH Judge Eyre QC found that the Adjudicator took an unduly narrow interpretation of his jurisdiction. His decision to expressly refuse to take account of a material issue in the adjudication constituted a breach of natural justice and therefore his decision was unenforceable.

The capping beam cross claim was a material issue because it would have had a significant impact on the decision. More specifically, had the Employer's cross claim been successful, no further sums would have been due to the Contractor in the adjudication once the payment made in respect of Payment Notice 34a was taken into account.

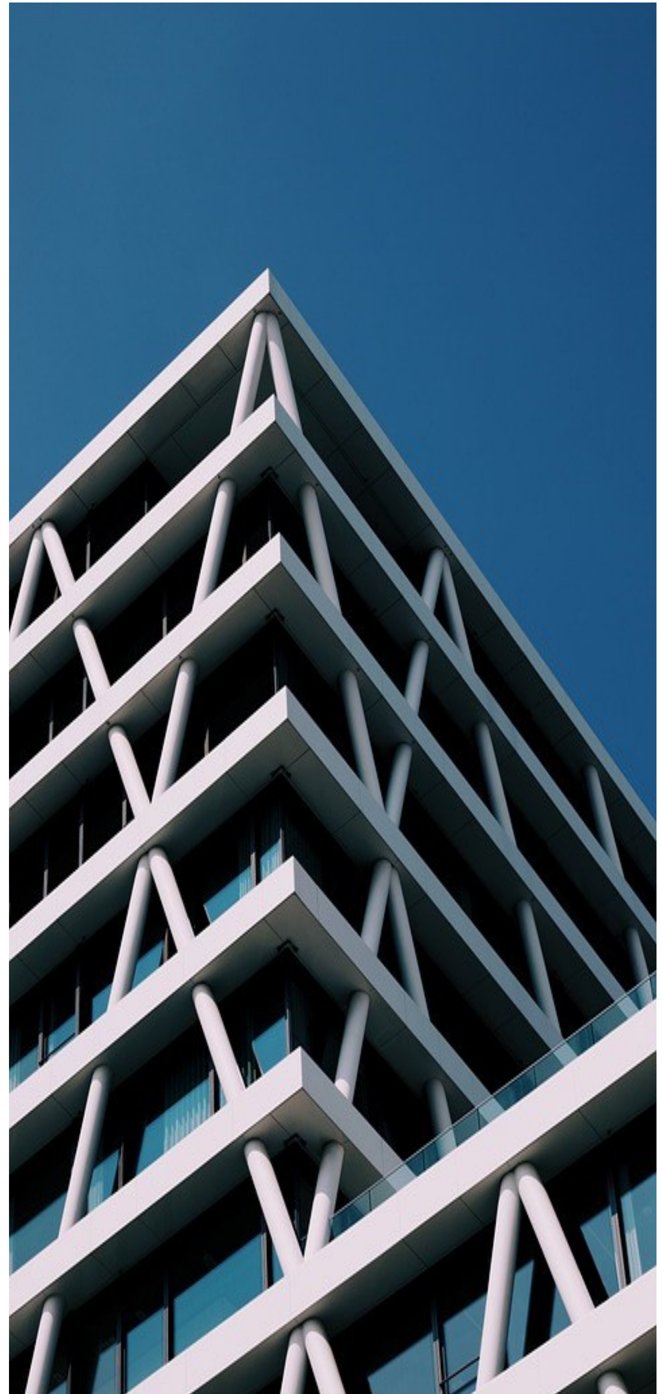
Had the Adjudicator considered the capping beam claim, the enforceability of the adjudicator's decision would not have been called into question.

Payment in Construction: Downs Road Revisited

Issue 3

To confirm that parts of the Adjudicator's decision could be severed, it must be accepted that the overall decision is made up of independent decisions that can be severed from it. That is, providing that severance would not lead to the splitting up of one continuous chain of reasoning.

In this case, HH Judge Eyre QC held that the Adjudicator's decision was made up of a continuous chain of reasoning and therefore it could not be severed and the entire decision was unenforceable.



Discussion

The fundamental take away from this case is that either party to a contract must fully understand the terms of that contract. Merely playing 'lip service' to the strict payment regime of either a JCT contract or indeed any contract from any other suite will not suffice.

Where a payment and/or payless notice is issued, but it is late, and there is not a genuine belief that the sums included are due, or it does not set out how that sum has been calculated, that notice is likely to be deemed invalid. The upshot is that it will likely expose the issuing party to a smash and grab adjudication (meaning that by default the sum applied for becomes the notified sum, which should be paid in full).

Whether or not there is a genuine belief that the sums stated within a payment and/or payless notice are due is a subjective test and therefore will be difficult for a contractor to prove in the context of an adjudication.

Context and the relevant correspondence will be critical in these circumstances and therefore consideration should be given to what is, and is not said, as this may be a deciding factor.

Having said this, to avoid this situation altogether, ensure you know what the contract requires and that you comply with it.

The Appeal of Toppan Holdings Ltd & Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2021] WEHC 2110 (TCC)

This year the Court of Appeal will hear a tenant's appeal of Mr Bowdrey QC's July 2021 decision, sitting in the TCC, not to grant summary judgment to enforce an Adjudicator's decision in favour of the tenant concerning works carried out to a care home in Mill Hill, London.

The decision to deny summary judgment of the adjudicator's decision in favour of the tenant focused on whether a collateral warranty can be deemed a 'construction contract' for the purposes of section 104 of the Housing Grants, Construction and Regeneration Act 1996 (the "**Act"**) which, if it is, entitles disputes to be referred to adjudication pursuant to section 108 of the Act.

