

## COVID-19: WHAT'S NEXT?

### KEY ISSUES TO CONSIDER FOR BUSINESSES OPERATING IN ENGLAND

#### EXECUTIVE SUMMARY

The COVID-19 pandemic has upended the world, resulting in lockdowns in nearly every country.

The lockdown in the United Kingdom started on 23 March 2020 and was codified in England through The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the “**Regulations**”), which (i) require people to stay at home and not leave without a “*reasonable excuse*”<sup>1</sup> and (ii) impose strict restrictions on a wide range of businesses.

In particular, the Regulations require the closure of businesses selling food or drinks for consumption on their premises,<sup>2</sup> non-essential public venues<sup>3</sup> (such as cinemas, gyms, sporting venues and nightclubs) and physical shops such as retail stores, except for limited permitted uses such as delivery services<sup>4</sup> (together the “**Closed Businesses**”).

Other businesses can stay open but must comply with strict social distancing measures<sup>5</sup> (the “**Other Businesses**”). Wherever possible, their employees should work from home.<sup>6</sup> To the extent employees are required to travel to, from and/or for their work — for instance to operate machinery, work in construction or manufacturing or to deliver front-line services — businesses should make every effort to comply with the social distancing guidelines set out by the UK government.<sup>7</sup>

The UK government has identified five tests which need to be met before any relaxing of the measures:<sup>8</sup> (1) making sure the National Health Service (NHS) can cope with potential numbers of hospitalisations; (2) a “sustained and consistent” fall in the daily death rate; (3) the rate of infections decreasing to “manageable levels”; (4) ensuring that the supply of tests and personal protective equipment can meet future demand; and (5) the government being satisfied that any adjustments would not risk a second peak.<sup>9</sup>

As lockdown measures are eased, the UK government’s social distancing rules and guidelines will change. In fact, some of the guidelines applicable to Other Businesses have already been updated several times. On 10 and 11 May 2020 the UK government outlined its approach on how to safely and gradually ease lockdown measures and restart the economy (the “**Plan to Rebuild**”).<sup>10</sup> It has also published a new set of guidance “*to make workplaces as safe as possible and give people confidence to go back to work during coronavirus pandemic*”, which includes eight workplace-specific guides to help UK employers “*get their businesses back up and running and workplaces operating as safely as possible*”.<sup>11</sup> However, the guidance has already been criticised for being unclear in parts and not adequate for blue collar workers.<sup>12</sup>

While Closed Businesses may be keen to re-open, and Other Businesses will have an interest in permitting employees to resume normal working arrangements, the situation for all businesses as lockdown measures are eased is a complex one due to the continuing evolution of the public health situation, the concerns on the part of many employees and employee organisations concerning their health and safety, the length and complexity of relevant government regulation and guidance and the range of advice from public health advisers and other organisations (which may not always be 100% consistent).

In summary, when they re-open all businesses will need to:

- 1) comply with all applicable rules, regulations and guidelines;
- 2) monitor the UK government's announcements regularly (including the government's daily COVID-19 press conference and its COVID-19 internet page: <https://www.gov.uk/coronavirus>) and ensure they know and have made the necessary preparations to comply with new government rules, regulations and guidelines as soon as they are introduced;
- 3) implement other appropriate health and safety measures to protect their employees and third parties (e.g. customers or contractors) and minimise their exposure to statutory, contractual, tort and other claims. The measures should be adapted to their premises, the types of work their employees perform in their premises and their interactions with third parties, in accordance with industry best practice;
- 4) balance appropriately their health and safety obligations with their regulatory obligations, including data protection and reporting obligations; and
- 5) consider the effect of the easing on other aspects of their trade, including their contractual obligations and insurance entitlements.

We recommend that Closed Businesses, and Other Businesses (to the extent they have not yet done so), develop and implement a detailed COVID-19 action plan, tailored to their activities and workplaces, which addresses the issues discussed above, as well as all other aspects of their business activities which may be affected by the COVID-19 pandemic and consequential government actions. Businesses should also pay close attention to the actions of local industry bodies and workers' unions, and leading peers around the globe, which may provide guidance as to the types of measures they may need to implement.

The purpose of this alert is to identify some of the key issues that businesses will face as the UK government eases lockdown measures:

- 1) What are my obligations concerning my employees' and customers' health and safety?
- 2) Will re-opening affect contractual defenses such as force majeure or frustration?
- 3) Will re-opening affect insurance claims arising from business interruption?

The alert is not intended to answer every question. Many details remain to be worked out by the government and may be subject to future regulations and guidelines.

## **I. What Are My Obligations Concerning My Employees' and Customers' Health and Safety?**

- A. How Do I Provide a Safe Environment for Employees and Customers, and Ensure My Employees Stay Healthy?**

The most important task for businesses is to follow health and safety laws, regulations, guidelines and recommendations.

Employers have a general duty, under the Health and Safety at Work etc. Act 1974, to ensure, as far as is reasonably practicable, the health, safety and welfare, at work, of all of their employees<sup>13</sup> and third parties that may be affected by their undertaking<sup>14</sup> such as visitors and customers. In addition, they must:

1. make a suitable and sufficient assessment of the risks to the health and safety of their employees at work and of persons other than their employees arising out of, or in connection with, their undertaking;<sup>15</sup>
2. implement protective measures;<sup>16</sup> and
3. make and give effect to such arrangements as are appropriate, having regard to the nature of their activities and the size of their undertaking, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures.<sup>17</sup>

#### COVID-19 specific measures

As discussed above, the Regulations (i) require people to stay at home and not leave without a “reasonable excuse” and (ii) impose strict restrictions on a wide range of businesses. In particular, they require the Closed Businesses to remain closed, except for limited permitted uses such as delivery services.<sup>18</sup> Other Businesses can stay open but must comply with strict social distancing measures.<sup>19</sup>

The UK government has also issued COVID-19 specific health and safety guidance for employers and businesses, which, to the extent applicable, should be followed by businesses:

1. A first set of guidance published shortly after the Regulations; and
2. A new set of guidance published on 11 May, alongside The Plan to Rebuild.<sup>20</sup>

Businesses should monitor the UK government’s announcements regularly, as it has and will continue to update guidance and regulations concerning COVID-19 referred to in this section on a regular basis.

