Coronavirus (COVID-19)

Legal guides to help UK business

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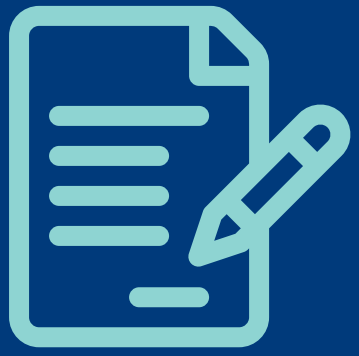
Commercial Contract Advice for Business



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What does the knock-on effect of the coronavirus mean for commercial contracts?

Now that the World Health Organisation has declared the outbreak of the coronavirus (COVID-19) a global health emergency, we consider the impact on businesses that may be affected and what companies should be looking at in order to protect their operations.

While China and Italy have to date been the worst hit in terms of number of confirmed cases and deaths, companies importing and exporting goods and services globally are increasingly being impacted by the disruption. We have set out below some of the key areas that businesses should review within their existing contracts when considering the impact of COVID-19 and potentially ways to mitigate exposure, including in particular the impact of force majeure.

What is a "Force Majeure" clause within a commercial contract?

Often set out towards the end of a commercial contract and sometimes wrongly classified as one of the "boilerplate" terms that all commercial contracts should contain and that are drafted as standard without careful consideration, the "force majeure" provision sets out the situation whereby one or more parties to a contract may exclude liability or suspend or terminate the performance of the affected party's obligations when certain circumstances arise beyond the affected party's reasonable control. Often, these clauses are invoked by one party to a contract say, for example, where there has been a fire at a warehouse. However, COVID-19 has the potential to impact businesses at all stages of the supply chain, regardless of whether there is an import or export of goods or services between countries, either in respect of those parties now considering the need to rely on it or those who may be on the receiving end of force majeure being raised as a defence.

Background under English law

There is no common law right under English law to absolve a party's liability where there is an event outside their (reasonable) control. If parties to a commercial agreement wish to benefit from this type of protection, then an express contractual provision is required.

How is "force majeure" defined?

There is no recognised definition of the concept under English law. Simply removing or delaying a party's obligations under a contract by reference to "force majeure" would be difficult to stand up in court. Whilst parties may understand the premise of it, it very much depends on the contractual drafting of the clause to determine how it operates and the way upon which it might be relied.

These clauses can be as specific or as general as the parties agree. We are often involved in drafting a range of options where the clause could be relied upon, such as, where there has been a fire, flood, epidemic etc. However, these clauses can simply often be drafted by reference to any events beyond the reasonable control of the affected party. Where negotiating parties are companies, the courts will deem them to be able to negotiate effectively and therefore, absent manifest error, will tend to follow the exact wording of these clauses without consideration as to whether the parties did in fact turn their minds to the precise drafting of the relevant clauses.

What would be the result of reliance on force majeure?

Again, this very much depends on the specific contractual language. For example:

1. it could excuse non-performance of all obligations under a contract;
2. it may be drafted in favour of one party only, i.e. only that party can seek the benefit of it;
3. it could adjust the terms to the extent necessary such that the contract can be performed; or
4. it could (automatically or otherwise) terminate the contract between the parties.

Another option – "frustration" of the contract?

Under English law, a contract may be discharged on the ground of "frustration" where, after a contract has been formed, an event occurs which renders any further performance impossible, illegal, or radically different from what was contemplated at the commencement of the contract. This means that even where a contract does not include a force majeure clause, it might be possible to argue that the outbreak of COVID-19 has frustrated the contract. The principle has developed in the English courts over the years, although it is generally accepted that a frustration event:

1. occurs after a contract has been formed;
2. is not due to the fault of either party;
3. is so fundamental as to be regarded as striking at the root of the contract and is beyond what was contemplated by the parties at the commencement of the contract; and
4. renders further performance of the contract impossible, illegal or makes it radically different from that contemplated originally by the parties.

Whilst some jurisdictions do not distinguish between frustration and force majeure, English law does. The main differences are:

1. the test the courts employ is generally stricter in relation to frustration, such that something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract; and
2. discharging the contract (i.e. the contract falls away altogether) may not be the only outcome where a party seeks to rely on a force majeure provision (this will depend on the scope of the provision – it could for example allow for suspension until the force majeure event passes); whereas if a contract has been frustrated, it is automatically discharged and the parties are excused from their future obligations.

If there is no force majeure clause within an agreement (or, indeed, even where there is) and performance is becoming increasingly difficult, the parties should have an open discussion in relation to this at the earliest opportunity, certainly before asserting that the contract has been frustrated, notwithstanding any WHO or government announcement/measures in place. Where an assertion of frustration or force majeure is found to be incorrect, this may amount to a breach (or anticipatory) breach of contract, which can entitle the other party to damages and potentially even being entitled to terminate the contract.

Will insurance cover this?

Clearly, as COVID-19 is a new virus, there will be no express existing insurance that specifically names the virus to cover companies and the performance of their existing contractual obligations. Similar considerations have arisen in recent years, not least in relation to the impact of the eruption of the Icelandic volcano in 2010.

The most common source of available coverage for many businesses may be business interruption insurance (which is often an extension of a property damage policy. However, it is often the case that for a policy to respond to a business interruption claim, some form of insured event giving rise to damage (or fear of damage) is required – as an example, policies for hospitality providers at a sporting event which is cancelled for high winds are more likely to respond if (say) the event is cancelled after a marquee is blown down.

Businesses may also have specific cancellation insurance in place which may or may not be dependent upon damage, and some policies will have civil authority cover, which would cover a situation where there is an order from a government authority that interferes with normal business operations.

As can be seen from the above, the devil is often in the detail in respect of insurance policies, and different insurance companies will use different wording across their policies. As such, businesses should consider the policies they currently have in place to determine whether there is likely to be any applicable cover that could assist should the need arise, and then identify and follow specific policy procedures if seeking to claim, to reduce the risk so far as possible of invalidating any claim. We look at business interruption insurance in more detail here.

What should companies do now to prepare and protect themselves best?

In light of the daily developments in respect of COVID-19 and the increasing impact and awareness across the country and beyond, companies should consider if and the extent to which any of their contracts might be affected by COVID-19, including their own terms and conditions, and whether and to what extent force majeure clauses are included within their agreements. With the current uncertainty shown in the markets, and some companies already starting to declare force majeure in response to the difficulties they face, payment provisions should also be reviewed, to determine whether earlier payment might be an option where typically longer costs exposure is not in normal circumstances considered an issue.

Often, "force majeure" discussions arise where there is an incident that affects one party to the contract. In this current situation, both parties may be affected to a certain extent, particularly if the Government or the WHO makes certain statements and/or recommendations that could affect trade and dealings between businesses, in order to seek to stem the progression of the virus.

Whilst some businesses might seek to exploit the outbreak of COVID-19 to extract themselves from unfavourable contracts, the majority of companies who have entered into agreements are likely to want to seek to "complete" the agreements for their anticipated mutual benefit. Early contract consideration and discussions between parties is recommended, as often, there might be alternative solutions that could be put in place contractually and logistically, even if in just the short term and/or particular to any direct impact of COVID-19, to enable the same or substantially the same obligations to be performed with as little deviation to the original agreement as possible. If nothing else, taking a commercial view and working with the other party to mitigate the effect of COVID-19 could actually improve a relationship and embed it for the long term.

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Coronavirus: dealing with strains and broken links in tech supply chains

There are 34 individual components in an iPhone, and all of them need to be produced somewhere. Once each element is produced, they need to be combined to create the finished product. Anyone in the business of advanced tech supply chains will be well aware of the logistical headaches this can cause. However, managing these types of supply chains in a pandemic is something else entirely.

Each tech company will have their own way of managing disputes, and each individual supply contract will be probably be on differing terms all the way up and down the chain. Despite this, there are a number of overarching practical and legal considerations that you should bear in mind when making risk-based decisions.

Practical issues

First off, you should consider what contracts might cause you problems. Consider whether one of your suppliers breaching their agreements with you will impact your obligations in other areas. You need to understand what your responsibilities are and the requisite timelines for each.

You should also consider geography as a first point of call, if you have not already done detailed analysis around this. You may already have done all this, but, if possible, it would be beneficial to confirm where each of your suppliers receives their key goods from. This may be achieved by contacting each of your suppliers and establishing the position before reviewing your detailed contingency planning. Geographic issues may well have a knock-on effect, impacting the time it takes your suppliers to get their goods to you. It may also cause you to then breach your contracts with others.

Supply chains are heavily dependent upon compliance with regulations around the world. Obviously, then, being able to keep up traceability of each component will be key in most industries. The aerospace sector is one example where industry testing is a fundamental necessity. Muddying traceability by recklessly seeking alternative suppliers without engaging in the proper process could actually be more damaging than waiting out the existing delays.

At present, there is no consensus about how long or whether Covid-19 can survive on surfaces. You should consider whether it is appropriate for you to hold your goods in quarantine to avoid increasing the risks to the parties you are contracting with.

Lastly, GCHQ has issued a public statement through the National Cyber Security Centre, about the increased ferocity of cyber attacks in the wake of the Covid-19 pandemic. Consequently, it would be wise to review the security of your systems to ensure that they are sufficiently resilient in light of this current trend.

A range of examples of contingency planning include:

- Organising business interruption insurance as an absolute first priority;
- Obtaining alternative sources of goods to enable you to carry on operating;
- Considering the safety of your staff and any implications of your workforce having to work from home;
- Communicating to your suppliers about any change in your policies;
- Consider which elements of the chain can be sped up by utilising technology and online means; and
- Seeking legal advice in respect of any contracts which you may have to breach as a result of the Covid-19 pandemic.

Legal issues

The practical issues set out above need to be offset against the legal considerations. Generally, you should look at:

- How much flexibility you have within each of your contracts with other parties;
- The size of operations, including the scale of each order and whether this is likely to increase or decrease in the circumstances – for example if you supply technology for remote working technology you may suddenly be met with an overwhelming demand;
- Your ability to make these types of predictions and what impact they will have is contingent on the provisions in your contracts.
- Your rights to cancel, terminate, suspend, vary, take control of subcontracts, break exclusivity provisions and demand information as required.

In addition to the above generic points, you may also want to examine the below in further detail:

Variation provisions

Changing obligations is an important consideration for tech companies. Many companies will respond to the Covid-19 pandemic differently, and hence it is impossible to truly predict the impact it will have on your contractual relationships. Whatever happens, flexibility and agility will be key.

Seeking advice in a timely manner will give you the time that you need to make proper action plans. It is important to make sure that you have evidence about agreements between the parties. The drafting of these pieces of communication should be undertaken with care: you need to avoid inadvertently waiving your rights or varying the contract.

Force majeure

Many contracts include a force majeure clause. This is often colloquially referred to as an "Act of God" clause. It is dubbed this because it caters for events such as:

- Natural disasters including hurricanes, earthquakes, tsunamis and volcano eruptions;
- Wars;
- Industrial action; and
- Subcontractor or third-party failure to supply.

The above are just a few examples of events that could be included. In practice, the drafting of force majeure clauses may vary greatly. If it is engaged, a force majeure clause is hugely significant because it can release a party (or both parties) from their obligations under the relevant contract. The impact of this is that you may be able to shrug off unhelpful contracts during this difficult time, but the same may also happen to you. However, each clause will need careful legal analysis to establish whether a pandemic would be covered by the wording. If it is not and you attempt to terminate on that basis anyway, there may be severe legal consequences.

Frustration, wrongful termination and wilful default

In contract law, there has long been a doctrine called "frustration". Frustration is a way of returning both parties to the position that they were in before the performance or partial performance of their respective obligations under the contract. It is worth noting that this can only be used in very specific circumstances. By way of example, the leading case in this area of law concerns a venue burning down. To come under this doctrine, the services or goods need to cease to exist. It is not enough to say that you cannot supply goods because they are stuck at your warehouse and you are unable to engage a delivery firm. The legal hurdle is extremely challenging to meet.

Most contracts will include express termination provisions. If these are tackled in the wrong way, you may well face a dispute. Similarly, if you simply do not supply your goods or do not pay your suppliers, then you may be in wilful default.

Regulatory issues

As mentioned above, it is likely that regulatory issues will be at the front of your mind when considering supply chain transparency. It may be wise to consider whether any re-testing of products is necessary if you do elect to change suppliers.

Conclusions

There are a range of legal options and practical issues to consider when address Covid-19 related supply chain issues. A thorough analysis of both can help to determine whether a legal or negotiated solution will be best.

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Coronavirus under the contractual microscope – some potential cures for contract problems

Q: I am no longer able to perform my obligations under an existing contract. Can I rely on the Covid-19 outbreak to get out of the contract?

A: From an English law perspective, the starting principle is that contractual obligations are absolute, meaning parties are required to perform their obligations and can be liable for breach if they fail to do so. There are, however, three key exceptions to this rule:

1. **Force Majeure Clause:** Some contracts include a 'force majeure' clause which excuses the performance of obligations under the contract if an event happens which is beyond the parties' contemplation or control.

2. **Material Adverse Change Clause:** Some contracts include a 'material adverse change' clause which may, depending on the wording and interpretation, entitle a party to avoid its performance obligations.

3. **Frustration:** Where there is no force majeure clause, the law provides potential relief in the form of 'frustration'. This discharges a party from its obligations if there is a change in circumstances which makes it physically or commercially impossible to perform the contract or would render performance radically different. This is a high bar and of narrow application. Whether this applied would need to be considered on a case-by-case basis.

Q: Is Covid-19 covered by the force majeure clause in my contract?

A: Force majeure clauses differ so there are various factors to consider on a case-by-case basis, such as:

- Is Coronavirus covered by the clause?
- If so, are there elements of conditionality associated with the clause applying and are they present?
- What notice requirements apply? These would need to be complied with to the extent that you wish to rely on the clause.
- What is the effect of establishing force majeure?
  - Is it an extension of time?
  - Is it a termination right immediately or after a period of time?
  - Who bears the costs?

It is advisable to seek legal advice on the interpretation of your force majeure clause before taking any action so that you can fully understand the potential risks and the commercial and financial impact on your business.

Q: What should I do if a party is seeking to avoid performance of their obligations under the contract?

A: There will be circumstances in which the Coronavirus excuse a party from performance of their obligations; however, this will largely depend upon the wording of the contract.

It is important that you review the terms of your contract, particularly any force majeure or material adverse changes clause, to be sure of each party's rights under the contract. Seek legal advice on their interpretation and the consequences that may follow and consider whether you need to inform your insurers. It is important that you are clear on your legal position before engaging with the other party.

Q: My supplier is asking to change its contractual obligations because of the impact of COVID-19. Should I agree?

A: This is a commercial question for you, but when communicating about the potential impact of the Coronavirus on your respective performance obligations, make sure that you are:

- clear and fully informed of your legal obligations and rights under the contract;
- no waiver or variation of the terms of the contract is inadvertently agreed
- the communications are in writing and are clear as to the intended scope and legal consequences
- proposed variations which you do not agree to are rejected expressly in writing

Seeking legal advice on the content of your communications before sending them is sensible to ensure that your intentions are clear and can be later relied on if necessary.

Q: I am concerned that, due to staffing shortages, I will not be able to fulfil my obligations under the contract. What should I do?

A: Carefully review the terms of your contract to see whether there are any clauses which can be relied on to absolve you from performance or protect you against potential breach. Where problems with performance are anticipated, it is wise to seek to negotiate a variation to the contract quickly and before the default occurs so has to avoid being in breach, which could otherwise have financial and reputational consequences.

Q: I have a dispute with a customer based outside England and Wales. Which laws will apply to the contract?

A: Most contracts will have a 'choice of law' which sets out which laws will govern the dispute and a 'jurisdiction' clause which identifies the legal system which should determine the dispute. In the absence of such a clause, a careful legal analysis will need to be carried out to ascertain which jurisdiction is likely to apply, to balance the commercial considerations of location where more than one jurisdiction may apply, and to negotiate agreement with the other parties involved.

Q: Am I covered under my business insurance for losses related to the covid-19 outbreak?

A: Cover will depend entirely upon the wording and interpretation of the insurance contract. Disputes often arise over the scope of definitions, interpretation of clauses, whether or not events were 'pre-existing' prior to inception of the policy, what exclusions have been placed on cover, what loss is covered, and when the outbreak became a notifiable event and whether notice periods have been complied with.

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Coronavirus: Mapping the supply chain

The impact of Covid-19

Given the effect that Covid-19 is having on all aspects of life, it comes as no surprise that supply chains are being disrupted, both in the UK and globally. In this article, we consider the risks posed to supply chains and the issues which businesses should consider. The continuing spread of COVID-19 and the measures to reduce its impact, are affecting:

- Goods: Movement of goods is being disrupted, both by government restrictions and by a lack of labour. Businesses that depend on severely affected areas such as China for raw materials and finished products are likely to be heavily affected.
- Labour: There is a lack of available workers due to factors such as restricted travel, self-isolation and illness.
- Services: Again, the lack of free movement will impact companies who provide services if they need their workers to move in and out of affected areas. Many businesses may not be able to provide their services due to lockdown restrictions (e.g. cleaning companies which provide their services in peoples' homes).

