"IT'S COMPLICATED": DECIPHERING THE ENGLISH GOVERNMENT'S RESPONSE TO SARS-COV-2 AND ITS IMPACT ON CONTRACTS[1]

By Sean Wilken QC

The English[2] Government's response to SARS-CoV-2 is legally and factually complicated. In this article I try to unpack the elements of it and then attempt to see how those elements may impact on the contracts that people may have.

"Trying to advise parties to a contract, one has the immediate problem, that the law is not clearly accessible"

In so doing, there are (currently) four elements:

- The Coronavirus Act 2020 ("the Act");
- Various regulations;
- Numerous items of guidance; and
- Political statements.

Together, I call this the "quadripartite approach" or "the puzzle". In this article I focus solely on the contractual aspects, I do not seek to address in detail any public law arguments as to the overall validity of the puzzle.

The Pieces of the Puzzle

Before the Coronavirus Act ("the Act") came into force, the Government's response to SARS-CoV-2 was set out in The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129). The Act in the main came into force on 25 March 2020[3] which is, of course, after the "lockdown" had been announced as a matter of policy.

The Act[4] revoked SI 2020/129. In so doing and despite that revocation, the Act grandfathered the previous declaration made in and by those regulations (SI 2020/129) as if it were made under the Act.[5] So far, this is perfectly orthodox and consistent with the Government's response to SARS-CoV-2 being within the four walls of the Act.

Yet, on the same day as the Act came into force revoking those regulations (SI 2020/129), the Government introduced the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) ("the Regulations"). The Regulations were not, however, introduced under the Act but under sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984.

Throughout this period the Government was also releasing various items of guidance as well as stating its policy position – as it altered – in relation to SARS-CoV-2. The only legislation in play, however, remained the Regulations.

That remained the position until 7 May 2020. Then, the Government issued further guidance: *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency.*[6]

Then on 10 May 2020, the position changed again. Via a speech not given to Parliament and not in guidance or regulation or legislation, a new approach was announced. This speech was the new foundation of the Government's position – indeed if on 11 May 2020 one accessed the Government portal on SARS-CoV-2 one was told that the current position was as set out in the speech.

On the back of that, four new pieces of guidance emerged: the "Our Plan to Rebuild";[7] the "Staying Alert";[8] the "Staying Safe";[9] and the "FAQs".[10] There is no attempt to link these pieces of guidance back to either the Act or the Regulations. Further, the speech and *Our Plan to Rebuild* referred to further additional guidance – Covid-Secure guidance which would apply to various work-places.

Then, after the new pieces of Guidance were issued, a speech was given (this time to Parliament) which may or may not be a source of new alleged obligations.

On 11 May 2020, the Government issued eight items of Covid-Secure guidance for particular sectors[11] including the construction industry.[12] These pieces of guidance emphasise two things. First, that the reaction to SARS-CoV-2 is to be one of employers making their own assessments of risk. Two, based on that assessment, there are no hard actions, other than the assessment, that *must* be taken. There are instead a series of possible actions that might be considered or "might be needed".

On 12 May 2020, the Government amended the Regulations using emergency powers to permit people to leave the house indefinitely for exercise, to visit parks, outdoor sports areas and garden centres.

At the same time as the Government was introducing and amending the Regulations, the devolved administrations were also introducing and amending their regulations – in rather different ways. Thus, in Scotland, construction sites were "locked down" from the outset but not in England. As time has progressed, however, the differences between Scotland, Wales and Northern Ireland and England have become more stark. As at time of writing, Scotland, Wales and Northern Ireland maintain the position as it had been in England before 10 May 2020 and their regulations therefore significantly diverge from those applicable in England.[13]

1 This article has benefitted from discussions with Tom de la Mare QC at Blackstone Chambers. Any mistakes are obviously my own.

2 Reaction to the coronavirus is a health question devolved to the Welsh; Scottish and Northern Irish administrations – a fact which has become increasingly important. For ease, where I refer to the Government in this article, I mean the English Government.