They should also pay close attention to the actions of local industry bodies and peers around the globe. For instance, the UK Construction Leadership Council has published detailed advice on construction site operating procedures for employers to protect their workforce,<sup>21</sup> based on the Sector Guidance discussed below.<sup>22</sup>

#### *First set of guidance*

The “Guidance for employers and businesses on coronavirus (COVID-19)”, as updated on 7 April 2020 (the “**Guidance for Employers**”),<sup>23</sup> recommends that employers and businesses adopt a combination of social distancing, hygiene, cleanliness, staff sickness and home working measures. These include:

1. encouraging employees to work from home unless it is impossible for them to do so;

2. adopting enhanced hygiene protocols, such as frequently washing hands, cleaning and disinfecting objects and surfaces that are touched regularly, providing hand sanitiser and tissues, and encouraging employees to use them;
3. keeping employees updated on actions being taken to reduce risks of exposure to COVID-19 in the workplace;
4. making sure managers know how to spot COVID-19 symptoms and are clear on any relevant processes and procedures in case someone in the workplace is potentially infected and needs to take the appropriate actions (including sickness reporting and sick pay);
5. sending home for seven days any employee who exhibits symptoms of COVID-19 or lives in a household where someone else exhibits symptoms;
6. maintaining a distance of at least 2 metres (3 steps) between individuals wherever possible;
7. where face-to-face contact is essential, this should be kept to 15 minutes or less wherever possible;
8. keeping teams of workers together (cohorting) as much as possible, and keeping teams as small as possible;
9. encouraging the use of digital and remote transfers of material where possible rather than paper format, such as using e-forms, emails and e-banking;
10. regulating entry so that the premises do not become overcrowded;
11. ensuring that employees who are in an extremely vulnerable group and should be shielded are supported to stay at home, in accordance with the “COVID-19: guidance on shielding and protecting people defined on medical grounds as extremely vulnerable”;<sup>24</sup> and
12. making regular announcements to remind staff and/or customers to follow social distancing advice (including the social distancing measures set out in the “Guidance for staying at home and away from others (social distancing)”<sup>25</sup> (the “**Social Distancing Guidance**”). The Social Distancing Guidance was withdrawn on 11 May 2020 and replaced by the “Staying alert and safe (social distancing)” guidance<sup>26</sup>.

The UK government has also issued high level sector guidance for social distancing in the workplace (the “**Sector Guidance**”), but it has been withdrawn and replaced by the new set of guidance as of 11 May 2020.<sup>27</sup>

*New set of guidance*

On 10 and 11 May 2020, the UK government outlined its Plan to Rebuild.<sup>28</sup> The UK government has also issued a new set of guidance to get “*businesses back up and running*” and “*to make*

*workplaces as safe as possible and give people confidence to go back to work during coronavirus pandemic*".<sup>29</sup> They have been prepared by the UK government following consultations with unions, large firms and business groups.<sup>30</sup> The guidance sets out practical steps for businesses focused on five key points:<sup>31</sup>

1. All reasonable steps should be taken by employers to help people work from home. However, employees who cannot work from home and whose workplace has not been told to close should go to work.
2. Employers must carry out a COVID-19 risk assessment, in consultation with workers or trade unions, to establish what guidelines to put in place. Employers should publish the results of their risk assessments on their website.
3. Workspaces should be re-designed to maintain distances of 2 metres between people by staggering start times, creating one way walk-throughs, opening more entrances and exits, or changing seating layouts in break rooms.
4. Where people cannot be 2 metres apart, employers must manage transmission risk. They should look into putting barriers in shared spaces, creating workplace shift patterns or fixed teams minimising the number of people in contact with one another, or ensuring colleagues are facing away from each other.
5. Employers must reinforce cleaning processes. Workplaces should be cleaned more frequently, paying close attention to high-contact objects like door handles and keyboards. Handwashing facilities or hand sanitisers at entry and exit points should also be provided.

The new set of guidance contains eight detailed guides on measures employers must implement in different types of workplaces. There is a guide for each of the following working environments:

1. construction and other outdoor work;<sup>32</sup>
2. factories, plants and warehouses;<sup>33</sup>
3. labs and research facilities;<sup>34</sup>
4. offices and contact centres;<sup>35</sup>
5. other people's homes;<sup>36</sup>
6. restaurants offering takeaway or delivery;<sup>37</sup>
7. shops and branches;<sup>38</sup> and
8. vehicles.<sup>39</sup>

Many businesses operate more than one type of workplace, such as an office, factory and fleet of vehicles (by way of example). They should implement the appropriate guide for each workplace.<sup>40</sup>

As is clear from the Plan to Rebuild, the UK government will continue to make “*regular steps of adjustments to current measures*”.<sup>41</sup> They will continue to change regularly, depending on the data available at a particular point in time, especially the data relating to “*the infection risk at each point, and the effectiveness of the Government’s mitigation measures like contact tracing*”.<sup>42</sup> Businesses should therefore regularly monitor the UK government’s announcements to ensure they comply with the most recent applicable measures.

## **B. What Are My Reporting and Privacy Obligations?**

Employers may be required to obtain and disclose health information of employees, such as whether they have contracted COVID-19 (or exhibit its symptoms), to comply with their:

1. health and safety obligations, such as those discussed above; and
2. reporting obligations, such as those under The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (“**RIDDOR**”), which require employers to report to the Health and Safety Executive where:<sup>43</sup>
  - a. an unintended incident at work has led to someone’s possible or actual exposure to COVID-19. This must be reported as a dangerous occurrence;<sup>44</sup>
  - b. a worker has been diagnosed as having COVID 19 and there is reasonable evidence that it was caused by exposure at work. This must be reported as a case of disease;<sup>45</sup> and
  - c. a worker dies as a result of occupational exposure to COVID-19.<sup>46</sup>

However, employers must balance these obligations against their employees’ privacy rights. The European Data Protection Board<sup>47</sup> has published guidance<sup>48</sup> (the “**EDPB Guidance**”) on the processing of personal data during the pandemic. The introductory statements to the guidance state that “*Data protection rules (such as the GDPR) do not hinder measures taken in the fight against the coronavirus pandemic. The fight against communicable diseases is a valuable goal shared by all nations and therefore, should be supported in the best possible way. It is in the interest of humanity to curb the spread of diseases and to use modern techniques in the fight against scourges affecting great parts of the world. Even so, **the EDPB would like to underline that, even in these exceptional times, the data controller and processor must ensure the protection of the personal data of the data subjects. Therefore, a number of considerations should be taken into account to guarantee the lawful processing of personal data and in all cases it should be recalled that any measure taken in this context must respect the general principles of law and must not be irreversible***”.