What became of critical importance was the timing the collateral warranty was put in place, following authority in *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd [2013] B.L.R. 589,* in which Mr Justice Akenhead reached the opposite conclusion that a collateral warranty was deemed to be a construction contract, because the language of the warranty referred to the construction of a pool development to take place in the future. In *Parkwood*, Mr Justice Akenhead acknowledged his decision should not be treated as authority that all collateral warranties will equate to construction contracts.

Unlike in Parkwood, practical completion, a settlement agreement and the completion of remedial works had all taken place, performed by an alternative contractor, by the time Simply Construct had warranted its works to Abbey. This meant the collateral warranty was deemed to have not been able to warrant works to be carried out for Abbey in the future.

Simply had challenged the Adjudicator's decision on the same ground during the adjudication, but the Adjudicator decided in favour of Abbey, a decision that the Court was not bound by and indeed did not follow.

As Mr Bowdrey QC held at paragraph 27 of his judgment, "*Whilst contractors and beneficiaries should negotiate the contents of their collateral warranties with some caution if they want them not to fall within the Act, the timing as to when they are executed is also important. On the facts of this case I cannot see how applying commercial common sense a collateral warranty*

The Appeal of Toppan Holdings Ltd & Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2021] WEHC 2110 (TCC)

executed four years after practical completion and months after the disputed remedial works had been remedied by another contractor can be construed as an agreement for carrying out of construction operations."

In addition to the interpretation that timing matters, it was also held that "*A collateral warranty might be parasitic upon a building contract but so would a parent company guarantee. No one would construe a parent company guarantee as a construction contract.*"

Section 104 of the Act refers to the "carrying out of construction operations", implying that it has to be works undertaken in the future. Even architectural and design works are works "*to do*" (section 104 (2) (a) of the Act).

The Court of Appeal will now be able to provide clarity over the question of timing, which could have wider consequences than determining the issue over the classification of a collateral warranty. For example, where works are undertaken pursuant to a Letter of Intent and the building contract is executed only after the works are complete.

It is likely that reference to a rectification period will mean there are works to be carried out for the purpose of the Act. Of course, not an advisable situation, but another question that may be soon answered.

In *Northumbria Healthcare NHS Foundation v Lendlease Construction (Europe) and others*, a case that has been highlighted by *The Lawyer* as one of the top 20 cases to watch this year, an emergency care hospital that suffers from a number of defects and faces demolition, forms a multi-party construction action in excess of £100 million.

The project gained attention in 2012 as the NHS' first purpose-built specialist hospital to provide round the clock emergency care. The Cramlington Hospital is said to have cost £75 million to build with another circa £20 million spent on access and new medical equipment.

Since its completion in 2015, it has been plagued with extensive structural defects, including fire safety concerns.

The claim will involve costs that may be incurred towards temporary facilities to treat patients while remedial works are underway. A number of parties have been brought into the proceedings with Part 20 contribution claims pleaded, including structural engineers, designers, joiners and roofers.

The extent of defects, culpability, reliance on contract terms and the quantification of loss, including reasonableness, the necessity of a proposed remediation scheme and who ought to bear the cost of decanting the hospital will all form important considerations should the matter proceed to trial later this year.

It will be particularly interesting to see whether any net contribution/just and equitable clauses will be relied upon and, if so, how they will be applied when apportioning liability across the parties.

Hirst & Another v Dunbar & Others [2022] EWHC 41 (TCC)

A recent decision in the TCC has provided some helpful guidance on the interaction between the Limitation Act and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) ("Scheme"); specifically whether the payment provisions of the Scheme affect the commencement of the limitation period for payment claims under a construction contract.

The Facts

The claimant, Mr Hirst carried out construction works at a residential development in Bradford between October 2011 and December 2012 ("**Works**"). Mr Hirst claimed to have performed the Works pursuant to an oral contract with the defendant, Mr Dunbar.

Completion of the Works occurred on 4 December 2012 and Mr Hirst demanded payment for the Works in the sum of £476,886.29 from Mr Dunbar in March 2014.

Mr Dunbar did not respond to the demand and Mr Hirst issued proceedings some five years later, on 2 August 2019.

Mr Hirst argued that the Works were carried out pursuant to an oral contract and that, as a 'construction contract' the provisions of the Scheme were implied.

Mr Dunbar argued that no contract existed between the parties and that, in any event, even if there was a contract the claim was time-barred as the cause of action accrued upon completion of the Works (i.e. 4 December 2012) and therefore the claim was issued after the six-year limitation period.

As such, there were two key issues to be considered, namely:

- was there a contract between the parties (the "**Contract Issue**")?
- if so, was the claim time-barred (the "**Limitation Issue**")?

The TCC was also asked to consider what Mr Hirst would be entitled to be paid (there being no agreed contract sum and the claim being brought on a *quantum meruit* basis).

Hirst & Another v Dunbar & Others [2022] EWHC 41 (TCC)

The Contract Issue

Mr Justice Eyre in the TCC held that there was no contract between the parties and therefore the claim failed.

The judge found that neither Mr Hirst nor Mr Dunbar were reliable witnesses, and that there was little contemporaneous documentary evidence to support either party's position. Ultimately, the court favoured Mr Dunbar's position for the following main reasons:

- the claimants' assertions about the contract, its terms, and which parties had entered it, were vague;
- in their previous dealings, the parties had entered formal contracts (unlike here); and
- the evidence of others involved in the project was consistent with the view that Mr Hirst had believed he would obtain funding to buy the site and was therefore carrying out the works as a contribution to its development rather than for Mr Dunbar.

Having decided there was no contract, the TCC went on to consider the Limitation Issue, namely whether the claim would have been time-barred in the event a contract had existed.

