39 Essex Chambers

OUTLOOK

NEWS AND VIEWS FROM THE
39 ESSEX COMMERCIAL AND CONSTRUCTION GROUP

APRIL 2020

INTRODUCTION

Welcome to the April 2020 edition of *Outlook*, a roundup of news and views from the 39 Essex Commercial and Construction Group.

The current COVID-19 pandemic presents a range of social, health and economic challenges worldwide and these challenges are impacting our clients both on a personal level and commercially. The C&C Group, in common with Chambers as a whole, is producing COVID-19 specific content to keep our clients informed in this fast changing and uncertain market and this newsletter brings you a selection of these articles.

John Denis-Smith considers the effect of coronavirus on the contract terms applicable to the **JCT FORM OF CONTRACT**. In the remaining articles in the series (available on our website), John has also considered the position under the NEC contract and common law considerations.

Marion Smith QC, Rose Grogan and Philippe Kuhn provide a useful summary of the effect of the Government's vital guidance to local authorities on how to comply with **PROCUREMENT RULES** during the COVID-19 crisis. The authors have also commented on further guidance promulgated since Procurement Policy Notes 01/20 and 02/20 in two articles which are available on our website, here and here.

Almost all **COMMERCIAL LEASES** will be affected by the current coronavirus emergency. As commercial tenants find their businesses struggling, cash flow will become a real problem: rent may not be paid; premises will shut; and landlords will struggle in turn. Damian Falkowski, David Sawtell and Gethin Thomas's article considers some of the issues that will be front and centre of both tenants' and landlords' minds.

And Kelly Stricklin-Coutinho analyses the **EUROPEAN COMMISSION'S TEMPORARY FRAMEWORK** for dealing with the COVID-19 situation. The Framework sets out a number of measures which, on notification, can be used to provide aid in the current challenging circumstances.

QUARANTINE QUERIES

The Commercial and Construction team has a new initiative which we hope will help those of you who are working in isolation. We have established a team of silks and juniors who will be available for up to half an hour – free of charge – to talk through the kind of issues that you would previously have mulled over with a colleague at the coffee machine. The discussion will be on a "no liability" and "no names" basis; however, you will be asked to provide some brief details of the query to our clerks so that they can make a barrister available.

If there is a matter that you would like to discuss (COVID-19 related or otherwise) please contact Niki Merison (niki.merison@39essex.com or + 44 (0) 7872 178 645) or Mark Winrow (mark.winrow@39essex.com or + 44 (0) 7930 333 993) and book a slot with one of our barristers.

CURRENT AND RECENT WORK

C&C Group members have also been busy away from the pandemic:

- Nugee J has ordered a preliminary reference to the Court of Justice of the EU in a dispute over a bankrupt's claim to his personal pension scheme which has not been tax approved in the UK. Deok Joo Rhee QC (and James Barker of Enterprise Chambers) act for the Trustees in Bankruptcy. The judgment can be read here.

- Andrew Baker J has dismissed the Kazakhstan Kagazy claimants' attempt to summarily obtain final charging orders against London properties worth about £60 million owned by various trust companies and granted relief from sanctions. The matter will now proceed to trial. Joe-han Ho (led by Dominic Chambers QC of Maitland Chambers) acts for various trust companies who are respondents in the proceedings. Read the judgment here.

Editorial team: Marion Smith QC, Hannah McCarthy, David Hopkins, James Bradford, Ruth Keating, Gethin Thomas

- The Trinidad High Court (Aboud J) handed down judgment in the matter of *Airports Authority of Trinidad and Tobago v Jusamco Pavers Ltd* on 17 February 2020. The claim is thought to be the first time the Trinidad High Court has considered whether to exercise its jurisdiction under section 8 of the Arbitration Act, Chap 5:01, to appoint an arbitrator – indeed, the authorities before the court were all English. Karen Gough appeared on behalf of the successful applicant. Her opposing number was a former Attorney General of Trinidad and Tobago.

- In *SPI North Ltd v Swiss Post International (UK) Ltd & Anor* [2019] EWHC 2004 (Ch), Vikram Sachdeva QC successfully persuaded the court to grant permission to amend a claim to add implied terms: (1) that the contractual counterparty would not seek to compete and/or assist any other entity to compete with the Claimant's performance of the contract; and (2) of good faith. Click here to read the judgment.

- Karen Gough has formally been appointed to the advisory board of the Jamaica International Arbitration Centre Ltd.

- Deok Joo Rhee QC has been appointed to KCAB International's Panel of International Arbitrators. She joins Adrian Hughes QC, Loretta Malintoppi and Steven Lim, who are existing members of the Panel.

- Having recently advised CERN on the Design Consultancy Appointment, Peter Rees QC and Jess Connors will now provide legal support to CERN on the Construction Contract for its new scientific education and outreach centre, the Science Gateway. More information on the project can be found here.

RECENT JOINERS

Finally, but by no means least, the C&C Group has been delighted to welcome the following new members who have joined Chambers in recent months: Shaman Kapoor (1999), David Sawtell (2005), Camilla ter Haar (2005), Andrew Kearney (2007), Niraj Modha (2010), Philippe Kuhn (2017) and Tom van der Klugt (2019). ●

CONTRACTING WITH CORONAVIRUS: JCT CONTRACT TERMS

John Denis-Smith

This article, the first in a series of three articles, considers the effect of Coronavirus on the contract terms applicable to the JCT form of contract. The other articles in the series cover NEC terms, and the possible impact of the common law principle of frustration and are available on our website:

- Contracting with Coronavirus: the NEC contract terms.

- Contracting with Coronavirus: JCT and NEC contract regimes and frustration.