Health information about an individual, such as whether they have contracted COVID-19 (or exhibit its symptoms), constitutes special category personal data under the General Data Protection Regulation<sup>49</sup> (“**GDPR**”). Under the GDPR and the Data Protection Act 2018 an employer can only lawfully process<sup>50</sup> such data if it does so in compliance with the conditions for lawful processing set out in the GDPR and the conditions for processing special category data.<sup>51</sup> The EDPB Guidance states that “*In the employment context, the processing of personal data may be necessary for compliance with a legal obligation to which the employer is subject such as obligations relating to health and safety at the workplace, or to the public interest, such as the control of diseases and other threats to health. 2 The GDPR also foresees derogations to the prohibition of processing of certain special categories of personal data, such as health data, where it is necessary for reasons*

*of substantial public interest in the area of public health (Art. 9.2.i), on the basis of Union or national law, or where there is the need to protect the vital interests of the data subject (Art.9.2.c), as recital 46 explicitly refers to the control of an epidemic?'.<sup>52</sup>*

The conditions for processing special category data that are most relevant to the current circumstances would be:

1. the explicit consent of the data subject;
2. compliance with employment, social security, and social protection law obligations;
3. vital interests of the data subject;
4. substantial public interest;
5. provision of medical or social care or treatment; and
6. public interest in the area of public health.

The data controller (in this case the employer) must document, in accordance with the DPA 2018 and the principle of accountability, how it intends to process personal data in this context and the conditions relied upon to do so. It would also be advisable to issue a specific notice to all employees setting out what personal data may be processed in order to comply with Health and Safety obligations and how this processing will meet the requirements of the GDPR and the DPA 2018.<sup>53</sup>

In processing special category personal health data, employers must also ensure that they comply with the other principles in the GDPR, which include the principles of fairness and transparency, accountability, security, and minimisation . For example, the EDPB Guidance sets out some Q&A's as follows:<sup>54</sup>

*“Can an employer require visitors or employees to provide specific health information in the context of COVID-19?”*

*The application of the principle of proportionality and data minimisation is particularly relevant here. The employer should only require health information to the extent that national law allows it.*

*Is an employer allowed to perform medical check-ups on employees?*

*The answer relies on national laws relating to employment or health and safety. Employers should only access and process health data if their own legal obligations requires it.*

*Can an employer disclose that an employee is infected with COVID-19 to his colleagues or to externals?*

*Employers should inform staff about COVID-19 cases and take protective measures, but should not communicate more information than necessary. In cases where it is necessary to reveal the name of the employee(s) who contracted the virus (e.g. in a preventive context) and the national law allows it, the concerned employees shall be informed in advance and their dignity and integrity shall be protected.*

*What information processed in the context of COVID-19 can be obtained by the employers?*

*Employers may obtain personal information to fulfil their duties and to organise the work in line with national legislation.”*

In addition, the Information Commissioner’s Office (“ICO”)’s COVID-19 information HUB<sup>55</sup> also provides practical COVID-19 specific data protection guidance to businesses. For instance, it states that employers may disclose that an employee is infected with COVID-19 to his/her colleagues to assure the health and safety of its other employees but that “*you probably don’t need to name individuals and you shouldn’t provide more information than necessary*”.<sup>56</sup>

However, data protection is a complex area of the law, and each case will need to be considered on its own merits.

### **C. What Duties Do I Have as to Common Law Tort Liability?**

As the UK government eases the lockdown measures, Closed Businesses re-open and employees of some of the Other Businesses progressively resume working in the businesses’ physical locations, businesses’ exposure to potential tortious liability to their employees and customers will dramatically increase for obvious reasons.

In addition, businesses now have more information about COVID-19 than they did even two or three months ago when lockdown measures began to become widespread around the world. This may translate to a heightened duty to warn about dangerous conditions and to take other reasonable measures to protect employees and customers. While COVID-19 and the risks of being infected by it are now common knowledge, businesses should be cautious about relying upon defences based upon the doctrine of voluntary assumption of risk. The defence of voluntary assumption of risk does not abrogate the statutory duty of care owed by businesses to their employees. With regards to customers, while voluntary assumption of risk can be an effective defence under the Occupier’s Liability Act, and at common law, it is unlikely to be a defence which a business would wish to rely upon for obvious reasons (in particular, it would require businesses to give notice to customers that they face a heightened risk of being infected by COVID-19 when they enter their premises). Implementing appropriate measures to minimize the risk of transmission of the virus would be a far more prudent course, both from a legal perspective and from that of customer-relations.

It is therefore necessary for businesses to carefully consider how to re-open safely. Whether a claim in negligence can be made successfully depends upon proof that:

1. a duty of care is owed by one party to another;
2. this duty of care was breached by the first party (that is, its behaviour fell short of the standard of conduct imposed by the law);
3. as a result of the breach of duty, damage has been suffered by the other party (it is critical that a causal link is established); and
4. the type of damage suffered is a foreseeable consequence of the breach of duty.

As is clear from these factors, negligence cases are extremely fact dependant. Therefore, it is difficult to provide definitive answers in the abstract. Notwithstanding this, we attempt to provide some guidance below as to what businesses should do to protect themselves legally if they are to open while the COVID-19 pandemic remains ongoing.



Is a duty of care owed?

As a matter of law, much of which is now contained in primary and secondary legislation, employers owe a duty of care to their employees, to take reasonable care for their safety.<sup>57</sup> This includes a duty to:<sup>58</sup>

1. provide safe equipment, a safe place of work, and safe systems for undertaking work;
2. take reasonable steps to identify risks in the workplace and put reasonable measures in place to reduce those risks.

More generally, a business will owe a duty of care to an individual (e.g. a customer, a contractor/subcontractor or another third party) where:<sup>59</sup>

1. harm is foreseeable;
2. the relationship between the parties is sufficiently close or proximate (in a legal sense); and
3. it is fair, just and reasonable in all the circumstances to impose a duty of care.

It is well-established that a business owes a duty of care to visitors to its premises. This is also largely codified, this time in the Occupiers Liability Act 1984.

The more complex question is the extent of the duty of care owed by a business and the steps which it must take to satisfy the duty.

Has the duty of care been breached?

If a duty of care is owed, whether to employees, customers, contractors or other third parties, it is necessary to consider the extent of the duty and whether it has been breached.

A duty of care will be found to have been breached if a party fails to meet the standards imposed by law, usually that of “*a reasonable and prudent man*”.<sup>60</sup> The particular content of the standards of care imposed by law depend upon the particular circumstances of the case, and cannot be answered in the abstract.<sup>61</sup> However, in general, the standard of care depends upon a number of considerations, including the likelihood that harm will occur if action is not taken, the severity of the harm that might be suffered, and the cost of taking precautions.

