

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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'Tis the Season for Exceptionally
Adverse Weather



'Tis the Season for Exceptionally Adverse Weather

Adverse weather claims are frequently seen in extension of time claims notified at this time of year. This is perhaps not surprising when the weather can have a very real impact on construction, causing delays and also defects to works that are in the process of being constructed. For example, very low minimum temperatures and ground frost can make concreting, road surfacing and excavation difficult or impossible. Similarly, very heavy rainfall can cause delays to groundworks, excavations, paving and tarmac, and can also lead to water ingress where the building has not yet been made watertight.

However, the mere occurrence of delays due to weather does not automatically entitle a contractor to an extension of time. Depending on the time of year the works were meant to be taking place, some adverse weather should be expected. Further, the fact a storm has occurred 50 miles away does not mean that it has actually impacted on the site in question. Gale force winds in the North Sea may not have had any impact on a site many miles inland, in a sheltered spot, which is carrying out concreting works.

In this *Insight*, we review the relevant provisions relating to weather in the two key domestic form contracts of the JCT and NEC. How should "exceptionally adverse weather" and weather patterns typical for that time of year be differentiated? What needs to be established in order to be granted an extension of time due to exceptionally adverse weather conditions under both standard forms? In answering these questions, we also provide practical tips for those seeking to bring, and those seeking to defend against, extension of time claims for adverse weather.

The JCT form of contract

Where does the risk sit?

"Exceptionally adverse weather conditions" are a Relevant Event under JCT contracts which may entitle the Contractor to an extension of time.¹ "Exceptionally adverse weather conditions" are not, however, a Relevant Matter in the JCT contracts. Therefore, even if a Contractor is entitled to additional time for "exceptionally adverse weather

conditions" it will not be entitled to any loss and expense. This perhaps reflects the fact that "exceptional" adverse weather is out of both parties' control and inherently unpredictable so any losses should lie where they fall. The Employer will not get their liquidated damages for delay but, equally, the Contractor has no entitlement to loss and expense.

How do you establish "exceptionally adverse weather"?

The JCT form of contract does not define "exceptionally adverse weather conditions". Further, there is very little case law on the topic. One case that dealt with the previous wording used in the JCT 1963 form ("inclement" as opposed to "adverse") did, however, confirm that it is the weather that must be exceptional rather than the delay that has been caused by it.²

Further, the effect of the weather was to be assessed at the time the work was actually carried out and not when it was programmed to be carried out. *Keating on Construction Contracts* notes that this reasoning should apply to the 2011 form (and presumably therefore the 2016 form as well).³

Ultimately, though, it is for the Contract Administrator / Architect (or the Employer's Agent) to decide whether the adverse weather conditions relied on in any claim are in fact "exceptionally adverse". In doing so, as they are performing a certifying role, they need to make sure they are acting impartially.⁴

Data to support a claim for any extension of time for "exceptionally adverse" weather is therefore critical. If

you can't support a claim with data, then, even if you can establish critical delay to the works, you don't get past first base. Further, the data needs to justify that the weather was "exceptionally adverse" in your specific site's location, not miles away from it.

With this in mind JCT have, since 2018, collaborated with the Met Office to provide two forms of weather report for use in construction project planning and management:

1. A Weather Planning Report.

This is designed for use in the project planning stage, and includes both 1-in-10-year and long-term averages for a number of weather elements (including daily rainfall totals, days of rain > 5mm, snow/freezing/ground frost, minimum ground and air temperatures, and mean wind speeds); and

2. A Downtime Report.

This includes both 1-in-10-year and long-term averages for numerous weather elements for each month of the year (including monthly rainfall totals, days of rain of over 5mm, snow/freezing/ground frost, minimum ground and air temperatures, and mean wind speeds).

The location-specific 1-in-10-year and long-term average data included in these reports (and in particular the Downtime Report) can be particularly helpful for Contractors seeking to demonstrate "exceptionally adverse weather conditions" to support an extension of time claim. Contractors

working under a JCT contract should therefore consider making use of these reports where possible.⁵

Notification under the JCT

The JCT suite of contracts provides that “if and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed” the Contractor “shall forthwith” give notice of a delay.⁶ In giving that notice, the Contractor must give details of the material circumstances of the delay, including the cause(s), and must identify any event which it considers to be a Relevant Event.

