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Covid-19 and English contract law

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Abstract

English law is unusual in Europe because it does not recognise either a defence of force majeure or a doctrine allowing renegotiation or termination of the contract because of change of circumstances; the doctrine of frustration (under which the parties' outstanding obligations are discharged automatically) applies only when performance of the contract is impossible. The much-discussed doctrine of "frustration of purpose" applies only when the change has defeated the purpose for both parties and has very seldom been applied. Pre-Covid-19 law contains a number of particular exceptions to this strictness, but most are in legislation that applies only to consumers. The measures taken to relieve parties affected by Covid-19 and the rules enforced in order to contain it do not involve any significant changes to contract law. For the most part they involve either delaying enforcement procedures or changes to the regulatory requirements imposed by the Financial Conduct Authority on providers of various kinds of consumer credit or other financial services, and take the form of "payment holidays". Only in respect of insolvency are more permanent changes being considered. It is possible that the effects of the crisis will encourage English courts to re-consider the law on a number of "pinch points" that may otherwise cause difficulty, but we do not expect any permanent changes to general contract law, if only because of the importance that English law has placed on certainty, particularly in financial transactions.

Keywords

Frustration, Impossibility, Suspension of Obligations, Insolvency Reforms, English Law

Introduction

In this chapter, we explore the ways in which the impact of Covid-19 on the performance of contracts would be dealt with in English law. Our aim is to provide both academic analysis and an idea of the way one common law system is (or is not) coping. We consider existing doctrine and the new legislation which has been introduced in response to the crisis and which impacts directly on contract law and the terms of existing contracts. In addition, we consider other

changes which have direct impact on contracts - for example, changes to practice directions that restrict procedures that the other party may apply and changes in other forms of regulation, particularly in the requirements of the Financial Conduct Authority. Changes that have only an indirect effect on the performance of contracts, such as changes in the welfare system, are mentioned briefly.

Our analysis will concentrate on contracts between businesses and consumers (B2C) and between businesses (B2B), but we will refer briefly also to employment contracts (E2E) and to contracts between parties neither of whom is acting in the course of a business (C2C: e.g. private house sales, tenancies with "hobby landlords"). It will also look at contracts of a variety of types: for example, simple contracts for the supply of goods or services; contracts of employment; contracts for housing (both rented and on mortgage); and contracts for other financial services including loans, credit cards, insurance, etc.

First, we will set out the pre-existing rules of English contract law and their potential application to the particular issues associated with Covid-19. Secondly, we will explain how the general rules are modified or replaced by particular, mainly legislative, rules in respect of particular kinds of contract. Thirdly, we examine provisions commonly found in contracts which seek to provide for unforeseen or unexpected circumstances (such as force majeure, extension of time, material adverse change and hardship clauses). Fourthly, we highlight new legislation and other forms of regulation (such as Financial Conduct Authority requirements and Government 'expectations') that impact directly on the contract rights, obligations and remedies of the parties affected by the consequences of Covid-19. We will end by considering a number of potential 'pinch points' in English contract law, issues which may become problematic and on which the courts may have to develop or refine the law in the light of the effects of COVID-19, the measures taken to contain it and the way in which we think parties to contracts affected may deal with each other.

Pre-existing contact doctrine and application to Covid-19 situations

Introduction

The starting point is that English law imposes a duty on each party to perform its obligations, and to do so on time. This is normally a strict duty – we may even say an absolute one, as the

common law does not (1) recognise a defence of force majeure or (2) allow for adjustment or termination of the contract on the ground of changed circumstances. In practice, very many contracts contain a force majeure clause and some have hardship or material adverse change clauses; but in the absence of such a clause, in English Contract Law, an unforeseen post-formation event will lead to the parties being excused or released from their future obligations only in a narrow range of circumstances.

Frustration by supervening impossibility

If performance becomes wholly impossible, either factually or legally[1] (e.g. because of a change in the law), the contract will be discharged automatically under the doctrine of 'frustration', so that each party is released from any further obligation to perform, provided that

1. the impossibility occurred without the fault[2] of either party,
2. it was unforeseeable (or possibly unforeseen), and
3. the contract does not allocate the risk of inability to perform to one of the parties, either expressly or impliedly because it is one of the risks that party is expected to bear.

Where the impossibility only relates to part of the performance (except as regards severable parts of the contract that have been performed, or should have been performed, before the event occurred[3]), the outcome will depend on whether the substance of the contract has become impossible. Thus, in *Taylor v Caldwell,*[4] the destruction of the musical hall by fire frustrated the contract even though the pleasure grounds around it were still useable. In determining whether partial impossibility constitutes frustration, the courts seem to adopt a test similar to the *Hong Kong Fir* test[5] as to when breach of an innominate term will give rise to a right to terminate the contract.[6]

[1] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32
[2] Or the choice of either party.
[3] See Law Reform (Frustrated Contracts) Act 1943, s 2(3).
[4] (1863) 3 B & S 826 (contract to hire Surrey Gardens and Musical Hall frustrated when the music hall burned down in a fire).
[5] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (does breach deprive the innocent party of the substance of what was contracted for?).
[6] Treitel argues that a stricter test is needed for frustration than this: Guenther Treitel, *Frustration and Force Majeure*, (3rd edn, Sweet & Maxwell, 2014), 249-50, para 5-061.

A temporary inability to perform is no excuse unless it lasts so long that performance of the contract becomes impossible (for example, if performance on the date set is essential or the impossibility lasts so long that it would make performance pointless), or performance in the new situation would be "radically different" to what the contract called for. (We return to "radically different" below.)

If performance of the contract is neither impossible nor, in the new circumstances, would be "radically different", the party who is unable to perform will be in breach of contract and liable in damages - or at least this is the common assumption in, for example, contracts of sale and for construction.[7] The fact that performance will be far more onerous than either party could have imagined is no defence; the contract will not be frustrated and, as we have said, English law has no doctrine of changed circumstances.

Thus frustration is often an "all or nothing" outcome: either the parties are wholly released or they remain liable to perform.

It is worth noting that if an unforeseen event does cause frustration, discharge occurs automatically, not through the choice of one of the contracting parties; the parties to the contract are released from having to perform future obligations as as a matter of law. Instead, in most cases,[8] the Law Reform (Frustrated Contracts) Act 1943 requires the parties to refund any payments that have been made[9] and to pay the value of any other benefits that were received before the date of discharge, [10] though in each case the court has power to reduce the amount payable to a 'just sum' that reflects any costs incurred by the recipient of the money or other benefit. Costs incurred that were not covered by a pre-payment and did not result in a

[7] Later, we discuss a few exceptional cases in which the courts seem to have reached a different result, though the basis of the decisions is not clear.

[8] The Act does not apply to certain types of contract, in particular voyage charters and contracts for the carriage of goods by sea, and contracts of sale where the goods have perished, see s 2(5). Also, the parties may agree on different provisions, s 2(3). In a commercial context such modifications would be effective and are not caught by the provisions of the Unfair Contract Terms Act 1977, see s.29(1) (exemption for a "contractual provision…authorised…by the express terms…of an enactment"). In a consumer contract, a term depriving the consumer of the entitlement to receive back any money already paid under a contract that has been frustrated, or providing for reimbursement only by other means such as a credit note or a voucher, might be unfair under Consumer Rights Act 2015 s 62.

[9] s 1(2). Payments that were due but unpaid cease to be payable.