Firstly, it is important to note that there is no "one size fits all" approach to managing these issues. Different industries are likely to be affected in different ways. That being said, it is important for all businesses to assess the risks that COVID-19 presents to their supply chains and their ability to meet their contractual obligations.

Stock shortages in supermarkets caused by a sudden surge in demand, have highlighted the vulnerabilities in the "just in time" supply chain. A system where stock is held for a matter of days before it is sold did not stand up well to a sudden spike in demand.

In other industries, demand will inevitably and significantly fall. For example, bars, restaurants hairdressers, cinemas etc. However, there may be opportunities to adapt e.g. restaurants that now operate on a delivery only basis or affected businesses that are now able to provide a purely online offering.

Before considering specific legal issues and contractual arrangements, it is important for businesses to understand where their potential vulnerabilities lie. As a first step, businesses should undertake a "mapping exercise" of their supply chains for existing services, goods, suppliers and customers.

Mapping the supply chain

It will be important for businesses to map their supply chains to identify key risks in order to the meet the challenges posed by COVID-19 head on. Issues to bear in mind whilst mapping the supply chain include:

- Business impact: Consider what is critical in the supply chain and what is essential for delivery of products and services. Identify whether there are any backup plans which can be implemented and what insurance arrangements are in place to cover potential losses.
- Location: If suppliers are in locations, or reliant on goods from locations which are significantly affected by COVID-19, supply chain disruption is more likely. Additionally, businesses with a single route of supply are likely to be more affected than those with more diverse supply chains.
- Diversification and Substitution: Consider whether goods could be sourced from another location or supplier and the cost implications of doing so. Think about whether such costs can be passed on to customers or suppliers. Assess whether it is possible for parts of the supply chain to be delivered or sped up using technology.
- Lead times and communication: Consider which contracts may be affected by delays and closures. Communicate with customers and suppliers about the impact of COVID-19 to prepare for and manage

disruptions. In particular, speak to key suppliers to understand the impact of lead times on stockholding, logistics, warehousing and distribution. Consider communications expected from suppliers (contractually or otherwise) about potential impacts. Businesses should act on such communications quickly, particularly, if they state that new terms / variations are deemed to be accepted if no response is provided.

- Opportunities: Assess any opportunities that COVID-19 creates. The nature of these opportunities will depend on the business and where it sits in the supply chain. Consider the implications of streamlining and entering into new third-party relationships. Implementing alternative cost options and locations may also lead to greater profitability and efficiency. There are also opportunities at the delivery end of the supply chain. For example, a business might have been about to deliver a new product or services to businesses but now it makes sense to adapt this product or services for delivery to consumers. Businesses should also consider developing or strengthening their online offerings in a time when people are restricted from going to physical shops.
- Lessons Learnt: In due course, this pandemic can be used to analyse supply chain procedures and overall resilience. This "lessons learnt" review will enable businesses to identify vulnerabilities and consider how similar risks and events could be mitigated in future.

Another angle to consider might be where the supply chain can deliver, but the customer is not in a position to accept the products or does not need the services because of COVID-19. This will require consideration of the relevant contract and any force majeure provisions. Force majeure provisions do not usually automatically excuse both parties from all liability. There is more information in the guide on the issues around force majeure, frustration and interruptions in the contractual supply chain.

How can we help?

We can help businesses navigate their legal options and risks by:

- undertaking a contract review to identify issues and advising on what relief may be available under contracts;
- advising a business on whether to rely on force majeure or to terminate or suspend a contract;
- advising on insurance issues;
- assisting with legal claims to enforce contracts and pursue customers for payment; or
- advising on how similar risks could be mitigated in future contracts.

Nothing is certain in these unprecedented times, but this situation can be seen as an opportunity to build better and more resilient supply chains for the future.

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Force majeure – how can you benefit from it?

In light of the ongoing impact of Covid-19, we have already covered what is meant by force majeure and frustration but if a business does decide it needs to invoke force majeure (assuming your contract includes provisions allowing you to do so), how should it go about it?

Simply giving notice that a force majeure event has occurred is not enough for a party to make use of it. The courts have set out a number of guiding principles which must be followed – this article summarises how businesses can ensure that these are met and avoid getting into difficulties when attempting to declare that a force majeure event has occurred.

If a party declares that a force majeure event has occurred, it must take steps to mitigate the impact of that event, which is highlighted in the recent case of 2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd [2020] (and we have commented on this below).

Simplistically, how can a business demonstrate that it has taken those steps?

The key guidance was given by the courts in the case of *Channel Island Ferries Ltd v Sealink United Kingdom Ltd [1988]* where the court stated that if a party wants to rely on the force majeure clause in a contract it will firstly have to establish that the event is actually covered by that clause but secondly (and critically) it will have to demonstrate that it has *"...taken all reasonable steps to avoid its operation or mitigate its results."*

On this basis, to get the benefit of a force majeure clause a party has to take "all reasonable steps". This is a pretty subjective requirement (and as is always the case, this will be dictated by the particular circumstances) but there has been something of a steer from the courts on this topic, mainly in cases involving shipping:

- In the *Channel Island Ferries* case which we mentioned above, the defendant was required to charter two specific boats but failed to do so as a result of what it claimed was a force majeure event. However, not only did they fail to charter the specified boats, but they also did not try to charter any replacements – as a result, the court found that the force majeure clause could not be relied upon as all reasonable steps had not been taken to mitigate its impact.
- In the case of *Kawasaki Steel v Sardoil [1977]* the court found that if the cargo which is supposed to be delivered is delayed or destroyed, the chartering party has the ability to (and therefore must) obtain a replacement or alternative cargo.
- In the case of *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018]* the court held that a party must take into account not just its own interests but also those of the other party to a contract when taking its reasonable steps to mitigate.

Businesses should also note that even if a contract does not set out that steps to mitigate must be taken, the courts will actually imply this obligation into the contract anyway. However, the duty to mitigate is a two - way obligation – the unaffected party cannot simply sit on its hands and must consider offers from the affected party to mitigate the impact of force majeure.

When considering "reasonable steps" it is also worth taking into account how the courts view reasonable endeavours obligations and also the common law doctrine of mitigation of damages. For instance:

- A best endeavours obligation may:
  - require expenditure on behalf of the obligor. For example, it obliged Blackpool Airport to open outside its normal operating hours despite the fact it incurred a loss in doing so as the ability to schedule flights during these times was essential to Jet2.com's business model *(Jet2.com v Blackpool Airport Ltd [2012])*
  - impose an obligation to litigate or appeal against a decision,

though this would not extend to something that was bound to fail or would be unreasonable in all the circumstances *(Malik Co v Central European Trading Agency Ltd [1974])*

- Reasonable endeavours are not as onerous:
  - a party should weigh up "the weight of their contractual obligation" to the other party against "all relevant commercial considerations" such as its relations with third parties, its reputation, and the cost of that approach *(UBH (Mechanical Services) Ltd v Standard Life Assurance Company [1986])*
  - "what would a reasonable and prudent person acting properly in their own commercial interest and applying their minds to their contractual obligation have done to try" to achieve the objective *(Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd [2017])*
  - the obligor is not normally required to sacrifice its own commercial interests and may be entitled to consider the impact on their own profitability *(P&O Property Holdings Ltd v Norwich Union Life Insurance Society [1993]*; *Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd [2019].* This is one of the major differences between a reasonable and best endeavours obligation
- The common law doctrine of mitigation of damages also gives some helpful guidance:
  - In the case of *British Westinghouse Co v Underground Electric Ry Co [1912]* the court found that a mitigating party should not have to take any step, which a reasonable and prudent person would not ordinarily take in the course of their business; and
  - In the case of *James Finlay & Co Ltd v NV Kwik Hoo Tong [1929]* the court found that a mitigating party was not required to put its commercial reputation at risk.

And if a party does not take steps to mitigate, what next?

Declaring force majeure could actually give rise to a breach of contract claim if a party does not follow the contractual process (if any) for making a declaration, which could also be the case if a party does not take reasonable steps to mitigate. It is critical for the party claiming relief under force majeure to demonstrate it has taken mitigating steps and retain evidence to that effect. Businesses must think about how they will do this. For example:

1. Do not sit back – get on with the mitigation! Think about the impact on both parties and how best to address this, and ideally, as we have said before, discuss the issue with the other party – it's good to talk;
2. Keep records to show what you have done and how you arrived at your decisions – everything can look different in hindsight, so contemporary records and board minutes etc. will be very helpful for setting the scene should this come under scrutiny at a later date. Bear in mind that you might be forced to disclose these in the event that that you end up in litigation, and that unless they have been produced for the purpose of litigation, they may not attract legal privilege;
3. Keep everything under constant review – the initial steps taken to mitigate will no doubt evolve as circumstances change.

Finally, the recent case of *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd [2020]* is worth considering when deciding whether or not to declare a force majeure event has occurred:
Sony and 2 Entertain had a contract under which Sony provided storage and distribution at a warehouse. Unfortunately, the warehouse suffered a major fire as result of an arson attack during the 2011 London riots, destroying all its contents.
2 Entertain brought a claim for breach of contract on the basis that Sony should have prevented the fire. Sony argued that the fire was covered by the force majeure clause in the contract and therefore claimed relief to try to defeat 2 Entertain's claim;
The court found that, despite the riots and fire being stated in the clause as potential force majeure events, Sony had not put in place

sufficient security at the site or stored the contents in a secure location as it was obliged to under the contract, and Sony's failure to do so was the main cause of the contents being lost, and not the fire itself.

In summary

Covid-19 may well be unforeseeable and fall outside a party's reasonable control but to claim relief businesses must still take reasonable steps to mitigate and to comply with their contractual obligations. If you would like to discuss this article or your own circumstances, please contact a member of our team.

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General Advice for Business

Coronavirus: the economic implications for businesses

A Guide for Directors

The outbreak of the Coronavirus has caused a serious and evolving health crisis which will continue to present significant challenges to our everyday lives. Furthermore, the implications for many businesses are likely to be profound. Coronavirus will have a growing impact on the economy and businesses are going to face pressure with the breakdown of supply chains, cash flow issues, labour shortages and disruption to manufacturing.

The Government announced a £350bn bailout to help businesses (in addition to the £12 billion worth of assistance announced in the budget). However, this is an evolving situation and only time will tell whether this will be sufficient to prevent many businesses tipping into insolvency.

Directors are under a duty to act in the best interests of the company and its shareholders. Once a director forms the view that the company is insolvent, on a cash flow and/or balance sheet basis, his/her duty is to act primarily in the interests of the company's creditors. If there is no reasonable prospect of avoiding an insolvent liquidation or insolvent administration, a director's obligation is to manage the affairs of the company with a view to minimising the potential losses to creditors. As the uncertainty of the impact on the economy continues, we advise directors to:

- Maintain accurate and up-to-date company financial records and consider the potential impact on creditors of the decisions they take.
- Continually monitor and review the financial state of the company. Directors should review the company's balance sheet and cash flow position and also consider the need to increase the frequency of management accounting and internal financial reporting.
- Consider ways to reduce expenditure, if necessary.
- Hold frequent board meetings convened specifically for the purpose of reviewing the company's financial position and keep proper minutes of those meetings, noting any decisions made and the reasons for them. Any contingency plans that are implemented and/or steps taken to mitigate the effects of Coronavirus should be carefully documented so that it is clear how and why those decisions were taken.
- Continually monitor market developments and set up alerts in order to keep appraised of such developments.
- Take professional advice aimed at reviewing whether an insolvency process is inevitable or whether there is some way of resolving or mitigating the company's financial difficulties.

Please speak to either Caroline Benfield or Elizabeth Taylor (details below) who can advise and guide you through what may be an extremely challenging time for you and your business.

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Coronavirus: wrongful trading laws to be suspended

There will undoubtedly be many directors who, increasingly concerned about the solvency of their businesses and their potential exposure to personal liability for trading whilst insolvent, may have been considering whether to shut down during this pandemic. The UK Business Secretary, Alok Sharma, recently announced proposed new insolvency measures to suspend the laws on wrongful trading to offer some protection to business directors.

What is 'wrongful trading'?

The law on 'wrongful trading' is essentially the duty placed on directors to ensure that a company is not trading whilst insolvent. Where wrongful trading is established, directors can be held personally liable for any losses incurred during the period of trading whilst insolvent.

The intention behind the proposed changes is presumably to stop otherwise viable, healthy businesses failing by giving them some breathing space to see whether the various incentives offered will work and allow them to survive the pandemic.

New rules may be open to abuse

Where businesses are looking at restructuring to avoid insolvent liquidation, the relaxation of the laws on wrongful trading will, no doubt, be welcomed. However, these proposals have prompted concerns that unscrupulous directors, or those who are running companies already in difficulty before the pandemic struck, taking advantage of any loosening of the rules around personal liability, deliberately flouting the rules. For instance, some businesses may use the current situation as an excuse to defer payment to suppliers which will, inevitably, have a domino effect on the liquidity of otherwise solvent companies up and down the supply chain.

The other concern is that, while there is no question that businesses face unprecedented disruption and, for some, a real fight for survival, there will be others who will use the coronavirus pandemic as a convenient cover for abusing the rules. We would strongly advise any director making the difficult decision whether or not to continue trading to keep the business afloat, or enter into insolvent liquidation, to take legal advice quickly, otherwise they could be facing potential personal liability. Businesses will also need to show that it was the economic fallout from the coronavirus pandemic that forced them to continue trading while insolvent; a circumstance that would never have occurred in normal times.

Proving business was solvent before the pandemic

This question is likely to create legal arguments over the true cause of the insolvent position and directors are still likely to be expected to show that the balance sheet was solvent prior to the pandemic announcement, and only became insolvent as a result of the pandemic. The timing of the shift from solvent to insolvent is also likely to be critical.

Businesses such as restaurants and pubs that were instructed by the government to close their doors to the public but still retain rent and staffing liabilities, may find it easier to demonstrate the cause of balance sheet insolvency; however, it is likely to be much less clear cut for other businesses affected by a multitude of external factors such as cancelled contracts and reduction in demand.

What should directors do now?

Directors will need to make careful notes of their decision-making process, underpinned by a genuine belief that the business will revert to being solvent once the pandemic is over. Regular board meetings will need to take place with frequent circulation of management

accounts to keep the balance sheet under review. Directors should be prepared to satisfy the subjective tests that may later be applied should their decision-making process be scrutinised. This is particularly important as it is proposed that the new legislation will apply retrospectively from 1 March 2020.

The government has stated that the proposed suspension of the law on wrongful trading will not affect directors' other ongoing duties, and those other checks and balances to ensure proper conduct are still expected to continue. The changes should not be seen as an opportunity for directors to turn a blind eye to their obligations, but to protect otherwise viable businesses during this challenging and uncertain time.

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Coronavirus: financial support for business

The Coronavirus Business Interruption Loan Scheme (CBILS)

CBILS was the first of a series of measures designed to support business when the scale of the damage coronavirus was likely to inflict on the economy became apparent. The scheme was originally designed to provide unsecured loans of between £25,000 and £5 million to small businesses (SMEs) that were losing revenue because the coronavirus-related lockdown was disrupting their cashflow. Over 75 lenders, accredited by the British Business Bank, are involved in the scheme making loans available for UK-based businesses with an annual turnover of up to £45m (of which over 50% must derive from trading activity). SMEs are able to approach more one than lender for a loan. The eligibility test being applied is: *"were it not for the current pandemic, the business would be considered viable by the lender and which the lender believes the provision of finance will enable the business to trade out of short- and medium-term difficulties."*

On 3 April the Coronavirus Large Business Interruption Loan Scheme (CLBILS) was introduced to support large businesses with a turnover of more than £45m. The scheme was further updated on 26 May, enabling large companies to access government-backed loans of up to £200m, (although there are conditions attached for companies borrowing more than £50m).

The scheme, which works in a similar way to the Enterprise Finance Guarantee scheme of recent years, is up and running as follows:

- The bank / lender will make the loan to the business;
- The government guarantee will underwrite a proportion of that lending (thought to be 80%);
- The government is making the guarantee to the lender rather than the business borrowing the money;

- The bank / lender will make the decision whether or not to grant the loan;
- The borrower is liable to repay 100% of the loan supported by the guarantee;
- There is no arrangement fee;
- Terms are available for six years for loans and asset finance, and three years for overdrafts and finance facilities;
- The first twelve months' interest on any loans made under the scheme will be payable by the government and not the borrower;
- Some business are excluded from the scheme under state aid rules.

After the scheme was announced, businesses reported difficulties accessing loans. The initial criteria required the lenders first to offer a loan on normal commercial terms, including the well-publicised requirement for personal guarantees and/or high interest rates.

As a result of the limited availability under the initial rules, in early April the government confirmed that applications will not be limited to companies refused commercial loans, or those without any security. Guarantee requirements have also changed and company owners will not be asked to guarantee a loan of up to £250,000 with their personal assets. For larger loans, if personal guarantees are needed these will never be for more than 20% of the sum borrowed. Guarantees required will never be secured on a principal private residence.

These new terms apply retrospectively so that those who have previously applied and been turned down, may now be able to proceed.

