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**JCT &
COVID**

Oct 2020

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JCT Contracts and COVID-19

GERALDINE FLEMING
BSc (Hons) LLB (Hons) MRICS

October 2020



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SECTORS

Driver Trett have the expertise and experience that brings immeasurable benefits to clients across the entire spectrum of sectors within the engineering and construction industries including:



- Building
- Power
- Infrastructure
- Process and Industrial
- Oil and Gas
- Transportation
- Marine and Offshore
- Utilities



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THE DRIVER GROUP

- Market leader in expert witness, planning, commercial, technical and dispute avoidance / dispute resolution
- Established in 1978
- Stock exchange listed plc. AIM (2005)
- Over 500 staff worldwide
- Network of offices across Africa, the Americas, Asia Pacific, Europe and the Middle East



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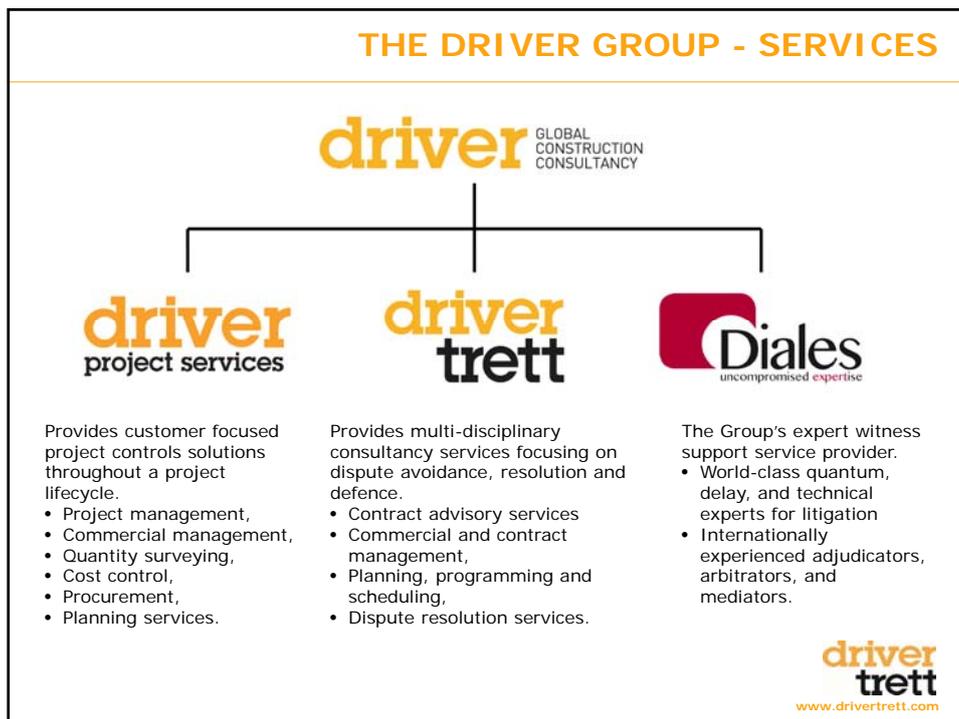
THE DRIVER GROUP - UK

In the United Kingdom we operate from a number of regional offices to offer the widest possible geographical coverage:

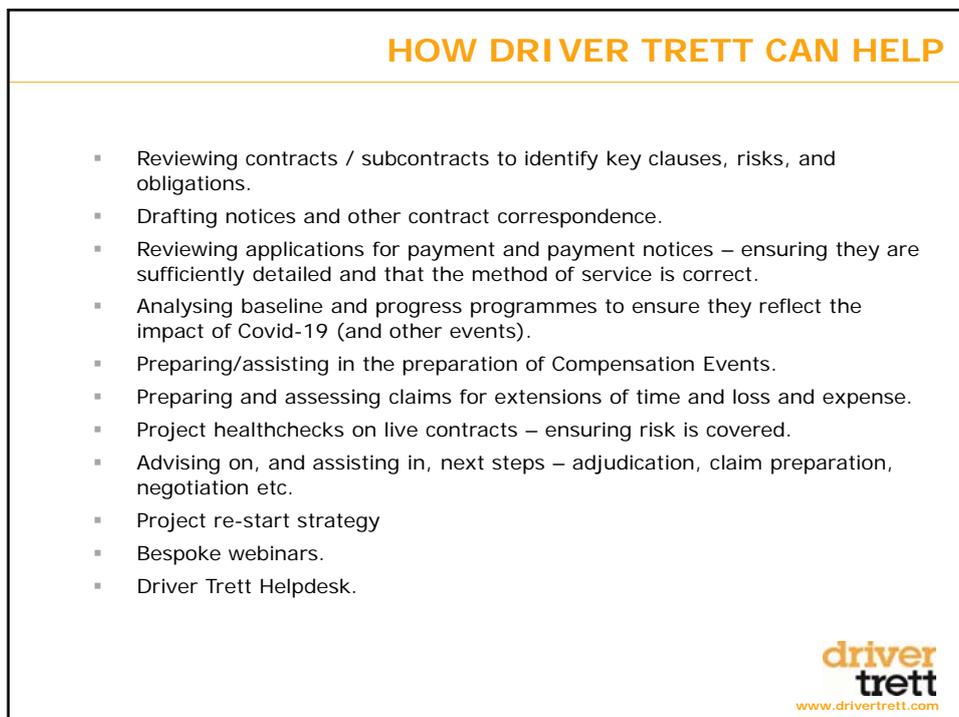
- Bristol
- Coventry
- Glasgow
- Haslingden, Lancashire
- Hooton, Cheshire
- London
- Reading
- Teesside



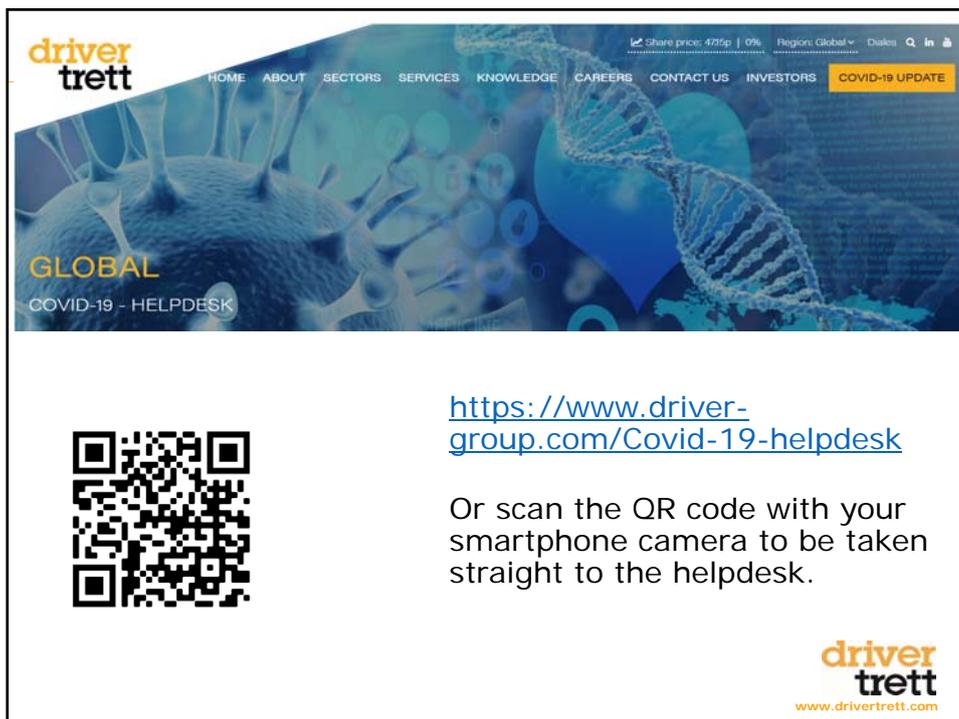
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The image shows a screenshot of the Driver Trett website. At the top left is the 'driver trett' logo. The navigation menu includes 'HOME', 'ABOUT', 'SECTORS', 'SERVICES', 'KNOWLEDGE', 'CAREERS', 'CONTACT US', and 'INVESTORS'. A 'COVID-19 UPDATE' button is visible in the top right. The main banner features a blue background with a DNA helix and a globe, with the text 'GLOBAL COVID-19 - HELPDESK'. Below the banner, a QR code is positioned on the left, and a blue hyperlink '<https://www.driver-group.com/Covid-19-helpdesk>' is on the right. Text below the link reads: 'Or scan the QR code with your smartphone camera to be taken straight to the helpdesk.' The Driver Trett logo and website URL 'www.drivertrett.com' are in the bottom right corner.

