

COVID-19: PRESSURE POINTS: MANAGING DELAY UNDER JCT CONTRACTS (GLOBAL)

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Legal Briefings - By **Nick Downing and Emma Schaafsma**

The worldwide challenge created by the coronavirus (Covid-19) is likely to have an impact on construction projects in the UK whether directly or indirectly due to public health implications or Government measures. In the case of live construction projects these implications may manifest themselves in relation to availability of people, delays in deliveries and, in the worst case, site closures.

The delay and additional cost consequences flowing from these implications will need to be assessed should contractors claim relief from performance or request instructions. Contractors may look for extensions of time (to avoid paying delay damages), the recovery of additional cost and in extreme circumstances even termination.

JCT contract forms are somewhat unusual in that they contain few express provisions about how to deal with this kind of situation. This note therefore examines how claims might arise under JCT contracts and how they might be applied.

WHAT IS A "FORCE MAJEURE" CLAUSE?

There has been a general assumption that Covid-19 entitles the contractor to relief as a force majeure event.

The term "force majeure" does not have a recognised definition in English law. It is generally

regarded as a contractual term by which one (or both) of the parties is excused from performance of the contract, in whole or in part, or is entitled to suspend performance upon the happening of a specified event beyond his control. A force majeure clause is usually intended to avoid the application of the common law doctrine of frustration so as to provide a mechanism for controlling the effect of supervening events and to avoid debate as to whether the contract has been brought to a premature end.

The phrase is commonly encountered in building contracts. Some contracts include a list (sometimes exclusive) of events that will (and sometimes will not) fall within its application. In the JCT 2016 Suite, the term "force majeure" is used without definition as one of the Relevant Events in the extension of time clause. Both the employer and the contractor can terminate a JCT contract if there is prolonged suspension (usually 2 months) of the whole or substantially the whole of the incomplete work for force majeure reasons.

As is common to a number of standard forms, under JCT contracts force majeure does not give an entitlement to the contractor for additional money.

WHAT EVENTS FALL WITHIN THE SCOPE OF A SIMPLE FORCE MAJEURE CLAUSE?

Since JCT contracts do not give force majeure a specific contractual meaning, there is uncertainty about its applicability. The English Courts have recognised the term is not easy to define as it does not arise in a common law context but rather in civil law jurisdictions. In one case under English law, it was not regarded as being confined to Acts of God, but extended to events resulting from human intervention. The complete dislocation of business as a consequence of a universal strike in a particular industry might come within the meaning of "force majeure" but not minor transitory events of which the examples given in that case were "bad weather, football matches or a funeral".¹ Subsequently the expression has been held to cover events such as legislative or administrative interference, the refusal of a licence as well as war and strikes but in every case the precise meaning will be established by the context.

Other extension of time events listed in JCT contracts are unlikely to also amount to force majeure, but if any are simply deleted by agreed amendment (e.g. the exercise by the UK Government of a statutory power) and force majeure is retained without further explanation then the position may not be clear cut.

WHEN WILL FORCE MAJEURE RELIEF BE AVAILABLE?

Some contracts will state that the event has to be beyond a party's (reasonable) control, but this is not an explicit requirement in JCT contracts. However the party seeking to be excused still has to prove that non-performance was due to circumstances beyond its control and there were no reasonable steps it could have taken to avoid or mitigate the event or its consequences.²

The English courts have stated that the force majeure event must be the sole cause for a party's non-performance, considering the facts and applying a "but for" test³, although how this will be considered in a case of "true concurrent delay" in the context of construction contracts has yet to be addressed [see our [article](#) on this issue].

In order to benefit from force majeure, it seems that the contractor must also show that performance has become physically or legally impossible, and not merely more difficult or unprofitable⁴. Therefore the availability of an alternative method of performance, albeit at an additional cost, would indicate that the force majeure clause should not apply.

MITIGATION

Quite separately from determining whether an extension of time event has occurred, in JCT contracts the contractor is also under an obligation to "constantly use his best endeavours to prevent delay" to the progress and completion of the Works.

Under English law, there is no case law on the obligation to "constantly" use best endeavours, but the case law on best endeavours suggests that the standard of endeavour required by a party obligated to use best endeavours is a high one: to take steps which a "prudent, determined and reasonable owner acting in his own interests and desiring to achieve that result would take"⁵. Keating, 10th Edition⁶ states:

"This proviso is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the Contractor's duty to reprogramme the Works either to reduce or prevent delay. How far the Contractor must take other steps depends on the circumstances of each case, but it is thought that the proviso does not contemplate the expenditure of substantial sums of money".

This therefore suggests that a contractor might be required to incur some cost, albeit not "substantial" additional costs in taking all reasonable steps to avoid delay (for example the contractor should re-sequence its works, reschedule deliveries and drawings approvals, but it would not be required to undertake substantial acceleration measures). However, there is a line to be drawn between taking such steps as part of constant best endeavours, and what should otherwise fall within the scope of a contractual change or variation provision.⁷

Contractors are well advised to document carefully all steps taken and to follow the contract variation procedure closely to ensure that costs falling within the scope of a variation can be distinguished and thereby recovered.