Coronavirus Bounce Back Loan (CBBL)

After a further review of how the scheme was operating, the Chancellor announced that, from 4 May 2020, small businesses (although 'small' has not been defined) will be able to access loans of up to £50,000 (or 25% of turnover, whichever is the lower figure) with the interest paid by the government for the first 12 months. These loans are 100% government-backed and available from lenders via a short application form, the details of which have yet to be confirmed. Lenders will only perform customary checks and should make the money available within 24 hours. Businesses can apply to transfer a CBILS loan to a CBBL loan but should take professional advice before doing so in respect of the 20% balance of the government guarantee under the CBILS loan.

You can find details of CBILS on the **British Business Bank's website** which is being regularly updated as more detail emerges.

Additional support for business

Beyond the loan scheme, details of other new and / or extended measures have been announced. To date, the Chancellor has set out a package of measures to support public services, people and businesses including:

- 12-month business rates' holiday for all retail, hospitality and leisure businesses in England. The rebate will be automatically applied to the next council tax bill;
- Grant funding is available for businesses in the retail, hospitality and leisure sector: up to £25,000 for those with property with a rateable value between £15,000 and £51,000; and £10,000 for those with property with a rateable value of under £15,000. Again, this is being managed directly by local authorities
- Nursery businesses will not have to pay business rates for the 2020/2021 tax year;
- VAT: the government has confirmed that VAT payments can be deferred from 20 March to 30 June 2020. Businesses have until 5 April 2021 to pay tax accrued during this three-month period.

The Government will continue to pay VAT refunds and reclaims as usual;

- Income tax for the self-employed can be deferred until 31 January 2021 with no penalties or interest for late payment.
- Commercial tenants are protected from eviction if they fail to pay their rents due to coronavirus-related cashflow problems. See our guide 'Commercial tenants protected from eviction' for more detail.

Support for businesses that pay little or no business rates

The government will provide additional funding for local authorities in the form of a one-off grant of £10,000 to support small businesses eligible for small business rate relief (SBRR), or rural rate relief, to help meet their ongoing business costs. Eligible businesses will be contacted by their local authority; they do not need to apply.

HMRC's 'Time to Pay' service

All businesses and self-employed people in financial distress, and with outstanding tax liabilities, may be eligible to receive support with their tax affairs through HMRC's Time to Pay service. These arrangements are agreed on a case-by-case basis and are tailored to individual circumstances and liabilities. If you are concerned about being able to pay your tax because of the impact of the coronavirus pandemic, call HMRC's dedicated helpline on 0800 0159 559.

Support for the self-employed

Following criticism that the government was failing to support the self-employed, the Chancellor announced a major package of support on 26 March. Anyone earning up to £50,000 can apply for a taxable grant of up to 80% of their average monthly profits (calculated by reference to their last three years of earnings) up to £2,500, bringing the self-employed in line with furloughed employees. The grant should be available for three months from June depending on how quickly HMRC can get the scheme up and running.

The banks are open for business and your usual bank should be your first port of call to discuss any concerns you have about managing your finances. However, our banking team is in daily touch with lenders and is on hand to review what you may have signed up to in the past and help you through any next steps for a fixed fee.

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Coronavirus: maintaining data security when working from home

We are all aware that the unexpected move towards home working undertaken as a result of the COVID-19 pandemic has presented a variety of challenges to organisations across every sector. Some of these can be relatively easily managed by the implementation of business continuity plans, such as establishing regular contact with staff and customers, whilst others will require new procedures, evolving as organisations encounter new and unexpected complications, and all whilst bearing in mind that this cannot simply be a temporary fix given the government's view that it could be up to six months before 'normal' life resumes.

Processing confidential data outside the office environment

While there is plenty of advice on managing employees working remotely and how they can deal with the practicalities of working from home, stress levels experienced by employees and managers alike will be significantly higher than usual, each dealing with personal as well as professional challenges. Along with a potential decrease in workload, there may also be, more importantly, a much greater risk to the security of personal data and confidential information being processed outside the secure office environment.

Risks to data security emanate from a variety of sources, most commonly human error. However, scams and cyber-attacks have significantly increased over recent weeks, becoming ever more convincing to their targeted recipients. It is conceivable that this increase, combined with the likely decrease in supervision and potential reduction in contact between colleagues, could result in an increase in data breaches or hacking of an organisation's confidential information, as well as significant financial risk where funds are regularly transferred.

Adopting appropriate security methods at home

So, how can you help your employees adopt appropriate security methods at home?

- If not using the organisation's equipment, ask employees to specify what devices they are using.
- If necessary, require employees to encrypt personal data and confidential information before sending, and to confirm the intended method of encryption beforehand.
- Issue reminders to update usernames and / or passwords.
- Require employees to store sensitive manual files and paper documents safely until they can be returned to the office for shredding.
- Advise all employees not to use a speakerphone or conduct work-related conversations in the presence of smart speakers or home surveillance (e.g. Alexa Echo, Google Home, Siri, Ring) and to be mindful of others who may have access to their screens.
- Where possible, require opt-out of cookies each time an employee uses video-conference applications.
- Update internal policies for remote working and data privacy, ensure these are circulated to all employees and referenced in online team meetings.

Keep cybersecurity up to date

As for the organisation, it goes without saying that, if it hasn't been completed already, ensure the organisation is properly equipped by consulting with an information security professional to maintain good cybersecurity. Such consultation is likely to include reference to the following:

- Include warning labels on incoming emails that originate from outside the organisation.
- Where possible, equip employee devices with remote access capability, relevant software, and up to date manufacturer software updates, via a virtual private network (VPN).
- Ensure multifactor, two-step authentication is required for employee remote access.
- Clarify with employees the acceptable systems and devices that are permitted and identify and specify particular information and documents that require careful handling.

GDPR continues to govern data processing activities

The recent statement published by the Information Commissioner's Office confirms its understanding that the processing of personal data may be affected by the needs of an organisation when addressing the impact of COVID-19 while attempting to limit its spread. Although this gives some comfort to organisations, maintaining adequate security measures remains imperative. Save for certain understandable delays, for example in the response to individual requests, the processing of personal data carried out by organisations on a daily basis must continue to be undertaken within the confines of the GDPR.

In conclusion, although the sudden move to remote working comes with a new set of challenges for many organisations, a careful and thoughtful approach in responding to issues as they arise will allow these organisations to continue to adequately limit risks to the data processed by employees, with the added benefit of future proofing those business continuity plans for any future similar event.

If you have any concerns or queries regarding your data security while your organisation is working remotely, please do not hesitate to contact Claire Halle-Smith or any member of our Data Protection team.

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Coronavirus: the impact on recovering debts

As the negative impact on the global economy from the coronavirus pandemic is revealed as far more damaging than initially anticipated by commentators at the beginning of the outbreak in China, businesses face important questions about how they can recover debts in these exceptional times.

Debt recovery services remain in place

As a firm we continue to offer our debt recovery services to our clients in spite of the widespread disruption to workplaces nationwide. While we are witnessing an increased number of courts adopting telephone conferencing for hearings, at the time of writing, the court system (and, importantly, the courts' online claim issuing systems) is functioning. Although it is important to judge how you carry out your debt recovery activities (see below) it is also important that you bear in mind that, even during these challenging times, the court system remains open for you to issue proceedings to recover the money that your business is due. Of course, the coronavirus pandemic is a rapidly evolving situation and this may be subject to change but, as a firm, our priority is to stay abreast of developments and we will issue updates accordingly.

Should I be collecting my debts at the moment?

Clearly, many businesses across a number of sectors, particularly tourism and leisure, have seen their incomes fall dramatically within a matter of days. In response, the Government has sought to intervene in the economy at a level unprecedented in the UK's history in an attempt to limit the impact of the pandemic on businesses. Notwithstanding the Government's intervention, it is inevitable that a number of businesses may struggle to recover.

Therefore, although many businesses may genuinely struggle to repay debts for the foreseeable future, it is important that your business takes the necessary steps to protect its interests now, rather than later.

Your business may have been seeking recovery of debts informally for some time before coronavirus intervened, and you may be aware that the company, or individual, owing you money has sufficient assets to satisfy your debt. Whilst caution has to be exercised when commencing legal proceedings, key stakeholders within businesses need to ensure they are in the best position possible to recover their money once the economy has stabilised and should not be deterred from acting now to ensure their business is protected. Recovering monies due now will give you the best possible chance to weather this storm.

Importantly, businesses should bear in mind that the legal process can provide them with the opportunity to obtain forms of security (such as charging orders) that can boost their chances of recovery if debtors are liquidated in the future. Equally, if your business considers that its debtors are genuinely unable to repay their debts at the moment and, for instance, cannot honour previously agreed repayment plans, it is vital that you have the appropriate legal documentation in place to ensure that any forbearance your business offers its debtors during this stage, or any other alternative arrangement, is supported. Getting this sort of thing right now while there is a lot of uncertainty will undoubtedly prevent expensive and time-consuming litigation in the future.

Your clients may be seeking to rely on a force majeure clause to evade contractually agreed payments. Please see our advice on the topic of force majeure on the section of our website dedicated to coronavirus-related issues. Whilst coronavirus undoubtedly presents businesses with a set of unique challenges, debtors are not able to rely on a force majeure clause as a matter of right, and it is important that you seek legal advice when confronted with this challenge to your debt recovery efforts.

How we can help

Our debt recovery team will be fully operational during this difficult period and on standby to help our clients. Please contact either Phil Wilding, Gemma Baker or Kalpesh Patel to discuss any specific concerns or questions you have regarding our debt recovery processes.

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Managing Disputes

WRIGHT HASSALL

Coronavirus: an introduction to business interruption insurance

Many businesses will have insurance to pay losses when their business is interrupted by an unforeseen event. This extends in some cases to illness and we set out below some areas for businesses to consider as they grapple with the current unprecedented challenge of coronavirus.

Business interruption insurance (BI)

This cover might be a free-standing policy or it might be a particular section included in your general business insurance. You will need to check your policy schedule to see whether that section is operative.

Whilst every policy is different, a typical BI cover will insure lost profit flowing from actual damage to business premises. The more normal claims would be for lost profit whilst a business closes for repairs after physical damage caused by fire or flood. The BI cover tides the business over until it is back in operation and is usually time limited, perhaps for 12 months.

But some policies also have cover for losses caused by specified illnesses. If, for example, your business has to close as a result of an illness such as coronavirus then you should check your cover to see whether you have BI and what the terms of that cover are.

It is obviously unlikely that the cover will refer to coronavirus or COVID-19 itself, but coronavirus became a notifiable disease on 3 March 2020 in England and Wales and if you have cover for 'notifiable diseases' then losses from that date might be covered.

Cancellation insurance

Another type of cover that might become relevant is cancellation cover. Some businesses that organise events have this cover, more usually to insure against cancellations due to extreme weather. These policies sometimes exclude losses caused by government intervention, in which case there may be no cover for coronavirus losses, but much will depend on the policy wording and the date of cancellation.

Credit insurance

Trade credit cover is also an area to consider. If payments are not made but the debtor relies on 'force majeure' (events beyond their control) to avoid payment, the cover may not respond but it is again worth checking the terms of your cover.

Liability insurances

In the longer-term liability cover may also become relevant if claims are made by employees or customers where businesses are said to have failed to protect them from the risks of coronavirus. Every policy is different and if your business has suffered loss arising out of the pandemic then we recommend urgently reviewing all policies and notifying claims, even as a precaution, soonest. Late notification could give insurers a reason to decline a valid claim.

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Coronavirus: business interruption insurance update

If you purchased business interruption cover (BI), you might have insurance to pay losses while you cannot trade. You will need to have one or two of the most common BI extension clauses and cover will depend very much on the wording of that clause. Insurers will not be expecting to cover losses due to a pandemic but, if the wording is not drafted carefully enough, they may find they are liable to indemnify. There are also questions being asked by government which might encourage insurers in a certain direction. We explain below.

BI cover

Standard BI covers a business for loss of income during periods when they cannot carry out business as usual due to physical damage: typically damage to the premises caused by a storm, fire or flooding. The insurance might compensate the business for any increased running costs and/or shortfall in profits for a set period and financial limit.

Some policies have extensions that might apply to Coronavirus losses, for which additional premium will have been paid. There are two main clauses likely to respond.

BI as a result of specific illnesses

Most extensions cover specific diseases, listed in the cover. These are diseases that are well known and understood. Covid-19 will not be named though and this is likely to lead insurers to deny claims. Insureds will feel aggrieved by that when they specifically bought cover for this type of circumstance. The argument will be that the clause was intended to cover disease closure and the clause could not have named a disease that did not exist.

Some disease extensions are more general and do not specify certain diseases. In these cases, business interruption cover for Covid-19 is more likely to apply. Usually Covid-19 must have been present at the premises or within a short radius. This is because business interruption is supposed to cover the short period while premises are shut down for a deep clean. Insurers will not have been expecting to pay for a long term shut down due to a global pandemic, but each clause is different and you should check your wording.

Given the limitations on these clauses, due to Covid-19 being new and the need for illness on the premises, the government is asking questions of insurers (see below).

BI for non-damage denial of access

Another relevant extension is cover for losses as a result of people not being able to access the business due to a specific circumstance such as the police cordoning off an area because of terrorism, fire, or the risk of a collapsing building. The clause might cover inability to trade due to a government restriction – this is exactly what has happened now with schools, bars, restaurants and similar venues being directed by the government to close. These clauses might cover loss, again depending on the wording.

Unoccupied premises; do you need to notify your insurer?

Another issue arising out of businesses being temporarily closed is the need to let your insurer know if the insured premises are unoccupied.

There may be a clause in your property insurance that requires the premises to be occupied. The Association of British Insurers (ABI) has suggested that insurers will be more flexible over the requirements around these types of clause under current circumstances, but you should consult your broker/insurer if you are in any doubt. The premises will still need to be insured against risks such as fire, theft and vandalism and all sensible risk management precautions need to be taken and policy conditions complied with.

The FCA's view

The government and its regulator have taken a very close interest in coverage concerns. The Treasury Select Committee wrote to the Association of British Insurers in March 2020 and the industry's regulator, the Financial Conduct Authority, has now taken up the baton. The FCA is bringing a test case to Court in July asking for a determination of liability on a selection of typical business interruption policies. The insurers in Court will be Hiscox, QBE, Royal Sun Alliance, Amlin and others. Insurers will say they do not cover pandemics and do not charge premiums commensurate with that exposure, but the Court will interpret the insurance contracts and decide what was actually underwritten. It seems likely that some of these policies will be required to pay out. Following the Court's assessment of policy liability there will still be a phase of loss adjustment and insureds will need to show that losses were caused by coronavirus and within policy terms, but it is hoped that some monies will flow into the economy from insurers following the FCA's very unusual but welcome intervention.

Where are we?

If you purchased business interruption cover (BI), you might have insurance to pay losses while you cannot trade. You will need to have one or two of the most common BI extension clauses covering closure due to infectious disease or denial of access to business premises. If insurers do not agree to indemnify now they might change their view by August when the FCA's court action should be complete. We can assist with policy liability questions, as well as collating losses in the quantum assessment phase that hopefully will follow.

We are monitoring developments with interest.

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Coronavirus: Pursuing claims when your business is cash poor

The COVID-19 outbreak has already had a significant impact on the performance of business to business contracts across the country. The cancellation of events, frustrated supply chains and inability to perform services has left many businesses in a precarious position with ongoing overheads and limited income.

The uncertain climate will mean that many businesses will shy away from disputes and litigation, shelving potentially good claims as a result

of cash poor balance sheets and potential fighting funds being diverted to more critical areas of the business. But when directors are faced with stark decisions over their own business' solvency, it is important that they are aware of all the available options to maximise the cash coming in. Good claims are business assets and, where funds can be swiftly recovered on those claims, can be a welcome influx of cash.

Getting a third party to finance your claim

Businesses do not need to use their own cash to pursue claims, they can instead use the funds of a third party to pursue it. In return, the third-party funder takes a cut of the balance recovered. Whilst this reduces the overall sum received, it turns an otherwise shelved claim into cash.

Third party funders invest in the litigation by funding the legal fees in exchange for a fee (usually a cut of what is recovered). Third party funders' fees are typically calculated as a multiple of the cash invested or a percentage of monies recovered, allowing businesses to calculate at any one time, what they stand to gain in pursuing the claim or negotiating a settlement. If the litigation is lost a third-party funder will lose their investment and no sums will be repayable meaning that the financial risk in pursuing the claim is also reduced.

What if the other party is cash poor too?

Businesses that had already performed their contractual obligations prior to the announcement of the pandemic, may now find themselves unable to obtain payment from the other party as a result of cash poor balance sheets across the country.

Starting court action against a business that genuinely has no cash to pay does not make commercial sense. However, in an environment where businesses will now be prioritising those creditors who 'shout loudest', prompt action can be critical and, despite issues with cash flow, many businesses will be insured or may be able to benefit from a parent company bail out.

Strategically, pursuing a good claim through third-party funding, may also benefit your business longer term if it establishes stronger market positions or removes a competitor completely.

It is sensible to take early advice on the merits of your position, to consider what funding might be available if the merits are good, and to take steps to protect your position.