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The image is an advertisement for the Driver Trett Digest. At the top right, the text 'DRIVER TRETT DIGEST' is displayed in orange. Below this, on the left, is a QR code. Text to the right of the QR code says: 'To download the current issue of the Digest, scan the QR code with your smartphone or visit our website: www.driver-group.com'. Below the QR code, it says: 'Or email marketing@driver-group.com to request a copy.' On the right side of the advertisement is a cover image of the 'DIGEST' magazine. The cover features a circular dial with 'SKILL' and 'EXPERT' labels and a red needle. The text 'Developing Experts' is at the bottom of the cover. The Driver Trett logo and website URL 'www.drivertrett.com' are in the bottom right corner.

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GERALDINE FLEMING

BSc (Hons) Quantity Surveying

MRICS

Worked for main contractor for five years as site QS

Completed law degree in 2002

Completed solicitor's exams in 2004

Worked in construction claims consultancy for over 20 years



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FORCE MAJEURE



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FORCE MAJEURE

What is force majeure?

No clear legal definition, and not defined in JCT contracts

Lebeaupin v Richard Crispin and Company (1920)

*all circumstances independent of the will of man ...
war, inundations, and epidemics, are cases of force majeure*

McKendrick "Force Majeure and Frustration of Contract" 1995

Thus, with some hesitation, we might say that in English law an event will be a *force majeure* event if it constitutes a legal or physical restraint on the performance of the contract (whether or not occurring through human intervention, although it must not be caused by the act, negligence, omission or default of the contracting party) which is both unforeseen and irresistible.⁴¹



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HOW DOES JCT DEAL WITH CORONAVIRUS?

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JCT CONTRACTS AND CORONAVIRUS

JCT Design and Build Contract 2016

Where do we look in the contract?

- Extension of time (Relevant Events)
- Loss and expense (Relevant Matters)

Relevant Events referred to in JCT DB 2016 at clause 2.26

“.14 force majeure”

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JCT - OTHER CLAUSES

Problem – “force majeure” only gives the Contractor an entitlement to an extension of time, and not to loss and expense (ie prolongation costs).

What other clauses are worth looking at?

- 2.26.1 – Changes (4.21.1)
- 2.26.2 – Employer’s Instructions (4.21.2)
- 2.26.3 – Deferment (4.20.1)
- 2.26.6 - impediment or prevention by the act or omission of the Employer (4.21.5)
- 2.26.13 – exercise of statutory powers
- 2.26.14 – force majeure

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JCT – NOTIFICATION

Unamended JCT DB 2016 contract

- Notification of EOT is not a condition precedent
- Notification of L&E **is** a condition precedent

Condition precedent?

- If you fail to give notice then you lose your rights

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JCT – EOT NOTIFICATION – 2.24.1

If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Employer of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.

- Whenever it becomes reasonably apparent
- progress
- Section
- Forthwith give notice
- Material circumstances
- Cause / causes of delay
- Identify "Relevant Event"

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JCT – EOT NOTIFICATION – 2.24.2

In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.

- Each event
- Particulars of the expected effects
- Estimate of expected delay
- Completion / Section

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JCT – EOT NOTIFICATION – 2.24.3

The Contractor shall forthwith notify the Employer of any material change in the estimated delay or in any other particulars and supply such further information as the Employer may at any time reasonably require.

- Any material change
- Estimated delay / any other particulars
- Supply further information required

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JCT – EOT - PROBLEM

6 Provided always that:

- .1 the Contractor shall constantly use his best endeavours to prevent delay in the progress of the Works or any Section, however caused, and to prevent the completion of the Works or Section being delayed or further delayed beyond the relevant Completion Date;
- .2 in the event of any delay the Contractor shall do all that may reasonably be required to the satisfaction of the Employer to proceed with the Works or Section;

Best endeavours – can include spending money to prevent delay ...