Further, the JCT Standard Building Contract and Design & Build Contracts require the Contractor to give details of the expected effects of the delay event (including an estimate of the length of expected delay to the completion of the Works or Section).⁷ If there is any material change in the estimated delay then they must also supply further information as may reasonably be required by the Employer.⁸

A claim for an extension of time for “exceptionally adverse weather” pursuant to a JCT contract should therefore do the following:

1. Identify the “exceptionally adverse weather conditions” that are relied upon. In particular, include records documenting the adverse weather conditions and why they are “exceptional” by reference to the long-term weather data for that site compared with the actual weather conditions encountered;
2. Give details of the anticipated effect(s) of the “exceptionally adverse weather conditions”, including an estimate of the expected delay to the completion of the Works as a result of those conditions; and

3. Show the specific impact those conditions caused on the progress of the Works going on at the site at the time of that weather by reference to supporting information such as photographs, site diaries, progress meeting minutes and any other available contemporaneous evidence.

The NEC form of contract

Weather can constitute a compensation event under the NEC forms of contract if specific objective criteria are met. In contrast to the JCT forms this may allow for the recovery of both time and money. Further, the approach to measuring the weather and what gives rise to a compensation event is also very different.

An Objective Test

Under clause 60.1(13) of the NEC3 and NEC4 Engineering & Construction Contracts, a *weather measurement* must be recorded:

- within a calendar month [of the Compensation Event];
- before the Completion Date for the whole of the Works; and
- at the place stated in the Contract Data.

Once that *weather measurement* has been recorded, it must then be compared with the *weather data* (historic weather records for the area local to the project). The Contractor will be entitled to a Compensation Event and extension of time if the *weather measurement* is found to occur, on average, less frequently than once in 10 years. However, only the difference between the *weather measurement* and the weather which the *weather data* shows to occur on average less frequently than once in ten years is considered in assessing a compensation event.

So, for example, if the weather data states that, on average, it will rain

over 5mm three days a month but it rains over 5mm on eight days in a month, then it is only the five additional days where it rains over 5mm that will count towards any claim for a compensation event (assuming critical delay is proven).⁹

As such the test laid down in the NEC form of contract is an objective test. As stated in the NEC4 Guidance Notes:

“Rather than rely on subjective generalisations about ‘exceptionally inclement weather’ or the like sometimes used in standard forms of contract, the ECC includes a more objective and measurable approach.” [Emphasis added]

What records must be taken?

Further, the place where the weather is to be recorded and the weather measurements taken should be set out in Section 6 of the Contract Data. Common sense would dictate that this site should be as close as possible to the construction site. Indeed, the Guidance Notes recommend that:

“If there is not a weather station nearby, the weather measurements should be made using gauges and equipment installed at the place stated in the Contract Data.”¹⁰

The default weather measurements to be recorded¹¹ are as follows:

- i) cumulative rainfall (mm);
- ii) number of days with rainfall more than 5mm;
- iii) number of days with minimum air temperature less than 0 degrees Celsius; and
- iv) the number of days with snow lying on the ground at a time to be agreed by the Employer and the Contractor.

Where does the risk sit?

The adverse weather Compensation Event under clause 60.1(13) therefore shifts the risk of very severe weather conditions on to the Employer. However, it is not all good news for those seeking to make such claims. A Contractor will bear the risk of any adverse weather conditions which do not fall within the strict criteria for weather measurements set out in the NEC form. Depending on the location of the project and/or nature of the works, a Contractor may therefore want to agree further weather measurements beyond the default measurements detailed in the Contract Data (and referred to above).

Notification under the NEC form

The NEC form provides that the Contractor must notify the Project Manager of a Compensation Event “within eight weeks of becoming aware that the event has happened”.¹² This is a condition precedent to the Contractor’s entitlement to time and money, so the Contractor must comply with this requirement. Accordingly, a failure to issue a notice by this deadline will result in any entitlement to additional time and/or money being lost. Given that a weather event is time specific (and therefore the eight weeks is easy to measure from), this eight-week deadline needs to be strictly adhered to.

Materially different weather conditions due to a previous Employer delay?

Finally, it may be possible to establish an extension of time for weather on the basis that an Employer delay event pushed tasks that should have been carried out in one set of weather conditions, into another set of weather conditions. The weather in question may well have been foreseeable but the point was to try and avoid it ever being an issue by finishing a certain task before that weather hit.