I don't want to damage the good business relationship

Many parties to a contractual arrangement will have long standing, good working relationships and concerns over the ability to pay, which have only arisen as a result of the pandemic, need not be the cause of a relationship breakdown. It is critical to communicate regularly with the other party about your respective positions, plans for payment, terms and conditions of payment and what steps each party can take in default. This may include a mutual agreement to vary the existing contractual payment terms while providing both parties with the certainty required. There may also be security options which could be explored with the right advice.

Protecting your business

Even if businesses can afford to wait for payment, they still need to be careful not to waive their standard payment terms or ability to demand payment within a specific timeframe at a later date. It should be made clear in writing what the terms of any payment plan will be and the consequences for further default. This will provide both greater certainty going forward and terms that can be enforced at a later date if necessary.

Businesses that cannot afford to wait, because to do so would risk

their own insolvency, need to consider taking steps to force payment. They need to be careful that other parties are not hiding behind the pandemic as a reason to delay payment to protect their own cash flow.

The availability of funding

In assessing any potential investment in litigation, a third-party funder will take account of the value of any claim, the prospects of it being successful and the prospects of recovering any monies awarded as a result of the litigation. We are experts in dealing with the funding market and can explain clearly the various, innovative ways in which you can balance risk. You can read more detail about how various funding methods can reduce your exposure to risk on our website. If a claim's prospects are strong enough, we will find a suitable funding arrangement to enable you to seek redress and manage the costs of litigation.

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Coronavirus: Preserving your business and protecting the nation

The food supply chain

Restaurants are closed for everything except take away services. Supermarkets are struggling to supply staples, but the nation still needs feeding. Most workers will be eating at home rather than in and around the workplace for some time to come. The recipe for feeding the nation has changed with immediate effect, by government order.

Whether you are a beneficiary of this change or a victim, there are opportunities to act for the good of your business and the people of this country.

You probably have contingency plans that you have put into effect. These plans will obviously differ depending on whether or not you are still permitted to open for business.

Open for business

If you are open for business, contingency plans will include:

- Ensuring the safety of your staff and any implications for your workforce, who will be key workers;
- Reducing the range of certain foods sold and focusing on the essential items;
- Sourcing fresh food from suppliers whose customers are no longer allowed to open;
- Increasing frequency of deliveries with existing suppliers and logistics companies;
- Seeking to use spare capacity from suppliers and hauliers no longer required for the restaurant trade;

- Seeking to use spare capacity from logistics companies and suppliers outside the food sector, in so far as their transport and other systems are suitable, or can be made suitable for use;
- Communicating to your suppliers and customers about the change in your policies; and
- Seeking legal advice in respect of any contracts which you may have to breach as a result of the Covid-19 pandemic.

Not open for business, at the present

If you are not open, they will include:

- Considering your staffing, making use of the Government's wage guarantee for staff who would otherwise be laid off and optimising your position for after the prohibition on opening is lifted;
- Considering rent, rates and other fixed overheads and how to minimise, defer or otherwise deal with these;
- Working with your customers or suppliers to mitigate the sudden stoppage of supply by identifying alternative purchasers for the foods;
- Communicating any change in your policies to your suppliers and customers; and
- Seeking legal advice in respect of any contracts which you may have to breach as a result of the Covid-19 pandemic.

Legal issues

As well as practical issues, there are related, legal considerations. Generally, you should look at:

- How much flexibility you have within each of your contracts with other parties;
- The requirement to mitigate any losses, by taking steps to avoid or minimise them;
- Your rights to cancel, terminate, suspend, vary, take control of subcontracts, break exclusivity provisions and demand information as required.

In addition to the above generic points, you may also want to examine the below in further detail.

Variation provisions

Changing obligations is an important consideration for the food chain. Many companies will respond to the Covid-19 pandemic differently, and hence it is impossible to truly predict the impact it will have on your contractual relationships. Whatever happens, flexibility and agility will be key.

Seeking advice in a timely manner will give you the time that you need to make proper action plans. It is important to make sure that you have evidence about agreements between the parties. The drafting of these pieces of communication should be undertaken with care: you need to avoid inadvertently waiving your rights or varying the contract.

Force majeure

Many contracts include a force majeure clause. This is often colloquially referred to as an "Act of God" clause. It is dubbed this because it caters for events such as:

- Natural disasters including hurricanes, earthquakes, tsunamis and volcano eruptions;
- Wars; and
- Industrial action.

These are just a few examples of events that could be included. In practice, the drafting of force majeure clauses may vary greatly. If it is engaged, a force majeure clause is hugely significant because it can release a party (or both parties) from their obligations under the relevant contract. The impact of this is that you may be able to get out of unhelpful contracts during this difficult time, but the same may also happen to you. However, each clause will need careful legal analysis to establish whether a pandemic would be covered by the wording. If it is not, and you attempt to terminate on that basis anyway, there may be

severe legal consequences.

Frustration

In contract law, there has long been a doctrine called “frustration”. Frustration discharges parties from their obligations under the contract. It is worth noting that this can only be used in very specific circumstances. By way of example, the leading case in this area of law concerns a venue burning down. To come under this doctrine, the services or goods need to cease to exist. It is not enough to say that you cannot supply goods because they are stuck at your warehouse and you are unable to engage a delivery firm. The legal hurdle is extremely challenging to meet.

Most contracts will include express termination provisions. If these are tackled in the wrong way, you may well face a dispute. Similarly, if you simply do not supply your goods or do not pay your suppliers, then you may be in wilful default.

Illegality

Contracts can also be declared void if they are illegal. This includes where, although there is no law prohibiting activities that have to be performed under the contract, the activities are against public policy. This is a complex area of law, and it is most likely that, if the contract was illegal, the force majeure clause will apply, if there is one, or the contract will have been frustrated.

Conclusions

Now is the time for cooperation, not confrontation. There are a range of legal options and practical issues to consider when addressing Covid-19 related supply chain issues. A thorough analysis of both can help to determine and implement the most appropriate solution.

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Coronavirus: protecting your business reputation

Whilst most businesses are understandably husbanding every penny and looking to cut costs to survive the coronavirus crisis, you must be strategic about your survival tactics. If not, you may find that your actions mean that you have no business left after the crisis has abated.

While it is to be hoped that most businesses will heed advice to seek emergency funding offered by the Government, there are those whose actions are in danger of damaging their reputation among their employees and their customers to the extent that, even if they do survive, people will not readily wish to do business with them.

Britannia behaving badly

Many people will remember the fuel crisis under Tony Blair’s Government. The garages that sought to profit from the situation quickly found out that, once the fuel suppliers returned to normal, no one would entertain buying from them ever again.

Unfortunately, there are businesses falling into the same trap. Circulating initially on social media and then on conventional media, was a shocking letter from Britannia Hotels. Although the hotel chain was understandably under pressure, it had not only written an insensitive letter to its Aviemore employees dismissing them from their jobs with immediate effect; but also ordered them out of their accommodation immediately. For a business that relies upon

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reputation and goodwill, it was an extraordinary act of callousness to fire and evict all its staff onto the street on the same day with no notice.

Their error was further compounded by a statement blaming that old chestnut, the traditional 'administrative error'. Regardless of the truth of the matter, that sort of passive response will always fail to undo damage caused.

Don't take advantage of the situation

Before the advent of social media, and a greater willingness on the part of consumers to call out bad behaviour by businesses, companies might have been able to get away with actions and / or explanations like that proffered by Britannia. These days, any business behaving badly is likely to face irreparable damage in the longer term, even if they survive the initial backlash.

Businesses that are currently thriving can also find themselves on the wrong side of public opinion if they are tempted to take advantage of the situation, as some petrol stations did in 2000. With photographs of packs of four toilet rolls being sold for £15 a time circulating on the internet, businesses need to recognise that "market forces" have their limit – consumers are not fools. Their profiteering behaviour will be remembered and they will be punished for putting profits before people.

Don't be tempted to trade your reputation for short-term gain

Therefore, we would encourage all businesses to think about their reputation while weighing up what will be extraordinarily difficult financial decisions. Yes, you do need to ensure the survival of your business beyond coronavirus but at what cost? Beware of trading your reputation for short-term gain.
Acting impulsively to deal with the coronavirus crisis can have unintended consequences: a knee-jerk reaction made by directors acting under immense pressure can lead to the business losing its reputation, carefully nurtured over years, in seconds. Along with all the other aspects of keeping your business afloat during this crisis is your business's reputation. You will need to rely on that heavily when you emerge on the other side.

Businesses that cherish their reputations during this critical period by acts of kindness and by having a considerate approach to their customers and employees alike, will have a much brighter future. Think carefully about how you manage your business through the next few months and take a measured, thoughtful approach towards the difficult decisions you are likely to face; by doing so, you will protect the business and its future.

For more advice please see our Reputation Management Guide and do not hesitate to call our team of reputation management experts for advice.

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Coronavirus: why you should consider mediation

The recent call by senior judges to try and resolve commercial disputes before they get to court (FT 26 April 2020) is driven by a real fear that the courts could be overwhelmed by companies pursuing claims. The coronavirus-related disruption to business has hit most sectors hard and many companies will be struggling with cash flow as a result of contracts not being honoured because the other party is also in survival mode, trying to preserve its own cash reserves.

Many parties to a contractual arrangement will have long standing, good working relationships which they will want to preserve beyond the pandemic and will, understandably, be reluctant to take a dispute to court which can be costly, time-consuming and distracting. This is where Alternative Dispute Resolution (ADR) clauses in contracts can be very valuable in helping to resolve concerns over the ability to pay. However, it worth noting that even without an ADR clause there is nothing to stop people agreeing to mediate. Indeed, under the Civil Procedure Rules, courts actively encourage parties to use ADR to settle disputes.

What is mediation?

Mediation is one form of ADR that can be used to settle a dispute in a more conciliatory, less confrontational way which is why it is most effective when used by parties who are actively seeking an agreement. Mediators themselves are independent, professionally trained individuals, many of whom are lawyers, who help both parties to see the wood for the trees. Mediators do not offer an opinion on the dispute; they are there to facilitate an agreement. They are able to put a positive interpretation on matters to help both parties reach an agreement that works for both sides. This is a more constructive approach than adversarial court proceedings which seek to find for one side only.

Why mediate?

Mediation is especially effective when neither party wishes to go to court, or cannot afford to do so, which will almost certainly be the case for many companies in the current climate. It relies on both parties taking a constructive approach, in other words, they must both want to participate. It is particularly useful for disputes between partners in the same business or between a customer and supplier, neither of which wish to inflict lasting damage on their trading relationship. Nonetheless it must be emphasised that reluctance on either side is a potential recipe for failure. The parties can walk away at any point but, if they manage to reach a settlement, it is legally binding.

How does it work remotely?

Each party provides a short summary of their case for the other side, and for the mediator. In normal circumstances, they would need to agree a suitable venue (with at least three rooms). However, as normal circumstances do not currently apply, mediation will take place via video conferencing, using a platform agreed on by all participants. Alternatively, there can simply be a telephone conference call. The mediator will circulate a mediation agreement in advance, setting out the terms of the mediation including that of confidentiality. At the mediation itself, the mediator will set out the ground rules to both parties, following which each party will set up their own video conferencing session, with the mediator able to move between each virtual meeting, questioning their cases and drawing out the salient facts. In telephone conference mediations both parties normally stay on the line but parties can be muted or drop out and call back in.

Impartial, confidential proceedings

An important aspect is that neither party is given advice by the mediator within the mediation. The mediator is impartial and both parties are encouraged to speak openly: the mediator will only disclose information to the other side if agreed. The mediator will also stress the importance of both parties taking legal advice to complement the mediation that takes place which is why most parties are accompanied by their legal advisers. This ensures that all parties understand the legal consequences of the agreement they reach.

In short...

There has always been a desire for some claimants to have 'their day in court' and, in some cases, taking a dispute to court is the only practical option. However, the extraordinary situation in which we all find ourselves provides the opportunity to re-evaluate our approach to dispute resolution and the judges' intervention in encouraging mediation is very timely. For many businesses it will be the most cost-effective and efficient way of producing an outcome acceptable to both parties – providing they both fully commit to the process.

How we can help

We can act as your representative in a mediation and we also have a CEDR accredited mediator in Philip Harris who is able to mediate disputes across a range of sectors and industries. Philip is on the panels of the Law Society, Association of Midland Mediators, RIBA, Talk Mediation and other bodies. He has mediated in a wide range of disputes and has been recommended by various organisations including major local authorities, national retailers, charities and individuals.

We have a number of solicitors with considerable mediation experience who could represent you for a fixed fee. We offer three different levels of fee depending on price and/or complexity and the volume of documents to be assessed. Once we understand the details of the dispute, we can advise on the level of service required.

Please do not hesitate to call us for more information.

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Employment Advice for Business

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Coronavirus (COVID-19) and immigration: double trouble for employers

On 5th March 2020, the Government unveiled its long-expected revised Immigration Bill to re-balance the immigration system and end Free Movement for EEA nationals from 2021. It simultaneously faced another priority: escalating the response to COVID-19. As the Immigration Minister and Chief Medical Adviser both took to the stage, businesses wanted to know how to manage an unfortunate combination of two unwelcome disruptions.

'Today we've taken the momentous first step to end free movement and take back control of our borders, delivering on the people's priorities', said Minister for Future Borders and Immigration, Kevin Foster, presenting the Bill in place of the embattled Home Secretary. Shortly afterwards, Chief Medical Officer, Chris Whitty, gave the first of his increasingly alarming briefings on what was coming to, and expected of, the UK.

More than three months on, "our borders" and "the people's priorities" look very different. Borders were shut down, at least to lawful entrants; many planes remain grounded, and immigration applications cannot proceed due to Government lockdowns. Few are discussing future immigration policy now; Brexit fears seem almost forgotten. Employers are firefighting the immediate consequences of the most severe national crisis since World War II, with an economy and workforce in turmoil. Everyone's first priority is the safety of their family's health and security.

But the economy is still part of the picture, and with immigration having been a key part of the economy for the last 25 years, Governments and businesses still have to manage it to their advantage in the immediate and longer term.

The challenge for employers: managing migration in a crisis

It was possible to apply employment law principles quickly to the problems of absence, infection management and furloughed employees. Dealing with immigration compliance, pending applications and recruitment costs already committed as travel advice changed by the day, has proved far more difficult. In an international crisis, global mobility has rapidly become fraught and complex.
The first formal guidance setting out the principles of the Government's approach was issued on 27 February 2020 in relation to Chinese nationals and absences by Tier 2,4 & 5 migrants due to COVID-19:

"The Home Office recognises the current situation is exceptional and will not take any compliance action against students or employees who are unable to attend their studies/work due to the coronavirus outbreak, or against sponsors which authorise absences and continue to sponsor students or employees despite absences for this reason."

A dedicated helpline was set up; within days, it was clear that its limited scope (migrants from China) was no help at all to the majority of employers and situations.

Having received some criticism, and following much lobbying from employers, lawyers and politicians, the Government has clarified the position in some situations. We can give some clearer pointers on those causing most concern, although all should be addressed on a case by case basis. Here are the issues which we are seeing most often:

Trapped by travel?

Many who have been issued Certificates of Sponsorship or have applied online for entry clearance in another category cannot complete their applications by attending biometric appointments overseas because the

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entry clearance posts are closed.
The Government's biometric provider has now moved to actively discouraging applications (3 April):

'Due to the impact of COVID-19 and the worldwide border, travel and public health restrictions, including Visa Application Centre (VAC) closures in many countries, UKVI services are limited and we are unable to meet our usual service standards. Therefore, we are not encouraging applications at this time and cannot say when your application will be decided if you do decide to apply. We continue to keep the situation under review and hope to resume normal services when we are able'.

We understand that, for example a Certificate of Sponsorship with a 3-month validity may still be accepted for entry clearance after that that time in light of this advice, and that the 3-month window for assigning a Restricted Certificate of Sponsorship in the first place will be extended.

So, some may be trapped outside the UK but decide to apply online in an application category that would normally require an in-country process, in the hope of applying for entry, or vice versa. There is provision for this already in the Immigration Rules, subject to Government discretion:

'33A. Where a person having left the common travel area, has leave to enter or remain in the United Kingdom which remains in force under article 13 of the Immigration (Leave to Enter and Remain) Order 2000, his leave may be varied (including any condition to which it is subject in such form and manner as permitted for the giving of leave to enter. However, the Secretary of State is not obliged to consider an application for variation of leave to enter or remain from a person outside the United Kingdom.'

Migrants who travelled on business and whose statuses must be renewed in the UK may be unable to return for the time being due to travel restrictions, with the risk of forced expiry, loss of accrued entitlements to indefinite leave and of access to the UK and their jobs. Others who were required to leave due to expiry, or to apply for a new status cannot.

On 24 March, the Government confirmed that no individual who was in the UK legally, but whose visa is due to expire, or has already expired, and who cannot leave because of travel restrictions related to COVID-19, will be regarded as an overstayer, or suffer any detriment in the future.

