

COVID-19 – WHAT DOES MY BUILDING CONTRACT SAY?

In this article we consider the impact of COVID-19 insofar as it relates to building contracts and for the moment we have limited our analysis to the JCT and NEC forms of main contract rather than their sub contract forms.



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WHERE ARE WE IN TERMS OF GOVERNMENT LEGISLATION AND GUIDANCE REGARDING CONSTRUCTION SITES?

It is not the case that the government has legislated to close construction sites and, unless there is a second wave of infections due to the virus, it seems unlikely that they will do so. However the government has issued guidance entitled 'Remediation and COVID-19: Building Safety Update' (last updated on 16 April 2020) which states: 'Construction sites have not been asked to close, so work can continue if it is done safely.'

Employers should ensure their workers on site are able to follow the public health guidance, and they should consider responsible arrangements for ensuring their workers can travel in line with this advice, such as through staggering site hours to reduce public transport use during peak periods. We will keep these arrangements under constant review and take any steps required.

It is, therefore, possible for construction work to continue in the current context. Those responsible for commissioning building safety work...and the construction companies undertaking the work, should consider how best to proceed and/or mitigate the risks arising from such work being paused.'

More recently the government has published further guidance called 'Working safely during coronavirus (COVID-19) – Construction and other outdoor work' and based upon that guidance and to assist the industry the Construction Leadership Council (CLC) has issued its guidance on the necessary site operating procedures to be followed during the coronavirus. The CLC guidance sets out in more detail the matters to be considered in order to provide a safe working environment on construction sites and refers to arrangements relating to:

- travel to work;
- toilets, canteens and rest facilities;
- site access and egress;

...NEITHER THE GOVERNMENT'S NOR THE CLC GUIDANCE MAKES REFERENCE TO SUPPLY CHAIN PROBLEMS...

- changing facilities and showers; and
- hand washing.

In particular the CLC guidance sets out a hierarchy of controls to be used where it is not possible to follow the PHE social distancing guidelines.

However neither the government's nor the CLC guidance makes reference to supply chain problems relating to, for example, unavailability of materials or lack of labour due to the pandemic.

In normal circumstances those risks would usually be borne by the contractor but let us now turn to the JCT and NEC main contract terms to see how the risks relating to the imposition of site restrictions and supply chain problems are allocated as between the employer and the contractor.

We will look at those risk allocations in the context of extensions of time, claims for additional monies and termination rights.

MORE TIME TO COMPLETE? **JCT standard contracts**

The various JCT main contracts include a series of relevant events entitling the contractor to an extension to the agreed completion date for the works.

It is possible that one or more of these relevant events may apply where COVID-19 affects the works:

Variations / changes – Under the JCT forms instructions issued by the employer which impose obligations or restrictions relating to access to the site, limitations of working space and working hours or carrying out work in any particular order fall within the definition of a variation or a change and may give rise to a relevant event.

It can be seen from the above summary that compliance with the CLC guidance could well involve matters relating to site access, working space / hours and sequencing of works but it may not be the employer's obligation under health and safety legislation to issue instructions in regard to such matters as it is likely, at least in relation to commercial projects, for the contractor (as principal contractor under the CDM regulations) to have the primary responsibility to ensure day to day site safety.

Deferment of possession – The JCT forms entitle the contractor to an extension of time if the employer defers giving the contractor possession of the site. It is



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possible that in relation to a new project the employer does decide to defer possession whilst the current lockdown restrictions apply.

Impediment, prevention or default – The JCT forms provide that a relevant event will occur if the employer commits any act of impediment, prevention or default.

It is possible that if an employer instructed the contractor to undertake work in a dangerous manner this could amount to an act of default but from the contractor's perspective taking this line may not be without risk as failure to comply with instructions could amount to a breach by the contractor entitling the employer to repudiate and / or claim damages.

Exercise of statutory powers –

The JCT contracts also provide for a relevant event where the UK government or any local or public authority exercises a statutory power which directly affects the execution of the works.

As mentioned above the government has not legislated to stop construction works and therefore ,unless it does so, it is unlikely that this relevant event will apply.

Permissions and approvals of statutory bodies –

It is possible for a relevant event to arise where there has been a delay in receiving any permission or approval of any statutory body.

The COVID-19 outbreak has certainly caused problems for various public bodies in

carrying out their functions but before the contractor is entitled to more time it will be necessary for it to demonstrate that the contractor has taken all practicable steps to avoid or reduce the delay.