Likelihood of harm is assessed with reference to the knowledge which could be attributed to the allegedly negligent party at the time the damage is suffered.<sup>62</sup> The assessment is not necessarily quantitative. Put another way, a business will not necessarily have a good defence to a negligence claim if it establishes that on a purely mathematical basis the risk of one employee being infected with COVID-19 and passing it on to another employee or a customer is below a certain threshold. While the law of negligence generally does not require a person to take steps to prevent risks which are theoretical only, it would be difficult for a business to argue successfully that the risk of transmission of COVID-19 was so low that it did not owe a duty of care to employees or visitors to its premises given the widespread imposition of lockdown and other protective measures across much of society.

Similarly, the fact that severity of the harm which may be suffered is difficult to assess with COVID-19 (as enough is not yet known about the disease to make a proper assessment) may not protect a business. On the one hand, it appears that a proportion of people who are infected show no

symptoms and the majority of those who contract COVID-19 will recover in full.<sup>63</sup> However, early analysis suggests that COVID-19 has a substantially higher mortality rate than, for example, influenza. There are also early reports that, for some, it can result in permanent damage (although further research is needed to determine whether this is the case in general).<sup>64</sup> Again, the extent of the measures taken by the UK government (and other governments overseas) would also be likely to render implausible any argument that the possible severity of harm arising from the transmission of COVID-19 was so low that it warranted no steps being taken to minimise the risk of transmission.

However, the extent of the steps which a reasonable and prudent person would take may well vary from case to case. Clearly, the risk of transmission of the virus on, say, a golf course is much lower than it is in a confined and closed office. The law will not expect a golf course operator to implement the same rigorous measures in connection with COVID-19 as an office-based business.

The cost of taking precautions is also likely to vary significantly between workplaces, and is another reason why the precise extent of the duty of care owed will vary from one business to another. However, there are a number of measures that have been recommended by the UK government that are likely to be relatively inexpensive, and are therefore also likely to be part of the duty of care owed by virtually all businesses, including the social distancing and good hygiene practices referred to in section I.A above.

As such, it is likely that a court would consider it reasonable that a business at least follow the applicable government COVID-19 related guidance to protect employees, customers, and third parties (such as contractors) against infection from COVID-19. Where a relevant industry body has issued recommendations, they are also likely to form part of the minimum standard of care owed by a business to its employees or visitors to its premises. As noted above, businesses should also be mindful of what their peers are doing as industry practice may also be regarded by a court as establishing the minimum standard of care owed by a business.

#### Did the breach of duty cause the harm?

Even if a duty of care exists and has been breached, a claimant must prove, on the balance of probabilities, that the breach of the duty caused the harm complained of in order to succeed in a negligence claim. When considering infection with COVID-19, until widespread testing and/or contact tracing measures are back in place, this may be difficult.<sup>65</sup>

However, each case will, again, need to be considered by reference to its particular facts. Even if the source of an infection cannot be proven directly, inferences can be drawn from the facts before a court, as illustrated by the following hypothetical scenarios:

- If the claimant and his/her family members or other household members (if any) obeyed the lockdown measures, and all remained free of symptoms during the stricter lockdown period, the fact that the claimant was diagnosed with COVID-19 after returning to work might suggest that their place of employment was the source.
- If the claimant is the only person (or perhaps one of a limited number) in the business's premises to have contracted COVID-19 at a particular time, it may be very difficult for them to show that they contracted it in that business's premises, rather than (for example) while grocery shopping, on public transport, from family members or otherwise being exposed to an asymptomatic carrier.

- However, if the claimant is part of an outbreak of COVID-19 in a large group of people who work at, or were recently physically in the business' premises, the chances are far higher that a court would accept that, on the balance of probabilities, the virus was contracted at work.<sup>66</sup>

#### Is the loss recoverable?

Even if a duty of care exists, has been breached, and has caused damage, there will be no liability unless the damage suffered is a foreseeable consequence of the breach of the duty and a “*real risk*”.<sup>67</sup> Having said that, it is likely that infection with COVID-19 is both a foreseeable consequence and a real risk of breach of a duty of care in any business' premises.

It is also worth referring here to a legal principle known as the “eggshell skull” rule. Loosely “translated” this rule means that a defendant must take the victim as they are. In this way, a defendant is liable for foreseeable damage even though the extent or severity of that damage was exacerbated by the victim's pre-existing condition (even if unknown to the defendant).<sup>68</sup> This is particularly relevant in the context of COVID-19 which appears to be especially dangerous for those with underlying health conditions. As a result of the eggshell skull rule, it will not be open to defendants to argue that its damages should be reduced because the claimant suffered more severely from COVID-19 than was reasonably foreseeable for members of the public generally.

#### Liability for secondary exposure

Businesses should also be aware of the risk of liability for secondary exposure — for example, where family members of staff who contract COVID-19 are also infected. Liability for secondary exposure has been considered particularly in cases concerning exposure to asbestos dust. In that context, the courts have held that liability for secondary exposure will not necessarily be found simply because liability exists in relation to the primary exposure. Rather, liability for secondary exposure requires that the risk of injury as a result of secondary exposure is reasonably foreseeable to person who is alleged to have been negligent.<sup>69</sup>

By way of example, a negligence claim brought by the wife of an employee who had been exposed to asbestos at work, where she became ill having herself been exposed to asbestos dust while washing his clothes, was rejected on the basis that, at the time of her exposure (the 1960s), her husband's employer should not necessarily have appreciated she was at risk in this way (i.e. the damage was not foreseeable).<sup>70</sup> However, decisions concerning later exposure have found that employers in the 1970s ought reasonably to have been aware of the risk of secondary exposure and, as a result, damage was foreseeable.<sup>71</sup>

Although liability for secondary exposure has not yet been considered in the context of a pandemic, given COVID-19 is widely understood to be highly infectious (including being able to survive on a range of porous and non-porous surfaces for several days) it would likely be considered reasonably foreseeable that secondary exposure to the virus (i.e. by an employer or customer taking it home) could lead to further infection.

#### Group litigation orders

Finally, English law permits collective or representative court actions<sup>72</sup> by which individual claims with similar facts against the same defendant or group of defendants may be grouped together and effectively heard at the same time and addressed in a single proceeding. The effect is that individual actions that would ordinarily be uneconomical become possible for a group of claimants.

