

Proving COVID-19 Related Time Claims

A step-by-step guide

The COVID-19 pandemic has led to widespread closures and disruption to businesses around the world. Whilst the construction industry and its supply chain have remained active, it has not been immune to this upheaval. It has been estimated that the impact of the COVID-19 pandemic is causing productivity losses of around 15% on UK construction sites leading to project delays and a surge in disputes.¹

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Contractual uncertainty: the verdict on business interruption

In relation to these challenges, over the past six months, the courts have sought to provide legal clarity on the meaning and effect of certain business interruption (BI) insurance policies² by way of a test case brought by the Financial Conduct Authority (on behalf of UK based small/medium businesses). The purpose of this has been to resolve contractual uncertainty around insurance claims related to the COVID-19 pandemic and define the validity of claims brought under BI insurance policies.

On 15 January 2021³, the Supreme Court found (largely) in favour of the businesses who will now be eligible for insurance pay-outs to cover business losses sustained because of the pandemic. The total value of such claims is estimated to be in the billions.

How is this relevant to the construction industry?

This ruling provides a timely reminder of the principles which need to be applied to properly demonstrate the effect of COVID-19 as a precursor to a successful claim for relief.

¹ Construction Manager, 23 June 2020 (<https://www.constructionmanagermagazine.com/covid-19-causing-extra-15-productivity-loss-on-uk-sites>).

² Business interruption insurance covers policyholders for loss of income during periods when it cannot carry out business due to an unexpected event.

³ *Financial Conduct Authority v. Arch and Others* [2021] UKSC 1.

The mere existence of the current pandemic will not automatically result in an entitlement to additional time or money. The key to successfully demonstrating the effects of COVID-19, either under an insurance claim or under the terms of the contract, remains a robust delay and disruption analysis.

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Is it delay or disruption?

Delay and disruption often occur together as a consequence of events, albeit being different issues.

Delay relates primarily to delayed completion (i.e. critical delay). Disruption is where the work is carried out less efficiently than was planned⁴, resulting in a loss of productivity and/or the need to implement mitigation measures; both resulting in additional cost.

Disruption may cause critical delay but, more often, causes non-critical delays which are not picked up through a review of the critical path alone. As a result, a successful extension of time claim does not result in the recovery of the losses associated with the disruption on site. Despite this, from experience, all too often it is disruption rather than critical delay that has dominated the losses suffered.

“A claim for disruption is not as simple as establishing the difference between what was planned and what actually happened.”

How do you prove a delay claim?

Insofar that matters related to COVID-19 have given rise to a delay to the critical path⁵, the usual prerequisites to demonstrating an extension of time claim apply. These are:

1. Demonstration of proper notification of delay in line with the contract provisions

2. Identification that an excusable event under the terms of the contract has occurred
3. Establishing a causal link between the excusable event and the delay incurred; and
4. Demonstration that a delay to completion (i.e. a critical delay) has occurred.

How do you prove a disruption claim?

A claim for disruption is not as simple as establishing the difference between what was planned and what actually happened.

A useful starting point for understanding the prerequisites of such claims is the judgment in *Walter Lilly & Company Limited v. Mackay and another* [2012]⁶; the court advised that in order to bring a successful disruption claim a contractor is required to submit particulars which:

1. Demonstrate that a disruptive event has occurred which gives rise to loss and/or expense under the terms of the contract
2. Evidence a causal link between the disruptive event and the delay and/or disruption experienced; and
3. Proof (and justification) that the disruption experienced caused delay and the incurring of loss and/or expense.

1. Demonstrating that a disruptive event has occurred

This is predicated by the timely submission of notices in line with the contract requirements to prevent any potential time-barring and to identify that the works have been affected (notwithstanding that the full extent of the impact may still not be known).

Whilst standard forms of construction contract were not written with the COVID-19 pandemic in mind, the variable provisions included in relation to *force majeure*⁷ events, which relate to the occurrence of an event which is outside the reasonable control of a party and prevent it from performing its contractual obligations, provide an avenue to seek relief for delay and also potentially for losses arising from prolongation or disruption.

