COVID BRIEFING

November 2021

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INTRODUCTION

This year's 1 Chancery Lane Autumn Bumper Briefing takes as its theme – what else? – Covid-19 and its consequences. Some two years after the virus was first identified, and just over eighteen months since the first lockdown began, the courts are starting to deal with cases arising out of the pandemic and the measures taken to contain it. Practitioners at 1 Chancery Lane are uniquely well placed to tackle these claims; our practice groups have considerable experience in dealing with the issues generated by norovirus claims, whether it be in the context of employers' liability, travel law, clinical negligence or property disputes. Covid-19, of course, presents a challenge on a different scale to anything any of us has seen before, but deploying our experience and looking to the future we have drawn together a briefing we hope you will find useful in considering claims involving the virus in a number of settings.

First we consider the evidential challenges faced by potential Claimants in these cases. Then we go on to examine particular categories of claim: musculo-skeletal injuries in home workers, stress claims, and those claims arising out of hazardous occupations. We look at claims founded on Regulations 12 to 14 of the Package Travel and Linked Travel Arrangements Regulations 2018 and on the Third Parties (Rights against Insurers) Act 2010, and we consider healthcare claims following the pandemic and the impact of Long Covid. The property team provides an overview of allocation of risk in commercial leases and of residential possession claims, and an insolvency update.

Not all of these articles will be of relevance to all readers, but we hope that there is something for everyone within the following pages, and that even if not of direct application to your area of practice, you will find them of interest in these unprecedented times.

COVID-19 CLAIMS FOR PERSONAL INJURY: POTENTIAL PITFALLS

Sarah Prager

Over eighteen months after the first lockdown was imposed in an attempt to slow the spread of Covid-19, practitioners are now seeing the shape of the first claims for personal injury arising out of the pandemic. But these claims are far from straightforward: this article examines the issues that are likely to arise, and attempts to suggest some ways of dealing with them. It is assumed for these purposes that the Claimant can show that (s)he was suffering from Covid-19, rather than any other condition, and this preliminary hurdle is likely to be relatively easily surmounted in claims arising in or after March 2020, not least because testing has been rolled out on an impressive scale since that time, but it should of course be borne in mind that there will be cases of Covid-19 acquired before this date which cannot be shown, to the satisfaction of the court, to be caused by the virus, because it was not tested for and subsequent testing cannot establish when the Claimant might have acquired the relevant antibodies. These claims are likely to fail on the grounds that it cannot be shown that the Claimant was suffering from Covid-19 at all; or if (s)he was, when (s)he contracted it.

The source of the illness

Typically Covid-19 claims arise either in an employment or in a health and social care context. Either the Claimant asserts that (s)he contracted the illness in the course of and as a result of his or her employment, or as a result of inadequate health or social care, particularly in the care home setting. The first challenge to be met in such claims is obviously therefore where the Claimant is likely to have contracted the virus; can it be shown, on the balance of probabilities, that it was acquired in a setting managed or controlled by the Defendant? These claims are vulnerable to a robust defence that the Claimant might have contracted the illness on public transport, in the community, or from family members or friends. All of these possibilities would have to be investigated and excluded for a claim to have any chance of succeeding, and this requirement alone is likely to limit the number of successful claims very significantly.

The easiest, perhaps the only, way of showing that a Claimant was infected in a particular setting is for him or her to show that there was an outbreak of illness in that setting. There have been a number of very well publicised outbreaks associated with workplaces and care homes, for example the DVLA Swansea site, said to be the worst workplace-related outbreak in the UK, with well over 500 cases from September 2020. A Claimant employed at that workplace during the outbreak might well find it a comparatively straightforward matter to persuade a judge that (s)he became infected there, but, as ever, his or her lifestyle would be scrutinised and (s)he would have to give evidence regarding what measures (s)he took to limit exposure to the virus outside the workplace. If, for example, the Claimant visited relatives in a care home or had children in a school which was itself at the centre of an outbreak, and if those family members also tested positive for Covid-19, the balance of probabilities might well tip against him or her, even if a large number of co-workers fell ill. (S)he might even be found to be the Patient Zero at the workplace; the source of the outbreak there.

The timing of the illness

If the Claimant can show that the illness in question is likely to have been Covid-19, acquired in a setting for which the Defendant is responsible, the next piece of the factual jigsaw is the timing of acquisition. This has a bearing not only on whether the Claimant can succeed in showing where (s)he contracted the disease, but on the nature of the duty owed by the Defendant.

Claimants who fell ill very early in the pandemic, in January or February 2020, for example, will not be able to hold employers or carers to the same standard of care as those who fell ill a year later. This is because Covid-19 is an entirely new phenomenon, and the response to it has evolved over time. Whereas in the early stages there may well have been no duty to warn, to impose social distancing or the wearing of face masks, or to provide appropriate PPE, by March or April 2020 these preventative measures had been, or ought to have been, adopted. Practitioners working on these cases will have developed a timeline of recommended measures against which to compare any potential claims; depending on the place of acquisition, some claims will not succeed because the illness was acquired too early in the timeline for the Defendant to have owed any duty to take preventative measures, or because at the time of acquisition it was taking such measures as were recommended.

Causation

Those with experience of handling norovirus claims will know that in outbreak cases the main issue in dispute is often causation, and it is anticipated that the same will be true of Covid-19 claims. The Claimant must show that if the Defendant had taken the recommended measures (s)he would not have contracted the virus. This requirement is likely to lead to debate around the efficacy of mask wearing and social distancing, amongst other measures, and notwithstanding the opinions freely expressed on these topics on social media, there is no substitute for expert evidence in relation to them. It will be for the Claimant to show, on the balance of probabilities, that had the Defendant acted differently and in accordance with its duty at the time of acquisition, (s)he would not have fallen ill. In practice this will be extremely difficult in many cases, particularly where the Claimant is vulnerable to the virus either by virtue of comorbidities or due to the home or familial situation. However, returning to the example of the DVLA outbreak, it is well documented that workers reported during the course of the outbreak that they felt pressure to attend work even if exhibiting symptoms, and if this is correct, it may be that a court would find little difficulty in concluding that this comprised a breach of duty which was likely to cause the virus to spread throughout the workplace. As ever, much will depend on the factual nexus, but in all cases the Claimant will require supportive expert evidence as to causation.

The nature and extent of symptoms

A somewhat unexpected challenge in these cases has arisen by reason of the characteristics of those who fell ill with Covid-19, at least in the early stages of the pandemic. Many of them were either very elderly, or suffered from comorbidities which made them vulnerable to the virus. Against this backdrop it may be difficult to show the nature and extent of the symptoms caused by Covid-19, rather than by the pre-existing illnesses or frailties. Again, there is no substitute for expert evidence as to the Claimant's likely health trajectory but for the virus, but it does appear that our understanding of conditions such as long Covid is still developing, and it would be dangerous to assume that we have reached an end point in this evolution. Those representing Claimants may therefore conclude that in valuing these claims it would be prudent to wait and see whether the Claimant develops further or long term symptoms; conversely, those acting for Defendants may consider that it might be worth settling some claims early on the basis that if the Claimant goes on to develop a long term disability an early settlement will represent a far more advantageous outcome for the Defendant than taking a more apparently cautious approach.

Conclusion

Claims arising out of the Covid-19 pandemic bring their own particular challenges and issues. However, cases involving outbreaks and those where Claimants fell ill after April or May 2020 may well have prospects of success, albeit it will be necessary for Claimants to adduce good cogent expert evidence as to breach and causation, and each case will of course be heavily fact-dependent. Those practitioners with experience of handling norovirus and other group outbreak claims will draw on that knowledge to explore the adequacy and efficacy of the Defendant's Prevention of Spread of

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Sarah Prager

Infection and Period of Increased Incidence plans, but it remains to be seen whether the courts' approach will, as anticipated, mirror its tried and tested methods of dealing with norovirus claims, or whether the fact that Covid-19 was, two years ago, an unknown (but not unforeseen) pathogen will influence judges' attitude to these claims. One thing is certain, however: practitioners anticipating handling claims of this nature in any numbers will need to identify and liaise with suitably qualified experts sooner rather than later, because in the final analysis the vast majority of them will stand or fall on the quality of the expert evidence adduced by the parties.

MUSCOLO-SKELETAL INJURIES IN HOME WORKERS

Ella Davis

Over 18 months since the start of the pandemic, this is a good time to assess which changes to our lives are here to stay, and how that means employers need to re-evaluate their potential liabilities. One of the obvious long-term changes is the rise in home working. Although the government is no longer instructing people to work from home if they can, many people continue to do so. Employers remain obliged to risk assess the safety of their employees should they return to the office with the result that many offices are still not filled to capacity. Further, the pandemic has shown the potential benefits to employer and employee of more flexible ways of working, and it seems likely that many more office workers will continue to work from home, at least some of the time, for the foreseeable future.

With these benefits, however, there are a number of risks. This article focuses on the use of home workstations which pose a risk of musculo-skeletal injuries if used for a prolonged period. Lots of people started homeworking in March 2020, expecting to be back in the office within a few weeks or months. Many of these will not have thought it worthwhile investing in, or requesting from their employer, proper work equipment. Many others don't have the luxury of a dedicated spare room they can turn into an office and have found themselves working at dining tables or from bedrooms. However, employers remain under a duty to take reasonable care for the safety of their employees, even when they are working from home.

Statutory Duty

In particular, employers have statutory duties under the Health and Safety (Display Screen Equipment) Regulations 1992/2792 ("the Regulations"). Breach of these duties will no longer rise to a civil cause of action (per section 69 of the Enterprise and Regulatory Reform Act 2013), but they, and the associated Guidance, are likely to continue to inform the scope of the duty at common law.