- A visa will be extended via a simple notification process to 31 July 2020 if an individual cannot leave the UK because of travel restrictions or self-isolation related to coronavirus (COVID19). Individuals must contact the Coronavirus Immigration Team email to advise of their situation. A dedicated Government UKVI email address requiring basic details is the contact point; there is also a helpline.
- Migrants trapped in the UK to switch to a long-term UK visa until 31 July. This includes applications where they would usually need to apply for a visa from their home country.
- They will need to meet the requirements of the route they are switching into and pay the UK application fee.
- Those whose leave expires between 24 January and 31 July 2020, including those whose leave has already been automatically extended to 31 March 2020, are eligible to apply online.

Home Secretary Priti Patel said in anticipation of this (24 March): *"The UK continues to put the health and wellbeing of people first and nobody will be punished for circumstances outside of their control. By extending people's visas, we are giving people peace of mind and also ensuring that those in vital services can continue their work."*

An announcement about further extensions is expected. More details can be found here.

UK Biometrics cancelled?

The vast majority of biometric enrolment appointments, the last stage of extension and change of status applications for migrants in the UK, were being cancelled by the end of March. This means that applications could not be completed.

Although in these cases status is preserved by statutory operation of law under the Immigration Act 1971, applicants are still in limbo– although of course they probably cannot travel anyway due to lockdowns. A phased reopening of UK and overseas biometric appointments has recently begun, first to clear backlogs of cancelled appointments during full lockdown. Application centres in severely affected regions are still closed, and priority appointments are generally not available anywhere.

What about Indefinite Leave, naturalisation and Life in the UK Tests (LITUK)?

Indefinite Leave applicants must demonstrate that they have spent a requisite proportion of time in the UK – what if their enforced absence meant they exceeded the thresholds?

We await clearer guidance but are advising on the assumption that Priti Patel's assurance (see Trapped by travel, above) will be written inti guidance and law.

Life in the UK Test appointments are cancelled and rescheduled

Simply, this is an essential protective public health measure. The Government is looking for online provision that builds in anti-fraud measures – fraud being the reason that personal attendance and evidence of ID.- is required at these exams.

The Government has stated that in relation to the absence limit of 180 days in a 12-month period it is "...considering further adjustments. These include a proposed concession to the continuous residence requirements for those trapped overseas...No one will be disadvantaged by the impact of COVID-19". Guidance on calculating the continuous period has been revised and can be found here.

EU Settlement Scheme (EUSS) applications

EU and EEA nationals and their non-UK dependents have been applying for a year to convert their EU law status into UK law before the transitional arrangements end in 2021. COVID-19 is throwing up challenges here, too.

The Home Office has stopped accepting documents by mail and stated that all documents already received will be returned as quickly as possible. Applications can still be made online using the EU Exit ID Document check app., which is the Government's preferred method.

Right to Work Checks

We received many queries from employers struggling to carry out right to work checks of documents in person, due to social distancing and restrictions on travel, whether for new starters or employees whose status had been due to expire. An inadequate right to work check can expose an employer to fines or even prosecution as well as loss of sponsorship, so this has caused much anxiety.

On 30th March the Government adjusted the requirements temporarily so that:

- Checks of documents as well as their holder can now be carried out over video calls
- Job applicants and existing workers can send scanned documents or a photo of documents for checks using email or a mobile app, rather than sending originals but
- Employers should use the Employer Checking Service if a prospective or existing employee cannot provide any of the accepted documents

The adjusted guidance makes clear that retrospective checks under the old arrangements will be expected when the crisis is over, and that checks carried out under the emergency measures must be recorded as such.

Then there is the question of start dates for migrants in the UK whose applications should have been decided but cannot be completed due to biometric lockdown. Where the status applied for is under Tier 2 or Tier 5 of the Points Based System, another special concession permits sponsors to allow employees to start work before their visa application has been decided if they:

- have assigned a Certificate of Sponsorship, and
- the employee submitted their visa application before their current visa expired, and
- the role they are to be employed in is the same as the one for which their CoS was assigned.

Sponsors' reporting responsibilities start from the date of employment, not from the date that their application is granted. If the employee's application is eventually refused, sponsors must terminate their employment.

Sponsor Licences – Sponsor duties in the COVID-19 Crisis

Licenced sponsors will be acutely aware of sponsor duties to report changes in circumstances affecting employees or their businesses, usually within 10 working days. Some changes, such as reductions in salary, are generally not permitted at all. As the crisis drives many unplanned alterations to working and contractual arrangements, the Government has announced some interim dispensations:

Working from home: Tier 2 and 5 sponsors are normally required to notify UKVI of a change of work location, but the Home Office states that "due to the current exceptional situation, we will not require sponsors to do so if working from home is directly related to the pandemic".

Furloughed sponsored migrants: The Tier 2 & 5 Guidance for sponsors has been revised to allow salary reductions to 80% of the stated salary or to £2,500 per month, whichever is lower, to reflect the provisions of the Coronavirus Job Retention Scheme. However, it also states that all employees should be treated in the same way – lawyers have requested much needed clarification of that statement.

Submission sheets: where a non-excepted notification is being made, a sponsor may now submit a signed submission sheet electronically with electronic supporting evidence as needed where a hard copy with wet signature is ordinarily required.

Absence: In respect of sponsored migrants prevented from working due to sickness, the need to serve a period of quarantine or the inability to travel due to travel restrictions caused by coronavirus:

- Sponsors do not need to report unauthorised absence;
- Sponsors do not need to withdraw sponsorship if they consider there are exceptional circumstances when a migrant employee is absent from work without pay for four weeks or more, as they ordinarily would.

Sponsor Licence Applications

Appendix A supporting documents, until now required by mail within five working days in original hard copy, are temporarily being accepted electronically, although the Home Office reserves its right to insist on originals in cases of doubt, with discretion applied on a case by case basis.

Quarantine

The Home Office refers to "self-isolation", but let's call it what it is. Since 8 June, the Government has been telling travellers: "When you arrive in the UK, you will not be allowed to leave the place you're staying for the first 14 days you're in the UK (known as 'self-isolating'). This is because it can take up to 14 days for coronavirus symptoms to appear".

There are circumstantial exemptions in a few cases, and anyone arriving via the Common Travel Area (ie Republic of Ireland) is exempt. The 'air bridges' mooted with France and some other countries did not materialise. Criticism that this is too late, too unworkable despite the £1,000 fine for non-compliance (as people travel to the place of isolation, risking infection) and economically damaging, and a legal challenge from two airlines, fuel speculation that the present quarantine will not long survive the 30 June review date.

The future of Immigration Policy

Back to 5th March and the Minister's announcement – as it often does, the Home Office chose the day before the Easter bank holiday to publish its revised guidance on the "new" (ie repackaged) Points Based immigration system to take effect from 2021. In essence, this carries through the commitment to some liberalisation on skills and salary thresholds, and brings EEA nationals, who at the end of the Brexit transition period will no longer able to rely on EU free movement law, into view. At a time when UK unemployment is expected to soar, the Government still makes special provision for migrant employees and plans to loosen the access criteria for migrants within months.

Its libertarian instincts may have been forced to one side by the immediate crisis, but protectionism is not written into the longer term picture. Contrast the 21 April tweet from Donald Trump, which is likely to translate within days into US law: *'In light of the attack from the Invisible Enemy, as well as the need to protect the jobs of our GREAT American Citizens, I will be signing an Executive Order to temporarily suspend immigration into the United States!'*

The agriculture sector was expected to be hard hit by Brexit's ending of free movement, as low-paid seasonal workers from the EEA were shut out. Coronavirus came first – only for the Government to provide quarantined flights from Europe with a ready supply of workers. One midlands farmer impressed by the "unbeatable" work ethic of a new supply of furloughed British workers and students wondered if he had a better answer. But the Government had already reached for the migration lever. Thanks in part to Coronavirus, Brexit may not prove to be the political answer to the immigration debate, after all.

As the national and global situation worsens, we expect further declarations by the UK Government about how it will manage the impact on immigration.

Our immigration team has extensive experience in managing crises and finding practical solutions where possible. We are staying fully abreast of developments and can speak with any clients concerned about managing the immigration impacts of COVID-19.

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Coronavirus: self-isolation for key workers - what you need to know

It is important that individuals with symptoms that may be due to coronavirus and their household members stay at home. Those with symptoms should remain at home for 7 days after the onset of their symptoms.

If you are the first person in your household to have coronavirus symptoms, you must stay at home for 7 days. All other household members who remain well must stay at home and not leave the house for 14 days. The 14-day period begins when the first person in the house became ill. If another member of the household becomes ill, they must stay at home for 7 days regardless of where they are in the 14-day period.

Self-isolation

On 23 March the Government ordered everyone to stay at home. However, key workers may find themselves in the position of having to self-isolate. If so, what is the legal position for employers on allowing their employees to self-isolate? If the employee is not entitled to company sick pay, they will be entitled to statutory sick pay which is now available from day one when self-isolating, instead of day four. If the employee continues to refuse to come into work, the employer would be entitled to take disciplinary action. However, in the first instance, an employer should consider the advice from ACAS:

- asking employees who have work laptops or mobile phones to take them home so that they can work there;
- arranging paperwork tasks that can be done at home for employees who do not work on computers; and
- making sure employees have a way to communicate with their employer and work colleagues.

Employees refusing to work

In addition to employees who are in quarantine or isolation, employees may be worried that they may catch the virus. It is, therefore, a vicious cycle if you allow the potentially unwell employees to attend work. If employees refuse to come into work as they are concerned that they might catch coronavirus, it is important that the employer listens to these concerns and potentially offers flexible working (such as homeworking).

Precautions

If the employer hasn't already done so, they may wish to send around email guidance on encouraging employees to be extra-vigilant. If the employer does have the capacity to, it is advised that it may be worth designating an 'isolation room' for employees who feel unwell and may feel the need to call a doctor for advice. This will ensure that other employees are less likely to refuse to work if the employer is taking measures to reduce the virus spreading.

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Coronavirus: Furloughed Workers and what it means for business

Overview

The Coronavirus Job Retention Scheme ("**the Scheme**") is designed to help businesses avoid having to lay off staff temporarily, or make them redundant, in the face of the unprecedented disruption caused by COVID-19. All businesses, regardless of size or sector, with a PAYE scheme in place on or before 19 March 2020, that have enrolled for PAYE online and have a United Kingdom bank account, can benefit from the Scheme. Under the Scheme, the Government will reimburse employers up to 80% of their employees' wages (up to a maximum of £2,500 per month, providing the employee was employed on or before 19 March 2020 and real time information had been submitted to HMRC prior to this date) plus the corresponding employer's National Insurance contributions and employer's auto-enrolment pension contributions. The Scheme, originally set to run from 1 March 2020 until 31 May 2020, but subsequently extended to 30 June 2020, has just been further extended until the end of October2020.

Employer and Employee Obligations

In order for employers to qualify for payment under the Scheme, they must designate affected employees as "*Furloughed Workers*" and place them on Furlough for a minimum of three consecutive weeks. Employee consent to this change of status and the cessation of all work for the employer must be obtained in writing and retained on file for five years by the employer. If employers wish to reduce Furloughed Workers' salaries in line with the amount they can reclaim from HMRC (i.e. 80% of the employee's wages up to a maximum of £2500 per month), consent must also be obtained for this change of the terms of employment.

If employees do not consent, employers may be required to consider less favourable alternatives, such as lay-offs or potential redundancies, in which case, employers are advised to seek legal advice.

Furloughed Workers must not earn money or perform any services, even the smallest task, for their immediate employer or any associated organisation while Furloughed. To do so would jeopardise the validity of their employer's claim. Saying that, Furloughed Workers are entitled to volunteer or undertake training, providing neither activity generates income for their employer. Quite unexpectedly, Furloughed Workers can also start work with another employer during their period on Furlough, although this will only be permitted if they are contractually allowed or otherwise get permission from their employer to do so.

Eligibility Criteria

For an employee to be eligible for Furlough under the Scheme, they must be on the employer's PAYE payroll on or before 19 March 2020 and HMRC must have receive an RTI submission in respect of the employee on or before this date. As always, there are a few exceptions to this general rule in relation to TUPE, payroll consolidation, Maternity and other types of family leave, and redundancies. It is also worth noting that there are a few expansions, meaning certain individuals who are not employees are also eligible for Furlough. Please seek advice separately on any these if you believe they apply to you.

Payments

Employers will be able to receive the grants in respect for Furloughed Workers under the Scheme through a portal set up by HMRC which went live on Monday, 20 April 2020, enabling the first payments to employers to start at the end of April 2020. Employers will need a range of information in order to submit their claims through the portal including, but not limited to, each employee's name, their National

Insurance Number, the claim period in respect of each employee and the amount being claimed for each employee. It is vital that employers keep the data used to calculate the value of their claims under the Scheme in case these are needed as evidence in the future. Employers must continue to pay their employees as usual during Furlough (taking into account any agreed reductions in salary).

Changes to the Scheme

As promised, Chancellor, Rishi Sunak, has now provided details as to how the revised Coronavirus Job Retention Scheme ("the Scheme") will be implemented. These changes were announced on Friday,29 May 2020.

June 2020

To facilitate the amendments to the Scheme, as documented below, the Government has confirmed that the Scheme will close to new entrants from the end of June (i.e. Tuesday, 30 June 2020). Therefore, for employees to be Furloughed for at least the 3-week minimum, thus permitting their employer to make a claim under the Scheme, employees must be Furloughed for the first time by Wednesday, 10 June 2020 at the absolute latest. From 1 July 2020 onwards, the Scheme will be restricted to employers currently using the Scheme and previously Furloughed employees.

Please bear in mind this 10 June 2020 deadline.

July 2020

Whilst it was initially thought the Scheme would remain in its current form until the end of July 2020, we now have confirmation that from 1 July 2020, businesses will be afforded the flexibility to allow Furloughed Workers back to work part-time. This transition occurring earlier than originally forecast is likely to be an attempt to support the Government's plans for a phased return back into the workplace, which are already in operation. It will be up to employers to work out the specific days and hours employees will work upon their return so that these can be adapted to suit their individual businesses.

When claiming from 1 July 2020, e.g. once part-time Furlough Leave is permitted, employees will only be able to claim for the hours an employee remains on Furlough. Employers will be responsible for paying employees in full for the hours they undertake work. Employers will need to make the claim for a minimum period of one week to allow for the grant to be accurately calculated across working patterns. It is thought that employers will be required to submit data confirming the usual hours an employee would be expected to work in the claim period, and the actual hours worked in such a period.

The grant employers are entitled to claim back from the Government (i.e. 80% of wages, up to a maximum of £2,500 per month) will remain the same for July.

August 2020

From August, the level of financial support from the Government under the Scheme will be slowly tapered out, reflecting the fact that businesses will hopefully be starting to be on the rise and gain some sort of financial stability with employees having been able to work part-time throughout July. The idea is to gradually reduce the level of support from the Government so as to not impact too heavily on businesses.

Whilst the Government will continue to pay 80% of wages, up to a maximum of £2,500 per month, from 1 August 2020, employers will be responsible for Employer National Insurance Contributions and employers pension contributions. Government guidance has confirmed that for the average claim, this will represent approximately 5% of the gross employment costs the employer would normally be liable to pay had they not been given the opportunity to Furlough the employee.

September 2020

Only from September will the actual value of the grant employers can claim for Furloughed employees (i.e. 80% of wages, up to a maximum of £2,500 per month) start to be diminished. From 1 September 2020, the Government will reduce the grant so as to pay 70% of wages, up to a maximum of £2,187.50 per month. This means that employers will not only be responsible for Employer National Insurance Contributions and employer pension contributions, but also 10% of wages – it is important that the employee continues to receive at least 80% of wages (up to the original maximum of £2,500 per month) throughout the whole period the Scheme is in force. Of course, employers will still have the prerogative to "top-up" the amount available from the Government if they so wish (although often limited by their financial position). Government guidance has confirmed that for the average claim, this will represent approximately 14% of the gross employment costs the employer would normally be liable to pay had they not been given the opportunity to Furlough the employee.

October 2020

Further measures will be taken in October to once again minimise the available grant from the Government. From 1 October 2020, employers will be able to claim 60% of wages, up to a maximum of £1,875. Therefore, employers will be responsible for 20% of wages, alongside Employer National Insurance Contributions and employers pension contributions, to make sure employees continue to receive at least 80% of wages (up to the maximum of £2,500 per month). Again, employers are able to "top-up" Furloughed employees' salaries. Government guidance has confirmed that for the average claim, this will represent approximately 23% of the gross employment costs the employer would normally be liable to pay, had they not been given the opportunity to Furlough the employee.

The Scheme will draw to a close on 31 October 2020.

It is important for employers to bear in mind that if they wish to extend an employee's period of Furlough beyond the date originally anticipated (and agreed), or if they are intending to bring an employee back to work, but only on a part-time basis, normal employment law rules will still apply. Therefore, any changes to an employee's terms and conditions of employment, however temporary, will require employee consent.

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Coronavirus: employment update - carrying over annual leave

Holiday roll over

On Friday, 27 March 2020, the Business Secretary, Alok Sharma, announced that the Working Time Regulations are to be amended to help ease the current pressure COVID-19 is placing on businesses. These changes give employers the flexibility to allow workers prevented from taking their statutory holiday entitlement within the company's designated holiday year as a result of COVID-19, to carry over up to four weeks of unused leave into the next two holiday years.