THE BACKGROUND

The legal background to contracts may well change. At present, the Government has enacted the Health Protection (Coronavirus) Regulations 2020 (SI 2020/129). Those Regulations empower the detention and isolation of persons. There may be further regulations, even apart from the Government acting directly to suspend construction operations within which it has been directly engaged and, in any event, in practice, the virus may have a significant impact on existing and future contracts.

The JCT Suite of contracts distinguishes between Relevant Events", defined by Clause 2.29 (of the JCT 2011 Standard Form of Contract), and Relevant Matters, defined by Clause 4.24 (of the same form, to which this Note will refer).

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Importantly, a Relevant Event may give rise to an entitlement to an extension of time (but not to additional payment), while a Relevant Matter may give rise to additional payment (but not to an extension of time).

Legal restrictions

Legal requirements fall within the definition of "Statutory Requirements" (defined more fully in Clause 1.1). Under Clause 2.1, a contractor must comply with those requirements, but Clauses 2.17 and 2.18 would entitle the Contractor to give notice of the discrepancy between the Employer's Requirements and Statutory Requirements, and hence to a Variation under Clause 5.2 which may entitle it to loss and expense under Clause 4.23, and hence could give rise to an entitlement to additional payment in addition to an extension of time.

Changes in law

Where the law changes in a way which impacts on the work to be carried out, such a change in the Statutory Requirements after the Base Date (to be identified in the Contract Particulars) which amounts to "the exercise by the United Kingdom Government of any statutory power which directly affects the execution of the Works" would constitute a Relevant Event under Clause 2.29.13.

There is no directly equivalent provision in the definition of Relevant Matters; on its face therefore, changes in law might be considered as entitling a Contractor only to an extension of time and not to additional payment.

However, given that the definition of "Statutory Requirements" in Clause 1.1 includes any statute or other legal instrument "which affects the Works or performance of any obligations under this Contract" or "bye-law of any local authority or statutory undertaker which has any jurisdiction with regard to the Works" and the definition is not itself fixed by reference to a given date, it may be argued that a discrepancy under Clause 2.17 can include a discrepancy arising from a change of law, so that additional payment can be obtained, if notice is given. The same result may apply under Clause 5.1.2: the imposition by the Employer of any obligations or restrictions in respect of limitations of working space, limitations of working hours or changes to the execution or completion of the work in any specific order would amount to a Variation. However, Clause 3.10.1 provides that the Contractor is not obliged to comply with such an instruction and need not do so "to the extent that he notifies a reasonable objection to it to the Architect/Contract Administrator". Moreover, the Employer (or Contractor, where no variation instruction is given) may, depending on the circumstances, contend that such changes are not being imposed by the Employer but by the Government or by force majeure, considered further below.

The impact of Coronavirus

More generally, the impact of Coronavirus may fall within the scope of the provisions governing "force majeure."

Clause 2.29.14 of the JCT Contract identifies "force majeure" as a Relevant Event which entitles the contractor to an extension of time and an event which entitles either party to terminate the contract under Clause 8.11.1.

The term "force majeure" is undefined in the JCT terms and does not have any specific legal definition more generally. It has been defined as referring to "all circumstances independent of the will of man, and which it is not in his power to control […]. Thus, war, inundations and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure" (*Lebeaupin v Crispin* [1920] 2 K.B. 714 at 719). As the other provisions in the JCT form do not refer to epidemics or pandemics, there is a reasonable argument therefore that an epidemic (or, a more widespread pandemic) may give rise to force majeure. However, as Clause 2.29.13 of the JCT terms deal specifically with "the exercise after the Base Date by the United Kingdom Government of any statutory power which directly affects the execution of the Works" as constituting a Relevant Event, such steps would probably not be held to fall within Clause 2.29.13.

Yet some care must be taken. There appears to be no case under the clause in JCT contracts and, in any event, force majeure is not a Relevant Matter and hence gives no entitlement to loss and expense.

Notification

Notice must be given of a Relevant Event or Relevant Matter, under Clause 2.27.1 and Clause 4.23 respectively. Notices must be given in writing, under Clause 1.7, and Clause 13.7 requires that notices are submitted separately from other communications. Minutes of a meeting therefore may well not amount to valid notice. However, it is likely that a Court would consider that proper notice is given where

sufficient information is given of the alleged event and its potential impact to enable assessment. In *Walter Lilly & Company v Mackay* [2012] EWHC 1773 (TCC); [2012] B.L.R. 503, Akenhead J held (at [466]) of a notice provision that "there is no reason why this clause should be construed strictly against the Contractor."

Nonetheless, care must be taken by a Contractor in relying on those words.

First, notice under Clause 2.27.1 is likely to be seen as a condition precedent, at least to any entitlement to an extension of time at the stage prior to Practical Completion: while Clause 2.28.5 provides for a review stage following Practical Completion, this will be of little value if the Contract does not reach that stage.

Second, Akenhead J also held in *Walter Lilly* (at [122]) that "In commercial and practical terms, it is important in my judgement under this construction contract for the notification to be clear and unambiguous". That decision has been followed in a Northern Irish case, *Glen Water Ltd v Northern Ireland Water Ltd* [2017] NIQB 20; [2018] B.L.R. 141. Keegan J also held (at [56]) that the burden is on the plaintiff to establish that a given document amounted to a proper notification, interpretation of that document involves an objective assessment and "notification should be clear and unambiguous". In that case, the Court relied not only on its view as to the natural meaning of the alleged notification but also on related witness evidence and on the fact that the Contractor did not state, when the Employer's response did not refer to the alleged Compensation Event, that notification had been given of that Event.

Other provisions

Clause 2.3 of the JCT terms provides that materials and goods to be supplied by the Contractor shall "so far as procurable, be of the kind and standards described in the Contract Bills". In the event of impact by the Coronavirus on the supply chain preventing the Contractor from accessing such materials, the question then arises whether the Contractor is entitled to an extension of time or additional cost arising from the changes it has to make to procure materials.

