MC MS Blog

The heat is on: how climate change is fuelling construction disputes

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Matt and I recently had the pleasure of joining Camilla ter Haar and Ruth Keating of 39 Essex Chambers as guests on their podcast series "*Construction and the Climate"* to discuss the key climate change issues relating to the construction sector, and in particular with regard to adjudication. While I don't plan to simply reiterate the podcast as a written blog (not least, because I'm sure you've all already listened to it), I thought it would be interesting to elaborate on a few of the many topics and considerations we talked about given how widely applicable the subject is becoming to all of us in the industry.

No longer a distant threat

For decades, discussions about climate change focused on future generations — melting polar ice caps, rising sea levels, extreme weather events projected to unfold by 2050 or 2100. It was easy for many to dismiss or deprioritise these concerns as something so far off. However, I firmly believe that we're clearly seeing the impacts of climate change now. What's more, construction disputes have traditionally stemmed from issues relating to ambiguity surrounding contract terms, delays, defects, or payment disagreements. However, over more recent years, contractors, developers, insurers, and legal professions alike have all been faced with new challenges brought about by the escalating impacts of climate change. As rising temperatures, extreme weather events, and shifting regulatory landscapes are becoming increasingly the new norm, climate change is introducing a new class of risks, many of which are unpredictable and unprecedented. And when a project goes awry, we all know what happens next: claims and disputes.

So, where are the pressure points?

To my mind, there are a number of key climate-related areas where we either already are or are likely to see tension — reinforcing that climate change is no longer a theoretical issue, but a driving force behind growing stress in societies, ecosystems, and economies around the world:

- Extreme weather is causing damage, delay, and disruption to construction projects. Hurricanes, wildfires, heatwaves, and floods are disrupting project timelines, damaging materials, and forcing costly downtime — all of which can lead to claims and counterclaims about liability and responsibility.

- Parties are invoking "force majeure" clauses due to climate-related events – but is a heatwave "foreseeable" now? Are wildfires "exceptional"? Contractors and employers frequently disagree — especially as climate events become more frequent, yet still difficult to plan for. Judges, arbitrators and adjudicators may need to reconsider what counts as an unforeseeable event in a world where climate extremes are becoming the norm.

- Material costs are volatile due to climate-driven supply chain issues. Climate impacts on supply chains are increasing the cost and reducing availability of materials like timber, aggregates, and concrete. If contracts don't clearly allocate risk, disputes arise quickly between stakeholders.

- Design responsibility and sustainability – for example, if a building doesn't meet passive cooling standards or future flood tolerances, is that a design flaw or a missed climate adaptation? Expect more disputes over performance specifications, energy models, and futureproofing.

- Many projects now have ESG targets or sustainability obligations, but these can still be vague or aspirational. Are they enforceable? Who's liable if they're missed? While the more sophisticated developers and main contractors may understand the implications and have the resources to meet these targets and obligations, it may not be the case for those further down the supply chain.

- Regulatory shifts are changing compliance requirements mid-project with Governments worldwide rapidly introducing new environmental regulations, green building codes, and emissions mandates. If project specifications must change midstream, who foots the bill? Who agreed to what? These uncertainties are often contested and suddenly, adjudicators are being asked to weigh in on climate-related issues, some of which are new, complex, and poorly defined in standard contracts.

Greater London Authority Plan

To help mitigate some of the risks posed by climate change, local policies are being introduced such as the Greater London Authority (GLA) London Plan, formally known as the London Plan. The GLA's London Plan requires all major developments to submit a Whole Life-Cycle Carbon Assessment (WLCA) and prioritises retrofit-first approaches over demolition. It sets embodied carbon benchmarks, promotes low-carbon construction methods, and ties planning consent to sustainability performance. In practice, this means:

- Demolition-heavy projects may face rejection or strict conditions. The well reported situation relating to Marks & Spencer, Oxford Street highlights the complex balance between urban development, heritage preservation, and environmental sustainability in modern city planning. The controversy revolved around M&S's proposal to demolish the existing 1920s Art Deco building, and replace it with a modern ten-storey structure comprising retail space, offices, a gym, and a café. Despite the long-awaited subsequent approval, conservation groups and environmental advocates continue to express concerns – arguing it may undermine efforts to preserve historic buildings and reduce carbon emissions through retrofitting rather than demolition and otherwise align with the GLA's London Plan.

- Contractors may inherit obligations tied to green building certifications or lifecycle carbon performance.

- Developers are bound to meet energy and emissions targets or face costly delays and redesign.

