

Onsite Insights

From the challenges caused by Russia invading Ukraine, to the increase in fire safety claims as a result of the Building Safety Act, in this New Year edition of Bevan Brittan's Onsite Insights the Construction Team review the key construction cases of 2022 and look ahead to what 2023 has in store for the construction sector in terms of legislative reform and industry trends.

Meet the team



Andrew
Tobin

Partner

0370 194 7838 | 07795 387884
andrew.tobin@bevanbrittan.com



Helen
Andrews

Partner

0370 194 5068 | 07825 271686
helen.andrews@bevanbrittan.com



Jonathan
Turner

Partner

0370 194 8969 | 07779 994169
jonathan.turner@bevanbrittan.com



Judith
Hopper

Partner

0370 194 5488 | 07825 854035
judith.hopper@bevanbrittan.com



Louise
Robling

Partner

0370 194 8924 | 07786 071611
louise.robling@bevanbrittan.com



Nathan
Bradberry

Partner

0370 194 1666 | 07810 882309
nathan.bradberry@bevanbrittan.com



Sarah
Wilson

Partner

0370 774 2955 | 07786 234258
sarah.wilson@bevanbrittan.com



Niamh
Batterton

Legal Director

0370 194 5640 | 07551 035238
niamh.batterton@bevanbrittan.com

5 years post Grenfell – what have we learnt and are high-rise residential buildings now safe?

2022 marked five years since the Grenfell tragedy in which 72 people died. The fire demonstrated that a “stay put” policy would not work when the flats weren’t actually self-contained and were constructed using materials and methods that in fact allowed fire to spread easily. The fire also highlighted a more widespread problem – that the system in place for ensuring building and fire safety was fundamentally flawed and that the issues identified at Grenfell actually affected many other similar properties, meaning many more residents remained at risk.

There has been significant progress since the fire to ensure the safety of people in high-rise residential buildings in the future, for example:

- A ban on the use of combustible materials in and on the external walls of flats over 18m in England as well as hospitals, student accommodation and dormitories in boarding schools, was introduced in December 2018. This has now been extended to new hotels, hostels and boarding houses over 18m;
- since Grenfell, 486 high-rise buildings were identified as containing ACM cladding. 318 have now fully completed remediation work;
- the London Fire Brigade has accepted every recommendation made to it by the Grenfell Tower Inquiry and has fundamentally changed the way it tackles large-scale fires in high-rise buildings; and
- the introduction of the Building Safety Act 2022 and the Fire Safety (England) Regulations 2022.

However:

- More than 100 buildings with Grenfell-style cladding are still yet to complete remediation work (31 are yet to see work begin, the other 53 have had their cladding removed but are awaiting building control sign off).
- The Department for Levelling Up, Housing and Communities (DLUHC) has found that nearly 140,000 leaseholders are still believed to be living in mid-rise buildings with “life-safety fire risks” and that between 6,220 and 8,890 out of a possible 71,000 to 79,000 mid-rise residential buildings in England require work to fix their issues.
- The “stay put” policy continues to be used in situations when it is not appropriate. On 27 April 2022, a fire broke out at a five-storey block in Deptford despite the fact that the property was timber framed and the fire spread within the wall cavities. The Government has confirmed it will not implement the recommendation from the Grenfell Tower Inquiry that all building owners should be required by law to develop a ‘plan B’ in case it becomes necessary to implement an evacuation and will continue with ‘stay put’ advice in most buildings as the recommendation was not “proportionate”. A consultation has however been launched, for buildings known to have serious fire safety issues only, around sharing the location of disabled residents with fire services.
- The police investigation into the fire continues. The decision is awaited as to whether anyone involved in the construction or operation of the tower will face criminal prosecution.

2022 Case Law Review

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP [2022] EWCA Civ 823 – Is a collateral warranty a construction contract?