[10] s 1(3). The main case where the scope of this section was considered was *BP Exploration Co (Libya) v Hunt (No 2) [1979]* 1 WLR 783 (High Court) on rather complex facts. Robert Goff J's first-instance judgment, which was upheld by the Court of Appeal ([1983] 1 WLR 232), is a detailed consideration of how the "just sum" should be calculated.

benefit to the other party will remain uncompensated. In other words, the regime is broadly speaking restitutionary,[11] though the Court of Appeal has pointed out that the Act must be applied according to its own terms, without "help from words which are not in the statute."[12]

Impossibility as a result of COVID-19

In many instances, performance of the contract, at least within the contractual period for performance, has become impossible as a result of Covid-19 consequences. Frequently, this will be the result of travel restrictions and prohibitions of activities under government regulations. For instance, under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020,[13] many businesses were forced to close altogether for the duration of the emergency. A contravention of this would constitute an offence. Consequently, carrying on one of those businesses required to close would effectively be illegal during the emergency. Insofar as any contracts were entered into before the emergency arose and had to be carried out during the period of "lockdown",[14] the effect of the regulations would be to render performance illegal.

A further category of impossibility relates to physical impossibility, e.g. because of death or personal illness, or because of lack of transport or other essential services. These cases raise a possible difficulty in arguing frustration. Being able to obtain goods to fulfil orders taken by customers, or providing labour, material and transport, on the one hand, or on the other hand being able to accept delivery of goods or performance of services despite the closure of facilities, is normally thought to be within the party's control and therefore the risk is normally on them.[15] However, we expect that courts would hold that the extent of the difficulties encountered by suppliers and customers during the Covid-19 pandemic were outside the risks normally assumed by parties.

[11] See Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991), ch 6.
[12] [1983] 1 WLR 232, 243.
[13] S.I. 2020/350.
[14] However, if there is a reasonable chance that performance can be completed after the closure period and before the contract duration is due to come to an end, then the temporary illegality affecting that contract will not mean that the contract has been frustrated.
[15] Compare *The Sea Angel* [2007] EWCA Civ 547, in which a chartered ship was wrongly detained for a long period by port authorities. The Court held that the charter was not frustrated; delays in port were one of the risks taken by the charterer.

Delay caused by temporary impossibility

Not all of the measures taken in response to the Covid-19 pandemic will render performance of a contract permanently impossible. Many contracts can still be performed, or performance completed, at a later point in time than envisaged under the contract. Such a situation is often not such that it would constitute frustration of the contract; whether it does will depend on the extent of the disruption on the overall duration of the contract.[16] This requires asking whether the delay is such that it will deprive the other party of the substance of what they were contracting for, or make performance of the contract something "radically different". This must be "determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur."[17] Generally, a delay has to be extensive to amount to a frustrating event, with reference to the contract and the expected impact on the contract.[18] A contract may be frustrated even though it provides for extra time for performance in certain events, if the delays are such that they are outside the clause. Asquith LJ once noted that "'delay' though literally describing what has occurred, has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind."[19]

Elements of contract impossible to perform

In the case of a long-term contract (such as subscription-style contracts many consumers enter into, e.g., gym membership, video streaming services etc.), or delivery of goods by instalments, performance may be interrupted or may be different from what was expected. For example, swimming pools have been temporarily closed, and streaming services have been unable to offer coverage of live sports events they would otherwise have provided. Again, this may result in frustration if the effect is sufficiently serious. In a case involving a 10-year lease of a warehouse, the contract was not frustrated when the only access road was temporarily closed for about a year.[20] This was because there was a period of 3 more years left after the closure

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[16] *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221.
[17] Lord Roskill in *The Nema*. See Hugh Beale (Gen Ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell, 2018), para 23-035.
[18] Hugh Beale (Gen Ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell, 2018), para 23-035.
[19] *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 KB 632, 665.
[20] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675.

had finished. Similarly, in a case involving a 99-year lease, when war broke out 9 years into the lease, it was held that this did not frustrate the contract as there was expected to be a significant amount of time left after the war had ended.[21] Whilst these cases involve a commercial lease, they are indicative of how the question of frustration might be approached in the case of temporary suspension of the contract leading to partial impossibility.

We have said that English contract law does not recognise partial frustration. However, this is subject to one important qualification: if obligations under the contract are severable, then frustration can apply to severable parts without causing the entire contract to be frustrated. A simple example of a severable contract is a contract for the delivery of a quantity of goods in monthly instalments, with each instalment to be paid for on delivery. If the contract is frustrated part-way through, with some instalments already delivered, then the seller is entitled to receive payment in respect of those instalments. More importantly, severability could assist where, for some reason, some but not all future obligations (each of which is severable) are affected by a frustrating event.[22] In our gym example above, if the client paid for their membership on a monthly basis, payment each month and the corresponding provision of gym facilities would be treated as a severable obligations. The fact that a gym had to close for several months would therefore be treated as frustration only in respect of the severable elements affected by the (temporary) illegality.[23] However, this would only be possible if severance of the obligations under the contract was possible; had the client paid for a whole year upfront, it may be trickier to argue frustration of severable parts, and it is not clear what sort of reduction in payment a consumer would be justified in making. In the case of access to a facility which is temporarily unavailable, one might think that should be the fee for the period it is not accessible. In the case of a service where some of the service cannot be provided (such as a sports channel which cannot offer live football matches during the period), the consumer clearly has to pay something but cannot be expected to pay in full.[24] We suspect that a court would take the common sense solution of apportioning the annual fee across the weeks of the year, at least where the supplier's costs would also be incurred on a more-or-less regular basis throughout the period.

[21] *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221
[22] See Guenther Treitel, *Frustration and Force Majeure*, (3rd edn, Sweet & Maxwell, 2014) 573-4, para 5-032.
[23] This possibility is also envisaged in s.2(4) of the Law Reform (Frustrated Contracts) Act 1943.
[24] Again, it may matter whether the contract is severable or not.

F. Contract no longer serves party's purpose

Another common consequence of the Covid-19 pandemic will be that the reason for which one or both parties have entered into the contract has fallen away. The contract itself will still be capable of being performed but performance would be no use to one or both of the parties. For instance, many students who have vacated their student accommodation early after on-campus activities were suspended are likely to argue that they no longer have any need for their tenancy, but from the perspective of landlords, students can still live in their term-time accommodation.

It is widely said that English law recognises a doctrine of frustration of purpose. It is true that in the famous coronation case of *Krell v Henry*[25] the court held that a contract to rent a room overlooking the procession route of the King had been frustrated by the cancellation of the procession: even though the contract could still be performed in a literal sense, (as the court put it at the time), "the foundation of the contract" had been destroyed or because (or as it would now be put) performance in the new circumstances would be "radically different." But it must be emphasised that English law will treat the contract as frustrated in such circumstances only if the *common* purpose of both parties has been frustrated.[26] It is important to appreciate that the purpose must be shared by the parties and not merely be the purpose of one of the parties, even if that purpose was known to the other party. This is shown by an example given by Vaughan Williams LJ[27]: a contract to take a cab to Epsom to watch the races there would not be frustrated if the races were cancelled because of an infectious disease. Another example (already noted above) is students who no longer require accommodation near their university after face-to-face classes were suspended. The students' purpose for entering into a tenancy agreement has fallen away, but landlords let properties for the purpose of generating an income and that purpose will continue. It is clear that it does not suffice that one party's circumstances have changed unexpectedly so as to no longer need the contract. For another example, take a hotel booking for the period of the Edinburgh Festival, but the Festival is cancelled. The guest no longer needs the hotel room so the purpose for which the room was booked is no longer relevant; however, this does not affect the purpose for which the hotel

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[25] [1903] 2 KB 740.