The Regulations define "display screen equipment" as any alphanumeric or graphic display screen, regardless of the display process involved. A "workstation" is an assembly comprising display screen equipment; any optional accessories to the display screen equipment; any disk drive, telephone, modem, printer, document holder, work chair, work desk, work surface or other item peripheral to the display screen equipment; and the immediate work environment around the display screen equipment. Protection is offered to "users" who are employees who habitually use display screen equipment as a significant part of their normal work. There are also duties owed to "operators" who are self-employed people who habitually use display screen equipment as a significant part of their normal work.

Duty to Risk Assess

The main duties are to be found in Regulation 2. Regulation 2(1) requires an employer to perform a suitable and sufficient analysis of those workstations which are used for the purposes of his undertaking by his users, for the purpose of assessing the health and safety risks to which those persons are exposed in consequence of that use. Importantly, this obligation applies regardless of who has provided the workstations. Regulation 2(2) also requires an employer to review such an assessment if there is reason to suspect that it is no longer valid, or if there has been a significant change in the matters to which it relates. As we move towards recognising that many employees will not be returning to the office, or not returning full time, employers should be considering the need to review any existing assessments.

Of course, assessing an employee's home workstation poses practical difficulties, especially during the pandemic. The Health and Safety Executive ("HSE") has provided updated guidance on homeworking which includes a recommendation that employers provide temporary homeworkers with advice on completing their own basic assessment at home. Where employers decide to make working from home arrangements permanent, they are advised to explain to workers how to carry out full workstation assessments.

Duty to Reduce Risks

Having carried out an assessment, employers are required by Regulation 2(3) to reduce the risks identified to the lowest extent reasonably practicable. It should be noted that the reverse burden of proof and higher standard of care implied by the "lowest extent reasonably practicable" test will no longer apply to common law claims, which require claimants to prove that employers failed to take reasonable care.

Regulation 3 requires an employer to ensure that any workstation which may be used for the purposes of his undertaking meets the requirements laid down in the Schedule to the Regulations. This contains detailed requirements in relation to screens, keyboards, work surfaces, chairs, space requirements, lighting, reflections, glare, noise, heat, radiation, humidity and software. Again, a breach of these requirements will no longer in and of itself give rise to civil liability. However, a court trying a claim in negligence is likely to have some regard to them.

The HSE guidance may also be referred to by either party in seeking to evidence what is reasonable practice. For temporary homeworkers, HSE advises allowing employees to take equipment such as keyboards and mouses home, and in relation to larger items (such as ergonomic chairs and desks), encouraging employees to try other ways of creating a comfortable working environment (such as with supporting cushions). Where homeworking arrangements become permanent, employers are advised to provide workers with appropriate equipment and advice on control measures. Employers should also consider the need to provide

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Ella Davis

auxiliary aids to any disabled employees further to their duty to make reasonable adjustments under the Equality Act 2020.

Regulation 4 requires an employer to so plan the activities of users at work in his undertaking that their daily work on display screen equipment is periodically interrupted by such breaks or changes of activity as reduce their workload at that equipment. There are again practical difficulties for employers in meeting this duty in relation to homeworkers. However, it is important that reasonable steps are taken as homeworkers are at particular risk. Many people have reported working longer or more irregular hours during the pandemic. Time freed up by not having to commute has caused some people to extend their days and it can be harder to switch off at the end of a day spent working from home. It is therefore important that employers remind homeworkers of the need to take breaks and to avoid spending too long at a workstation. This also requires a culture of respect and mutual trust that allows a homeworker to feel comfortable enough to take these breaks, and not to feel unduly pressured to demonstrate that their productivity is not affected by homeworking. It should of course also be remembered that employees do have a duty to take reasonable care for their own health and safety.

Duty to Provide Training and Information

Regulation 6 requires employers to provide users with adequate health and safety training in the use of any workstation upon which they may be required to work. Similarly, Regulation 7 requires employers to ensure that users are provided with adequate information about all aspects of health and safety relating to their workstations and the measures taken by the employer in compliance with his duties under the Regulations.

It is clear that such a duty also exists at common law. In *Presland v Padley (29 January 1979)*, it was held that there is a duty of care to give warnings of risks staff would face in employment at the stage of engaging them. Further, in *Burgess v Thorne Consumer Electricals Ltd (1983) Times, 16 May*, Bristow J held that a warning should have been given to assembly line workers that if they began to feel pains in their wrist or arm they must report it at once, and consult their GP, because the pain might indicate the presence of a condition which if dealt with promptly would resolve, but if not dealt with might become serious enough to require surgery.

Again, this duty is perhaps of particular importance in relation to homeworkers who may be subject to less close supervision. They should be advised of the risk of musculo-skeletal disorders, the measures they can take to protect themselves and the signs and symptoms of musculo-skeletal disorders so that they can be reported early.

Conclusion

Many cases in recent years have been decided by reference to the Regulations and will have to be treated with some caution. However, it is clear that employers do owe a duty at common law to take reasonable care to protect employees from musculo-skeletal injury. *Goodwin v Bennetts UK Limited* was a case in which the Court of Appeal held that the defendant was liable in negligence for the claimant's recurrence of symptoms of a work related upper limb disorder. It should have been apparent to the defendant that the claimant was particularly vulnerable to such an injury from moderate use of a keyboard, and they were therefore in breach of duty for causing or allowing her to use it at the rate which they did. Nevertheless, the scope of the common law duty may still need to be tested in further cases

following the removal of civil liability for breach of the statutory duties.

Further, the unprecedented rise in homeworking is likely to raise new questions about the reasonable steps which should be taken to protect homeworkers, particularly given some of the practical difficulties associated with managing their work. What is clear though is that homeworkers should not be treated as out of sight and therefore out of mind, and that they may in some respects be at greater risk than employees in an office.

STRESS CLAIMS POST-PANDEMIC

Ian Clarke

In *Hatton v Sutherland [2002] EWCA Civ 76,* Hale LJ noted that claims for psychiatric injury arising from the stress of work require particular care in determination because "*they give rise to some difficult issues of foreseeability and causation*". In discussing the issue of foreseeability, Hale LJ made the following observations[1]:

i) Unless the employer knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job;

ii) Generally, the employer is entitled to take what he is told by or on behalf of the employee at face value;

iii) An employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he was doing before;

iv) In view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it.

The above comments are cited often in stress cases, but it is important to bear in mind that Lord Walker in *Barber* noted that while Hale LJ's statements were "*useful practical guidance*" they must be read as just that, guidance and not "*as having anything like statutory force*". The best statement of general principle, Lord Walker held, remained as set out by Swanwick J in *Stokes v Guest, Keen and Nettlefold* [1968] 1 WLF 1776:

> *"the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know …"*

What positive thought should the reasonable employer give to the increased stresses caused by the Covid-19 pandemic and how will Lady Hale's practical guidance be interpreted 19 years after it was first set out and in the aftermath of a pandemic?

Research conducted recently by the University of Birmingham has revealed that the pandemic has created new causes of job-related stress. One of the main new

STRESS CLAIMS POST-PANDEMIC (CONTINUED)

Ian Clarke

stressors revealed by the research was fear from employees of being exposed to the virus when being called to return to the office. In addition, those employees who remained working from home found that their jobs became more stressful as a result of being unable to separate their personal life from their work and the general stress created by working from home and being isolated from colleagues.

These novel factors will likely give rise to an increase in occupational stress claims and may well challenge the traditional analysis of such cases and the Courts will have to grapple with how the reasonable employer should be expected to anticipate the risk posed to their employees.

The challenge of avoiding impending harm is made more complex by a lack of proximity in staff that may be scattered all over the country and no longer based in an office. If the trigger for action is an indicator that is "*plain enough for any reasonable employer to realise that he should do something about it*", it must be far harder for an employer to note signs of stress when the employee is seen in an occasional video call rather than seated in the office. Likewise, the notion that it is for the employee to raise the issue of his or her workplace stress is made more difficult to sustain when the employee may never, or rarely, meet in person their managers.

It should be remembered however that the employer's duty as postulated by Swanwick J is to take "*positive thought for the safety of his employers*", that requires a degree of proactivity. Lord Walker in *Barber* noted at §29:

> *But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent is he bound to probe further into what he is told?* ***Unless he knows of some particular problem or vulnerability****, an employer is usually entitled to assume that his employee is up to the normal pressures of the job.* ***It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder****. But thinking harder does not necessarily mean that he has to make searching or intrusive enquiries.*

Arguably, the pandemic is a type of "*particular problem*" that requires employers to "*think harder*" about issues relating to mental health. Given the widespread knowledge that the pandemic has had a largely negative effect on mental health, it may be more difficult for employers to argue that negative reactions to stress were not foreseeable. Indeed, such an argument was foreshadowed, to a degree, in *Melville v The Home Office*[2] where the Court concluded that injury was foreseeable, despite the Claimant not having given any indication that he was developing a stress related illness, as the Defendant had already foreseen the possibility of injury through their issuing a circular addressing the risks posed by the Claimant's particular type of employment.

Working during the time of a pandemic may also raise complicated issues of causation. Hale LJ in *Hatton* held at §43:

"(14) The claimant must show that the breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.