Around the world, group actions (or class actions as their equivalents in other jurisdictions are known) are already being contemplated by a number of employees, consumers and other groups:

- In the United States, there are early reports that a class action has apparently been filed to require authorities to put measures in place to protect prisoners at the Federal Correctional Institution in Danbury from COVID-19. Requested measures include the transfer of medically vulnerable prisoners to home detention, and the implementation of social distancing and better hygiene practices for those who remain inside.<sup>73</sup>
- In Australia, QANTAS staff were said to be considering a class action against the airline, alleging that it failed to protect them against COVID-19, after around 60 of them contracted the virus.<sup>74</sup>
- In Austria, authorities in Tyrol are facing investigations and a potential class-action lawsuit involving as many as 2,500 tourists over their handling of a COVID-19 outbreak in the Austrian winter sports resort of Ischgl. The Austrian Consumer Protection Association alleges that authorities kept ski resorts open after reported cases of COVID-19, even though they knew or should have known of a threat of mass infection, and are liable for damages.<sup>75</sup>

## II. Will Re-Opening Affect Contractual Defences Such as Force Majeure or Frustration?

### A. Force Majeure

“Force majeure” (literally, “greater force”) is not a term of art in English law, and it has no particular significance in common law systems.<sup>76</sup> Rather, it is a label used to describe exceptional events that commercial contracts commonly identify as entitling affected parties to be relieved from liability for non-performance (temporarily or permanently, depending upon the circumstances and the applicable contractual terms). The clauses specifying the relevant events and the required impact on one or both parties’ obligations are known as “force majeure clauses”.

As it is a creature of agreement and not of any overarching legal principle, the effect of a force majeure clause depends entirely on the terms in which it is drafted and the commercial background and context of the contract in which it appears. However, drafting practices have converged over time, and most force majeure clauses require a similar set of conditions to be met before relief can be claimed. While each clause must be considered on its own terms, such clauses generally require the party invoking them to prove four things:

1. The occurrence of an exceptional event (as defined in the contract).
2. That the event has impeded the party’s ability to perform one or more of its obligations to the necessary degree. The precise degree of interference required varies according to the wording of the clause. For instance, many contracts stipulate that the force majeure event must “prevent” performance,<sup>77</sup> whereas others require no more than “hindrance” or “delay”.<sup>78</sup> Such distinctions matter in practice. An embargo of ports in a country affected by COVID-19 could, by way of example, affect a contractor’s obligation to deliver materials very differently depending on which standard applies.

If the relevant obligation is simply the delivery of materials and the applicable contractual regime requires prevention as a condition to relief, the contractor would unlikely, on the face of the contract, be able to claim force majeure as other methods of delivering the materials would likely be available. Instead, the contractor would generally be required to restructure its supply chain to source the materials from elsewhere (even if this requires it to incur greater costs).<sup>79</sup> By contrast, a force majeure clause subject only to a “hindrance” condition might more readily enable a supplier to suspend its obligations entirely, avoiding major financial damage, in the same circumstances.

3. A sufficiently close causal relationship between the force majeure event and the impediment to performance.
4. That the occurrence of the event and its effect on performance were beyond the party’s control.<sup>80</sup> This generally means that the event must have been unforeseeable and beyond the control of the parties (at the time of the event).<sup>81</sup>

The relief available will also be dependent on the wording of the applicable force majeure clause. Force majeure clauses can prescribe for a graduated range of remedies, including extension of time, compensation for loss and additional expense, suspension of performance, termination of the contract and consequential remedies.

Assuming a party has validly claimed relief from performance for a force majeure event arising from the COVID-19 pandemic and/or consequential changes in law, the easing of lockdown measures by the UK government may undermine that party’s claim that the force majeure event continues to impede its ability to perform to the necessary degree. If that is the case, the party may not be able to rely on the defence going forward, and will have to resume performance (again, even if this involves increased cost, such as the cost of measures to protect employees or other visitors to the party’s premises).

Whether the party is required to resume performance or not will depend on the wording of the contract and the specific facts of the case. The English courts traditionally interpret force majeure clauses restrictively,<sup>82</sup> and the burden of proof is on the party seeking to rely on the clause.<sup>83</sup> Therefore, affected parties which have claimed relief from performance on the basis of force majeure must ensure that, when the lockdown measures are relaxed, they continue to comply strictly with the provisions of the contract, including any requirements to resume performance and notify the other party as soon as it ceases to be affected by force majeure.

## **B. Frustration**

The doctrine of frustration operates to discharge a contract when an event occurs after the formation of the contract, which renders it physically or commercially impossible to fulfil, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.<sup>84</sup>

As the COVID-19 crisis develops, the doctrine of frustration is likely to play a particularly important role in unwinding contracts whose performance has become illegal. The primary difficulty posed in cases of frustration for illegality is whether the illegality interferes enough with the bargain to warrant the discharge of the contract as a whole. This depends on whether the supervening prohibition affects the “main purpose” of the contract.<sup>85</sup>

Frustration for illegality can occur even where the illegality is merely temporary. For instance, in *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd*,<sup>86</sup> the illegality arose from regulations which would not last beyond the end of the Second World War. Nevertheless, it was enough that the interruption was long enough to destroy the work's essential identity. Knowing exactly when that line has been crossed is very difficult. However, frustration for illegality is more generous in this regard than the general doctrine, which requires "*abnormal*" delay as a condition to relief.<sup>87</sup>

The easing of lockdown measures by the UK government may result in certain contracts, which were illegal to perform under the current lockdown measures, becoming legal again. To date, the lockdown in the United Kingdom has lasted roughly seven weeks, although certain businesses will be affected for a much longer period. Parties which are able to resume performing their contracts in the near future may find it difficult to argue that their contracts have been frustrated (or, if they have previously asserted a claim that a contract has been frustrated, to maintain such a claim). While there will, of course, be exceptions, the relatively limited interruption to most commercial contracts, where it will shortly become legal to perform those contracts again, is unlikely to destroy their essential identity.

In relation to businesses whose operations continue to be restricted by government regulations, it could be said that any such restrictions are only temporary given that the government's intention is for virtually all businesses to return to normal operations in the second half of 2020. However, there may come a point in the interim at which the essential identity of certain contracts is effectively ended. As with many of the issues discussed in this alert, this will need to be considered on a case by case basis.

### **III. Will Re-Opening Affect Insurance Claims Arising from Business Interruptions?**

Another issue to consider is what impact, if any, re-opening your business may have on insurance claims.