[26] In *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [1935] AC 524, Lord Wright noted that the authority of *Krell v Henry* "is certainly not one to be extended: it is particularly difficult to apply where… the possibility of the event relied on as constituting a frustration of the adventure … was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility." (at 529).

[27] [1903] 2 KB 740, 751. See also *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 603, 689. The case was decided by the same judges as *Krell v Henry*.

entered into the contract, which is to rent out the room for payment. This contract would therefore not be frustrated.[28]

Performance has become more costly

Another possibility is that the contract could still be performed, but performance would increase costs for one party. This is a situation which is covered by provisions on hardship in many other jurisdictions. English law does not have comparable provisions.

Can a contract ever be frustrated by increased expenditure? This raises the issue that the courts have said that a contract may be frustrated if performance in the changed circumstances would be "radically different". We are aware of one case that might seem to suggest this is possible. In *Metropolitan Water Board v Dick Kerr*[29] a construction contractor was prevented from working by wartime government restrictions and the House of Lords held (while the war was still going on) that the contractor would not be obliged to complete the work after the war because performance in the new and unknown economic circumstances would be "radically different". Even if this begins to look like change of circumstances, we think the late Professor Sir Guenter Treitel was right to insist that it was not just the change in costs that frustrated the contract but the combination of a very long period of temporary impossibility and the change in economic conditions.[30] It is only in this way that the case can be reconciled with the many statements that frustration is not available on the basis of increased difficulty and expense in performing or financial hardship.[31]

Customer unable to pay for goods or services

A customer may no longer have the means to pay and therefore cannot proceed with the contract. This can arise in a number of different permutations. One instance would be an executory contract for the goods or services to be provided where the customer is not able to pay due to financial difficulties caused by the consequences of the pandemic. Another instance,

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[28] In practice, such contracts would contain some kind of cancellation clause any event.
[29] [1918] AC 119.
[30] Guenther Treitel, *Frustration and Force Majeure*, (3rd edn, Sweet & Maxwell, 2014), para 6-031. In para 6-035 Treitel refers to another case (*William Cory & Son Ltd v Corporation of London* [1951] 1 KB 8; [1951] 2 KB 476 where the contract a frustrated by combination of new government restrictions (a local authority by-law) and changed circumstances.
[31] *Davies Contractors v Fareham UDC* [1956] AC 696. Note *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323 (TCC), where a drop of property prices by 20% did not frustrate a development agreement.

affecting commercial parties as much as consumers, might arise under a loan or other credit agreement where the sum owed is to be repaid in monthly instalments. The effects of the pandemic and its consequences might affect the ability of a borrower to keep up their regular instalments. These situations would generally not amount to frustration of the contract, but be treated as a risk which the customer would have to bear.[32] However, as we will explain in the next section, there are special rules in place for certain types of credit agreements.

Rules that modify the general law in particular cases

We have found one exceptional rule of the common law that seems to "buck the trend" by, in effect, admitting a defence of force majeure. This is in contracts of employment, where it seems to be widely accepted that an employee who is temporarily prevented from working by illness is not in breach of contract.[33] We can only explain it as a customary exception.

A number of relevant statutory provisions can be invoked in instances where the common law itself would not be of assistance.

Consumer Credit

The Consumer Credit Act 1974 (CCA) governs consumer credit agreements, i.e., "an agreement between an individual ('the debtor') and another person ('the creditor') by which the creditor provides the debtor with credit of any amount."[34] An "individual" in the CCA covers not only natural persons, but also partnerships of up to 3 persons and unincorporated bodies.[35] This includes sole traders but not companies. A consumer credit agreement is a regulated agreement provided that it does not fall under one of the many exemptions in Part 14A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.[36]

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[32] In a sense, this is akin to the exclusion of financial hardship situations from the scope of frustration.
[33] Although it is widely accepted, it is not easy to find authority for the rule. The only and "early" authority cited in Hugh Beale (Gen Ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell, 2018), para 40-178 (*Boast v Firth* (1868) LR 4 CP 1) is actually a case of permanent impossibility, as the employee had died.
[34] s.8(1) CCA 1974.
[35] cf. s.189(1) CCA 1974.
[36] See Art.60B of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544, as amended).

Two provisions of the CCA 1974 are of particular relevance to our discussion. The first is section 129, which provides that where a borrower is unable to pay the instalments due under a regulated consumer credit agreement, and the lender seeks to enforce the agreement, the court has the power to make an order to determine payments in instalments as the court considers reasonable in the circumstances (a "time order"). In effect, the court has the power to reschedule a borrower's debt in light of the borrower's circumstances. Furthermore, in the case of goods supplied under a hire-purchase agreement, under which the contractual supplier, usually a finance company, retains ownership of the goods until the consumer has exercised the option to purchase after paying all the required instalments, section 90 of the CCA 1974 protects a defaulting borrower from repossession, provided that the borrower has already paid at least one-third of the total price of the goods to the creditor. Repossession of such "protected goods" is only permitted with a court order; and the court can of course make a time order instead.

Prepayments and connected lender liability

Note that despite a Law Commission proposal for reforming the law,[37] there is insufficient consumer protection where goods were pre-paid and the business supplier becomes insolvent before the goods have been delivered/ownership has transferred to the consumer. One legislative provision of relevance is section 75 of the CCA 1974, which offers protection to consumers who used a credit card to pay for their goods, provided goods are worth more than £100/item and no more than £30,000/item. If the supplier to whom prepayment was made is unable or unwilling to give a refund, a consumer may invoke s.75 to recover the money directly from the credit card company.

Package travel:

The Package Travel and Linked Travel Arrangements Regulations 2018[38] (S.I. 2018/634) implement the EU's Package Travel Directive (2015/2302/EU) and apply the rules from the Directive concerning due to "unavoidable and exceptional circumstances", defined as a situation beyond the control of the party who seeks to rely on such a situation, the consequences

[37] Law Commission, *Consumer Prepayments on Retailer Insolvency*, Report No.368 (Law Commission, 2016).
[38] S.I. 2018/634, amended by the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1367) to adjust the Regulations following the UK's withdrawal from the EU.

of which could not have been avoided even if all reasonable measures had been taken (cf. Reg.2(1)). Where such circumstances arise, termination of the contract and a full refund of the price paid by the traveller is triggered, although there is not entitlement to additional compensation.[39]

Housing

Space precludes a detailed treatment of housing law. Very summarily, most residential tenants who fall behind in their rent can be evicted only after a court order; and 'social' landlords (local councils and housing associations, as opposed to private companies and individuals) are required to follow an elaborate protocol before evicting a tenant; among other things, landlords are required to "try to agree affordable sums for the tenant to pay towards the arrears, based upon the tenant's income and expenditure" and to assist the tenant in applying for welfare benefits.[40] Although in many cases if the tenant owes more than two months' rent, the court cannot refuse to grant possession,[41] the court has power to issue a "suspended possession order", and (particularly when the arrears have come about because of delays in the payment of Housing Benefit, or a change of circumstances such as illness of loss of job) frequently will do so if the landlord will accept the tenant's undertaking to pay the future rent and something (often a nominal amount) towards the arrears. (If the tenant defaults, the landlord can immediately apply for a warrant of eviction.) In the case of other tenancies, the landlord may not re-enter or the lease forfeited without the landlord first demanding that the default be remedied; and the tenant may apply to the court for relief against forfeiture.[42]

