

FORCE MAJEURE – Delays beyond the Developer's reasonable control

1 The Force Majeure definition in both the Energy Supply Agreement and the Lease has the same core
2 meaning in the operative provision:

3 *"In respect of any party any event or circumstance which is beyond the reasonable control of such party and
4 which results in or causes the failure of that party to perform any of its obligations under this agreement"*

5 In the Lease however, the definition of Force Majeure is not mutual and is defined as being only in favour
6 of Tenant. We quote from page 7 of the Lease ("Definitions"):

7 *"means any event or circumstance which is beyond the reasonable control of Tenant and which results in or
8 causes failure of the Tenant to perform on any of its obligations under this Lease"*

Chapter 13 - The delay of Force Majeure – The turbine could not lawfully operate

9 From 23rd September 2013 through until 23rd December 2014 EW suffered an unreasonable delay
10 beyond its reasonable control that prevented the turbine from lawful operation until the situation was
11 resolved. It was however proven, EW had done what was required to discharge the condition on 23rd
12 September 2013 and the delay of Force Majeure was as a result of failure of the Planning Authority to act
13 in accord with planning law and discharge condition 7 of the planning permission (nonfeasance).

14 *It was later admitted by the LPA that it did not have the expertise to do what it was required to do in
15 discharging the condition. (*See: [MBC email chain 23/09/2013](#) pages 2 & 3, [Planning Decision](#)
16 [Notice](#), [DTVA Notification of Decision](#) and [MBC Complaint Assessment Response](#) of 19th May 2015).

17 Notably, it was all of those key documents referred to above that *MFC later fraudulently withheld from
18 the ex-parte hearing of 9th January 2017, because those documents proved that the delay was of Force
19 Majeure, entirely beyond reasonable control of EW, although EW did single headedly resolve the issue at
20 no small cost to its financial and project timing resources

21 By 23rd December 2014 EW had successfully resolved the defective planning permission whilst MFC "sat
22 on the fence" and did absolutely nothing to assist contrary to its requirement to assist. The delay of Force
23 Majeure lasted 457 days, (15 months and 1 day), costing EW over £150,000 in legal and technical fees to
24 resolve.

Force Majeure suspended the 12-month period free of rent within the Lease from which EW had to commission the wind turbine

1 Referring to schedule 7 of the Lease, *there is a provision for a 12-month period free of rent from which to
2 commission the wind turbine. (*See; [Lease](#), page 33).

3 Therefore, aside from *[MFC's written agreement to defer rent until commissioning](#), the 12-month
4 period free of rent from which to commission the turbine was also suspended from 23rd September 2013
5 through until 23rd December 2014.

6 The event of Force Majeure occurred just 3 months and 6 days (98 days) into the 12-month period free of
7 rent respective of the Lease that was completed on 17th June 2013. EW did not therefore, enjoy the
8 benefit of the 12-month period free of rent intended by Lease, because of that delay of Force Majeure.

9 On 8th March 2015, when MFC made their ransom demand, were it not for the additional delay beyond
10 reasonable control of EW caused by MFC when from 7th February 2015 they began to procrastinate by
11 "u-tuning" on the connection configuration, EW had the benefit of 267 days from 23rd December 2014
12 from which to have commissioned the wind turbine, free of rent. No rent was payable until 15th
13 September 2015.

Force Majeure suspended the 12-month period from which EW had to procure the Start Date of the Energy Supply Agreement

14 The Energy Supply Agreement provided for 12-months from execution from which EW had to procure the
15 "Start Date" of the Energy Supply Agreement. The purpose of the provision was to ensure that the capital
16 equipment would be installed and connected to the grid within the 12-month period free of obligation in
17 line also with the 12-month period free of rent within the Lease. It was the contractual intention that EW
18 was not to incur liability until the turbine is commissioned.

19 The "Start Date" is defined as the date from which the conditions in clause 2 of the Energy Supply
20 Agreement are satisfied. (See: [Chapter 8: - The Energy Supply Agreement is conditional](#))

21 The period of Force Majeure preventing the turbine from lawful operation was incurred from 23rd
22 September 2013 through to 23rd December 2014 and therefore, even though no start date was in fact
23 specified, the implied obligation to ensure that the "Start Date" was within 12 calendar months from the
24 date of the Agreement (7th November 2013) was suspended accordingly until 23rd December 2014 when
25 EW had successfully resolved the issue.

1 The delay of Force Majeure was encountered just 1 month and 15 days (45 days) into the 12-calendar
2 months from which EW had to procure the Start Date. EW did not therefore enjoy nor have the benefit of
3 the 12-calendar months granted contractually, free of liability from which to commission the wind turbine
4 in accord with the terms of the Energy Supply Agreement.

5 From 23rd December 2014, EW therefore, had a further 320 days (10 months and 15 days), from which
6 to have installed the capital equipment and commissioned the wind turbine prior to expiration of the 12-
7 month period to procure the Start Date.

