

Coronavirus/COVID-19 and Construction Contracts

Recent Developments and Further Actions

by Jon Miller

Introduction

- 1 This note sets out the most recent developments the construction industry has adopted in trying to deal with the Coronavirus/COVID-19 outbreak, and suggests what actions need to be taken including:-
 - 1.1 The impact of the Construction Leadership Counsel's ("CLC") Site Operating Procedures Version 3 ("SOP"), which has become the prevalent standard for dealing with COVID 19 on construction sites.
 - 1.2 What is happening with various projects re the grant of extensions of time, loss and expense, suspension etc?
 - 1.3 The recent document issued by the CLC's COVID-19 Contractual Best Practice Guidance ("Best Practice Guidance") which gives recommendations as to what everyone in the construction industry should be doing at the moment to avoid disputes over COVID 19.
- 2 Please bear in mind the observations made about the rules governing force majeure and construction contracts , the need to give notices etc mentioned in my previous notes:
<https://www.fenwickelliott.com/research-insight/articles-papers/covid-19/coronavirus-construction-contracts>
<https://www.fenwickelliott.com/research-insight/articles-papers/covid-19/coronavirus-covid-19-construction-contracts>
<https://www.fenwickelliott.com/research-insight/articles-papers/covid-19/coronavirus-covid-19-construction-contracts-developments>

What is happening at the moment?

"Where it is not possible"/"Where it is possible"

- 3 The above phrases are being widely used in Government communications aimed at the workplace, and construction industry advice. Employers, Contractors and Sub Contractors who are looking for a clear set of rules telling them what to do and have criticised the use of these phrases, as almost anything is "possible" with sufficient time and money. One thing however is clear, it is impossible to produce a set of detailed rules which could govern a large number of different building operations.

The SOP

- 5 Against this backdrop the SOP has essentially become the benchmark as to how sites should operate in the new post COVID 19 world. The SOP covers areas such as,

how to travel to and from site (i.e. public transport should be avoided, if operatives drive to site in their own transport with others they should keep the windows open etc), hand washing (when entering and leaving the site), toilet facilities (an attendant may be necessary to reduce overcrowding...) etc.

- 5 When dealing with construction operations significantly the SOP does not say work should stop if operatives cannot keep at least 2 metres from each other. According to the SOP, "Where it is not possible" to keep to the 2 metre distancing rule, "... you should consider whether the activity needs to continue for the site to continue to operate, and, if so, take all mitigating actions possible to reduce the risk of transmission". In these circumstances a hierarchy of controls are recommended:-
 - 5.1 Can the risk be eliminated completely? (i.e. does it need to be done now or can it be done more safely in the future)
 - 5.2 Reducing the risk – reducing the number of people involved – e.g. avoiding the use of the lift (which will be very interesting in high rise developments).
 - 5.3 Isolating – keeping small teams together and separate from other operatives.
 - 5.4 Control – limiting face to face working to 15 minutes or less.
 - 5.5 PPE – whilst not used when the 2 metre rule is in place PPE could be relevant where this rule cannot be adhered to.
- 6 The SOP is guidance, and does not have the force of law. Indeed according to a Construction News survey 1 in 5 construction workers on site still believe there has been little or no attempt to maintain the 2 metre distancing rule¹. Nevertheless the HSE are almost certainly going to rely on the SOP when deciding if a site is operating safely or not, which ultimately could lead to enforcement action - apparently the HSE received more than 4,500 reports relating to COVID-19 between 9 March until the first week of May².

What should I do if the SOP is not being followed?

- 7 Highlight the failure in writing to the relevant Sub Contractor, Principal Contractor and the Employer who all have duties to not only their employees but also those who might be impacted by the works under the Health and Safety at Work Act/ CDM Regulations. Bearing in mind though there is no absolute requirement that everyone must be at least 2m away from each other at all times.
- 8 Refusing to work can have serious implications commercially speaking and will nearly always amount to a breach of contract, unless there is clear justification for the refusal. As always gather together as much evidence as possible via photographs, emails written at the time etc highlighting the issues. As an adjudicator it never fails to surprise me when someone complains of a significant event on site, but failed to even mention it in an email to anyone.