USE OF CONTRACT TERMS SUCH AS FORCE MAJEURE, MAC, HARDSHIP

The restrictive nature of the English doctrine of frustration, combined with the absence of a general principle of force majeure, puts the onus on the contracting parties to make appropriate provision for the occurrence of uncertain or unforeseeable events and their consequences

[39] See e.g., Regulation 12.
[40] Ministry of Justice *Pre-Action Protocol for Possession Claims by Social Landlords*.
[41] See Housing Act 1988 Sch 2 Ground 8.
[42] Law of Property Act 1925, s 146.

through express contract terms. Unsurprisingly, force majeure clauses are used widely. Such clauses usually spell out in great detail which sort of events[43] will trigger the clause (often supplemented with some sort of "catch-all" wording at the end) and what the impact of this on the parties' ability to perform must be[44], and what is to happen to the parties' obligations once the clause is engaged.

A force majeure clause must be interpreted in the way that reasonable people in the same situation, and with the same background information as the parties, would understand it.[45] In other words, each clause must be dealt with individually and without the help of any general doctrine that might inform the discussion. Their application in the context of the Covid-19 pandemic will therefore depend on which events are listed as trigger events (these need to include "pandemic" or at least "epidemic"), what consequences are addressed in the clause (inability to perform, reduction in supplies), and whether what has actually happened is covered by the clause.

However, it should not be assumed that all contracts disrupted by COVID-19 will contain a force majeure clause. For instance, many contracts for the sale of private houses will have been affected by both the Government's temporary ban on[46] all but "reasonably necessary" house moves, and the British Removers Association instructions to its members to delay or cancel any house move that had not already been started. The Standard Conditions of Sale issued by the Law Society do not contain a force majeure clause and at least some solicitors are warning that sellers who had to delay "completion" because they could not move out and therefore could not give "vacant possession" may be liable the buyer.[47]

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[43] See e.g., the detailed clause at issue in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

[44] The clause in *The Super Servant Two* required that the trigger event must "impede, prevent or delay the performance"; in contrast, the clause in *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 described the consequences as a party "unable wholly or in part to carry out any of its obligations".

[45] See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR. 896 and for a general account of interpretation in English contract law, Hugh Beale (Gen Ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell, 2018), paras 13-041-13-107.

[46] Moving house during the emergency period was permitted only "where reasonably necessary": The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 6(2); it was permitted more generally from 13 May. For an account see House of Commons Library, 'Coronavirus: Advice on Home Moves' <https://commonslibrary.parliament.uk/social-policy/health/diseases/coronavirus-advice-on-home-moves/> accessed 11 June 2020.

[47] E.g. Brachers LLP, 'What impact will coronavirus have on buying or selling a house?' <https://www.brachers.co.uk/insights/what-impact-will-coronavirus-have-on-buying-or-selling-a-house> accessed 11 June 2020. In many cases, however, neither party will be able to complete: if there is a "chain", the buyers may equally be unable to complete since they will only be able to pay the price once they have themselves

The absence of any doctrine of hardship or change of circumstances also leads to express provisions being included in some contracts. Not only are "Material Adverse Change" clauses common in corporate finance and mergers and acquisitions, but clauses calling for re-adjustment in the case of hardship are frequently found in longer-term contract such as for oil and gas exploration or supply.

Insolvency

Lastly we should point out that English law has a relatively liberal law of insolvency. We have neither the space nor the expertise to give a detailed account of English insolvency law, let alone to compare it to the law in other jurisdictions.[48] Suffice it to say that, provided that there has been no wrongdoing, businesspeople can "make a fresh start" as sole traders within a year and they may act as directors of another company unless they are disqualified for fraudulent or wrongful trading or as "unfit". Any parts of the business that remain viable can be sold off as going concerns by an administrator; this is often done within days of the administrator being appointed.[49] For consumers whose debts amount to less than £20,000 there is a simpler and much simpler and cheaper form of relief called a Debt Relief Order, which also results in most types of debts being wiped out after one year.[50]

New legislation or other forms of regulation impacting on contracts

Measures with an indirect, but practical effect

There is not space to give a complete account of all the UK's responses to COVID-19 that will have an impact on contracts. The measures that are probably most important in practical terms

given vacant possession to the person buying from them. Under cl 7.2.1 of the Standard conditions, "If there is default by either or both of the parties in performing their obligations under the contract and completion is delayed, the party whose total period of default is the greater is to pay compensation to the other party." In effect the liabilities will cancel each other out.

[48] See Mariana Pargendler, 'The Role of the State in Contract Law: The Common-Civil Law Divide' (2018) 43 Yale J. Int'l L. 143, esp at 175-178.

[49] This is done under a "pre-pack" arranged by the administrator before formal appointment.: see e.g. Julie Palmer, 'What company directors need to know about the Pre Pack Administration process' <https://www.realbusinessrescue.co.uk/pre-pack-administration/process-and-procedure> accessed 11 June 2020.

[50] See Insolvency Service, 'Getting a Debt Relief Order' <https://www.gov.uk/government/publications/getting-a-debt-relief-order/getting-a-debt-relief-order> accessed 11 June 2020. The fee is £90.

are those involving income support. These have only an indirect effect on contracts, and we will briefly mention just two.[51]

First, Universal Credit, the principal benefit for those who are too ill to work, are looking for a job or have a low income,[52] has been made easier to apply for,[53] and somewhat more generous, in that the monthly amount has been increased and many of the deductions that can be made when the recipient owes money to the State or a third party have been suspended unless a deduction is considered to be in the interest of the customer or the customer's family.[54]

Secondly, the Government has launched an extensive scheme for "Job Retention", under which employers may 'furlough' workers on 80% of their pay up to £2500 per month, and will be reimbursed by the Government.[55] The scheme has been extended to agency workers and in June a parallel scheme will become available to the self-employed.[56] These schemes are "designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy" rather than to protect employees, and employees have no right to be furloughed; but for very many employees the scheme has provided a lifeline – and even more so if the employer follows the Government's exhortation to pay the rest of the employee's salary. On 3 May, HMRC said that 800,000 employers had applied to use the scheme and 6.3m jobs were being covered.[57] The Government has announced that the scheme will be extended until October 2020, and from August, it will

[51] Other indirect effects will flow from Government-backed loans to businesses.
[52] Universal Credit provides for living costs and the cost of renting a home (subject to local financial limits and a 'bedroom tax' where the property is larger than is needed). It can also cover mortgage interest but only after a wait of 39 weeks. UC is paid in arrears, so claimants have to wait 5 weeks from when they apply before they will be paid. It is possible to get an 'advance payment' but this must be repaid later.
[53] Face-to-face interviews are no longer required and proof of identity has been simplified. It has been reported that the relaxations have led to many fraudulent claims: see BBC News, 'Coronavirus: Benefit claims fraud could be £1.5bn' <https://www.bbc.co.uk/news/business-52745983> accessed 11 June 2020.
[54] See Department of Work and Pensions, 'Universal Credit: Third party payments creditor and supplier handbook' <https://www.gov.uk/government/publications/how-the-deductions-from-benefit-scheme-works-a-handbook-for-creditors/universal-credit-third-party-payments-creditor-and-supplier-handbook> accessed 11 June 2020.
[55] HMRC, 'Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme' <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme> accessed 11 June 2020.
[56] HMRC, 'Check if you can claim a grant through the Self-Employment Income Support Scheme' <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme> accessed 11 June 2020.
[57] Delphine Strauss, 'Pay for more than 6m UK workers now covered by furlough scheme' <https://www.ft.com/content/be2d317e-54f9-42b0-bf17-d4a9ae4d7489> accessed 11 June 2020 (noting that this total may involve some double-counting where part-time workers are furloughed by more than one employer).

be made more flexible, so that employers can bring employees back part-time and still receive support[58] - but employers will be expected to pay a percentage of the cost.

