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ELEVATE

Construction quarterly newsletter

Helping our clients from the ground up

Our Construction and Engineering update

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Welcome to the Summer 2022 Edition of our quarterly construction newsletter, Elevate.

It is perhaps no surprise that building safety continues to dominate the legal headlines. With 28 June 2022 marking one of the key implementation dates for the Building Safety Act 2022, we start by providing an overview on those provisions that are now in force. With such change afoot we consider what the future holds for EWS1 forms. We also consider the guidance provided by the TCC in a recent case on what is needed to bring a claim for defective cladding.

The Court of Appeal finally determined when a collateral warranty can be adjudicated upon as a construction contract. With baseline costs escalating, we also look at a highly topical issue on how a party may seek to obtain cost assurance on an infrastructure project.

We have also started to produce a podcast called Con-versations, which can be found via Apple Podcasts and Spotify under the title "Eversheds Sutherland Legal Insights". In the first two episodes members of the team discuss the impact of the changes introduced by the Building Safefy Act.

It is my pleasure to wish all our clients and contacts a happy and relaxing summer break.

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In this issue we look at:

The Building Safety Act 2022 – what can I expect now?

Key changes in effect from 28 June 2022

The Building Safety Act passed on 28 April 2022 and proposes widespread legal and regulatory reform. It is broad in scope, with some of its provisions affecting all buildings (not just higher risk buildings). A lot of its detail has been reserved for secondary legislation and its implementation is expected to be staggered over 2-18 months from the date of the Act. This will take effect by way of separate regulations, which means that building safety will continue to be a developing area over this period.

With such change on the horizon, it is important to know which elements of the Act are in force or immediately forthcoming. From 28 June 2022 a number of provisions came into effect which change the claims landscape. We will consider these in this article[1].

Changes in effect from 28 June 2022
It is not surprising that the provisions which have been prioritised are those that provide homeowners and occupiers with additional rights to have building safety concerns addressed. In comparison, those areas that require regulatory reform and new systems to be put in place before such change can be effective have a longer lead in time.

With effect from 28 June 2022, two months since the Act was passed, a number of provisions came into effect which fall under the following four themes.

1 This article considers the position in England and was first published on 6 July 2022.

New legal remedies

The Act offers new rights to claim against defective work, particularly at dwellings, to encourage rectification and greater accountability.

Refurbishment work that causes a dwelling to be unfit for habitation

The Defective Premises Act 1972 (**DPA**) has been amended, with the addition of s.2A[2], which provides homeowners and leaseholders with a right of action where refurbishment works results in their dwelling being unfit for habitation. This right is against those who carry out the works or arranges for the works to be done.

Previously the DPA only offered a remedy for works that were for the "provision" of a dwelling, and so was limited to new build or conversion works. It should be noted that this change affects all dwellings and is also in relation to any defective work that renders a dwelling unfit for habitation (i.e. not just in relation to unsafe cladding or building safety concerns).

Civil remedy for breach of building regulations

s.38 Building Act 1984 was previously introduced but never brought into force, until now[3]. This section allows a claim for damages where breach of the building regulations causes harm. Such harm could relate to death or injury to any person, but does not include pure economic loss. There are no restrictions on who can bring such a claim and it applies to any building.

Remediation orders

A tribunal can issue a landlord with a remediation order to remedy defects within a specified time[4]. This can be made in respect of buildings that are at least 11 metres high or have 5 storeys and contain at least two dwellings (referred to as a "**relevant building**"). The defects must relate to anything that is not correct with the works which was done in the past 30 years from 28 June 2022 and which causes a building safety risk[5], hereafter referred to as the "**relevant defects**". An application for this order can be made by the Building Safety Regulator, a local authority, a fire and rescue authority, a person with a legal or equitable interest in the relevant building of any part of it, or any other person who may be later prescribed by regulations.

Liability for construction products and past defaults relating to cladding products

A party with a right or interest in a dwelling or a building containing two or more dwellings can now make a claim against another party if:

- the other party fails to comply with construction product requirements in relation to a construction product, markets or supplies a construction product with a misleading statement, or manufactures a construction product that is inherently defective
- such product is installed or attached to a dwelling or a building which contains two or more dwellings and
- that product results in such dwelling or building being unfit for habitation[6] (referred to elsewhere as a "**construction product claim**")

A party can also claim for defective cladding products if the above conditions are met[7], (referred to elsewhere as a "**cladding claim**"). These provisions also provide an express right for damages in relation to personal injury, damage to property or economic loss suffered by the claimant, and so provide an important remedy that would otherwise not be available in a negligence claim.

All of these provisions provide additional statutory rights, meaning that they exist as legal remedies even where the contract is silent or the parties do not have a contract with each other. Together they raise the standards of what can be expected regarding works done at dwellings, encourage compliance with the building regulations, and facilitate the rectification of defective work.

2 Made by virtue of s.134 of the Building Safety Act 2022 (BSA)
3 s.135 BSA
4 s.123 BSA
5 A building safety defect is defined in relation to a building as any risk to the safety of people arising from the spread of fire or the collapse of a building of any part of it (s.120(5) BSA).
6 s.148 BSA
7 s.149 BSA

Extended limitation periods

The Act offers extended limitation periods for these new types of claim and certain other claims. A limitation period is the time in which a party has to bring a claim, calculated from when the event giving rise to their claim occurred. Typically contractual disputes in construction, where the contract has been executed as a deed, have a 12 year limitation period from the date of practical completion. Previously claims under the DPA had a limitation period of 6 years from completion of the new build or conversion works or from completion of any rectification in relation to such works.

Under the Act limitation periods have been extended to 15 or 30 years for certain types of claim, as set out below:

15 year limitation period	30 year limitation period
s.1 DPA claim, if right of action accrued on or after 28 June 2022	s.1 DPA claim, if right of action accrued before 28 June 2022
s.2 DPA claim	cladding claim, if right of action accrued before 28 June 2022.
s.38 Building Act claim	
construction product claim	
cladding claim, if right of action accrued on or after 28 June 2022	

Where the 15 year limitation period applies, this is in relation to claims that arise following the implementation of this provision (from 28 June 2022). However, the 30 year limitation period has retrospective effect and applies to claims that arose before 28 June 2022. This date has been used as a defining date simply because it is two months from when the Act came into force.

This means that if a defect under these sections is up to 30 years old (i.e. going back to 1992 or later) , it can still be brought before the courts (unless it has previously been determined or settled). It also means that such claims that have accrued before 28 June 2022 have a 30 year period in which the parties can make a claim (e.g. the limitation period for a claim that arose in 2022 can last until 2052). If a potential claimant's 30 year limitation period has only one year left to run (i.e. it expires on or before 27 June 2023), then they are given an additional year from 28 June 2022 to make their claim, so that they have the opportunity to take legal advice.

These provisions mean that historic claims, that a party may have thought had long since expired, may now be resurrected if they can be claimed under those rights that have a 30 year limitation period. However, the extension to the limitation period does not allow claims that have already been settled or legally determined in the courts or arbitration to be recommenced again. This provides claimants with longer rights to claim defects and greater periods of time in which to bring their claim.

Wider classification of liable parties

One of the problems encountered in the first wave of remediation work to high rise residential buildings after Grenfell was that the liable party may not be available to pursue. This could be because the developer had no assets (due to either being an investment vehicle (such as a SPV) or becoming insolvent), or because there were jurisdictional issues in pursuing entities that were based overseas.

