

SARS-CoV-2: CURRENT RESPONSES

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- Daily changes of policy
- More than weekly changes in guidance
- New Amendments/Regulations every Sunday
- Different approaches – England, Scotland, Northern Ireland and Wales
- Different entities – Cabinet Office v Public Health England v the departments
- Now the Joint BioSecurity Unit

- Position has changed over time
- What was the position has to be ascertained before any analysis as to the effect of that position
- Made more difficult due to the websites being altered with retrospective effect – Wayback machine has to be used

The “Covid Critical Path”



- 10/2/20 – 129 SI 2020
- 23/3/20 – Lockdown announced
- 25/3/20
 - Coronavirus Act 2020
 - 129 SI 2020 revoked
 - 350 SI 2020
- 2/4/20 – CCL SOP2 issued and withdrawn
- 14/4/20 – CCL SOP3 issued

- 10/5/20:
 - Johnson speech. PHE being phased out
 - divergence
- 11 – 13/5/20 – multiple sets of guidance
- 31/5/20 or 1/6/20 – 350 SI 2020 amended
- 7/6/20 – 350 SI 2020 amended
- 13/6/20 – 350 SI 2020 amended
- 14/6/20 – new Regs re public transport and masking
- 23/6/20 – end of social distancing

- 3 Statutes
- 6 sets of Regulations (22 across the UK)
- Excluding schools – innumerable sets of Guidance
- Innumerable statements of policy

- Civil Contingencies Act 2004 – not used
- Coronavirus Act 2020 – Sch 21 and 22 not used
- Public Health (Control of Disease) Act 1984 – used
See Ewing Covid-19: Government by Decree
<https://doi.org/10.1080/096115768.2020.1759398>

- Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) as amended (four times)
- Need amending again
- Probably *ultra vires* the PH(CoD)A
- Probably unlawful due to improper use of emergency powers
- Unclear – see debate over criminal liability



- Reg 6(1)(f) – leaving home to work (where you cannot work there)=reasonable excuse

but

- Reg 7(b) – no gatherings of more than 2 people unless “*the gathering is essential for work purposes*”

and

- Reg 8(9) – can be ordered to disperse backed by force Reg 8(10)
- Reg 9(1) – failure to comply was an offence – with corporate liability – Reg 9(5)

- Overnight curfew
- A gathering = 6 people maximum outside/2 inside (Reg 7(1))
- A gathering which is “reasonably necessary” for work purposes is permissible – Reg 7(2)(d)
- Therefore after 1/6, the Regulations are very dilute

- At least 13 sets of it (if you ignore schools)
- If issued by PHE – that is under a statutory power – see s 2A National Health Act 2006
- PHE has been sidelined
- If issued by Cabinet Office – under prerogative
- If issued by JBSU – who knows? (If it exists)

- Increasingly vague over time
- Inconsistent – PHE believed and believes in the 2m rule – Cabinet Office does not
- Current position *as per Guidance*:
 - work if unable to work elsewhere;
 - socially distance if practicable;
 - Focus is all on the employer's assessment;
- The Guidance does not yet reflect the 1m change – do not know how it will be implemented

- *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*
- Does not amend any contracts – explicitly so
- Explicitly stated not to have the force of law
but
- But paras 14 and 15 say it should be taken into account in assessing force majeure, delay, extensions of time and compensation



- Hard law – sets legal standards; imposes obligations; backed by criminal penalty; must be complied with
- Soft law – suggests legal parameters; informs the performance of obligations; not backed by sanctions; should be taken into account by public authorities – but can be departed from

- JCT Change in Law/Statutory requirements –
 - *any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Works or performance of any obligation under this Contract...*
- “Change in law” also common on PFI etc contracts
- *Force majeure*; plague; pandemic; epidemic; change in law; change in guidance; Act of God
 - See discussion (papers and streaming – www.keatingchambers.com/events/webinars “Covid-19: A Force Majeure Event”)