Extensions of time and money

- 9 A significant number of notices requesting an extension of time, and in some cases loss and expense have been issued – see my earlier note on this topic [<https://www.>

1. Construction News website 6 May 2020
 2. Construction News website – Article 6 May 2020

fenwickelliott.com/research-insight/articles-papers/covid-19/coronavirus-covid-19-construction-contracts-developments]. Many of the notices are relying on a wide range of reasons, not only force majeure but also changes in law³ and statutory requirements⁴, the issue of instructions in order to justify more time, and sometimes money, and ascertained damages being payable.

- 10 However the small survey I conducted⁵ covered around 40 – 50 projects and it appears to be that for some small commercial/residential developments employers and contractors alike have agreed to suspend the work with some form of agreement on financial terms. The same projects are now looking at what can be done to re-open. This however appears to be the exception.
- 11 Overall very few extensions of time let alone anything else have been dealt with. To some extent this may be quite rightly due to Employers, Contractors, Consultants etc all directing their efforts as to how they can proceed in light of the current restrictions, and particularly the SOP. However, to quote a leading developer who spoke to me, many Employers, Contractors etc are “kicking the tin can down the road”. Essentially the question as to whether even an extension of time should be granted is not being answered. The common response is to simply ask what “best endeavours” are being used to mitigate the delay?
- 12 A senior representative of a large firm of consultants pointed out that many consultants are not entirely sure what to do with an extension of time claim based upon COVID-19? As mentioned before there are no real English cases as to whether COVID-19 would constitute “force majeure” under the JCT contract (although I believe that it would), and faced with this uncertainty some consultants are not entirely sure how they should react.

Records, Records and Records (again)

- 13 What is becoming apparent is that, with the parties’ energies being directed as to how they can safely operate on site, very little attention is being paid to record keeping as to what the impact of the COVID-19 pandemic actually is on the Works. Records are vital for establishing whether the Contractor is entitled to an extension of time (and if applicable) and any loss and expense.
- 14 We have been recommending a daily narrative of what has happened on site, the number of operatives, the areas where they are working, and the reason for any shortcomings (e.g. operatives who have to self-isolate). This can even be done in the form of daywork sheets/daily allocation sheets, provided they include the details and could prove very useful in the future.

CLC Guidance

- 15 Faced with the potential for disputes that may keep the legal profession busy for years the CLC has recently issued the Best Practice Guidance⁶ in an attempt to avoid the intransigence which often blights the construction industry. The document also contains sample notices to be given for claiming an extension of time for COVID-19 under a JCT and NEC contract, and an explanatory note on how the notices should operate.

3. I.e. under the NEC 4
 4. I.e. under the JCT D & B 2016, and there are real issues as to whether there has been change in law or statutory requirements at all

5. I.e. Sending an email to all of my colleagues of which a few replied

6. I should point out here that I was involved but not exclusively in drafting this document

The Best Practice Guidance recognises that the parties need to protect their position by issuing notices, and I would expect the relevant notices to be given already under most standard form building contracts, but this is not enough.

- 16 The Best Practice Guidance then goes further by encouraging the parties to meet and discuss the problems that they are inevitably facing on site, and the commercial issues involved, and gives the precedent for a "Without Prejudice Subject to Contract" approach whereby the parties should be able to discuss the issues faced more openly without fear of what is being said being used against them in the future. The Best Practice Guidance even explains what is meant by the terms "without prejudice" and "subject to contract" and contains a suggested agenda for any "without prejudice and subject to contract meetings".
- 17 Whilst the SOP produced by the CLC may have turned into the "go to" document for operating on site, it remains to be seen whether the Best Practice Guidance will have anything like the same impact. I have to say that my experience so far is that everybody is rather reluctant to discuss time and money, but hopefully the Best Practice Guidance will give the encouragement and tools for this to happen in at least some cases.