The Act therefore introduces a number of provisions that surmount this problem, by making other entities liable who may have some association with the original liable party. The meaning of what counts as being "associated" with another party changes according to when it is used for the following new measures:

Remediation contribution orders

Under this provision the tribunal may on the application of an interested person, require a specified body corporate or partnership to contribute to the costs incurred or to be incurred in remedying relevant defects at a relevant building (as such terms have been previously defined).[8] There is no definition of who constitutes an "interested person". Those who may be "specified" by the tribunal include a landlord, a person who was a landlord at the qualifying time (i.e. at the beginning of 14 February 2022), a developer in relation to a relevant building or any person **"associated"** with any such persons. The term "associated" has a specific meaning in the Act[9], which largely relates to shared directorships, or where one party controls another.

Remediation costs under qualifying leases (s.116 to s.125 and Schedule 8)

In certain circumstances service charge amounts relating to relevant defects in a relevant building are not payable and such amounts can be recovered by the landlord. This is a substantial issue in its own right and will be discussed in a separate legal briefing.

Meeting remediation costs of insolvent landlord

Under this provision the High Court can impose liability on another party, upon the application of an insolvency practitioner, to contribute to the costs of rectifying relevant defects at a relevant building where the landlord is insolvent[10].

Building liability orders

The High Court can impose an order making a body corporate responsible for the liabilities of another, where such liabilities arise under the Defective Premises Act 1972, s.38 Building Act 1984, or as a result of a building safety defect. This can be imposed regardless of whether or not such liability was incurred before or after the commencement of this section. This order can be made whenever the High Court considers it just and equitable to do so, whether or not the original party has been dissolved. These liabilities can be imposed on another "associated" body, which is defined in the Act[11] and arises when one party controls another.

Previously parties could assess their liability by reviewing the contracts that they have entered into. These provisions now impose liability on parties that they might not otherwise have had such liability, due to their association with the original liable party (most often when part of the same group of companies). There are also provisions to make original developers and previous landlords accountable, even if they have since disposed of their interest in the property. These provisions overturn established legal principles, so that there is a statutory means to hold the original parties, or parties who have some relation with the original parties, accountable for the sake of financing remediation works.

8 s.124 BSA
9 s.121 BSA
10 s.125 BSA
11 s.131 BSA

Higher professional standards

Architects: discipline and professional requirements

New disciplinary orders can be made by a statutory body (the Architect Registration Board) against architects, which are kept on a register for public inspection. There are also new competency requirements placed upon architects to undertake continuing professional development, which will be monitored by the Board. If an architect does not meet the requirements of the Board then they will be struck off the register. These provisions apply to all architects and not just those working on higher risk buildings.

Construction product regulations

In the aftermath of Grenfell it was discovered that aluminium composite material cladding and certain types of fire doors were not included in the existing regulatory framework on construction products. The Act facilitates the introduction of new Construction Products Regulations, will require construction products to be safe and will create a list of safety critical construction products[12]. The current regulatory framework derives from EU Law and applies to products with a EU harmonised standard. There are many construction products where there is no existing EU harmonised standard and so these new regulations should cover any gaps that are currently present.

These provisions apply to all construction work and thereby elevate the professional standards required across the construction industry.

Transition Plan

The Act makes provision that the rest of its provisions will come into force on such day as the Secretary of State may appoint by way of regulations. However, in July 2021 a draft transitional plan was published by the Government in relation to the Bill, which at the time of writing has not since been updated. This provides a notional list of implementation dates which provide an insight into when we might expect these further changes to be made. They anticipate that the other provisions of the Act will be in place between 12-18 months from when the Act was enacted (i.e. between April 2023- October 2023). These include the gateway regime, the provision of the golden thread of information, the role and the new dutyholder requirements, including the duties of the Accountable Person.

As golden thread requirements could affect existing higher risk buildings as well as new build developments, it would be prudent to gather this information where possible before the requirements come into force. However, there are currently no draft regulations specifying what this golden thread of information should consist of. The Act simply refers to the "prescribed information". In general preparation for these provisions is still dependent on further information being released and the accompanying regulations that provide detail on what needs to be done.

Conclusion

The extent of these changes show that the Act is a major piece of legislation, broadening the net of those who can be held liable for the rectification of defects that affect dwellings and building safety concerns. As these provisions are to promote the fitness for habitation and public safety of buildings, it is right that these measures are hard hitting and have been prioritised. However, the means by which a party can be liable under the new Act are surprising and widespread. Parties should be aware of these additional measures both when making and defending claims and be prepared for any additional litigation that could pursued, particularly for liabilities that had previously been discounted as being too historic or remote.

Key definitions

relevant building	a building that is at least 11 metres high or has at least 5 storeys and contains at least two dwellings
relevant defect	a defect that arises as a result of anything done (or not done) or anything used (or not used) in connection with relevant works and which causes a building safety risk[13].
building safety risk	means in relation to a building a risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it[14].
higher risk building	a building that is at least 18 metres high or has at least 7 storeys and contains at least two dwellings, as further defined by separate regulations

12 s.146 BSA
13 s.120(2) BSA
14 s.120(5) BSA

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Timing isn't everything

The Court of Appeal confirms when a party can adjudicate under a collateral warranty

The Court of Appeal has overturned a previous decision, so that the ability to adjudicate under a collateral warranty is no longer dependent on when the collateral warranty is executed. The decision in *Abbey Healthcare v Simply Construct*[15] has provided greater certainty for those seeking to rely upon collateral warranties. It has also increased the possibility of using adjudication as a popular and cost effective means of dispute resolution.

Background to adjudication and collateral warranties

There is an implied statutory right to adjudicate under a construction contract, which includes contracts that are "*for…the carrying out of construction operations*"[16]. Adjudication allows a party to obtain a quick decision in a dispute, so that any failings in a construction project (relating to payment, defects etc) can be promptly addressed. It is a useful right for a claimant to have and because it is offered by legislation it cannot be taken away by anything within the contract.

Collateral warranties provide third parties (such as a tenant, funder or purchaser) with a right to claim against a contractor, professional consultant or sub-contractor, even though they are not party to the original contract with the employer. Instead the third party uses a collateral warranty as its means to make a contractual claim.

In the previous case of *Parkwood Leisure Ltd v Laing O'Rourke*[17], it was decided that a collateral warranty could be a classed as a construction contract and thereby could be adjudicated under. This was because those offering collateral warranties, in favour of a third party, typically undertake to carry out and complete the works in accordance with the underlying contract. This was considered to be sufficient to be an agreement "*for… the carrying out of construction operations*" and thereby caught by the statutory adjudication provisions.

Issues for the Court of Appeal to consider

In Abbey Healthcare v Simply Construct, the collateral warranty was entered into years after practical completion of the Works. It was determined by the Technology and Construction Court (the **TCC**) at first instance that "*where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate.*[18]" Under this authority there could only be a statutory right to adjudicate if the collateral warranty was entered into before the works have completed.

This created an unsatisfactory position, as noted in my **previous article** whereby there could in theory be two different classes of collateral warranty. Each would have different remedies, depending on when they were executed and the stage that the works had reached. These were arbitrary distinctions that would be difficult to manage in practice and have the unfortunate effect that the same wording in a contract could have different consequences.

It was therefore brought before the Court of Appeal to consider:

1. can a collateral warranty ever be a "construction contract" (with an implied statutory right to adjudicate)?
2. does the wording within the collateral warranty determine whether or not it is a construction contract?
3. does the date on which a collateral warranty is executed have any impact?

Coulson LJ provided the leading judgment on the case and considered each of these matters in turn.