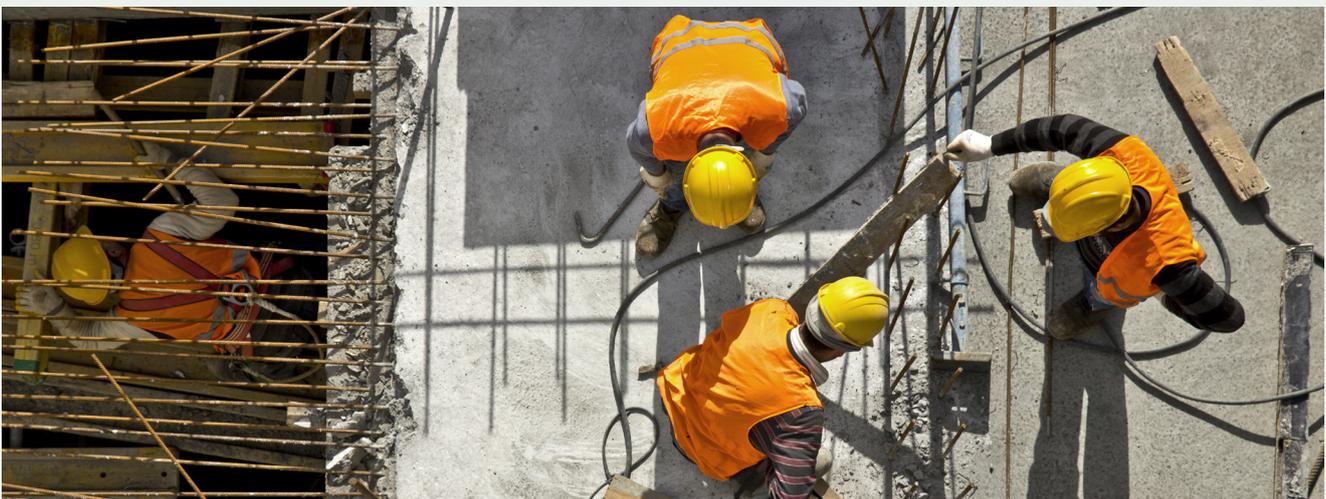
- The High Court in 2021 decided that a collateral warranty can, but not necessarily will, constitute a construction contract within the meaning of the Construction Act.
- This decision was appealed and Summary Judgment was handed down in June 2022 by the Court of Appeal, who held by a majority that the collateral warranty in this case was a construction contract.
- Crucially, they held that the period between the actual works being carried out and the date of execution of the collateral warranty should not matter.
- The Supreme Court granted permission to appeal this decision on 21 December 2022. The appeal is an opportunity for the Supreme Court to clarify the meaning of section 104 and provide guidance on the proper interpretation of wording typically found in collateral warranties on construction projects.

Andrews and others v Kronospan Ltd [2022] EWHC 479 (QB) – Reminder of the importance of expert independence

- This case shows the risks to a Claimant where an expert and/or instructing solicitors overlook the overriding principle that experts should be independent and that their obligations are to the Court.
- It came to light that there had been frequent communication between the Claimant's solicitor and their expert during the period of joint statement discussions, including working drafts being passed between the Claimant's solicitors and their expert along with frequent discussions where the content of the joint statement was discussed.
- The Defendant succeeded in bringing an application to revoke the Claimant's permission to rely on their expert, who had incurred fees of £225,000 and had been involved with the claim for over 3 years.

Martlet Homes Limited v Mulalley & Co Limited [2022] EWHC 1813 (TCC) – the Court's approach to cladding claims

- This case gives useful guidance to the approach the Court will take in relation to claims for defective cladding, as in the first reported judgment following a full trial of a fire safety/cladding claim they awarded a housing association substantial damages.
- The decision is helpful to other parties seeking to recover damages for remedying such defects, particularly the emphasis that a reasonable solution does not have to be the cheapest. There will be a number of factors for parties carrying out such remedial works to take into account.
- It is worth noting that reasonable steps taken to mitigate risks, such as waking watches, will also in principle be recoverable.



Northumbria Healthcare NHS Foundation Trust and another v Lendlease Construction (Europe) Ltd and others [2022] EWHC 2116 (TCC) – Maintaining privilege whilst rectifying defects

- The TCC considered the scope of litigation privilege and the extent to which parties may, pursuant to the Disclosure Pilot Practice Direction 51U (now found in Practice Direction 57AD) be able to withhold the disclosure of documents pertaining to the discussions of a third party group of specialists, on the grounds that such documents attract litigation privilege.
- It is critical to maintain privilege over any expert reports that have been obtained highlighting the defects, especially in the case of the well-known risks with fire defects.
- In this case, the reports remained privileged because they were developed and discussed in meetings with a Small Project Group (initially set up to respond to a Request for Information) and the Claimant's legal advisors.

