



Technical

COVID-19 and Force Majeure under the JCT Contract

Date: 30 April 2020

Introduction

1. Force Majeure is a French civil law concept which is undefined within English Law but was introduced due to the narrow application of the Contract Law doctrine of Frustration.

Case Law

2. The principle of Force Majeure has been defined over the years through several cases. Matsoukis v Priestman & Coⁱ Justice Bailhache found that *force majeure* did apply to the disturbance of business caused by a national coal strike along with accidents to machinery but also decided that this did not cover delay caused by bad weather, football matches or funerals as *“these are the usual incidents interrupting work and the defendants, in making their contract, no doubt took them into account”*.
3. Lebeaupin v Crispinⁱⁱ five years later expanded on this to include War and Epidemics *“... Thus was, inundations and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure”*. Justice McCardie went on to state that the force majeure clauses should be constructed with close attention to the words and the effect which could be different when considering different documents.
4. In relation to Strikes it was found that this could extend to where a strike is anticipated along with embargoes and refusals to grant licenses in Coloniale Import-Export v Loumidis Sonsⁱⁱⁱ.
5. The recent case of Sadrill Ghana Operations Ltd v Tullow Ghana Ltd^{iv} noted that a party who looks to rely on a force majeure clause must demonstrate that (on the balance of probabilities):
 - A Force Majeure Event has occurred and that it had the effect specified in the contract (e.g. it prevented / hindered performance).
 - The Claimants failure to perform was due to circumstances outside its control.
 - There was nothing the Claimant could reasonably have done to avoid the Force Majeure Event or mitigate its effects.

The force majeure claim failed in this case as it was found that the claimant would have been unable to act in any event due to their own negligence/default.

Defined Force Majeure Clauses

6. Some contracts (by way of amendments) may seek to define the term “Force Majeure” with a list of events with the final event to be a broader range of terminology such as “other such events”. Great care needs to be taken in this regard as rather than applying a ‘catch all’ principle it can lead to the *Ejusdem Generis* (of the same kind or class) principle applying, in that within the preceding list there will be some common category developed and anything which falls outside of this category will not be included.^v This stance of the courts remains as is highlighted in BOC Group plc v Centeon LLC and another & Burrows Investments v Ward Homes.^{vi}
7. Whilst the inclusion of a definitive list may help a party to bring a Force Majeure claim, this does not automatically guarantee that a party will be successful in claiming Force Majeure. This is evident in the recent case of Classic Maritime Inc v Limbungan Makmur Sdn Bhd^{vii} which introduced a ‘but for’ test for causation and found that Limbungan would have been unable to perform even if the Force Majeure event had not occurred.

Force Majeure in relation to COVID-19

8. To enable a successful claim under the Force Majeure clause of the JCT, a party would have to demonstrate that as a result of COVID-19 they have been prevented from completing their works or that to continue would lead to the party breaking other contracts^{viii}.
9. The fact that performance has taken longer to achieve than originally anticipated or was more difficult/unprofitable^{ix} will not allow a party to be successful in a Force Majeure claim.
10. So, if you want to rely on the Force Majeure provisions of the Contract you must be able to establish that you could not progress your works whatsoever.

CDM Regulations 2015

11. Under the CDM Regulations 2015^x the client has overall responsibility, as defined within section 4. This is clarified under the following sections below:
 - 4.(1) –
 - 4.-(1) *A client must make suitable arrangements for managing a project, including the allocation of sufficient time and other resources.*
 - 4.(2) (a) & (b) –
 - (2) *Arrangements are suitable if they ensure that –*
 - (a) *the construction work can be carried out, so far as is reasonably practicable, without risks to the health or safety of any person affected by the project; and*
 - (b) *the facilities required by Schedule 2 are provided in respect of any person carrying out construction work.*
 - 4.(3) –
 - (3) *A client must ensure that these arrangements are maintained and reviewed throughout the project.*
 - 4.(6) (a) & (b) –
 - (6) *A client must take reasonable steps to ensure that –*
 - (a) *the principal designer complies with any other principal designer duties in regulations 11 and 12; and*
 - (b) *the principal contractor complies with any other principal contractor duties in regulations 12 to 14.*