- Within NEC forms, clause 19 (prevention) deals with force majeure type events (albeit there must be an impact on the date of completion of the whole of the

⁴ For example, lack of unrestricted access, out-of-sequence working or work-area congestion.

⁵ For example, site closure, alteration/suspension of certain works or supply chain issues.

⁶ *Walter Lilly & Company Limited v. Mackay and another* [2012] EWHC 1773 (TCC).

⁷ The judgment in *Lebeaupin v Crispin* [1920] 2 KB 714 considered that the term *force majeure* was "...used with reference to all the circumstances independent of the will of man, and which it is not in his power to control... Thus war, inundations, and epidemics, are causes of force majeure ...".

- works to entitle additional time and additional cost to be claimed)
- The JCT suite lists force majeure as a *Relevant Event* (allowing for an extension of time), but not as a *Relevant Matter* (allowing for the recovery of loss and/or expense)
- Clause 18 of FIDIC 2017 Yellow/Red Books deals with “*Exceptional Events*” and, subject to giving proper and timely notice, the affected party is excused performance of those obligations for as long as the event or circumstances prevents performance. This does not, however, apply to claims for additional cost.

Essential to this step, therefore, is a review of **each** active contract impacted by the disruptive event to consider what action needs to be taken and identify provisions which may assist in the current situation.

Additional supplemental notices also require consideration as these may be required to reflect the further development of the disruptive event which may impact upon that previously notified.

2. Evidencing a link between the event and the delay and/or disruption experienced

With regards to presenting a disruption claim on the impact of COVID-19, the timing and effect of recent government interventions, in particular, the enactment of specific legislation is key.

The notification of a disruptive event ought to prompt the compilation and maintenance of detailed records relating to staff, labour, material and plant availability (including if they are unable to attend site due to self-isolation, infection, lockdown restrictions and any new logistical restrictions). Any new working requirement imposed by specific legislation ought to also be documented with new risk assessments and method statements compiled (highlighting differences/restrictions to that previously proposed and any additional resources now required).

Such records may include:

- Programme updates and detailed site progress information
- Detailed labour and plant allocation/attendance records in the periods before and during the pandemic (including evidence of any site personnel who are unable to work, reduced labour/plant capacity and standing time)

- Evidence of any delays in the delivery of plant and materials
- A list/drawings of work areas where work is unable to proceed
- Photographs (date stamped) highlighting site restrictions, alternative access arrangements, additional measures and congestion
- Delays to any third party or subcontractor works (including handover records)
- Increased costs attributed to site restrictions, additional measures required or from the supply chain.

This contemporaneous factual evidence will be essential to support a successful disruption analysis and demonstrate how the loss of productivity can be linked to the site conditions and the actual production due to either social distancing or government restrictions⁸.

“The notification of disruption attributed to COVID-19 is not an opportunity to excuse oneself from unrelated project delays and inefficiencies such as procurement issues or issues relating to design.”

KEY CONSIDERATIONS:

The notification of disruption attributed to COVID-19 is not an opportunity to excuse oneself from unrelated project delays and inefficiencies such as procurement issues or issues relating to design. It is crucial to identify and segregate COVID-19-related issues from **other unconnected issues** to address any counter-arguments that the contractor was late in any event and was incurring losses, in any event, meaning that COVID-19 does not have any impact.

A further consideration when maintaining records is that many contracts incorporate a **duty to mitigate delays** incurred, so this step ought to trigger the recording of the desirable actions being taken to mitigate such delays. This can include extended work hours, re-planning of the works to minimise the effects of the legislative requirements and convening risk meetings to identify the measures to be taken to mitigate delay or disruption.

⁸ It is further recommended to insist that the supply chain (subcontractors, plant operators and material suppliers) also provide similar information.

3. Proving that the disruption experienced caused loss and/or expense

The next step is to use the contemporaneous records to prove that COVID-19 has caused disruption and a loss of productivity.