Thomas Barnes & Sons Plc (in administration) v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC) – Valid termination of a construction contract

- The TCC held that a construction contract was validly terminated by the Council because of Thomas Barnes' delay-related default, which they were able to accept as repudiatory and treat the contract as discharged at common law.
- This case serves as a timely reminder of the risks and potential consequences of failing to comply with contractual notice provisions, in particular when purporting to terminate a contract pursuant to such provisions.
- The Judge also identified deficiencies in both parties' lay witness evidence, which serves to highlight the importance of keeping comprehensive contemporaneous records, as the value of such evidence will inevitably increase with the passage of time.

St James's Oncology Spc Ltd v (1) Lendlease Construction (Europe) Limited (2) Lendlease Construction Holdings (Europe) Limited [2022] EWHC 2504 (TCC) – Assessing damages where remedial works have not yet been carried out

- This case is helpful both in addressing defences from contractors around fire strategy, and in reviewing the appropriate method of assessing damages – particularly where remedial works have not yet been carried out.
- The judgment shows the importance for Claimants of planning a remedial scheme which maximises the possibility of recovering costs in litigation. The scheme does not have to be the cheapest scheme available; it does, however, have to be reasonable.

Bexheat Limited v Essex Services Group Limited [2022] EWHC 936 (TCC) – Immediate payment obligations and true value adjudications

- If a party is unhappy with an adjudicator's award, it must pay the sums awarded, unless grounds exist to avoid enforcement of the award.
- The Court considered some of these grounds in this case, which involved adjudication enforcement proceedings regarding a technical adjudication for immediate payment and arguments around a prior true value adjudication.
- This case is a reminder that s111 of the Construction Act creates an immediate obligation to pay the notified sum, and that any right to adjudicate under s108 of the Construction Act to obtain a true valuation of the sum due is secondary to the right to payment

Van Oord UK Ltd v Dragados UK Ltd [2022] CSOH 30 - Breach of natural justice in adjudication

- In this case, the argument that there was a breach of natural justice in the adjudication decision was successfully used to avoid enforcement of the adjudication decision.
- The court held that the adjudicator should have allowed the parties a further opportunity to address him on various issues, and he had not given the parties a fair opportunity to comment on his proposed adoption of a certain programme as the baseline and the consequences for the critical date in the dispute.
- This case highlights the importance of the adjudicator to consider and allow the parties to comment and test the thoughts of the adjudicator before a decision is issued where reasoning had been put forward by the adjudicator and information was presented which had not been argued by the parties.

Legislation Changes

Building Safety Act 2022

The Building Safety Act 2022 gained Royal Assent on 28 April 2022. It is an important development for anyone involved in property management, property dispute resolution, planning, construction, residential development taxation, and health and safety. It contains measures that are intended to improve the safety of buildings. While it has a particular focus on “higher-risk” buildings, its reach is much wider.

The Act allows for a number of key changes including, for high-rise buildings specifically:

- The establishment of a dedicated Building Safety Regulator to act as the sole Building Control body and to ensure advisory and competence committees are established;
- a 3-stage gateway process which requires approval at the planning, pre-construction and completion stages;
- an Accountable Person to be appointed to have legal responsibility for ensuring that fire and structural risks are understood, and that appropriate steps and actions to mitigate and manage these risks are taken;
- a Golden Thread of building Information to be created, stored and updated throughout the building’s lifecycle; and
- residents to be given a voice and a channel to ensure their complaints and concerns are heard and not dismissed.

The Act also introduced legal protections for leaseholders against historical building safety costs. Remediation orders will allow interested persons to apply to the Property Chamber of the First-tier Tribunal for an order requiring a building owner to remedy specified relevant defects. Interested Persons includes the Building Safety Regulator, Local Authorities, the Fire and Rescue Authorities, the Secretary of State and any person with a legal or equitable interest in the building or any part of it (e.g. leaseholders/freeholders). Remediation orders can be made against building owners, as well as management companies with repairing obligations, freeholders, and superior landlords such as head-lessees with repairing obligations.

