

Coronavirus (Covid-19) and JCT Contracts



The outbreak of the coronavirus is of great concern and those involved with construction projects should, despite the difficulty of the situation, take a measured approach and not act rashly, such as walking off site, as this could constitute a repudiatory breach of contract. The primary consideration is the health and safety of the workforce and the general public. Contractors and clients have obligations in this respect, notwithstanding their respective contractual positions but, naturally, they will also want to understand their respective positions under the JCT contract which they have executed. It is essential that the parties to the contract and their advisors communicate openly as to how the project is to be dealt with and, wherever possible, agree a way forward within the parameters of the contract.

It is now clear that the coronavirus will have a significant effect on most construction projects, both as a result of the virus itself and the Government's response to it. Also, that its effects will be felt for an unknown duration that may run for some months. The uncertainty of duration makes appropriate action on the part of contractors and clients that much more difficult to determine.

The Government's response includes:

- The Health Protection (Coronavirus) Regulations (No. 129) laid on the 10th February 2020
- The Health Protection (Coronavirus, Business Closure) (England) Regulations (No.327) laid on the 23rd March 2020
- The Coronavirus Act 2020, 25th March 2020.

Wales is subject to separate regulations. The timing of these regulations and acts is relevant to the contract provisions because Government action after the Base Date defined in the contract is a specific Relevant Event.

Distinguishing between impacts caused by the virus and impacts caused by Government action

Even before any Government action, delay to the works may occur as a result of any sickness or self-isolation caused by the virus infecting members of the project workforce and supply chain. In addition, delays may also be caused where action by the Government restricts operations both on and off-site. From a contractual perspective this distinction is important because the rights and obligations provided in the contract differ. Also, the contract provisions will operate differently depending on the scale and intensity of the effect of the virus upon the project and whether any effects occurred prior to Government intervention. As one moves through the early emergence of the virus, to the development of the epidemic, and the introduction of Government action, the case for relief under the contract becomes more apparent.

The way these two matters (virus, Government action) impact depends upon the stage of the project at which the commencement of the event gives rise to the delay. Regarding Government intervention, the nature of the project may also be relevant because such intervention provides additional requirements as to health and safety (e.g. social distancing) yet stops short of an outright ban on construction activity. This was made clear by the Secretary of State for Business, Energy & Industrial Strategy in his letter to the construction industry dated 31st March 2020, which states:

“To help ensure that it is safe for you to operate in your workplace, the industry has worked to develop Site Operating Procedures (SOP), which were published by the Construction Leadership Council. These align with the latest guidance from Public Health England. As this health guidance updates, the SOP will reflect any changes.”

The practicability of complying with SOP may depend on whether the works are new build or works to an existing building, occupied or otherwise. If the contractor cannot comply with, or fails to comply with, SOP it might be required to shut down. SOP wording is:

“If a site is not consistently implementing the measures set out below, it may be required to shut down.”

Where it is required to shut down because of the contractor's default then that contractor would not be using best endeavours to prevent delay, which is a requirement of the contract when seeking an extension of time.

Because the existence of the virus and the public health matters enacted by the Government's intervention are separate matters, each project, depending upon its timing and progress at the time, will need to be considered on its own facts in relation to the contractual position. However, projects delayed will fall into three broad groups, those delayed because of the effect of:

- the virus, prior to Government intervention, causing a shortage of labour and materials, different working or by delay of a Statutory Undertaker carrying out statutory obligations.
- the virus, both before and after Government intervention, causing a shortage of labour and materials, different working or by delay of a Statutory Undertaker carrying out statutory obligations and compliance with the requirements of SOP.
- the virus after Government intervention, causing a shortage of labour and materials or by delay of a Statutory Undertaker carrying out statutory obligations and compliance with the requirements of SOP.

Understanding and complying with JCT contract provisions

JCT contracts make provision for dealing with the above situations and should be complied with. The above situations may give rise to:

- Extension of time
- Suspension of the works
- Termination of contractor's employment

JCT contracts provide that the contractor gives notice as soon as it becomes apparent that the progress of the works is delayed. The notice must state the cause of delay and identify any event which is a Relevant Event under the extension of time provisions. The notice is also required to give notice of expected effects and estimated delay where practicable: something that is likely to be largely impossible in the current circumstances.

The contractor, in seeking an extension of time to the contract completion date, must constantly use best endeavours to prevent delay in the progress of the works. This means continuing to work in accordance with SOP unless it is impractical to do so.

Where a delay to the works has been caused by compliance with the Government's intervention, a specific Relevant Event applies.

The ordinary shortage of labour and materials does not give rise to an extension of time and is the contractor's responsibility but delay by a Statutory Undertaker carrying out statutory obligations is a Relevant Event. Whether such shortages which arise because of the virus (as compared with Government intervention) remain the contractor's responsibility depends on the circumstances and whether there is a prevailing epidemic impacting upon the works. The timing by the World Health Organisation of its notice of a pandemic is also relevant. The Relevant Event that may apply in such circumstances is force majeure but clearly this will not always apply. If that Relevant Event applies the contractor is relieved of liquidated and ascertained damages. Force majeure in JCT 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)). But as Parris on the Standard Form of Building Contract puts it, "the term is a chameleon expression which takes its colour from the contractual background against which it is used".

Additionally, the contractor may suspend the works where it is impracticable to continue work in the light of the current restrictions. If the suspension that follows is longer than that stated in the Contract Particulars, then either party may give notice of termination of the contractor's employment. Although either party may terminate, the parties may, depending on circumstances at the time, agree other arrangements for continuation of the project.

The contractor cannot recover loss and expense either in respect of an extension of time for the Relevant Events referred to above (i.e. force majeure, act of the UK Government) or upon termination of the contractor's employment as these are treated as neutral events. Although no money may flow it is still important to establish whether a delay falls under one or other of those events in order to determine an appropriate extension of time. Because of the exceptional circumstances of the coronavirus and the many possibilities of how delay might arise, with problems of concurrency, a pragmatic approach may be appropriate in some situations. However, it should not be treated as an opportunity to cover all manner of other programming problems.

In some exceptional situations, possibly where work is in defined areas or sections of existing buildings, the employer or the architect/supervising officer may wish to give instructions as to how to proceed (subject to the contractor's right of reasonable objection) or to postpone the works. In such cases there is provision for an extension of time for any delay that might arise and possibly termination by the contractor where the instructions lead to a postponement longer than the period stated in the Contract Particulars. Where such instructions are given the contractor would be entitled to recover direct loss and/or expense for any variation or postponement and direct loss and/or damage where termination arises.

Under the JCT Constructing Excellence Contract the approach to the coronavirus will be different and dependent upon whether a Risk Allocation Schedule applies and what is included in such schedule. Where the risk is identified in the schedule it will be dealt with as set out therein. If the risk is not set out, then relief is provided where there is occurrence of any other risk which is not reasonably foreseeable at the date of the contract and is beyond the control of the supplier. Notice of the effect of a Relief Event should be sought by the parties as soon as reasonably practicable and agreement sought. Termination under the current circumstances, if it is thought appropriate, is by agreement.

The JCT Minor Works Contract requires the contractor to give notice that the works will not be completed by the date for completion and in doing so can seek an extension of time for any delay that occurs for reasons beyond the control of the contractor. Under the provisions, loss and expense is only relevant in relation to a variation. Damages may be payable only where delay is occasioned by a default of the employer – the effect of the virus and government intervention would not constitute a default unless other factors that laid a specific duty upon the employer were also present.



**Authored by Peter Hibberd,
past-chair, JCT**

April 2020