For Contractors, ideally “reasonable endeavours” should be used

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JCT – L&E NOTIFICATION – 4.19.1

If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.4 or because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.19.2 and compliance with the provisions of clause 4.20 be entitled to reimbursement of that loss and/or expense.

- L&E – preliminaries / prolongation costs
- Contractor is entitled to claim **BUT MUST MEET** clause 4.19.2 / 4.20 requirements

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JCT – L&E NOTIFICATION – 4.20.1

The Contractor shall notify the Employer as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him.

- “as soon as”
- When did we become aware?
 - December 2019
 - Mid January
 - Start March
 - PM briefings – 16 March 2020
 - PM address at 8:30pm on Monday 23 March 2020

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JCT – L&E NOTIFICATION – 4.19.2

That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain the loss and/or expense incurred.

Notification to include

- Initial assessment
- Such information “reasonably necessary ... to ascertain”

Records ...

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JCT – AMENDMENTS

- Remember – the previous slides have concentrated on an unamended JCT DB
- Many Employers will amend these terms in their favour, for example
 - Making the requirement for a notice for EOT into a condition precedent
 - Stating how the notice has to be issued (by recorded delivery?)
 - Inserting a specific timeframe for the issue of both EOT and L&E
 - Has the force majeure reason has been deleted?
 - Has a definition of force majeure been added in?

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INTERIM VALUATIONS

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INTERIM VALUATIONS

“Cashflow is the lifeblood of the industry”

Denning LJ in 1973

Construction industry survey: 22-26 March 2020 – 46 per cent of companies would struggle to maintain a viable business if market remains depressed for more than three months

CLC 1/4/2020 letter to PM “Emergency Plan”

The letter was written by the Construction Leadership Council with support from National Federation of Builders, Civil Engineering Contractors, Build UK, Association for Consultancy & Engineering, Electrical Contractors Association (ECA), Home Builders Federations, Federation of Master Builders, British Property Federation, Construction Products Association, and Construction Industry Council (on behalf of 35 professional institutions and associations)

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INTERIM VALUATIONS

- Well presented and easy to understand applications for payment
- Complying with the contract requirements (how, who, when)
- Sum due / basis on which this sum is calculated
- Fully particularised
- Records

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INTERIM VALUATIONS AND RECORDS

- Photographic records
- Marked up drawings
- "Contemporaneous" (at the time)
- Variations / Compensation Events properly priced – with all relevant back up (invoices etc)
- Evidence of materials on site – delivery tickets / photographs
- Progress report – based on progress on the last day on site

Potential for termination – this next interim valuation must detail everything

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THE COST OF SOCIAL DISTANCING



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NEW SOCIAL DISTANCING MEASURES WHO PAYS?

It depends on the contract

NEC3 – CE's attract time and money

JCT16 – force majeure is time only

What about contract amendments?

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PRICING NEW CONTRACTS

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PRICING NEW CONTRACTS

Force majeure only applies if there is an “unforeseen” event – is coronavirus now “unforeseen” (NEC3 – such a small chance ...)?

Quotations you have given since ?? - have these been provided in the knowledge of coronavirus?

Would you be precluded from claiming “prevention”?

Do you need to

- caveat your quotations?
- amend your own terms and conditions?
- Review all contracts that you have not yet signed and returned?

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CHECKLIST

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CHECKLIST

- Review your contracts. Identify which clauses give entitlement to extensions of time and additional cost entitlements
- Decide what clauses you are going to rely on
- Give the required notices, ensuring
 - They are sent using the stated contractual method (this could be email, post, recorded delivery, hand, document management system – every contract is different)
 - Timing – notices usually have to be served in a strict timescale
 - Giving the required detail – this may mean quoting clause numbers, confirming steps you are taking to minimise delay

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CHECKLIST

Records – hugely important. Consider

- Time - You must be able to evidence the effect of any delays
- Cost / loss and expense – keep all records relating to additional works, non-productive and out of sequence working, preliminaries and additional management time

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QUESTIONS



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