Under a predecessor JCT form, the JCT 1998 edition, Private With Quantities form of building contract, Clause 25.4.10 provided that the inability to secure essential labour and materials for reasons beyond the Contractor's control and which it could not reasonably have foreseen at the base date (as defined in the Contract) constituted a relevant event. However, there is no equivalent provision under later JCT forms and, in the 2011 edition, Clause 3.2.1 provides that the Contractor shall not substitute any materials or goods without the Architect/Contract Administrator's consent, "which shall not be unreasonably delayed or withheld". Provision for such consent is not the same as provision for an instruction by the Architect/Contract Administrator, and would not on its face give rise to an entitlement to a variation which would potentially entitle the Contractor to an extension of time and/or additional payment.

Instead, the safer approach for a Contractor is probably to identify as soon as possible any effect preventing procurement of materials and to seek to rely upon delay in giving consent as amounting to unreasonable delay or unreasonable refusal, which would be a breach of contract entitling the Contractor to an extension of time and additional payment.

TERMINATION

Clause 8.11.1 of the JCT 2011 and 2016 editions both provide that the Contractor may terminate the Contractor's engagement where the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for the relevant continuous period of the length stated in the Contract Particulars by reason of, respectively, force majeure and the exercise by the United Kingdom Government of any statutory power which directly affects the execution of the Works.

In such circumstances, Clause 8.12.2 provides that the Contractor becomes entitled to payment for works done, any loss and expense already suffered, costs of removal from site and materials for which it has already become legally obliged to make payment, but (as Clause 8.12.4 provides) not any direct loss and/or damage caused to the Contractor by the Termination itself.

By contrast, Clause 8.11 does not in terms provide for a right of termination where the imposition of delay to completion results from Variations ordered by the Employer. Such delay caused by instructions under Clause 5.1.2 would entitle the Contractor to terminate under Clause 8.9.2.1 where the result is that "the carrying out of the whole or substantially

the whole of the uncompleted Works is suspended for a continuous period of the length stated in the Contract Particulars". Under Clause 8.12.2 and Clause 8.12.4, the Contractor in such circumstances does have a right to recover direct loss and/or damage caused to the Contractor by the Termination itself, which opens the way to obtain loss of profit on works not carried out or completed. Thus the distinction between delay by reason of "force majeure" or "action by the Government" on the one hand and delay caused by changes imposed by the Employer may have significant consequences.

CAUSATION AND DRAFTING

However, causation must always be established. This may appear obvious but the outcome may turn on whether the Contractor was in reality able and willing to perform. Whether that is the case depends on the wording of the provision Court of Appeal recently held, in a shipping case, that a party could not rely upon a form of force majeure clause where it was not in fact intending to or able to perform (*Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102; [2019] 4 All E.R. 1145).

It is currently less than clear whether, on unamended JCT terms, a Contractor is entitled to an extension of time in the case of "concurrent delay" ("a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency"). The Court of Appeal in *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744; [2018] B.L.R. 565; 180 Con. L.R. 1 noted the potentially different approaches in various authorities but left that matter undecided. It is at present unclear whether the Coronavirus as such can be treated as a dominant cause of delay which prevents such concurrency arising if, but for the virus, the Contractor was not in fact ready to carry out given work. One suspects that the Courts would be likely instead to focus on specific delays caused by specific problems arising from the impact of the virus.

The same result may be achieved by drafting however. *North Midland Building Ltd v Cyden Homes Ltd* concerned a contract on the amended terms of the JCT Design and Building Contract 2005 form, of which Clause 2.25.1.3(b) stated that, in assessing an extension of time, "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account". The Court of Appeal (upholding the first instance decision) held that the clause was unambiguous and that, where a delay was due to the Contractor, even if there was an equally effective cause of that delay for which the Employer was responsible, liability for the concurrent delay rested with the Contractor so that it would not be taken into account in calculating any extension of time.

CONCLUSION

It seems likely that the Coronavirus and its impact on construction projects may be considerable. The provisions of the JCT contract form does not necessarily afford complete relief: the impact of the virus under the JCT form may give rise to an entitlement to an extension of time but not money, save under Clause 8.12.2 where termination occurs under Clause 8.11.1. Clause 5 and Clause 8.9 may, however, provide an alternative possible form of recovery of cost, including lost profits, in the event of termination and both Employers and Contractors will no doubt consider which route favours it and argue accordingly. Parties are likely to address the impact of pandemic or epidemic by way of amendments to the forms and there may be considerable dispute before the position becomes clear. ●

LOCAL AUTHORITY COMMERCIAL CONTRACTS AND PROCUREMENT IN A COVID-19 WORLD

Marion Smith QC, Rose Grogan and Philippe Kuhn

The Government has provided vital guidance to local authorities on how to comply with procurement rules during the COVID-19 crisis. This is currently in the form of two Procurement Policy Notes ("PPNs") issued by the Cabinet Office last week. Both have immediate effect. They offer important guidelines on the continued operation of procurement legislation, especially the Public Contracts Regulations 2015 ("PCR 2015"), and wider best practice.

PPN 01/20 deals with mechanisms for urgent procurement by central and local government, education institutions, NHS bodies and other contracting authorities. It addresses: (1) direct awards; (2) call-offs; (3) standard procedures with accelerated timescales; and (4) extensions or modifications of existing contracts.

PPN 02/20 concerns special measures that local authorities should take to support their usual service providers, including waivers, variations, extensions and price adjustments. It also encourages normal and prompt payment, even if service delivery is disrupted or temporarily suspended. As a condition, suppliers are expected to act on an 'open book' basis, provide cost information and pay employees and sub-contractors. Local authorities are also encouraged to provide relief against contract terms, rather than accepting force majeure or frustration claims.

