



Coronavirus: Dealing with it under JCT



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Following on from an earlier article I published on dealing with Coronavirus under NEC, this is a companion article on dealing with it under JCT. You should note from the outset that the JCT and NEC approaches are very different. So, if you have some projects under JCT and some under NEC, you need to treat them differently.

This article focuses on the key mechanisms within the 2016 edition of the JCT Design and Build Contract ("DB"). Almost identical provisions exist within the JCT Standard Building Contract ("SBC"), so the advice in this article should largely hold true for that contract as well.

Before reading on, please note that the information below is based on the JCT DB contract in its unamended form. If your project is likely to be affected by coronavirus, then you should check to see if any of the clauses referenced below have been amended. In my experience, this would often be the case.

Early Warning? Under JCT?

Strictly speaking, there is no contractual early warning mechanism within the JCT DB contract.

That said, there is absolutely nothing to stop the parties collaborating early and often with respect to the coronavirus issue. In fact, it is advisable to do so for the benefit of all involved. The points set out below are food for thought on what parties should be discussing at this early stage of the pandemic:

- The likely impact of the coronavirus outbreak on the Contractor's programme;
- The likely impact of the coronavirus outbreak on the Contractor's supply chain, design submittal processes, access requirements etc.;
- The likely impact of the coronavirus outbreak on others, for example statutory undertakers, utility providers, the planning office, regulators etc.;
- The specific impact that self-isolation measures would have on each party and the project;

- What contingency measures can be put in place in case any key individuals are affected by the coronavirus outbreak; and
- The contractual mechanisms regarding Relevant Events and Relevant Matters to ensure that each party is aware of its obligations (I explain this in more detail below).

Talking about time and money should not be the priority right now. That will come later when things become more certain. Collaborating on how to reduce the impact of the coronavirus outbreak on all parties involved should be priority one.

Does a Contractor get time, money, both or neither?

The big question and one that is likely to be contentious moving forward. To begin to answer this question, you need to look at the following clauses of your contract:

- Clause 2.26 – this clause lists out the 14 events that will entitle the Contractor to an extension of time i.e. the Relvant Events.
- Clause 4.21 – this clause lists out the

five events that will entitle the Contractor to loss and/or expense (money) i.e. the Relevant Matters.

Some events appear on both lists, so should they occur, they would entitle the Contractor to both time and money. Other events appear on only one list, so they will entitle the Contractor to time or money, depending on which list they appear on. Hopefully this is clear!

Instead of reviewing each list separately, which would lead to lots of duplication, I have set out some analysis below of what events might happen over the coming months, and what that event might entitle a Contractor to recover.

The Employer restricts access to the site, or specific parts of the site (time and money)

This would constitute a Change under clause 5.1.2.1 of the Contract.

A Change is both a Relevant Event (under clause 2.26.1) and a Relevant Matter (under clause 4.21.1). In other words, if the Employer decided to close or restrict access to the site because of the coronavirus outbreak, this would entitle the Contractor to both an extension of time and its loss and/or expense.

The Employer issues an instruction to postpone any of the works to be done under the Contract (time and money)

Such an instruction can be given by the Employer under clause 3.10 of the Contract.

This instruction is both a Relevant Event (under clause 2.26.2.2) and a Relevant Matter (under clause 4.21.2.1). In other words, if the Employer decided to postpone part of the works, to ride out the storm that is coronavirus, then this would entitle the Contractor to both an extension of time and its loss and/or expense.

A permission or approval required by a statutory authority is delayed (time and money)

Such a delay is both a Relevant Event (under clause 2.26.13) and a Relevant Matter (under clause 4.21.4) if the Contractor took all practical steps to avoid the delay.

These delays can arise in several ways: TTROs not being given, planning permission not being granted and so on. Should these delays occur because the relevant authority is on lockdown, then this would entitle the Contractor to both an extension of time and its loss and/or expense.

The Employer or any Employer's Person impedes or prevents the Contractor from doing the Works (time and money)

Any impediment, prevention or default by the Employer or any Employer's Person, regardless of whether it is by a positive act (i.e. by doing something) or by an omission (i.e. by not doing something), is both a Relevant Event (under clause 2.26.6) and a Relevant Matter (under clause 4.21.5).

This event is very wide ranging and is often described as a 'catch-all'. I can picture a number of scenarios where the event above would be triggered by the coronavirus outbreak. For instance, the Employer not doing something they were supposed to do in accordance with their

obligations within the Contract Documents, the Employer's design team being placed into self-isolation and thereby not responding to design submittals, construction drawings not being approved, the list goes on.

There is civil commotion because of the coronavirus outbreak (time only)

Hopefully we are not going to get to the point where there is rioting, looting and pillaging because of coronavirus, but you never know. If there was to be 'civil commotion' because of the coronavirus outbreak, then this would be a Relevant Event (under clause 2.26.10) entitling the Contractor to an extension of time.