In doing so, the contractor will need to demonstrate the cost effect of COVID-19 on the direct labour and plant resources as well as on indirect resources such as supervisory staff, standing plant and where resources have had to be increased.

Whilst there is no single defined method for demonstrating the above, and so it remains open to a contractor to choose an appropriate means of assessing the effects, the [SCL Protocol](#) sets out several methods for the calculation of lost productivity resulting from a disruption event:

Productivity-based methods	Cost-based methods
1. Project-specific studies:	1. Estimated v incurred labour
a. Measured mile analysis	2. Estimated v used cost
b. Earned value analysis	
c. Programme analysis	
d. Work or trade sampling	
e. System dynamics modelling	
2. Project comparison studies	
3. Industry studies	

The SCL Protocol sets out that *productivity-based methods* and *project-specific studies* are preferred because of their greater reliability and general acceptance given that these are furthest from a pure total cost claim (which makes no effort at all to prove causation).

Productivity-based methods are those seeking to measure the loss of productivity in the individual resources utilised and then allocates a price to that loss⁹. Of these, the benchmark is widely considered to be the “[measured mile analysis](#)”.

This looks at productivity levels for an activity (labour, plant, materials or period of time) where there was no disruption which then becomes the baseline (or the “measured mile”) against which the expended resources and subsequently the impact of the disruption is measured/quantified.

As such the following is key in successfully preparing such an analysis:

- Identifying disruption impacted activities and **specific** claims on an area by area, activity by activity, or period by period basis¹⁰.
- Preparation of a causation section to explain the relationship between the disruptive event and its impact to establish the basis for the claim.
- Establish a **sensible** and **achievable** baseline for the undisrupted productivity levels that would have been achieved *for each specific claim* (by reference to man-hours, productivity, cost or resource data) had the disruptive event not occurred.¹¹
- Fully referenced analysis of the contemporaneous records relating to the disruptive event and its effect on the productivity achieved (by reference to the metric) *for each specific claim*.
- Consideration of any other factors which may have affected progress, including the contractor’s own risk events and their impact on the COVID related disruption identified *for each specific claim*.
- Comparison of the impacted metric (adjusted as necessary) with the unimpacted metric to identify the lost man-hours, productivity or cost as a per cent difference in productivity or productivity difference achieved¹².
- Quantification of the compensation necessary to place the contractor in the same financial position it would have been had the event complained of not occurred¹³.

By following the above procedure, it will be possible to identify a cause and effect relationship between COVID-19 and the disruptive effect on each of the affected site operations.

⁹ Conversely cost-based methods seek to identify the difference between the actual cost and the planned cost without first measuring productivity losses to the resources.

¹⁰ Whilst not fatal to successfully demonstrating entitlement, “total cost claims” or “global claims” are less credible.

¹¹ This should be reflective of the site progress achieved (as far as is possible) as opposed to just the tendered rates which may not have been achieved, even without the disruptive event. Where this is not possible it may be suitable to identify this baseline from a different but similar project or from standard output/productivity data.

¹² This can take the form of a graphical representation of productivity to identify and determine the impacted and unimpacted periods of performance.

¹³ This can take the form of the hourly labour rates factored in to quantify the total damages incurred as a result of lost productivity.

3 key steps to preparing a successful disruption claim

The key to preparing a successful disruption claim is:

- **Accurate record-keeping, capturing the amount of work completed and the resources expended:** to demonstrate a link between cause and effect, and entitlement to disruption.
- **Establishing an accurate and robust baseline scenario:** revisiting the tender assumptions and productivity levels achieved prior to the disruption as a basis for measuring disruption.
- **Using factual evidence:** There is no single defined method of analysis but a productivity-based method (based on factual evidence) which measures the loss of productivity to the individual resources utilised, and then allocates a price to that loss, is generally preferred.

+90%

Over 90% of extractives, infrastructure and renewable resources companies in the G20 are concerned about a drop in productivity due to the COVID-19 outbreak.*

*FTI Consulting 2021 Resilience Barometer

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