Measures with a direct effect on contracts

The principal measures that have a more direct effect on contracts fall into a number of categories:

- Payment holidays
- Longer notice before termination of residential leases
- Suspension of enforcement
- Insolvency measures

Three general points are worth making at the outset. First, the measures tend to be particularistic rather than relying on general provisions. This is a general characteristic of English law; as Bingham LJ said after referring to the civilian doctrine of good faith:

> "English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."[59]

Secondly, there has been little direct interference with contract law or contract terms by means of legislation. Most of the measures involve regulation – though the practical effect may be to override the law. Thirdly, the changes tend to affect enforcement proceedings rather than the contractual obligations or rights of the parties.

We do find direct legislative interference with the terms of contracts in respect of residential tenancy agreements. For example, in the case of most privately-rented properties the landlord has been able to terminate the lease and obtain possession, without the tenant being in default or the landlord having to show a reason for the termination, after giving the tenant two months' notice.[60] This period is now extended to three months,[61] as are the notice periods required before eviction under many other types of residential tenancy.[62]

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[58] As with Germany's *Kurzarbeitergeld*.
[59] *Interfoto Picture Library v Stilletto* [1989] QB 433, 439.
[60] Housing Act 1988 s 21. The tenant is safe from termination only during the first six months.
[61] Coronavirus Act 2020, Sch 29 para 7.
[62] Coronavirus Act 2020, Sch 29.

The most important ground for evicting a tenant, non-payment of rent,[63] is not itself changed; instead, the courts have issued a Practice Direction under which the possession proceedings that would have to be taken before the tenant can be evicted are suspended, currently until 23 August 2020.[64] Eviction proceedings may only proceed in exceptional cases.[65] Bailiffs are not permitted to enforce debts (including rent owed for commercial properties[66]) by seizing the debtor's assets for a similar period.[67]

Changes are also being made to insolvency, under the Corporate Insolvency and Governance Bill, which was introduced in Parliament on 20 May 2020.[68] Some of the changes were under discussion before Covid-19 struck: for example, to allow companies to apply for a 20-day moratorium to give them "breathing space", preventing "termination-on-insolvency" clauses operating during the moratorium or rescue proceedings and the introduction of a new restructuring procedure that can involve "cram down" across certain classes of creditor. Other changes are clearly in response to the effects of the virus: for example, the temporary easements on filing requirements and Annual General Meetings, a ban on new petitions and statutory demands for three months and the suspension of directors' personal liability for wrongful trading (i.e. continuing to trade when the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation[69]). Under clause 10 of the Bill,

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[63] Housing Act 1988, Sch 2, Ground 8 (e.g if rent paid monthly has not been paid for two months).

[64] Practice Direction 51Z: Stay of Possession Proceedings, Coronavirus (as amended on 20 April 2020, to allow some proceedings, such as against trespassers, to continue). The validity of Practice Direction 51Z was confirmed by the Court of Appeal in *Mehmet Arkin v Gary Ronald Marshall and others* [2020] EWCA Civ 620 (11 May 2020).

[65] *Arkin v Marshall*, para.42. Eviction proceedings were not stayed in *Bernica Group v Mark Mann* (Newcastle County Court, 17 April 2020), in a case of serious anti-social behaviour where the tenant had already agreed to vacate the property (see Alice Richardson, 'Court of Appeal Holds 90-day Stay on Possession Proceedings Lawful' <https://www.trinitychambers.co.uk/news/court-of-appeal-holds-90-stay-on-possession-proceedings-lawful/> accessed 29 May 2020.

[66] See Tribunals, Courts and Enforcement Act 2007, chapter 2.

[67] Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020

[68] For a summary see Companies House, 'How the Corporate Insolvency and Governance Bill will help your business'<https://www.gov.uk/government/news/how-the-corporate-insolvency-and-governance-bill-will-help-your-business> accessed 11 June 2020.

[69] Insolvency Act 1986 s 214.

> “the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period.”[70]

Whilst this provision would provide some breathing space for directors, it would not affect the application of other provisions on the duties of directors under the Companies Act 2006.

For many consumers and very small businesses, it is the regulatory changes that will have most effect on their contracts. The principal actor[71] is the Financial Conduct Authority, which now has responsibility for consumer credit - which, as we saw earlier,[72] includes credit given to sole traders and partnerships of no more than three persons. In regulating consumer credit, the FCA relies on both detailed rules, which are contained in the Consumer Credit Sourcebook referred to as ‘CONC’, and on high level ‘Principles’, such as Principle 6:

> A firm must pay due regard to the interests of its customers and treat them fairly.

If a regulated firm fails to comply with a rule, a private person who suffers harm as a result will have a claim for breach of statutory duty.[73] Breach of a Principle does not give rise to the same right, but the offending firm may be disciplined and the FCA may require it to pay compensation to parties who have been harmed. Equally importantly, complaints about the behaviour of firms may be referred to the Financial Ombudsman Service, which will ask whether the firm complied with the Principles, and if it did not do so may order it to pay compensation to the consumer. The result is that a firm that, for example, does not ‘treat its customers fairly’ may be both disciplined and made to pay compensation – and the FCA or the Ombudsman may decide that it was not treating the customer even if as a matter of strict law

[70] The “relevant period” starts on 1 March 2020 and ends either on 30 June 2020 or one month after the Act has come into force (clause 10(2)), which, in effect, will mean the latter date, at least on the current wording of the clause.

[71] Other regulators are imposing parallel requirements, e.g. the energy regulator (Ofgen), see https://www.ofgem.gov.uk/system/files/docs/2020/06/open_letter_on_relaxing_network_charge_payment_terms_1.pdf. Contrast the role of the Competition and Markets Authority, which is concentrating on businesses that seem to be exploiting the situation to take advantage of people, for example by charging excessive prices, making misleading claims about their products or refusing to refund money after holiday, travel or other cancellations: see Competition and Markets Authority, ‘CMA coronavirus (COVID-10) response’ <https://www.gov.uk/government/collections/cma-covid-19-response> accessed 11 June 2020.

[72] CCA 1974 s 8 (‘an agreement between an individual (‘the debtor’) and any other person (‘the creditor’) …).

