

# CONSTRUCTION CLAIMS AND DISPUTES IN AN ERA OF RISING TEMPERATURES

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# HEATWAVES: DELAY, DISRUPTION & EXTENSION OF TIME

- University of Reading report ‘Understanding the impact of heat on construction sites: from awareness levels to on-site practices’ (25 June 2025)
- JCT D&B 2024 :Relevant events include:
  - “*exceptionally adverse weather conditions*” (Cl.2.26.10)

# HEATWAVES: DELAY, DISRUPTION & EXTENSION OF TIME

## **FIDIC Red/Yellow Books 2017 Clause 8.5 (c) (NOT SILVER)**

- The contractor shall be entitled to an EOT where completion is delayed due to:

*“exceptionally adverse climatic conditions, which for the purpose of these Conditions shall mean adverse climatic conditions at the Site which are **Unforeseeable having regard to climatic data** made available by the Employer under Sub-Clause 2.5 [Site Data and Items of Reference] and/or climatic data published in the Country for the geographical location of the Site”*

# HEATWAVES: DELAY, DISRUPTION & EXTENSION OF TIME

## NEC4 (2017) Compensation Events

### Clause 60.1(13)

*A weather measurement* is recorded

- within a calendar month,
- before the Completion Date for the whole of the works and
- at the place stated in the Contract Data

the value of which, by comparison with the *weather data*, is shown to occur on average less frequently than once in ten years.

Only the difference between the *weather measurement* and the weather which the *weather data* show to occur on average less frequently than once in ten years is taken into account in assessing a compensation event.

# HEATWAVES: DELAY, DISRUPTION & EXTENSION OF TIME

Contractor seeking to rely on the clause must demonstrate:

- The contractually defined event occurred;
- That event caused the non-performance or delay;
- Compliance with the clause's notice and mitigation requirements.

# 1. PROVING THE EXCEPTIONAL: DID THE “EVENT” OCCUR?

- NEC4 (2017) cl. 60.1(13) – **Less frequent than once in ten years**
- JCT D&B 2024 cl.2.26.10 - “**Exceptionally adverse** weather conditions”
- FIDIC Red/Yellow Books 2017 Clause 8.5 (c) “**exceptionally adverse climatic conditions...** *adverse climatic conditions at the Site which are unforeseeable having regard to climatic data made available by the Employer under Sub-Clause 2.5 [Site Data and Items of Reference] and/or climatic data published in the Country for the geographical location of the Site*”

# 1. PROVING THE EXCEPTIONAL: DID THE “EVENT” OCCUR?

- Consider:
  - What information was provided at the stage of contracting about local or expected temperature? (NEC4 – weather data; FIDIC – climatic data)
  - Is the heat parameters?
- Data is Key:
  - Collect the evidence: measurements, photographs
  - Use past data to show conditions were extreme/exceptionally adverse/unforeseeable

# PROVING THE EXCEPTIONAL: WHAT IS EXCEPTIONAL OR UNFORESEEABLE IN LIGHT OF GLOBAL CLIMATE CHANGE?

## *Sherman v Reader Offers Ltd [2024] EWCA Civ 412:*

- [99] “...***While the ice conditions in the Northwest Passage were undoubtedly beyond ROL’s control, and can reasonably be regarded as unusual for the time of year in the light of the Recorder’s finding that the voyage described in the detailed itinerary would have been possible if ice conditions in those waters had been similar to those experienced in the preceding 10 years, it is impossible to say that those conditions were unforeseeable....annual patterns that were once considered reliable are now very much less reliable. It was, therefore, entirely foreseeable that it might prove impossible to perform the cruise in accordance with the detailed itinerary.***”
- [100] “... *Ironically, it was the very unforeseeability of ice conditions which was itself foreseeable.*”

## 2. CAUSATION

- Demonstrate how the heat has:
  - Affected performance
  - Delayed the critical path
- Evidence
  - Delay analysis report
  - Weather data
  - Site records of heat and the damage it has caused

# REASONABLE ENDEAVOURS

## ***RTI Ltd v MUR Shipping BV*** [2024] UKSC 18

- A force majeure clause would generally be interpreted (or a term would be implied to the same effect) as applicable only if the party invoking it could show that the event or state of affairs was **beyond its reasonable control** and **could not be avoided by the taking of reasonable steps**. [26]
- "reasonable endeavours" to overcome a force majeure event did not include accepting an offer of non-contractual performance absent clear wording to that effect. [102]

# DEVELOPING DESIGN DUTIES

- Ensuring the delivery of climate resilient buildings and infrastructure able to withstand extreme weather events.
- Developing regulations, legislation, technology and building materials.
- Existing and well-developed duties applied to failure to mitigate the effects.
- Claims relating to methodologies and finished buildings.