3 Section 87(1).

4 Schedule 21 para 24(1).

5 See Sch 21 para 24(2).

6 Currently at this locale but that may obviously change:vhttps://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf.

7 https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy.

8 https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing.

9 https://www.gov.uk/government/publications/staying-safe-outside-your-home/staying-safe-outside-your-home.

10 https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do.

11 All eight can be found here - https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19.

12 https://assets.publishing.service.gov.uk/media/5eb961bfe90e070834b6675f/working-safely-during-covid-19-construction-outdoors-110520.pdf.

13 For the extent of the divergence – see https://gov.wales/sites/default/files/publications/2020-05/the-health-protection-coronavirus-restrictions-wales-regulations-2020-as-amended.pdf.

The Puzzle

Trying to advise parties to a contract, one has the immediate problem, that the law is not clearly accessible – there is no one document, one can point to and say "do or do not do that which is said here". In England alone,[14] there are now the thirteen items of guidance referred to above ("the Guidance").

As and when one locates the various elements of the Guidance, one cannot then actually say which has precedence. No item of guidance is said to be more important than the others. This is important as the Guidance is not consistent.[15]

Then one has on top of that the Regulations and the Act. There is no obvious interplay between the Guidance and the Regulations. *The FAQs*[16] and *Staying Alert* make reference to the Regulations, the other two items of guidance do not. In *Staying Alert*, the Regulations are both to be amended[17] and apparently to have effect as is.[18]

If one then turns to the Regulations themselves, three points arise.

First, as others have pointed out,[19] there is some doubt as to whether those sections of the Public Health (Control of Disease) Act grant the requisite *vires* for the Regulations.

Second, the Government has chosen, notwithstanding the vires issue, not to use the obvious mechanisms in the Act (which it could have done having brought into place the appropriate mechanisms on that day) but to use the more obscure Public Health (Control of Disease) Act 1984.[20] The rationale for so doing is unknown.

Third, the Regulations have been amended twice. Both times using emergency powers. Given the most recent amendment was a relaxation of their requirements, it is difficult to see how the use of emergency powers was justified. If that is correct, then this would constitute a further ground for challenging the validity of the Regulations.

Impact of the Puzzle

As things currently stand, we are firmly in the realm of guidance. Nothing has been done under the Act and the Regulations have not been amended to reflect the Guidance in any detail.

It is trite law that guidance, whilst relevant to the exercise of public law powers by public bodies, may have little or no effect on the purely private law of rights, obligations and liability. Guidance does not, for example and absent particular wording, give one private party to a contract an ability to sue the private other party.[21] Under the Act, however, regard must be had to the Guidance.[22]

Therefore, not locating the Guidance under the Act – irrespective of the terms of the Guidance itself – creates uncertainty.

If one then turns to the wording of the Guidance itself, the extensive debate over the exercise of police powers under the Regulations and Guidance, has shown that the previous iteration of the Guidance was unclear.[23] That lack of clarity, at least in terms of criminal liability, falls outwith the scope of this article. This article instead focuses on the impact of the puzzle on commercial and construction law.

As far as commercial law is concerned, the obvious issues arise in relation to frustration; *force majeure*; the operation of contract terms and variation by necessity. Common to all of them is what is the legal effect of the quadripartite response?

Here, the distinctions between the Regulations and the Guidance become important.[24] The Regulations, to the extent they are clear and lawful, would obviously have legal force. Thus, a contract under which people agreed to leave the house without possessing a reasonable excuse would be contrary to Reg 6(1). It would therefore be an illegal contract – if entered into after the Regulations came into effect – and would otherwise be frustrated (and/or if it contained a force majeure provision potentially caught by force majeure). So far, so clear. There is, however, a critical distinction between the Regulations and all versions of the Guidance. There is nothing in the Regulations which imposes either obligations or penalties in relation to social distancing.[25] Yet that suggestion[26] was a feature of all previous versions of the Guidance up and until 10 May 2020.

Thus, the question becomes what is the status of the Guidance?