We have no decided case law on what the term 'civil commotion' means under the JCT. When it comes to insurance contracts, the same phrase is often construed as meaning "a stage between a riot and a civil war". Being from Belfast myself, I can picture what that would look like.

The likelihood of us getting to the point of 'civil commotion' becoming an issue is so remote that it bears no further discussion. Unless the supply of toilet roll runs out...

Last but not least... a force majeure event occurs (time only)

If a 'force majeure' event was to occur, then this would be a Relevant Event (under clause 2.26.14) which would entitle the Contractor to a fair and reasonable extension of time.

The problem is that the term 'force majeure' is not defined. Not particularly helpful. We therefore need to look at what the case law says and how the courts have interpreted this phrase over the years.

The problem with the case law concerning force majeure is that no two cases are ever the same (as you can probably imagine). We can therefore only derive guidelines from the courts to help us interpret the phrase. In my opinion, the most useful statement about the meaning of the phrase 'force majeure', in light of current events, was approved by the English Courts in the case of *Lebeaupin v Crispin* (1920). In this case the Court said the following:

"Force majeure. This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control ... thus, war, inundations and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure"

I have included the statement above in full, as it is right on point. It sets out that "epidemics" are cases of force majeure. The coronavirus outbreak is currently classified as a "pandemic" ... which according to Websters Dictionary, is even worse than an epidemic.

I have closely reviewed the words which precede and follow the "force majeure" Relevant Event under the unamended JCT DB contract. I can see nothing which suggests that this Relevant Event would not include a pandemic such as the coronavirus outbreak.

It therefore seems clear to me that the coronavirus outbreak would be a Relevant Event under clause 2.26.14, entitling a Contractor to fair and reasonable extension of time.

Who should notify? Notify What?

****AMENDMENT ALERT**** – the clauses discussed in this section with respect to notification are almost always amended, so please check your specific contract to check what the notification requirements are.

Before looking at the specific notification requirements of the JCT DB, it is important to understand why correctly notifying Relevant Events and Relevant Matters is important.

Notification is important, because if you don't do it, you may not be able to recover anything, regardless if you would otherwise be contractually entitled to do so.

In other words, notification is important because it is often a condition precedent to recovery.

In the unamended JCT DB contract, the requirement to notify Relevant Events (time only events) is not a condition precedent, but it is generally accepted that the requirement to notify Relevant Matters (money events) is a condition precedent.

That said, in my experience, some of the most common amendments I see are changes to these notification requirements. These amendments would often:

- Make the requirement to notify a Relevant Event a condition precedent;
- Introduce additional requirements that the notices must satisfy. If the contract says the notice should be on blue paper, it is no good serving it on pink paper (this example was used when discussing notice requirements by the House of Lords (now the UK Supreme Court) in a case called *Mannai Investment v Eagle Star Life* (1997)... look it up!); and
- Introduce tight timeframes for notification e.g. to notify within one week of the issue becoming apparent.

Fair warning. Please read your contract to see if the notification requirements have been amended and do what the amendments say. If the notice needs to be on blue paper and served within a week, then do it.

Moving on. As set out in the previous section, in the coming weeks and months there is likely to be events that arise which are both Relevant Events and Relevant Matters. There may also be events which arise that are only Relevant Events.

The difficulty with the JCT DB is that there are two separate notification clauses. One for Relevant Events (look at clause 2.24) and a separate one for Relevant Matters (look at clause 4.20).

To keep this article as concise as possible, I have set out a suggested procedure below on how to notify (1) an event which is both a Relevant Event and a Relevant Matter; and (2) an event which is only a Relevant Event.

Procedure for notifying an event which is both a Relevant Event and a Relevant Matter (e.g. the Employer restricting access to the site)

- If it becomes likely that the works will be delayed, then the Contractor should give a notice under clause

2.24.1. This notice should (1) include details of the circumstances and causes of the delay and (2) state what Relevant Event is applicable (so cite one or more of the Relevant Events listed at clause 2.26). If possible, this notice should also set out an estimate of any expected delay.