At present, the majority of workers are required to take their statutory holiday entitlement (i.e. 20 days plus 8 bank holidays) within the designated holiday year. If that leave is not taken, it is often lost (the current regulations allow a maximum of 8 statutory days to

be carried over, subject to an employer's agreement). By the same token, employers risk being fined if they fail to ensure that their workers take this minimum holiday entitlement. Due to the impact of COVID-19, there are currently a number of key sectors, such as health, food and manufacturing, where employers require flexibility in holiday arrangements in order to continue delivering vital services and products without being left short-staffed. This change in the law means that no worker should have to forfeit their holiday as a result of contributing towards the national effort to fight the pandemic.

Employers across all sectors are likely to find workers are reluctant to take annual leave whilst they are unable to get away and remained confined at home. This is something that all employers will have to address; agreeing to defer leave until restrictions are lifted is likely to be unrealistic for most businesses and so employers will have to manage holiday requests sensibly and sensitively.

Employers can compel workers to take annual leave, provided twice the period of leave is given as notice to the worker (i.e. for 2 days of annual leave, 4 days' notice is provided by the employer).

Coronavirus Job Retention Scheme or furloughing staff

The Coronavirus Job Retention Scheme is designed to help businesses avoid having to lay off staff in the face of the unprecedented disruption caused by COVID-19. All businesses with a PAYE scheme in place on 28 February 2020, regardless of size or sector, can benefit from the scheme with the government reimbursing employers 80% of their employees' wages (up to a maximum of £2,500 per month, and providing the employee was employed on 28 February 2020), plus employer's National Insurance contributions and auto-enrolment pension contributions. Employees on agency contracts and flexible or zero hours contracts can also benefit from the scheme. Due to government guidance confirming the scheme can be backdated to 1 March 2020, any employees who were on the payroll on 28 February 2020, but made redundant following this, can benefit from the scheme if they are re-hired by their employer. For more detail, please see our guide on furloughed workers.

Statutory Sick Pay

All United Kingdom businesses employing fewer than 250 employees as at 28th February 2020 can reclaim up to two weeks statutory sick pay ("**SSP**") paid to any employee who is self-isolating as a result of COIVD-19. Employers should maintain records of staff absences and payments of SSP. Although employees are not required to get a GP sick note, they can request a note from NHS 111.

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Coronavirus: designated key workers - what you need to know

In the past few weeks, particularly since 23 March 2020, there has been a serious escalation in the United Kingdom's measures to combat COVID-19 pandemic. Millions are tuning in every day to listen to members of Government and the country's top medical advisers updating us on how we will "turn the tide".

School closures and managing childcare

A significant measure, and one with far reaching implications for working parents, was the closure of schools on Friday, 20 March 2020. Almost all working parents rely on the education system as an important part of their childcare arrangements; schools closing left many wondering how they would manage.

On 19 March 2020, the government published an official guidance note for schools, colleges and local authorities in England which outlined vital information on how childcare arrangements should be managed. The guidance includes the following five key principles:

1. Children should stay at home if at all possible;
2. Educational provision is available for a child needing specialist support, is vulnerable, or has a parent who is a critical worker;
3. Parents should not ask grandparents, friends, or family members with underlying health conditions who are in the stringent social distancing category, to provide childcare;
4. Children should observe the same social distancing principles as adults, and parents should try and ensure children do not mix socially in a way that could spread the virus.
5. Residential special schools, boarding schools and special settings should continue to care for children wherever possible.

Designated 'Key Workers'

One notable point from the above guidance, and the focus of the remainder of this guide, is that government guidance focuses on providing childcare arrangements for the children of those workers who are critical to the Covid-19 response effort. Practically, this requires schools to remain open for these children to attend if necessary. Such individuals who are fundamental to the fight against COVID-19 have been designated "**Key Workers**". Specifically, the following groups have been designated as Key Workers:

- Health and social care;
- Education and childcare;
- Key public services;
- Local and national government;
- Food and other necessary goods;
- Public and national safety;
- Transport; and
- Utilities, communication and financial services.

Examples of job descriptions falling within the above groups, include:

- NHS staff;
- Nursery staff and childminders;
- Teachers;
- Individuals who work for the courts;
- Prison staff;
- United Kingdom intelligence agency staff;
- Border security staff;
- Those working for the National Crime Agency;
- The emergency services (including the coastguard and any support staff);
- Agricultural workers;
- Food processing or distribution staff;

- Employees of energy companies and water companies;
- Staff working for telecommunications companies;
- Postal service staff;
- Journalists providing public service broadcasts;
- Employees of funeral homes and other organisations that manage the deceased;
- Employees who work for transport companies on the air, water, road, rail or freight.

The above list is non-exhaustive. It appears that the wording of the guidance on Key Workers is sufficiently flexible to account for the current uncertainty as it may be necessary to include additional groups as the need arises in the coming days, weeks and months.

If workers believe they fall within one of the critical categories as listed above they should speak to their employer to confirm that, based on their business continuity arrangements, their specific role is necessary for the continuation of this essential public service.

Understand what 'key worker' means for your business

Following the Prime Minister's announcement of a country-wide lockdown on Monday 23 March 2020, only those in the Key Worker category should be attending their place of work. Everyone else should be working from home. Therefore, it is imperative that workers discuss with their employer whether or not they fall into this category, not only so they can continue to send their child to school if necessary, but also so they can follow the correct working arrangements.

It is worth noting that just because and employee falls within the definition of Key Worker, does not mean they should automatically send their child to school.

Whilst such educational provisions will be available as an option to support Key Workers as they help tackle to Covid-19 outbreak, they should only be utilised only where the child of a Key Worker cannot stay at home.

We recommend employers give key workers formal, headed letters explaining what they do and why they are categorised as key workers. We have produced some templates for employers which will allow staff to confirm their status so do please get in touch with us.

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Brief guide to redundancy

Although the Coronavirus Job Retention Scheme ("Scheme") has eased some of the pressure resulting from Covid-19, it is no 'silver-bullet'. This temporary measure is undoubtedly helping businesses maintain headcount in the short-term but, with the end of the Scheme in sight, some businesses will be forced to consider the less favourable options the Scheme enabled them to avoid temporarily; the most drastic of these being redundancy.

While most employers will do their utmost to avoid making staff redundant, if they do need to go down this route, it is imperative that they follow the correct process.

Stages of the Process

Stage 1: Establish whether there is a genuine redundancy situation;
Stage 2: Establish the number of employees at risk of redundancy;
Stage 3: Look for alternatives to redundancy;
Stage 4: Establish a proposal for the organisational restructure and its supporting rationale;
Stage 5: Inform employees they are "At-Risk" of redundancy;
Stage 6: Establish selection criteria if the proposal concerns more roles than proposed redundancies;
Stage 7: Conduct the first Consultation Meeting;
Stage 8: Provisionally score employees against the selection criteria;
Stage 9: Conduct the second Consultation Meeting;
Stage 10: Make a decision on the proposal; and
Stage 11: Allow the employee to appeal.

The redundancy process does not require every stage to be implemented; this will depend on the number of roles in the "pool" of those being considered for redundancy and how many redundancies the employer is proposing to make. If in doubt, we can advise you on the process required in your specific circumstances.

Employers should keep an open mind throughout the process: redundancy is only a proposal at this stage and the affected employees should be invited to offer any counter proposals to avoid the proposed redundancies.

A genuine redundancy situation

Arguably, the most important stage in the process is the initial one: without establishing a genuine reason for redundancy, employers should not embark down this route. The employer must demonstrate a genuine business need for the redundancy, otherwise it risks being deemed unfair and leaves the employer exposed to risks of constructive and unfair dismissal claims.

There will be a genuine redundancy situation where:
i. There is a closure of the business where the employee was employed;
ii. There is a closure of the employee's place of business; and/or
iii. There is a reduced requirement for the employee to carry out work of a particular kind.

Employers must comply with this initial stage – as well as further stages of the process – and not assume it is obvious, or the outcome of the process to be inevitable.

Alternatives to Redundancy

Obviously, redundancies should only be considered as a last resort and employers should explore alternative options including:
i. Voluntary Redundancies – employees volunteer to be made redundant rather than compulsory selection;
ii. Reduced Hours of Work – this can involve short-time working or overtime bans; and/or
iii. Temporary Stoppages of Work – this can involve lay-offs or unpaid leave.

Taking the time to evaluate other measures, and thus avoid potential

redundancies, will reflect positively on the employer's process and make it more likely to be judged as fair.

Suitable Alternative Employment

The process requires employers to offer affected employees suitable alternative employment (if this exists) as a way to avoid their potential redundancy. Employers must check their vacancy lists before consulting potentially redundant employees in order to provide this information.

If an employee takes up the offer of suitable alternative employment, they will be entitled to a trial period of four consecutive weeks in this new job role in order to assess whether, in practice, the role is suitable for them.

Collective Consultation

The law dictates a different, more complex, procedure when large scale redundancies take place. As such, where an employer proposes to *make 20 or more employees at one establishment redundant within a period of 90 days or less*, an employer should follow a "Collective Consultation" procedure.

However, this does not mean that the individual consultation procedure for redundancies can be ignored. Once Collective Consultation has concluded, employers must make sure that they still consult individually with all employees regarding their potential selection for redundancy. Individual consultation is still essential to ensure that the employer follows a fair overall process. Looking at the stages above, Collective Consultation should be inserted directly above Stage 6 for situations in which it is necessary.

Risks

Employers who fail to follow a fair, transparent and open-minded redundancy process may face claims for both constructive unfair dismissal for the duration of the process and unfair dismissal after completion of the process. Therefore, it is imperative that employers do not rely on the redundancy process as a pretext for exiting difficult or under-performing employees from the business.

On top of this, if the employer does not provide the employee with their usual basic entitlements of notice in accordance with their contract of employment and payment for their accrued but untaken holiday, as well as a redundancy payment (if the employee is eligible), they may face further claims for breach of contract and / or unlawful deduction of wages.

Conclusion

Whilst the redundancy process is often unpleasant for all involved, it is important employers comply with their duties, however difficult this may be, not least to protect themselves should they face a claim at an Employment Tribunal.

Please do not hesitate to get in touch with any of our employment lawyers who would be happy to discuss any questions you may have in relation to any stage of this process.

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Coronavirus: the effect on UK landlords

The World Health Organisation has recognised Coronavirus (COVID-19) as a pandemic which is causing the UK real estate market to take a hit. We have considered the practical implications that commercial landlords may face as a result of the outbreak and what they should be doing to protect their position including landlord's obligations, temporary closure of commercial buildings and tenant's requirement to continue paying rent.

Can I require my tenant to temporarily vacate the property on government advice?

To date, the government has not recommended closure of the workplace even where a member of staff or member of the public with confirmed COVID-19 has recently been at the property. Public Health England will instead contact the business affected to discuss the circumstances and provide advice. It is likely they will advise on how to best clean communal areas and isolation of any other persons who have potentially been in contact with the infected person.

If the advice of the government changes, most commercial leases will include a clause requiring the tenant to comply with all legislation, notices or orders made by a competent authority. The tenant would therefore be in direct breach of that provision if they fail to comply with any directives published by the government or Public Health England.

Who pays the cost for additional services?

Undertaking additional cleaning services to prevent the spread of COVID-19 will understandably come at a cost. Landlords should check the service charge provisions within their lease as they are most likely to say that the costs can be recovered from the tenant under the landlord's obligation of good estate management or where the additional services have been undertaken under statute.

Temporary closure of business – does my tenant still have to pay rent?

In the majority of commercial leases there will be a rent suspension provision to cover the tenant in circumstances where the property has suffered physical loss or damage by an insured risk (i.e. fire, flood, storm, escape of water). It is very unlikely that the lease will contain a provision to allow tenants to suspend rent in any other circumstances such as a worldwide health pandemic. Landlords should check the terms of their lease to determine in what situations a suspension of rent provision would be triggered.

In some parts of Asia, which have been more severely affected by the virus, landlords who have been forced to close restaurant and retail businesses have offered rental rebates of between 30-50% to assist their tenants in seeing out the COVID-19 outbreak. This would of course need to be offered as a gesture of goodwill and whilst there has been no requirement for these businesses to close in the UK, the public has been advised to refrain from all social activity which will has already hugely impacted on the retail and hospitality sector. Whilst landlords are under no obligation to renegotiate the terms of the lease at the request of the tenant, landlords should consider the implications of bringing a lease to an end when it is unlikely that they will be able to find a new tenant in the current climate.

Temporary closure of business – can my tenant bring their lease to an end?

If you are required by the UK government to close your premises your tenant may consider bringing their lease to an end under the law of frustration or by a force majeure clause. A force majeure clause in a commercial contract will seek to excuse one or both parties from performing the contract where certain events occur that are outside of the parties' control.

Force majeure clauses in commercial property leases are uncommon however, landlords should check the terms of their lease and if it does contain a force majeure provision, further information on the enforceability of said clauses has been considered by Pete Maguire and can be found here.

The law of frustration applies where a contract has been entered into and an unexpected incident occurs outside of the control of both contractual parties making it impossible for the contract to be performed as originally agreed. Whether a Lease can be frustrated has been the topic of discussion in the House of Lords on numerous occasions. Whilst it has been held that there are some very limited circumstances where a lease could be frustrated, to date, there is no reported case law where a lease has actually been frustrated. As a result, we find it very unlikely that a tenant will be able to successfully argue their lease has been frustrated as a result of a temporary closure of their building.

Ongoing considerations for landlords:

- Landlords should seek advice on their lease provisions so that they can take any necessary steps to protect their position;
- Landlords should regularly check updates issued by the World Health Organisation, UK Government and Public Health England;
- For all new leases, consider asking your solicitor to include provisions for future pandemics;
- Undertake more thorough cleaning to assist in containing the virus; and
- Consider flexible working arrangements and where possible, allow employees to work from home on a temporary basis.

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Coronavirus: residential landlords – latest government guidance

On Wednesday 18 March, the government announced measures in an attempt to provide some reassurance for both residential landlords and tenants. We are not sure how reassured either landlords or tenants will be.

Mortgage commitments

For many landlords, their rental income is vital to meet mortgage commitments. The government has recognised this and landlords who have buy-to-let mortgages, where the ability of their tenant to pay rent has been affected by any aspect of the coronavirus pandemic, will be able to take advantage of the three-month mortgage payment holiday, already available to home owners in difficulty.

It is not yet clear what evidence will be needed. It is likely that it will be left to lenders to set the criteria. If landlords are already seeing missed rental payments, it would be prudent to ask their tenant to confirm in writing what their circumstances are, i.e. laid off, made redundant or simply receiving statutory sick pay. Landlords should give lenders a few days grace before making contact to discuss this relief. Lenders are already struggling to manage enquiries from those who are owner occupiers.

A mortgage holiday is simply a break from paying the mortgage and landlords will have to make up the missing payments at some point. Lenders are likely to be happy enter into a payment plan to repay the arrears over a reasonable period and it is worth landlords knowing that the remaining term of the mortgage is considered by the court to be a reasonable period for repayment of mortgage arrears.

Rent arrears

Tenants have not been afforded any sort of break from paying rent. What the government has said is that no tenant who cannot pay their rent due to the coronavirus will be forced out of their home. Whilst the tenant is unable to pay, rent arrears are going to accrue. The government has said that, at the end of the three-month period, landlords and tenants will be expected to work together to establish an affordable repayment plan, taking into account a tenant's individual circumstances.

Possession Proceedings

New legislation is being rushed through to provide further protection for tenants. The immediate implications are:

- No new possession claims will be issued at courts for the next three months (at least). It is not clear if this will apply to possession claims based on rent arrears only, or whether it will extend to claims brought pursuant to S21 of the Housing Act 1988, which is the 'no fault' repossession route where a landlord might simply want their property back, rent arrears or no rent arrears.

- The Pre-Action Protocol currently in place for social landlords (requiring them to take certain steps before proceedings can be issued) is going to be revised to include protection for tenants who have accrued rent arrears due to the coronavirus pandemic. Again, until we see the new legislation and the revised protocol, we will not know whether the protocol requirements will extend to the use of S21 Notices, but it seems likely that it will.

- There was no mention of proceedings that may already have been issued but it seems likely that the Court will be seeking to protect tenants as much as possible and so expect Judges to exercise more discretion than usual.

- Given that the government was already looking at ways to shake up housing legislation and potentially remove S21 entirely, it is possible that this emergency legislation will remain in perpetuity.

More generally, there has been no mention of the impact of non-payment of mortgages on individual's credit ratings. Currently, missing a mortgage payment will be reflected in someone's credit score. However, the Building Societies Association (BSA) has reported that '*firms will make efforts to ensure that forbearance offered under these circumstances (i.e. payment holidays) will not result in an adverse impact on the customer's credit score.*' Clearly this forbearance will depend on mortgagees speaking to their lenders and keeping lines of communication open. However, the situation will remain unclear for some time and we will continue to monitor it.

As soon as the new legislation has been released, we will be able to advise you on any particular circumstances. Meanwhile, if you are unsure about anything, or if you are a managing agent that has a query, please get in touch with Mary Rouse.