15 Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2022] EWCA Civ 823
16 s.104 Housing Grants, Construction and Regeneration Act 1996
17 [2013] EWHC 2665 (TCC)
18 Paragraph 26

Collateral warranties can be "construction contracts"

The wording of the collateral warranty is significant in determining whether or not a collateral warranty is a construction contract and therefore can be adjudicated under. It was decided:

- if the collateral warranty simply makes a promise about past performance, then it is not a contract for the carrying out of construction operations and instead is akin to a product guarantee
- however, if the collateral warranty says that a party would carry out and continue to carry out construction operations (however such operations are expressed) to a specified standard, then it will be a construction contract. This is because it creates a future obligation to carry out works or services. As most collateral warranties contain such wording, it is likely that a party will be able to adjudicate under one.

In this way, the Court of Appeal added authority to the decision made in *Parkwood Leisure Ltd v Laing O'Rourke*. In reaching this decision, the court concluded:

- the statutory reference to *"for...the purposes of carrying out construction operations"* is to be interpreted broadly
- there is no requirement for such contract to be the one "under" which the primary obligations to carry out the works were undertaken
- there is no requirement for payment provisions to be included
- for the purposes of adjudication, there can be more than one contract in relation to the same dispute (e.g. a building contract and a collateral warranty) and there is statutory provision for such disputes to be decided in parallel by the same adjudicator
- in theory a beneficiary under a collateral warranty could bring an action for specific performance, albeit that it might be difficult to pursue as this is an equitable and discretionary remedy and not used unless damages are not sufficient

Therefore the only restriction that was placed on whether or not the collateral warranty could be adjudicated upon was if the wording of the warranty related solely to past performance.

The wording of the collateral warranty must refer to future performance

In this case the collateral warranty stated that the warrantor, *"has performed and will continue to perform diligently its obligations under the contract."* It was determined by the Court of Appeal that this phrase constituted *"a warranty of both past and future performance of the construction operations*[19]*"* and therefore was a construction contract for the purposes of adjudication.

In addition the Court of Appeal considered that such wording created two separate obligations that could exist independently, and so should not be construed as solely referring to an obligation in the past. It was also decided that the absence of the verbs "acknowledges" or "undertakes" had no effect in considering whether or not a future obligation was created.

Timing of the collateral warranty has no consequence

In what amounted to a major departure from the original decision made by the TCC, the Court of Appeal decided that the timing of when the collateral warranty was executed and entered into bore no relevance on the operation and effect of the collateral warranty.

The collateral warranty contained a future obligation, which was not possible to fulfil as the works had already completed at the time the collateral warranty was entered into. However the Court was able to reconcile this by determining that the words within the collateral warranty were to have retrospective effect. In that respect the delay between the completion of the works and the execution of the collateral warranty did not matter.

It is quite common for contracts to be entered into at a later date (for example a building contract being entered into after works on site have begun). The Court's approach in determining that the collateral warranty was to have retrospective effect was not unusual and is consistent with how a number of other contracts are interpreted.

As the Court of Appeal concluded that the judge in the first case *"was wrong to find that the date of the execution of the collateral was determinative*[20]*"*, this overturned the case. This meant that the adjudicator's decision in relation to the dispute under the collateral warranty was enforceable.

19 Paragraph 62.
20 Paragraph 77

Conclusion

This decision is welcome news, so that there are not inadvertently two classes of collateral warranties (i.e. ones that can be adjudicated under and others that cannot) based on an arbitrary execution date. The original decision made by the TCC was not satisfactory as it created this inconsistency and would have prejudiced those who received a collateral warranty at a later date (which could be due to the timing of when they were entitled to have a collateral warranty).

There remains a distinction regarding the wording of a collateral warranty, so that only those that refer to future obligations can be adjudicated upon. However, such wording is well-established in the market and this decision provides parties with certainty that they can rely upon those contractual terms. It is clear from the Court of Appeal's decision that the statutory entitlement to adjudicate is intended to be interpreted widely, to broaden its availability as a means for dispute resolution. As the Court of Appeal has refused appeal further to the Supreme Court, the decision constitutes the final word on this issue.

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Are you covered?

Project wide insurance policy may offer different cover to co-insureds

Project insurance policies, under which a number of parties working on a project are insured under the same policy, are increasingly common. In principle, this type of policy can be used when the employer and its contractors need to take out all risks cover for works to an existing building and to cover damage to third party property. However as the recent case of *The Rugby Football Union v Clark Smith Partnership and FM Conway*[21] shows, care should be taken to assess the scope of the policy and it should not be assumed that the same level of cover applies for each of the co-insured parties, as this will depend upon the terms of the underlying contract between the employer and contractor.

Advantages in having a project wide insurance policy

The Rugby Football Union (**RFU**) was engaged in substantial upgrade works to Twickenham stadium in preparation for the rugby world cup. This required a number of contractors to each be appointed under separate work packages. The RFU's project manager decided that a comprehensive project insurance policy covering all the contractors would be appropriate. It was considered that this would prevent expensive delays, avert claims arising between contractors and their separate insurance companies, and avoid any possible issues with gaps in insurance cover.

Part of the works involved the installation of high voltage power cables in buried ductwork. RFU engaged Clark Smith Partnership (**Clark Smith**) to design the ductwork and FM Conway (**Conway**) to install it.

The policy was taken out before contracts were entered into and before the identity of some of the sub-contractors was known. In the normal way, the policy described as insured parties "*all other contractors or sub-contractors of any tier*".

Insurance requirements under a JCT contract

Conway was appointed by RFU under a JCT Standard Building Contract Without Quantities 2011 (the **JCT Contract**). RFU was required under insurance Option C to take out all-risks insurance under a joint names policy, which was to cover physical loss or damage to the work executed, "*but excluding the cost necessary to repair, replace or rectify.....any work executed or any Site Materials lost or damaged as a result of its own defect in design, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof*". The joint names policy was to have RFU and Conway named as composite insured and "*under which the insurers have no right of recourse against any person named as an insured*."

In addition, under clause 6.2 Conway was to remain liable for and indemnify RFU against any loss, injury or damage to any property that arises out of the "*carrying out of the Works and to the extent that the same is caused by the negligence, breach of statutory duty, omission or default of the Contractor or of any of the Contractor's Persons.*"

Claim under the insurance policy

It was found that the installation of the ductwork carried out by Conway was defective and this caused damage to the cables when they were pulled through. RFU claimed over £3m for the cost of replacing the damaged cables and over £1m for the cost of rectifying the ductwork. RFU was indemnified under its project policy with Royal & Sun Alliance Plc (**RSA**) for the replacement cables to the value of just over £3m.

RSA sought to recover this financial outlay by using rights of subrogation against Conway. Subrogation is where an insurer indemnifies an insured in respect of its claim, but then "steps into the shoes" of the insured to recover its outlay from the party who caused the loss. In short, RSA sought to recover from Conway the money it had paid out under the insurance policy to RFU. RSA effectively exercised RFU's right to compensation under the terms of the JCT Contract for the loss caused to RFU by Conway.

21 [2022] EWHC 956

Dispute over the insurance cover

Conway brought Part 8 proceedings against RFU and RSA, seeking declarations regarding the effect of the project insurance policy. Conway claimed:

- it was co-insured with RFU under the policy
- it had the benefit of cover under the policy to the same extent as RFU
- RFU could not claim against Conway for alleged losses that were covered by the policy
- RSA were not able to make a subrogated claim against Conway to cover the cost of the cables

These arguments were made on the basis that:

1. RFU had the necessary authority to procure the project policy on the basis that Conway would be jointly insured alongside RFU and to the same extent as RFU; and
2. the project policy and the JCT Contract were to be read together and established that Conway was to be insured to the same extent as RFU.