- All turns on the clause
- Some of the standard wordings might apply
- Causation will be very difficult – see *Seadrill v Tullow Ghana* [2019] 1 All ER (Comm) 54
- But note
 - “sole cause” versus “impacted by”
 - “prevent” versus “hinder”

Impact – the Regulations up to 1/6 (Change in Law)



- If lawful, undoubtedly had force of law (now due to the incoherence of the provisions – unsure).
- Are caught by the JCT wording
- Note operation of Reg 6; 7; 8 and 9 – in relation to gatherings
- Has to be an assessment as to whether your gathering was essential for work
- If not, there was a criminal offence
- This is capable of being a “Change”/”Change in Law”

➤ Orthodox view

- Guidance is soft law
- Therefore not binding
- Therefore cannot be change in law

But

- Position may be different if you are dealing with a local authority

- PHE Guidance exists under a statutory duty – therefore a rule made under a statute
- Other guidance is a directive in the dictionary sense
- Therefore elements of, eg, JCT wording met
- But does it have force of law?



- Health and Safety at Work Act 1974 – section 2(1) and section 3(1)
- Duty to have a safe place of work for both employees and non-employees
- Guidance obviously dictates what amounts to a safe place of work (as it says so)
- Would be treated as setting the standard
- HSE said it would prosecute but didn't and government says it would enforce the Guidance but didn't (Government now says HSE will prosecute)

- To attract criminal penalty, a provision must be sufficiently certain and have the force of law (otherwise there would be arbitrary punishment)
- Criminal sanction is also an indication of hard law
- Thus, this Guidance which when placed in its proper context is guidance, Jim, but not as we know it
- Note changing position over time. There is a possibility that what did have force of law now no longer has force of law

- There are at least two judicial review challenges on foot
- If successful and if the *ultra vires* challenge succeeds, the Regs were void and never had effect
- Very difficult question of the relationship of that result with contract law
- Post 1/6/20 – very difficult to say the Regs have relevant force of law and so the Guidance cannot have force of law either

- Adopted its Regulations under the Public Health (Control of Disease) Act
- Guidance suggests all non-essential construction sites should close
- V strong rhetoric that sites must close

But

- Non-essential construction sites do not appear in the “must close” list in the Regs
- No Coronavirus Act powers or directions issued

- Position seems parallel to the fracking “ban” in Scotland ie there is stated to be a ban but as a matter of policy that has not been implemented (see *Ineos Upstream Ltd, Petition of and Friends of the Earth Scotland against the Lord Advocate* [2018] ScotCS CSOH 66)

But

- Social distancing as per Regulations from 21 April
- No loosening until the end of May
- Slowly emerging from lockdown

- Same regulations

But

- By the regulations
 - Guidance has force of law
 - Social distancing has force of law

And

- No dilution in May

The Devolved Administrations – Northern Ireland



- Same Regulations
- Same underlying position as England

But

- No dilution in May

- Massive uncertainty and therefore risk transfer to the private sector
- Current risk allocation mechanisms are probably inadequate
- Future risk allocation mechanisms uncertain due to volume and imprecision of documents
- “Cross-border” issues completely unsettled
- Possible judicial review as a risk control mechanism?

➤ Causation

- Did the guidance render performance impossible – more difficult, yes, more expensive, yes. Impossible is going to be a stretch
- Was the guidance likely to be one of numerous factors affecting performance – yes

➤ Impact on the works

- Check the prelims re:
 - Site access
 - H&S
 - Compliance with regulations

- What of the contractual guidance?
 - Black letter law view – no effect
 - White letter
 - Is this like the other guidance (cf McKendrick COMBAR lecture)?
 - Will courts give it effect
 - Implied term?
 - Purposive construction?
 - (contractual orthodoxy neither work as based on intention of the parties and parties did not envisage SARS-CoV-2 – hence *force majeure*)
 - Imposed by government
 - Unparalleled
 - Art 1, First Protocol ECHR

Thank you for listening

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