Taking the guidance specifically issued by Public Health England, this is issued under section 2A(2)(f) of the National Health Service Act 2006 which imposes a statutory duty on the Secretary of State to issue advice on public health issues. By virtue of the Framework Agreement which underpins Public Health England, the Secretary of State has delegated these functions to Public Health England.[27] Thus the Public Health for England Guidance is statutory.[28] On that basis, a public authority would have to have regard to it as a matter of general public law and by operation of section 2B of the National Health Service Act and also by Schedule 21 para 21 of the Act. Thus, a public authority would have to have regard to the need for social distancing. Can a private body, however, also rely on that need as against another private body? If it could, then there would be the concomitant potential to claim relief from contractual obligations by relying on, as appropriate, frustration, force majeure, contractual change of law provisions or even variation by necessity.

The orthodox view is that a private body could not rely on the Guidance to alter contractual relations as the Guidance is merely that – advice which the private body can take or not take. Thus, if a private body chose to follow the Guidance and as a result make either its performance of its obligations more onerous or, perhaps, impossible, that would be a choice for the private body to make and the consequences of that choice would be that private body's risk. On this orthodox approach, the Guidance is archetypal soft law – there to advise as opposed to determine obligations and penalty.

The Guidance is not, however, standard guidance, not least because it is backed by the Regulations which impose criminal sanction. To take one example, under Reg 7: *"no person may participate in a gathering in a public place of more than two people except… (b) where the gathering is essential for work purposes"*. Under Reg 8(1): *"A relevant person[29] may take such action as is necessary to enforce any requirement imposed by regulation 4, 5 or 7"*. Under Reg 8(9):

Where a relevant person considers that three or more people are gathered together in contravention of regulation 7, the relevant person may—

(a) direct the gathering to disperse;

(b) direct any person in the gathering to return to the place where they are living;

(c) remove any person in the gathering to the place where they are living.

Under Reg 8(10), the relevant person may use force to support the exercise of the Reg 8(9) powers. Under Reg 8(11), the relevant person may also issue instructions. Finally, a breach of regulation constitutes an offence under Reg 9(1) – there also being corporate liability under Reg 9(5).

There are oddities in this wording – the use of "gathering" rather than assembly; the fact that the gathering is "essential for work purposes" as opposed to be for "essential work purposes" both of which render compliance with the provision more complicated. Further, that there is an exemption based on "essential for work purposes" suggests that one can gather to work. If that was not the case, there would be no need for exemption. Thus, any enterprise with two or more people in one place would be caught.

This then moves to the next level of the problem. What is the relationship between these provisions and the Guidance? It is possible that the Guidance is entirely irrelevant to the analysis of the Regulations. Thus, if one is "gathered", there is potential criminality irrespective of social distancing as per the Guidance. That, however, would be contrary to the aim of the Guidance – which is to allow working provided that people can still work at home or at a work site if there is social distancing "where practicable". Therefore, it would follow that the Guidance is relevant to the operation of the Regulation. If that is right, the Guidance would be operable in two ways – offensively (you have not instituted social distancing at work and therefore there is a potential offence) or defensively (I have instituted social distancing at work and therefore there is no potential offence). By either route, however, the Guidance is operating not as guidance but as an indicator of criminality. That means the Guidance is operating as hard rather than soft law.

A similar conclusion can be reached via the Health and Safety at Work Act 1974. It is well established under section 3 that an employer owes various obligations to employees as to a safe system of work. If the Health and Safety Executive were to prosecute a failure to adopt the Guidance (as the HSE has indicated that it will),[30] that can only mean that the Guidance has operation as a hard principle of law relevant to section 3.[31] If, as per traditional thinking, the Guidance is purely advisory, failure to comply could not found any enforcement.

Thus, one gets to the position that the Guidance is by appearance soft law but by operation (and not straightforwardly) hard law. Therefore, the application of the Guidance could well have private law consequences – in the realm of frustration, *force majeure*, contractual provisions and variation by necessity.