Considerations for the court

The question for the court therefore was whether:

- Conway's insurance under the policy was limited to the extent of the cover that was required under Option C of the JCT Contract, which would mean that Conway was not co-insured for the relevant loss and RSA could make a subrogation claim, or
- Conway's cover under the policy was fully co-extensive with RFU's and so covered the losses for which RFU was indemnified for under the policy. This would mean that Conway would be entitled to the benefit of the waiver of subrogation and RSA could not pursue their claim

Court decides JCT Contract did not permit the contractor to be fully co-insured

In making his judgement, The Honourable Mr Justice Eyre decided that Conway and RFU were not co-insured for the same loss and therefore RSA could bring a subrogation claim against Conway for the cost of replacing the cables. This was on the basis the cost of rectifying damage caused by Conway's own defective works was excluded from the insurance policy, as it had been excluded under the JCT Contract. Conway found itself on the receiving end of a substantial claim, for which it was not insured under the project policy (even though it had expected to be covered for such risks).

This was decided on the basis that the JCT Contract only required RFU to procure insurance to the extent of Option C (i.e. all risks insurance) and this did not include a requirement upon RFU to take out public liability insurance for Conway, which Conway, as the Contractor, remained responsible for under the JCT Contract.

The court considered how, and the extent to which, a party becomes an insured party to a policy which is arranged by a third party. This is a common scenario where an employer is taking out a project policy which purportedly covers all sub-contractors as insured parties. The court concluded that either:

1. a project policy is deemed to be a standing offer from insurers to insure sub-contractors, which can be accepted upon execution of a sub-contract (although the offer could also be rejected depending on the terms of the sub-contract); or
2. the underlying contract may have provided authority from the sub-contractor to the employer to take out a policy on its behalf.

On the facts, the judge concluded that, "*If the parties had been contracting on the footing that recourse to the insurance would be the sole avenue for redress for damage of the kind which occurred then further amendments to the standard JCT contract could have been made so as to provide for that in clear and express terms.*"

For that reason, it was found that RFU did not have the authority to procure the insurance on behalf of Conway beyond what was required under Option C within the JCT Contract. Therefore, even though both Conway and RFU were co-insured under the same project policy, the cover for Conway was limited to what was envisaged under the JCT Contract.

Lessons learnt

This was a preliminary issues trial, but the case may prove to be a costly mishap for a contractor who believed that they were fully insured under the project policy,

This shows that reliance on project policies should be exercised with care, so that the parties are fully aware of the level of coverage offered. Further, great care should be taken when preparing the insurance provisions in contracts as these will inform the extent of cover. If the parties do intend for such cover to be more extensive than typically envisaged under a JCT contract then the contract should be amended to reflect this and to provide the employer with the required authority to procure the insurance for the contractor's benefit.

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What's needed to bring a claim for defective cladding?

Recent guidance from the Technology and Construction Court

The Building Safety Act 2022 will extend the ways in which a party can seek legal redress for defects relating to building safety. However, how should a party go about making a defects claim? Often the defects are self-evident, but deciphering the cause and the party responsible can be difficult. That is especially so for a claimant who lacks technical knowledge, does not have information available about the construction of the building, and will often be dealing with defects hidden within the external walls of their property.

Helpfully this matter was considered in the recent case of *Evolve Housing + Support v Bouygues (UK) Limited and Others*[22].

Background

The claim was brought by Evolve Housing + Support (**Evolve**) , a charity and registered provider of social housing, in respect of alleged fire safety defects in the façade of a YMCA hostel built in 2012. Missing and defective work had been discovered to the terracotta and copper cladding systems, which required Evolve to replace the external walls.

Façade claims are commonly multi-party proceedings and this was no exception. The defendants were Evolve's design and build contractor, a firm of architects (**STL**) from whom Evolve had a collateral warranty and a construction consultancy who acted as employer's agent. A building envelope contractor was joined as a third party and an approved building control inspector as a fourth party.

Request for Further Information

The court had to consider an application by STL for a Request for Further Information from Evolve on its Particulars of Claim under rule 18.1 of the Civil Procedure Rules (**CPR**). STL argued that such Further Information was necessary because Evolve had failed to particularise its case on causation and breach, meaning that STL was unable to effectively reply to the claim. In response, Evolve said that it was unable to properly plead its case until it had been provided with designs and inspection records from the defendants upon disclosure.

What is required to plead a claim?

In assessing the positions of each party, Mr Roger Ter Haar QC (sitting as a deputy high court judge) first set out what is necessary to plead a claim.

- CPR r.16.4(1)(a) requires *"a concise statement of the facts on which the claimant relies."*

The meaning of this phrase has been subsequently developed in case law:

- the claim must be pleaded in such a way to allow the defendant to know the case it has to meet, what it has failed to do, and the consequences of that failure[23]
- the claim should not be so vague and incoherent that the defendant cannot plead to it in response, disclose documents relevant to it, or prepare witness statements
- the court must be able to understand the case so that it can decide it fairly, expeditiously and saving unnecessary expense[24]

This was important context in considering whether Evolve's pleaded case was sufficiently detailed or whether STL's Request for Further Information was valid.

22 2022 EWHC 906 (TCC)
23 Pantelli Associates Ltd v Corporate City Developments No 2 Ltd [2010] EWHC 3189 (TCC)
24 Towler v Wills [2010] EHC 1209 (Comm)

Status of claimant's knowledge

Evolve's position was that it knew what the defects to its property were and that they arose in part from STL's performance. However Evolve did not have insight into precisely what role STL had played on the project and therefore could not specify which of STL's duties had been breached and how, so as to cause the defects. Evolve would not gain such insight until it saw contemporaneous project documents on disclosure.

In fact, STL gave evidence that considerable disclosure had already been given to Evolve. This was determinative. The judge decided that enough disclosure had been provided to enable Evolve to serve the Further Information requested – even if it might need to be supplemented upon receipt of more documentation during the formal disclosure process. As he put it:

"*STL is entitled to know how Evolve puts its case on the basis of what has already been disclosed*".

Implications for cladding claims

The take-away message from the case is that claimants need to be careful to avoid gaps in their pleaded claims, especially where the material that can fill such gaps is available to them.

It is interesting that the judge determined that Further Information was required with reference to the level of disclosure previously given to Evolve. Neither CPR r.16.4(1)(a), nor the passages from the three key cases to which the judge referred in his judgment[25], expressly link the necessary content of pleadings to disclosure.

How much disclosure has been given by pleading stage will vary from case to case. If the Pre-Action Protocol for Construction & Engineering Disputes has been used effectively, considerable information may already have been shared before proceedings are commenced.

In contrast, where defects are identified close to the expiry of the limitation period – as has happened with many cladding defects post-Grenfell – the claim may have to be issued without going through the Protocol, in order to avoid the claim becoming time-barred. Particulars of Claim may then follow with relatively little material having exchanged hands.

Does this mean that a more lenient approach could be taken to any Request for Further Information in these last-minute cladding claims?

Perhaps, but there is another problem lurking for a claimant who has issued proceedings late in the day and is still piecing together the jigsaw of what happened to its cladding. If the jigsaw reveals new claims, but the limitation period has expired, the claimant can only amend its pleadings and bring the new claims before the court if they arise out of "the same facts or substantially the same facts" as a claim for which a remedy is already sought (CPR r.17(4)).

It is therefore crucial for claimants to consider with their lawyers, as early as possible pre-action, what routes (contractual and procedural) should be pursued to obtain information relevant to their claims. That way the claims can be pleaded as comprehensibly as possible from the outset. The need for Further Information can be avoided and the prospects of success maximised.