So, for example, the case of *E.H. Cardy & Son Ltd v Taylor and Paul Roberts and Associates*¹³ in which the Judge noted:

“If the design had been done properly in the first place, the work would not have gone into the period of inclement weather, nor would there have been any intervention of a Christmas break. The delay due to inclement weather, Christmas break, and redrawing were all results of the original bad design of the third party.”¹⁴

This case law is also supported by judgments from other common law jurisdictions. For example, in *SKK (S) Pte Ltd v Management Corporation Strata Title Plan No 1666*,¹⁵ the Judge noted:

“I do not accept the defendant’s foregoing arguments. Painting works in Singapore would invariably be subject to the vagaries of the weather. It bears noting again that the original completion date of the contract was 5 December 2008 before the full onset of the seasonal rainy weather in December. Had it not been for the defendant’s conduct which resulted in completion being delayed by five months to May 2009, the plaintiff would have completed the Works on time or ahead of schedule which meant a ‘float’ would have been factored into the completion period, bearing in mind the plaintiff are experienced as a paint supplier as well as a paint contractor...”

By definition these types of weather delay claims are likely to be harder to win than ones based on the occurrence of exceptionally adverse weather.

A Contractor will need to establish that it is an Employer delay, not one of their own making, that has pushed the works into a very different period of weather. They will also need to establish that the nature of that task

was weather dependent. If all parties are also aware of the weather dependency in relation to a task, then this is also likely to make it easier to claim for an extension of time.

Practical tips

So, what practical tips can be given for those dealing with adverse weather claims?

Well, for those seeking to advance an extension of time claim the mantra of “records, records, records” must never be forgotten. Comprehensive records must be kept of the weather conditions as outlined above; the impact of those conditions on the specific works ongoing at the time; and the measures taken to mitigate any delays. Depending on whether there is a prolongation or loss and expense entitlement under the contract in question, details of the costs arising out of such weather also need to be kept.

For those seeking to rebut such claims:

- 1. Review the records provided carefully and consider obtaining your own weather reports to verify the accuracy of those provided.**

This can be particularly helpful if the data relied on was obtained far away from the site.

- 2. Consider the exact type of adverse weather being claimed for and how it would impact on the works actually being carried out on site when the weather in question hit.**

Is one really likely to impact on the other? For example:

- **High winds** may make crane work, roofing, and working at height unsafe. Was there actually a crane on site at the time though? If, in reality, internal works were being carried out, then high winds should have had no impact on the site.

- Heavy rainfall can cause delays to groundworks, excavations, paving and tarmac, and can also lead to water ingress where the building has not yet been made watertight. Were such works being carried out at the time of the heavy rain? Or was the building already watertight?
- Low minimum temperatures and ground frost can make concreting, road surfacing and excavation impossible. Again, were these the types of works being carried out at that time?

All too often retrospective weather claims ignore the actual impact of the specific weather complained about on site, i.e. they don't link cause and effect. Exceptionally adverse weather does NOT automatically cause critical delay to the works going on at a construction site. The impact on the site, both in terms of its physical impact on the works and also in terms of causing critical delay to the works as a whole, needs to be established.

Finally, as ever, notices must be served in accordance with the specific requirements of the contract, especially where they are a condition precedent to any claim being made in the first place.

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Footnotes

1. See e.g. Standard Building Contract 2016 clauses 2.29.8 (Without Quantities)/2.29.9 (With Quantities/ With Approximate Quantities); Design & Build Contract 2016 clause 2.26.8; and Intermediate Building Contract clause 2.20.8.
2. See *Walter Lawrence v Commercial Union Properties* (1984) 4 Con LR 37.
3. See Keating on Construction Contracts, 10th edition, section 20-162.
4. See *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC). See Insight 79 "Know your position: An overview of the role of the certifier" for further details.
5. JCT Met Office Weather Reports (jctltd.co.uk)
6. Standard Building Contract 2016 clause 2.27.1; Design & Build Contract 2016 clause 2.24.1; and Intermediate Building Contract clause 2.19.1.
7. Standard Building Contract 2016 clause 2.27.2; and Design & Build Contract 2016 clause 2.24.2.
8. Standard Building Contract 2016 clause 2.27.3; and Design & Build Contract 2016 clause 2.24.3.
9. See NEC FAQs as downloaded on 14 December 2020 at "Assessing weather compensation events". See also NEC4 Guidance Notes, Chapter 2 (Adverse Weather), page 56.
10. See NEC3 Guidance Notes, "weather records during the contract", page 72.
11. Additional weather measurements can be agreed by the Parties and included within the contract.
12. NEC3 and NEC4 Engineering & Construction Contracts, clause 61.3.
13. (1995) 38 Con LR per HH Judge Bowsher QC at 94.
14. For further commentary see Keating on Construction Contracts, Chapter 8-072, "Weather"
15. [2011] SGHC 215 at para 138. See also Julian Bailey on Construction Law