(15) Where the harm has more than one cause, ***the employer should only pay for that proportion of the***

harm suffered which is attributable to his wrongdoing *unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment."*

The issue of causation and apportionment was taken up by Underhill LJ in *Konczac v BAE Systems* [2017] EWCA Civ 1188 at §71:

> *"What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm."*

The University of Birmingham's research suggested that some of the main Covid related stressors are things like an inability to separate work life from home life or concerns about encountering the virus whilst either travelling to or at work. If those factors give rise to a psychological injury, can it be maintained that the injury was caused or attributable to the fault of an employer? Is, for instance, the problem of social isolation caused by home working to be blamed on the company for whom the employee works? Is the stress caused by worrying about catching Covid whilst at work attributable to the fault of the employer? If so, how does one go about distinguishing the stress suffered whilst at work from the stress of travelling on public transport to work or going the shops? To an extent these are issues for expert evidence, but the task of unravelling and attributing such injuries will prove a challenge.

The pandemic has changed the way we work and those changes will play out in the Courts. Cases of workplace stress in the context of Covid will need to be litigated and one can foresee a range of novel arguments being deployed for and against Claimants in the near future.

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[1] Endorsed later by the House of Lords in *Barber v Somerset County Council* [2004] 1 WLR 108

[2] [2005] EWCA Civ 06

HAZARDOUS OCCUPATIONS IN COVID TIMES

Roger André

Time has flown since the start of Lockdown on 23 March 2020. A reflection on the circumstances of some of the main occupational groups who fell victim to the Pandemic is sobering. In this article, I shall set out some of the fatality issues and statistics in the early part of the Pandemic, by certain occupations. I will also set out recent media reports on public transport workers and highlight potential for litigation relating to Covid-19.

According to statistics published by Office for National Statistics (ONS) on 25 January 2021, the number of people working in frontline jobs (e.g. bus, taxi drivers and care workers), who have passed away as a result of Covid-19 is significantly higher than that of the rest of the working population. The statistics reveal that between 9 March and 28 December 2020, there were 7,961 deaths involving coronavirus, registered in England and Wales in the working age population (aged 20 to 64 years). This includes care workers, taxi drivers, process plant workers, security occupations and chefs.

The ONS reported 469 Covid-19 deaths amongst social care staff in this period. Within this group, care workers and home care workers accounted for 74 per cent (347) deaths. By gender, that amounted to 107 deaths amongst men and 240 deaths amongst females. Amongst transport workers, deaths reported included 209 taxi drivers and chauffeurs, 83 bus drivers. 82 chefs also died during this period.

A note with the ONS analysis from Ben Humberstone, Head of Health Analysis and Life Events states:

"Today's analysis shows that jobs with regular exposure to Covid-19 and those working in close proximity to others continue to have higher Covid-19 death rates when compared with the rest of the working age population…."

However, the ONS reveal limitations in the statistics. For example, the analysis only considers the occupation of the deceased. It does not take into account occupations of others in the deceased person's household, which could increase exposure to members of the same household. Mr Humberstone further adds:

"As the pandemic has progressed, we have learnt more about the disease and the communities it impacts most. There are a complex combination of factors that influence the risk of death; from your age and your ethnicity, where you live and who you live with, to pre-existing health conditions. Our findings do not prove that the rates of death involving Covid-19 are caused by differences in occupational exposure."

As an example of frontline workers, bus drivers have been the focus of attention concerning their treatment in terms of Personal Protective Equipment (PPE) compared to other frontline workers in the medical arena. According to the answer given by the Mayor of London in the London Assembly on 28 May 2021, "… since March 2021 there has been one bus driver death. Since March 2020 there have been 52…"

A recent BBC Radio 4 documentary (File on 4: Occupational Hazard: The Bus Drivers Who Died from Covid, 28.9.21 (Produced by Annabel Deas, with journalist Paul Kenyon; Editor Carl Johnston); see: https://www.bbc.co.uk/sounds/play/m00107wd) focused on the early part of the Pandemic, examined the experience of bus drivers, deaths amongst them, work practices and PPE provision. The documentary opened with the observation that bus driving has "Over the last 18 months, it's been one of the most dangerous occupations in the land…… During the pandemic, Covid spread among them with deadly speed…." and asked the question: "Did the bus companies do all they could to protect their drivers once they knew the danger?" It

presented what amounted to an indictment of the bus companies, Transport for London (TfL), the office of the Mayor of London, Unite the union and Public Health England. The journalist asks and suggests "…The question is, did the drivers die as a result of their job, because if they did, the way is open for a raft of civil lawsuits."

The death of a bus driver was discussed, from the perspective of his daughter. Her father was employed with ferrying frontline health workers to and from hospital in the early part of the Pandemic. It is alleged that he and his colleagues, in the early part of March 2020, repeatedly asked their employer for hand sanitiser; but none was provided. She described how he resorted to using harsh soaps at home, washing his hands so much that they were cracked and wounded. Unable to source medical grade face masks, she claimed to have resorted to purchasing a lycra face mask for her father.

The documentary highlighted that, in addition to the risk of infection from passengers and from "touch points" on buses, there were frequent bus changeovers between drivers. It alleged that back at the garages, drivers shared crowded canteens, mess rooms and toilets. One driver recalled busy signing on areas and ferry cars (tasked with taking drivers off garage site, to the location of their shift bus) that breached social distancing guidelines. One ferry car driver whose identity was protected by a voice actor, claimed that she took up to 25 drivers (in one, twos or threes) in the same, small vehicle each day - with no masks, poor ventilation and inadequate cleaning. The programme cited University College London's Professor John Ashton, who suggests that this is a recipe for Covid transmission, "the very idea that you had full vehicles with lots of drivers being ferried in the same vehicle, with drivers, without cleaning vehicles, without having adequate ventilation, this is absolutely shocking and, in my view, it's completely negligent".

A particularly forceful part of the documentary concerns reference to a "controversial declaration" which has come to be known as "the tripartite letter". It was made by the bus companies, TfL and Unite the union. It was signed on 5 April 2020 and issued to drivers on 7 April 2020. It declared that routine use of PPE, including facemasks, should be reserved for those working directly with people who have Covid 19 symptoms.

"Inappropriate use of PPE can increase the risk of infection, and routine use of PPE is not currently recommended for transport workers. TfL has policy in place that covers staff health and safety and has based its approach to the deployment of PPE during this pandemic on national guidance. We will review the position should guidance change". See: https://www.london.gov.uk/questions/2020/1724

The documentary describes how The Mayor for London (Sadiq Khan) is reported to have appeared on TV, stating that in accordance with other agencies such as WHO and Public Health England, Department for Health and Government, their advice is quite clear, PPE should only be used in care settings and transport workers should not be wearing PPE. See link to Good Morning Britain, 8 April 2020.

The documentary further quotes Professor Ashton: "I believe that the reason they said that PPE wasn't needed for transport workers at the outset was because they didn't have sufficient PPE and they weren't sufficiently minded to look after that group of workers. You know, I think the advice was based on the availability, not on the scientific evidence."

The example of the early decisions and statistics concerning public transport workers and bus drivers during the early stages of the Pandemic, raises questions as to how much reliance employers and authorities may seek to absolve their actions, by reliance upon policy pronouncements and advice from other organisations. On the other hand, the limitations in the ONS statistics (such as not taking into account occupations of other members of the deceased's household) and other subjective and environmental issues, may disrupt proof of causation in litigation claims. Bus drivers are but one example of the potential litigation to come from those in hazardous occupations.

CANCELLATIONS OR POSTPONEMENTS OF PACKAGE HOLIDAYS

Robert Parkin

The current position for travel is something of an enigma. On the one hand, the last seven remaining countries remaining on the Red travel list for travel to or from England were removed last month; meaning in practice that the travel rules for any part of the world are analogous to the Green list rules in place during the summer.

On the other hand, the traffic light system remains very much in existence in principle and Covid-19 prevalence remains high. Countries could be returned to the Red list, or the rules altered; or UK travellers might be excluded from entry by the domestic authorities of the destination country, all with little to no warning.

It follows that it is highly probable that a number of foreign holiday packages will be booked over the next year or so; and entirely possible that a number of those will face short-notice alterations or cancellations before departure. Where does this leave the individual consumer?

Individual packages will have specific contractual terms, but a minimum level of protection is set out in the Package Travel Regulations (SI No 634/2018), particularly at reg.11:

11.—(1) The provisions of this regulation are implied as a term in every package travel contract.

(2) The organiser must not unilaterally change the terms of a package travel contract before the start of the package, other than the price in accordance with regulation 10, unless—

(a) the contract allows the organiser to make such changes;

(b) the change is insignificant; and

(c) the organiser informs the traveller of the change in a clear, comprehensible and prominent manner on a durable medium.

(3) Paragraphs (4) to (11) apply where, before the start of the package, the organiser—

(a) is constrained by circumstances beyond the control of the organiser to alter significantly any of the main characteristics of the travel services specified in paragraphs 1 to 10 of Schedule 1;

(b) cannot fulfil the special requirements specified in paragraph 1 of Schedule 5; or

(c) proposes to increase the price of the package by more than 8% in accordance with regulation 10(4).

(4) The organiser must, without undue delay, inform the traveller in a clear, comprehensible and prominent manner on a durable medium, of—

(a) the proposed changes referred to in paragraph (3) and, where appropriate, in accordance with paragraph (7), their impact on the price of the package;

(b) a reasonable period within which the traveller must inform the organiser of the decision pursuant to paragraph (5);

(c) the consequences of the traveller's failure to respond within the period referred to in sub-paragraph (b); and

(d) any substitute package, of an equivalent or higher quality, if possible, offered to the traveller and its price.

(5) The traveller may, within a reasonable period specified by the organiser—

(a) accept the proposed changes; or

(b) terminate the contract without paying a termination fee.

(6) Where the traveller terminates the contract pursuant to paragraph (5)(b), the traveller may accept a substitute package, where this is offered by the organiser.