Force majeure – Finally the JCT contract provides that a relevant event will arise in the event of force majeure. However what is meant in this context is not clear as the JCT standard contracts do not include any definition of this term but given the other relevant events the reference to force majeure must presumably mean a specific event (not otherwise covered by one of the other relevant events) which is outside the control of the contractor and which has given rise to a delay.

In an article produced by the JCT called 'Coronavirus (COVID-19) and JCT contracts' they have stated 'force majeure is not defined because it is intended to embrace the unknown and to enable the contract provisions to remain operative in all circumstances, thus avoiding the application of the legal concept of frustration. Force majeure is normally held to mean all circumstances beyond the will of man, and which it is not in his power to control (Lebeaupin v Crispin (1920)).

Given the widespread effects of the COVID-19 epidemic it is likely that the contractor will seek to rely on this relevant event to justify an extension of time. The above effects could include supply chain consequences as well as site restrictions so long as those supply chain issues can be said to have properly arisen due to circumstances outside the control of the contractor.

If the supply chain consequences merely make securing labour and / or materials more difficult but not impossible then it is more likely given the lack of clarity as to what is meant by force majeure, that a court may find that those consequences are to be borne by the contractor without any extension of time.

Whether the contractor can find alternative labour or materials supplies will obviously depend on the nature of the project and the stage of construction but if the contractor does seek to rely on force majeure then as with any other delay event it will be necessary for the contractor to give the appropriate notices to the employer, provide particulars of its effect and continue to mitigate the effects of the delay ie in the language of the JCT 'do all that may

reasonably be required, to the satisfaction of the employer, to proceed with the works'.

NEC standard contracts

The NEC standard forms refer to a series of compensation events the occurrence of which may give rise to a delay to the agreed completion date. The following compensation events may be relevant in the context of the consequences of COVID-19:

Changes to the scope – It is possible that an instruction from the project manager changing the scope to reflect CLC guidance on site safety could give rise to a compensation event.

Access to the site not allowed – A compensation event will also arise if the employer does not give access to the site by the later of the agreed access date and the date shown on the accepted programme. In this context please see our comments above regarding deferment of possession.

Instructions to stop or start work – If the project manager gives an instruction to stop or not to start any work or to change an agreed key date again a compensation event may arise.

Breach of contract by the employer – The NEC refers to breaches of contract by



...WHETHER THE CONTRACTOR CAN FIND ALTERNATIVE LABOUR OR MATERIALS SUPPLIES WILL OBVIOUSLY DEPEND ON THE NATURE OF THE PROJECT...

the employer as giving rise to a compensation event. In this context please see the comments we made above under the heading 'Impediment, prevention or default' as the point is essentially the same.

Unforeseen events – The NEC includes much more specific drafting to deal with force majeure and it is perhaps worth setting out the relevant compensation event in full – 'An event which:

- stops the contractor completing the works;
- stops the contractor completing the works by the date shown on the accepted programme;
- which neither party could prevent;
- experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it; and
- is not one of the other compensation events stated in this contract'.

...THE RELEVANT MATTERS INCLUDE VARIATIONS / CHANGES AND ACTS OF IMPEDIMENT, PREVENTION OR DEFAULT...

It will be necessary for the contractor to satisfy all of the elements of the above drafting to justify a compensation event. However it is not difficult to envisage a contractor properly identifying COVID-19 and its consequences as events which neither party could prevent and, in relation to contracts entered into perhaps prior to 2020, successfully arguing that these were not events contemplated by an experienced contractor.

Query whether a compensation event would arise under contracts entered into in 2020, once news of the virus was available?

In all cases it must be noted that the event must have the effect of stopping work being completed or delaying its completion by the agreed date.

CLAIMS FOR ADDITIONAL MONIES?

JCT standard contracts

The JCT standard forms provide that if the contractor incurs or is likely to incur any direct loss and / or expense due to any deferment of possession or because the regular progress of the works is affected by any relevant matter (see below) then, subject to compliance with the relevant provisions regarding notification and

provision of information, the contractor is entitled to reimbursement of that loss and / or expense.

The relevant matters include variations / changes and acts of impediment, prevention or default.

Please see our comments above in relation to those relevant events and delay but please also note that force majeure is not a relevant matter and therefore, although an extension of time may possibly be granted, a claim for direct loss and / or expense will not be available to the contractor.