This article summarises the effect of the two PPNs and highlights best practice points. It also comments on force majeure clauses and frustration as they apply to local authorities.

The authors have also commented on further guidance promulgated since the PPNs in two articles which are available on our website:

- Fraud control in emergency management: COVID-19 guidance.
- Important updates to PPN 02/20: Procurement guidance for contracting authorities.

(1) GUIDANCE ON PROCUREMENT REGIME IN PPN 01/20:

While COVID-19 is an unprecedented crisis, the procurement regime continues to apply. PPN 01/20 deals with the PCR 2015.

(a) Direct awards:

Regulation 32(2)(c) of the PCR 2015 will be a natural first port of call in many cases. It allows for direct awards due to extreme urgency after a negotiated procedure, without a prior publication in the form of an OJEU notice.

There are four cumulative requirements:

- Genuine reasons for extreme urgency, such as immediate consequences of COVID-19 requiring response on public health or essential services grounds;
- Unforeseeability of the trigger events;
- Impossibility of complying with usual timescales, including accelerated procurement, competitive procedures with negotiation or a call-off; and
- Lack of attributability/fault.

PPN 01/20 makes clear that authorities should limit their requirements to what is "absolutely necessary". Value for money, good commercial judgement and sound record-keeping remain guiding principles.

Direct awards may also be made under regulation 32(2)(b) where goods or services needed at this time can only be supplied by a particular supplier due to either (i) technical reasons for absence of competition (such as special expertise or capacity) or (ii) exclusivity of intellectual property rights. In practice, care must be taken to avoid overly narrow definitions of the available market or procurement category.

The importance of assessing whether, and keeping a written justification to the effect that, the situation is covered by the PCR 2015 is highlighted.

(b) Call-offs:

Call-offs from existing framework agreements or dynamic purchasing systems ("DPS") are a further option. Local authorities need to be mindful of the following key prerequisites:

- Prior identification as a permitted customer;
- Compliance with the original scope of the contract, framework agreement or DPS;
- Procurement was PCR 2015 compliant originally; and
- Adequacy of existing terms, without the need for significant modification.

In practice, it is vital to follow the contractual mechanism. There may also be additional minimum tendering requirements and timescales, such as for a call-off from a DPS.

(c) Standard procedures with accelerated timescales:

These procedures will be more familiar and deal with urgent situations short of direct awards. The PCR 2015 provide different timescales, which must be carefully reviewed. While there is no express unforeseeability or no-fault requirement, a clear justification should be provided in the OJEU notice. There is a helpful example at page 6 of PPN 01/20.

(d) Extending or modifying a contract during its term:

This is addressed in regulation 72. The first question is whether modifications are specifically provided for, not substantial or due to a change of contractor not being possible for economic or technical reasons (regulations 72(1)(a), (e) and (b)). If not, regulation 72(1)(c) provides a further ground for modification, provided three requirements are met:

- Unforeseeability;
- Not altering the overall nature of the contract; and
- A 50% price increase cap from the contract or framework agreement value.

The third requirement is crucial. PPN 01/20 usefully explains that multiple modifications (each capped at 50% of the original contract value) are permissible and that a reasoned OJEU notice should be provided to justify such modifications. These are best kept time-limited and narrow in scope. Again, the need for a written justification of the application of this Regulation is expressly identified.

(2) THE EFFECT OF PPN 02/20:

PPN 02/20 is less technical in nature and essentially deals with adjustments to local authority practices to help ease the immediate financial pressure on suppliers and the wider supply chain. This guidance is split into three main areas.

(a) Payment to maintain business continuity:

The concept of "at risk suppliers" is central to this PPN and not strictly defined. This allows local authorities the flexibility to identify suppliers and explore options including paying at usual contractual rates, payment against revised milestones or timescales, interim payments, forward ordering, payment on order or (with added risk avoidance steps) pre-payment. On the supplier side, they should be asked to identify in their invoices which elements of the invoiced amount relate to services they are continuing to supply and those which are attributable to the impact of COVID-19.

Importantly, it is a condition of such payment support that suppliers operate on an 'open book' basis. This is widely defined to allow access to "any data […] as required and requested to demonstrate the payments made to the supplier […] have been used in the manner intended." The importance of keeping records of decisions and agreements made is stressed, as well as ensuring suppliers maintain records. Such procedures and the continued documentation of decision-making are designed to enable future reconciliation (if necessary) and guard against suppliers taking "undue advantage". Suppliers should be made aware that in cases where they are found to be taking undue advantage, or failing in their duty to act transparently and with integrity, contracting authorities will take action to recover payments made.

(b) Other contractual relief:

Local authorities are firmly encouraged by PPN 02/20 to explore alternative measures such as (1) extensions of time for contract performance, (2) waivers or delay in the ability to exercise a right or remedy and (3) variations. This is envisaged as way of avoiding reliance by suppliers on force majeure and other contractual clauses allowing the

suspension of performance or the doctrine of frustration. It should also help avoid more lasting supply disruption.

More generally, local authorities are asked to maximise any commercial flexibilities within the contract, such as by agreeing new lead time arrangements. In practice, relief on KPIs and service credits are further options. Adjustments should be time-limited and well-documented.

(c) Accelerating payment of invoices:

All contracting authorities are now expected to further accelerate their payment practices beyond the 30-day requirement found in the PCR 2015. This PPN makes detailed provision as to relevant steps. They include targeting high-value invoices, resolving disputed invoices quickly, more regular invoicing by suppliers and wider use of delegated authority for payment authorisation. In addition, monitoring of payments down the supply chain is an important new feature.

(3) FORCE MAJEURE AND FRUSTRATION:

In the local authority context, the clear effect of PPN 02/20 is that reliance on force majeure and frustration is to be discouraged, especially on the part of suppliers.

