

Construction Law Update

COVID-19 or “Coronavirus” – Force Majeure, Frustration and Cash-Flow Considerations

Earlier this month we published a [bulletin](#) considering the potential implications of COVID-19 on construction companies and how to mitigate them. Since then, the Government has advised widespread social distancing and self-isolation; including the recommendation that entire households should self-isolate for 14 days in the event that one family member is symptomatic. It is now inevitable that almost all construction companies are going to be affected in some way. In this bulletin we expand on our earlier guidance and look further at the potential options for your company in these unprecedented circumstances.

How COVID-19 is infecting the construction industry

For any construction project to progress it needs two things. The first is to be able to procure materials. The second is regular labour. As the UK inches further and further toward a COVID-19 ‘lock-down,’ and these two key elements become even harder to ensure, delay and disruption seem unavoidable. Unfortunately, delay comes with cost-consequences and determining who foots the bill will require careful consideration of each contract’s risk allocation. Other consequences of COVID-19 may be programme revisions, variations to the scope of works and in some cases, performance being deemed impossible. For these reasons, it is now more crucial than ever for contractors to understand and administer their contracts. Below we answer the questions we believe many of you will be asking during these difficult times.

My company is working under a JCT Design & Build Contract 2016 – what are my options?

If you are working under a JCT D&B 2016 and your ability to perform your obligations is likely to be affected by COVID-19 there are two key areas of your contract to review. The first is ‘Adjustment of Completion Date’. This sub-section of the contract governs extensions of time (“EOT”) and includes a list of ‘Relevant Events’ which, if occur, entitle a contractor

to an EOT. Gaining an EOT will be key as it will prevent liquidated damages being levied against a contractor for the period in question. Whilst a pandemic is not itself a specified Relevant Event, the consequences of one may fall under several. The first is clause 2.26.14 - *force majeure*.

What is *force majeure* and when does it occur? *Force majeure* is not defined in the JCT suite of contracts, although it is often defined in schedules of amendments. If a definition has been included in a contract’s amendments, its scope will be key. In the absence of a definition, its meaning is open to interpretation but a widely relied upon definition, approved in *Lebeaupin v Crispin*, states “*all circumstances independent to the will of man and which is not in his power to control... thus, war, inundations and epidemics are cases of force majeure...*” Where a project has been delayed by the health and economic implications of COVID-19, therefore, it is possible that this Relevant Event may be relied upon and an EOT granted. It is also worth noting that if *force majeure* is found to have occurred and causes the works to be suspended, depending on the period of suspension, both parties may have a right to terminate the contract under clause 8.11.1.1.

Another potential Relevant Event is at clause 2.26.12 – the exercise by the UK Government or any Local or Public Authority of a statutory power which directly affects the execution of the works. This Relevant Event may be relied upon if, for example, a site is closed by the Government, or, if by virtue of The Health Protection (Coronavirus) Regulations 2020, a workforce is required to stay at home, stopping progress. In these circumstances, where the legislative implications of COVID-19 have delayed the works, this Relevant Event may be relied upon and an EOT granted.

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Whether other Relevant Events become applicable will depend on an employer's response to the situation. If an employer has instructed a change, suspended works, restricted site access or is unable to provide materials which it is responsible for providing – further Relevant Events may be invoked.

That is not the end of the EOT story, however, because to ensure an EOT is granted notice must be given by the contractor, in accordance with clause 2.24, as soon as it becomes reasonably apparent that the project is likely to be delayed. For delay resulting from the current COVID-19 outbreak, this means notices should be prepared and issued now. Being able to show that a contractor used its best endeavours to prevent delay will also be key.

The second area of a JCT DB 2016 which will be of interest to contractors at this stage is 'Loss and Expense'. Clause 4.19 entitles a contractor to claim any loss incurred as a result of progress of the works being materially affected by any of the Relevant Matter's listed at clause 4.21. Unfortunately, in an unamended JCT DB 2016, unless the employer has instructed a change or caused prevention, none of the Relevant Matters cover the implications of COVID-19 on a project. Loss incurred as a result of COVID-19 is, therefore, unlikely to be recovered unless clause 4.21 has been amended and an applicable Relevant Matter has been inserted.

My company is working under an NEC4 2017 Contract – what are my options?