(7) Where—

(a) the changes to the package travel contract referred to in paragraph (3), or

(b) the substitute package referred to in paragraph (6),

result in a package of lower quality or cost, the traveller is entitled to an appropriate price reduction.

(8) Where—

(a) the traveller terminates the contract pursuant to paragraph (5)(b), and

(b) the traveller does not accept a substitute package,

the organiser must refund all payments made by or on behalf of the traveller without undue delay and in any event not later than 14 days after the contract is terminated.

(9) Where paragraph (8) applies, regulation 16(2) to (10) applies.

(10) Where the traveller does not confirm, within the period specified in paragraph (5), whether the traveller wishes to—

(a) accept the proposed change, or

(b) terminate the contract,

in accordance with that paragraph, the organiser must notify the traveller, a second time, of the matters in sub-paragraphs (a) to (d) of paragraph (4).

(11)If, having been notified under paragraph (10), the traveller fails to respond, the organiser may terminate the contract and refund all payments made by or on behalf of the traveller without undue delay and in any event not later than 14 days after the contract is terminated.

So the package organiser can- reg.11(2) only make insignificant, contractually permitted changes, and must clearly communicate those to the customer. Plainly an outright postponement or cancellation would not be insignificant.

There are, however, exceptions which apply- reg.11(3)- where the organiser is "constrained by circumstances beyond [its] control" to make significant alterations of any of the matters listed in sch.1- including, e.g. the destination, itinerary, or dates of departure.

The organiser must provide the information to the customer required by reg.11(4) at least twice- reg.11 (10). The customer may either accept those changes or cancel the package without a fee- reg.11(5)- and will be entitled to a refund- regs.11(8)-(9). Or the customer may accept a substitute package- reg.11(6)- and may be entitled to compensation- reg.11(7) if the package is of a lower quality. If the customer fails to elect, the organiser may, but need not, cancel the package- reg.11(11).

Plainly everything turns on the meaning of the work "constrained". Plainly if travel to a country is not possible in light of new Covid-19 restrictions; that is an alteration which is constrained by circumstances beyond its control.

Even so, the term has a rather less generous meaning than might be obvious. There are few cases generally and those which do exist are from before 2018 (albeit that the 1992 Regulations at regs.12-13 were extremely similar in nature). However, the following may be illustrative:

Lambert v Travelsphere Ltd [2005] CLY 1977 (1 September 2004, Peterborough CC, HHL Darroch)

The county court (on appeal) considered a situation where the operator had informed the customer that the itinerary might have to be altered to exclude Hong Kong in light of the SARS outbreak. The customer cancelled the package and paid a cancellation fee in response. Later, the package had to be cancelled for other customers free of charge.

The court held that while the organiser had been constrained to consider altering the package by reason of a matter beyond its control, they had not (at the date of cancellation) actually been constrained to alter it. The information was not notice of a change of itinerary, merely notice that such a thing was in contemplation. The customer's right to cancel free of charge had not, therefore, arisen.

The operator is, in short, entitled to regard no changes to have been definitively made until "there is not a

CANCELLATIONS OR POSTPONEMENTS OF PACKAGE HOLIDAYS (CONTINUED)

Robert Parkin

flicker of hope that the contract can be performed in accordance with the original term".

This could well be highly relevant in present circumstances- can it really be said that there is "not a flicker of hope" that a customer can visit a newly Red listed country in 3 months' time, given how swiftly the rules change?

This was explored in *Clark & Others v Travelsphere Ltd* (22 October 2004, Leeds CC); another SARS case.

The organiser notified the customer that it would cancel a portion of the tour (to Hong Kong) if FCO travel advice remained against visiting there at the relevant time. It did. The customer did not attend the departure airport.

Shortly after intended departure, the customer purported to cancel the package. They sought a refund of the whole package.

The court accepted that there remained, at least, a flicker of hope that this portion of the package could go ahead, as it was wholly possible that the advice might be changed. The claim failed.

This perhaps seems harsh to the customer. An unscrupulous organiser could continue to buy themselves the benefit of the doubt until the 11th hour. It is possible, but remains to be seen, whether judicial sympathy for the customer will permit a different outcome in future, particularly with reference to the stronger rights contained in the 2018 Regulations.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

Henk Soede

It is no secret that the travel industry has been hard hit by the global pandemic: holidays were terminated; plans were postponed; and litigation ensued. Sadly, these economic pressures have forced some tour operators into insolvency, particularly those operating at a smaller scale. Given this backdrop, it is likely the Third Parties (Rights against Insurers) Act 2010 (as amended by the Insurance Act 2015 and the Third Parties (Rights against Insurers) Regulations 2016) (the "2010 Act") will assume an important role in travel litigation in the next year or so. This article sets outs the basic mechanics of the 2010 Act; clarifies issues relating to its application; and highlights a number of points relevant to the insurer's possible defences, jurisdiction and applicable law.

The 2010 Act

In broad terms, the 2010 Act works by providing that, where an insolvent "relevant person" has a liability to a "third party" (i.e., a claimant), the relevant person's rights against its insurer vest in the third party: see s.1. The insolvency scenarios in which an individual and corporate body will become a "relevant person" are specified in sections 4 and 6-6A, respectively. For claimants, the advantage of the 2010 Act is that it permits them to sue the insurer without having first established the relevant person's liability, which means there is no need for a struck off company to be revived so that it can be sued. Importantly, though, such liability must be established before those rights can be

enforced: s.1(3). Liability can be established for enforcement purposes by way of judgment, arbitration award, settlement or requesting a declaration from the court under s.2: s.1(4).

Which Act?

When analysing potential claims under the 2010 Act, the first point to keep in mind is whether the 2010 Act or its predecessor – the Third Parties (Rights against Insurers) Act 1930 ("1930 Act") – applies. The 2010 Act represents a more favourable set of provisions for claimants, and the question of which applies has proven to be contentious. This precise issue arose for consideration in *Redman v Zurich Insurance Plc* [2017] EWHC 1919 (QB), where Turner J summarised the following key points: -

1. By section 2 of the Third Parties (Rights Against Insurers) Act 2010 (Commencement) Order 2016/550, the 2010 Act came into force on 1 August 2016.
2. Schedule 3 to the 2010 Act sets out the circumstances in which the 1930 Act would continue to apply – namely, where before 1 August 2016 (i) "the relevant person has incurred a liability against which that person is insured under a contract and (ii) the person subject to such a liability has become a 'relevant person'": [17].
3. A relevant person "incurs a liability" under section 1 of the 2010 Act "when the cause of action is complete and not when the claimant has established the right to compensation whether by judgment or otherwise": [28(i)].
4. The transitional provisions do not provide for the 2010 regime to be applied retrospectively so as to run in parallel with the 1930 regime – either the 1930 regime applies or it does not: [28(ii)]. If it does apply, the 2010 Act has no application.

In *Redman*, the claimant's estate incorrectly brought the claim under the 2010 Act when the 1930 Act applied, and the claim was struck out. Accordingly, at the outset of any potential claim, practitioners in this area should make sure they are aware of the principles outlined above.

Claims with a foreign element

In non-package travel cases where injury has been suffered abroad, questions of jurisdiction and applicable law loom large. Section 18 lays down a general rule whereby, if the insolvency procedure is one conducted under the law of the constituent parts of the UK (see, for exp., s.4), then the 2010 Act will apply irrespective of the place in which liability was incurred, the domicile of the parties, the law applicable to the insurance policy, and the place where payment is made. The question of jurisdiction and applicable will then be governed in accordance with the standard rules. Whilst detailed consideration of those rules is outside the scope of this note, the following preliminary points are highlighted:

1. The claimant's claim against the insurer is brought as transferee of the insured's contractual rights, so the claim will most likely be classified as contractual for jurisdictional and/or applicable law purposes (c.f., direct claims against motor insurers, which does not depend on assignment, and is accordingly classified as tortious: *Maher v Groupama Grand Est* [2009] EWCA Civ 1191).
2. If the 2010 Act applies but the applicable law is not English law, the question of whether the foreign law permits a transfer of rights will presumably be irrelevant, as that transfer is effected under the statute. The principal relevance of the applicable law analysis will be to determine whether or not there is a liability under the insurance policy.
3. Section 13 deals with intra-UK jurisdiction, where the claimant is domiciled in one part of the UK and the insurer in another. This provision gives the third party a choice to issue proceedings either in his or her own place of domicile or in that of the insurer, regardless of any contrary provisions in the insurance contract.

It should finally be noted that there is an absence of authority dealing with the proper choice of law rules applicable to cases brought under the 2010 Act, and it seems that difficult issues will arise which require judicial determination. In other words, watch this space.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010 (CONTINUED)

Henk Soede

Insurer's defences

Notably, the insurer can deploy any of the defences that would have been available to the insured (e.g., breach of duty, causation, contributory negligence, limitation etc.): s.2(4). Further, the insurer will generally have the same policy defences against the third party as it would have had against the insured. There are some notable exceptions in section 9 which cover the scenario where transferred rights are subject to a condition that the insured has to fulfil: see ss.9(2)-(3), (5)-(6). Finally, if the insured has a liability to the insurer under the insurance policy, such as payment of an excess or unpaid premium, the insurer can set off this liability against the claimant's claim: s. 10. This point is likely to be highly material in circumstances where the claimant's claim for damages is numerically small.

What all of these provisions make clear is that it is critical for legal advisors to carefully examine the relevant insurance policy at the earliest possible stage. Claimant practitioners should be familiar with the provisions of section 11, which confers on the "third party" rights to obtain information about the insurance policy, including the contract, the identity of the insurer, the terms of the policy, and whether any policy limits have been reached (Sch. 1, para 1(3)).