8 We turn to page 20 of [tab_004](#), being the email from Mr Millinder to MFC at 6.53PM. The email expresses
9 frustration at MFC seeking to charge EW for the period affected by Force Majeure when no payment was
10 owed. The email refers to the one below it at page 21 of the exhibit from Andrew Lindsay, the solicitor
11 acting for EW dated 8th March 2015 at 18.18PM.

12 The email set out very clearly, in legal terms that no payment is due to MFC. Mr Lindsay correctly cites
13 Force Majeure applying and refers to the "Start Date" of the Energy Supply Agreement being the date
14 from which the conditions precedent in clause 2 are satisfied, not a specific date.

15 There was no obligation to pay any sum to MFC pursuant to the Energy Supply Agreement until 7th
16 November 2015. Aside from that, there was never any requirement to make payment pursuant to the
17 Energy Supply Agreement, because Mr Millinder / EW could get no "satisfaction of" the Connection
18 Agreement or commissioning of the wind turbine and therefore there was no "Entitlement to agreed
19 output" (agreement to supply power) and any "Invoicing & payment" was also contractually prohibited.

20 Essentially, there was no agreement to supply power by EW, the Generator, because MFC reneged upon
21 the grid connection two-years after the connection was jointly negotiated and agreed during the option
22 period and clearly without a connection the turbine cannot supply power.

23 Aside from the completed terms of the conditional Energy Supply contract, logic would in itself imply that
24 without a connection, the turbine cannot supply power. Those facts were however, inconsequential to
25 MFC and Womble Bond Dickinson. They knew that the purpose of the project was to supply power
26 directly from the turbine to the stadium, yet they refused the connection to enable EW to do so.

Related content:

27 **Chapter 6: [The grid connection for the wind turbine](#)**

28 **Chapter 8: [The Energy Supply Agreement is conditional](#)**



Force Majeure applied from 7th February 2015 – The unforeseen delay caused by MFC

1 From 7th February 2015, MFC began to cause unreasonable and unforeseen delay by procrastinating on
2 the agreed grid configuration and effectively renege on the completed collateral contract. MFC were
3 seeking to challenge the wind turbine's grid connection that they had jointly negotiated, agreed and
4 completed with EW during the option period. They were seeking to renege on their express obligation to
5 take ownership of its substations. From then on, Force Majeure applied thereafter in favour of EW, the
6 Tenant, further suspending EW's obligations under both the Lease and the Energy Supply Agreement
7 accordingly.

8 We move back to [tab 004](#) and turn to page 16. MFC had not only sought to renege on the connection
9 configuration, but they then sought to demand money from EW for rent and energy supply that was not
10 owed. Page 16 of the exhibit contains the email from Mr Millinder to Mr Bloom dated 15th April 2015 at
11 12.34PM. Although Mr Millinder clearly did not accept that any money was owed to MFC and it is
12 evidenced that no money could have possibly been owed to them, he offered to deposit the sum of the
13 ransom demand in Escrow, pending resolution by an independent arbitrator. Mr Millinder clearly made
14 that offer as a means of mitigating loss for the parties and in resolving the unreasonable impasse created
15 by MFC.

16 Moving to page 15 of the same exhibit, tab_004, there is an email from Mr Bloom replying to Mr
17 Millinder's dated 16th April 2015 at 10.03AM seeking to make the agreement to resolve the unreasonable
18 impasse conditional upon; "*recording the configuration, infrastructure, ownership and maintenance*" of the
19 wind turbine connection when the configuration was already affirmed, agreed and completed during the
20 option period. The ownership and configuration agreements were expressly clear. Mr Bloom knew only
21 too well that they were, they encompassed the conditional precedent of the Connection Offer that he
22 himself jointly negotiated and agreed.

23 It is Northern Powergrid, the Distribution Network Operator, that specifies the connection, not the Tenant
24 or Landlord, it did so, from October 2012 through until 12th December 2012. It is proven to be wholly
25 illogical and entirely unreasonable that MFC then sought to "record the configuration, infrastructure,
26 ownership and maintenance", they knew all of that had been agreed and completed during the option
27 period.

28 The actions of MFC in renege upon the [completed collateral contract](#) forming the entire understanding
29 and reason Mr Millinder completed the Lease is dishonest, they knew of the correct factual circumstances
30 and deliberately sought to frustrate and undoubtedly they knew that their actions in doing so would
31 ultimately cause significant financial loss to Mr Millinder, resulting in failure of the wind turbine project that
32 would have otherwise been successfully commissioned.

33 Moving to page 14 of [tab 004](#), there is an [email from Mr Bloom dated 21st April 2015 at 15.55PM](#) stating
34 that;

1 "We believe that in order for progress to be made an alternative configuration must be established in which the
2 turbine operator is accountable for the energy supply including the fallback of supply from the grid when
3 necessary"

4 Mr Bloom knew there was no such alternative connection. There was the Connection Offer with its
5 condition precedent that MFC takes ownership of its substations so that the connection for the wind
6 turbine could be established. It was that connection, the same and only connection that had never
7 changed that formed the entire the basis of EW being enticed to complete the Lease and associated
8 contractual documents.

