

# ACE insight webinar

## Risk, Professional Indemnity insurance and contract

## Before we start...

- This is best experienced through headphones which will cut out the background noise.
- To ask questions please go to “**questions**” in your control panel (the sidebar with the controls to the right of your screen). We’ll try and answer as many as possible, but don’t worry we’ll also answer any others we haven’t had time to cover after the webinar.
- Don’t worry if you miss anything we will be uploading this to our website in the next few days, so you can listen to us again if you want to!

## Agenda

### **Introduction**

Stephen Munro, Allen Gordon

### **Professional Indemnity Insurance**

Brian Graham, Brunel Professions

### **Covid-19 and consultants**

Manus Quigg, Brodies

### **Q&As**

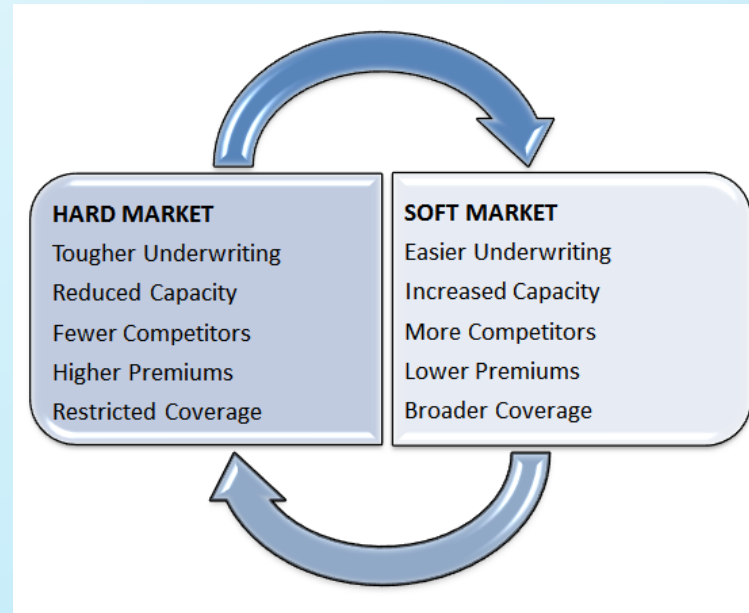


**Brian Graham**  
Associate Director  
Brunel Professions



## Professional Indemnity Insurance

# Why is the PI market hardening?



# Renewal Process



# The Future

**BACK**  
**TO**  
**THE FUTURE**





**Manus Quigg**  
Partner, Contentious Construction  
Brodies

# COVID AND CONSULTANTS

COVID-19 and Consultants



ENLIGHTENED THINKING

- 25 March 2020 – Scottish Government guidance is to stay at home unless essential works
- 21 April 2020 – Regulation 4(1) of the Coronavirus Regulations amended to apply the 2m social distancing rule to ‘Premises’ = "any building or structure and any land."
- 11 June 2020 – Phase 2 - Soft start on site
- 22 June 2020 - Phase 3 – Steady Start but social distancing and no PPE
- 15 July 2020 – Phase 4 – Steady Start and social distancing or PPE

- Two main ways in which COVID can impact consultants:
  - Delivery of design services
  - Contract administration
- Design Services
  - Our experience is that designers 'caught up' on projects
  - Few COVID-related disputes
  - Will be instances where design has been delayed by:
    - Furloughing own staff
    - Employer/contractor having furloughed staff
    - Lack of access to site
- Possible routes to recover more time and money (ref NEC Professional Services Contract)

## RECOVERY OF TIME & MONEY

- If your appointment has no force majeure clause then it offers no relief in the event of a force majeure event
- If there is a force majeure clause the party seeking to rely on it must have taken all reasonable steps to avoid or mitigate the relevant event.
- Frustration is where performance of the services has become legally or physically impossible, or circumstances have rendered performance of the contract radically different from what was originally agreed by the parties. Frustration brings the contract to an end. We are not aware of contracts being found to be frustrated as a result of COVID 19.
- There is an obligation to mitigate loss in both scenarios.

- Key Compensation Events
  - The Employer gives an instruction changing the Scope (constraint on how the Consultant Provides the Services)
  - The Employer or Others do not work within the times shown on the Accepted Programme or within the Conditions stated in the Scope
  - The Employer does not provide access to a person, place or thing as stated in the contract
  - The Employer gives an instruction to stop or not to start work or to change a Key Date
  - Force majeure – an event which stops or delays the Consultant completing the services at all, or by the date on the Accepted Programme, and which neither party could prevent, and an experienced Consultant would not have been expected to price for the risk as there was such a small chance of occurring

## RECOVERY OF TIME & MONEY (2)

- Compensation event has to be notified within 8 weeks of becoming aware of the event, or no time and/or money
- Subject to duty to mitigate – clause 63.7 – only cost and time reasonably incurred. This has been argued as including an obligation to furlough staff.
- X2 – change in law after the date of the Contract – from 21 April 2020 Reg 4(1) applied social distancing to Premises. Used more to cover disruption on site as a result of social distancing, and being used to argue for travel costs