Pre-emptive measures

Evolve's position is symptomatic of many property owners, who were not close enough to or involved in the design and construction phase on their project, to know precisely who did what to cause the problems. The difficulty is compounded when those involved in the project at the time have left the business. This is often the case by the time latent defects (such as combustible cladding and insulation) manifest.

Property owners can protect themselves against this "information gap" to an extent during the early stages of the project, by:

- including in their building contracts and professional appointments, rights to attend meetings and to see documentation that will offer insight into the roles being performed by the various parties on the project
- maintaining detailed records during and after the project. (If relying on the professional team's records, it is essential to ensure that the team is contractually required to retain the records for, and preferably beyond, the limitation period.)
- "downloading" information and documents from employees with first-hand knowledge of the project when they leave the business
- instructing a cladding expert early on upon discovery of the defect to investigate the issues

25 Footnoted above

Building safety Act

Hopefully the information gap in building safety claims will be more easily resolved once the "Golden Thread" regime under the Building Safety Act comes into force. Under this regime, all parties working on the design and build of a higher risk building are required to provide its residents with information relating to its construction and safety. This may make future defective cladding claims easier to pursue, but until then the parties should proceed with caution and additional proactive steps are necessary.

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Can a prior 'true value' adjudication be utilised as a defence to a 'smash and grab' adjudication?

In *Bexheat Ltd v Essex Services Group Ltd*[26] Mrs Justice O'Farrell enforced a 'smash and grab' style adjudication, which followed an earlier 'true value' adjudication. The case reaffirms established law that the true value of a payment application is a different to payment of such application, and so each issue can be adjudicated separately. The case also sets out some important reminders on the nature of set off, and the Late Payment of Commercial Debts (Interest) Act 1998 when applied to adjudication decisions. It also considers the restrictions on the adjudicator's ability to consider multi-dispute adjudications

Background

Bexheat Limited (**BHL**) were appointed as a Sub-Sub-Contractor by Essex Service Group Limited (**Essex**) to carry out plumbing works at a residential care facility. The Sub-Sub-Contract made provision for interim payments, some of which were challenged by way of adjudication.

An adjudication was commenced by BHL seeking the true value of payment application 22 (the **First Adjudication**). This was determined and Essex made the payment in full. However, prior to the commencement of this adjudication, BHL issued payment application 23 requesting additional payment. Essex failed to issue a pay less notice in time in response to payment application 23.

Due to late service of the pay less notice, BHL commenced a 'smash and grab' adjudication for the sums stated in payment application 23 (the **Second Adjudication**). Some of the sums claimed under payment application 23 had already been set out and paid in payment application 22.

In the Second Adjudication it was decided that the pay less notice had not been served in time and the sum stated in payment application 23 was payable by Essex in full. Essex failed to make payment and summary judgement proceedings for enforcement were brought by BHL. Essex challenged enforcement on the basis that:

- the First Adjudication had already determined issues raised in the Second Adjudication
- they had a contractual right to set off amounts due under the adjudicator's decision
- they had a contractual entitlement for a true value dispute and a payment dispute in respect of the same application to be considered by the same adjudicator at the same time
- the adjudicator did not have jurisdiction to award compensation under the Late Payment of Commercial Debts (Interest) Act 1998

26 [2022] EWHC 936 (TCC)

Were the issues in the First Adjudication and Second Adjudication the same?

An adjudicator has no jurisdiction to determine matters which are the same or substantially the same as those determined in a prior adjudication[27].In considering whether payment application 23 raised in the Second Adjudication had already been determined as part of the First Adjudication, it was necessary for the Court to carefully examine the scope of the First Adjudication:

- the notice of adjudication in the First Adjudication specifically referred to "*the true value of BHL's Application for Payment Number 22 dated 16 July 2022*"
- payment application 22 covered the valuation of the work completed up to 31 July 2021 and the figures claimed in the First Adjudication all matched with those claimed in payment application 22
- Essex's declarations for relief in the First Adjudication was also based on the sums claimed in Payment Application 22
- the adjudicator's decision noted that the dispute related to "*the true value of BHL's interim application for payment 22 dated 19th July 2021*".

It was therefore clear to the court that the scope of the First Adjudication was limited to the valuation of payment application 22.

The Second Adjudication on the other hand, was solely based on the question of whether Essex had served a valid Pay Less Notice in response to payment application 23. Payment application 23 was based on a valuation of the works completed up to 31 August 2021. In providing his decision, the adjudicator conducted no analysis of the valuation of the works specified in payment application 23. Rather, he limited his analysis and decision to whether Essex served a valid Pay Less Notice, and upon determining that Essex had not, awarded the full amount claimed in payment application 23 to be paid to BHL.

Given the above analysis, the Court determined that the dispute decided in the First Adjudication was not the same or substantially the same as the dispute decided by Mr Silver in the Second Adjudication. Therefore the decision within the Second Adjudication was enforceable.

In addition, the Court held that if Essex had intended to rely upon the 'true value' assessment of payment application 22, as decided in the First Adjudication, and for it to form part of its defence of the sums claimed in payment application 23, then it should have utilised that assessment as part of a Pay Less Notice, which it had not served in time.

Was Essex entitled to apply a set-off to the sums claimed in Payment Application 22

Essex claimed a £163,000 contra-charge from the monies awarded to BHL under the Second Adjudication. Clause 30.2 of the Contract entitled Essex to set-off or make deductions against an Adjudicator's award in respect of any amounts which had become due to Essex under the Contract. However, such provision was contrary to Section 8 of the Housing Grants, Construction and Regeneration Act 1996, which states that an Adjudicator's decision is binding until the dispute is finally determined. In the *Ferson case*[28], it was determined that pending final resolution by arbitration or litigation, an Adjudicator's decision "should be enforced in derogation of any contractual rights with which it may conflict".

This was further expanded in the *Thameside case*[29] which determined that Adjudicator's decisions directing payment to one party or another are to be honoured, and no set-off or withholding against payment of that amount should be permitted. However, there are limited exceptions to this rule provided that they do not offend the statutory requirement for immediate enforcement of the Adjudicator's decision. Alternatively, the Adjudicator could be given authority to permit a set off in their decision, if so instructed. Such limited exceptions or instruction did not apply in this case.

In light of the above, the Court determined there was no valid entitlement for Essex to set off the sums owed to it under the Contract against the sums awarded in the Second Adjudication.

Was Essex entitled to have the 'True Value' of Payment Application 23 determined at the same time by the same Adjudicator during the 'Notified Sum' dispute

Clause 30.3 of the Contract provided Essex with a unilateral entitlement to elect the same Adjudicator to adjudicate both the 'notified sum' and the 'true value' elements of the dispute relating to payment application 23. When Essex sought to the enforce this, BHL refused to agree to the disputes being determined together.

The Court determined that this contractual right was not consistent with paragraphs 8 and 20 of the Scheme for Construction Contracts (England and Wales) Regulations 1998 which requires the consent of all parties to allow a multiple dispute adjudication.

27 *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd [2007] EWHC 144 38 and Benfields Construction Ltd v Trudson (Hatton) Ltd [2008] EWHC 2333 34*
28 Ferson Contractors Limited v Levolux AT Limited [2003] EWCA Civ 11
29 Thameside Construction Co Ltd v Stevens [2013] EWHC 2071

In addition to the above, the cases of *S&T*[30] and *Davenport*[31] specify that when there is an obligation to pay a notified sum due to the failure to serve a Pay Less Notice, the immediate statutory obligation is to pay that sum in accordance with Section 111 of the Act. These cases therefore confirm that the Act prevents the possibility of commencing a 'true value' adjudication until such payment has been made.