While there is authority that "reasonable endeavours" carries with it a lesser obligation than to use "best endeavours"⁸ each case needs to be considered in view of the performance obligations as prescribed in the contract and the circumstances in which force majeure is being asserted. The courts considered the contractual obligations to use "reasonable endeavours" to avoid or overcome force majeure and to use "reasonable endeavours" to remedy delays in performing the contract.⁹ They decided that these provisions required the party invoking force majeure to consider its own interests as well as the interests of the counterparty expecting performance and where, as in that case, the party seeking relief had

an alternative means of performing the contract, it should have done so irrespective of the fact that it would cost money to do so.

COVID-2019: MANAGING CONTRACTS

Whether the implications of the Covid-2019 amount to force majeure is not as clear cut as one might suppose, and will be fact specific.

A case of infection amongst site workers causing a site shut down for a period of time is probably likely to fall square within the definition.

Where supplies from overseas are delayed due to disruption at ports or lack of vessels availability the position is rather less clear. Such events might be enough if the supply contract was entered into before the emergency became apparent. The contractor might need to consider whether it can take reasonable steps to try to obtain the same supply from alternative suppliers, even if it means breaking its original supply contract. But it should take into account any cancellation costs payable to the original supplier, the price of alternative supplies and the additional time it would take to obtain the alternative supply, relative to the anticipated delays to the original supply. Supply constraints in affected areas might cause capacity constraints elsewhere in the global supply market.

It may be less likely that force majeure relief will be available if the supply contract has not been placed. One would expect the main contractor to try to obtain supplies from an alternative, more secure, source even if more expensive.

On the other hand, if the contract specification requires the use of, say, Italian marble, a variation which permits an alternative will arise if substitution is instigated by the employer. If the contractor instigates the use of an alternative for the employer's approval a variation does occur. However, the employer may decide that the time saved by ordering a variation is a better outcome than for the contractor to sit out the delay claiming a force majeure event with no guarantee of when it will end.

Delays in the supply chain caused by government mandated shutdowns may well fall within the scope of a change in law provision providing specific remedies. The exact wording of those clauses will be key. For example, in the main JCT 2016 forms the exercise of a statutory power by the UK Government or a local authority which "directly affects the execution of the Works" will qualify for time relief, subject to mitigation measures. Similar action by other governments might not qualify for relief. Other JCT drafting on change in law is somewhat "UK centric" and does not reflect the use of an international supply chain particularly well. One hopes that in practice a pragmatic approach will be adopted.

Contractors may be entitled to relief under JCT contracts if there are delays in obtaining a necessary permission or approval of any statutory body. This could include delays in imports clearance into the UK or design approvals. If related to Development Control Requirements (e.g. planning or building regulations), additional cost could be recoverable by the contractor too.

Where time relief is available for the contractor, suspension of the project could in some cases also result in a right of termination.

Contractors may also request instructions such as to close the site. Such requests need to be examined carefully as they could result in instructions which amount to a variation (e.g. introducing new restrictions which limit working hours).

Faced with challenging situations, employers or contract administrators sometimes fall into the trap of issuing instructions to postpone the works. Great care is required in the issue of instructions to postpone since they will trigger an entitlement for the contractor to claim an extension of time and recovery of additional expense.

Covid-19 might also impact on the performance by the employer of its obligations under a JCT contract (e.g. late supply of information by the employer's design team due to staff disruption or office closure). The contractor may become entitled to an extension of time and recovery of additional costs if this occurs.

It is of course possible that depending on the circumstances employers will take a sympathetic approach to any difficulties encountered by a contractor and adopt a lenient rather than strict application of the conditions of contract.

Factors influencing the employer's approach will no doubt depend on the impact of delay on the employer's own risks and losses (e.g. delayed rent commencement) and the impact of agreements for lease, forward sale agreements and the like, as well as the availability of insurance proceeds for such losses, if any. It should be noted for example that agreements for lease, forward sale agreements, etc often require extension of time provisions under building contracts to be operated properly, dictate the ability to use different materials to those originally specified and contain termination rights exercisable by the counter-party if the developer does not achieve practical completion by a fixed date for any reason.

Insurance cover may also be limited or unavailable as business interruption policies for specific projects usually require physical damage to the works before they are triggered.

A transparent and co-operative dialogue between employer and contractor allowing any difficulties encountered to be identified early and solutions found may deliver the most efficient outcome for both parties, especially where the relationship between employer and contractor is a positive one. More difficult situations could develop if the project is already subject to pre-existing delays.

1. Matsoukis v Priestman (1915) 1KB 681

2. B&S Contracts v VG Publications [1984] ICR; Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323

3. Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm), and Classic Maritime v Limburgan Makmur SDN BHD & Anor [2019] EWA Civ 1102]

4. Thames Valley Power Ltd v Total Gas & Power Ltd [2005] EWHC 2208 (Comm)
5. IBM (UK) Ltd v Rockware Glass Ltd CA [1980] FSR 335
6. 20-152 page 791
7. A Noble, 'Contractors' and sub-contractors' constant best endeavours to prevent delay' Const. L.J. 1997, 13(5), 293-296
8. UBH (Mechanical Services) Limited v Standard Life Assurance Co. T.L.R, 13 Nov. 1986 (Q.B.)
9. Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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