

SARS-CoV-2: 28 WEEKS LATER

Sean Wilken QC
15 October 2020

- **Globally very different reactions to the pandemic**
 - Laissez faire populist model – UK/US/Brazil/Sweden
 - Repeat strictly enforced lockdowns – France and Spain
 - Rigorous isolation and track and trace – NZ; South Korea; Japan
- **Differing legal reactions as well**
 - China immediately issued force majeure certificates to all affected industries
 - Other end of the spectrum – extensive use of non-binding guidance (UK) or devolution to individual states (US)

- Globally - position has changed over time
- In all cases what was the position has to be ascertained before any analysis as to the effect of that position
- In England:
 - Response has been very confusing
 - *The Use and Misuse of Guidance during the UK's Coronavirus Lockdown* Tom Hickman 9/9/20 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686857
 - Made more difficult due to the websites being altered with retrospective effect – Wayback machine has to be used
 - With the shift to localism, position is even more unclear

➤ There are seven phases

- Phase 1

- 10/2/20 – 129 SI 2020
- 21/3/20 – canteens closed

- Phase 2 - Lockdown

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- 2/4/20 – CLC SOP2 issued and withdrawn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

- Phase 3 - relaxation, guidance and divergence
 - 10/5/20:
 - Johnson speech. PHE being phased out
 - divergence
 - 11 – 13/5/20 – multiple sets of guidance
 - 19/5/20 – CLC SOP4 issued
 - 31/5/20 or 1/6/20; 7/5/20; 13/6/20 – 350 SI 2020 amended
- Phase 4 – further relaxation
 - 23/6/20 – end of social distancing (1m ie one arm's length)
 - "Independence Day" – 4 July. New regime – ie new Regs – SI 684 – amended 10 – 13 July
 - SOP5 from the CLC
 - New guidance – 1m with "risk mitigation"

- Phase 5 – localism – micro trumps the macro - 18/7/20
 - SI 750 in effect – new regime but runs alongside SI 684
 - Local authorities can now proscribe places, events and people – Regs 4 – 6 (check the website – Reg 10)
 - Backed by criminal sanction – Reg 13
 - In force to Jan 2021
 - SI 685 (Leicester) also amended by SI 754 – now done by reference to Leicester City Council’s remit
 - 24/7/20 – SI 685 (Leicester) further amended by SI 787
 - Multiple amendments of SI’s July – August
 - Advice must be tailored to the area at issue

- Phase 6 – “Tiers”
 - Tier 1 (Medium); 2 (High); 3 (Very High)
 - Differing provisions for each
 - All provide for gatherings if reasonably necessary for work purposes
 - In fact – same for some baffling wording in relation to restaurants in Tier 3 and a debate over whether there is any difference between Tier 2 and 3 – very much the same as localism; but
 - Will be even more “local”
- Phase 7 – “Tiers” are not enough

- The timeline and the critical path
 - What is the project's critical path
 - How does it compare to the Covid timeline
 - What are the causative links?

- Claims may vary over time

- V localized claims – possibly conflicting
 - See Greater Manchester and Hannah Miller's interview of the Prime Minister

What have we learned legally?



- Differing nations have adopted differing regulatory approaches
- Courts of civil law nations have more freedom to find an appropriate outcome – established doctrine of force majeure
 - See eg China where the Courts regarded SARS as an FM event
- Courts of common law nations are tied to the words of the contract – no established doctrine of force majeure
- Standard contract wordings are unhelpful

- **Standard contract wordings are unhelpful**
 - JCT - force majeure may give you time not money. Query whether there is a change in law
 - FIDIC – multiple requirements to be met to establish force majeure
 - NEC – stops or delays completion (may be easier)
 - AIPN JOA – mirrors the upstream contract (NB – local law issues)
 - LOGIC – force majeure includes change in law
 - BEACH – must prevent the supply of gas
- **But do you have a “material adverse change” provision in the suite of contracts – this may assist**

What have the courts done?