The above would be difficult enough if the Guidance now issued were consistent. It is not. Thus, paragraph 1 of "Staying Safe" states:

Public Health England recommends trying to keep two metres away from people as a precaution. However, this is not a rule and the science is complex. The key thing is to not be too close to people for more than a short period of time, as much as you can.

Further, as indicated above, the Covid-secure guidance is very weakly worded. Thus, it is, from one perspective, difficult to see how any form of obligation is imposed by it. Yet, the Government's stance is that it will be checking whether the Guidance is being complied with and action will be taken against those who are not complying.

14 Again the position is different in Scotland, Wales and Northern Ireland. I am not sure if anyone has yet to consider how these different regimes can be operated where there are cross border commercial activities.

15 For example, Cabinet Office does not, necessarily, accept the Public Health for England 2m rule – see para 1 of "Staying Safe".

16 See para 1.2.

17 See the preamble.

18 See paras 2 and 5.

19 See https://ukhumanrightsblog.com/2020/04/20/is-the-lockdown-lawful-an-overview-of-the-debate/ for a review of the conflicting views as to the legality of the Regulations themselves.

20 There is also the oddity that the government did not rely on the already existing Civil Contingencies Act 1984 which would have enabled all and each of the steps the government has taken but with a much more oversight and control of the breadth of governmental power.

21 If a party to the contract was a public body and possessed a discretion between a range of options, there would be an obvious argument guidance would at least inform the exercise of that discretion – under the implied term that the discretion would not be exercised arbitrarily; irrationally or capriciously (as to the implied term see *Abu Dhabi National Tanker Co v Product Star Shipping Ltd ("the Product Star")* [1993] 1 Lloyd's LR 397; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287; *Socimer International Bank v Standard Bank London* [2008] EWCA Civ 116; *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34). Query, however, whether the guidance would be relevant if there was no contractual discretion but a black and white choice to be made under the contract – see *Mid-Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 at [89 – 95].

22 See Schedule 21 para 21.

23 The College of Policing sought to redress this ambiguity by issuing a series of briefings – these are now at: https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Pages/default.aspx.

24 In this discussion, I draw the familiar distinction between hard/bright light law and soft law. The former is a principle or rule with distinct legal consequences eg criminality. The latter is a guiding principle from which subjects may or may not depart.

25 Compare the position in Wales, where social distancing is in the Regulations and therefore is a legal obligation backed by penalties – see https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Documents/Health-Protection-Regulations-Amendments-England-changes-130520.pdf.

26 Social distancing was to be observed wherever practicable under the previous Guidance.

27 See https://www.gov.uk/government/publications/framework-agreement-between-the-department-of-health-and-public-health-england.

28 The basis of the other Guidance issued, for example, by Cabinet Office is less clear.

29 A police constable, police support officer or someone designated by the Secretary of State or local authority

30 See https://www.tuc.org.uk/news/employers-staying-open-must-guarantee-safe-working-conditions-including-social-distancing-say.

31 See https://www.hse.gov.uk/pubns/hse41.pdf for the unsurprising policy statement that one can only prosecute where a law has been broken.

The immediate practical issue is against what benchmark is compliance with what appear to be suggestions to be tested? Further, absent a benchmark, does this impose any form of legal obligation? At least as far as the health and safety and employment law perspective, it apparently does.[32] Further, if the Government is going to be checking compliance and penalising non-compliance there must be some form of obligation being imposed here.

The above then leads to two questions: what does it mean for commercial dealing and in each of the realms of frustration, *force majeure*, contractual provisions and variation by necessity?

One could, of course, refer to *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*.[33] Yet, this is once again guidance and in its own terms is non-binding.[34] If the Government were to interpolate a whole series of terms into contracts, one would expect that to be done by primary legislation. Further, as tangible contractual rights are choses in action, they would be possessions within Article 1, First Protocol of the European Convention on Human Rights. Wholesale intervention into contractual arrangements would therefore inevitably attract a human rights based scrutiny. Therefore, this guidance, I would suggest, takes one no further forward.