The Court therefore decided that failure to pay the awarded sums prohibited Essex from commencing a 'true value' adjudication at the same time as the 'smash and grab' adjudication regardless of any contractual entitlement for these disputes to be heard together.

Did the adjudicator have jurisdiction to award compensation pursuant to the Late Payment of Commercial Debts (Interest) Act 1998?

It was decided that as this had not been raised during the adjudication, Essex had waived their right to claim that the adjudicator lacked jurisdiction in this regard.

Analysis

In matters where a Pay Less Notice has not been served within the required timeframe, it is very difficult for the paying party to avoid having to make the payment claimed in the relevant application. Payment of such sum has to be made, even if there is a dispute over the true value of such an application. This case highlights the importance of Section 111 of the Act and reaffirms the decision in the S&T case. It provides useful guidance that a previous 'true value' adjudication will only provide a defence to a future payment application if it is utilised as part of a Pay Less Notice.

This case also establishes that it is highly unlikely that a 'true value' adjudication and any subsequent 'smash and grab' adjudication are "substantially the same" dispute for the purpose of adjudication. These two types of adjudications are markedly different in what they require the adjudicator to determine. One is aimed at examining the actual costs of works and contractual entitlement to those costs, whereas the other is an examination of whether the payment provisions of a contract and/or the Act/the Scheme has been complied with, especially in relation to the service of a Pay Less Notice. The only way to truly avoid a 'smash and grab' Adjudication is to comply with all provisions of the Contract, Act and the Scheme and provide all notices as required within the relevant timeframes.

The other key takeaway from this case is in relation to the negotiation of contract terms. In this matter, Essex had managed to agree two terms in its favour: (i) the ability to set off sums awarded in adjudications against sums owing under the Contract; and (ii) to unilaterally request multiple disputes to be determined by the same Adjudicator at the same time. Whilst Essex had successfully managed to agree these terms with BHL, the terms were contrary to the requirements of the Act. As such, the terms were not capable of enforcement and Essex was not able to rely on the benefits it thought it had secured.

The Courts will be quick to ensure that parties are provided with the full rights afforded to them by the Act and will go against the parties' commercial agreements where necessary. As paying parties arguably have a stronger bargaining position than payees in many construction projects, the courts will deem it important and necessary to ensure that payees are not being constrained to a bad deal which prevents them from relying upon the rights afforded to them by the Act. There is no way for a party to contract out of its obligations under the Act and any attempts to do so will be short lived when the matter reaches the Court.

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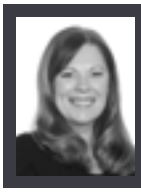

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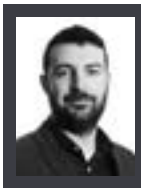

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30 S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448
31 M Davenport Builders Ltd v Greer [2019] EWHC 318 (TCC)

EWS1 Forms –
are they still required and if so, for how much longer?

In the aftermath of the Grenfell Tower tragedy, RICS introduced the External Wall System 1 (**EWS1**) form to report to lenders on the presence, or absence, of combustible materials on the external façade of multi-storey residential buildings. With widespread regulatory reform and legislative updates regarding fire safety, there has been debate on whether EWS1 forms are still required. As this article shows, EWS1 forms perform a separate commercial purpose and their continued use is expected.

How is fire risk assessed?

EWS1 forms do not assess fire risk. This is done via fire risk assessments, which are required in England and Wales under the Regulatory Reform Fire Safety Order 2005 (**FSO**). The FSO applies to workplaces and the communal parts of residential properties (i.e. those parts that are or could be used by the occupants of more than one dwelling), but not to private dwellings.

Under the FSO there was no mention whether the external walls and flat entrance doors of a multi-occupied residential building should be included in the fire risk assessment. This ambiguity was highlighted as a faliure in the public inquiries following Grenfell.

In response to this, the Fire Safety Act 2021 (**FSA**) was introduced in England and Wales to clarify that the FSO applies to the structure, external walls (including balconies, doors and windows) and flat entrance doors in multi-occupied residential buildings, with two or more domestic premises. The FSA requires a "responsible person" in such buildings to update their fire risk assessment to include this revised scope within the inspection.

Sections 1, 2 and 3 of the FSA commenced in Wales on 1 October 2021, but these provisions will not be enacted in England until 23 January 2023 when the Fire Safety (England) Regulations 2022 comes into force. Until these provisions are enacted it is prudent to be cautious about the scope and reliability of current fire risk assessments.

What is the continued risk of combustible cladding?

In December 2018, the Government banned the use of combustible cladding and insulation in high rise (i.e. 18 m metres or over) blocks of flats, hospitals, residential care premises and student accommodation. This was done by amending the Building Regulations[32] and updating Approved Document B (Fire Safety). On 1 June 2022, new regulations were introduced[33] which further ban the use of combustible materials in hotels, hostels and boarding houses. These new regulations will come into effect in England from 1 December 2022.

This legislative reform means that new build properties caught by the revised regulations will not have combustible cladding. However there is a huge legacy issue, whereby it was estimated in 2019 that 1700 buildings in England would fail fire risk assessments, if conducted under the new regime, due to the presence of combustible cladding.

Interim solutions

The scale of the problem presented after the Grenfell inquries initiated funding solutions through the Government's ACM remediation programme and Building Safety Fund, and widespread legal reform under the Building Safety Act 2022 to facilitate remediation works. In December 2019 RICS introduced EWS1 forms so that it was able to confirm to mortgage lenders whether remediation works were required to external wall systems in high rise buildings and to give an estimate of the costs involved.

The Government also brought out advice notes for building owners on what measures should be taken to ensure that existing buildings that have external cladding are safe. These were brought together in what became known as the "Consolidated Advice Note" in January 2020.

On 10 January 2022, the Government withdrew its Consolidated Advice Note, as it claimed that it gave rise to disproportionate risk assessments. In its place the Publicly Available Specification (**PAS**) 9980 was introduced by the British Standard Institition (**BSI**) to provide new guidance on how to assess fire risks within a multi-storey, multi-occupied residential building.

32 Building (Amendment) Regulations 2018 (SI 2018/1230)
33 Building etc (Amendment) (England) Regulations 2022 (SI 2022/603)

Fire risk assessments vs EWS1 forms

Fire risk assessments are technical documents that cover a wide range of fire protection precautions. The Government notes that these are not normally appropriate to use as an indication of the level of risk of fire at a building to inform lending decisions or to provide assurances to valuers, residents, buyers, or sellers. The BSI has stated that, "*PAS 9980 is not intended as an alternative to the EWS1 form, which is for valuation purposes and administered by RICS.*"

Government advice does not require the use of an EWS1 form, which is largely driven by mortgage lenders and their valuers. However, the Government has criticised the "over-use" of EWS1 forms. RICS had intended them to be used for buildings over 18m in height or where there were "specific concerns" about a property. The reference to "specific concerns" was interpreted widely by lenders, who frequently requested them as a matter of routine. Due to the shortage of suitably qualified professionals able to provide the EWS1 forms this created problems and delay for nearly 450,000 flat owners in being able to sell, move or re-mortgage their homes.

In response to this, on 8 March 2021 RICS updated their guidance notes to clarify the circumstances in which an EWS1 form should be requested. This guidance came into effect from 5 April 2021. On 16 March 2022 the RICS issued a further notice that, despite the Government's withdrawal of the Consolidated Advice Note, RICS's guidance remains valid.

When is an EWS1 form required?

An EWS1 form can only be procured and issued in favour of the owner of the entire building (rather than an individual apartment owner). Sellers of individual apartments will need to persuade the building owner to procure an EWS1 form. The EWS1 form is personal to the owner and cannot be relied upon or transferred to others.