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Coronavirus: commercial tenants protected from eviction

The Government has announced extra protection for businesses by placing a temporary restriction on landlords' ability to enforce re-entry or forfeiture for non-payment for at least three months so that those who cannot pay their rent because of cashflow difficulties related to the coronavirus will be protected from eviction.

The measures contained within Section 82 of the Coronavirus Act 2020 (the Act) (passed on 25 March 2020) will mean no business will be forced out of their premises if they miss a payment in the next three months. The key points are:

Protection from eviction

Following the Government's recent announcement, landlords will not be able to forfeit a commercial tenant's lease for non-payment of rent for the next three months. In most standard leases the right to forfeiture does not arise until a certain period of time has elapsed (lease dependent but usually between 7 and 21 days). Rent payable on 25 March, which remains unpaid after the relevant period under the lease, a landlord will not be able to forfeit. This also appears to extend to any other rent payment pattern such that any rent if unpaid, whenever it fell due, will be caught.

Who will be protected and how long will the moratorium last?

The measures apply to all business tenancies in England, Wales and Northern Ireland and will last until 30 June 2020 (Section 82(12)(b) of the Act), with an option for the Government to extend if needed. It should be noted that the measures only suspend a landlord's right to forfeit for the period of three months (ending 30 June 2020); it does not extinguish a tenant's liability to pay rent under the lease. Unless the current deadline of 30 June 2020 is extended, a landlord's right to forfeit will again arise on 1 July 2020.

Which payments are caught by the moratorium?

The measures apply to any sums a tenant is liable to pay under the lease (Section 82(12) of the Act). Depending on the terms of the lease, this could include service charges, insurance rents, landlord's costs and interest in addition to the basic or principal annual rent.

Are landlords' other rights and remedies affected?

Other rights and remedies available to landlords do not appear to be affected by the moratorium, enabling landlords to pursue other options for non-payment of rent or other breaches of tenant covenants: exercising CRAR (Commercial Rent Arrears Recovery), suing for rent arrears, insolvency proceedings, including forfeiture for other tenant breaches but in these circumstances, service of a Section 146 notice pursuant to the Law of Property Act 1925 would be required.

Waiver by landlords

Pursuant to section 82(2) of the Act, no conduct by or on behalf of the landlord during the three months moratorium will be regarded as waiving the right to forfeit for non-payment of rent, other than giving an express waiver in writing.

Court proceedings

The Act also makes provision in relation to ongoing court proceedings, ensuring that the courts do not grant orders for possession prior to expiry of the moratorium period.

Opposition by landlord to application for new business tenancy

One of the grounds on which a landlord can oppose the grant of a new tenancy is based on '*persistent delay in paying rent which has become due*' (Section 30(1)(b) of the Landlord and Tenant Act 1954). Section 82(11) of the Act provides that any failure to pay rent during the period of the moratorium (whether rent due before or in that period) is to be disregarded for the purposes of determining whether the ground is established.

These measures will provide welcome reassurance to businesses struggling with cashflow and ensure no commercial tenant is evicted for non-payment of rent over the next three months. This will inevitably have significant ramifications for landlords and therefore it is imperative that parties maintain an open line of dialogue and support ongoing conversations about voluntary arrangements where possible, a stance supported by the Government, which will continue to monitor the impact on commercial landlords.

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Coronavirus: further protection for commercial tenants

As we await publication of the Corporate Insolvency and Governance Bill, which is expected to include details of the new moratorium procedure and changes to wrongful trading provisions, the Government made a surprise announcement on 23rd April 2020 when it confirmed that the Bill would also include further measures to protect commercial tenants from aggressive debt collection by landlords in respect of rent arrears which have accrued directly as a result of the coronavirus pandemic.

Winding-up petitions to be 'temporarily voided'

The government statement confirmed that statutory demands and winding up petitions issued to commercial tenants are to be "temporarily voided". In practical terms this appears to mean that a statutory demand for payment of commercial rent arrears that have accrued because of Covid-19 can be ignored and there would be no need to apply for an injunction to prevent the issue of a winding-up petition based on non-compliance.

Any winding up petition issued in respect of commercial rent arrears will be reviewed by the court prior to issue in order to determine whether the tenant's ability to pay is as a direct result of Covid-19 and, if the court determines that it is, the petition will not be issued. It isn't clear how the court will be able to make this assessment based purely on the content of the petition: it seems improbable that Covid-19 would be the reason for the tenant's inability to pay for any arrears accrued prior to the December rent day, or before March 2020 if paid on a monthly basis. However, it seems likely that any doubts in this regard will be resolved in favour of the tenant.

Initially these restrictions will last until 30th June 2020 which ties in with the Section 82 of the Coronavirus Act 2020 which prevents forfeiture of leases on grounds of rent arrears until this date.

Changes to Commercial Rent Arrears Recovery (CRAR)

Landlords will be prevented from using CRAR unless rent is 90 days overdue. It remains to be seen whether this period will be extended with effect from the end of June 2020 if full lockdown remains in place as it seems unlikely that pubs and restaurants are going to be able to open for many months to come causing further arrears to accrue.

Notwithstanding these measures, rent will continue to accrue and there will come a time when accrued arrears will have to be paid. At this point we will presumably see either an increased demand for borrowing under the Coronavirus Business Interruption Loan Scheme or businesses throwing the towel in and entering a formal insolvency process. It is hard to imagine Landlords agreeing the write off the debts with many of them facing their own financial challenges.

Tenants encouraged to pay rent

The government seems to acknowledge that there is a balance to be struck between the protection offered to tenants and the position of landlords and urges tenants to pay rent where they can. The government expects landlords and investors to work collaboratively with high street businesses who are unable to pay their bills during the coronavirus pandemic and, although the government acknowledges that landlords could themselves face hardship as a result of the new measures, it appears to regard the option of a loan under the Coronavirus Business Interruption Loan Scheme as the solution. This will not be an attractive option to landlords in the face of uncertainty as to whether the arrears will ever be paid, leaving them exposed to liability for the 20% not currently guaranteed by the government.

As always, the devil will be in the detail as and when the draft Bill is published. The announcement on 23 April 2020 focuses solely on rent so it will be interesting to see whether the measures introduced by the Bill extend to other commercial debt.

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Coronavirus and the impact on commercial rents: advice for landlords

Requests from commercial tenants for rental holidays in the light of a drop in business caused by the coronavirus pandemic have become commonplace. Analysis indicates that overall rent collection for the March quarter fell by over 25% in the UK.

Forfeiture moratorium

In March 2020, the Government announced extra protection for business tenants by placing a temporary restriction on commercial landlords' ability to enforce re-entry or forfeiture for non-payment for at least three months, so that those who cannot pay their rent because of cashflow difficulties related to coronavirus will be protected from eviction. These measures are contained within Section 82 of the Coronavirus Act 2020 ("the Act") (passed on 25 March 2020) and will mean no business tenant will be forced out of its premises if it misses a rent or other lease payment prior to 30 June 2020. The Act gives the Government power make future extensions of the moratorium beyond 30 June.

In any event most landlords, in the current uncertain market, would not wish to bring their tenants' leases to an end by re-entry or forfeiture, regardless of the Act.

Pursuant to Section 82(2) of the Act, no conduct by or on behalf of the landlord during the three month moratorium will be regarded as waiving the right to forfeit for non-payment of rent, other than an express waiver in writing. The landlord's actions will therefore will not prejudice it from exercising a right to forfeit in the future, when the moratorium is over.

Insolvency proceedings moratorium

Normally landlords are entitled to serve a statutory demand for non-payment of rent after which, if it remains unpaid for a period of 21 days, the landlord can issue winding up proceedings. The tenant can apply for an injunction to restrain the presentation of a winding-up petition. Due to the urgent nature of such application this can be an extremely expensive application to make. The landlord also has the option of bypassing service of the statutory demand and proceeding straight to winding-up proceedings.

However, on 23 April 2020 the Government announced that it is to ban temporarily the use of statutory demands and winding up orders for non-payment of rent. The legislation has not, as at 24 April, yet been passed but it is clear from the Government's statement that the moratorium will be in force until 30 June 2020 initially, with the same possibility for future statutory extensions as are given to the forfeiture moratorium.

Commercial Rent Arrears Recovery (CRAR)

Normally CRAR permits a landlord to instruct an enforcement agent to take control of a tenant's goods and sell them to cover the debt. The process is quite complex and necessitates the landlord serving notices on the tenant. CRAR may only be used in respect of principal rent, so cannot be used to recover other sums due under the lease such as service charges and insurance rent.

The Government's 23 April 2020 missive, however, stated that it would be laying secondary legislation to provide tenants with more breathing space to pay rent by preventing landlords using CRAR unless they are owed 90 days of unpaid rent. This legislation came into force on 25 April. The 90 day rent threshold is temporary and will last for the same period as the statutory forfeiture moratorium discussed above.

There are remaining rights and remedies which enable landlords still to pursue other options for non-payment of rent or other breaches of tenant covenants. The forfeiture moratorium and the CRAR changes do not extinguish a tenant's rental or other liabilities under the lease, and it is not expected that the legislative changes relating to insolvency proceedings will remove those liabilities either. It is open to landlords, then, to agree a temporary payment holiday with the tenant, safe in the knowledge that the missed payments will remain due. Landlords and tenants may also agree lease re-gears with mutual benefits to each, about which we have published a separate bulletin.

What other rights and remedies remain available?

Debt recovery proceedings

The landlord can issue court proceedings for non-payment of rent as a simple breach of contract claim. If the claim is for less than £10,000 then the landlord will only be entitled to reclaim a fixed amount of legal costs and interest but, above £10,000, the landlord will be entitled to reclaim reasonable legal costs and interest.

Rent deposit

A landlord may be able to draw down on a rent deposit if one was entered into when the lease was granted. The ability to draw down will depend on the terms of the deed, which may impose certain limitations, but the landlord is likely to be in a position to withdraw funds in the event of tenant default (i.e. non-payment of rent) and require the tenant to top up the deposit following withdrawal.

Side letter as a "lever"

If a tenant has personal concessions in a side letter, it is possible – if the side letter is worded accordingly - that these may be capable of being withdrawn if the tenant is in breach of the lease, such as if it is in rent arrears.

Social distancing will be likely to prejudice the efficacy of the debt recovery proceedings remedy, at least while lockdown remains in place.

Practical options

The coronavirus outbreak inevitably has significant ramifications for landlords and their income streams. The changes announced on 23 April are, according to Business Secretary Alok Sharma, designed to prevent a "*minority of landlords using aggressive tactics to collect their rents … while the COVID-19 emergency continues.*" It is important to stress that the existing and impending legislation discussed above does not suspend or extinguish lease liability for unpaid rent, only some of the remedies available to the landlord for non-payment. We would therefore encourage, where possible, an open line of dialogue with tenants in difficulty - to preserve commercial relationship and reputation.

For further advice, please see 'The effect of coronavirus on UK landlords', 'Further protection for tenants' and 'Can lease re-gearing save the high street?'

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Sale and leasebacks: sacrifice or a saviour?

For many businesses the financial packages offered by the UK Government, trying to keep the economy afloat during the coronavirus pandemic, will provide much needed support and respite. Nonetheless, if the stories being reported are to be believed, for many companies the money cannot come quickly enough with the Business Secretary acknowledging over the Easter weekend that 'more money needs to go out faster'.

The property world has been exploring alternative ideas for raising cash quickly and, in doing so, has dusted off an old favourite – the sale and leaseback.

What is sale and leaseback?

A sale and leaseback deal does very much what it says on the tin – the owner of a property sells a property to another party and, as part of the transaction, agrees to take a lease of the property back immediately. Indeed, as an example, Next Plc is one of a number of high-profile companies that has announced plans to market a number of their assets.

A sale and leaseback can provide an alternative means of raising finance for a business which may prefer to free up cash in the business rather than approaching a bank for the money.

In addition, many property investors including large funds, private equity houses and smaller individual investors are looking at a range of opportunities. Many funds, unless they can negotiate or revise terms, may be bound by covenants to spend cash they have raised by a certain date; and individual investors may see little value in the interest rates offered by banks or not be prepared to risk the current volatility of the stock market.

Accordingly, there are people in the market who have cash to spend.

As with every transaction there are advantages and disadvantages which we outline below:

Release of cash and existing debt

For many businesses a sale and leaseback allows them to convert an asset into cash without losing control of the business. In the same way, where bank debt is secured against the asset, the sale of that asset should enable a company to repay that debt and remove the ongoing need for interest repayments.

Lower costs compared to traditional refinancing

While engaging with a bank to secure debt against an existing asset may be an option, there are usually higher transactional costs associated with such deals including being responsible for valuation, arrangement, legal and bank commitment fees. Theoretically a sale and leaseback deal should see each party bearing their own costs.

SDLT Relief

Providing certain conditions are properly met, the leaseback aspects of a sale and leaseback deal may be exempt from SDLT meaning that the business will not need to pay any SDLT on the grant of the lease. The sale element is still likely to attract SDLT for the buyer.

Loss of value to the business and director's duties

The sale of an asset is obviously a key consideration for directors as it could reduce the value of the business in any future business sale.

It is important to remember that while directors owe a duty to the company, where a company falls into financial difficulties and the risk of insolvency is real, those duties can then extend to creditors. In exercising these duties, they need to ensure they are minimising losses. Accordingly, any decision to enter into a sale and leaseback arrangement, where the company is perceived to be struggling, should always involve professional advice and a clearly documented decision-making process why the company took this approach.

Financial covenant and security

This is a key one for any investor. An investor buying any asset wants to try and build in a level of certainty that the rent due under the lease they grant will be paid. In uncertain times there may be a feeling amongst investors that some companies looking at sale and leasebacks are struggling financially and a commitment to pay rent over a long term may not be realistic.

In such circumstances, parties will need to consider whether any rent should be held back in escrow or in a rent deposit deed. This would give the investor certainty that an element of the rent is already held securely in the event that the new tenant does not perform. Depending on how much rent is held in this way the seller/tenant may be quite relaxed: from a cashflow perspective they will know that they won't actually have to pay any rent for a prescribed period if it has already been escrowed. If they have been able to negotiate a rent-free period as part of the deal this could leave the seller/tenant with a couple of years to focus on other parts of their business.

As with any transaction it is important to consider a number of factors but sale and leaseback might represent a sensible option for many at the moment. For more information or advice on how sale and leaseback might help your business, please contact me or any member of our commercial property team.

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Coronavirus: commercial leases for the retail and hospitality sectors

Following the World Health Organisation's recognition of Coronavirus (Covid-19) as a worldwide epidemic, the UK government was forced to take extraordinary measures to prevent the spread of the disease. One such step was to instruct all restaurants, pubs, bars, hotels and other businesses in the leisure sector to close along with retailers designated as non-essential. We consider below the financial effect this will have on UK businesses and advise on options available to commercial lease tenants that may help keep their business afloat.

Rent-free period or lease termination?

Commercial leases are unlikely to include provision for rent suspension in the event of a health epidemic and tenants will be left to try and negotiate a rent-free period or discounted rent with their landlord. Tenants should consider bringing their lease to an end early (if their lease allows) as this will help to alleviate some of the financial burdens such as rent, service charge and insurance payments due under the lease.

Where a commercial landlord is unwilling to offer a rent-free period or discounted rent, tenants may be faced with a decision to try and extricate themselves from their lease before arrears start to accrue. A review of the lease will determine whether it can be ended without having to wait until the end of the term. In some commercial leases, a "break clause" is included where the lease is on a fixed term basis which allows either party to end the lease earlier.

Break clauses

Some break clauses are on a rolling basis which allows either party to exercise their right to bring the lease to an end at any point during the term, but others have conditions attached which only allow parties to exercise the break clause at certain 'trigger' points during the term. We would advise tenants to ask a solicitor to review their lease without delay to ensure they do not miss the opportunity to exercise their break if there is an imminent trigger date.

Break clauses will usually have conditions attached which will have to be strictly adhered to when exercising a right to break. Conditions can include, but are not limited to, the following:

- All payments due under the lease are paid up to date;
- Vacant possession must be given i.e. the property must be returned to the landlord empty
- The tenant is not in breach of any covenants under the lease including any covenants to repair the internal or external parts of the building
- A landlord looking to redevelop the premises may include a break clause allowing them to bring the lease to an end.

As highlighted above, the majority of break clauses will require all rent and other payments to be up to date before the break clause can be exercised. Now would be the time for tenants to consider bringing their lease to an end whilst (hopefully) their business has not already been too affected by Coronavirus and their rent payments are up to date. Further, some leases only offer one opportunity to break and if the break date is missed, tenants will be faced with continuing to meet their obligations and covenants under the lease, including all rent payments, until the end of the term.

Commercial tenants protected from eviction

In a further development, the government, as part of the Coronavirus Act passed on 25 March, announced extra protection for businesses by placing a temporary restriction on landlords' ability to enforce re-entry or forfeiture for non-payment for at least three months so that those who cannot pay their rent because of cashflow difficulties related to the coronavirus will be protected from eviction. For more detail, please see our detailed guide on the subject. Please do not hesitate to contact any member of our property litigation team for help.