The Limitation Issue

Common law position

The Limitation Act 1980 provides that a claim made pursuant to a 'simple' contract is subject to a limitation period of six years from when a cause of action accrues.

In terms of the a right to payment claim, the common law position is that in the absence of clear contractual provisions to the contrary, the cause of action for payment for works/services accrues when the works or services in question have been provided. In this instance, that would have meant the cause of action accrued when the Works were completed, on 4 December 2012 (at the latest).

The Scheme

In circumstances where a construction contract does not provide adequate payment provisions, the payment provisions included in the Scheme will be implied into the contract.

Mr Hirst argued that pursuant to the payment provisions of the Scheme, the limitation period did not begin until five days after Mr Hirst had made a demand for payment (being the date Mr Dunbar should have issued a payment notice in response to the demand as per paragraph 9, Part II of the Scheme). Mr Hirst made a demand for payment in March 2014 and therefore argued that the proceedings were issued inside the six-year limitation period.

Decision

The TCC held that a provision stating that a sum became payable when it was demanded by a claimant would not, absent clear drafting, displace the common law position as this would allow the claimant to indefinitely delay the accrual of its right to payment and determine the beginning of the limitation period, depending on when it chose to make the demand.

The TCC found the provisions of the Scheme are not provisions determining the accrual of a cause of action but rather these provisions are mechanisms for identifying when payment is due or for identifying any disagreement between the parties as to the amount that is due.

As a result, the Court found that, had there been a contract, the claim would have time-barred as the cause of action accrued on 4 December 2012 at the latest.

Implications

While the TCC's decision on the interaction between the Scheme and limitation is obiter, it is the first authority that we know of on these points.

The decision confirms the provisions of the Scheme provide for the discharge of existing rights to payment but do not create an entitlement to payment.

However, the decision leaves room for debate as regards when the right to interim or stage (rather than final) payments accrues under contracts subject to the Scheme. Further, careful consideration should be given to contractual terms that include, as a condition precedent, a right to payment and, as a condition precedent for payment, the requirement for an independent certifier.

Climate Reporting and the Government's "Green Rules"

On 5 June 2021, the UK government announced new public procurement rules that seek to 'decarbonise the government supply chain', driving the government's climate change agenda and helping deliver its manifesto promise to reach 'Net Zero' carbon emissions by 2050.

The Public Policy Note

Public Policy Note 06/21 (the "**PPN"**) implements new measures that require companies bidding for major government contracts to commit to achieving Net Zero.

The new measures will apply to any UK or international business bidding for a public contract with a value of at least £5 million per annum (excluding VAT), where the contracting authority is a central government department, executive agency or non-departmental public body, and where the tender process commenced on or after 30 September 2021 (a "**Qualifying Contract**").

Pursuant to the PPN, bidders are required to produce and publish a clear and credible Carbon Reduction Plan with their bid/tendering documents to be considered for a Qualifying Contract.

Carbon Reduction Plan ("CRP")

The new measures introduced by the PPN include a selection criterion, which must be included in the tender processes for all Qualifying Contracts that requires bidders to provide a CRP (in the form set out in the PPN).

A bidder's CRP must (among other requirements):

- confirm the bidder's commitment to achieving Net Zero by 2050 in the UK;
- set out 'the environmental management measures in effect, including certification schemes or specific carbon reduction measures' that will apply when the bidder is performing the contract;
- set out the bidder's 'baseline emissions footprint' (meaning the greenhouse gases produced prior to the introduction of any strategies to reduce emissions);

Climate Reporting and the Government's "Green Rules"

- be approved by a director of the bidder company/ firm; and
- be published on the bidder's website and updated regularly (at least annually).

Many large companies are already required to self-report on their greenhouse gas emissions, notably in respect of Scope 1 (direct) and Scope 2 (indirect owner) emissions pursuant to the Streamlined Energy and Carbon Reporting Regulations 2018 (the "**SECRR**").

However, the new measures introduced by the PPN provide that any bidder for a Qualifying Contract must produce and publish a CRP that includes self-reporting on Scope 3 (indirect) emissions (which include business travel, employee commuting, transportation, distribution and waste and represent a significant proportion of a firm's carbon footprint).

Impact

For those companies that have already made commitments to achieve Net Zero, the key concern will be to ensure existing commitments and reporting obligations are appropriately evidenced in their CRP.

Meanwhile, companies that have not made such commitments and are looking to be considered for large public contracts should start collating relevant information to produce a compliant CRP.

Looking forward

While the measures set out in the PPN only apply to large government contracts at this stage, the imposition of environmental requirements in contractual terms will no doubt become more prevalent in the years to come.

Moving forward, contractual clauses with Net Zero objectives are likely to become commonplace in construction contracts.

Further, such clauses are likely to become more onerous than mere reporting requirements and may include a range of targets (such as reductions in energy and water usage, recycling and use of recycled materials, use of sustainable construction methods, and protection of the environment).

In the event that targets are not met, it may be that contractual consequences apply (such as a right for the employer to terminate a contract, the application of general and/or liquidated damages, and a right for the employer to withhold retention).

Higher Fuel Costs for the Construction Industry: Red Diesel Reforms

From 1 April 2022 (the "Change Date"), the construction industry is no longer able to use red diesel in off-road vehicles and machinery. Red diesel is fuel that is dyed red so that it is easily identifiable. The primary reason for using red diesel is that it is a rebated fuel and therefore subject to (i) less fuel duty than white diesel and (ii) a lower rate of VAT for supplies up to 2,300 litres.

Before the Change Date, non-road mobile machinery (such as cranes, bore/drill rigs and bulldozers) were eligible to use red diesel. But from the Change Date, it is only possible to use red diesel in certain machines and vehicles for specific purposes, such as agriculture, horticulture, marine transport and non-commercial electricity generation and heating.