The Government's approach of having Guidance which is not guidance but is some form of chimera inevitably creates commercial uncertainty: parties do not know whether there is a private law obligation to socially distance and, if so, what role that plays in their arrangements.

Thus, parties do not know whether to comply with the Guidance or their contract. This in turn creates uncertainty as to where the risks and liabilities ultimately lie. Where there are multiple parties in the contractual chain and/or layered transactions (e.g. a supply of goods chain backed by finance and insurance obligations or a large scale project with multiple parties also backed by finance and insurance obligations), there will be concerns as to whom is the ultimate payor and whether that entity has assets to cover the eventual liability. These basic risks are then compounded by the fact that the Guidance wording varies and contains caveats such as practicability or essential. These add additional uncertainty. Finally, as the risks cannot lie with Government (this is guidance supposedly advisory only), intentionally or not, all risk has been transferred to the private sector.

Thus, the effect of the puzzle is not only to transfer risk away from Government but also to do so in a doubly uncertain fashion – namely, uncertainty as to what the risk is and whose risk is it? This is, in commercial and legal terms, unfortunate. Not only is there no legal certainty (which is of importance in commercial law and the absence of which generates litigation) but also parties cannot hedge against risk.

With those general comments in mind, I turn to the possible relevance of the quadripartite approach to each of frustration, force majeure, contractual terms and variation by necessity. In my approach to each of the areas, I assume, however, that legal uncertainty is not a factor and one can assume that the Guidance has some legal effect.[35] I also approach the application to each issue as a matter of legal and not factual analysis – that is I do not consider the potential issues raised by the ambiguous wording of the quadripartite wording as they may or may not arise on the facts. What I am looking at is the ways in which this new, private sector risk may manifest or be managed.[36]

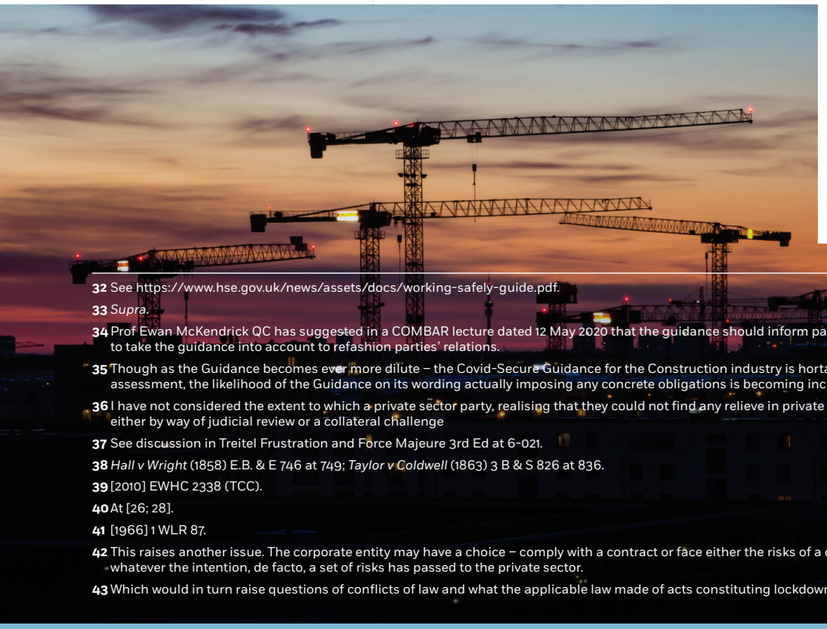
Frustration

For frustration to occur, the contract must be incapable of performance. The fact that performance has suddenly become more onerous or impracticable for one party does not suffice.[37]

If one has a contract for personal service, the illness of the person may amount to frustration.[38] Further, although the contract may not be frustrated, the affected party may be discharged from future performance. In *Atwal v Rochester*[39] a builder who had become ill was discharged from future performance due to the relationship of trust the builder had with the client.[40] Similarly, in *Condor v The Barron Knights*[41] the claimant was discharged from further performance of the contract due to a fear of further mental illness.

