



## Covid-19, Force Majeure and JCT Contracts

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It is undeniable that the current novel coronavirus Covid-19 pandemic and subsequent lockdown is an event which is unprecedented in modern times and has caused significant disruption to those undertaking construction work in the UK (and abroad). You should check the terms of your contract at the earliest opportunity to find out what notices need to be given and when.

It is important to note that your rights and obligations will depend on precisely what the terms of your contract say and what has happened. The following is intended to assist those working on the JCT standard form. The unamended JCT terms are deliberately broad, and so do not deal with disease outbreaks specifically. One must therefore return to first principles.

### What are the relevant JCT provisions?

The relevant terms are the usual extension of time and loss and expense provisions. Issues that provide an entitlement to an extension of time (and limit exposure to liquidated damages) are referred to in the JCT contracts as Relevant Events. Issues that provide an entitlement to recover loss and expense are referred to in JCT contracts as Relevant Matters. The JCT requires notice to be given if either a Relevant Matter or Relevant Event applies.

It is important to remember that the lists of Relevant Events and Relevant Matters are different, so there are issues which will entitle you to an extension of time and extra money, and issues that will entitle you only to extra time. An entitlement to additional payment is not contingent on an entitlement to additional time (and vice versa).

It is therefore important to note what clauses you are giving notice under and what their effect actually is. The clauses that relate to disruption caused by a national or international crisis such as Covid-19 are likely to include the following (note that clause references are to the JCT 2016 Standard Building Contract Without Quantities):

### Variations

Variations can be a Relevant Event (clause 2.29.1) or a Relevant Matter (clause 4.22.1), so there is a potential entitlement to extra time and extra money for issues notified under this clause. Examples of variations that an Employer might instruct in a time of crisis could include:

- A restriction of access to the site.
- A requirement to carry out the same work in a different manner.

- A requirement to carry out the same work in a different sequence.
- A requirement to carry out completely different work.

The important feature here is that for these clauses to be relied on, the Employer must have instructed a variation. If you have taken it upon yourself to work in a different manner then you will not be able to rely on this clause.

### ***Architect/Contract Administrator's instructions***

These can be a Relevant Event (clause 2.29.2) or a Relevant Matter (clause 4.22.2), so there is a potential entitlement to extra time and extra money for issues notified under this clause. The most obvious such instruction is an Employer's instruction under clause 3.15 to postpone work.

### ***Any impediment, prevention or default ... by the Employer ...***

This is a catch-all clause and can be a Relevant Event (clause 2.29.6) or a Relevant Matter (clause 4.22.5), so there is a potential entitlement to extra time and extra money for issues notified under this clause.

Thought should be given to whether the Employer has done anything which puts them in breach of contract. For instance, have they delayed the provision of information, or failed to issue instructions? If so, notices can be given under these clauses.

### ***The carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work***

This is Relevant Event (clause 2.29.7) but not a Relevant Matter, so there is a potential entitlement only to extra time. It is not hard to imagine that there would be delays to the ordinary work of Statutory Undertakers at a time of crisis. If such a delay materialises, then notice should be given under this clause.

### ***The exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor's Person but which directly affects the execution of the Work***

This is Relevant Event (clause 2.29.12) but not a Relevant Matter, so there is a potential entitlement only to extra time.

Although this 'change of law' ground might seem obvious if the Government has put in place restrictions that affect work, considerable caution needs to be exercised here. The Government is able to issue advice in a time of crisis, which although may be entirely sensible, does not actually represent the use of a statutory power or change in law. If you think that this ground applies then you need to be clear on what the government action actually is. You should also consider whether any of the out clauses set out here apply as well.

### ***Force Majeure***

This is Relevant Event (clause 2.29.14) but not a Relevant Matter, so there is a potential entitlement only to extra time.