If you are working under an NEC4 contract and the works are likely to be affected by COVID-19, the key area of your contract to review is section 6 of the Core Clauses which governs compensation events ("CEs"). CEs generally cover both a contractor's right to additional time and costs. Clause 60.1 includes a list of CEs which, if occur, entitle a contractor to additional time and costs. As with JCT DB 2016, pandemics are not specifically covered. Clause 60.1(19), however, contains the NEC equivalent of an event of *force majeure* – an event which neither party could have prevented, and had such a small chance of occurring

that it would have been unreasonable to have allowed for, which stops the contractor completing the works at all and/or in accordance with the Accepted Programme. As above, this is likely to cover delay caused by the health and economic implications of COVID-19. Whether a NEC4 contract grants a CE where the impact of changes to legislation has caused delay (as detailed above in relation to JCT) will depend on whether Secondary Option Clause 'Option X2: Changes in the law' has been selected. Further CEs may be applicable depending on the actions of the employer.

As with EOTs under JCT, in order to be entitled to a CE there are a number of tasks a contractor must complete. Clause 61.3 contains a condition precedent requiring a contractor to notify the project manager of a CE within 8 weeks of becoming aware that it has occurred or is expected to occur. For delay resulting from COVID-19, such a notice should be prepared and issued now. In accordance with clause 15.1, a contractor is also obliged to give early warning to the project manager of events which may increase prices, cause delay or impair performance. Early Warning Notices in relation to COVID-19 should also be given now, a failure to do so may affect the sums a contractor is entitled to in relation to a CE.

My contract is amended so that I cannot claim an EOT or CE – what are my options?

Where a contract provides no protection in circumstances such as those arising from COVID-19, a contractor may be able to rely on the common law doctrine of frustration. To rely on frustration a contractor would have to prove that a contract had become physically or commercially impossible to perform, or that the obligations under it were now radically different. Case law suggests that this is significantly more difficult than proving *force majeure* and will not apply in cases whereby the contract is simply more expensive to perform. Where a contract is 'frustrated' it will effectively be terminated and both parties will be automatically discharged from their obligations. In practice, frustration will only occur in the most extreme cases where there appears to be no other options.

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My company is having cash-flow problems as a result of COVID-19 - what can I do to protect it?

Cash-flow is the life blood of the construction industry. So much so that one of the key purposes of the amendments to the Housing Grants, Construction and Regeneration Act 1996 implemented in 2011 was to improve the sector's cash-flow. Profit margins on projects are often low and companies do not always have the resources to cover outgoings, even in the short term, without cash coming in. For companies feeling the strain in relation to cash-flow as a result of COVID-19, we provide the following points as food for thought.

- At the moment, companies may feel like their hands are tied in terms of a project's progress but making sure all key notices, including payment and pay less notices, are being issued and forward planning is key. The current position will not last forever and plotting how best to get projects back on track when the situation calms will ensure that the consequences of COVID-19 on a company are not prolonged and kick-start cash-flow.
- The Coronavirus Business Interruption Loan Scheme is expected to become available next week (w/c 23 March 2020). This aims to support small and medium sized eligible UK businesses financially during the COVID-19 outbreak by encouraging lenders to provide business loans up to £5 million by offering participating lenders with a Government-backed guarantee. The Government has also pledged to cover the first six months of interest payments on the loans. Companies may want to consider their eligibility.
- The Government has announced that companies with fewer than 250 employees who have paid employees Statutory Sick Pay ("SSP") for sickness absence due to COVID-19 may be able to recover up to 2 weeks SSP per eligible employee.
- The Government has announced a new lending facility from the Bank of England called COVID-19

Corporate Financing Facility to help support larger firms financially through COVID-19.

- Lastly, the Construction Leadership Council has written to the Government warning of the potential catastrophic impact of COVID-19 on the construction sector and appealing for: sites to remain open as long as possible, public sector construction clients to continue paying contractors and for financial measures to be considered such as deferring VAT and PAYE payments to reduce the burden on businesses. Companies should keep their eyes peeled for the outcome of such discussions.

Comment

Whilst the above provides general guidance, we strongly recommend seeking legal advice as to a company's protection/obligations in any specific contract. This will allow a company to protect its position by flagging up notice obligations it is required to comply with and ensuring all additional time and cost available is recovered.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

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