In any event, the ability to rely on force majeure clauses, and their impact on contractual performance is contract-specific. Where necessary, local authorities should review contracts to check whether COVID-19 falls under the contractual force majeure definition. Typically these clauses contain a list of specific events. Health emergencies or pandemics are not always expressly referred to as trigger events. However, COVID-19 may be covered by a "sweeper clause". This PPN points out that the threshold for a contract being declared "frustrated" is high. Overall, PPN 02/20 recommends that legal advice is taken when dealing with a supplier's claim for force majeure or frustration.

(4) OVERALL BEST PRACTICE AND CONCLUSIONS:

PPN 01/20 seeks to address immediate questions about the procurement regime. The purpose of PPN 02/20 is broader. It reflects a commitment to use public bodies as a vehicle to lessen the socio-economic impact of the COVID-19 crisis. It aims to avoid supply disruptions and mitigate insolvency risks for suppliers, employees and sub-contractors. That said, both PPNs also make clear that local authorities must take adequate steps to guard against wastage of public funds and, in more extreme cases, suppliers taking undue advantage or using illegitimate practices.

Time-limited arrangements, record-keeping and transparency:

The aims of the two PPNs are to be achieved primarily through time-limited arrangements, full record-keeping and a transparent approach, including the 'open book' system. Proper record keeping in relation to every aspect of the transactions envisaged by the PPNs is vital. Local authorities should be wary of committing to longer term arrangements without following the usual procurement mechanisms. Accelerated timescales on a standard procedure or a temporary call-off from or variation of an existing framework agreement are likely to be more appropriate.

Beyond short-term adjustments to payment models and information-sharing, it will generally be prudent to seek legal advice before agreeing to new supply arrangements or varying or terminating existing agreements.

Role of other procurement regimes:

Particular care must also be taken when applying the mechanisms in the PCR 2015 to urgent procurements and existing contracts. While safe havens exist, it is important to make sure that decisions are fully justified with reference to the relevant tests in the Regulations and that decision making is documented. Challenges to the use of these safe havens are likely (especially in strained economic times) and so it is important that local authorities are able to justify their decisions.

Force majeure and frustration:

While the general advice provided in PPN 02/20 is to discourage reliance on force majeure and even more frustration, contracting authorities are also reminded to carefully consider the extent of payments to be made to suppliers who are underperforming and subject to an existing improvement plan. The purpose of PPN 02/20 is not to underwrite failing contractors. ●

CORONAVIRUS AND COMMERCIAL LEASES

Damian Falkowski, David Sawtell and Gethin Thomas

Almost all commercial leases will be affected by the current coronavirus emergency. As commercial tenants find their businesses struggling, cash flow will become a real problem: rent may not be paid; premises will shut; and landlords will struggle in turn. This note will consider some of the issues that will be front and centre of both tenants' and landlords' minds.

THE CORONAVIRUS ACT

The Coronavirus Bill (HC Bill 122; HL Bill 110), as it was originally introduced, said little about business leases directly. However, a raft of further amendments were introduced dealing with business tenancies. In particular, on the government's initiative, protection from forfeiture for non-payment of rent was added. This is given effect in England and Wales pursuant to section 82 of the Coronavirus Act 2020, which was enacted on 25 March 2020. It applies to 'business tenancies' as defined in Part II of the Landlord and Tenant Act 1954 (whether or not they are contracted out of the Act), pursuant to subsection 82(12). During the 'relevant period' (25 March 2020 to 30 June 2020, or as further extended by statutory instrument), rights of re-entry (by action or peaceable re-entry) may not be enforced, while at the same time, only an express waiver in writing will act to waive a right of re-entry for non-payment of rent. Section 82(6) changes the time period when possession may be granted (either under subsections 138(3) and (4) of the County Courts Act 1984 or the inherent jurisdiction of the High Court) to after the end of the relevant period. Unless extended, the Coronavirus Act 2020 will expire 2 years from the date of enactment.

Persistent delay in paying rent during the relevant period is to be disregarded for the purposes of section 30(1)(b) of the 1954 Act (persistent delay in paying rent is one of the grounds of possession in that Act), pursuant to subsection 82(11).

There is nothing, yet, about Commercial Rent Arrears Recovery (CRAR). Commercial landlords might well wish to consider this as a possibility to recover rent arrears.

GOVERNMENT ASSISTANCE

The government have announced a raft of measures aimed to support businesses through the severe economic turbulence caused by the coronavirus crisis. This support includes:

- 12-month business rates holiday for all retail, hospitality and leisure businesses in England for the 2020 to 2021 tax year. Businesses that received the retail discount in the 2019 to 2020 tax year will be rebilled by their local authority as soon as possible. There is no action required to be taken. It should apply automatically to the next council tax bill in April 2020.

- Additional Small Business Grant Scheme funding for local authorities to support small businesses that already pay little or no business rates because of small business rate relief (SBBR), rural rate relief (RRR) and tapered relief. This will provide a one-off grant of £10,000 to eligible businesses to help meet their ongoing business costs.

- The Retail and Hospitality Grant Scheme will provide businesses in the retail, hospitality and leisure sectors with a cash grant of up to £25,000 per property with a rateable value between £15,000 and £51,000.

- Business interruption loans for SMEs. The Government will provide lenders with a guarantee of 80% on each loan (subject to pre-lender cap on claims) to give lenders further confidence in continuing to provide finance to SMEs. The scheme will be delivered through commercial lenders, backed by the government-owned British Business Bank.

- All businesses and self-employed people in financial distress, and with outstanding tax liabilities, may be eligible to receive support with their tax affairs through HMRC's Time To Pay service. These arrangements are agreed on a case-by-case basis and are tailored to individual circumstances and liabilities.

Business tenants may well have more available cash than they thought.

