

# QS Series: COVID19

**Presented By**

**Conor Ahern, Trainee Solicitor**



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# QS Series: COVID19



## Presented By:

### Conor Ahern

Conor is a Chartered Quantity Surveyor with over 12 years' experience in the Construction Industry acting for Contractors, Consultants and Developers both in Ireland and the UK working on contentious and non-contentious matters

Experience and qualifications:

- BSc in Quantity Surveying
- MSc in Construction Law and Dispute Resolution at Kings College London
- Graduate Diploma in Law at BPP (Conversion)
- Legal Practice Course at BPP (Ongoing)
- Member of Royal Institute of Chartered Surveyors (MRICS)
- Fellow of the Chartered Institute of Arbitrators (FCIArb)

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## QS Series: COVID19

### Housekeeping:

- **Questions in the Q & A box, answered at the end**
- **This is NOT legal advice**



# QS Series: COVID19

## Agenda

- Notice
- Variations
- Loss and Expense
- Adjudication
- Negotiation
- Conclusion



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# Notice

- Extension of Time – ‘Force Majeure’ Clause which is drafted quite broadly in JCT and NEC
- Check the contract for any conditions precedent
- Record the following dates (as applicable):
  - Impacted productivity;
  - Left site and returned to site;
  - When the Site Operating Procedures were updated (now v5 since 1 July 2020)





# Variation Categories

## **COVID19 Variation 1**

The **alteration or modification** of the design, the quality or the quantity of **the Works** including the addition, omission or substitution of any work



# Addition, Omission or Alteration

- Narrow definition of the “**Works**”
- **Strachan & Henshaw vs Stein (1997) 87 BLR 52**
  - Site facilities had to be moved a significant distance
  - Reduced productivity and Contractor brought a claim
  - Works defined as ‘**work to be done by the Contractor under the Contract**’
  - Court of Appeal found this did not extend to the site facilities
- Most standard forms are widely drafted now but it serves as a reminder to check the detail



# Interpretation

## COVID19 Variation 2

The imposition of an **instruction** of the Architect / Contract Administrator of any **obligations or restrictions** in regard to:

- **Access to the site** or use of any specific part of it;
- Limitations of **working space**;
- Limitations of **working hours**; or
- The execution or completion of the work in any **specific order**



# Variations

- **Access to the site** (or lack of)
- **Working space** is important given social distancing guidelines and the need for 1 – 2 metres
- **Working hours** can have been effected and many sites can now work staggered shifts due to longer site opening hours



# Execute The Works In Any Specific Order

Depending on the Contract wording, if the contract is **silent** as to the order of works then if the Employers team issues an instruction to complete the works in a reasonable order then this will not always amount to a variation

## **Neodox v Swinton (1958) 5 BLR 34**

- The engineer instructed the Contractor to carry out work in specific way
- The court held that the Contractor entitled to a variation if:
  - The engineer's instructions amounted to a breach of contract by the engineer or the employer, in this case the working method was reasonable
  - The instructions amounted to a variation of or an addition to the contract works, for which the contractor was entitled to an extra charge **under** the contract





# Valuation Rules

Where the execution of additional or substituted work is of similar character, but **different conditions and quantity** then a **fair allowance** must be made for difference

## What is a fair allowance?

**Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [1999] EWHC 263** held this to mean:

*"... a fair valuation generally means a valuation which will not give the contractor more than his actual costs reasonably and necessarily incurred plus similar allowances for overheads and profit for anything more would confer on him an additional margin for profit and would not be fair to the employer"*

# Presenting Variations

## Records

- Daily diaries
- Progress reports
- Dropline programmes
- Photographs
- Emails
- Notices
- Allocation sheets
- Concrete pour sheets

## Proving the drop in outputs

- Measured mile approach – records are key



# Loss And Expense

- Avoid Global Claims as the cause and effect should be obvious
- Consider prelim costs for the following:
  - Additional PPE and welfare
  - Travel costs
- L&E picks up the residue of sums which are not recoverable elsewhere in the Contract



# COVID19 And Adjudication

**MillChris Developments Limited v Waters [2020] 4 WLUK 45**

## **Legal Background:**

Could a party be granted an injunction in an on-going adjudication because of a belief that circumstances related to Covid-19 would result in a breach of natural justice?



