

# Government's updated Covid-19 guidance identifies specific issues



The 30th June update of the Cabinet Office's *'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency'* stresses that the further guidance provided remains non-statutory and it identifies three specific issues for further consideration. Those issues include payment, extensions of time, and the avoidance and resolution of disputes. It also refers to unfair business practices.

## Payment, Cash Flow, and Insolvency

The Government continues to promote the Prompt Payment Code as it recognises the specific related problem of payment is cash flow. Cash flow is assisted by the Government providing a package of financial support for businesses and individuals during the Covid-19 emergency. In the public sector, Government published Procurement Policy Note 02/20 and updated this with 04/20 by providing guidance on relief to suppliers. Notwithstanding such support, problems of cash flow can lead to insolvency, which the Government expressly addressed by introducing a moratorium on creditor action.

The act containing the moratorium is the Corporate Insolvency and Governance Act which received Royal Assent and came into force on 26 June 2020. In addition to the corporate moratorium, it provides an extendable 20 working day period giving eligible businesses protection from creditor action while they seek professional restructuring advice. It also introduces the new role of a Monitor to oversee that moratorium. The Act (by insertion of section 233B in the 1986 Insolvency Act) prevents the operation of termination clauses when a company enters an insolvency procedure (which by definition includes a moratorium) but the Act also provides means by which the termination

provisions come back into play. This is of importance to those operating under JCT contracts because of the inclusion therein of such contractual provisions. Furthermore, the Act also suspends the termination provisions during the insolvency period in those circumstances where some other right to terminate has arisen prior to that insolvency, unless such right was exercised before the insolvency occurred. By contrast, where the ground for termination arises during the insolvency period such right of termination may then be exercised.

Information on the operation of the suspension of contract termination clauses is available from the Insolvency Service at <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/prohibition-of-termination-clauses>

There are many aspects to this new insolvency legislation, including the exclusion of certain contracts (most notably contracts forming part of a PPP) and those companies of a defined type and size. Those exclusions, together with the many other contractual issues that may be present, mean expert advice is probably necessary before attempting to invoke termination.

The Act also provides temporary relief until 30 September 2020 from being subject to a winding up petition and from wrongful trading provisions where a business can demonstrate its difficulties flow from trading conditions arising from the Covid-19 pandemic.

## **Extension of Time**

The impact of Covid-19 upon the performance of construction projects varies significantly and was covered in '[Coronavirus \(Covid-19\) and JCT Contracts](#)' in April. As was indicated, JCT contracts provide for extensions of time but additional costs do not necessarily flow. Not all Relevant Events for an extension of time are Relevant Matters for loss and expense. It is now evident from both the Government and CLC publications that '*Parties to commercial contracts should consider carefully, and reasonably, what reliefs may be available, including whether an extension of time for performance should be granted, how additional costs should be dealt with and whether terms should be renegotiated to preserve the viability of the contract to accommodate the impact of Covid-19.*' The maintenance of the contract, wherever possible, is an important objective.

## **Avoidance and resolution of disputes**

The guidance properly suggests that parties to a contract impacted by Covid-19 should endeavour to find an equitable accommodation in preference to a formal dispute. The principal JCT contracts provide not only for collaborative working but also provide for early resolution of differences through early notification and good faith negotiations. If the negotiations fail, then serious consideration should be given to mediation before pursuing the matter as a dispute through the formal dispute mechanisms i.e. adjudication, arbitration, and the Courts.

## Unfair Business Practice

The Government is concerned that during the Covid-19 emergency, and because of the unusually stressful conditions it creates, business practices may fall short of what are acceptable, despite its encouragement to find collaborative solutions. It points out that the Competition and Markets Authority is monitoring business practices during the Covid-19 emergency and that unfair business practices can be reported. This can be done online by completing the relevant form. It is to be hoped that such reporting would not be necessary but despite the guidance provided by the Authority, one can see a potential problem in determining whether certain behaviours are unfair.

## Administration of existing projects

The Government's and CLC's guidance continue to stress the need, during the Covid Emergency, to act reasonably and fairly when administering the terms of the contract. That aspiration is right but as the terms of contract should always be administered reasonably and fairly, it begs the question as to what it is really saying, especially as it accepts the contract terms should not be overridden. This is a matter that, in practice, may well be interpreted differently within the public and private sectors. It is one that could be particularly difficult in the context of an unfair business practice referred to in the previous paragraph.



Peter Hibberd  
September 2020