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Advice for the Construction Industry

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Coronavirus: the impact on the construction industry

In these uncertain times, we are aware that parties operating within the construction industry at all levels need reassurance on how to manage the problems they are likely to face in the near future. The most common contracts are the JCT suite and the NEC3 suites, so we have set out below some initial thoughts and guidance to help those of you operating these contracts. We have referred to 'employer' and 'contractor' generically as those terms apply in any part of the supply chain.

Safety and Security

The safety and security of personnel, as well as the site itself, are of paramount importance. Employers have an ongoing duty of care to employees to assess the working environment and take appropriate measures, which may include a mixture of virtual meetings and physical site inspections (where critical to do so and while the UK is not legally locked down). That dovetails with health and safety on site. According to CDM regulations, the principal contractor is responsible for managing the site, but clients must ensure that resource is in place and information provided. While the building contract is live, the site is usually insured and controlled by the main contractor, so a skeleton staff may be required to preserve the safety and security for workers and the general public alike.

Taking specific measures against the spread of the infection will be important not only in relation to safety of individuals but could be crucial to the productivity and viability of sites, particularly where projects are close to practical completion. Making sure that anyone with symptoms is either isolated from or removed from the site will help to prevent the virus spreading to other workers and site-based staff. Limiting travel of people between sites will also help to ensure that some sites remain viable even if others have to close.

Hygiene facilities including soap/handwash and hand drying should be readily available and the importance of following good hand hygiene should be reiterated regularly on 'toolbox talks' and site posters/ information boards. Consider risks such as shared tools and canteen equipment and ensure cleaning regimes are appropriate.

Can you fall back on legal rights?

It is worth remembering that there is no general legal right to cancel a contract once it is signed and effective unless there is an express contractual right to do so or one of the common law grounds such as frustration of contract applies. For the purposes of this article, frustration will be hard to argue because it is a much higher threshold than simply suffering financial hardship to deliver their project. However, all the circumstances must be reviewed in the context of any particular project.

JCT position

The JCT suite refers to force majeure which is undefined by the JCT authors, relying on the general understanding of the meaning of force majeure as an 'act of God' or other unusual and unforeseeable event out of everyone's control. JCT will treat this as a cost neutral event so an extension of time is available, but the contractor has to cover its own costs of such an event. However, if the project is suspended for force majeure for two, continuous months, the contractor can serve notice to terminate and pass an incomplete site back to the employer. THE JCT also acknowledges that materials must be used "as far as procurable". Depending upon what happens next for the industry, other grounds to consider may be civil commotion, change in law, employer impediment, and employer instructions to postpone work.

However, the JCT is very clear that the contractor must use best endeavours to prevent delay and mitigate the situation so, although the full effect of Coronavirus is not yet known, it would be reasonable to ask a contractor what steps they have taken to resource and complete the job using alternative provision.

It is also worth remembering that a substantial change in conditions would entitle extra time and money for a contractor so, if instructions were given to restrict site access or limit working hours, or work in a different order, or other change of condition of work, then this is a Change for the purposes of the JCT, creating a claim for time and money which must be assessed in the normal way.

Please see our website for detailed guides for sub-contractors working under JCT DB Sub and JCT main contracts.

Financial hardship

The contractual (or statutory) payment mechanism continues to apply so the Construction Act requirements for an adequate payment mechanism is unaffected. Payers still need to issue notices at the right time and payees should continue to apply for payment. Ensure that the notices will be issued, and responded to, by a number of contacts in case the usual individuals administering the contracts are ill or otherwise unavailable. If there is any possibility of insolvency (which we all hope can be avoided but must be recognised as a possibility) then, prior to the start of the contract, the JCT does provide options for performance bonds and parent company guarantees. Parties can also consider altering the payment schedule by mutual consent to vary the contract.

NEC3/4

The NEC3/4 contracts deal with time and money collectively through compensation events. Relevant points to consider include instructions to change Works Information, change in law (if the optional clause is selected), instructions to stop - or not to start - work, failure to reply to communications (if staff are isolating and unavailable) or the NEC3/4 equivalent of force majeure, which is '*an event which stops the Contractor from completing the works, which neither party could prevent and which an experienced Contractor had judged was such a small risk to be unreasonable to allow for it*'. Again, the legal principles of mitigation apply so the claim for compensation events must be tested in the normal way and, in the NEC3/4 suite, there is an additional complication of claiming the compensation event within the required period of time or the claim is barred. Whether parties would agree to waive this may depend on the circumstances but, in the current climate, parties are already likely to be aware of the circumstances already and therefore the clock would be ticking.

Overall, we know what a difficult time this is for all businesses. Our Construction team is here to help all parties within the construction industry so that everyone has the right information and tools available to consider their own particular circumstances for their project and their business. We would be happy to give you more detail on any of these issues so please do not hesitate to contact us. As always, the particular circumstances and terms of the contract should be assessed on an individual basis.

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Coronavirus: some practical points for the construction industry

The impact of a lack of materials or labour

Materials coming from China are likely to be in limited supply given the two or so months of limited to zero production from some plants but, as the virus spreads through Europe, the impact will become more wide-reaching, particularly as borders start to close and distribution networks become more critical for food and supplies. In addition, the transport industry faces its own challenges.

Labour shortages could result from high absence levels, whether those who fall ill with the virus or who self-isolate on government advice. As things currently stand, a family member showing symptoms will stop a perfectly healthy and otherwise willing labourer from attending site for 14 days. This is already affecting some industries and on some sites.

A breach of contract may arise where contracts cannot progress as planned, due to lack of materials or labour, meaning the contractor may not be able to complete the works by the agreed date. The risk of obtaining materials and labour typically rests with the party supplying the relevant work.

It is necessary to identify whether each specific contract provides for any entitlement to additional time in the circumstances, if so then there will be no breach of contract.

A 'force majeure' clause in your contract, such as in forms of the JCT suite of contracts, might help and might specify the remedies. It might entitle you to more time, and even additional money in some cases. If the government imposes specific statutory measures which prevent labour and/or materials from going to site, this would also allow an extension of time on many standard forms of contract.

The best approach is to know what your contract says, understand it, and ensure that the right notices are in place in the right timescales – communication will be key over the next few months.

Site-specific issues

If a contractor or sub-contractor is refused entry to a site without a government policy that supports such a refusal, this would be likely to be an act of prevention by the employer or sub-contractor, and likely to lead to an entitlement to more time to complete the works - and probably more money too - to cover loss and expense suffered during the period. If the refusal of access is prolonged, it may be possible to terminate the contract lawfully.

However, if the reason for lack of access is that the party carrying out the works is not complying with site, or wider health and safety considerations (showing symptoms which means they should self-isolate or not complying with hand-wash requirements etc), responsibility for the inability to attend site is likely to rest with them.

If a site is to be closed down due to health concerns or due to government policy, notice should be given to allow the safe and timely collection of materials and equipment. It would be wise, in the event of a national 'lockdown'/quarantine (given that other countries further along the infection 'curve' do appear to all be following this model), to remove from site what can be easily and safely removed and to make arrangements, if at all possible, for payment for materials as soon as they arrive on site rather than when they are fixed.

Entitlement to interim / stage payments

These should not be directly affected by the virus. Stage payments will still become due when the stages are reached and interim periodic payments should still fall due in accordance with the contract. If no work is progressing then there is unlikely to be anything due (although extended preliminaries and potentially loss and expense could be claimed in some instances), but the first application for payment following any site closure is still likely to contain a sum that could become payable so the usual notices should still be administered by both parties to the contract. It might be wise to include new additional individuals in the distribution of such notices in case their colleagues who normally administer the process are unwell or otherwise unavailable.

Practical site issues

Make sure your workforce, and all of those for you have site responsibility, know what is expected of them from a hygiene perspective and know how to recognise the symptoms meaning that they should self-isolate. Construction sites are sources for rapid transmission of the virus. Ensure that there are plentiful stocks of soap/handwash at cleaning stations and that personnel are regularly and properly washing hands. Make sure that this message is communicated in all relevant languages and reinforced in 'toolbox talks'. We have been specifically asked about face masks but there is no specific requirement in force at the time of writing about these and the World Health Organisation only says they should be used if you are caring from someone suspected of having the virus. Since this note was first drafted, the Construction Leadership Council has issued Site Operating Procedures and they should be consulted. On Tuesday 31 March 2020 the UK Government confirmed that the CLC SOP's aligned with Public Health England's guidance.

Resource levels

Given the current situation, you may need to consider laying-off your workforce, reducing their hours or even making redundancies. Laying off employees means that the company will provide the employees with no work and no pay for a period of time. Short-time working is where the company can reduce the hours of their employees, and pro-rata their salary accordingly.

In these circumstances, the first thing that you should consider is whether you are contractually entitled to lay-off your staff or place them on short-time working as different rules apply. If you are not contractually entitled to lay-off then this can still be achieved, but we strongly recommend you seek legal advice before commencing this process. Our Employment law team will be happy to assist you with any queries you may have. If you have agency staff or direct sub-contractors, the terms of those contracts will have to be considered too.

Since the first draft of this note the government has announced packages to support in the current environment, including 'furloughing' arrangements, on which please see our detailed guidance note or seek specific advice.

What help will there be available for Sole Traders / SME's and large regional/national contractors?

The government has announced a £350bn package and has announced financial support for small businesses with a turnover of up to £45million via the Coronavirus Business Interruption Loan Scheme (CBILS).

However, the way which this is working has been criticised and the government is announcing new measures to help businesses access this support. In the meantime, good financial hygiene remains critical in order to claim money, chase debts and minimise liabilities. Some initial help may be available in relation to tax liabilities and if your income is affected, it would be worth speaking with HMRC about their 'Time to Pay' facility, which has a designated coronavirus helpline.

You should also speak with your insurance broker to establish if you have business interruption cover in place that could respond in the circumstances.

New contracts

Given current uncertainties, it will be difficult, at this stage, to argue that disruption caused by the coronavirus is unforeseeable, so force majeure (if indeed it is provided for in your contracts) will not assist. You need to have frank, realistic and sensible discussions about risks relating to time and money which could yet be amplified by further developments with the virus. Once you agree where those risks sit, make sure they are properly recorded in the terms of your contract.

Please see our website for detailed guides for sub-contractors working under JCT DB Sub and JCT main contracts.

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Coronavirus: available public money for the construction industry

The construction industry has a number of vocal supporters but, nonetheless, we must keep pushing government to do more. Liquidity and cashflow have never been more important. The Retention Bill was a victim of the recent general elections, the identity of the Minister with construction in their portfolio has changed several times, and the Fair Payment Charter was guidance and best practice but not law. However, in this time of national emergency, the Cabinet Office has been considering how to use the power of the public purse to keep the industry moving forward. As a result, the first two Procurement Policy Notes in 2020 ("PPN") have been issued which will hopefully allow money to move down through the supply chain.

PPN1/20 – place orders more quickly

The Note is designed to encourage all contracting authorities (central government, councils, 'blue light', schools, housing associations) to speed up the process and place orders to secure future projects. If you are a main contractor you can encourage your client contacts, whose projects fall above the current financial threshold, that options are available which still comply with procurement rules:

- Direct awards due to extreme urgency caused by unforeseeable events and it is impossible to comply with the normal rules.
- Direct awards due to absence of competition in a specialist technical area.
- Increased use of pre-approved frameworks.
- Accelerated procedures.
- Extending the contract up to permitted financial maximum expenditure
- Sharing resource between public authorities while still applying the value-for-money test in the circumstances

PPN2/20 – payment to supplier to ensure service continuity

If you are a contractor, or a subcontractor, mid-job, push up the line to make sure that payment is being processed. All contracting authorities should:

- Inform suppliers that they will be paid as normal, even with service interruptions, up to the end of June.
- Temporarily adjust payment mechanisms to use shorter interim payment periods, forward ordering, pre-payment and payment on order not delivery.
- KPIs should be judged against three months or more
- Interim invoices are paid and balanced later providing the contractor agrees to work on an open book basis.

Although these PPNS are guidance, they do indicate recommended best practice which allows the payer more flexibility and will allow the payee to exert some pressure. Please contact our Construction team for more details on payment in construction contracts.

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Advice for charities and not-for-profit organisations

WRIGHT HASSALL

How to manage the effects of coronavirus on the Third Sector

Charities, like everyone else, may find themselves struggling to adapt to the fast-moving situation created by Covid-19, however it's incredibly important to ensure these organisations are in a position to provide their services and support in the current climate. We've put together this brief guide to ensure charities and not for profits know what they can do to pandemic-proof themselves:

Filing

Charities have an obligation to ensure they make their annual filings on time, and keep the Charity Commission updated as to their circumstances, especially if these are likely to change drastically in the imminent future, and last week this position was reiterated after it said that charities severely affected by the coronavirus outbreak might need to file serious incident reports

Clearly, in the current environment, it's difficult for anyone to make such a judgement call and the Commission found itself coming under fire for its lack of guidance. The Commission has since changed its position, saying that it will consider granting an extension to any charity that is struggling to file its annual return because of the coronavirus pandemic.

The Commission said in a statement on 17 March that it wanted charities to be reassured its approach to regulation would be "as flexible and supportive as possible" and that "charities can feel confident that we will, where possible, act in a pragmatic way by taking account of the wider public interest during this unprecedented period."

If you are due to file your charity's annual return imminently but are or feel unable to do so, you can request a filing extension. The Commission has confirmed that requests for filing extensions would be made on a case-by-case basis.

Funding

With the Chancellor's announcement on Friday of a £330 billion injection for the British economy being silent on the position for charities and not for profits, many may have been left wondering how they will survive the pandemic, or whether they can meet obligation they might have to funders.

The National Lottery Community Fund has today said it will be flexible with grant recipients if they are adversely affected by the coronavirus pandemic. The Chief Executive of the Fund said the fund wanted to support charities and community organisations as much as possible at a difficult time and that they would look to accommodate changes to activities and timelines because of the outbreak and consider any requests for support if organisations experienced financial pressures as a result of the situation.

This will come as welcome news to many charities supported by the National Lottery, but many more are set to face funding difficulties, as social distancing comes into effect and fundraising event including the London Marathon are postponed or cancelled. However, a group of 130 charitable grant makers have led the way in reassuring charities that they support that funding would not be withdrawn during the current crisis and that they would also be flexible on how funding is used.

If you're concerned about how your organisation will fare financially, we would recommend getting in touch with your donors, funders or grant makers and putting in place a contingency plan. You should also carefully review any insurance policies you have in place to ensure you're utilising them properly.

Moving Forwards

Advice to charities as to how to manage to evolving situation is, as with all current advice, changing rapidly, however all charities should be taking steps to drawn up plans to deal with the possible effects of the coronavirus outbreak on their workforce and service offering. Ultimately a charity must always function for the public benefit, and charities should ensure they are able to adapt to meet the changing environment.

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Coronavirus: emergency support for the Third Sector

Following increasingly desperate calls, the government announced a number of measures to help support charities and not-for-profits during the COVID-19 crisis on 8th April 2020. It was acknowledged by ministers that the work the Third Sector does is vital during this time, and to lose services which support those most in need would place further strain on the NHS and other vital systems.

The Chancellor announced that £750 million of funding would be made available for the charitable sector; £370 million of this will be for small local charities working with vulnerable people in their communities and £60 million would be for use in Scotland, Wales and Northern Ireland. These funds would be allocated using the Barnett formula (a mechanism used by the Treasury in the United Kingdom to automatically adjust the amounts of expenditure allocated to Northern Ireland, Wales and Scotland).

A further £360 million will be made directly available to charities providing essential services and supporting vulnerable people, of which £200 million will be allocated to hospices and organisations such as St John's Ambulance, the Citizens Advice Bureau, domestic violence charities and those supporting the disabled.

The Government also threw their weight behind the BBCs "Big Night In" charity appeal on 23 April 2020 by pledging to match pound for pound whatever the UK public donates. This will start with a £20 million contribution to the National Emergencies Trust appeal.

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This support from the government will come as a boon to the Third Sector. Many charities have recently made public announcements that they will not be able to survive the current period without government support, and there have been reports that charities across the board are furloughing workers and preparing to streamline their operations in order to survive.

If you represent, or work for a charity or not-for-profit facing difficult decisions at the moment, we would advise you to access emergency funding which is available through several channels:

1. **National Emergencies Trust:** The National Emergencies Trust (NET) has launched an appeal to raise funds for local charities and grassroots organisations that have been impacted by coronavirus. The trust is planning to distribute grants through a network of local community foundations. Organisations will need to apply directly to a community foundation, not to the NET.

2. **National Lottery Community Fund:** All National Lottery funding decisions in the next six months will be devoted to responding to the COVID-19 crisis. Existing grant holders and applicants with activities specifically geared to supporting communities through Covid-19 with be prioritised, followed by organisations faced with liquidity issues caused by COVID-19.

3. **The Emergency Loan Fund for Charities and Social Enterprises (Big Society Capital):** A fund to allow social lenders, including the Charity Bank, to provide emergency loans to affected charities; they will require no personal guarantees and no fees or interest for 12 months. Applications open in mid-April.

Other organisation and banks, including John Lewis, Barclays, Tesco, Sports England and Arts Council England have also announced initiatives to support both national and local charities. Trustees and charity representatives should be reassured by this financial support which, along with other measures announced by the Treasury, is one of the most comprehensive support packages in the world for the Third Sector.

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