- Key risks
  - Issuing instructions to close the site without client instructions
  - Incorrect assessment of extensions of time and loss & expense
  - Not advising on the risks of 'wrap up' deals to clients to get the works restarted
- Instructions
  - Clients now complaining about a liability to pay loss & expense throughout lockdown which would not have been required had no instruction been issued.
  - If instructions issued – do you have a record of the client approval?
- Assessments of time
  - What was the status of the contract at site closure? Was there culpable delay?
  - COVID 19 is a force majeure and likely to be the dominant cause of delay during lockdown.
  - Change of law is not a justification for being off-site if there is no force majeure clause under the contract



- Assessments of time
  - What was the extent of culpable delay upon return to site?
  - Did the contractor mitigate delay in his remobilisation?
  - Disruption is very difficult to prove. How can you be satisfied in making an assessment of future disruption without any evidence of progress or a 'measured mile' to assess against?
- SBCC Contracts
  - Clause 2.25 – *“save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable”*.
  - Clause 2.28.6.1 *“the Contractor shall constantly use **best endeavours** to prevent delay in the progress of the Works or any Section, howsoever caused, and to prevent the Completion of the Works being delayed or further delayed beyond the relevant Completion Date”*.

- Key Relevant Events
  - Force Majeure
  - Instruction
  - Exercise of a statutory power by the Government which directly affects the execution of the Works
- *"This proviso is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the Contractor's duty to reprogramme the Works either to reduce or prevent delay. How far the Contractor must take other steps depends on the circumstances of each case, but **it is thought that the proviso does not contemplate the expenditure of substantial sums of money**". (Keating 10<sup>th</sup> Edition )*

# WHAT DOES THE CONTRACT SAY? 'BEST ENDEAVOURS'

- Best endeavours sits somewhere between mitigation and acceleration.
- There are three qualifications to this:
  - The steps would have to be capable of producing the desired results – so there must be a worthwhile output in proportion to the measures being implemented.
  - It is not clear what level of reasonable cost the Contractor would be under an obligation to incur in order to meet its best endeavours obligations. A Court would probably decide it by reference to the cost of the works being undertaken.
  - Health & Safety considerations override all.

## Factors

- Legislation being reviewed every 3 weeks so what do you actually know now?
- Balance between time saved; cost incurred and prelims saved

Looking at this calculation does it justify shift working and NPO?

- Two quite obvious routes to CE's.
  - Cause 60.1 (19) – commonly termed 'prevention' ; that could also take in an instruction given by the PM under Clause 19.1.
    - Must affect ability to complete by completion shown in Accepted Programme. Where it does the contractor will get time and money; but needs to affect planned completion. Does not apply if the only impact is cost.
  - Secondary Option Clause X2.1. – a change in the law of the country in which the Site is located is a CE if it occurs after the Contract Date.
    - Secondary option and so does not apply by default
    - Coronavirus Regulations in Scotland, as amended from 21 April, will in our view engage X2.1, because they place social distancing on a statutory footing

#### Other routes

- PM's should have been issuing an instruction to stop work on sites. Has that power under Cl. 19 and Cl. 34.1.
- Change to WI – Clause 60.1 (1). Have works been modified or have additional constraints been imposed?
- Acceleration
- Balance between time saved; cost incurred and prelims saved

Looking at this calculation does it justify shift working and NPO?

- Clause 63.7 – obligation to mitigate loss - “reasonably incurred” - contractor inefficiencies from any assessment of CE and so reintroducing and resequencing work to maximise productivity will be something PM's are likely to audit.
- Clause 63.1 – Defined Cost Plus Fee
  - **Options A & B** = Defined Cost is as set out in Shorter Schedule of Cost Components. You **must** bring yourself within that on People, Equipment, Plant & Materials, etc. – whether subcontracted or not.
  - **Options C, D & E:** Defined Cost is Schedule of Cost Components plus any amounts paid to subcontractors (less DC).
- Reasonably settled that Coronavirus Regs will be change in law from 21 April, and so non-productive working will be captured under cl. 60. (19) or X2 if unamended.
- Discussions about assumptions; PM's can state assumptions; and these can be revised if later inaccurate – for example, that regs will remain in place.

- Is productivity be impacted more by work space or welfare?
  - If it is welfare then who has the liability to provide it? Relief Event?
  - May change over time depending upon work activity.
- Is the delay/disruption caused by COVID 19 or other contractors?
  - Will depend upon the ability to require works to be resequenced under the relevant contract.
  - Clause 5.1.2 of JCT/SBCC is the focus of attention just now.
- How do I assess the extent of any disruption?
  - Measured mile from before suspension?
  - Record keeping essential. Can staff work as before and then stop?
- Based on the above any amendments to the contract/awards of money and new completion dates must be carefully documented as being a commercial compromise.

# Questions

# Thank you!