

# Coronavirus/COVID-19 and Construction Contracts

## Recent Developments and Further Actions

by Jon Miller, 2 July 2020

### Introduction

- 1 This note deals with the most recent developments in the construction industry in dealing with Coronavirus/COVID-19 and covers:
  - 1.1 the new Site Operating Procedure Version 5 ("SOP V5");
  - 1.2 a recent case in the Technology and Construction Court interpreting a force majeure term clause in an agreement;
  - 1.3 current attitudes of some employers, contractors and subcontractors to delays caused by COVID 19;
  - 1.4 how the construction industry is dealing with COVID-19 when entering into new contracts.
- 2 Please also see my earlier notes [<https://www.fenwickelliott.com/research-insight/articles-papers/covid-19>] dealing with matters such as the legal position re force majeure, giving notices etc.

### SOP Version 5

- 3 There has been a large volume of guidance issued by different organisations as to what should be done socially and in the workplace. This includes the Coronavirus Act which came into force on 25 March 2020, the Health Protection (Coronavirus Restrictions) (England) Regulations 2020, further guidance issued by the Government resulting in the "*Staying Alert*" message and the "*Working safely during COVID-19 in construction and other outdoor work*" documentation, as well as information from Public Health England.
- 4 Like many I suspect I have been suffering from guidance fatigue but for construction at least the "go to" document appears to be Site Operating Procedures issued by the Construction Leadership Council ("CLC"). The latest version – SOP V5 – has just been released dated 4 July 2020. Like its predecessors it covers not only travel to and from site (e.g. suggestions as to what should happen if operatives have to share cars and vans), but also steps to be taken with facilities (e.g. attendants to prevent overcrowding of some welfare facilities), and what to do if social distancing cannot be maintained.
- 5 The new rules introduce changes such as suggesting canteens on site can re-open subject to restrictions and, according to the CLC website, reflect the new "*one metre plus approach*" whereby a two-metre distance should be maintained on site,

but where it cannot, risk mitigation measures need to be looked at. The Health and Safety Executive has made clear it will enforce previous versions of the SOP, and presumably this will also be the case for SOP V5.

### Exercise of a statutory power by the UK Government or a change in law?

- 6 The difficulty, however, is that much of what is being done currently on construction sites is in response to **guidance**. The JCT D&B 2016 only gives rise to an extension of time where there has been the exercise by the UK Government or any Public Authority of a “*statutory power*” – arguably much of the guidance that has been produced has not been the result of the UK Government exercising any statutory power. SOP V5 is produced by the CLC – a trade organisation. Ministers have made statements encouraging the construction industry to continue to work which do not, despite what they may believe, always have the force of law.
- 7 To use an analogy which has been put forward by some commentators, the need to safeguard the health and safety of employees and the general public under the Health and Safety Act – “*as far as reasonably practicable*” – has not changed, but the guidance on the way this is to be done has altered.

### 2 Entertain Video Limited and Others v Sony DADC Europe Limited and Others<sup>1</sup>

- 8 The Technology and Construction Court has recently considered the meaning of a *force majeure* clause which could have implications for how these clauses are interpreted within construction contracts. This concerned the riots in North London in 2011 following the shooting of Mark Duggan – a warehouse was looted and eventually burnt to the ground. The fire took 10 days to extinguish and led to damage to a large number of DVDs, CDs etc. worth circa £40m.
- 9 The contract for the storage/distribution of the DVDs/CDs contained a *force majeure* clause whereby:

*“Neither party shall be liable for its failure or delay ... if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to ... riot, civil commotion, malicious damage ... pandemic ...”*

- 10 Interestingly, the above clause included “*pandemic*” so would probably come into play in the current COVID-19 pandemic. However, here the Defendant alleged that the looting and burning down of the warehouse was “*beyond the reasonable control of [the Defendant]*” which included “*riot, civil commotion [and] malicious damage*”.
- 11 The Court held that the *force majeure* clause did not exonerate the Defendant who was found liable for the damage caused by the looting and the subsequent destruction of the warehouse<sup>2</sup>. This was because:
  - 11.1 the Court heard from witnesses and experts pointing out the warehouse had been broken into on occasions in the past, and the Defendant had failed to put in place sufficient safeguards against further break-ins;
  - 11.2 the Defendant did not follow the relevant British Standard for protecting the

<sup>1</sup> [2020] EWHC 972 (TCC).

<sup>2</sup> Subject to limitations of liability clauses elsewhere within the underlying contract.

warehouse from damage by fire.

Accordingly, the looting and fire damage was not “*beyond the reasonable control*” of the Defendant, who remained liable for the damage.

- 12 Much has been written about the interpretation of *force majeure* clauses in construction contracts. The 2 *Entertain Video* case emphasises the need to interpret the actual words used in any *force majeure* clause – in this case it was not a question of whether the rioting etc. was foreseeable; rather whether it was “*beyond the reasonable control*” of the Defendant. The Court decided it was not.
- 13 The JCT D&B 2016 merely refers to “*force majeure*” and no more on this point, whilst the NEC4 clearly relies on foreseeability in that it would exonerate the Contractor for an event that has such a small chance of occurring it would be unreasonable to expect the Contractor to have allowed for it. On balance, it would appear that the current COVID-19 outbreak would give rise to an extension of time under the JCT D&B 2016 and NEC4, but still there is no legally binding authority as to whether this really is the position.

## Extensions of time

- 14 That said, we are still finding a reluctance to grant extensions of time and particularly to pay any loss and expense or associated costs as, according to a senior partner of one leading firm of consultants, “*no one wants to be the first person to grant an extension of time for force majeure*”.
- 15 Indeed, I have just been asked to formally advise as to whether COVID-19 type delays gave rise to an extension of time under a JCT D&B 2016 but the answer was relatively easy – the Contractor managed to ignore the bespoke condition precedent clause which required a notice to be given within 14 days of a delay. Earlier articles have emphasised the need to give notices in accordance with the underlying contract and anyone who has not done so yet is likely to have some real problems to overcome.

## New contracts –dealing with COVID-19

- 16 There are inherent uncertainties in trying to price and programme new projects which are planned to start in the second half of 2020 and beyond. No one knows when the restrictions will change next or end, or worse if there will be a second wave etc. In broad terms the few contracts that are being negotiated currently tend to be on the principle of “*benchmarking*”.
- 17 We have seen situations where the contractor under the NEC has made it clear its valuation of the delays and additional costs caused by COVID-19 assume that SOP V4 would apply to the works but only until (say) 31 July 2020 – this may now have to be revised with the introduction of SOP V5. Other contractors are trying to set out exactly what they have allowed for within their price by way of working restrictions etc., and for how long, with an added clause saying that should these restrictions change this could lead to a delay, increase in price, or even a decrease in the Contract Sum if the restrictions are removed far quicker than everyone anticipated.

- 18 However, that being said, a conversation with a recent developer revealed that they are finding that some contractors on new projects are seeking to insert clauses within new construction contracts containing not only more time but more money for COVID-19 related delays, but the developer's view is the state of the market is that contractors are starting to look at the lack of work going forward, and are not pushing too hard when it comes to seeking further money for disruption caused by COVID-19.
- 19 Finally, the CLC is due to publish very soon a suite of clauses to be inserted within the JCT D&B 2016 and NEC4<sup>3</sup> contracts going forward whereby COVID-19 can either just give rise to an extension of time, an extension of time and the costs shared between the Contractor and the Employer (how they are shared is to be negotiated), or the Contractor receives an extension of time and all costs associated with COVID-19. The amendments are still to be published and we are to see how the construction industry will react.

<sup>3</sup> Which I have been involved with.