The change is part of the government's efforts to meet its climate change and air quality targets by incentivising users of red diesel (including the construction industry) to improve the energy efficiency of their vehicles and machinery, invest in cleaner alternatives and use less fuel.

Mitigating the effects of the rule change

Construction companies may have taken mitigation measures to prepare for the change, for example by:

1. using up surplus red diesel;
2. reducing orders of red diesel in the run-up to the change date, to avoid holding excess red diesel;
3. investigating whether the higher fuel cost can be recovered under existing contracts (as set out below);
4. pricing future contracts to account for higher fuel costs;
5. if using a vehicle or machinery for both allowed and non-allowed purposes, either preparing to (i) flush out any red diesel when switching uses or (ii) just use white diesel or biofuels; and keeping records (as set out below).

Since 1 April 2022, you can only use red diesel if it was legally put into your vehicle or machinery before that Change Date.

It is worth noting that after the Change Date you are not required to flush out any surplus red diesel in your storage tanks until 31 March 2023, after which any surplus will need to be sold, given away or disposed of.

Record keeping

There is likely to be a gap between the Change Date and the red diesel in a tank or engine being used up. Therefore, going forwards, if any trace of fuel marker is found in the fuel supply of a vehicle or machine that is not permitted to use it, users may be asked to provide evidence to show that any rebated fuel was put in before the rules changed and is still being used up.

Accordingly, it is important that users keep invoices or receipts to show that, since the Change Date, purchased diesel or biofuels have had full duty paid on them and are being used to refill vehicles and machinery.

Users of vehicles or machines for both allowed and non-allowed purposes after the Change Date should also keep records demonstrating that either they have flushed the tank or the fuel being used has had full duty paid.

Recovery of costs under existing contracts

We have set out below the recovery position under the standard form JCT Design & Build Contract 2016 and NEC4 Engineering and Construction Contract.

However, we note that under these forms, a contractor either has no or very limited ability to recover additional fuel costs arising after the Change Date.

JCT ("JCT DB 2016")

Under the JCT DB 2016 contract, a contractor can only recover loss and/or expense where a Relevant Matter applies.

Under clause 2.15.2.1, a change in Statutory Requirements after the Base Date will be treated as a Change (and therefore a Relevant Matter) only where the change in Statutory Requirements necessitates an alteration or modification to the Works.

It is difficult to see how additional fuel costs will require the Works themselves to be changed. Therefore, any additional fuel costs are likely to have to be borne by the contractor.

NEC4 ("NEC4 ECC")

The possibility of recovery under an NEC4 ECC is also limited and depends on whether secondary Option X2 (changes in the law) has been selected.

If it has been selected, a change in law occurring after the Contract Date is a compensation event, which will entitle an adjustment to prices. Such an adjustment is assessed by reference to the effect of the compensation event upon the Defined Cost which, for fixed price Options A and B, is defined as the cost of the components in the Shorter Schedule of Cost Components ("**SSCC**").

The cost of Equipment under the SSCC is largely assessed on the basis of rates and the cost of fuel is not a specific cost component under the SSCC, so the scope for a contractor recovering additional fuel costs is limited except in two circumstances:

1. Where the rates for Equipment stated in the published list in the Contract Data do not include the cost of transporting Equipment to and from the Working Areas (other than for repair and maintenance), there may be scope to recover additional fuel costs as part of the cost of transportation.
2. Where Equipment is not in the published list stated in the Contract Data nor listed in the Contract Data, then its cost is assessed by way of competitively tendered or open market rates and therefore additional fuel costs incurred in relation to such Equipment should be rolled into that rate and therefore recoverable.

However, even if a contractor's additional fuel costs can be recovered under one of the two circumstances above, an employer could challenge whether that contractor is entitled to a compensation event under option X2 by questioning when the change in law actually occurred.

The statute that gives effect to the change in red diesel rules is the Finance Act 2021, which was given royal assent on 10 June 2021. Therefore, an employer could argue that there is no entitlement to a compensation event if the contractor failed to notify the change in law as a compensation event within eight weeks of becoming aware that the change in law (i.e. the passing of the Finance Act) had happened.

Materials and Labour Shortages

2021 will be remembered by the construction industry as a year in which materials prices rocketed while labour and materials availability plummeted. For construction lawyers, it was the year of the letter of intent (to allow long lead in items to be procured) and keen interest in fluctuation provisions in building contracts (to allow contractors an uplift in their costs, in response to adverse price changes).

2022 looked a little brighter, until the conflict in Ukraine broke out in February. Before the war, while challenges remained, more up-beat members of the sector thought the construction industry was through the worst of the Brexit/Covid-19 one-two.

Many building materials appeared to be becoming more readily available, albeit still at inflation-beating prices, and the sector was looking to the future with renewed attempts to increase training opportunities to address skills shortages, and to increase female representation.

High prices of materials before the start of the war in Ukraine were exacerbated by the spiralling cost of electricity and gas, which materials manufacturers were, and still are, seeking to pass on down the supply chain.

Further energy price increases and the war in Ukraine have added to this by pushing up the price of materials further and adding to supply chain disruption. The significant rise in the cost of aluminium products, for example, is seen as directly related to the war, as the cost of the raw material (alumina) from Russia, has increased considerably.

Some commentators forecast that the war may result in some larger construction projects coming to a standstill and some industry bodies have called for government intervention. The Federation of Master Builders, for example, has called for a reduction in VAT on energy-efficient improvements to help cut costs.