Conclusion

In this author's view, the 2010 Act is likely to assume an important role in travel law litigation over the next year or so, and practitioners on both sides of the fence should be familiar with its mechanics. With significant experience in these sorts of claims, the Travel Team at 1 Chancery Lane are well placed to advise on the difficult issues that can arise.

HEALTHCARE CLAIMS FOLLOWING THE COVID-19 PANDEMIC

Dominique Smith

Introduction

The Covid-19 pandemic has arguably been one of the NHS's greatest challenges to date. As infection numbers began to drastically rise in the early stages of the pandemic, so too did the number of hospital admissions. This, coupled with an increasingly insufficient availability of resources, such as personal protective equipment ("PPE"), placed the NHS under significant strain.

Many have wondered whether the availability of resources would be considered in the context of Covid-19 related litigation against the NHS, as well as what potential claims could be made.

Whilst the courts have historically been loath to take account of the scarcity of resources when assessing clinical negligence and the relevant standard of care, the courts are yet fully to engage with the question of whether a lack of resources can provide a defence where a clinician's care might otherwise have been found to be wanting.[1]

The Current Picture

As readers will be aware, in any clinical negligence claim, a claimant must prove that the care they received fell short of the appropriate standard of care. The *Bolam* test reminds us that a breach of duty will be established if a medical professional has not acted in accordance with a practice accepted as proper by a responsible body of professionals skilled in that particular discipline.[2] In *Bolitho*[3], the body of opinion was required to be reasonable, and it should also withstand a logical analysis and scrutiny of risks and benefits.

Bolam requires the courts to consider allegations of negligence in the context of what a reasonable clinician would have done in those circumstances. Clearly, this is important when considering emergency situations. In *Mulholland v Medway NHS Foundation Trust*[4], Mr Justice Green stated that "*the assessment of breach of duty is not an abstract exercise but one formed within a context…*" One can therefore expect the courts to consider the circumstances clinicians were acting in when assessing the standard of care in claims arising out of the pandemic.

There is, however, a question as to how the above tests will operate in the context of the pandemic. How can one assess what the reasonable body of opinion is in the current circumstances? Undoubtedly, establishing a breach of duty of care will likely lead to a situation where "Covid-19 experts" may be required to give evidence, who will have to consider the realities of providing care during the pandemic.

If a breach of duty is made out, can the inadequacy of resources be used a defence? The extent to which resource constraints should be considered when assessing a breach of duty of care has troubled the courts. In *Knight v Home Office*[5], Pill J stated that "*in making the decision as to the standard demanded the court must… bear in mind as one factor that resources available for the public service are limited*". Further, in *Geoffrey Hardaker v Newcastle Health Authority and the Chief Constable of Northumbria*[6], it was considered that the Health Authority's duty of care was qualified by the resources available to them. However, Mustill LJ gave a warning in *Bull v Devon Area Health Authority*[7] concerning resources arguments, namely that: "*it is not necessarily an answer to unsafety that there were insufficient resources to enable administrators to do everything which they would like to do… there is perhaps a danger in assuming… that it is necessarily a complete answer to say that even if the system in any hospital was unsatisfactory, it was no more unsatisfactory than those in force elsewhere*". This position was reiterated by

HEALTHCARE CLAIMS FOLLOWING THE COVID-19 PANDEMIC (CONTINUED)

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Simon J in *Ball v Wirral Health Authority*[8] who noted that, although the courts usually leave the decision of resource allocation to those responsible for making such decisions, "*the fact that an area of medicine may be under-funded…does not necessarily provide the basis of a claim in negligence by a patient who may suffer the effects of the under-funding or the lack of facilities*[9]". Consequently, the case law at present does not suggest that a defence exists on the basis of insufficiency of resources alone.

Potential Claims Arising out of Covid-19

There can be no doubt that claims are likely to arise out of the pandemic. The possible types of claims that could arise are considered below.

A failure to provide PPE

Although there was widespread criticism of the Government in respect of the availability and adequacy of PPE, that does not remove the duties of an employer to its employees in respect of the provision of PPE.

It is likely that Covid-19 will be considered a 'controlled substance' pursuant to the Control of Substances Hazardous to Health Regulations 2002. As such, organisations such as the NHS will owe a duty of care to their employees to risk assess, provide information, training and equipment, and control exposure to the virus. Controlling exposure to the virus will involve providing appropriate and adequate PPE. Failure to do so could therefore result in a breach of duty of care. However, claimants may face difficulties in establishing causation, as it will inevitably be difficult to prove that a Covid-19 infection resulted from inadequate PPE.

Claimants who contracted Covid-19 in these circumstances may argue an extension of the *Fairchild* exception to causation[10]. Claimants with mesothelioma could not ordinarily prove causation on the conventional "but for" test, due to the uncertainty of the biological cause of their mesothelioma. However, the ordinary rules of causation were modified by the court in *Fairchild* and subsequent legislation. The rule in such claims is that: "*each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a material increase in the risk of the victim contracting the disease will be held to be jointly and severally liable for causing the disease*[11]". Consequently, claimants who were unable to establish causation according to the conventional "but for" test were able to succeed in their claims. Claimants may attempt to argue that similar special rules of causation should extend to claimants in the context of Covid-19. The difficulty claimants will face when running such an argument is that under the *Fairchild* exception, a claimant must prove: exposure on the balance of probabilities; exposure in breach of duty; and that the exposure in breach materially contributed to the risk of injury and was more than *de minimis*.

Alternatively, scientific evidence could be utilised to establish that a particular workplace provided exposure to a higher viral load, and thus, on the balance of probabilities, a Covid-19 infection resulted from workplace exposure.

Claims following infected patients being discharged to social care

Following a sharp increase in March 2020 in Covid-19 related hospital admissions, critical care capacity in hospitals had to be expanded by freeing up beds. Hospital inpatients who were fit to leave were discharged, including those who resided in care homes. It is important to note that the Government had not indicated at that point that testing of patients who were

to be discharged to social care was mandatory. The guidance document entitled "*Covid-19 Hospital Discharge Service Requirements*"[12], only went so far as to state that Covid-19 test results would be included in discharge documentation, "*where applicable to the patient*".

On the 15th April 2020, the Government published its adult social care action plan[13]. Within that plan, it was made plain that a policy "*of testing all residents prior to admission to care homes*" was to be instituted, beginning with testing all those discharged from hospital into social care, irrespective of whether they were symptomatic for Covid-19.

Consequently, there was a small window of time between March 2020 and April 2020 where infected patients, albeit possibly asymptomatic, may have been discharged to social care. The consequence of that is that care workers and residents thereafter could have been infected with Covid-19.

Of course, a care worker could seek redress against their employer if they were not supplied with adequate PPE. However, if the care workers were provided with proper PPE and their employer had not breached their duty of care, it is pertinent to ask whether there is a duty owed by the NHS.

It could be argued that there was a duty upon the NHS to give information to care homes prior to patient discharge, for example whether a patient had Covid-19 at the time of discharge, or whether they were symptomatic. The difficulty that arises in respect of those individuals who were not tested for Covid-19 prior to discharge is how a trust could have satisfied itself that they were medically fit for discharge into the community, given that Covid-19 can render infected patients asymptomatic. That does not however take account of the fact that there was a lack of availability of Covid-19 tests in the early stages of the pandemic.

It is difficult to say with certainty how the courts will treat a lack of resources in respect of testing in the context of the need to expand a hospital's critical capacity. However, in *University College Hospitals NHS Foundation Trust v MB*[14] (albeit not a negligence claim), Chamberlain J stated that "*where the decision to discontinue in-patient care involves the allocation of scarce public resources, the positive duty can only be to take reasonable steps to avoid such suffering…it is difficult to conceive a case in which it could be appropriate for a court to hold a hospital in breach of that duty by deciding, on the basis of an informed clinical assessment and against the background of a desperate need for beds, to discontinue in-patient care in an individual case*". This indicates that the courts will consider the resources available to the NHS and the demand for beds, however it is unclear whether this will suffice as a defence.

Establishing causation will likely again remain a difficult task. It will inevitably be challenging to establish that a claimant contracted Covid-19 from a care home and that their infection was a consequence of being exposed to a Covid-19 positive resident that the NHS had discharged to that home.

Patients who contract Covid-19 in hospital

Prior to the Covid-19 pandemic, claims had been brought against the NHS concerning the contraction of MRSA in hospital. Claims often alleged negligence, as well as a breach of statutory duty pursuant to the Control of Substances Hazardous to Health Regulations 2002. Although Regulation 3 of the 2002 Regulations imposed duties to third parties who were affected by substances used at work, they were not imposed on a trust for the benefit of a patient in the case of an infection, where there was no "relevant substance" being used at work (*Billington v South Tees Hospitals*[15]). Consequently, the question of whether a hospital had breached its duty of care in such claims came down to whether the trust was negligent for failing to take reasonable steps to prevent patients from becoming infected with MRSA, or whether they failed to have an adequate system in place to prevent infection.

Claims for contraction of MRSA in hospital are arguably akin to claims where a patient contracts Covid-19 in hospital. As such, an analysis of whether a proper system was in place to prevent and/or control Covid-19 is required. Of course, the risk of Covid-19 in a hospital

HEALTHCARE CLAIMS FOLLOWING THE COVID-19 PANDEMIC (CONTINUED)

Dominique Smith

setting cannot be completely eradicated and it would be wrong to conclude that a single instance of infection would indicate an inadequate system was in place.

However, it is inevitable that a system will depend on whether adequate resources, such as PPE, were available at the relevant time. Again, expert evidence will be necessary to prove what constituted a reasonable system in the context of the pandemic.

