

Coronavirus/COVID-19 and Construction Contracts

Recent Developments and Further Actions

by Jon Miller

Introduction

- 1 This note sets out some further practical points to be considered when dealing with recent developments in the Coronavirus/COVID-19 outbreak, including:
 - 1.1 The Principal Contractor's, Principal Designer's and Client's responsibility for health and safety matters on site.
 - 1.2 The Health and Safety Guidance which is now being produced.
 - 1.3 The implication of refusing to work on a site which is not operating safely.
 - 1.4 Legal issues arising out of sites reopening.
 - 1.5 "Best Endeavours" – what does it mean?
 - 1.6 The first case before the courts considering the impact of COVID-19.
- 2 Please bear in mind the points mentioned in my earlier note re the rights and obligations of Contractors, Subcontractors and the like which really do turn on the terms of the underlying contract [<https://www.fenwickelliott.com/research-insight/articles-papers/covid-19/coronavirus-construction-contracts>]

Legislation

- 3 Despite a clear disagreement between the UK Government and the First Minister of Scotland/The Mayor for London, as at 13 April 2020 the current position in England remains that construction sites can continue working, when they can do so safely.
- 4 There are of course legal restrictions on the movement of people in England.¹ But there are exceptions re leaving home for travel to work where it is not possible to work from home² and on gatherings of more than two people in a public place where this is essential for work purposes.³

Health and Safety

- 5 Quite rightly, the health and safety of employees, subcontractors etc. has come to the fore. Under CDM it is not only the Principal Designer and Principal Contractor who have health and safety obligations, but also the Client who has to make suitable arrangements for managing the project so that health, safety and welfare are all looked after. The Client is not required to take an active role in managing the Works, but the Client cannot simply absolve themselves by seeking to delegate completely their responsibility for health and safety to the Principal Contractor/Designer.⁴

1. Particularly the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

2. Regulation 6(2)(f).

3. Regulation 7(b).

4. CDM Regulations 2015, Regulation 4.

Health and Safety Guidance – the Site Operating Procedures (“SOP”)

- 6 Only non-essential shops and public venues have been asked to close – the UK Government at least, together with some trade unions and government organisations, is encouraging businesses such as construction to keep open when this can be done safely.⁵ There has been some confusion over what constitutes safe practices on site. The 2-metre social distancing rule is to be followed “*where possible*”. After some initial confusion most parties are relying upon the SOP issued by the Construction Leadership Counsel (“CLC”).⁶ The SOP was updated on 2 April 2020 making its guidelines more stringent whereby, if it was not possible for workers to keep 2m apart, then the Works in question should not continue.⁷ However, following feedback the CLC have indicated that this latest update should not currently be followed.
- 7 There are no hard and fast rules as to exactly what constitutes a safe site but at the moment I would suggest following the initial version of the SOP, but if it is not really possible to maintain the 2m distance, then consider whether the Works really can continue.

Sites Reopening

- 8 While some sites remain shut, many are reopening after a review of working practices and facilities. There are also reports of some Subcontractors ceasing their activities on site if Principal Contractors have not put in place suitable COVID-19 safeguards.
- 9 As emphasised in my previous note [<https://www.fenwickelliott.com/research-insight/articles-papers/covid-19/coronavirus-covid-19-construction-contracts>], in the event of any party refusing an instruction to return to site or continue working, it is imperative that they can in the future establish that they were justified in refusing to work. Emails sent to the Principal Contractor/Designer (and even the Client) explaining why the Works cannot proceed, photographs of the facilities or lack of facilities and detailed explanations may be needed in the future. Refusing to return to site can amount to a breach of contract giving rise to claims for substantial damages, unless it can be proven that the refusal was justified.
- 10 The Business Secretary Alok Sharma has made it clear: “*If there are instances where people feel that organisations and businesses are not behaving appropriately in terms of their duty of care there are organisations like the HSE who should be informed.*”⁸ The Health and Safety Executive (“HSE”), in turn, have added that if anyone is not complying with the relevant Guidance they are prepared to give the appropriate advice and ultimately are prepared to issue enforcement notices including prohibition notices.⁹

5. See for example Coronavirus: A Joint Statement between HSE, the TUC and the CBI dated 3 April 2020.

6. Particularly following the Alok Sharma’s (Secretary of State for Business etc.) letter to the construction industry of 31 March 2020 encouraging use of the SOP.

