

30 April 2020

---

# Information

---

## JCT and COVID-19 – Developments

This is an update on our article on JCT and Coronavirus (COVID-19) published on 23 March 2020.

The 23 March article looked at, among other things, claims for delay and explained that they fall into two potential categories; claims for extra time and claims for extra money. [Click here](#) for a copy of that article

The focus as at 23 March, was on whether COVID-19 was a force majeure event. Under JCT 2016 and 2011 (DB and SBC) a force majeure event is what is known as a Relevant Event. It can entitle a contractor to extra time if the completion date is delayed. However force majeure is not a Relevant Matter so there is no entitlement to extra money for delay. Where a delay claim for time but not money can be made, that is known as a neutral event.

Other possible Relevant Events considered in the 23 March article included where the Government issues a decree which amounts to a change in the law after the Base Date and that causes delay. Since 23 March we have seen an increasing number of claims that have been submitted on this basis. The reason for this is discussed later on in this article but first we explain more about what this Relevant Event means and whether it actually applies in the present COVID-19 situation.

Clause 2.26 lists Relevant Events. The wording of clause 2.26.12 of the JCT DB 2016 (clause 2.29.13 of the JCT SBC 2016)<sup>1</sup> says

*“the exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor’s Person but which directly affects the execution of the Works”*

(Underlining added)

### What is the Base Date?

The Base Date is a specific date which is inserted into the Contract Particulars. It is usually a date on or around the date that tenders are submitted. Its purpose is to allow a contractor to price a tender with a degree of certainty. Contractors can assume, for tender purposes, that the exercise of statutory powers by the UK Government, or a Local or Public Authority will remain as they are at the Base Date. The Base Date is also used in relation to the fluctuation provisions (if they apply).

### Statutory Power

Statutory power is not defined in the JCT but it is probably fair to say it means a power given by statute law. And that is the nub of the issue here. While the UK Government has introduced the Coronavirus Act 2020, there is nothing specifically in that Act which obviously causes delay to construction sites. Whilst the Government has issued guidance which might affect the construction industry, none of it can be said to be the exercise of a statutory power.

---

<sup>1</sup> The wording in the 2011 JCT edition is slightly (but not materially) different

And what's more the Government has in fact made it clear in its letter to the construction industry on 31 March that the industry should keep working. The Site Operating Procedures have been issued by the Construction Leadership Council, not the Government or a Local or Public Authority.

For more details on the guidance, letter and Site Operating Procedure issued click [here](#).

## Common reasons for delay as a result of COVID-19

The most common reasons for delays on construction sites as a result of COVID-19 are:

- A decision by the Employer to close the site, alter access routes or change the way works are conducted
- A decision by the Contractor to close the site.
- Insufficient labour available to carry on site
- Problems with the materials supply chain

None of these are obviously caused by the exercise of a statutory power after the Base Date.

## Statutory Requirements (clause 2.15 of the JCT DB (clause 2.17 of the JCT SBC))

Why might you ask is anyone concerned about whether there has been the exercise of a statutory power after the Base Date if it is unlikely to be the case that it has caused delayed and in any event it only entitles a contractor to time for delay to the completion date? Surely a contractor would be better off relying on force majeure, which as mentioned above, would give time but not money if there was a delay to the completion date.

The answer appears to lie in clause 2.15 of the JCT DB (clause 2.17 of the JCT SBC). These clauses deal with divergences from Statutory Requirements after the Base Date which require an alteration or modification to the works. This is to be treated as a Change (DB) or Variation (SBC). Not only does that entitle a contractor to be paid for the cost of the actual change, but because it is a Change or a Variation, it is arguably a Relevant Matter entitling the contractor to be paid the costs of any delay.

There are of course differences between the 2.26.12 or 2.29.13 clauses and clause 2.15 or 2.17. Clauses 2.15 and 2.17 include reference to Statutory Requirements which is a defined term, which statutory authority is not. However, at least so far as changes to UK law is concerned, there is no fundamental difference. Neither clause is likely, as things stand at the moment, to give a contractor time or money as a result of COVID-19.



**Alison Garrett**  
Senior Legal Adviser  
T: +(44)(0)1223 222207  
E: [alison.garrett@mills-reeve.com](mailto:alison.garrett@mills-reeve.com)

Mills & Reeve LLP is a limited liability partnership authorised and regulated by the Solicitors Regulation Authority and registered in England and Wales with registered number OC326165. Its registered office is at 7th & 8th floors, 24 King William Street, London, EC4R 9AT, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP.

The contents of this document are copyright © Mills & Reeve LLP. All rights reserved. This document contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites.

Mills & Reeve LLP will process your personal data fairly and lawfully in accordance with professional standards and the Data Protection Act 2018, General Data Protection Regulation (EU) 2016/679 (as applicable) and any other applicable laws relating to the protection of personal data and the privacy of individuals. You can set your marketing preferences or unsubscribe at any time from Mills & Reeve LLP marketing communications at [www.preferences.mills-reeve.com](http://www.preferences.mills-reeve.com) or by emailing [preferences@mills-reeve.com](mailto:preferences@mills-reeve.com) T +44(0)344 880 2666