12. Due to the requirements to maintain social distancing as far as practicable and increase the cleaning regime on site as a result of the Site Operating Procedures, this overall responsibility for this arguably rests with the client. The Client must ensure that the Principal Contractor complies with sections 12 – 14 of the Regulations, meaning that if the Principal Contractor was to not implement any measure to comply with the Site Operating Procedures then the Client would be ultimately responsible in this regard.
13. Under paragraph 4.1 onwards of the CDM Regulations 2015, the client is ultimately responsible for ensuring the works are carried out safely.
14. The CDM regulations place obligations on both the Client and the Principal Contractor.
15. There may be an argument that compliance with the current site operating procedure requires an instruction from the Client to the Principal Contractor.
16. It may be possible by following the respective Parties obligations under the CDM regulations to demonstrate that the Client ensures compliance with the site operating procedures which may arguably be possible to be a relevant event and relevant matter.

Recommendations

17. The approach to be taken may change depending on your position in the supply chain i.e. Main Contractor or Subcontractor and the Terms and Conditions of the Contract you are working under.
18. For Subcontractors the introduction of the Site Operating Procedures will lead to the imposition of restrictions which may be included under variation 5.1.2 of the Sub-Contract which could (depending on amendments) lead to a claim for both an Extension of Time and Loss and Expense. Alternatively, this may be an 'Act or Impediment' by the contractor and give rise to an Extension of Time and Loss and Expense.
19. For Main Contractors taking into consideration the clients obligations under the CDM Regulations along with the restrictions placed upon construction activities by the Site Operating Procedures Version 3 could fall under clause 5.1.2 of the Contract if established would give rise to both an Extension of Time and Loss and Expense.
20. In each instance the exact wording of the Contract will need to be reviewed along with the relevant notices that are in place, and most importantly a careful review of the specific facts of each situation.

<p style="text-align: center;">Sheffield (Head Office)</p> <p>The Annexe 260 Ecclesall Road South Ecclesall Sheffield S11 9PS</p> <p>Tel – 0114 230 1329 E-mail – frances.sawicki@ramskillmartin.co.uk</p>	<p style="text-align: center;">London</p> <p>Adam House 7-10 Adam Street London WC2N 6AA</p> <p>Tel – 020 7520 9295 E-mail – clive.ramskill@ramskillmartin.co.uk</p>
<p style="text-align: center;">Liverpool</p> <p>Horton House Exchange Flags Liverpool L2 3PF</p> <p>Tel – 0114 230 1329 E-mail – nick.cheetham@ramskillmartin.co.uk</p>	<p style="text-align: center;">Manchester</p> <p>3 Hardman Street Manchester Lancashire M3 3HF</p> <p>Tel – 0114 230 1329 E-mail – nick.cheetham@ramskillmartin.co.uk</p>
<p style="text-align: center;">Birmingham</p> <p style="text-align: center;">Birmingham Business Park 4200 Waterside Centre Solihull Parkway Birmingham B37 7YN</p> <p style="text-align: center;">Tel – 0121 481 2381 E-mail : clive.ramskill@ramskillmartin.co.uk</p>	

ⁱ [1915] 1 KB 681 at 685-7

ⁱⁱ [1920] 2 KB 714 at 719

ⁱⁱⁱ [1978] 2 Lloyd's Rep 560

^{iv} [2018] EWHC 1640 (Comm)

^v Powell v. The Kempton Park Racecourse Co., [1899] A.C. 143

^{vi} [1999] 1 All ER (Comm) 970, & [2015] EWHC 2287

^{vii} [2019] EWCA Civ 1102

^{viii} Reardon Smith Line v Ministry of Agriculture, Fisheries and Food [1961] 2 All ER 577

^{ix} Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917]

^x The Construction (Design and Management) Regulations 2015