[73] Financial Services and Markets Act 2000, s 138D(2).

the firm was only doing what it was entitled to. The practical effect is that the law is reformed by regulation.[74]

It is Principle 6 on which the FCA is mainly[75] relying when it is now requiring creditors to take steps to help consumers affected by COVID-19 and its effects. For example, with credit card repayments and personal loans, lenders should agree to a 'payment holiday' of up to initially three and subsequently extended to six months, without affecting the consumer's credit rating,[76] and they must not call on guarantors to pay instead. The same applies to mortgages,[77] motor finance and 'rent-to-own' (i.e. hire-purchase) agreements, and there must be no repossessions during the three-month period. Banks must allow customers who have a pre-arranged overdraft (a common arrangement even with customers who do not usually use the facility but want to avoid the risk of overdrawing accidentally and incurring the (often steep) charges for doing so) must be allowed up to £500 interest-free for three months.[78] Under another branch of its regulatory powers, the FCA has told insurers that the fact that the insured is now working from home, or has to leave a second home empty and unvisited, or is using a vehicle differently should not be used as a ground for rejecting claims on home or motor insurance. In some cases, a firm will not be treating a customer who is reliant on insurance

[74] A graphic example was provided by consumer insurance. The FSA (the relevant authority at the time) decided that a firm that sought to avoid an insurance policy on the ground of non-disclosure of a material fact by the insured – a basic rule of insurance law - was not treating the customer fairly if the insurer had not asked the consumer about the matter; and in such cases the Ombudsman would require the insurer to pay the claim. See Law Commissions, Joint Consultation Paper *Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured* (LCCP 182 /SLCDP 134, Law Commission, 2007), Part 3.

[75] In relation to mortgages the FCA also relied on Principle 7 ('A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading') and MCOB 2.5A.1R ('A firm must act honestly, fairly and professionally in accordance with the best interests of its customer'), see FCA, 'Mortgages and coronavirus: information for consumers' <https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers> accessed 11 June 2020. There have been some minor changes to the Rules also. For example, CONC 6.7.5. has been amended to remove the duty to set a minimum monthly repayment, if the consumer is allowed to defer payments because of the effects of the virus.

[76] For a summary and links to more detailed pages see FCA, 'Coronavirus: information for consumers on personal loans, credit cards, overdrafts, motor finance and other forms of credit' <https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts> accessed 11 June 2020.

[77] See FCA, 'Mortgages and coronavirus: information for consumers' <https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers> accessed 11 June 2020 (this was amended to provide an extension for the further three months on 4 June 2020).

[78] See FCA, 'Overdrafts and coronavirus: temporary guidance for firms' <https://www.fca.org.uk/publications/finalised-guidance/overdrafts-coronavirus-temporary-guidance-firms> accessed 11 June 2020.

fairly were the firm to refuse to renew the policy, even if the firm is not taking on new policies of the relevant kind.[79]

The concessions are limited in some respects, however. First, not all customers will benefit. The concessions apply only to those affected by the crisis - and it is easy to see cautious staff in creditor firms refusing to apply the COVID-19 concessions to people who were struggling already. Second, the concessions should not be applied 'if the firm [reasonably] determines it is obviously not in the customer's interests to do so'.[80]

> Where a customer was in pre-existing financial difficulty, our existing forbearance rules and guidance in CONC[81] would continue to apply. These would include for example the firm considering suspending, reducing, waiving or cancelling any further interest or charges, deferring payment of arrears or accepting token payments for a reasonable period of time.[82]

Thirdly, even when the debtor is granted a 'payment holiday', interest will continue to accrue,[83] though in some cases the firm must review the rate of interest it is charging the consumer - for example with credit cards, on which the rate of interest can be very high.[84]
Fourthly, related provisions of the CCA continue to apply, such as the requirement that a creditor must give notice of sums in arrears to a debtor after two missed instalments.[85] Consumer debtors who were granted a 'payment holiday' have still be sent such warning

[79] See FCA, 'Insurance and coronavirus (Covid-19): our expectations of firms' <https://www.fca.org.uk/firms/insurance-and-coronavirus-our-expectations> accessed 11 June 2020; and, for further guidance directed to insurers, FCA, 'Coronavirus and customers in temporary financial difficulty: draft guidance for insurance and premium finance firms' <https://www.fca.org.uk/publications/guidance-consultations/coronavirus-customers-temporary-financial-difficulty-draft-insurance-premium> accessed 11 June 2020.
[80] E.g. FCA, 'Credit cards (including retail revolving credit) and coronavirus: temporary guidance for firms' <https://www.fca.org.uk/publications/finalised-guidance/credit-cards-retail-revolving-credit-coronavirus-temporary-guidance-firms> accessed 11 June 2020.
[81] See CONC 7.3.
[82] FCA, 'Credit cards (including retail revolving credit) and coronavirus: temporary guidance for firms' <https://www.fca.org.uk/publications/finalised-guidance/credit-cards-retail-revolving-credit-coronavirus-temporary-guidance-firms> accessed 11 June 2020.
[83] There is an exception for pay-day and similar high-cost short term credit, for which the holiday is interest-free but will last for one month only: FCA, 'Coronavirus: information for consumers on personal loans, credit cards, overdrafts, motor finance and other forms of credit' <https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts> accessed 11 June 2020.
[84] See FCA, 'Credit cards (including retail revolving credit) and coronavirus: temporary guidance for firms' <https://www.fca.org.uk/publications/finalised-guidance/credit-cards-retail-revolving-credit-coronavirus-temporary-guidance-firms> accessed 11 June 2020.
[85] s.86B (fixed-sum credit agreements) and s,86C (running account agreements) CCA 1974.

notices, which are likely to confuse and worry them at the very least.[86] The introduction of the 'payment holiday' through amendments to regulatory guidance is therefore not as neat as the government and FCA might have hoped – it seems that some legislative adjustments were needed to make the 'payment holiday' work smoothly but this was not done.

There are of course many other measures to help consumers. Many of them have been arranged between industry, regulators and government on an voluntary basis: for example, the agreement reached with major phone and internet providers to ensure vulnerable customers or those self-isolating receive alternative methods of communication wherever possible if priority repairs to fixed broadband and landlines cannot be carried out, to treat customers who struggle with their bills fairly and appropriately as well as to remove data caps and provide more generous packages.[87]

We have said that the 'concessions' required by the FCA were set initially to last three months and have been extended to six months. They may of course be extended again; but we have to hope that sooner or later things will begin to move back towards some sort of normality. Housing experts in particular fear that when the grace period is over and repossessions start again, many landlords may seek to evict tenants who have not been able to pay their rent. We are glad to see that at least some thought is being given to this. We saw earlier the protocol that 'social' landlords are required to follow before evicting a tenant.[88] The Housing Minister has announced that all landlords will be required to do something similar and, interestingly, to act 'in good faith' – a new departure for English housing law.[89]

However, it will not just be in housing that an end to the concessions will be a problem, especially if the end is a sudden 'cliff edge' rather than a gradual 'taper'. We can expect many

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[86] *The Guardian*, 'Borrowers on payment holidays to receive 'thuggish' debt letters', 3 June 2020, <https://www.theguardian.com/money/2020/jun/03/borrowers-on-payment-holidays-to-receive-thuggish-debt-letters> accessed 3 June 2020.

[87] See Department for Digital, Culture, Media and Sport, 'Government agrees measures with telecoms companies to support vulnerable consumers through COVID-19' <https://www.gov.uk/government/news/government-agrees-measures-with-telecoms-companies-to-support-vulnerable-consumers-through-covid-19> accessed 11 June 2020.

[88] Pre-Action Protocol for Possession Claims by Social Landlords (REF).