A wide range of insurance policies may cover losses associated with the consequences of the COVID-19 pandemic, such as government-enforced quarantines or travel restrictions, including business interruption insurance, contractors' all risk insurance, credit risk insurance, event cancellation insurance, general liability policies, directors' and officers' policies, and workers' compensation. Affected businesses have made, and will continue to make, insurance claims to the extent they are entitled to under their insurance policies for losses arising from or related to COVID-19. As of 25 April 2020, members of the Association of British Insurers anticipated paying out more than £1.2 billion to individuals and businesses affected by COVID-19 on business interruption, travel insurance, weddings policies and cancelled school trips alone.<sup>88</sup>

As the pandemic regresses, governments ease lockdown measures and businesses re-open, the circumstances entitling businesses to make valid claims under their insurance policies may no longer exist (or, in theory, may change and entitle businesses to different claims under their policies). It is therefore critical that businesses:

1. stay up-to-date with all changes to rules, regulations and guidance in the jurisdictions in which they operate; and

2. whenever a change arises, review each policy carefully for the scope of coverage it provides and any specific exclusions, and ascertain whether their ability to claim under each policy is affected.

For instance, a business may have an express obligation under the applicable insurance policy to resume trading as soon as possible. The business may also have a duty implied by law to do so.<sup>89</sup> Failing to resume trading when it becomes possible may have very serious financial consequences on the insurance claim.

Other considerations businesses should take into account when thinking about re-opening include:

- Whether re-opening would cause additional expenditure. Some policies may cover additional expenditure incurred as a result of resuming trade. However, the express terms should be considered carefully as a court will usually interpret a policy strictly. It is also important to keep detailed records of any additional expenditure and the reasons for it. For example, merely relying upon an increase in the ratio of expenses relative to turnover may not qualify as or otherwise demonstrate that there has been “additional” expenditure.<sup>90</sup>
- The extent of any obligation to minimise losses. While it is common for policies to require the insured party to mitigate its loss, the obligation must be carefully assessed. A business may not, for example, be required to go so far as to take on new or temporary premises to resume trade.<sup>91</sup> Directors and officers in particular should be aware that the company’s shareholders may make claims against the directors or officers for any loss to the company caused by re-opening prematurely. Accordingly, the directors’ and officers’ insurance policies should be reviewed thoughtfully.
- The impact of revenues made as a result of re-opening. Depending on its specific terms, business interruption insurance may impliedly exclude certain revenues when calculating the value of a claim. For example, there may be an argument that revenues made at temporary premises should not be taken into account under the policy.<sup>92</sup>
- Any applicable policy extensions caused by the shutdown. Commonly, construction insurance policies provide for an automatic extension of the policy, at a predetermined price, for the period that any building work was suspended. Otherwise, any required extension must be the subject of agreement.<sup>93</sup> Once construction resumes, the period of any necessary extension will be known. However, disputes can arise where it is only possible to resume part of a construction project while other aspects of the project remain on hold as insurance policies often do not contain express terms addressing such situations.
- Inferences that may be drawn from re-opening. Conduct may amount to an admission in certain circumstances (or, even if not an admission in a strict legal sense, may nevertheless be powerful evidence).<sup>94</sup> If there is a dispute about whether trade remains “interrupted” within the meaning of the policy, an insurer (or court) may interpret any resumption of part or all of trade by a business as an admission that its trade is no longer “interrupted” for the purposes of the policy. Alternatively, such conduct may

be relied upon simply as a matter of evidence to demonstrate that the business has not been sufficiently “interrupted”.

For these reasons, businesses should carefully document any decision to resume normal trading or any part thereof. This should include the basis for the decision (e.g. a relaxation in government restrictions, or a change in industry advice). It may also be prudent for businesses which are not yet able to resume normal trading to keep records of their decision-making process in this regard, particularly as the UK government continues to ease lockdown restrictions.

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- <sup>1</sup> The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, s. 6(1).
- <sup>2</sup> Ibid, s. 4(1), pt. 1 of sch. 2.
- <sup>3</sup> Ibid, s. 4(4), Pt. 2 of sch. 2.
- <sup>4</sup> Ibid, s. 5(1).
- <sup>5</sup> GOV.UK, *Guidance for employers and businesses on coronavirus (COVID-19)*, (April 7, 2020), available at <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19#social-distancing-in-the-workplace---principles>.
- <sup>6</sup> Ibid.
- <sup>7</sup> Ibid.
- <sup>8</sup> Nick Triggle, *Coronavirus lockdown: Are the five tests being met?* (April 27, 2020), available at <https://www.bbc.co.uk/news/health-52374513>.
- <sup>9</sup> BBC, *Coronavirus lockdown: Are the five tests being met?*, (April 27, 2020) available at <https://www.bbc.co.uk/news/health-52374513>
- <sup>10</sup> GOV.UK, *OUR PLAN TO REBUILD: The UK Government's COVID-19 recovery strategy*, (May 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf).
- <sup>11</sup> GOV.UK, *New guidance launched to help get Brits safely back to work*, (11 May 2020), available at <https://www.gov.uk/government/news/new-guidance-launched-to-help-get-brits-safely-back-to-work>.
- <sup>12</sup> Financial Times, *Boris Johnson draws criticism over return to work guidance*, (May 11, 2020), available at <https://www.ft.com/content/86ca1fb2-3299-436b-b0de-333a5d9bc5f3>.
- <sup>13</sup> Health and Safety at Work etc. Act 1974, s. 2(1).
- <sup>14</sup> Ibid, s. 3(1).
- <sup>15</sup> The Management of Health and Safety at Work Regulations 1999, s. 3(1).
- <sup>16</sup> Ibid, s. 4, sch. 1.
- <sup>17</sup> Ibid, s. 5(1).
- <sup>18</sup> The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, ss. 4(1), 4(4) and 5(1), and pt. 1 and 2 of sch. 2.
- <sup>19</sup> GOV.UK, *Guidance for employers and businesses on coronavirus (COVID-19)*, (April 7, 2020), available at <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19#social-distancing-in-the-workplace---principles>.
- <sup>20</sup> GOV.UK, *OUR PLAN TO REBUILD: The UK Government's COVID-19 recovery strategy*, (May 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf).
- <sup>21</sup> Construction Leadership Council, *Construction Sector - Site Operating Procedures: Protecting Your Workforce During Coronavirus (Covid-19)*, (April 14, 2020), available at

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<https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/04/Site-Operating-Procedures-Version-3.pdf>.

