

Superior force or developers remorse justifiable delay in Channel Island construction contracts

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With seemingly ever-increasing costs of goods and materials, contractors and developers alike continue to feel the squeeze. Pressure on costs can only be compounded by difficulties in securing delivery of goods and materials within a reasonable timeframe and indeed on time. Against a wider context of a challenging macro-economic environment, not to mention pandemic-related pressures, meeting pre-agreed development milestones is a growing challenge. But where does this leave contractors and developers who have committed to delivering a particular project on time?

Force majeure and extension of time

Contractual provision for justifiable delay or "force majeure" (French for "superior force") have long been a feature of the construction industry. They are typically agreed on relatively standard terms with those parties responsible for the timely delivery of a new development project. Such provisions represent crucial contractual protections for contractors and developers where circumstances arise that are out of their control to delay completion of the project, and where such issues could not have been reasonably foreseen. Where justifiable delay, or force majeure, can be established in accordance with the provisions of the contract the party with the obligation to deliver the project on time may be entitled to an award of what is referred to as an "extension of time".

An award of an extension of time will award the responsible party time to postpone the date of completion of the project. The time awarded is commensurate with the delay that has been suffered by the relevant justifiable delay or force majeure event.

JCT contracts

Construction agreements in the Channel Islands are typically based on one of the "JCT" suite of

standard-form contracts. These are intended as standard form contracts designed to reflect industry standards and best practice in the UK. To enable these contracts to be construed and enforced under Guernsey or Jersey law (as the case may be) they are typically amended to ensure they comply with local law.

By design, these contracts impose on the parties a set of obligations that have become accepted over time. While parties may have been comfortable in adopting the use of the standard JCT provisions in the past, the suite of JCT contracts are not updated all that regularly so depending on the particular project, it may no longer be prudent to simply rely on those provisions in light of the increasing pressures referred to above.

'Relevant events'

Provisions that may require particular attention include those that relate to extension of time and delays caused by a 'relevant event'. A relevant event is an event, on or off site, that causes a delay to the completion date of the project. It might include something that takes place in the design and manufacture process to delay things, or an event that impacts the site that prolongs completion of the project. Given the pressures highlighted above, it has become more important for parties to pay particular attention to terms around what constitutes a relevant event, justifiable delay or force majeure and there is the potential to expand the definition so that it captures additional matters that may not have been anticipated when the standard-form contract was prepared.

What could or could not have been reasonably foreseen requires an element of subjective assessment, so how do those with obligations to deliver a project on time ensure that they have protected themselves from exposure to delay damages? The principal way to achieve this is to ensure that the contract is clear, precise and unambiguous when it comes to defining what constitutes a justifiable delay, force majeure, or relevant event.

Where a developer employs a contractor to complete various development works it is important to ensure that what may constitute a justifiable delay under the construction contract is replicated in any agreements made by developers with onward purchasers of new units within any such development. Without these obligations "flowing through" the developer could be exposed to delay damages for late delivery of the unit to the purchaser but not have a "back to back" entitlement to delay damages from the contractor under the building contract.

We regularly advise contractors and developers on matters pertaining to local development projects and are more than happy to provide advice to ensure that contracts are fit for purpose in the current challenging environment.

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