[89] See Jack Simpson, 'Government's plan for rent protection after eviction ban at risk of being just 'words on a page', says Shelter' <https://www.insidehousing.co.uk/news/news/governments-plan-for-rent-protection-after-eviction-ban-at-risk-of-being-just-words-on-a-page-says-shelter-66386> accessed 11 June 2020. It is hoped that the Government will also follow through on its plan, announced in the Queen's Speech on 19 December 2019, to abolish the right of many private landlords under Housing Act 1988, s 21, simply to terminate a tenancy on 2 months (now three months) notice: see https://commonslibrary.parliament.uk/research-briefings/cbp-8658/

consumers to become bankrupt or use the simpler procedure of a 'debt relief order' (DRO), under which their debts are written off after one year if their situation does not improve by then. But the current maximum for a DRO is £20,000. We are afraid that in order to cope with the expected numbers of insolvencies, the maximum for a DRO may need to be increased by several multiples.

Cabinet Office Guidance on responsible contractual behaviour

A rather unusual document which was issued in early May 2020 is the Cabinet Office *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*.[90] In this document, the government exhorts all individuals and businesses "to act responsibly and fairly in the national interest in performing and enforcing their contracts" (para.3) where these are affected by the Covid-19 pandemic. In particular, this means that contracting parties should be "reasonable and proportionate in responding to performance issues and enforcing contracts" (para.14), which entails "acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party" (para.14). This guidance has no legal force, nor indeed any basis in law, and it is in obvious conflict with the general philosophy of English contract law. Whilst parties in a commercial relationship always have the flexibility to depart from their strict contractual obligations in the interest of their commercial relationship, such a decision needs to be weighed up against each party's wider interests and obligations to others (such as shareholders). This may explain the rather dismissive reactions to the document in blogs from law firms and barristers' chambers.[91]

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[90] Cabinet Office, 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency> accessed 11 June 2020.

[91] See, for example, Charles Samek, 'Freedom of contract: Does it still exist?' <https://littletonchambers.com/articles-webinars/freedom-of-contract-does-it-still-exist/>; Katherine Calder and Mark Richard, 'Play fair children! - UK Cabinet Office publishes contract management guidance entreating all parties to act "reasonably" in managing Covid-19 issues' <https://www.jdsupra.com/legalnews/play-fair-children-uk-cabinet-office-30763/>; Fern Schofield, 'Play nicely, children': Cabinet Office guidance on responsible contractual behaviour during the pandemic' <https://www.falcon-chambers.com/publications/articles/play-nicely-children-cabinet-office-guidance-on-responsible-contractual-beh>; Norton Rose Fulbright, 'UK Government publishes guidance on "responsible contractual behaviour" applicable to all contracts impacted by COVID-19' <https://www.nortonrosefulbright.com/de-de/wissen/publications/0a264bcc/uk-government-publishes-guidance-on-responsible-contractual-behaviour-applicable#2>; all accessed 11 June 2020.

There will be situations in which each party needs some adjustment to the contract. Then we can expect the parties to negotiate voluntarily whether or not the contract, or for that matter the law, contains provisions for adjustment in changed circumstances. In this context, the *Guidance* may be relevant, as re-negotiation is more likely to leave each party reasonably satisfied if it was conducted in a co-operative way rather than in the adversarial manner that at least some Law Lords have envisaged as the norm for contractual negotiation.[92] In such a situation, mediation may help the parties to reach an acceptable compromise.[93] In other situations, however, there is less room for a mutually beneficial compromise. For example, there seem to be many disputes over whether what has happened is covered by the wording of business interruption insurance policies. This is more of a zero-sum game. If the parties each take the view that the position is unclear then of course they may readily settle for a sum representing part of the claim. If however each thinks it is likely to win if the matter goes to court, they will have little incentive to settle and indeed between them they may end up investing more in trying to win than the claim is worth.[94]

Future "pinch points" for English Contract Law

In this final section, we look ahead at those aspects of English Contract Law which we think might come under renewed strain because of the impact of the Covid-19 pandemic.

Temporary impossibility

There must be many parties who are temporarily unable to perform because of COVID-19 or the measures taken a result of it and who are not protected by a force majeure clause – not because they were deliberately taking the risk of being unable to perform but through oversight or because they are dealing on the other party's standard terms and were unable to get a force majeure clause included. We may expect some courts to be at least a little sympathetic, and it is just possible that the courts will find ways to excuse them form liability. There are a few exceptional cases, generally ignored in the books, in which courts have held that a person who, for example, is too ill to work is not in breach, but that the other party may terminate the

[92] See Lord Ackner in *Walford v Miles* [1992] 2 AC 128, 138 ("the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.")
[93] See https://www.biicl.org/breathing-space
[94] See the analysis in George Priest, 'Breach and Remedy for the Tender of Non-conforming Goods' (1978) 91 Harvard LR 960.

contract if the effects of the non-performance are serious.[95] The doctrinal basis of these case is unclear; they are not cases of breach but equally they cannot be cases of frustration, as impossibility does not give the other party an option whether or not to terminate the contract. Rather, they seem to rest on interpretation of the particular contract. Perhaps an ingenious advocate in front of a sympathetic judge will be able to develop this into a more general form of relief.

Self-induced frustration and pro-rating

One of the limitations to the English doctrine of frustration is often referred to by the label "self-induced" frustration. In essence, if a party has brought about the frustrating event or its consequences for the particular contract,[96] the doctrine of frustration will not apply.[97] The cases that may need reconsideration were concerned with instances where one party had more limited resources than expected and had allocated them to other contracts. In the *Ocean Trawlers* case,[98] only 3 instead of 5 expected operating licences were issued. The licensee chose to have the three licences allocated to the licensee's own vessels rather than to two vessels that it had chartered, and claimed that the two charters were frustrated. In *The Super Servant Two*,[99] the owners had two barges and, when one was lost accidentally, they allocated the remaining barge to another contract and claimed that their contract with the plaintiffs was frustrated. In each case the court held that the contract was not frustrated as any impossibility was self-induced. The implications of this approach are that a supplier would, it seems, not be able to allocate whatever supplies or resources are available to some of its contracts and be discharged from its obligations in respect of those contracts it can no longer perform, even if the reason for its limited supplies are due to an event which would otherwise constitute frustration. Similarly, it would not allow a supplier to pro-rate its available supplies among all customers and avoid liability for any shortfalls, however sensible a solution that might seem to be.

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[95] The best-known example is *Poussard v Spiers and Pond* (1876) 1 QBD 410, In that case, an opera singer had been engaged for a three-month run of a new opera, but was ill for the opening night and also several nights thereafter. It was held that the promoter was entitled to rescind the contract, even though the opera singer was *not* liable for breach of contract. (In contrast, in *Bettini v Gye* (1876) 1 QBD 183 it was said that at singer who did not attend rehearsals was in breach of contract (though not a sufficiently serious breach as to justify the other party in terminating the contract.) See similarly, *Minnevitch v Café de Paris (Londres) Ltd* [1936] 1 All ER 884 (employer temporarily unable to provide work). See Guenther Treitel, *Frustration and Force Majeure*, (3rd edn, Sweet & Maxwell, 2014), para 5-059.

[96] See the somewhat complex facts in *DGM Commodities Corp v Sea Metropolitan SA* [2012] EWHC 1984 (Comm).