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# COVID19 And Adjudication

## Case Background:

- Waters was the homeowner and MillChris was a Contractor/Developer
- In September 2017 MillChris carried out works at the Property
- In November 2019 MillChris ceased trading
- In March 2020 Waters alleged overpayment of £45,000 and commenced adjudication
- An Adjudicator was appointed and requested evidence by 3 April 2020
- The Adjudicator also requested a site visit on 14 April 2020
- MillChris asked to postpone the adjudication due to COVID19
- The Adjudicator proposed a two week extension to the timetable to deal with COVID19
- MillChris did not agree to the extension



# COVID19 And Adjudication

MillChris applied for an injunction to prevent the adjudication from continuing arguing:

- Breach of **natural justice** as they had ceased trading
- Needed time to obtain evidence from witnesses
- Their solicitor was self-isolating due to COVID19
- It did not have time to instruct an alternative solicitor to attend a site inspection

The '**natural justice**' point is key to adjudication and one of the few grounds available in order to resist enforcement







# COVID19 And Adjudication

The TCC refused the injunction on the basis that:

- The Contractor could have scanned documents to solicitor
- No need to be present at site visit but list of matters could be provided
- Contractor failed to contact its PM, undermining its evidence point
- Difficulty contacting previous director was not due to COVID19

The TCC confirmed that it would only grant an injunction to ongoing adjudication proceedings “**very rarely and in very clear cut cases**” and satisfying the criteria for an injunction under the well-established principles in **American Cyanamid Co v Ethicon Ltd [1975] A.C. 396**

# COVID19 And Adjudication

## Conclusion:

COVID19 delays are unlikely to amount to a breach of natural justice at enforcement but this will be dependent on the facts

In order to succeed there must be clear causation, without any other events breaking the chain of causation, between the events unfolding and the ability to plead a parties case

The parties must mitigate the effects of any causation - Parties should not rely on COVID19 as a means to delay adjudication in order to gather more evidence



# Negotiation Of COVID19 Costs

- Apply for COVID19 costs in application for payment
- Use COVID19 costs to negotiate a better deal particularly if the project is at final account stage



# Future Contracts

- COVID19 is now reasonably foreseeable as an event
- Broaden the definition of the *force majeure* clause to include time and/or money
- Site possession and termination definitions
- Need to consider the potential effect on labour, plant and materials
- Long-stop date for future price increases?
- Contractor needs to address the issue - Silence is not enough (*Neodox*)
- Consider the drafting very carefully and avoid future contract problems



# Conclusion

- Notice
- Variations
- Loss And Expense
- Adjudication
- Negotiation
- Future Contract



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**CONCLUSION**



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**QUESTIONS?**

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# The QS Series

## Other webinars in this series:

- Construction Law: Interaction
- Variations
- Loss & Expense
- Payment
- Adjudication

The aim of this series is to assist Quantity Surveyors (and other members of the Project Team) to understand how to manage these topics when they occur

**All available via our YouTube Channel -**

**<https://www.youtube.com/channel/UCPA6ANPzr6db7DZxVmezvQQ>**



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# Looking for more information?

## Upcoming Online Seminars

**COVID19 Vs Your Construction Contract UPDATE**

**Wednesday 15<sup>th</sup> July, 6pm**

**Leave Site Now & Don't Come Back!**

**Wednesday 22<sup>nd</sup> July 2020, 8am**

**Renewable Energy Part 3**

**Wednesday 22<sup>nd</sup> July, 6pm**

**COVID19 & The Insurers Response**

**Thursday 23<sup>rd</sup> July, 6pm**

To book a place / places please email Julie at [seminars@silverllp.com](mailto:seminars@silverllp.com)



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# What The Property Team Does & What We Can Do To Help You!

- **Development agreements – conditional contracts and pre-let agreements**
- **Financing for the purchase and building works and the re-financing including short term bridging finance**
- **Site acquisition and sale (from plan or as-built)**
- **Review of Section 106 Agreements and other planning documents**
- **Option agreements**
- **Joint ventures for finance and development**
- **Land promotion and other acquisition schemes**
- **Residential and mixed use development and plot sales/off plan purchases for high net worth clients**
- **Leases and the management work of commercial and residential portfolios**
- **Servicing the needs of commercial occupiers of offices, showrooms, warehouses and ‘sheds’**

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