- Raft of Covid Procedural Rules
- The rise of the virtual hearing
- Two key cases:
 - *Dolan* - the challenge to the English Government's whole approach – failed at first instance – being heard before the CoA
 - *FCA v Arch Insurance* [2020] EWHC 2448

- Class action to decide the meaning of 21 different policy wordings Business Interruption Insurance Policies
- Court adopted a time slice approach
- Court held that anything other than the Regulations themselves was advice
- Accepted that undercounting of cases was possible and to be taken into an account
- Where a wording required “prevention”, there had to be closure of the premises

- Did not have to be actual cases of Covid to trigger cover – that Covid could be diagnosable in an area would suffice
- Insurers' stance that an over-formalistic approach should not be taken (as claims would then fail) was welcomed

- Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) as amended (four times)
- 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)
- 1/6 to 4/7, the Regulations are very dilute

- The Health Protection (Coronavirus, Restrictions) (No 2) England Regulations 2020 SI 684
- Reg 5
 - Private land – outside – no restriction
 - Public space – outside – 30 cap unless you comply with the Guidance
 - A home – no more than 30 people
 - Private space – inside – no restriction unless you are holding a rave
- 2020 SI 685 preserves old position for Leicester post codes

- The Health Protection (Coronavirus, Restrictions) (England) (No 3) Regulations 2020 SI 750
- 18/7/20 – there were 2 regimes running in parallel
 - SI 684 – central government
 - SI 750 – new localised restrictions – possibility of individual proscription by local authority in relation to specific outbreaks
- By 5 August 2020, the regime all turns on the protected area – Reg 2 SI 828 – localism

- 70 items of guidance – ignoring schools
- If issued by PHE – that is under a statutory power – see s 2A National Health Act 2006
- PHE has been sidelined – nothing since 10 May
- If issued by Cabinet Office – under prerogative
- If issued by JBSU – who knows? (If it exists)

- Increasingly vague over time
- Current position *as per Guidance*:
 - work if unable to work elsewhere;
 - socially distance if practicable;
 - Focus is all on the employer's assessment;
- As from 4 July, allows for 1m if “risk prevention measures” are taken
- Note – under localism, guidance often matches the Regulations

- *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency –*
 - Two versions – May and June: both are to be read together
 - Does not amend any contracts – explicitly so
 - Explicitly stated not to have the force of law; but
 - Up to 30 June, paras 14 and 15 say it should be taken into account in assessing force majeure, delay, extensions of time and compensation. Post 30 June even more dilute
 - Relevant to any good faith obligations?

Impact – frustration and force majeure – up to 1/6



- Frustration – very unlikely in any event and almost impossible here
- Force majeure
 - All turns on the clause
 - Some of the standard wordings might apply
 - Plague, epidemic, act of god, restraint of princes
 - 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”



- Currently have four parallel systems in operation:
 - Central government general regulations
 - Central government local regulations governing particular areas
 - Central government regulations allow local authority action
 - Local response – eg Manchester is using the Gold/Silver/Bronze EPRR which does not match the regulations
- Bear traps abound

➤ 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/central government

- PHE Guidance exists under a statutory duty – therefore a rule made under a statute
- Other guidance is a directive (note not “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 position as to whether it would prosecute has changed over time – currently FAQ 5.4



- Post 1/6/20 to 18/7 or 6/8 – very difficult to say the Regs have relevant force of law and so the Guidance cannot have force of law either
- 6/8 – query localized claims

- Situation is not going to change for the foreseeable future
- Want to focus on possible impacts:
 - Supply chains
 - Insolvency
 - Particular sectoral impact
 - Drafting

- Due to “pulse” nature of the pandemic – continued risk
- What are the other countries in the chain
 - How have they responded
 - Civil/common law
- For FM – supply has to be impossible – therefore query whether alternate supply is possible
- What happens when a link in the chain has FM – but that would not FM in England?
- *Mississippi Flood Cases*

- Manifest risk

- Bond/guarantee/letter of credit protection/PCGs
 - Check wordings re expiry and crystallization

- Check termination provisions

- Know your counter-party – how cash flow dependent is it? What provisions have been made for adversity?

➤ O&G

- Impact of low prices – cashflow squeezes, production and exploration shut downs, cash call refusals
- Upstream versus downstream force majeure (similar to supply chains)

➤ Finance

- MACs
- Capital reserves against insolvency
- Continued exemptions to competition rules

➤ Insurance

- *Arch!*

- Consider pandemic/epidemic
- Consider localized and variable impact
- Consider guidance and other forms of soft law
- Consider where time and money risk should lie
- Consider choice of law/jurisdiction/venue
- Consider if you want hearings of disputes and if so virtual/hybrid/real

Thank you for listening

Please contact the Practice Management Teams for further information
T +44 (0)20 7544 2600
E clerks@keatingchambers.com
www.keatingchambers.com