Causation is likely to remain an issue for claimants, as some strains of Covid-19 appear to have a relatively lengthy incubation period before symptoms develop. As such, a claimant who was recently admitted to hospital may have difficulty establishing that the infection was acquired at the hospital itself. A claimant will require expert evidence, particularly from a microbiologist, to ascertain that the source of infection was the hospital on the balance of probabilities. In addition, those with underlying health issues appear to be at greater risk of adverse consequences, such as death, following infection. In any fatal accidents claim, there will also be a need to establish whether the individual died from their underlying health condition, or from Covid-19 itself.

Undiagnosed Illnesses

If a claimant, as a result of the pandemic, did not present to their General Practitioner, a Walk-In Centre or their local Accident and Emergency Department, that in itself cannot give rise to an actionable clinical negligence claim. The situation however will be different if a patient has attempted to seek medical attention, yet their illnesses remained undiagnosed for a period of time due to the inability to obtain an appointment. It is likely that such claims will arise in the context of cancer, of which diagnosis was delayed as a consequence of the pandemic. Crucially, such claims will still require claimants to prove that the delay in diagnosis has resulted in a deterioration in their condition, which would not have occurred had a diagnosis been made earlier.

Will resources arguments be deployed successfully in this scenario? Potentially. As mentioned earlier, context is entirely important. If a patient pre-pandemic discovered a suspicious lump in their groin, one would expect that they would be referred in a two-week period for a biopsy. However, considering that same situation post-pandemic, it may be accepted that a four-week period for referral was instead reasonable, given the resources available to the NHS at the time. It seems inevitable that arguments are going to turn on the expert evidence available to the court. However, there is a possibility that resource arguments could be successfully deployed, as evidence in respect of referral times is likely to be different to pre-pandemic referral timescales. In terms of causation, the issues will be akin to any standard delayed diagnosis claim.

Conclusion

It remains to be seen if the impossibility of maintaining what would, in normal times, be the mandated standard of care in the face of a pandemic sees an increased judicial willingness to encroach on this territory.

This article was co-written with Joanna Lloyd, Partner at Bevan Brittan.

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[1]Sir Nicholas Browne-Wilkinson in Wilsher v Essex Area Health Authority [1988] AC 1074 (HL).

[2]*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).

[3]*Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL).

[4][2015] EWHC 268 (QB).

[5][1990] 3 All ER 237 (HC).

[6][2001] Lloyd's Rep Med 512 (QB).

[7][1993] 4 Med LR 117.

[8][2003] Lloyd's Rep Med *165.*

[9]*Alan Andrew Ball v Wirral Health Authority* [2003] Lloyd's Rep Med 165.

[10]*Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, as developed in *Barker v Corus UK Ltd* [2006] UKHL 20. Parliament later intervened with section 3 of the Compensation Act 2006, which varied the rule.

[11]*Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) (Respondent) v Greif (UK) Limited (Appellant)* [2011] UKSC 10 (SC).

[12]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880288/COVID-19_hospital_discharge_service_requirements.pdf

[13]https://www.gov.uk/government/publications/coronavirus-covid-19-adult-social-care-action-plan/covid-19-our-action-plan-for-adult-social-care

[14][2020] EWHC 882 (QB).

[15]*Billington v South Tees Hospitals NHS Foundation Trust* [2015] 1 WLUK 27 (CC)

LONG COVID

David Thomson

Long Covid – possible circumstances are many and so important for persons and employers. It's not clear, as yet, but here is an early heads up!

It has been challenging times, but we at 1 Chancery Lane are focussed on the future and understand the past.

"*One in 40 people with coronavirus has symptoms lasting at least three months*" …Office for National Statistics (ONS). This is potentially (and likely) many thousands of people in the UK.

A previous ONS report put the proportion at about one in every 10! The incidence and duration of symptoms post Covid-19 (or SARS-Cov-2) is not yet accurately determined -see the NHS "Technical article" at https://www.ons.gov.uk

"Experimental estimates from three approaches to estimating the percentage of people testing positive for coronavirus (Covid-19) and who experience symptoms four or more weeks after infection, broken down by demographic and viral characteristics, using UK Coronavirus Infection Survey data.

*Experimental estimates of the prevalence of symptoms that remain 12-weeks after coronavirus (Covid-19) infection (commonly referred to as "Long Covid") range from **3.0%** based on tracking specific symptoms, to **11.7%** based on self-classification of Long Covid, using data to 1 August 2021."*

The ONS advised that a major Long Covid study is gathering data from patients in Scotland in order to forecast who might need treatment. It has been stated, what appears to now be the obvious: "*Most people recover quickly and completely after infection with Covid -19, but some people have reported a wide variety of long-term problems….It is crucial that we find out how many people have long-term problems, and what those problems are, so that we can set up systems to spot problems early and deal with them effectively."*

The NHS has platformed an assessment and signposted a website https://www.yourcovidrecovery.nhs.uk/ that endeavours to address Long Covid understanding. It sets out:

LONG COVID (CONTINUED)

David Thomson

- Each individual will experience Covid recovery differently.
- The course of recovery does not appear to be related to the severity of the initial infection.
- Many people make a full recovery within 12 weeks, but some people do not.
- For some people, symptoms can persist for longer than 12 weeks and may change over time and new symptoms may develop.

So, after all of that, what is Long Covid? The NHS site explains that "*…Most infections with Covid resolve within the first 4 weeks. "Long Covid" is an informal term that is commonly used to describe signs and symptoms that continue or develop after an acute infection of Covid. Depending on how long you have ongoing symptoms for, it can be called one of 2 things:*

- *Ongoing symptomatic Covid*

This is where your symptoms continue for more than 4 weeks. If your symptoms last for longer than 12 weeks, it will then be called…

- *Post-Covid Syndrome*

This is where your ongoing symptoms continue for longer than 12 weeks and cannot be explained by any other condition."

So, the intention appears that term "Long Covid" is being avoided. However, the NHS guidance continues:

> *"…Symptoms of Long Covid can be many and varied and can change over time. The most commonly reported symptoms include (but are not limited to) the following:*
>
> *Respiratory & Cardiovascular symptoms: breathlessness, cough, chest tightness, chest pain, palpitations;*
>
> *Generalised symptoms: fatigue, fever, pain, neurological symptoms, cognitive impairment ('brain fog', loss of concentration or memory issues), headache, sleep disturbance, pins and needles or numbness, dizziness, delirium (in older people);*
>
> *Gastrointestinal symptoms (digestive system): abdominal pain, nausea, diarrhoea, anorexia and reduced appetite (in older people), weight loss;*
>
> *Musculoskeletal symptoms: joint pain, muscle pain;*
>
> *Psychological/psychiatric symptoms: symptoms of depression, symptoms of anxiety:*
>
> *Ear, nose and throat symptoms: tinnitus, earache, sore throat, loss of taste and/or smell:*
>
> *Dermatological symptoms: skin rashes…"*

These are the symptoms and signs set out in the NICE Guidance December 2020.

I cannot see that there can be many more symptoms that could actually be included in those parts of the Long Covid syndrome.

Further, and this is the rub for Long Covid sufferers and their family, carers and employers, there is the issue of what should they expect during the recovery from Covid?

The NHS Guidance is that "*…The recovery time is different for everyone. The length of your recovery is not necessarily related to the severity of your initial illness or whether you were in hospital. If new or ongoing symptoms do occur and they are causing you concern, you should always seek medical advice and support. For additional information please see our 'When Do I Need*

To Seek Help' web page."

Aside from the effects for the person from Long Covid, there is a clear issue about what will carers and employers need to know? Whatever the percentages of non-recovery, there is much understanding, support, assessments and decisions that now and in the near future need to be made.

Whilst it is clear that a fundamental shift away from traditional working patterns to remote working has been made, and there is now Government intention that we all return to work from work from home, much is uncertain.

Long Covid, which can render people unable to work to some extent, has spurred the NHS to create a network of Long Covid outpatient clinics.

There are a number of Long Covid sufferers/survivors' groups which is completely understandable and necessary.

How should employers be preparing? Some persons will have disabilities they cannot cope with. Some persons will not understand their illness. Some will take advantage of Long Covid. Others will need assistance to return to work. A clear observation must be that post-viral conditions happen regardless of age or underlying health conditions. Long Covid could affect more of the working population than those who died or were obviously injured by Covid alone.

An obvious issue is - how can employers manage workers with Long Covid when the symptoms are so varied? I consider that employers should treat Long Covid as any other condition or illness, so ensure they invest in health assessments and consider a range of support already established, but be prepared for more cases than anticipated (whatever could or should have been anticipated!). So Long Covid should be dealt with in the same way as any other medical condition.

Expert occupational health advice will be key to understanding where adjustments at work can be made. Getting this advice is the first thing an employer should do if they identify that an employee may have a condition that could be classified as a disability. As such, employees should be allowed to have a reasonable time to return to work.

The riposte is that Long Covid arguably is unlikely to be classed as a disability under the Equality Act, because the Equality Act's definition that a 'disability' has to have a 'long term' negative effect on a person's ability to carry out day-to-day activities. 'Long term' means 12 months or longer. The research on Long Covid indicates no such duration, arguably. No definitive answer as yet.

Long Covid could become similar to chronic fatigue syndrome and ME, in that it won't automatically be viewed as a disability, but the origin of Long Covid after Covid infection, with likely Covid testing results, is clearer than much of the other post-viral medical research literature.

COVID-19 AND THE ALLOCATION OF RISK IN COMMERCIAL LEASES

Zachary Bredemear

"*Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract*."