9 EW was fraudulently misrepresented into completing the Lease when two years later, it became apparent
10 that MFC had absolutely no intention of fulfilling its obligations.

11 Moving to page 6 of tab_004, there is an email from Mr Bloom dated 30th April 2015 at 10.07AM wherein
12 he states:

13 "WE WILL NOT TAKE ON THE LIABILITY FOR THE HV NETWORK CURRENTLY OWNED BY NPG. WE HAVE
14 CONSISTENTLY SAID THIS AND YOU JUST SEEM TO IGNORE IT"

15 Nowhere during the option period, when it was an option for the parties to negate without financial
16 commitment if either party was dissatisfied, was any such contention raised. On the contrary, Mr Bloom
17 extended the Option Agreement for the specific purpose of securing that connection with its condition
18 precedent that MFC was to take ownership of its substations.

19 EW was left high and dry, without a grid connection due to MFC effectively "u-turning" on the 11th hour
20 without any cause or explanation to have done so. Despite Mr Millinder's requests to explain why MFC
21 sought to renege on the completed Connection Offer, absolutely no response was ever forthcoming. It
22 was illogical, unreasonable and plainly dishonest for MFC to have behaved in this way and their actions in
23 renegeing on the connection configuration vandalized the project that was otherwise ready to complete.

24 MFC and Womble Bond Dickinson knew the correct factual circumstances, they knew therefore that their
25 actions in "u-turning" and refusing the connection that had already been agreed would cause loss to Mr
26 Millinder, it is proven therefore that they knew what they were doing was malicious and dishonest.

27 It was the combination of making a ransom demand, then when Mr Millinder did not pay, because no
28 money was owed, MFC changed its course again and refused the connection, rendering the project unfit
29 for purpose. Both MFC and Womble Bond Dickinson were aware that without a connection, the turbine
30 cannot commercially operate, neither can it supply power.

31 On the balance of probabilities therefore, in applying logic and in evaluation of the circumstances, had Mr
32 Millinder conceded and paid MFC the £255,000 demanded, MFC would only have later "u-turned" on the
33 connection, rendering the project useless. Mr Millinder would have been down by a further £255,000, less
34 the connection and less the revenue from the wind turbine that formed the basis of him investing in and
35 originating the project in the first instance

1 It becomes clear that this was the aim of MFC and their intent was proven by virtue of the collusion with
2 Mr Hannon of the Insolvency Service and utilisation of insolvency and further fraudulent claims that
3 cannot possibly be established, as their means of evading justice and defrauding Mr Millinder of the
4 revenue he would have otherwise gained.

5 Thereafter, there emerges a pattern wherein MFC has, over a protracted period of time, acted with
6 dishonest intent to defraud Mr Millinder in full knowledge of the correct factual circumstances. Their
7 combined actions in doing so is dishonest and would be viewed as dishonest in the opinion of any
8 ordinary and reasonable person and it is proven that they, including Michael Brown and Womble Bond
9 Dickinson, knew what they were doing was dishonest. These people are supposed to be lawyers, they
10 undoubtedly did fully understand the terms of the contracts that they themselves negotiated, agreed and
11 completed with EW, yet they sought to change the goal posts, disregarding the terms they agreed
12 altogether.

13 We turn to [Exhibit JRB BD 15 06 2016](#), being the 12-page exhibit of email correspondence dated
14 between 8th June 2015 and 15th June 2015. Page 1 contains an email from Mr Millinder to MFC of 15th
15 June 2015 at 13.55PM that consolidates the matters. Page 1 expresses the position in concise format,
16 citing the correct position insofar as the connection configuration was jointly negotiated and completed in
17 2012 during the option period. At the 4th paragraph Mr Millinder states;

18 *"I also note that the defective planning permission was finally resolved in 23rd December 14 and in accord with
19 the contract, no payments would become due until 12 calendar months from that date. I state this because you
20 previously made it clear you had intended to invoice my company for payments that are clearly not due"*

21 At the 5th paragraph Mr Millinder goes on to state;

22 *"I consider therefore that MFC is in material breach of the Connection Deed, as well as Lease and the ESA as it is
23 preventing me from carrying out the rights granted under such contracts. I cannot build a wind turbine that has
24 no grid connection and neither can I lose the OFGEM FIT tariff because you decide to change the goal posts on
25 the 11th hour"*

On 9th January 2017, Staunton, the Club's barrister, admitted in writing, in the note of hearing that:

"For the purpose of the Energy Supply Agreement, Force Majeure has effect"

Contract, **force majeure** shall be automatically extended for the purpose of **force majeure**, it being any penalty payable the...