What is common to all these cases is the concept of particular, individual service. Thus, at that level, individual circumstances would discharge any further obligation to perform. In terms of a company, however, unless as per Atwal the company can only perform the contract via a particular employee, the company will not be discharged, it can always perform via another employee (assuming employees are available).[42]

Further, It is possible that a contract could in theory be frustrated by lockdowns resulting from SARS-CoV-2 – for example a contract to travel to an area under total lockdown would be incapable of performance as would a contract for the supply of goods from an area where all the factories had been closed. Neither of those factual scenarios would apply within England as there is no such lockdown, therefore this possibility would arise in relation to international contracts.[43]



32 See https://www.hse.gov.uk/news/assets/docs/working-safely-guide.pdf.

33 *Supra*.

34 Prof Ewan McKendrick QC has suggested in a COMBAR lecture dated 12 May 2020 that the guidance should inform parties' relations but accepted that a court would not be able to take the guidance into account to refashion parties' relations.

35 Though as the Guidance becomes ever more dilute – the Covid-Secure Guidance for the Construction industry is hortatory at best and really only requires a work place assessment, the likelihood of the Guidance on its wording actually imposing any concrete obligations is becoming increasingly remote.

36 I have not considered the extent to which a private sector party, realising that they could not find any relieve in private law, might simply challenge the quadripartite structure either by way of judicial review or a collateral challenge

37 See discussion in Treitel Frustration and Force Majeure 3rd Ed at 6-021.

38 *Hall v Wright* (1858) E.B. & E 746 at 749; *Taylor v Coldwell* (1863) 3 B & S 826 at 836.

39 [2010] EWHC 2338 (TCC).

40 At [26; 28].

41 [1966] 1 WLR 87.

42 This raises another issue. The corporate entity may have a choice – comply with a contract or face either the risks of a dispute or the risks of infecting employees. Once again, whatever the intention, de facto, a set of risks has passed to the private sector.

43 Which would in turn raise questions of conflicts of law and what the applicable law made of acts constituting lockdown in terms of frustrating events.

It will be a very rare case, however, where the Guidance will form grounds for frustration: performance of the contract with social distancing is highly likely to be a possibility. Further, although performance will be more onerous and more costly, neither of those constitute frustration.

Force majeure

There is no independent doctrine of *force majeure* in English law.[44] Force majeure can therefore only be invoked where there is the appropriate clause and all will turn on the provisions of the particular clause.[45]

I focus here on what the parties may do in relation to the risk that the puzzle has placed onto the private sector.

Looking at some of the standardised wording:

- A simple reference to force majeure would require reference to the general caselaw. That, unsurprisingly, does suggest that a pandemic would be *force majeure*. It is more difficult to suggest, however, that social distancing constitutes *force majeure* – this may be relevant to causation as discussed below.

- One could see that a lockdown could permit a party to rely on a *"restraint of princes"* wording by analogy with the blockade cases.[46]

- Obviously, any clause which included "epidemic" as *force majeure* would be of simple application.

- "Act of God" – given that an Act of God is described as *"events which involved no human agency and which it was not realistically possible for a human to guard against: an accident which the defendant can show was due to natural causes, directly and exclusively without human intervention"*[47]. The pandemic would be an Act of God. The Guidance, however, would not be.

- More difficulty would be had if the clause referred to plague.[48] At first blush, it could be thought that this would refer solely to the result of *Yersinia pestis* (the bacterium that causes bubonic plague) but dictionaries and case law say differently. Thus, the OED has plague defined as: *Any infectious disease which spreads rapidly and has a high mortality rate; an epidemic of such a disease*. Further, if one were to look at the original plague cases – for example *Plague in London & Westminster*[49] or *Anonymous*[50] – one would see that "plague" was not used in the sense of a specific bacillus but of some general disease – a fact which is hardly surprising given the state of medical knowledge at the time. Thus, perhaps it may well be that recourse to seventeenth century learning may assist a twenty first century commercial entity to resolve its SARS-CoV-2 issues created by the quadripartite scheme.