Lord Toulson, *Barnes v Eastenders Groups* [2014] UKSC 26

Introduction

This article looks at the importance of analysing risk allocation in two situations. First, it looks at the importance of the analysis of risk allocation in claims for rent arrears arising during the Coronavirus pandemic. Second, it looks at the role risk allocation will play if a tenant seeks a "pandemic clause" when renewing its lease under the Landlord and Tenant Act 1954.

Rent Arrears Claims

London Trocadero (2015) LLP v Picturehouse Cinemas Ltd [2021] EHHC 2591, 28 September 2021, is the most recent of three High Court cases in which the landlords applied for summary judgment for rent falling due during the periods that the tenants' business could not open, or could only operate subject to restrictions, due to public health measures arising from the Coronavirus pandemic. The impact of these restrictions can be stark. The evidence given by the tenant in London Trocadero, which was only permitted to use its premises as a cinema, was that income over the period in question had fallen from £8.92m to £247,000.

The three cases show an increasing focus by the court on the allocation of risk when looking at (i) the terms of the lease and (ii) whether there has been a failure of the basis underlying the lease.

Terms of the Leases

In the first case, *Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd* [2021] EWHC 863 (Ch) the tenant's arguments that the rent cesser provisions operated in its favour were rejected. The essential reason given by Chief Master Marsh for finding in favour of the landlord was that, "The lease apportions risk between the parties and the rent cesser provisions apply exceptionally in the limited circumstances they expressly contemplate, and no further."

The second case was *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB) which was heard with two similar other cases. When considering the tenants' argument on the construction of the rent cesser clause (which was that "damage" should be construed as extending beyond physical damage") Master Dagnall considered that although the allocation of risk contended for by the tenants was a plausible balance the landlords' construction, which left the tenant to obtain its own business interruption insurance, was also perfectly commercially sensible (para 123) and was closer to the natural meaning of word "damage" (para 127). A similar conclusion was reached regarding the tenants' argument that the insurance provisions in the lease required the landlord to insure against a loss of rent (para 180).

The tenants' alternative case based on an implied term ran into similar difficulties; the test of "necessity" or "obviousness" had to be assessed against whether the contract is or is not an apparently carefully drafted formal commercial contract which purports to be a comprehensive agreement allocating risks between the parties and without gaps requiring to be filled (para 135). The Master considered that the landlords' construction represented an "allocation of risk which is perfectly commercial and reasonable" so that an implied term was neither "obvious" or "necessary". It was "a classic case for a difference of view (or at least a negotiation) for the potential agreed allocation of

risk" (para 148).

A similar result was reached in *London Trocadero* where the tenant's argument that there should be implied into the lease a term that the tenant should be excused from paying rent for any period when the premises could not be used as a cinema failed. The availability of business interruption insurance meant the implied term was not necessary (para 73) and the fact the landlord expressly excluded any warranty or representation that the demised premises could lawfully be used as a cinema meant the implied term was not obvious (para 78).

Failure of Basis

In *Bank of New York Mellon* the tenants also advanced a defence based on the doctrine of frustration. The Master held that whilst Covid had had an "unprecedented" impact, when the period of closure was compared against the duration of the leases (of between 15-20 years) the period of closure was not sufficient to give rise to the required "radical difference" or make it "unjust" for the leases to continue given "their terms and their actual allocations of risk" (para 209.d.vi).

The tenant in *London Trocadero* put forward a different defence. It argued that it had a claim for unjust enrichment for a total failure of consideration in relation to the severable or divisible part of a contract. Robin Vos, sitting as a deputy judge of the High Court, held that three issues arose (1) had there been a "failure of basis"? (2) if so, did the "failure of basis" relate to a severable part of the lease? and (3) if so, did that provide a defence to the rent claim?

In addressing the first issue (had there been a "failure of basis"?) the court addressed the "problematic" relationship between liability in contract and liability in unjust enrichment. The starting point was that there could be no unjust enrichment claim while the contract subsisted because, "The law should give effect to the parties' own allocation of risk and valuations, as expressed in the contract, and should not permit the law of unjust enrichment to be used to overturn those allocations or valuations." (para 101). However, the judge recognised that the Court of Appeal in *Dargamo Holdings Limited v Avonwick Holding Limited* [2021] EWCA Civ 1149 had held that there could be exceptions to this general rule where the unjust enrichment claim could provide a "gap-filling device" which was "complementary, though not subsidiary, to the law of contract" (paras 75-76).

As *Dargamo* emphasised that an unjust enrichment claim should not be inconsistent with the terms of the contract or interfere with the contractual allocation of risk between the parties, the judge had to consider the lease, identify what allocation of risk had been agreed upon and consider whether a gap had been left which it was legitimate for an unjust enrichment remedy to fill.

The judge did not accept that the landlord's submission that what the tenant had bargained for was the grant for merely a term of years (para 139); "that the default position is that, in the case of a lease, an inability to use premises for the intended purpose is unlikely to constitute a failure of basis as it may be relevant to the presumed allocation of risk between the parties. However, there can be no general rule. Each case will depend on its own facts" (para 141). It was possible that the ability to use the premises for a particular purpose (in this case the only permitted use, as a cinema) was the foundation of the agreement. This question which required consideration of "the specific terms of the leases and the allocation of risk between the parties" (para 126).

The judge considered that the terms of the lease placed the risk that the premises could not be used as a cinema on the tenant (para 131); this was apparent from an express term excluding a warranty that the premises could lawfully be used as a cinema and the fact that the rent cesser provision only operated in the case of physical damage. The "failure of basis" defence therefore failed on the first question because the defence would "both interfere with the agreed allocation of risk between the parties as well as being inconsistent with the terms of the leases" (paras 132 and 135).

The judge also gave his views on the other two questions that the failure of basis defence depended.

COVID-19 AND THE ALLOCATION OF RISK IN COMMERCIAL LEASES (CONTINUED)

Zachary Bredemear

On the question of severability the judge said, "there seems to me to be no reason in principle why the periods during which the premises could not be used as a cinema should not be treated as a severable part of the leases and the rent apportioned accordingly". On the third question (could failure of basis be defence?) the judge said that a failure of basis defence would not be a defence to a claim for rent but suggested that it might be raised as a counterclaim.

New Leases under the Landlord and Tenant Act 1954

Questions about the allocation of risk also arise if a tenant seeks a "pandemic clause" (so that rent is suspended or reduced if premises are closed for public health reasons) when renewing a business tenancy. The landlord may be willing to agree to a "pandemic clause" in return for an uplift in the rent but if the landlord will not agree to a "pandemic clause" then the court must decide whether a pandemic clause should be included in the new lease.

Under section 35 of the Landlord and Tenant Act 1954, in default of agreement, the terms of the new tenancy are to be determined by the court having "regard to the terms of the current tenancy and to all relevant circumstances". Authoritative guidance was given on the effect of section 35 in *O'May v City of London Real Property Co. Ltd* [1983] AC 726. The House of Lords held that the burden of persuading the court to depart from the terms of the old tenancy rested on the party proposing the change and that if the change was objected to the court would decide according to "fairness and justice".

When assessing where "fairness and justice" lies, the speeches in *O'May* demonstrate the importance of (i) identifying the "risk" that would be transferred by the change and (ii) asking whether it would be fair to reallocate that risk. In *O'May* the question was whether the tenant should assume the burden of the unpredictable and variable costs of maintaining and repairing the building. There were three factors that indicated this risk should remain allocated to the landlord. First, the tenant had access to only part of the building and could not carry out precautionary inspections or surveys or verifying works that were carried out. Second, as a solicitor's firm the tenant did not have staff with the skills required to manage the building whereas the landlord managed 200 buildings in the City of London. Thirdly, the landlord had a freehold interest in the building and so was the appropriate person to assume long term risks.

A recent unreported decision *Poundland Ltd v Toplain Ltd* (7 April 2021, Brentford County Court) mentioned in articles in the Law Society Gazette (L.S.G. 2021, 118(34), 22) and the Estates Gazette (E.G. 2021, 2139, 58-59) shows the difficulty the tenant may encounter arguing for a "pandemic clause". In *Poundland* the judge considered that the risk of closure due to a pandemic was a risk which the tenant should bear. The judge considered that due to reliefs and other government schemes, the tenant would have more control over the circumstances if there were a lockdown than the landlord.

This decision is of course consistent with the presumed allocation of risk the judge identified when looking at the failure of basis arguments in *London Trocadero*.

A tenant seeking a "pandemic clause" in new lease will therefore need to think carefully about the argument as to why it is fair and just for the risk of a pandemic to be allocated to the landlord. The tenant may for example want to think about:

- Which party is better placed to obtain insurance against the risk of the pandemic? This will require evidence of how the insurance market operates and the respective parties' positions and bargaining strength in that market.
- Whether there is anything about the nature of the tenant's interest in the building that makes shifts where the balance lies. For example, a short tenancy might make the tenant more vulnerable to the effect of a pandemic whereas the landlord may be less vulnerable to the cesser of rent under a short lease;
- A tenant of part of a building may be able to justify a pandemic clause if its business depends of servicing the needs of the other occupiers of the site, especially if it expects its customers to be the employees of its landlord whose presence on site is something the landlord has more control over.

Conclusion

Identifying where risks are allocated in a contract is an important part of the process of resolving disputes about the meaning of contracts or the effect of unexpected events.

The rent arrears cases show the vigour of a "presumed allocation" to the tenant of the risk that premises can be used for a particular purpose. However, the court will enquire into the terms of a lease as a whole to see how risk is allocated in the specific case before it and *London Trocadero* even leaves open the door for an unjust enrichment claim to succeed if the tenant can show that the use of premises for a particular purpose was foundational to the agreement.