# DESIGN RESPONSIBILITY AND PROFESSIONAL DUTIES



- The contractual framework will be determinative.
- However, consider the case of *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg Ltd* [2017] UKSC 59.

# DESIGN RESPONSIBILITY AND PROFESSIONAL DUTIES

- The Supreme Court held that, on the proper construction of the contract:
  - The contractor was subject to a specific “required outcome” obligation (in substance, a fitness for purpose / warranty of result type obligation) that the foundations would achieve a specified design life / satisfy the contractual performance requirement.
  - That obligation could co-exist with more general provisions requiring professional skill and care and/or compliance with the technical standard; the more specific obligation was not displaced merely because the contract also referred to J101 and reasonable skill and care-type duties.
  - The result was that the contractor bore the design risk of the inadequacy produced by reliance on the defective technical standard even though the error was in the standard itself.

# DESIGN RESPONSIBILITY AND PROFESSIONAL DUTIES: EXAMPLE 1

*IBA v EMI and BICC* [1980] 5 WLUK 151 | 14 B.L.R. 1 Lord Edmund-Davies at page 196:

*“Justice requires that we seek to put ourselves in the position of BICC when first confronted by their daunting task, lacking all empirical knowledge and adequate expert advice in dealing with the many problems awaiting solution. But those very handicaps created a clear duty to identify and to think through such problems, including those of static and dynamic stresses, so that dimensions of the venture into the unknown could be adequately assessed and the ultimate decision as to its practicability arrived at.” (emphasis added)*

# DESIGN RESPONSIBILITY AND PROFESSIONAL DUTIES: EXAMPLE 2

*Victoria University of Manchester v Hugh Wilson & Womersley* [1984] 2 Con LR 43 where it was said:

*“For architects to use untried, or relatively untried, materials or techniques cannot in itself be wrong, as otherwise the construction industry can never make any progress. I think, however, that architects who are venturing into the untried or little tried would be wise to warn their clients specifically of what they are doing and to obtain their express approval.”* (emphasis added)

*Baylis Farms Ltd v RB Dymott Builders Ltd* [2010] EWHC 3886 (QB) – warning in clear terms.

# DESIGN RESPONSIBILITY AND PROFESSIONAL DUTIES: EXAMPLE 3

*Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC), paragraph 271:

*"I accept the claimant's argument in closing submissions that the argument that "everyone else was doing it" does not, on a proper application of the "Bolam" principle, operate as a get out of jail free card...for the Bolam principle to operate to exonerate a defendant, there must be "evidence of a responsible body of opinion that has identified and considered the relevant risks or events and which can demonstrate a logical and rational basis for the course of conduct or advice that is under scrutiny" (paragraph 120). "A defendant is not exonerated simply by proving that others ... [were] ... just as negligent"."*

# DESIGN LIFE

- *Blackpool BC v Volkerfitzpatrick Ltd* [2020] EWHC 1523 (TCC).
- Paragraph 152: *"In my view there is no basis for treating the decision in that case as support for any argument that the suitability and the design life obligations in this case should be construed as being only "reasonable care" obligations. I am satisfied that they have the same essentially strict character as the Supreme Court held that the clauses in issue did in that case."*
- Paragraphs 157 and 158:  
*"It cannot realistically be thought that a structure should be intended to be maintenance free for the whole of its design life, whereas it can reasonably be assumed that it ought not to need major repairs over that period.  
Thus, the distinction lies between anticipated maintenance and major repair."*

## CONCLUDING THOUGHTS

- **Project Disruption:** Extreme weather creates immediate delays and downtime, sparking liability claims.
- **Legal Definitions:** The threshold for force majeure is blurring as extreme events become foreseeable.
- **Supply Chain Volatility:** Unclear risk allocation for material shortages and price spikes triggers rapid disputes.
- **Design & Performance:** Futureproofing and climate adaptation are the next frontiers for professional indemnity claims.