Assuming, however, that an individual case can fall within the wording, there still remains the test of causation. As the court emphasised in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*,[51] the alleged event must be the sole cause of the failure to perform. Whilst it is easy to see how a full lockdown could amount to the sole cause of the failure to perform, proving maintaining social distancing, a far more nebulous concept, is the sole cause of the failure to perform will be far more difficult.

Contractual Terms

The other area which private sector parties will be forced to examine is whether their contracts contain change in law provisions. This are common in finance contracts, PFI contracts and in the JCT model for building contracts.

Common to all of them is a requirement that there be a change in the hard law provisions relevant to the contract. As I have discussed above, the quadripartite arrangement straddles the hard/soft law divide. An orthodox analysis would say there is no change in law – but the quadripartite approach might suggest otherwise. Whilst again, care must now be taken with the wording of the latest Guidance, in theory it is arguable that because the Guidance is being treated as having force of law, then there could be a change of law.

Variation by Necessity

Again, one has recourse to some very old law.

In Lawrence v Twentiman, the Court said:[52]

> *"If a man covenant to build a house before such a day, and then the plague is there before the day and continues there till after the day, this excuses him from the breach of the covenant for not doing it before the day; for the law does not wish to compel him to venture his life for this, but he must do it afterwards"*

Or one has recourse to some very complicated law. There are a series of very complicated cases relating to Mississippi soya bean cargoes afloat from 1973. These were described by the courts at the time as an 'unattractive piece of forensic history'[53] with those involved being the 'cognoscenti in this recondite field'.[54]

The two combined above can enable private sector parties to have recourse to the idea of variation by necessity – namely that the obligation to perform may, in extreme circumstances, be varied by events beyond the parties' control. In *Lawrence*, being permitted to suspect performance, and in the soya bean cargo cases, to supply amounts others than those stipulated by the contract without being in breach.[55]

Conclusions

There are undoubtedly legal mechanisms which would theoretically assist private sector entities affected by SARS-CoV-2. In each case, however, there is considerable uncertainty as to whether those mechanisms will in fact assist private sector parties. While it is possible to see that a particular set of facts – the collapse of a supply chain or a significant and irreplaceable portion of the workforce falling ill – might well trigger all or any of the above mechanisms, it is very difficult to see how either the Guidance per se or the fact that commercial life is more difficult, more complicated and more expensive will aid private sector parties in relieving themselves from such burdens.

44 *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 .

45 For a useful general summary – see https://www.fountaincourt.co.uk/wp-content/uploads/Force-Majeure-and-Frustration-April-2020.pdf. There is further a lecture by Prof Ewan McKendrick QC given 12 May 2020 which should be soon uploaded to the COMBAR website.

46 *Geipel v Smith* (1872) LR 7 QB 404. The lockdown would have to be actual not anticipated – see *Watts, Watts & Co v Mitsui & Co* [1917] AC 227.

47 *Transco v Stockport MBC* [2003] 3 WLR 1467 at [59]

48 The plague reference also occurs in some Business Interruption Insurance policies as well as the charters of schools and universities.

49 (1665) 82 ER 1103.

50 (1562) 73 ER 498.

51 [2019] 1 All ER (Comm) 34.

52 1 Rolle's Abridgement Condition G. pl. 10 (p.450).

53 *Andre & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254 at 258 cols 1–2 per Kerr L.J.

54 *Tradax Export SA v Cook Industries Inc* [1982] 1 Lloyd's Rep 385 at 387 col 2 per Kerr L.J.

55 See most recently Sean Wilken QC *"Contractual Performance in times of Peril"* to be found at https://www.keatingchambers.com/contractual-performance-in-times-of-peril-2/. See also the original text as modified for the article – Wilken & Ghaly The Law of Waiver, Variation and Estoppel 3rd Ed OUP Ch 2 *passim*.