Remaining material shortages

The Construction Leadership Council (CLC), which produced and updated rules for the construction industry throughout the Covid-19 pandemic (which we kept you

abreast of), has set out what materials are still subject to lead-in issues:

1. **Bricks and blocks:** demand is expected to be strong this year, so "imports may be necessary to a make up a shortfall in UK production until new production lines come on stream in 2023/24";
2. **Cement:** as above, "manufacturers have raised concerns that rising energy costs will likely lead to price inflation";
3. **Roof tiles:** are said to be subject to "*lead times averaging 24 weeks*" owing to high demand;
4. **Structural timber:** (the price of which (sawn/planed) increased circa 70% in the past year according to the BEIS Monthly Statistics of Building Materials and Components report): "*tongue & groove*" timber products it is said "*[remain] in short supply" and "congestion both here and at Scandinavian ports may lead to reduced supplies and higher prices in Q1 2022*".

Other materials also remain harder and more expensive to source than pre-Brexit/Covid-19/Ukraine and the CLC has said "*pressures on global shipping, including delays and volatile prices, look set to continue*".

It also references the "*ongoing disruption stemming from China's (…) policy with regard to Covid-19 outbreaks.*"

Many commentators have spoken of the specific effects of the Ukraine war on materials, pointing out that, because smaller construction businesses tend to be locked into fixed-price contracts with their customers, they were considerably less able to cope with shocks to their businesses.

Main contractors must therefore ensure they maintain dialogue with their suppliers and have a plan to keep projects going. In some cases, they may need to pay more to ensure projects remain viable for smaller companies operating in the sector.

Labour shortages

Another major challenge for the construction sector is the labour shortage that has been heavily affecting the construction industry for a considerable period of time, and which shows no sign of abating.

Demand for labour remains far higher than the industry can supply, allowing trades to increase their prices. The

CITB suggests that "*construction will need 216,800 new workers by 2025 to meet demand*". This lack of skilled workers (both from Europe and domestically) is leading to higher recruitment costs for construction companies in addition to the cost of sourcing busy suppliers and subcontractors.

This inevitably drives up tender prices and causes projects to become more expensive.

The Continued Squeeze on the Industry

Tough times for contractors are set to continue as inflation and conflict drive materials and labour costs further skywards. Many contractors that were under financial strain pre-Brexit and pre-Covid-19 have struggled to pull through the economic uncertainty. The effects of inflation, and now the war in Ukraine and soaring energy costs, mean their outlook remains uncertain. Those involved in long-term projects without fluctuation provisions to allow for adjustments in the contract sum due to price inflation fear they will see profit margins significantly eroded by this inflation.

Contractual relief

We are likely to see some contractors more aggressively seeking contractual solutions to mitigate their ongoing exposure to risk. Taking the JCT Design and Build Contract 2016 and the NEC4 Engineering and Construction Contract as examples, they allow for extensions of time and additional costs as follows:

JCT

Clauses 2.26.14 (*force majeure*) and 2.26.12 (change in law) are "relevant events" under the contract. *Force majeure*, although it is not defined in the JCT suite, is essentially, an event that causes a delay to the completion of the works that neither contracting party reasonably contemplated at the time they signed the contract; and the event is beyond the reasonable control of the party seeking to rely on it.

Whether events in Ukraine and the impact on the flow of goods and materials is a *force majeure* event will be assessed on a case-by-case basis, but case law tells us that a contract becoming more expensive to perform or more onerous is not sufficient to amount to *force majeure*.

Unlike *force majeure*, a change in law is defined in the JCT suite. The definition could include government sanctions, such as those imposed on Russia by the UK government in response to the invasion of Ukraine and maybe an extension of time event as: "*….the exercise after the Base Date by the United Kingdom Government… of any statutory power…which directly affects the execution of the Works*".

Neither relevant event will give the contractor additional cost, however, as neither is a "relevant matter" under the

The Continued Squeeze on the Industry

contract. A contractor may, however, become entitled to additional costs under other provisions. Under clause 2.2.1, a contractor is only required to use in the works materials and goods ("so far as procurable") "of the kinds and standards described in the Employer's Requirements…". In other words, to the extent that materials and goods are not procurable, this could be a ground for a "Change" under the contract.

Also, under clause 5.1, if there is a change in law that necessitates an amendment to the Employer's Requirements, this would be treated as a "Change".

NEC

Under the NEC form, the allowance of additional time and additional costs are assessed together by reference to a "compensation event", for example, under clause 60.1(19). Under this provision, additional time or costs can be claimed where an event occurs that prevents the contractor completing the works either entirely or by the date for completion.

If it is an event that "*neither Party could prevent, an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it*", this is grounds for a compensation event.

Also, under secondary option X2 (changes in law): if there is a change in the law of the country in which the site is located after the date of the contract, this is also a compensation event. Further, if the Scope requirements are 'impossible' to perform, the Project Manager must issue an instruction changing the Scope, which instruction is also a compensation event under clause 60.1(1).

Secondary option X1 (price adjustment for Inflation) may be used with some NEC pricing options to allow the contractor to claim adjustments to prices due to market volatility and price increases in goods and materials required for the works.

It is also worth mentioning the parties' obligation to "act in the spirit of mutual trust and co-operation". Contractors may seek to rely on this overall obligation to try to encourage the project manager and the client to work with them in this very challenging time and to try to secure compensation for losses arising through no fault of the contractor.

Safety in numbers?

There are also signs that contractors will continue to merge to take advantage of market contacts and long-term frameworks. As an example, there had been speculation that the listed Kier Group would take over

Tilbury Douglas, but that is now not going ahead, with Kier reported to have pulled the plug on the plan, though others have, however, been reported.

Also, Keller, which is said to be the UKs leading geotechnical specialist contractor, has announced its ambition to expand its UK business; and consultants are seemingly also bolstering their businesses, with Aecom recently acquiring 30% of SLC rail.