<sup>22</sup> GOV.UK, *Social distancing in the workplace during coronavirus (COVID-19): sector guidance*, (April 24, 2020), available at <https://www.gov.uk/guidance/social-distancing-in-the-workplace-during-coronavirus-covid-19-sector-guidance>.

<sup>23</sup> GOV.UK, *Guidance for employers and businesses on coronavirus (COVID-19)*, (April 7, 2020), available at <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19#social-distancing-in-the-workplace---principles>.

<sup>24</sup> GOV.UK, *COVID-19: guidance on shielding and protecting people defined on medical grounds as extremely vulnerable*, (May 5, 2020), available at <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>.

<sup>25</sup> GOV.UK, *Staying at home and away from others (social distancing)*, (May 1, 2020), available at <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others>.

<sup>26</sup> GOV. UK, *Staying alert and safe (social distancing)*, (11 May 2020), available at: <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing>

<sup>27</sup> GOV.UK, *Social distancing in the workplace during coronavirus (COVID-19): sector guidance*, (April 24, 2020), available at <https://www.gov.uk/guidance/social-distancing-in-the-workplace-during-coronavirus-covid-19-sector-guidance>.

<sup>28</sup> GOV.UK, *PM address to the nation on coronavirus: 10 May 2020*, (May 10, 2020), available at <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-10-may-2020> ; GOV.UK, *OUR PLAN TO REBUILD: The UK Government's COVID-19 recovery strategy*, (May 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf).

<sup>29</sup> GOV.UK, *New guidance launched to help get Brits safely back to work*, (11 May 2020), available at <https://www.gov.uk/government/news/new-guidance-launched-to-help-get-brits-safely-back-to-work>.

<sup>30</sup> BBC, *How the government plans to get the UK back to work*, (1 May, 2020), available at <https://www.bbc.co.uk/news/business-52496636> ; GOV.UK, *New guidance launched to help get Brits safely back to work*, (11 May 2020), available at <https://www.gov.uk/government/news/new-guidance-launched-to-help-get-brits-safely-back-to-work>.

<sup>31</sup> GOV.UK, *New guidance launched to help get Brits safely back to work*, (11 May 2020), available at <https://www.gov.uk/government/news/new-guidance-launched-to-help-get-brits-safely-back-to-work>.

<sup>32</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work>.

<sup>33</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/factories-plants-and-warehouses>.

<sup>34</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/labs-and-research-facilities>.

<sup>35</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/offices-and-contact-centres>.

<sup>36</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/homes>.

<sup>37</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/restaurants-offering-takeaway-or-delivery>.

<sup>38</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches>.

<sup>39</sup> GOV.UK, *Working safely during coronavirus (COVID-19)*, (11 May 2020), available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/vehicles>.

<sup>40</sup> GOV.UK, *New guidance launched to help get Brits safely back to work*, (11 May 2020), available at <https://www.gov.uk/government/news/new-guidance-launched-to-help-get-brits-safely-back-to-work>.

<sup>41</sup> GOV.UK, *OUR PLAN TO REBUILD: The UK Government's COVID-19 recovery strategy*, (May 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf).

<sup>42</sup> GOV.UK, *OUR PLAN TO REBUILD: The UK Government's COVID-19 recovery strategy*, (May 2020), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/884760/Our\\_plan\\_to\\_rebuild\\_The\\_UK\\_Government\\_s\\_COVID-19\\_recovery\\_strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf).

<sup>43</sup> Health and Safety Executive, *RIDDOR reporting of COVID-19*, available at <https://www.hse.gov.uk/news/riddor-reporting-coronavirus.htm>.

<sup>44</sup> The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, regulation 7 sch. 2, s. 10.

<sup>45</sup> *Ibid*, regulation 9(b).

<sup>46</sup> *Ibid*, regulation 6(2).

<sup>47</sup> The EDPB is made up of representatives of each member state's data protection authority and promotes best practice in compliance with data protection and the GDPR.

<sup>48</sup> European Data Protection Board, *Statement on the processing of personal data in the context of the COVID-19 outbreak*, (March 19, 2020), available at [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_2020\\_processingpersonaldataandcovid-19\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf).

<sup>49</sup> *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1, art. 9.1 (“GDPR”).

<sup>50</sup> Processing means an operation performed on personal data, including collection, recording, use or disclosure: Data Protection Act 2018, s. 34.

<sup>51</sup> The GDPR is supplemented in this respect in Schedule 1 of the UK Data Protection Act 2018.

<sup>52</sup> European Data Protection Board, *Statement on the processing of personal data in the context of the COVID-19 outbreak*, (March 19, 2020), available at [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_2020\\_processingpersonaldataandcovid-19\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf).

<sup>53</sup> Data Protection Act 2018, sch. 1 pt. 1 s.1(1)(b).

<sup>54</sup> European Data Protection Board, *Statement on the processing of personal data in the context of the COVID-19 outbreak*, (March 19, 2020), available at [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_2020\\_processingpersonaldataandcovid-19\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf).

<sup>55</sup> Information Commissioner’s Office, *Data protection and coronavirus information hub*, available at <https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/>.

<sup>56</sup> Information Commissioner’s, *Office Data protection and coronavirus: what you need to know*, available at <https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/data-protection-and-coronavirus/>; see also European Data Protection Board, *Statement on the processing of personal data in the context of the COVID-19 outbreak*, (March 19, 2020), available at [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_2020\\_processingpersonaldataandcovid-19\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf).

<sup>57</sup> *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 W.L.R. 1766, 1883.

<sup>58</sup> For a fulsome discussion of the various obligations, see Michael A. Jones, ‘Negligence’ in Michael A. Jones et. al. (eds.) *Clerk & Lindsell on Torts* (Sweet & Maxwell 22<sup>nd</sup> ed., 2018), Chapter 13.

<sup>59</sup> *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 617–618 (Lord Bridge).

<sup>60</sup> *Blyth v Birmingham Waterworks* (1856) 11 Ex. 781, 784; see also *Glasgow Corp v Muir* [1943] A.C. 448 457 (Lord Macmillan); *London Graving Dock v Horton* [1951] A.C. 737, 785 (Lord Reid).

<sup>61</sup> Michael A. Jones, ‘Negligence’ in Michael A. Jones et. al. (eds.) *Clerk & Lindsell on Torts* (Sweet & Maxwell 22<sup>nd</sup> ed., 2018) [8-150].

<sup>62</sup> *Roe v Minister of Health* [1954] 2 Q.B. 66.