GOVERNMENT RESTRICTIONS

The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 oblige restaurants, cafes, bars and pubs to close premises on which food or drink are sold for consumption, and to cease felling food or drink for consumption on its premises. An area adjacent to the premises of the business where seating is made available for customers of the business, such as a picnic table area, (whether or not provided by the business) is specifically to be treated as part of the premises of that business, and as such, must also be closed. Notably, food or drink sold by a hotel or other accommodation as part of room service are not treated as being sold for consumption on its premises.

A person who, without reasonable excuse, contravenes the ban, commits an office punishable on summary conviction by a fine. A person, designated by the Secretary of State, may take such action as is necessary to enforce a closure or restriction.

Although there is not currently sight of light at the end of the tunnel, the Secretary of State must review the need for restrictions imposed by this regulation every 28 days, with the first review being carried out before the expiry of the period of 28 days starting with the day after the day on which these Regulations are made. As soon as the Secretary of State considers that the restrictions set out in this regulation are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, the Secretary of State must publish a direction terminating the relevant period.

EASE OF PLANNING RULES ON TAKEAWAYS

The Government has announced that planning rules will be relaxed so that pubs and restaurants can operate as hot food takeaways during the outbreak.

The government will introduce a time limited permitted development right through secondary legislation (by way of the negative resolution procedure) to allow the temporary change of use of a pub (A4 – drinking establishment) and a restaurant (A3 – restaurants and cafes) to a hot-food take away for a period of up to 12 months only.

Businesses will be required to tell the local planning authority when the new use begins and ends.

COVENANTS TO STAY OPEN

Many retail and other commercial leases contain covenants that the premises will remain open during trading hours. In *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, the term read as follows:

> "To keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner in keeping with a good class parade of shops."

This term can be qualified, so that it does not apply where an insured risk takes place preventing the premises from opening, or some other reason or force majeure event prevents the business from opening. Government restrictions on restaurants and pubs opening, for example, might well take precedence on a proper construction of the lease. Some leases make it clear that this kind of covenant does not apply where it would be unlawful to do so, which might well be the case for non-essential shops.

These clauses are beneficial for both landlords and other tenants. If a shopping centre or retail park has a number of closed units it can dissuade customers from visiting other businesses. On the other hand, the business might well be trading at a loss if it remains open. The last few weeks have seen a number of major retail chains announce that their shop premises are closing due to declining visitor numbers, while retaining online presences and 'click and collect' facilities. This could have the effect of depressing turnover rent in the next rental period, as online shopping may not show up in any rent calculation.

The landlord will struggle, however, to obtain an order for specific performance requiring the premises to re-open. Lord Hoffmann in Cooperative Insurance Society Ltd emphasised that such a remedy is almost never available to a landlord. It might also be difficult for a landlord to prove that any damages have been caused by the breach of a covenant to stay open in light of government restrictions on retail outlets.

FORFEITURE

As noted above, section 82 of the Coronavirus Act 2020 deals with forfeiture on the grounds of non-payment of rent. For some leases falling outside the LTA 1954, or where the

landlord wants to forfeit for breach of covenant other than failure to pay rent, the following considerations will apply.

A landlord might well become frustrated at the tenant's failure to pay rent or to abide by covenants such as to keep trading from the premises. Such a landlord might, however, want to pause before forfeiting the lease. Forfeiture brings the tenancy to an end: it might well be difficult for the landlord to find a new tenant, especially if there are planning restrictions as to the types of uses which be carried out from the premises. It is unlikely, for example, that there will be much demand for class A3 or class A4 premises in the near future for immediate occupancy. The landlord might prefer to hold on to a tenant, so as to at least hold on to the promise of further rent or to claim from a guarantor.

A further problem that the landlord might face if it brings a claim for forfeiture through court proceedings rather than through peaceable re-entry is that the courts are facing not inconsiderable pressure due to the need to protect court users and facilitate social distancing. Commercial lease possession cases are being adjourned and are unlikely to be regarded as priority cases.

If the tenant becomes insolvent, it might become necessary to obtain the consent of the relevant insolvency practitioner or permission of the court to forfeit the lease, whether or not the landlord intends to proceed by way of peaceable re-entry or by court proceedings, depending on the insolvency procedure. For example, if the tenant company goes into administration under Schedule B1 of the Insolvency Act 1986, the landlord will need to seek the consent of the administrator or permission from the court to peaceably re-enter the premises (paragraph 43(4), Schedule B1, Insolvency Act 1986) or to begin or continue any court proceedings (paragraph 43(6), Schedule B1, Insolvency Act 1986).

BREAK CLAUSES

Tenants may be looking to exercise break clauses in order to escape commercial leases. The usual rules as to break clauses, however, will apply. Compliance with their terms will be strictly applied. This also applies to the break period and the service provisions. Furthermore, a tenant must ensure that it complies with provisions as to the delivery of vacant possession, payment of rent up to the break date, and compliance with covenants in the lease, if these are expressed to be conditions precedent to the exercise of the break clause. This might be difficult in COVID-19 conditions: the tenant might struggle paying the rent and there may be a dispute if the premises cannot be kept open, for example.

TENANT INSOLVENCY

We are considering here commercial tenancies; different rules apply to residential tenancies. The starting point for a landlord when the tenant starts to fall into arrears is:

- Sue for the arrears and recover as a debt.
- Forfeiture (although as noted above, the Coronavirus Bill will affect this remedy).
- Commercial rent arrears recovery ("CRAR") – the remedy of distress was abolished and replaced by CRAR: section 71, Tribunal Courts and Enforcement Act 2007.