Insolvency

Over the last year, we have continued to see the collapse of some large well-established contractors.

The South West construction firm Midas collapsed into administration in Q4 of 2021. There were calls for government intervention and later attempts to sell the business but these failed, resulting in over 300 redundancies. The demise of Midas, like any contractor, has had an effect across the industry. Midas left a supply

The Continued Squeeze on the Industry

chain reported to be owed circa £70 million and there are fears sub-contractors and connected businesses will (if they have not already) feel the squeeze from unfulfilled contracts and unpaid invoices.

Creditors of Midas are reported to be out of pocket to the tune of £115 million, plant hire companies and materials suppliers are among the worst hit by their demise and there seems little hope of recovery of their unsecured debts.

The figures collated by the Insolvency Service for Q4 of 2021 make grim reading for the industry, showing a stark contrast to the position in 2020. There is evidence of a substantial increase in insolvencies in the sector above the overall annual increase.

The average was an 11% increase, with construction seeing over double this at 25%. The sector was top performer in respect of the number of insolvencies with 2,579 (followed by 1,722 for wholesale, retail trade, and repair of vehicles, and 1,673 for accommodation and food services).

Insolvency has plagued every layer of the sector, with large sub-contractors and specialist contractors also struggling. Building facade specialist Kaicer has gone into administration owing over £7 million to suppliers and trade contractors. Having grown quickly, it achieved a peak revenue of £32 million in 2019, but this plunged to £14 million in the year to February 2020.

The causes

The blame for the spike in insolvencies has been levelled at the pandemic, shortages of materials, labour, and significant rises in costs caused by inflation and events in Ukraine. However, the writing was on the wall for many companies pre-pandemic as shortages of work and competitive tender processes squeezed their bottom line throughout the industry.

The spiralling costs of energy continues to be a significant risk factor for businesses and will immediately increase base costs. Energy prices affect inflation and those in long -term contracts will feel the pinch when they assess the difference between quoted prices and actual prices.

There are still issues arising from the catch-up of timber production from Scandinavia as well as international trade of items produced in China.

Energy-intensive materials such as concrete and steel are expected to offset any relief felt in the short term; and if there was light at the end of the tunnel, the events in Ukraine and the resulting sanctions has pushed it much further away.

Contractors are likely to use market conditions to renegotiate contracts that place them at greater risk financially. Meanwhile, Employers will need to decide between sharing in the risk of their contractor's increased costs, or facing the disruption of an insolvent main contractor. Market standard is for fluctuation provisions to be removed from contracts, however, as projects delayed by Covid-19 catch up, it is evident that initial tender prices have been rendered obsolete.

The increase in energy prices alone has seen tenders become out of date and economically unviable very quickly.

The continued squeeze on the industry

Developers are also being affected by the squeeze. Levelling-up Secretary Michael Gove is expected to unveil plans for a new development tax, which will hit developers who build affordable housing. This follows a proposal in the government’s 2020 *Planning for the Future* white paper to introduce a “nationally set, value-

The Continued Squeeze on the Industry

based flat-rate charge" in place of the existing council-set obligations.

The white paper envisages that the levy would deliver "at least as much on-site affordable housing" as the current system of developer contributions through Section 106 agreements and the Community Infrastructure Levy (CIL), but developers are not convinced. They have warned ministers the proposal could lead to fewer affordable homes being built.

The Federation of Master Builders, for example, has said the flat rate charge "must reflect local circumstances and be set at a local level" because project viability varies according to the type of site and different market areas.

Representatives of the House Builder's Federation and the British Property Federation have also warned against the government's proposal, saying it is likely to have the opposite effect to that which the government expects and will adversely affect both the viability and the provision of affordable housing.

Further detail from the government has been called for.

Some practical points for the future

Companies will need to focus on efficiency to avoid wasted costs, with traditional building methods likely to suffer.

We may see more growth in off-site manufacturing and greater embrace of new sustainable construction techniques. 3D printing, however, remains an experimental method of construction although it can reduce materials wastage.

Such changes are likely to result in risk for contractors who may need to make an initial outlay of costs to achieve long term savings.

Planning for the worst case scenario remains the most sensible approach for contractors. We suggest the following measures at the start of any project:

- Check the financial standing of the Employer and any subcontractor. Are they offshore entities or companies known to be struggling?
- Seek a parent company guarantee of performance when dealing with a subsidiary within a group;
- Obtain collateral warranties from those parties with principal design or construction responsibilities creating direct contractual links and a layer of insurance protection;
- Consider insolvency-based insurance products;
- Ensure insolvency is well defined in your contracts and that no further sums are payable where an insolvency event occurs;
- Ensure you have retention of title clauses and consider the use of vesting certificates that transfer title once payment has been made;
- Consider step-in rights in the event of insolvency; and
- Never ignore the early warning signs, for example late payments or a reduced workforce.

Good planning and pre-emptive advice remains the best cure for the threats facing the industry. Ensuring the risk of increased costs sits with those benefiting from the works may be a necessity for those who continue to prosper.

Poor risk allocation in current market conditions will be potentially fatal if not managed pro-actively.

Building Safety: Key Points to Note

Building safety has always been at the forefront of the construction industry's collective conscience, but even more so since the tragic Grenfell Tower fire in June 2017. The tragedy exposed serious and systematic failings in the design, construction and management of high-rise residential buildings and has given rise to homeowners facing significant bills for the rectification of fire safety and other defects in their properties. This article looks at some of the key takeaways from those aspects of the government's proposed new building safety regime that have received particular prominence insofar as they affect homeowners and developers.

