

Client Alert

COVID and the U.K. Construction Sector – Practical Problems and Legal Considerations in JCT D&B Contracts

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We all know that COVID-19's implications are both hazardous and complex. That is the least that can be said for its impact on the construction industry.

In this note we provide a brief breakdown of some of the key legal areas to keep an eye on in JCT D&B contracts, as well as some practical tips to bear in mind as the situation develops.

Summary of the Status Quo

Construction sites have not been forcibly closed by the Government. It is recognised that there is a clear need for works to continue in most cases - new hospitals/medical centres are crucial in the effort to fight COVID-19, and many other projects are still essential for a wider public benefit (a key example is the removal of dangerous cladding – which on 16 April the Housing Secretary and various Mayors and local leaders pledged to continue).

There is also an acknowledgement that where productivity can progress safely, there is a greater good for the UK economy to let it continue. Alok Sharma, the Secretary of State for Business, Energy and Industrial Strategy has written a letter to the construction industry thanking it for its call to action.

Clearly, in some cases private owners may choose to take a different approach, and some commercial sites may be closed for other reasons.

In all cases where workers are able to attend construction sites, they must comply with Public Health England Guidelines on social distancing and the Construction Leadership Council's (CLC) Site Operating Procedures (which will be enforced by the Health and Safety Executive). Where it is physically impossible to maintain 2m between individuals – *e.g.* in particularly narrow or contained areas, work should not continue.

It shouldn't be forgotten that the Guidelines also apply to travel, so where transport to site had previously been shared between workers for example, alternative solutions may now be needed.

Whilst sites may still be open, clearly there are additional challenges in maintaining business as usual. Builders' merchants are considered an "essential service" and so have not closed their doors, but the availability of materials and supplies has obviously been impacted by disrupted supply chains. Particular sub-sectors of the industry have had to shut down altogether, meaning that certain subcontractors are entirely unable to operate.

More widely many businesses have had not only to furlough employees, but to manage substantial staff shortages as a result of ill health. Indeed, in some instances given the inevitable delays to some projects and

supply chain issues, furloughing staff may be seen by many contractors as an ideal stop gap solution until projects can ramp up again properly and supply chain issues have reduced.

So how are these wide-ranging practical issues addressed in JCT contracts?

Force Majeure

There is inherent uncertainty around force majeure generally (not least because the term is derived from French law, and as the concept continues to evolve over time as more than simply an "act of God"). This is particularly so in the case of JCT contracts, given that the standard form does not prescribe a definition, instead making express reference to force majeure being a "Relevant Event" and a potential termination trigger.

In practice contracts should be checked to see whether a bespoke amendment has been made that offers some certainty around COVID-19-type circumstances. If there is a definition that expressly includes "disease", "pandemic" or "epidemic" then the contractor will likely be protected against claims for breach if it is unable to perform due to COVID-19.

That said, the messages communicated in the Secretary of State's letter to the industry and CLC's related publications, may mean that any unilateral decisions to stop works due to coronavirus (where they could strictly go ahead) are unlikely to entitle a contractor to force majeure.

It is worth remembering that in cases where force majeure does apply, it is still subject to an obligation to mitigate its effect – so contractors will have to demonstrate that they have taken reasonable steps to prevent any delay (which may include efforts to pre-order materials etc.). Also, if force majeure continues for a prolonged period to the extent that the contract becomes terminable, a contractor will not be entitled to claim any losses beyond payment for work done to date and any pre-ordered materials or equipment.

Relevant Events

Relevant Events are essentially delays either caused by the Employer or by neither party. A number of the standard list of Relevant Events could be relevant to current circumstances, for example, the exercise by the UK Government or a Local Authority of a statutory power which directly affects the works (e.g. an order to shut down particular areas), or any delay in obtaining necessary approvals (e.g. planning permission). In such circumstances the contractor would be entitled to an extension of time (but no money).

For contracts that are still being negotiated, it may be advisable to consider adapting the list of Relevant Events to take into account issues that are likely to impact progress in current circumstances. Examples might be: inability to procure materials necessary for the works; inability to travel safely to site; illness of employees; or even any COVID-19 matter beyond the contractor's reasonable control.

Concurrent Delay

Concurrent delay is clearly a complex area and one that is regularly tested in the courts - it will always be very dependent on the particular circumstances in question. Our broad view is that if a contractor was already responsible for a delay, but has become further delayed due to a COVID-19-triggered Relevant Event then the standard form JCT does not strictly preclude an extension of time. That said, this is clearly an area where contractors need to tread carefully and also likely a fertile area for further disputes as and when we start to come out of the crisis.

Relevant Matters

The occurrence of Relevant Matters potentially allow a contractor both additional time and money. They apply to circumstances where delay has been caused by the Employer – *e.g.* changes, instructions or other impediments. So, if an Employer issues an instruction which restricts access to the site or postpones the works, then the contractor would likely be entitled to both time and compensation.

To claim relief by way of a Relevant Events or Relevant Matters, care must be taken to follow the prescribed notification procedures.

Notice

This raises an issue in itself – if a contract requires hand delivery of notices in particular circumstances, it may be impossible to comply whilst also following Public Health England and CLC Guidelines.

In this situation we would recommend that communication is key – where possible Employers and contractors should agree and document a suitable alternative approach for the duration of current circumstances, *e.g.* giving notices by email but followed by posted hard copy.

Conclusion

Current circumstances are presenting all kinds of new and complex challenges for the construction industry. As set out above, the JCT Contract form does not necessarily afford complete relief. For projects that have already commenced, a good understanding of the underlying contractual terms and pro-active communication between employer, contractor and subcontractors will certainly help. For projects that are still in negotiation there are opportunities to build suitable provisions into contracts that address the challenges presented by current circumstances (including making specific provision for delay caused by any further impact of coronavirus), and seek to give some certainty to all parties.

Finally, employers and contractors will also need to start considering what measures they should be taking in order to review and where appropriate diversify their critical supply chains. Unfortunately it is inevitable that some businesses in the construction sector will struggle to survive the current crisis however the time to start addressing this from a business continuity perspective is of course now rather than when the subcontractor or supplier is no longer operating.

The situation is obviously fluid and we will be keeping an eye on matters as they develop across the market.

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