However, the defaulting tenant may be on its way to insolvency. In that case, the usual remedies of suing in debt, forfeiture or CRAR, may not be available: the key provisions are the Insolvency Act 1986 (IA 1986) and the Insolvency (England and Wales) Rules 2016 (IR 2016). It should be noted that references in IA 1986 to distress are now to be read as references to CRAR: section 436 IA 1986 (as amended). The following are possible outcomes following the insolvency of companies.

CVA

See sections 1 to 7B, IA 1986. A "small" company can apply for a moratorium on proceedings brought by creditors: section 1A and Schedule A1 of the IA 1986. Like an individual voluntary arrangement, it is essentially a consensual process whereby the creditors agree by a qualifying decision procedure to accept the proposal. If the proposal is accepted, all creditors are bound by it. An insolvency practitioner acts as nominee and supervises the CVA. If there is already an administrator or a liquidator in place and they propose the CVA, they will usually be the nominee and supervisor. The landlord will, like the other creditors, only receive a proportion of what is due to it under the terms of the lease.

Once a CVA is applied for, a moratorium comes into effect and the landlord cannot take any enforcement action without the leave of the court: Sch 1A, para 12(1)(f).

Administration: (Schedule B1, IA 1986).

The purpose of administration is:

- Rescue of the company as a going concern (*cf.* business being carried on);
- The achievement of a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or
- The realisation of some or all of the company's property to make a distribution to one or more secured or preferential creditors.

The purpose of the administration should be to rescue the company as a going concern unless it is not reasonably practicable to do so, or that a better result could be obtained for creditors by not doing so: Sch B1, para 3, IA 1986.

As with a CVA, the consequence of administration is that a moratorium applies, so that a landlord cannot exercise the remedy of forfeiture or other legal proceedings: Sch B1, para 3, IA.

Administrative receivership

In respect of floating charges created on or after 15 September 2003, (other than large capital project etc. cases, see sections 72A to 72GA IA 1986) a floating charge holder generally only has a right to appoint an administrator.

The administrative receiver must act to realise the security of the chargee in order to repay the debt. The administrative receiver is the agent of the debtor company: section 44, IA 1986. The property of the company remains vested in the company, unless and until the administrative receiver has exercised his power of sale: section 42 and paragraph 2, Schedule 1, IA 1986. These are rare now.

Again, the effect of the administrative receivership is that the usual landlord remedies cannot be exercised without the consent of the court or the receiver. There is no power for an administrative receiver to disclaim the lease.

Law of Property Act 1925 receiver (LPA receiver)

Unlike receivership or administration, the appointment of the LPA receiver does not affect the usual remedies open to a landlord and the LPA receiver has no power to disclaim the lease.

Winding-up (or liquidation) (sections 73 to 219 and 230 to 246, Part IV, VI and VII, IA 1986)

Winding-up can be compulsory, i.e. pursuant to a creditor petition, or a voluntary winding-up, members or creditors. Winding-up is the death of the company. The general position is that once a winding-up order has been made, permission of the court is generally needed for enforcement. The landlord is in the position of other unsecured creditors with no better remedy.

Whether it is a voluntary or compulsory winding-up, the liquidator has power to disclaim the lease.

FORCE MAJEURE

While force majeure is recognised in certain civil jurisdictions, it is not a term of art in English law. Nevertheless, the incorporation of force majeure provisions is common in commercial contracts. For example, the effect of the Force Majeure (Exemption) Clause of the International Chamber of Commerce, 2003) I.C.C. Publication No. 650.832 is that a party is not liable for failure to perform any of his obligations in so far as he proves:

- that the failure was due to an impediment beyond his control;
- that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and
- that he could not reasonably have avoided or overcome it or at least its effects.

In *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 W.L.R. 280 a clause that "the usual force majeure clauses to apply" was held to be void for uncertainty because such a term could refer to clauses usual in a particular trade.

It may be rather more straightforward if the clause expressly refers to pandemic or epidemic, but even without such specific reference, it has been held that force majeure is wider than "Act of God" of vis major: see *Matsoukis v Priestman & Co* [1915] 1 K.B. 681, 686; *Lebeaupin v Crispin & Co* [1920] 2 K.B. 714, 719, so coronavirus may well fall within force majeure.

Where there is an unqualified reference to force majeure, this will usually be interpreted as only being available where the relevant obligation is impossible not merely hindered or made more onerous.

FRUSTRATION

In the seminal case of *National Carriers v Panalpina (Northern)* [1981] A.C. 675, Lord Simon of Glaisdale said:

> "Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

Traditionally, the courts of England and Wales have been reluctant to find that a lease has been frustrated. After all, a lease is an estate in land, and land cannot be destroyed. However, the courts have in limited cases allowed the doctrine to operate in respect of a lease. In the case of *Cricklewood Property and Investment Co. v Leightons Investment Trust* [1945] A.C. 221 war time planning measures meant that a development could not proceed and it was said by Viscount Simon L.C.: "Where the lease is a simple lease for years at a rent, and the tenant, on condition that the rent is paid, is free during the term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration – though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea."

On the other hand, in *Northern Estates Company v Schlesinger* [1916] 1 K.B. 20 a landlord let a flat in Westcliffe on Sea for three years to an Austrian national, just before the outbreak of the first world war. When war broke out, the tenant was classed as an alien enemy and legislation was passed making it illegal for him to live in coastal areas. The claim that the lease was frustrated failed as not all the benefit the tenant expected to derive from the lease was taken away – he could still assign or sub-let.

As a result of decision to leave the EU, the European Medicines Agency wished to vacate London office and argued that Brexit had frustrated its lease as it was forced to relocate to another member state. The High Court did not agree. See *Canary Wharf Limited v European Medicines Agency* [2019] EWHC 335 (Ch). We do not consider it likely that a court would that Coronavirus was comparable to "some vast convulsion of nature [that] swallowed up the property altogether" so as to hold a lease to be frustrated. In our view, it is therefore unlikely that you could successfully argue that the lease has been frustrated. ●

STATE AID AND COVID-19

Kelly Stricklin-Coutinho

The measures government will provide to particular industries or businesses to bail out or help those suffering the impact of COVID-19 would ordinarily be subject to State aid law, although not all measures would fall foul of State aid law.