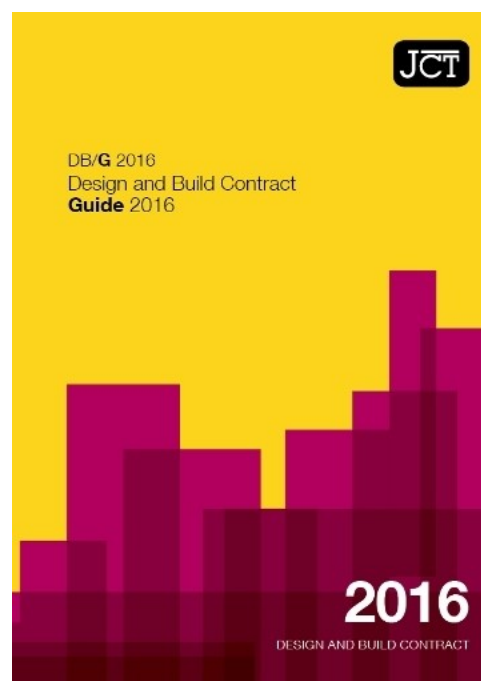
- At the same time as issuing the notice above, the Contractor should issue a separate notice under clause 4.20.1. If possible, this notice should contain an initial assessment of the loss and/or expense likely to be incurred by the Contractor and enough information to allow the Employer to ascertain the loss and/or expense incurred. If providing said initial assessment and information is not possible at the time of giving the notice (which is likely to be the case) then the Contractor should provide these as soon as possible after the notice.
- After the notices above have been given then the Contractor should provide regular updates at monthly intervals of (1) its estimate of the expected delay; and (2) its assessment of the loss and/or expense it has or will incur.

Procedure for notifying an event which is only a Relevant Event (e.g. force majeure)

- If it becomes likely that the works will be delayed, then the Contractor should give a notice under clause 2.24.1. This notice should (1) include details of the circumstances and causes of the delay and (2) state what Relevant Event is applicable (so cite one or more of the Relevant Events listed at clause 2.26). If possible, this notice should also set out an estimate of any expected delay.
- After the notices above have been given then the Contractor should provide regular updates of its estimate of the expected delay.

Assessing an extension of time – what is ‘fair and reasonable’?

Under clause 2.25.1, the Employer is required to give a “fair and reasonable” extension of time if a delay is caused by one of the Relevant Events.



In determining what is a 'fair and reasonable' extension of time, the Employer is obliged to act fairly, lawfully, rationally and logically – the words used by the Court in *John Barker v Portman Hotel* (1996). They are also obliged to act impartially, honestly and fairly – the words used by the Court in *Sutcliffe v Thackrah* (1974).

Using common-sense is generally the best way to abide by the obligations above.

With respect to the coronavirus outbreak, I would recommend parties to start considering the programme impacts as quickly as possible. Start getting programmes drawn up which are suitably logic-linked to enable everyone to easily see the impact that delaying certain events will have on the overall duration of the project.

It is much easier to make a fair and reasonable determination when you understand the logic and how the durations are arrived at. The worst time to make a fair and reasonable determination is at the end of the project when all of these current problems have been forgotten about.

Assessing loss and/or expense – ascertainment

Under clause 4.19, a Contractor is entitled to be reimbursed for any direct loss and/or expense it suffers as a result of one of the Relevant Matters materially affecting the regular progress of the works.

To make a successful claim for loss and/or expense, a Contractor must link cause and effect. In other words, a Contractor must prove, with reference to records and evidence, that a specific Relevant Matter (the cause) resulted in it suffering a specific loss (the effect).

Therefore, the ascertainment of loss and/or expense is highly dependent on the effect of the Relevant Matter.

Say for example an Employer closes the site due to the coronavirus outbreak. As set out above, this is a Relevant Matter. In this case, to recover its loss and/or expense, a Contractor would need to prove that the site closure (the cause) resulted in it suffering the loss and/or expense (the effect). The loss and/or expense in this example would typically be the likes of standing time, demobilisation costs, loss of productivity etc.

However, if a Contractor was already suffering (or was going to suffer) this loss and/or expense, because for example its resources being placed into self-isolation, its

supply chain had shut down, or its subbies did not turn up, then it may be difficult for a Contractor to prove that it was the site closure imposed by the Employer that caused this loss. This inability to link cause and effect may prevent a Contractor from recovering its loss and/or expense.

Think about dominoes (the game, not the pizza company). What event started the dominoes toppling over? Was it the site closing? Or was it the supply chain being shut down? This is usually a very difficult question to answer.

Cause and effect analysis can be extremely complicated. I expect to see lots of arguments in the coming months concerning the scenario described above.

To best protect yourself when these arguments do inevitably arise, regardless of whether you are a Contractor or Employer, there are three words you need to remember:

Records, records, records

I suggest that you do a pre-mortem of the situation. Imagine you are in a dispute in six months' time. What records would you have wished you kept? If you work that out, you will save yourself a huge amount of effort when we eventually beat this coronavirus pandemic.

Conclusion

I appreciate that this is a rather long article, but hopefully you found it useful. To summarise:

- The outbreak of coronavirus is likely to be a Relevant Event under the JCT DB contract. The outbreak may also indirectly trigger several Relevant Matters;
- Parties to the contract should immediately take steps to notify the event as a Relevant Event and as a Relevant Matter where appropriate to avoid arguments later down the line;
- The notification requirements of most JCT DB contracts are amended. Care should be taken to check these amendments to see how they impact upon the notification obligations of the parties; and
- Parties should work together regularly to keep each other informed of the likely programme and cost impacts of the coronavirus outbreak.

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