

To our Social Housing Partners

Date: 24 March 2020

Dear Sir/Madam

COVID-19 - Open letter to Our Clients

We write on behalf of Chartered Surveyors, Employers Agents and Project Managers, that have proudly served the social housing sector and, between us, G15 associations for over 40 years. In these challenging and changing times we set up the Consultants Thought Leadership Group (CTLG), initially as our response to the Grenfell tragedy, to drive quality and implement change within our sector. We now have additional further challenges ahead.

Having invested in our businesses over decades, embraced the ever-changing economic and regulatory context and responded to help meet the demands of our clients in the procurement and delivery of new build construction, asset management, maintenance and repair, we now have to navigate one of the biggest challenges we have ever faced, in COVID-19.

Part of the group's mission is to share our knowledge and vast experience so that we can overcome the sectors incumbent challenges providing a "think tank" for delivery of our service to our Social Housing Partners, helping to redefine the way that we all communicate and do business together.

As the position with COVID-19 and Construction continues to develop, Government advice at this moment in time appears somewhat ambiguous as to whether the Industry should continue to work.

We are aware that Contractors are now taking decisions to shut down sites, and the ramifications associated with this decision needs to be assessed.

We are also aware that some clients are instructing sites to be shut.

There are a number of issues associated with these decisions, and as an Industry we need to work together to overcome the impact of COVID-19, not only in terms of our health and wellbeing, but for the industry's health and wellbeing.

As a recent quote from a Contractor noted in Building Magazine says: *"If we can't drop our industry's adversarial attitude at a time like this, then we never will"*

Now is the time for us all to collaborate, to overcome, and to minimise the impact on all of us, so that we can all pick up once this is over and to evolve into a fitter better equipped sector that continues to be a significant contributor to the economy.

Members

Airey Miller
Baily.Garner
Churchill Hui
Silver

Martin Arnold
Potter Raper
Philip Pank Partnership
Frankham Consultancy

Faithorn Farrell Timms
Pellings
John Rowan and Partners
Hunters

Calford Seadon
Walker Construction Consultants
BPM Project Management

So what can we all do?

Firstly, we all need to agree a sensible and ordered way of endeavouring to meet contractual obligations. And where they can't be, a collaborative agreement between the contracting parties as to how to proceed. These include progression of Works, Valuation of Works, Security and Health and Health and Safety.

Secondly, we need to record a position now so that when we return, we know where we are starting from.

There have been a number of helpful Articles from Legal Advisers, some of which we note the links below:

<https://www.devonshires.com/publications/latest-government-advice-regarding-covid-19-and-what-it-means-for-live-construction-sites/>
<https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/construction-engineering-and-projects/2020/covid-19-time-and-money-under-ict/>
<https://www.lexology.com/library/detail.aspx?g=081f69f5-85d5-4ff5-b6f5-dd7b6f0bdc8b>
<https://www.constructionenquirer.com/2020/03/16/legal-guide-to-coronavirus-and-construction-contracts/>
<https://www.fieldfisher.com/en/insights/covid-19-and-construction-contracts>
<https://www.bakermckenzie.com/en/insight/publications/2020/02/coronavirus-english-law-perspective>
<https://www.fenwickelliott.com/research-insight/articles-papers/other/coronavirus-construction-contracts>
<https://www.devonshires.com/publications/latest-government-advice-regarding-covid-19-and-what-it-means-for-live-construction-sites/>

Sealing documents with e-signatures

<https://www.traverssmith.com/knowledge/knowledge-container/covid-19-closing-the-deal-when-the-office-is-closed/>
<https://www.herbertsmithfreehills.com/latest-thinking/covid-19-global-managing-delay-under-ict-contracts>
<https://www.herrington-carmichael.com/coronavirus-construction-industry/>

In summary under a typical JCT D&B, subject to of course any specific client amendments, two fundamental issues arise through Force Majeure:

- It is likely to be a relevant Event but not a Relevant Matter (I.e. EOT may be given but no Loss and Expense).
- If the matter is over a 2-month period (or as varied) either party can determine the contract.

There has also been the issue of PPN's from the Government, again the links are here:

<https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>
<https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>

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These in summary are the Government's attempt to maintain some sort of Cashflow channelled through the public sector. Whilst this is helpful for Local Authority guidance, are other Registered Provider Clients, or Private Sector Clients going to take a similar approach? For the sake of the Industry we hope they will.

What we suggest our clients and contracting bodies do now:

1. If shutting a site – Record with as much evidence as possible (Photographic/Video) the Work In Progress.
2. When in a position to do so re-open the site with first access prior to works re-commencing, being to the EA/CA to substantiate the WIP recorded.
3. Ensure the site is secure and again record evidence. Obtain confirmation from the Contractor that all required Insurances remain in place and are not invalidated by the site being closed.
4. Advise the Client and Consultants of the closure, advise why and provide emergency contact details.
5. Clients and Consultants to agree with Contractors processes for Valuations, agreement of process to be in writing, to only take into consideration reasonable and justifiable costs on an open book basis.
6. Clients and contractors may require deeds of variation to deal with matters associated with valuations as substantially amended contracts may preclude the ability of clients to follow the principles of the Government's PPN's. In terms of Deeds of Variation Legal advice on how these can be executed remotely maybe required.
7. Progress Meetings to continue remotely through MS Teams or other agreed portal, Contractors Reports to continue, valuations to continue but on an open book basis.

In summary, we all need to pull together, agree a sensible – non-adversarial way forward on each site, maintain the norm as far as practicable, and see out COVID-19 so we can return to an Industry in good shape.

We are aware that some legal advisers are taking a more adversarial approach in terms of definition of Force Majeure, we do not believe this is either helpful or collaborative and will only create more uncertainty in this time of significant uncertainty.

Our intention is to assist all to return to a healthy industry not one with extended legal battles which will not help any of us. As another Legal Adviser has just stated:

“In these unprecedented times we advise employers and contractors to co-operate with each other at the earliest opportunity and to have a sensible and pragmatic conversation about whether it is possible (or not) to carry out work on the construction site safely and in accordance with the Government's directions and advice”

Let's all do that!

Yours sincerely

Thought Leadership
For and on behalf of CTLG.

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