The European Commission has been working (at unprecedented speed) to deal with how State aid law will apply in the present circumstances to permit appropriate measures.

APPLICATION OF ORDINARY RULES

State aid law will continue to apply in the usual way, subject to special measures put in place by the European Commission. Any measures which would not normally be regarded as prohibited State aid may still be put in place. Measures which are generally applicable, for example, are permitted under Article 107 TFEU. Similarly, measures which otherwise fit within the General Block Exemption Regulations ("GBER") or other exemptions will also continue to be permissible.

Some desirable measures will be ones which are not possible to bring on a generally applicable basis, or may not fit within the GBER or other exemptions, for example bailing out a large company. Some of the GBER and other exemptions are driven by policy whose focus is not bailing out large businesses, so there will be circumstances where the GBER or other exemptions simply do not provide a suitable harbour for what is now up for consideration.

SPECIAL MEASURES

The Commission has taken two main actions, on different bases. First, it has approved specific applications made to it in respect of proposed aid packages, one of which was before it set up a special framework for COVID-19. Second, it has set up a temporary framework under which aid may be given in these circumstances, on "very rapid […]" approval by the Commission. Alongside these it has indicated future commitments to funding to help with COVID-19 related issues.

The first clearance, the Danish measure, was approved on the basis of Article 107(2)(b) TFEU, that there are exceptional circumstances. The Temporary Framework is made on the basis of Article 107(3)(b) concerning remedying a serious disturbance in the economy of a Member State.

The Temporary Framework recognises the impact to both demand and supply, the impact on undertakings and employees, and the particular impact on the health, tourism, culture, retail and transport sectors. It also recognises the specific issues of a severe lack of liquidity, and that SMEs are at particular risk. The measures are therefore targeted at helping banks and other financial intermediaries to maintain the flow of credit to the economy, and specifically to Member States taking measures to incentivise them.

The Commission's Temporary Framework[1], based on Article 107(3)(b) TFEU (where aid may be compatible with the internal market where it is to remedy a serious disturbance in the economy of a Member State), provides for five types of aid:

1. Direct grants, selective tax advantages and advance payments, whereby Member States can set up schemes to grant up to €800,000 to a company to address its urgent liquidity needs.

2. State guarantees for loans taken by companies from banks.

3. Subsidies public loans to companies with favourable interest rates, with the intention of helping businesses cover immediate working capital and investment needs.

4. Safeguards for banks that channel State aid to the real economy, particularly SMEs (which is direct aid to the banks' customers, not to the banks themselves).

5. Short-term export credit insurance.

[1] Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final, 19.3.2020: https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

Each of those categories has specific conditions which must be met in order for the aid to qualify, some of which are sector specific (for example, with special rules as to agricultural, fisheries and aquacultural sectors).

In an update to the first version of the Temporary Framework the Commission has also now permitted public guarantees on individual loans in certain circumstances, and subsidies to public loans in certain circumstances. It has also provided for a wider range of measures intended to support businesses developing products to assist in the outbreak, as well as deferrals of tax and wage subsidies.

Many clearances have already been given under the Temporary Framework, including in relation to the UK.

TEMPORARY FRAMEWORK

The Framework identifies measures which Member States may take. By way of example:

- Measures can be designed in line with the GBER, without the involvement of the Commission. These are likely to be of use to those dealing with regional state aid issues in particular, or dealing with local authorities.
- For matters which fall within the Rescue and Restructuring Guidelines, Member States can notify those schemes to the Commission, for example to meet acute liquidity needs and support undertakings facing financial difficulties due to or aggravated by the COVID-19 outbreak.
- Sectors particularly hit by the outbreak (examples identified are transport, tourism, culture, hospitality and retail) and organisers of cancelled events may be compensated, such schemes being notified and assessed under Article 107(2)(b).
- Notification of alternative approaches to the specific ones set out in the Temporary Framework are also noted as possibilities – either as aid schemes or as individual measures.

The Commission requires that Member States publish information as to each individual aid granted under the Communication within 12 months of its grant, and the submission of annual reports, a list of measures put in place and maintain detailed records.

BANKS

The Temporary Framework is careful to define the aid it permits as aid granted by Member States benefiting the undertakings directly, which does not have the objective of preserving or restoring the viability, liquidity or solvency of banks. The point of doing so is that the aid therefore does not fall to be extraordinary public financial support under Directive 2014/59/EU (the BRRD) or Regulation 806/2014 (the SRM Regulation), nor is it assessed under rules applicable to the banking sector.

Measures which remain within the Temporary Framework are therefore safe from the Commission considering there is a breach of either the BRRD, the SRM Regulation or banking aid rules. Should banks need direct assistance (such as liquidity recapitalisation or impaired asset measures) that will have to be assessed in line with the BRRD.

OTHER REMEDIATION

In its guidance on what should be contained in a notification application, the Commission sets out that any such application should set out confirmation that the payment of aid made to beneficiaries will be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage. It further requires that if aid is paid out before any insurance, the authorities will recover the insurance amount from the beneficiary.

This is plainly designed to ensure no double dipping of remediation measures, and should be borne in mind when considering how this is to be dealt with in practice, by recipients, insurers and government. ●

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He joined Chambers after completing a third six pupillage in March 2020. He was previously a Judicial Assistant at the Supreme Court of the United Kingdom (2018/19), assigned to Lord Briggs, Lord Sumption and Lord Sales. He completed his pupillage at 11 King's Bench Walk (2017/18) and maintains an interest in commercial and statutory employment matters. Full profile

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