The Building Safety Bill

The Building Safety Bill (the "**Bill**") is one of a number of measures intended to improve the regulatory regimes and standards for building and fire safety in high-rise residential and other in scope buildings (or higher-risk buildings as they are termed), by ensuring there will always be someone responsible for keeping residents safe.

The Bill was first published in draft in July 2020 after 'Building a Safer Future', the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt, was published in May 2018.

The Bill was subsequently revised in July 2021 and a number of policy changes have become clearer with the passage of the Bill through parliament. This has resulted in amendments to it as well as the publication of several pieces of draft secondary legislation, such as to provide clarity on the scope of "higher-risk buildings", which will be subject to a stricter regime during their design, construction and occupation phase.

At the time of writing, the Bill has reached its Report Stage in the House of Lords and the Building Safety Minister, Stephen Greenhalgh tweeted on 27 April that Royal Assent will be given on 28 April. Thereafter, the measures it sets out will be made law by way of secondary legislation over a further period of up to 18 months.

Building Safety: Key Points to Note

Impact for Leaseholders and Developers

The overarching aim of the Bill, as outlined by the then Housing Secretary (Robert Jenrick) when the Bill was revised in July 2021, includes giving residents in tower blocks more power to hold builders and developers to account and to toughen sanctions against those who threaten residents' safety.

The potential for Claims

The measure grabbing the headlines for leaseholders and developers at that time was the extension to the time period within which homeowners may claim compensation, including from developers, under the Defective Premises Act 1972 (DPA) for construction defects that render a dwelling unfit for habitation.

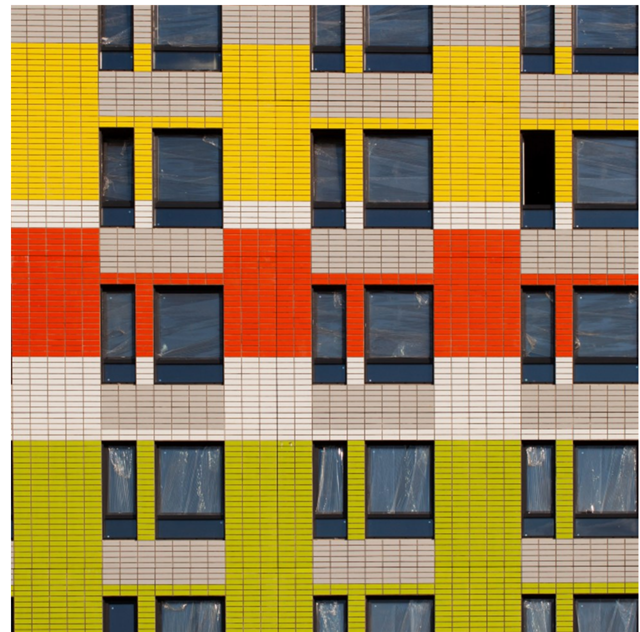
The proposal then was that the limitation period will more than double, from six to 15 years from the date of completion of the building. The latest draft of the Bill, however, has amended the limitation period to 30 years in certain circumstances (retrospectively in respect of claims under s1 of the DPA – where works are undertaken in the course of a business). This means claims could be brought in respect of properties completed up to 30 years prior to this change coming into effect (expected to be two months after Royal Assent). The limitation period is to be 15 years, prospectively, for claims under s1 and s2A (for claims that accrue after the Bill takes effect).

The duty of care under s1 of the DPA is also to be extended. It will now include mixed-use buildings, refurbishment works and extensions to existing dwellings in the course of a business. This is in contrast to the current DPA regime, which affects only new dwellings.

Essentially, work affecting any part of such a building that directly impacts a “dwelling” must not render that dwelling unfit for habitation. The upshot is that developers are more likely to face a DPA claim against them, though they may obtain some relief under the Civil Liability Contribution Act in the form of a claim against their own builder.

In *Rendlesham Estates Plc v Barr Ltd [2014] EWHC 3968 (TCC)*, the court provided guidance on the applicable standard to be met for a dwelling to be 'fit for habitation'.

Applying the court's guidance, where dwellings cannot be occupied for a reasonable time without risking the health and safety of the occupants, then such dwellings are unlikely to be deemed fit. This would cover many of the residential buildings with serious fire safety defects including those, for example, that have insufficient fire stopping and/or incorporate unsafe combustible materials.



Any extension of the limitation period will no doubt be welcomed by homeowners, but it is important to note that homeowners pursuing claims under the DPA will bear the burden of proving that the particular dwelling is 'unfit for habitation'. Accordingly, they will need supporting evidence from appropriately qualified experts; and if they have already settled claims they will not benefit from the extension.

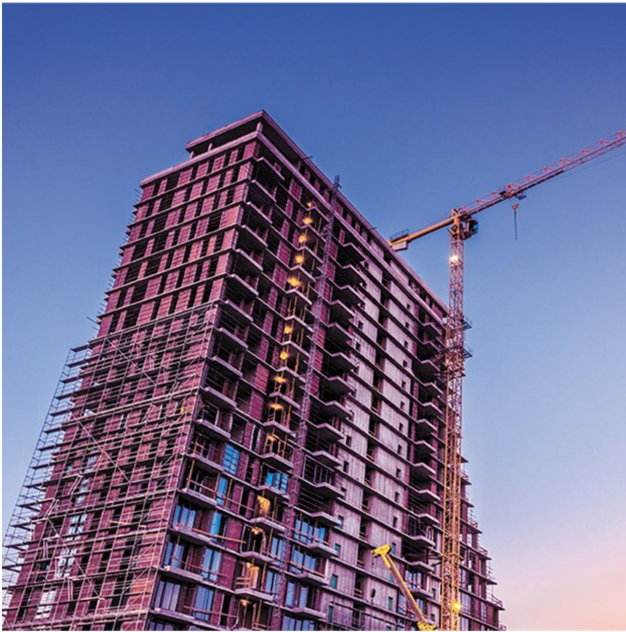
The challenges in regard to fitness for habitation are illustrated by the recent case of *Naylor v Roamquest Ltd [2021] EWHC 567 (TCC)*, which involved allegations by leaseholders of defects in combustible cladding installed in residential flats in Greenwich. Faced with the impending expiry of the limitation period for bringing a claim, the leaseholders of 82 of 1,002 residential flats issued a claim against the freeholder and builder. The basis of the claim was a lack of documents proving the absence of defects.