7. See Revision 2 of the SOP issued on 2 April 2020.

8. Ministerial Briefing 28 March 2020.

9. See again the Joint Statement mentioned above dated 3 April 2020.

Notices, Notices and Notices

- 11 Bearing in mind that any protection, such as a force majeure clause, which may be offered by the underlying contract can usually only be invoked by a notice; presumably everybody who is by now impacted by COVID-19/Coronavirus has given a notice under their contract. Notices do not have to be given in an aggressive manner and without the extension of time provisions of a contract being invoked via a notice, no matter how obvious the reason for delay might be, a delay to the Completion Date without an extension of time will normally give rise to liquidated and ascertained damages being payable.

Another Notice?

- 12 Further, a notice may have been given requesting the extension of time when the Works originally stopped on site. Upon returning to a site where there are restrictions such as social distancing and staggered start and finish times etc., this will no doubt have a further effect on the progress of the Works. Please bear in mind that in these circumstances a further notice requesting an extension of time (and if possible loss and expense) may be required; if the notice and particulars that have already been given dealt only with the consequences of a complete stop of work on site, this would not necessarily cover the situation where the Works recommence, albeit in a more restrictive and therefore inefficient manner.

Best Endeavours – A New Weapon?

- 13 Many contracts contain a provision whereby the Contractor is to use their “best endeavours” to mitigate delays.¹⁰ We have experienced responses to requests for an extension of time whereby Contractors and Subcontractors have been reminded of their duty to use best endeavours and asked for an explanation of what they have been doing to discharge this responsibility.

What is “best endeavours”?

- 14 Unfortunately (yet again) there is no definitive legal answer. Explanations have been given whereby:

14.1 *“Best endeavours means what it says – it does not mean second best endeavours.”*¹¹

14.2 *“Best endeavours are something less than efforts which go beyond the bounds of reason but are considerably more than casual and intermittent activities.”*¹²

14.3 *“This proviso [to use best endeavours] is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the Contractor’s duty to re-programme the Works either to reduce or prevent delay. How far the Contractor must take other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate expenditure of substantial sums of money.”*¹³

- 15 I suggest that a “best endeavours” obligation would include:

15.1 If the site is shut down, continuing with off-site activities insofar as they can safely be carried out (e.g. design, but this might even include off-site prefabrication).

15.2 Reprogramming the Works in accordance with the SOP.

15.3 Looking at the possibility of replacing labour who cannot attend site (e.g. due to illness or self-isolation), even temporarily.

- 16 The key point as always, legally speaking, is to make sure that all efforts to use “best endeavours” are recorded and kept – e.g. emails.

10. For example see the JCT D&B 2016 clause 2.25.6.1.

11. Sheffield District Railway v Great Central Railway [1911] 27 TLR 451.

12. Pips (Leisure Productions) Ltd v Walton (1980) 43 P&CR 415.

13. Keating on Building Contracts, 6th edition, page 642.

Insurance

- 17 Presumably when leaving the site the relevant insurers were notified – they should also be notified again when returning to the Works.

First Coronavirus Case Reaches the Courts

- 18 The issue of delays caused by Coronavirus has already troubled the Courts, but in the context of an adjudication. In *Mill Chris Developments Ltd v Waters* a contractor sought an injunction preventing a homeowner from proceeding with an adjudication on the basis that the contractor would not have sufficient time to prepare its defence, particularly where the contractor's solicitor had been forced to self-isolate at home which made it difficult to obtain evidence. Also a site visit had been arranged which the representatives would not be able to attend (but presumably the homeowner would at least be on the premises when the adjudicator was present).
- 19 The Court refused to grant an injunction. It was recognised that adjudications often take place in a short time scale but there was no explanation why papers could not be sent or scanned to the contractor's solicitor and, whilst the homeowner would be present at the property, arrangements could be made for the site visit to be recorded or for the contractor to highlight specific matters for the adjudicator to consider before the visit itself.

Good to Talk

- 20 This note, like its predecessors, sets out the contractual position, and the practical steps that might need to be taken with the Coronavirus/COVID-19 outbreak. It is always best to try to reach some form of agreement with those involved in how to deal with an unprecedented situation. But the construction industry does not always have an outstanding record when it comes to compromise...