Remediation contribution orders allow interested persons to apply to the Property Chamber of the First-tier Tribunal for an order requiring a company to make payments in connection with the remediation of relevant defects. Remediation contribution orders will allow building owners to seek to recover remediation costs from the building’s developer by applying to the Property Chamber of the First-tier Tribunal for an order against the developer. They will also allow leaseholders to recover remediation costs from building owners, developers and associated parties. We are starting to see the first applications for Remediation Contribution Orders now so it will be interesting to see how these progress in 2023.



Fire Safety (England) Regulations 2022

The Fire Safety (England) Regulations 2022 (FSR) were announced on 18 May 2022 and come into force on 23 January 2023. These Regulations extend the obligations on Responsible Persons under the Regulatory Reform (Fire Safety) Order 2005 (FSO).

From 23 January 2023, in all residential buildings of any height with at least two sets of domestic premises, Responsible Persons must:

- 1 Provide fire safety information and instructions to residents in a conspicuous part of the building, including the evacuation strategy for the building, how to report a fire and other guidance setting out courses of actions once a fire has occurred. These should be re-issued to all tenants annually and provided to new tenants as soon as reasonably practicable; and
- 2 Provide fire door information to residents to the effect that fire doors should be shut when not in use, residents or their guests should not tamper with self-closing devices on fire doors and residents should report any fault with, or damage to, fire doors immediately to the Responsible Person.

In residential buildings over 11m in height, Responsible Persons must also undertake annual inspections of flat entrance doors, and quarterly checks of fire doors in common parts.

In high-rise buildings over 18m or 7 storeys, Responsible Persons have even more extensive duties including providing electronic floor plans and information about the design, materials and any known defects of external wall systems to Fire and Rescue Services, undertaking monthly checks on lifts intended to be used by firefighters, and installing wayfinding signage visible in low light or smoky conditions which identifies flat and floor numbers in stairwells of relevant buildings.

Breaching the above requirements is a criminal offence that can lead to enforcement action by the fire and rescue service, including prosecution (against organisations and/or individuals) with unlimited fines and possible imprisonment, notices requiring Responsible Persons to take action to address breaches, and/or notices prohibiting or restricting use of premises (which could require tenants to be relocated until breaches are remedied).

There are no transitional provisions within the FSR, meaning these additional duties will apply to all Responsible Persons and all relevant buildings from 23 January 2023.



Procurement Bill 2022

The Government first laid out its proposals for procurement reform in December 2020 in a green paper called Transforming Public Procurement. The key objective was to repeal the current EU law-based procurement regulations following Brexit and replace them with a more modern set of rules which better meets the UK's needs. Following a period of public consultation on those proposals, the Procurement Bill was introduced in May 2022. The Bill is currently proceeding through Parliament and is expected to become law later this year.

The government has described the Bill as introducing “the most significant changes to the way public sector organisations buy goods and services for a generation” with the end result a procurement regime which is “quicker, simpler, more transparent and less bureaucratic”.

Access to information is central to delivery of this regime with a new digital platform enabling suppliers to input data only once in order to qualify for any procurement and with a new notice regime giving greater visibility over the entire procurement lifecycle (from procurement planning and contract award through to contract performance and termination).

Another key element of the Bill are the provisions aimed at tackling unacceptable behaviour and poor performance by suppliers. There are new exclusion rules, including the ability to take greater account of supplier conduct in the delivery of previous contracts and a new central public debarment list. These go hand in hand with new provisions relating to contract management and the publication of information on contract performance.

The Construction Playbook

The Construction Playbook was originally published in late 2020 and sets out key policies and guidance for how public works projects and programmes are assessed, procured and delivered. In September 2022, updates were published to five key themes in the playbook:

- 1 **Digitalisation** – the playbook remains committed to driving efficiency in construction through digitalisation, reflecting the progress made in information management and modern methods of construction;
- 2 **Sustainability** – this was already in the playbook but the update includes benchmarking of greenhouse gas emissions and social value, further embedding sustainability at each stage of business case development;
- 3 **Building Safety** – the Building Safety Act 2022 is now referenced in the playbook;
- 4 **Frameworks and Contracts** – the 24 recommendations made in the “Constructing the Gold Standard” review (also known as the Mosey Review) were endorsed in the update; and
- 5 **Contract management** – the update emphasises the need to have the right team and skills involved at the right stages, specifically for those delivering contracts to get involved early in the procurement stage.