Building Safety: Key Points to Note

Rejecting the claim as presented to it in the formal pleadings, the court said it was improper for the leaseholders to bring a claim on such a basis and that the onus was on them to carry out investigations as required to identify defects with precision. The court was not sympathetic to the pressures imposed by the impending expiry of the limitation period and confirmed this could not relieve the claimants of their burden of pleading and establishing a positive case.

The court did, however, allow the claim to continue on the basis that the leaseholders amended their statement of case (with support from investigations and expert reports).

In addition to DPA claims, the government is considering allowing claims under section 38 of the Building Act 1984, which imposes liability for breach of the Building Regulations. More detail as to how this will work in practice is needed, but broadly it will allow claims for



compensation for physical damage (injury or damage to property following a breach of Building Regulations) under an extended limitation period from six to 15 years (unless the Building Regulations provide otherwise).

Claims will be able to be made by a person who has suffered damage, against the person whose breach has caused the damage.

Other measures that impact Developers

Government action on building safety that impacts developers does not end with the increased prospect of claims by homeowners. Other government measures (some recently announced by the Secretary of State for Housing, Communities and Local Government (Michael Gove)) specifically target developers.

Key announcements include that developers who remain the owner of a building over 11 meters in height constructed or refurbished by them, will have to meet in full the cost of remedying historic building safety defects in the property.

Those who use shell companies, for example, to manage their developments will find the courts will have powers to enable them to be sued; and those who fail to fix unsafe cladding will find their applications for planning permission and building control sign-off of their developments refused.

The gateways

This refusal will occur under the new gateway process, which will regulate higher risk buildings during their design and construction phase.

Planning gateway one has been in force since August last year, but the introduction of gateway two (application for building control approval) and gateway three (application for building control sign-off) will bring with them a 'hard stop' at which sign-off is required to enable a developer to move on to the next gateway.

Building safety levy

Significantly, gateway two brings with it another key measure, that is the obligation to pay the Building Safety levy, which will affect all developers who seek regulatory permission to build high-rise residential buildings or care homes.

These developers will have to contribute to the costs incurred by the government to remediate unsafe cladding in residential buildings, unless an exclusion applies. Under section 57 of the Bill, the levy will apply at gateway

2, so that payment is due before start on site. The levy will not apply to affordable housing (because of the risk of dis-incentivising its construction), or to hospitals (to guard against additional cost in the health sector) or to refurbishment works (to avoid delays). Small and medium sized enterprises may pay the levy in instalments.

On 13 April this year Michael Gove announced that developers will contribute a minimum of £2 billion to fix their own buildings, and that industry will also pay up to a further £3 billion through an expansion to the Building Safety Levy.

At the time of the announcement, over 35 of the UK's biggest homebuilders had pledged to fix all buildings of 11 metres or more in height that they have played a role in developing in the last 30 years.

Developers who have yet to sign are being urged to sign the pledge and the government has stressed there is little time left for those who haven't. Those who refuse will face consequences, which could include being blocked from building and selling new homes.

Developers who have committed to the pledge will sign legally binding contracts to implement their promises as soon as possible. The legal agreement confirms that developers will:

- act as quickly as possible to fix buildings
- implement new proportionate guidance on building safety
- regularly report to leaseholders and government on their progress
- respect an independent dispute resolution process established by government; and
- refund money already received from the taxpayer to fix their buildings.

More information on how government plans to enforce the agreement in law will be released in due course.

Regulatory Sign-Off

Having completed the works to in scope residential buildings, developers will find that they will be unable to allow them to be occupied unless the Building Safety Regulator, which will act as the building control body for such buildings, has signed off the building as being compliant with the requirements of Building Regulations.

Golden thread

Linked to this is the requirement for a 'golden thread' of information to be collated. This information must be stored digitally and demonstrate that building safety was considered at every key stage of the building's life cycle, including during the earliest stage of the planning process.

Compliance by dutyholders with their responsibilities throughout a building's design and construction will help create this golden thread and developers should ensure this information is collected so that it can be passed to the Regulator to receive sign-off of the works at the end of gateway three, allowing the building to be occupied.

Residential Property Developer Tax

Larger residential property developers (i.e. those with profits from the development of residential property that exceed £25 million per year) are set to pay an additional 4% tax on profits with the introduction of the Residential Property Developer Tax, which will be in force from 1 April 2022.

Some developers will be required to pay both the Building Safety Levy and the Tax.

New homes Ombudsman

A final point to note is that all developers of new build homes will be mandated to join the New Homes Ombudsman Scheme. This gives residents of new homes the ability to complain to the ombudsman about the Scheme's members within two years of the first acquisition of a new build home from the person who developed it.

Broadly, the Ombudsman Scheme requires developers to provide purchasers of residential property with redress or compensation and if residents think their concerns are being ignored, they can raise them with the Building Safety Regulator.

Developers that fail to meet their obligations may face criminal charges and if they are a corporate body, their directors or managers can be held criminally liable.