Under the current RICS guidance, an EWS1 should not be required where a valuer or lender has been able to establish that a building over 18 metres has a valid building control certificate in accordance with Building Regulations post December 2018, which banned the use of combustible materials as cladding and insulation.

Where that is not the case, RICS guidance suggests the following criteria:

- for buildings over six storeys, an EWS1 form should be required where:
  - there is cladding or curtain wall glazing on the building, or
  - there are balconies which stack vertically above each other and either both the balustrades and decking are constructed with combustible materials (e.g. timber) or the decking is constructed with combustible materials and the balconies are directly linked by combustible material
- for buildings of five or six storeys, an EWS1 form should be required where:
  - there is a significant amount of cladding on the building (for the purpose of the guidance, approximately one quarter of the whole elevation estimated from what is visible standing at ground level is a significant amount), or
  - there are aluminium composite material (**ACM**), metal composite material (**MCM**) or high pressure laminate (**HPL**) panels on the building, or
  - there are balconies which stack vertically above each other and either both the balustrades and decking are constructed with combustible materials (e.g. timber), or the decking is constructed with combustible materials and the balconies are directly linked by combustible materials
- for buildings of four storeys or fewer, an EWS1 form should be required only where there are ACM, MCM or HPL panels on the building

What does the future hold for EWS1 forms?

It is likely that the use of EWS1 forms will decline over time, as they will become redundant as more fire safety assessments are carried out in accordance with FSA (to address those matters previously overlooked in the FSO) and as new built high rise buildings are constructed in accordance with the updated Building Regulations. However, as the FSA only comes into force in England from 23 January 2023, and remediation work to existing high rise developments is expected under the Building Safety Act 2022, it is clear that there will be a long lead in time for these changes to come into effect.

RICS guidance makes it clear that their advice is subject to the specific requirements of lenders. It is up to a lender to determine what is a necessary pre-condition to the drawdown of funds. The guidance from RICS is there to inform lenders of the level of risk, but whether an EWS1 form is required for a particular transaction is a commercial decision for the lender. With building safety being such a high profile issue it is likely to remain on the agenda when considering funding requirements for some time to come. Therefore, although the regulatory landscape on building safety is changing dramatically, EWS1 forms still serve an important commercial function in certain circumstances. It will take some considerable time for the remediation works and regulatory regime to catch up before EWS1 forms become obsolete.

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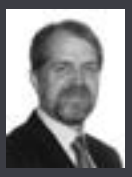

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All change for latent defects

Times are changing in Scotland

Why should I read this?

The laws governing how long a party has to make a claim for latent defects differ between Scotland and England/Wales, and are about to change in Scotland.

What are the relevant periods?

In England and Wales, the "limitation period" for bringing a claim is governed by the Limitation Act 1980. Claims under contracts that are simply signed can be brought within 6 years from completion of the project, and under contracts executed as a deed, for 12 years. Latent defects are subject to a long stop of 15 years from completion and need to be brought 3 years from the date of knowledge. This date of knowledge has similar nuances to the Scots discoverability test discussed below.

In Scotland, the "prescriptive period" for bringing a claim for breach of contract is 5 years from the date of the loss – irrespective of how a contract is executed – under the Prescription and Limitation (Sc) Act 1973. However, the latent defects exception to this statutory time limit for claims in Scotland is about to change.

Changes for latent defect claims in Scotland from 1 June 2022

Changes to the prescriptive period for latent defects come into force on 1 June 2022. This will affect any claims that are not already out of time by 31 May 2022.

At the moment, most claims must be raised within 5 years of the date when the loss occurred. But latent defects often neither appear nor are known about until significantly later. So Scots law provides an exception to the 5-year period with its "discoverability test".

For latent defects, the 5-year prescriptive period runs from the date when the claimant – "pursuer" in Scotland – knew, or ought with reasonable diligence to have known, of the defect causing loss. In other words, the starting date for the 5-year period can be postponed to the point when the pursuer knew it had suffered a loss and knew that loss was caused by breach of contract – even if the pursuer did not know who was responsible.

This discoverability test crucially determines whether a claim arising from latent defects is out of time. As this time bar prevents any claim being pursued, the courts have carefully scrutinised when that 5-year period starts.

The existing discoverability test

A Supreme Court decision in 2014 (*David T Morrison & Co Ltd v ICL Plastics Ltd & Ors*)[34] altered our understanding of how the discoverability test operates. Essentially, the courts decided that any loss started the prescriptive period – irrespective of whether the potential pursuer had any idea that something had gone awry or even that it had suffered a loss.

This interpretation has led to harsh results for pursuers. For example, loss was interpreted as suffered when the pursuer paid for legal services – even though the pursuer did not know, and had no reason to suspect, that there was any problem with those services when the payment was made.

The practical impact was that a pursuer did not need not know that it had a right to claim, or the identity of the perceived wrongdoer, for the 5-year period to start. The most important factor became the date of the loss.

It has been widely accepted that this interpretation of the law was overly favourable to defenders and tough for pursuers of latent defects.

34 [2014] UKSC 48

The new Scottish test

Section 5 of the Prescription (Sc) Act 2018, in force from 1 June 2022, seeks to redress this imbalance and revert to how the law was thought to operate before 2014.

Section 5 amends the discoverability test. As a result the 5-year period will begin only when a pursuer is aware, or with reasonable diligence could have been aware:

- that loss, injury or damage has occurred
- that the loss, injury or damage was caused by the acts or omissions of another party
- of the identity of that party

In other words, the 5-year period will only begin when the pursuer knows not just that it has suffered a loss, but also that there has been fault of some kind, and the pursuer can ascertain who caused the loss.

This is a significant change which is likely in practice to extend the prescriptive period for latent defects and allow more cases to continue. The focus of debate will be less on the date the loss arose but more on what the pursuer knew and when. Should the pursuer have known about the loss at an earlier date? What investigations were, or should have been carried out?

There will also be some teething issues about whether the claim was prescribed by 31 May 2022 – if so, the new changes will not assist. If the defender can successfully argue that a case is already time- barred by 1 June, the new wider test will not apply.

Introducing standstill agreements to Scotland

Also on 1 June, Scotland welcomes Standstill Agreements, enabling parties to agree to extend the prescriptive period for any claim by one year. Although common in England and Wales for decades, standstill agreements have not previously been used in Scotland. This change should be welcomed by parties keen to avoid the costs and time of litigation, as this additional period can be used to more amicably resolve disputes.

What to do if you have a claim for a latent defect

Although the prescriptive period remains 5 years in Scotland, from 1 June 2022:

- you can bring a claim beyond that prescriptive period if it is brought within 5 years from when you are aware or with reasonable diligence could have been aware not only that the loss has occurred but that it was caused by the acts or omissions of another party, and you are also aware of the identity of that party
- you can enter into a standstill agreement to extend the 5-year period by one year for all claims

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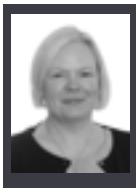

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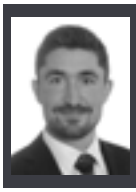

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Cost assurance on infrastructure projects

In the current economic climate cost assurance is more important than ever. There have been sharp increases in the baseline cost of projects, sometimes up to three times more than comparative projects in recent years. Parties are well experienced in managing cost escalation on projects (where the cost increases once the contract has commenced). However, when this is compounded with vast increases in other costs due to supply issues and labour demands, there is a pressing need in the industry to adapt and respond to these changes. Having cost assurance protects the financial viability of a project, instils investors with confidence to finance the works and, in instances where disputes cannot be altogether circumvented, provides transparency and knowledge to facilitate early resolution.