Market Trends

Inflation in the Construction Sector

There are various external global factors impacting the construction industry, curtailing the supply of goods and materials i.e. Brexit, Covid and, more recently, the war in Ukraine. The UK and European construction markets are wrestling with disrupted trade and supply chains, and increasing competition for limited resources. As a result of this we are seeing:

- Increased cost in materials and labour, which has pushed up tender price inflation and made the market less competitive;
- Reduced construction confidence and higher investor uncertainty resulting in tighter financial conditions from funders;
- An overall restriction of construction growth prospects, and ongoing projects being delayed as they adjust for a shortage of materials, labour and funding; and
- A shortage of skilled construction workers as the older generation move in to better paid sectors or retire altogether.

All of the above result in extended timelines for projects and the knock on effect of this is an increase in uncertainty over completion dates and increased difficulty estimating the future costs of projects, including higher education developments.

Levelling Up

The Government has recently awarded £2.1bn of levelling up funding to more than 100 projects around the country. This is an exciting step for the Construction sector. More than £670m has been allocated to 26 projects across the United Kingdom to improve transport links, and over £760m is being provided to regenerate towns and cities and unlock thousands of new homes. Some of the major funding awards include:

- £50m to transform a derelict site on Morecambe's seafront into Eden Project North, a world class visitor attraction. It will also kick-start regeneration more widely in Morecambe;
- £50m to Cardiff Crossrail to improve the journey to and from the city and raise the economic performance of the wider region;
- £40m to Blackpool Council and Wyre Council to deliver a new Multiversity, a carbon-neutral, education campus in Blackpool's Talbot Gateway Central Business District; and
- £50m to help create a new direct train service, linking 4 of Cornwall's largest urban areas: Newquay, St Austell, Truro, and Falmouth/Penryn.

The successful councils will now have to get projects rolling to meet the 2025 deadline for spending the cash.

Arcadis UK Cities Director Peter Hogg said: "It's now critical for local authorities that are successful to move quickly and decisively. The deadline for spending the money of March 2025 is a challenging one – particularly as inflation has soared in the interim. Authorities will need to rapidly move projects through the design phases, complete any land acquisition, secure planning approvals, appoint contractors and move into delivery – no mean feat, especially with no shortage of competing priorities for local government time and resources."

The government has also confirmed there will be a further round of the Levelling Up Fund but has given no date for bid submissions.

Energy Efficiency

From 1 April 2023, it will be unlawful for a landlord to continue to let a commercial property with an Energy Performance Certificate (EPC) rating of F or G, unless an exemption applies and has been validly registered. Landlords must carry out energy improvement works to bring the EPC rating up to at least an E or register an exemption. To carry out these works, landlords do not have an automatic right of entry. If they do not have a right in the wording of the lease, they will need the tenant's consent. If tenants refuse to give this, landlords may be able to register a "consent exemption".

A buyer of a tenanted commercial property with a rating below E will be able to register a temporary six-month exemption to enable the buyer to get the property up to the required standard or register a longer-term exemption.

To strengthen these standards the Government has proposed that all commercial properties have a minimum EPC rating of at least B by 2030, and is considering an interim requirement by 2027 of level C. The government is also considering introducing a performance based rating that evaluates the actual energy consumption and associated emissions rather than the current EPC rating which evaluates a building's fabric and services and does not reflect its use by the occupiers. In May 2022, the UK Green Building Council (UKGBC) published a guide to support the industry to retrofit the UK's poorly performing commercial buildings.

Most commercial buildings in the UK were constructed before 2000, therefore, in order for the UK's 2050 net zero targets to be realised, there will need to be significant carbon reductions and energy efficiency which will require some sort of retrofit across much of the sector.



Birmingham | Bristol | Leeds | London

 Bevan Brittan LLP |  @BevanBrittanLLP | www.bevanbrittan.com | 0370 194 1000