A relevant matter may also be arise if there has been a delay in receiving any permission or approval for the purposes of development control requirements (eg satisfaction of a planning condition) but for additional monies to be due the contractor must demonstrate that it has taken all practicable steps to reduce or avoid the delay.

NEC standard contracts

In the case of the NEC forms of contract all of the compensation events referred to above in the context of delay may potentially give rise to a change in the prices.



It is worth noting that in order to claim a compensation event the contractor must notify the project manager within eight weeks of becoming aware of the event.

It is also worth noting the obligation on both the contractor and the project manager to give early warnings of events which may increase the total of the prices or which may delay completion. Such early warnings will be reflected in the risk register and may be the subject of further discussion at a subsequent risk reduction meeting.

In this regard we now have version 4 of the CLC Guidance so if previous early warnings

were given based on earlier versions of this guidance it may be necessary for revised warnings to be given.

IS IT POSSIBLE TO TERMINATE?

At common law it may be possible to suggest that performance of the parties' obligations has been frustrated and therefore they are no longer obliged to perform them.

However generally it is very difficult to successfully argue that frustration applies. Previous cases suggest that it is likely to only apply where the subject matter of the contract has been made illegal and therefore performance has become impossible.

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In the context of COVID-19 it is clear that whilst compliance with the relevant guidelines and guidance makes work on site more difficult, it is not impossible and certainly the government has not legislated to render construction activity illegal.

Putting aside the doctrine of frustration do the standard forms have anything to say by way of express termination rights?

JCT standard contracts

The JCT standard forms include the possibility of either the employer or the contractor terminating in the event of force majeure but such rights to terminate will only arise if the carrying out of the works

or substantially the whole of the uncompleted works is suspended for a continuous agreed period which, if no other period is selected, will be two months.

Putting aside issues as to whether COVID-19 can be said to be in event of force majeure our understanding is that in relation to most projects work has not been suspended or if it has then the period of suspension has not been long enough to give rise to a right to terminate.

NEC standard contracts

The NEC contracts include a number of termination events which may be relevant following the COVID-19 outbreak:

Health and safety – The employer may terminate if the project manager has notified that the contractor has defaulted by substantially breaking a health or safety regulation and has not stopped defaulting within four weeks of that notification.

Released under law – Either party may terminate if the parties have been released under the law from further performance of the whole of the contract.

As mentioned above in the context of frustration it is not the case that legislation has released the parties to a building contract from further performance and therefore the above right to terminate does not currently apply.

Stop or not start work – It is possible for either party to terminate if the project manager has instructed the contractor to stop or not to start any substantial work or all work and an instruction allowing the work to restart has not been given within 13 weeks.

Please see our comments above in relation to the JCT termination right arising following force majeure.

Unforeseen events – The employer may terminate if an event occurs which:

- stops the contractor completing the works;
- stops the contractor completing the works by the date shown on the accepted programme and is forecast to delay completion by more than 13 weeks;
- which neither party could prevent; and
- an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it.

Again please see our comments above in relation to the similar compensation event and in relation to the JCT termination right in the event of force majeure.

As a general comment relying on the express rights to terminate in the JCT or NEC contracts will not be easy and the financial and other consequences of termination are of course significant and must be considered carefully before any action is taken either legally or on site.

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CONCLUSION

It will be apparent from the above that the contractor's ability to seek an extension of time and additional monies will depend on how COVID-19 has affected the particular project.

For example it may be particularly difficult to comply with the guidance where significant elements of the works are to take place in confined spaces where distancing between workers is hard to maintain. In cases like these the contractor's position under the contract may be more easily established. However, it is clear that the government has been very resistant to pressure to close sites, despite contractor and industry body pressure to do so.

Our comments above relate to the Standard JCT and NEC forms as unamended but they are of course often amended and therefore, as always, it is important to look carefully at the actual contract terms and seek advice. Many extension events are in practice deleted.

Finally whilst it only has the status of guidance the government has made it clear

in its Cabinet Office guidance dated 7 May that whilst it expects sites to remain open, it expects contracting parties to act responsibly and fairly, support the response to COVID-19 and protect jobs and the economy.

In particular the guidance states that responsible and fair behaviour is strongly encouraged in dealing with matters such as force majeure and delay and compensation events.

We would expect the courts to have regard this guidance if one party took an overly aggressive stance in the application of contractual terms as a result of the current pandemic, and letting a contractor go to the wall, even over risks which it has willingly assumed, benefits no one.

This publication is not meant as a substitute for advice on particular issues and action should not be taken on the basis of the information in this document alone.

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