On 8 July, the construction disputes team hosted a multi-disciplinary conference in association with CFBL Consulting, CICES and Turner & Townsend. Eversheds is a member of an industry-wide multidisciplinary steering group comprising a diverse group of industry experts and professionals with the vision of enabling all infrastructure projects and businesses to optimise cost, profit and strategy sustainability.

The conference pulled together the findings of key outputs produced by the steering group over the last three years. These key outputs are:

1. developing a proactive risk based methodology
2. people competencies and team capabilities
3. utilising technology and innovation
4. value of upfront investment and insight provided
5. open book culture
6. role of technology in reducing dispute burden
7. cost assurance in mitigating cost/revenue risks
8. importance of processes and protocols.

The conference focused on (i) the future of assurance; and (ii) the future of construction. Some common themes emerged within the conference on how cost assurance can be achieved:

1. Cost reimbursable and target cost contracts
Parties may want to consider how the pricing of the works can be best managed to facilitate better cost efficiencies. A cost reimbursable contract allows a contractor to be paid its actual cost, sometimes with an agreed percentage uplift for profit. This option can be useful where the full project scope is unknown at the contracting stage, the client and contractor have a long established relationship, are both experienced in the delivery of such projects, and can work together to collaboratively manage the pricing of the works. An alternative is a target cost contract, whereby a base cost is established and the contractor is incentivised to save costs where possible. The contractor shares in any price savings that are made, but also shares in any losses sustained, by way of an agreed methodology. This encourages the contractor to make suggestions on how price savings may be achieved and to avoid cost overruns. Such pricing mechanisms are transparent, flexible, and utilise the experience of the employer and contractor from similar jobs. They avoid using traditional measures, where a cautious contractor may over-price its initial cost in order to cater for any perceived risks, which may not arise in practice.

2. Alliance contracts
There has been an increase in the use of alliance contracts whereby parties work together to promote greater co-operation, communication, and cost savings. This can be achieved in two ways. The parties may have separate contracts, like in a traditional design and build arrangement, but these contracts are overlaid with increased collaboration obligations so that the parties work together towards common aims and objectives. For example on a NEC contract this could be achieved by including the partnering obligations in X12 and introducing standardised KPIs. Alternatively the parties may have greater integration whereby they are all included within a single contract and work together as one. Alliancing has become more popular due to the fact that risk is shared collectively across the whole project team. This minimises the impact felt by one party and also incentivises the parties to work together to mitigate the effects of any difficulties encountered. These arrangements have also been praised for promoting a "no blame" culture, so that any disputes are dealt with proactively and efficiently, without incurring additional time and costs. The Alliance contract requires complex governance protocols as the alliance team signs up to a single set of terms that include shared rewards and risks of the success or failure of the project.

3. Identifying and managing risk
A continued theme in managing cost is a clearly communicated strategy and risk-based methodology to identify and manage cost risk. The ability to do this comes from experience. At present there are some difficulties in making sure that the current labour market has the necessary skills and knowledge to be able to proactively respond to these issues. Upskilling staff, putting in place appropriate management cascades, and making sure that each person has clarity on their role and responsibilities are really important. This can ensure that the individuals working on projects have the expertise to respond to issues in real time and reduce their potential cost.

4. Open book accounting
Open book accounting is where a contractor keeps transparent records of the costs it incurs. This can include the number of hours worked, cost of materials, head office costs and overhead costs. This promotes discussions on what costs can be adjusted or redeployed to allow a global budget to be maintained as far as possible. For example, when considering the cost of insurance, there may be other ways in which such insurance can be procured or shared between the parties to achieve cost savings. As well as facilitating the ability to operate on a reimbursable or target cost contract, it also promotes greater accountability, trust and co-operation between the employer and contractor.

5. Independent cost assurance
Before commencement of a project it might be worthwhile engaging cost assurance services from a qualified professional. Such services provide an independent opinion on the commercial, financial, contractual controls and data management of a project. This could include matters such as the auditing of accounts or an evaluation of the interpretation of the contract. This promotes confidence for external stakeholders who may be investing in the project. It is also a sign of good financial governance, as the parties can demonstrate compliance and accountability with agreed processes.

6. Data analytics
A key component in assessing costs and anticipating any overruns is to ensure that there is good data analytics in a project. Access to this type of information can identify key trends, spot issues before they arise, and provide explanations on where things go wrong to avoid repetition. The collection and analysis of such data requires appropriate technology. This requires financial outlay, upskilling of staff, and changes to everyday working practices. There are also issues in preserving the confidentiality and security of such data and ensuring that the technology remains relevant and up to date. However, the returns on such investment offer perhaps the most tangible benefit towards cost assurance. Having real time data helps with project management and avoiding disputes by promoting communication, strengthening relationships, and encouraging the proactive avoidance and management of any potential risks as they arise.

7. Horizon scanning
Through strategic polls and Q&As conducted during the conference, it became clear that the future of cost assurance on construction and infrastructure projects needs to take account of more than just the rising cost of materials, supply chain availability and a move towards alliancing and collaborative risk-sharing. Other key themes for the future included: (i) managing sustainability obligations (in particular carbon offsetting); (ii) establishing best practice across non-cost aspects of the project (including ESG and legal) adopting a standardised approach; and (iii) identifying and best utilising technology across all aspects of the project.

As we continue to work in challenging economic times, construction professionals are going to have to be more creative and inventive in how they manage risk. Established practices may no longer be sufficient to create the cost certainty that parties require. Higher standards of cost assurance are required, as there is less flexibility in being able to accommodate price overruns. Upskilling and adoption of these increasingly popular methods may help in fulfilling the need for providing economical and important infrastructure services.

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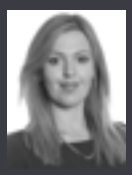

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Conversations Podcast

Introducing **Con-versations**, a new podcast from Eversheds Sutherland, in which members of our construction team discuss leading topical issues affecting the market.

Hosted by professional support lawyer **Gemma Irving** our first series of episodes looks at the changes introduced by the **Building Safety Act 2022**. This momentous piece of legislation introduces widespread regulatory reform and amends existing legislation. It overturns legal exposure on historic disputes, broadens the potential for new claims, and broadens the scope of liable parties. This podcast looks at discrete issues raised by the Act and how parties can respond to these changes.

1. Building Safety Act 2022 – Limitation Periods
With effect from 28 June 2022, the Building Safety Act amends the limitation periods for certain types of claim. It also introduces new rights of action with limitation periods that are much longer than those typically seen under construction contracts. **Nick Pinder, Kate Hencken** and **Jennifer Hurley** in our construction disputes team discuss what this means and how clients can respond to these changes.

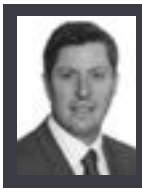
Download our summary guide to issues talked about in this episode – **available here**.

2. Building Safety Act 2022 – Widening the classification of liable parties
With effect from 28 June 2022, the Building Safety Act introduces new measures whereby third parties can become liable for remediation costs, perhaps where the original accountable parties are no longer financially viable to support the costs involved. These changes mean that parties who had no prior involvement may now find themselves responsible for the cost of remote and historic liabilities of other corporate bodies that they are associated with. Kate Hencken, principal associate in our construction team, Victoria Groves, principal associate professional support lawyer in our corporate team, and Steve Manson, consultant in our real estate team, explain these issues and discuss the implications.

Follow us on **Apple Podcasts** and **Spotify** by subscribing to Eversheds Sutherland Legal Insights.

Building Safety Hub
For all our articles, webinars and podcasts on matters affecting building safety, please see our Building Safety Hub, **available here**.

For further information, please contact:



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Disclaimer:

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