

HOT WEATHER AND DELAY – WHAT’S MY ENTITLEMENT?



DAVID FOGARTY

ASSOCIATE DIRECTOR, DGA UK

Within the construction industry, it is not unusual for inclement weather conditions to cause delays and/or disruption. This invariably opens the ‘floodgates’ for claims, and in our experience, it is often a much-debated subject in dispute resolution.



To that end, it is typical for parties to reach a prior agreement as to who bears the contractual risk for any delays caused by bad or extreme weather conditions. However, in the absence of reaching any agreement in advance, it is generally trite law that the Contractor would be responsible for any delay to the project because of inclement weather.

As such, any entitlement to an extension of time will rest on the express terms of the contract. For example, the JCT Design and Build Contract 2016 identifies “exceptionally adverse weather conditions” as a “Relevant Event” (under Clause 2.26). However, it is worth noting that adverse weather conditions are not listed as a Relevant Matter, and thus the risk is shared between the parties in that the contractor will benefit from an extension of time but will not be able to recover the loss and expense inevitably associated.

Yet, there still remains a lack of consistency amongst construction practitioners as to what exactly what is meant by “exceptionally adverse” and how any consequent delay is to be calculated. The JCT, for instance, does not go further to explain or define the word ‘exceptional’, nor does it provide the Contract Administrator with an appropriate threshold to measure the delay. It is unsurprising, therefore, that weather disputes can be a subjective judgement and, as a result, continue to be contentious and hotly debated.

Here in the UK, we often associate weather claims with severe wintery conditions, such as rain, snow, ground frost, below-zero temperatures, and the like. Nevertheless, as we are on the cusp of the UK summer holidays, the recent hot weather has sought to remind us that adverse weather claims can occur at the other end of the meteorological spectrum. The Met Office informs us that the average temperature is up by almost a degree in the past 30 years, and hours of sunshine are up 5.6%.

It was only last year that the UK saw its hottest temperature on record (with an official high of 40.3 degrees). While it is typical for construction operations to adapt their working practices in accordance with the Construction (Design and Management) Regulations 2015, we have also seen that the high temperatures can impact upon the physical site works.

By way of example, we were involved in a dispute regarding the slow progress of one of the main pile caps on a power infrastructure scheme in Bedfordshire. The Subcontractor realised that the unusually high temperatures caused several earlier (and much smaller) foundations to cure at a faster rate than expected. This was later confirmed in the cube tests, in which the concrete failed to achieve the desired strength, and as such, the subcontractor was required to undertake remedial works. Given the risk to the upcoming and larger pile caps, the subcontractor proactively sought to revise the concrete composition by introducing retarders into the mixture (which slows down the chemical process in order to overcome the accelerating effect of the high temperatures).



In the end, the subcontractor managed to settle its final account. Nevertheless, it served as a reminder that exceptionally hot weather can equally delay and disrupt construction projects.

PRACTICAL POINTS TO TAKEAWAY

This type of scenario is likely to become more frequent, with the Met Office predicting that climate change is continuing to influence the likelihood of extreme weather. With that in mind, what should you do if you need to prove you were delayed or disrupted?

- **Firstly**, a party will face an uphill battle if it has not kept sufficient records. Not only the weather data to demonstrate that conditions were “exceptionally adverse” (or whatever test or threshold is set out in a particular form of contract) but also its impact on construction site operations. To that end, a good starting point is often the Met Office downtime records.
- **Secondly**, ensure compliance with the notice provisions under the contract and, if possible, notify potential delays around the time of the event. Although, it is unlikely that local weather stations will be able to provide real-time data, and therefore the parties may have to adopt a wait and see approach (until the relevant weather records are available).
- **Thirdly**, it is not simply enough to show that the weather encountered was, in fact, “exceptional”. A Contractor must also show that the exceptional weather resulted in a delay (or a likely delay) to the progress of the works that then impacted the completion date for the project. This generally requires some form of critical path analysis to demonstrate cause and effect.

While weather related disputes tend to focus on wind, rain, and the like, I hope that this article sheds some light on the fact that adverse weather is not only confined to the winter months. Accordingly, the evidence seems to suggest that extreme climate events will increase. As such, weather-related disputes at either end of the spectrum are likely to remain prevalent.

DGA CONTACT INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

DGA HEADQUARTERS

25 Eastcheap
London
EC3M 1DE

Tel: +44 (0)203 961 5340

SINGAPORE

#11-09,
Eon Shenton
70 Shenton Way
Singapore
079118

Tel: +65 62916208

AUSTRALIA

Level 8
One Melbourne Quarter
699 Collins Street
Melbourne
Vic 3000

Tel: +61 (0)3 8375 7620

AUSTRALIA

Suite 4.14, Level 4
Lawson Place
165-167 Phillip Street
Sydney
NSW 2000
Australia

Tel: +61 (0)2 7202 3494

UNITED ARAB EMIRATES

Associated Office
PO Box 6384
Dubai
United Arab Emirates

Tel: +971 4 437 2470

CANADA

Associated Office
61 Legacy Landing SE
Calgary
Alberta
Canada
T2X 2EH

Tel: +1(587) 586 5502

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

Tel: +27 (0)11 258 8703

HONG KONG

6/F Luk Kwok Centre
72 Gloucester Road
Wan Chai
Hong Kong

Tel: +852 3127 5580

DGA UNITED KINGDOM