Due to the stringent targets and enforcement mechanisms of the GLA London Plan, disputes over compliance, cost, and accountability are on the rise, particularly when the environmental obligations filter unevenly through project teams and supply chains. While I can't disclose specific details for confidentiality reasons, I recently adjudicated a particularly illustrative dispute involving a high-end residential development of nine super-prime apartments in one of the London boroughs. The original planning permission had been granted in 2019 — prior to the adoption of the relevant updated City Plan applying to the borough. However, during early construction works in 2022, an incident occurred which led the Local Planning Authority to require a new planning application. This brought the project under the scope of the revised City Plan and, by extension, the GLA London Plan that I mention above, both of which include firm commitments to achieving net zero carbon emissions for major developments.

As adjudicator, I was tasked with assessing not just the costs associated with delay, but also the

additional costs of compliance with these updated sustainability requirements. For instance, the revised planning conditions mandated the installation of air source heat pumps across all nine units — adding approximately £150,000 to the project cost. The space required for those systems also reduced the total internal floor area, resulting in a loss valued at circa £1 million. To compound matters, the scheme ultimately failed to meet net zero carbon targets, triggering a carbon offset levy of in excess of £20,000.00.

This case stands out as a clear and concrete example of how evolving sustainability standards — even within the span of just a few years — can materially affect construction costs, design choices, and the scope of disputes.

What does this mean for adjudicators?

While I don't think adjudicators need to be environmental scientists any time soon, the increasing technicality of these disputes means we need to become "climate-literate" and comfortable operating in this area - it's not our core domain as construction adjudicators, but certainly critical to credible decision-making when disputes arise. As sustainability becomes central to contract delivery and risk allocation, adjudicators will need a working knowledge of, for example:

i. Familiarity with carbon accounting & Lifecycle Carbon Assessments (LCAs) - Disputes can involve carbon footprint calculations, especially disputes over net zero claims, offsetting, or embodied carbon. Adjudicators don't need to be carbon experts, but should be able to evaluate conflicting expert reports and assess credibility with a high-level understanding of e.g. embodied vs operational carbon, common pitfalls in carbon reporting (e.g., boundaries, assumptions, double counting) and tools like the RICS Whole Life Carbon Assessment, which is a standardised framework for assessing the total carbon emissions of built assets over their entire life. It combines embodied carbon + operational carbon + end-of-life impacts into one holistic assessment.

ii. Technical insight into sustainable materials and construction methods - Substitutions (e.g., low-carbon concrete, recycled materials, modular components) could result in disputes, so adjudicators need the ability to evaluate performance risks of substitutions.

iii. Basic fluency in sustainable material certifications and green building frameworks - LEED, and BREEAM, are two of the most recognised sustainability rating systems for buildings. They each help evaluate how "green" a building is, based on factors like energy use, materials, water, indoor environment etc. Projects aiming for BREEAM, LEED etc, or other certifications face added risks when performance standards aren't met. If sustainability consultants or designers fall short, claims and counterclaims are likely to follow, so adjudicators should be familiar with these too.

iv. Existing and emerging environmental and energy regulation - such as the Future Homes Standard (due out later this year) with its aim of ensuring that new homes built from 2025 will produce 75-80% less carbon emissions than homes built under the current Building Regulations.

Final thoughts

Despite what some 'experts' on the other side of the Atlantic might have us believe, climate change is real and it introduces more than just physical risk. It brings legal and contractual uncertainty, especially when it comes to responsibilities around environmental compliance, sustainable material sourcing, green building certifications and adaptation measures, and these complexities are fertile ground for disputes — and for adjudication.

Adjudication has always been about trying to resolve disputes quickly, fairly, and efficiently. However, the issues being brought forward are changing and the sector needs to adapt too — because climate change isn't just reshaping our planet, it's reshaping the way we build, contract, and resolve issues and disputes. While sustainability is a growing concern, disputes specifically hinging on climate

performance are still fairly limited and I don't think there is enough volume or demand yet to justify formal specialist panels. However, as climate policy tightens and ESG expectations grow, I'm sure we'll see more green clauses, decarbonisation goals, and performance guarantees written into contracts. That means more potential for disputes and more pressure on adjudicators and tribunals to understand this evolving landscape.

While construction is undeniably having an impact on the climate, the climate is also having an impact on construction, and I think the industry is at a bit of a tipping point. Climate change and sustainability are no longer abstract ideals or solely environmental or scientific issues — they're becoming legal and commercial ones, too — and they are now incorporated into contracts, regulations, planning conditions, and public expectations. As a result, the number of disputes arising from environmental obligations is growing, and adjudication, with its speed and flexibility, should be well-positioned to meet this challenge — but only if contracts, practitioners, and adjudicators evolve alongside the climate risks they now face.

As parties race to build a greener future, they must also prepare for a higher volume and greater urgency of disputes. So, the question is no longer whether climate will affect construction or whether construction will affect the climate. The affects are already being felt and the real question is: are we all really ready for them? Because the **Heat is On**.

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