[97] *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

[98] *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

[99] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

Consideration and performance of existing contractual duties

A third issue relates to contractual renegotiation. English law treats a variation to an existing contract as a new contract, so that consideration is required. There is no problem over consideration if each party stands to benefit, or each gives up something, under the variation; nor if there are outstanding obligations on each side and the parties agree to rescind the original contract and replace it with a different set of obligations. However, if one party as a concession agrees to pay an additional sum if the other party simply completes performance of its original obligation, or if a creditor agrees to accept part-payment of a debt "in full satisfaction" (in other words, promises to release the debtor from any further obligation), the traditional approach was that there was no consideration and the promised concession was not binding. [100] It has long been recognised that these rules are unsatisfactory: as Lord Blackburn said in *Foakes v Beer*,

> … all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole.[101]

In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[102], a contractor had promised additional payments to a struggling sub-contractor if the sub-contractor would complete the work in time for the contractor to avoid paying liquidated damages for late completion. The Court of Appeal, though purporting merely to distinguish earlier case law, effectively altered the law by holding that there was consideration if the contractor obtained a "practical benefit" from securing performance of only the sub-contractor's original obligation; and in *MWB Business Exchange Centres v Rock Advertising Ltd*[103] the Court of Appeal applied the same argument in a case of part-payment.[104] The *MWB* case was appealed, but the Supreme Court decided the

[100] *Stilk v Myrick* (1809) 2 Camp 317 (promise to pay extra); *Foakes v Beer* (1883-84) LR 9 App Cas 605 (part payment of debt).
[101] *Foakes v Beer* (1883-84) LR 9 App Cas 605, 622
[102] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.
[103] *MWB Business Exchange Centres v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604, reversed (on other grounds) [2018] UKSC 24, [2018] 2 W.L.R. 1603
[104] Although in *Re Selectmove Ltd* [1995] 2 All ER 531, the Court of Appeal had previously declined to apply *Williams v Roffey* to a part-payment of debt situation.

case on the basis that the contract provided that variations were only to be effective if in writing, whereas the alleged variation was purely oral. However, Lord Sumption, speaking for the majority, contrived to cast the law on consideration for variations into doubt by saying on the one hand that the practical benefit obtained "was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer"* and on the other that "*Foakes v Beer*… is probably ripe for re-examination".[105] English contract lawyers were disappointed that the Supreme Court had refused to take the opportunity to sort out the law. [106] Perhaps it will get another opportunity to do so sooner than anyone thought.

Economic duress

Lastly, as a result of the crisis, we can expect there to be cases in which party A states that it cannot or will not perform unless party B agrees to change the terms in A's favour, and B agrees because B feels that in the circumstances it has little choice. Later B may try to argue that the agreement to change the contract is voidable on the ground of "economic duress". Many of the economic duress cases have involved exactly this scenario; and it is established that if one party threatens to break the contract (an "illegitimate" threat) as a way of exacting a concession that it knows is not justified, and the other agrees only because it has no practical alternative, the variation can be avoided.[107] However, in some relevant respects the limits of the doctrine remain unclear, and in particular whether a threat to break a contract can ever be "legitimate" or justified.[108] If A genuinely cannot perform without an extra payment, because without the extra payment it is or will become insolvent, it is thought that the variation cannot be avoided: it can be argued that A has not made a threat but has issued a warning. But what if A wrongly but honestly believes it has legal grounds for demanding the concession? Or if A knows that it has no basis in law for its demand but honestly thinks the demand is justified commercially? Some years ago Dyson J suggested that a relevant factor is "whether the person

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[105] [2018] UKSC 24 at [18]. The doctrine of promissory estoppel, introduced into English law by Denning J in *Central London Property Trust v High Trees House Ltd* [1947] KB 130, is also relevant and indeed was applied by the CA in the *MWB* case; but it seems not to have been argued in the SC. It too is ripe for review, as it is uncertain in many respects; however, if sensible changes were made to the doctrine of consideration as applied to variations, promissory estoppel might no longer be needed.

[106] In *Dan Simantob v Yacob Shavleyan t/a Yacob's Gallery* [2018] EWHC 2005 (QB), Kerr J assumed that the Supreme Court had not overruled *Williams v Roffey*, and that the part-payment of debt issue was governed by *Re Selectmove*.

[107] *North Ocean Shipping Company v Hyundai Construction, The Atlantic Baron* [1979] QB 705; *B & S Contracts and Designs Ltd v Victor Green Publications Ltd* [1984] ICR 419.

[108] For a fuller discussion see *Hugh Beale (Gen Ed), Chitty on Contracts* (33rd edn, Sweet & Maxwell, 2018), paras 8-038 – 8-045.

allegedly exerting the pressure has acted in good faith or bad faith."[109] Perhaps there is a greater role for good faith in English law than is often admitted – though when Dyson J referred to good faith it is doubtful that he meant anything more demanding than the absence of fraud.

Conclusions

Despite the apparent inflexibility of English law when contracts are disputed by unforeseen events, the measures taken to soften the effects of Covid-19 involve little direct change to the law of contract, or indeed to their terms. Most of the measures so far taken involve temporary changes either to enforcement procedures or to the regulatory requirements that apply to consumer credit contracts of various kinds. Changes to regulatory requirements are a curious way of effectively altering the law for some categories of consumer while leaving the underlying legal principles untouched. It is not possible to explore the reasons for this approach fully here, but we suggest that it is in part due to the great reluctance on the part of English lawyers to change general contract law, which is what applies to most B2B contracts. This may be partly because law firms have invested heavily in "work arounds" (e.g. pre-drafted force majeure clauses for various types of contract) or barristers have invested in expertise at arguing around the rules, and neither wants to give up these competitive advantages. But we think that the principal reason for leaving the law somewhat inflexible is the fear that greater flexibility would mean requiring judges and lawyers to intervene more extensively in contracts and the way they are performed, and to apply broad standards - and that this would lead to uncertainty. Moore-Bick LJ made just this point when he said:

> There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.[110]

For this reason we do not expect the Covid-19 to have much effect, let alone a lasting effect, on general English contract law.

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[109] *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530 at [131]. The Court of Appeal has recently accepted that when a party threatens to do something that it is legally entitled to do (such as to refuse to renew a contract – "Legitimate Act Duress") the threat is not illegitimate, and the resulting contract will not be voidable unless the threat was made in bad faith (*Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828).

[110] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] 2 CLC 272, 291

On the other hand, it is conceivable that the gradual development of a discrete consumer contract law[111] might be accelerated in the wake of Covid-19. It has been suggested that some of the changes made in response to Covid-19, together with the pre-existing rules for consumer credit agreements, might be indicative of an emerging principle of "social force majeure".[112] But such a principle would, much like good faith, meet the objection that it would cause more difficulties than it would solve and it seems very unlikely that the common law courts would take the initiative - so it would be a matter for Parliament rather than the courts.

[111] The Consumer Rights Act 2015, and the various, mostly EU-derived, statutory instruments regulating consumer contracts have already carved out a partial consumer contract law, although the separation between consumer and commercial contracts is far from complete.

[112] See Iain Ramsay, 'Contract Law, social force majeure and adjusting consumer credit contracts' <https://creditdebtandinsolvency.wordpress.com/2020/04/18/contract-law-social-force-majeure-and-adjusting-consumer-credit-contracts/> accessed 9 June 2020], referring to the notion of social force majeure developed by Thomas Wilhelmsson in '"Social force majeure" — A new concept in Nordic consumer law' (1990) 13 Journal of Consumer Policy 1.