<sup>63</sup> The World Health Organisation’s early figures suggested that 3.4% of those who caught COVID-19 died, though Professor Chris Whitty, the UK’s Chief Medical Officer, said there was reason to believe this does not represent the true mortality rate of the disease, as it fails to account for those who develop only mild cases or are asymptomatic. In any event, this suggests more than 96% of those who catch COVID-19 will recover: See World Health Organisation, *WHO Director-General’s opening remarks at the media briefing on COVID-19* (3 March 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media->

[briefing-on-covid-19---3-march-2020](#); Sarah Boseley and Matthew Weaver, *Coronavirus UK: U-turn over plan to stop daily geographical updates*, Guardian Online (5 March 2020), available at <https://www.theguardian.com/world/2020/mar/05/coronavirus-minister-hints-u-turn-decision-stop-daily-uk-updates>.

<sup>64</sup> Dr. Amir Khan, *Doctor's Note: Can coronavirus cause permanent damage*, Al Jazeera (April 10, 2020), available at <https://www.aljazeera.com/indepth/features/doctor-note-coronavirus-permanent-damage-200410112235801.html>.

<sup>65</sup> Rory Cellan-Jones, *Coronavirus: UK contact tracing app 'ready in two to three weeks'*, BBC (April 28, 2020), available at <https://www.bbc.co.uk/news/technology-52458759>.

<sup>66</sup> Though the exposures above would still apply.

<sup>67</sup> *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] A.C. 388 (“*Wagon Mound (No. 1)*”); *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 A.C. 617 (“*Wagon Mound (No. 2)*”).

<sup>68</sup> See *Owens v Liverpool Corp* [1939] 1 K.B. 394, 400–401 (Mackinnon J).

<sup>69</sup> *Carey v Vauxhall Motors* [2019] EWHC 238 (Q.B.), [12], [13]; relying upon *Margereson v JW Roberts Ltd* [1996] P.I.Q.R. 358.

<sup>70</sup> *Maguire v Harland & Wolff Plc* [2005] EWCA Civ. 1, [51] (Mance LJ).

<sup>71</sup> *Gibson v Babcock International Ltd* [2018] C.S.O.H. 78, [122]–[123].

<sup>72</sup> Civil Procedure Rules 1998, pt. 19, practice direction 19B – Group Litigation.

<sup>73</sup> Kelan Lyons, *Federal class action lawsuit filed to protect Danbury prison inmates from COVID-19*, CT Mirror (April 28, 2020), available at <https://ctmirror.org/2020/04/28/federal-class-action-lawsuit-filed-to-protect-danbury-prison-inmates-from-covid-19/>.

<sup>74</sup> Anne David, *Qantas staff consider class action alleging airline failed to protect them against Covid-19*, Guardian (April 12, 2020), <https://www.theguardian.com/business/2020/apr/13/qantas-staff-consider-class-action-alleging-airline-failed-to-protect-them-against-covid-19>.

<sup>75</sup> Nadine Schmidt, *Austrian officials face lawsuit from 2,500 tourists over ski resort outbreak*, CNN (April 1, 2020), <https://www.cnn.com/travel/article/austria-ski-resort-ischgl-coronavirus-intl/index.html>.

<sup>76</sup> The term originates in the French Civil Code, which through various iterations has treated “force majeure” as a defence to a claim for damages for breach of contract.

<sup>77</sup> For an overview of such clauses, see Simon Whittaker, ‘Exemption Clauses’ in Hugh Beale et. al. (eds) *Chitty on Contracts* (Sweet & Maxwell, 33<sup>rd</sup> ed., 2018) [15-156]–[15-157].

<sup>78</sup> These provisions are briefly considered in Simon Whittaker, ‘Exemption Clauses’ in Hugh Beale et. al. (eds) *Chitty on Contracts* (Sweet & Maxwell, 33<sup>rd</sup> ed., 2018) [15-158].

<sup>79</sup> However, the wider factual matrix concerning the contract might be relevant. For example, if it was self-evident to the parties when they entered into the contract that the materials in question would always need to be imported by ship, an argument that delivery has been prevented may be available.

<sup>80</sup> *Channel Island Ferries Ltd v Sealink (UK) Ltd* [1988] 1 Lloyd’s Rep. 323, 327, 328; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.2)* [2003] EWCA Civ. 1031.

<sup>81</sup> *Trade and Transport Inc v Ino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 224–227.

<sup>82</sup> *Channel Island Ferries Ltd v Sealink United Kingdom Ltd* [1988] 1 Lloyd’s Rep. 323; *Tandrin Aviation Holdings Limited v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [43].

<sup>83</sup> *Channel Island Ferries Ltd v Sealink United Kingdom Ltd* [1988] 1 Lloyd’s Rep. 323, 327.

<sup>84</sup> Ewan McKendrick, ‘Discharge by Frustration’ in Hugh Beale et. al. (eds) *Chitty on Contracts* (Sweet & Maxwell, 33<sup>rd</sup> ed., 2018) [23-001].

<sup>85</sup> *Denny Mott & Dickson Ltd v James Fraser & Co Ltd* [1944] A.C. 265, 271.

<sup>86</sup> [1944] A.C. 265, 271.

<sup>87</sup> *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ. 18.

<sup>88</sup> ‘Covid-19: Payouts of over £1.2 billion likely to be made to customers according to latest estimate from the ABI’, *Association of British Insurers* (April 25, 2020), available at <https://www.abi.org.uk/news/news-articles/2020/04/covid-19--payouts-of-over-1.2-billion-likely-to-be-made-to-customers-according-to-latest-estimate-from-the-abi/>.

<sup>89</sup> *Brunton v Marshall* (1922) 10 Lloyd’s Rep. 689; *City Tailors Ltd v Evans* (1921) 126 L.T. 439.

<sup>90</sup> *Polikoff v North British and Mercantile Insurance Co Ltd* (1936) 55 Lloyd’s Rep. 279.

<sup>91</sup> *City Tailors Ltd v Evans* (1921) 126 L.T. 439.

<sup>92</sup> See for example *City Tailors Ltd v Evans* (1921) 126 L.T. 439.

<sup>93</sup> *Jones Construction Co v Alliance Assurance Co Ltd* [1961] 1 Lloyd’s Rep. 121.

<sup>94</sup> For an overview of admissions by conduct, see ‘Conduct’ in Hodge Malek et. al. (eds) *Phipson on Evidence* (Sweet & Maxwell, 19<sup>th</sup> ed., 2017) [4-20].