Force majeure is not defined in the JCT contracts. Keating on Construction Contracts 10th Edition gives the French definition (which has judicial approval in this country) as being used

*“with reference to all circumstances independent of the will of man, and which is not in his power to control... Thus, war, inundations and epidemics are cases of force majeure; it is even been decided that a strike of workmen constitutes a case of force majeure.”*

If the JCT contract has been amended to provide a specific definition of force majeure, then that definition will override the definition above.

Given that the current Covid-19 issue has been classified by the World Health Organisation as a pandemic (worse than an epidemic), it seems reasonable that this would give rise to an entitlement to an extension of time under an unamended JCT contract, if properly notified.

### **Which Relevant Events and Relevant Matters should I notify?**

You should err on the side of giving notice under as many clauses that apply, rather than relying solely on the force majeure provision. This is particularly the case if it is the Employer that is preventing you from working, as notice of this may give rise to an entitlement to extra money, as well as extra time.

If you expect to incur both loss and expense and delay, then notices need to be given in respect of each. The notification requirements are given at clauses 2.27 (delay) and 4.21 (loss and expense). You should carefully review the notification provisions of your contract as they are often amended.

To comply with the default JCT delay notification provisions, the notice should:

- Be given as soon as it becomes reasonably apparent that there will be a delay.
- Set out the material circumstances, including the cause or causes of the delay.
- Identify in the notice any event which in his opinion is a Relevant Event.
- In respect of each event identified in the notice you should, if possible, give particulars of the expected effects of the delay, including the effect on the completion date. If this is unknown, then a follow up notice containing this information should be given as soon as possible.

To comply with the default JCT loss and expense notification provisions, the notice should:

- Be given as soon as soon as it it becomes reasonably apparent that a Relevant Matter is likely to affect regular progress or give rise to loss and expense. The notice should identify which Relevant Matters are being relied on.
- Set out the material circumstances, including the cause or causes of the delay.
- Provide your initial assessment of the loss and expense incurred and any further amounts likely to be incurred, together with any information as is reasonably necessary to enable the Architect/Contract Administrator or Quantity Surveyor to ascertain the loss and/or expense incurred. If it is not possible to give this information at the outset, then it should be provided as soon as possible.

### **Keep Records**

It is likely that when the current crisis abates, there will be a lot of picking at delay notices by Employers and a lot of disputes arising as Employers challenge the entitlements claimed. There are likely to be arguments over precisely what it was that occurred on site that gave rise to the disruption. For instance, was it the actions of the Employer, or was it the failure of the Contractor's supply chain?

It is therefore critical that good records are kept which back up any delays incurred or losses suffered. In a dispute, it is often the party with the best records that wins.

- Keep good site diaries, recording any standing time or non-productive time. The more detail provided in these, the better.
- Keep invoices that show all additional costs, including any demobilisation/remobilisation costs.
- Keep records of your efforts to mitigate any loss and expense and delay.
- Record any instructions issued by the Employer or Contract Administrator.

## Termination

Clause 8.11 of the JCT 2016 Standard Building Contract Without Quantities provides that where the whole of the works is suspended for a continuous period of the length stated in the Contract Particulars (the default is 2 months) for one or more of various events, including force majeure, then either party can give 7 days' notice of termination. The Contractor is then entitled to consequences which are the same as termination for Employer default, so include the value of work properly executed, reasonable cost of removal, the cost of materials or goods for which the Contractor is bound to pay and any direct loss and expense (including that caused by the termination).

Whether this clause becomes capable of operation depends on what happens in the coming weeks and months. There is discussion of restrictions being more or less strict at different times, which might mean that there is an overall suspension that is longer than 2 months, but which is not "continuous" for the purpose of this clause.

## Key Advice

- Review your contract as soon as possible to ascertain the loss and expense, delay and termination provisions.
- Give any notices required as soon as possible.
- Keep good records of any delays, and loss and expense.

Date: 6 April 2020

### Free initial consultation

If you have a contractual problem, are involved in a project which is going wrong, or if you have a dispute, we can assist. We offer a *free one hour initial consultation* to all clients. Please get in touch for more information.



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