The "presumed allocation" of the risk being on the tenant will also be relevant to a tenant seeking a "pandemic clause" in its new tenancy. If this is opposed by the landlord it will not be enough for the tenant to suggest that increased rent might be payable for the clause. The tenant will have to identify cogent reasons why it is fair and just for the risk of closure to be passed to the landlord.

COVID AND RESIDENTIAL POSSESSION CLAIMS

Richard Cherry

In this article Richard Cherry of the 1 Chancery Lane Property team looks back on the changes wrought by the Covid-19 pandemic on residential possession claims; together with a glance into the future.

The General Stay

The most obvious impact of Covid in this area was of course the General Stay imposed by the courts in CPR 55.29 and via PD51Z – possession claims could be issued but no action could be taken on any current or new claim for possession of residential property from 1 March 2020. CPR PD51Z stayed:

> 'all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession'

PD51Z specifically excluded from the stay claims against trespassers under CPR 55.6 and IPOs.

The legality of the stay was challenged and upheld by the Court of Appeal in *Arkin v Marshall* [2020] EWCA Civ 620.

The Coronavirus Act 2020

Among its many provisions The Coronavirus Act 2020 (as subsequently amended by SIs in 2020-21) used Schedule 29 to amend possession procedure during a 'relevant period' [currently ending 25 March 2022] to extend the required notice periods of notices seeking possession of all residential tenancies including those under ss8 and

COVID AND RESIDENTIAL POSSESSION CLAIMS (CONTINUED)

Richard Cherry

21 of the Housing Act 1988. Accordingly new prescribed versions of Forms 3 and 6A were issued. Whether a landlord can rely on a form that is not that currently prescribed is a matter upon which permission to appeal is being sought from the Court of Appeal. The period for these extensions was originally until 30 September 2020 (Para 1(1) of Schedule 29) but has now been extended to 25 March 2022 by The Coronavirus Act 2020 (Residential Tenancies and Notices) (Amendment and Suspension) (England) Regulations 2021.

The Overall Arrangements

We previously commented on the Overall Arrangements here: https://1chancerylane.com/possession-in-the-post-covid-world/

After the lifting of the stay on 23 August 2021, the 'Overall Arrangements' in PD 55C had been designed by a working group under Knowles J and were intended to deal with:

> 'a combination of (a) accrued demand from the stay, (b) the possible increase in demand caused by economic consequences of the pandemic and (c) reduced physical court capacity because of social distancing.'

A Guidance Note of 17 September 2020 from the Master of the Rolls to Civil Judges set out the wish to ensure consistency by listing cases according to priorities depending on the nature and facts of the claim and the characteristics of the Parties.

The interests of landlords were said to be reflected in the intention that "*When courts do resume eviction hearings they will carefully prioritise the most egregious cases, ensuring landlords are able to progress the most serious cases, such as those involving anti-social behaviour and other crimes, as well as where landlords have not received rent for over a year and would otherwise face unmanageable debts*."

The practice of 'Covid marking' claims was an attempt to balance the interest of tenants (especially those most vulnerable to Covid) and landlords (especially those owed the greatest arrears or in cases that were in some other way 'egregious'). Either party could ask the court to award a higher or lower priority to a case based on their own circumstances and have the case moved up or down the pecking order as a result. Whether that has in fact been reflected in practice remains to be seen.

Under the Overall Arrangements, along with the requirement to reactivate any stayed claims and for a landlord to state in writing what they knew of the impact of the Coronavirus on the tenant and any dependents (generally the answer was 'nothing at all') the Courts employed a lengthened process once a claim was before it.

The first hearing was a Review ('R') Hearing. The key point of this was that it wasn't a hearing at all but a date on which a Judge would consider the papers in boxwork and potentially strike out the claim if the new requirements hadn't been complied with. It appears as was always more likely that in most cases, courts simply required any deficiency to be made good. The landlord or a representative was required to be available and advice would be provided to tenants via a duty adviser at court. Of course as no party was actually at court, it is unclear how and how often tenants actually made use of the advice. It was supposed to be an opportunity for the parties to negotiate a settlement – of which more later. (Spoiler – it doesn't work).

The next (and indeed first actual) hearing was a Substantive ('S') Hearing which took very much the format of the previous first hearing in a possession list

with the court having the same options – grant the claim, allocate and give directions if 'disputed on grounds which appear to be substantial' or dismiss. An extra option was available to adjourn for a tenant to get advice if they had not previously done so. The S hearing was supposed to be listed either '28' or 'at least 28' days after the R hearing. At least 28 days and an extra quasi-hearing has thus been built into the process.

The Effect of the Changes

The intention of the provisions was principally to avoid or limit evictions and resultant homelessness at a time when its impact would simultaneously be more drastic on those evicted as well as on society as a whole given the need to maintain social distancing and the added pressure on both the structures designed to alleviate and prevent homelessness and the ordinary workings of the private rental sector. It also aimed to reflect the fact that many formerly 'good' tenants (ie who paid their rent) may be forced into arrears by a sudden unexpected loss of income.

The post-stay measures were also aimed at easing what was feared as a tsunami of cases held back under the general stay by lengthening the possession process post-issue, establishing a cadre of judges specifically to deal with possession claims and active case management.

It is understood that the Master of the Rolls has considered the impact of the Overall Arrangements concluding that:

i. the "R" hearing has not been a success as it has not resulted in cases settling;

ii. it won't become standard practice BUT that or some form of triage hearing may be used in future at the discretion of the Designated Civil Judges who will decide listing procedure for their courts and subject to guidance from Public Health England

iii. the Lord Chancellor will be urged to extend legal aid so that defendants to possession claims can receive legal advice well in advance of final possession hearings (this of course had been one aim of the Overall Arrangements)

iv. a reduced working group will continue under Males LJ with Knowles J still a part of it

v. the CPRC will be asked to make appropriate changes to the CPR

The Overall Arrangements had two main aims:

1. To slow the progress of claims from issue of a notice seeking possession through the court process to any final order

2. To reduce the number of cases requiring final resolution by the Courts

The first aim depended on the extended notice periods; the requirement to re-activate stayed claims; adding the new step of the R hearing and the abandonment of the requirement to list claims within any fixed timeframe.

In my view that has been achieved at least to a degree – whether this sits well with the dictum that 'justice delayed is justice denied' is another matter.

The second aim depended on using the R hearing as an opportunity for the parties to discuss and negotiate a solution; the theory was that making advice available to tenants at an early stage and in particular at the R hearing would facilitate this.

As will be seen above, this does not appear that this has been achieved. I might gently suggest that those of us used to the way such cases go could have predicted – and in many cases did predict – just such an outcome. I consider the reasons are that:

1. The outcome of most possession claims is binary – landlords either recover possession or not;

2. Negotiated solutions are thus unlikely – generally (though not always) landlords want nothing short of possession and tenants want to stay. If a landlord offers a commercial solution (eg paying a tenant to leave) tenants may be well-advised to be cautious as this may impact on an intentional homelessness decision;

3. The R hearing was never a suitable vehicle to enable settlement as:

    a. It is not a hearing and parties were NOT to attend physically (not unreasonably in the

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Richard Cherry

context of the pandemic)

b. Tenants frequently do not attend court or put in a defence until actively required to do so in any event;

c. Duty advisers (on whom the task of brokering any negotiated solution seemed to fall) appeared not to be given any mechanism to help them do so with neither party physically present.

Back to Reality?

With effect from 1 October 2021 The Coronavirus Act 2020 (Residential Tenancies and Notices) (Amendment and Suspension) (England) Regulations 2021 extends the 'relevant period' in Schedule 29 of the Coronavirus Act 2020 to 25 March 2022. It 'resets' the period for notices under ss8 and 21 Housing Act 1988 to the customary 2 months for a s21 Notice and the variety of periods under s8. Further new prescribed forms are specified by Para 5 and are appended at Schedule 2 to the Regulations.

The Brave New[?] World

While the R hearing is deemed a failure and should not become standard practice, management of possession claims under CPR55 will be at the discretion of individual courts as directed by the Designated Civil Judge. Changes will be made to the CPR though when and what they will be are not yet certain. There is certainly a stated aim that the default will be face to face hearings unless a party has reason to request otherwise by reason inter alia of Covid vulnerability.

While the greater use of telephone and CVP/Zoom/ Teams in interim hearings has been welcomed by many practitioners the Courts appear to wish to revert to more in-person hearings. It may also be of concern that the discretion of Designated Civil Judges to adopt different procedures in their own courts could create inconsistencies between courts causing uncertainty and difficulties in advising clients.

The Overall Arrangements succeeded in lengthening the possession process (as noted, understandably in the circumstances) but even more cases (not just in possession claims) seem to be adjourned for want of an available judge and it remains to be seen whether this will improve as we move towards more normal (possibly) times.

Until then, we also serve who only stand and wait.


COVID INSOLVENCY UPDATE

Simon Newman and Christopher Pask

With the easing of restrictions and the pandemic itself, we take this opportunity to look at some of the key changes to the insolvency landscape and some recent decisions of interest.

During the course of the last 18 months, Simon Newman and Christopher Pask have written a series of articles addressing these matters. These measures have largely been introduced through the Corporate Insolvency and Governance Act 2020 (CIGA) and related statutory instruments, legislation which was due to hit the statute book prior to the pandemic, but which was amended to include measures targeted at mitigating the impact of Covid-19.

Changes under the Corporate Insolvency and Governance Act 2020

The key changes introduced by CIGA were via the suspension of the wrongful trading provisions of the Insolvency Act, the introduction of the Concept of the Monitor, and restrictions, often inaccurately described as a ban, on the issuing of Winding Up Petitions. Some of these were introduced as temporary measures and subject to extension, whilst some were permanent.

Suspension of Wrongful Trading Provisions

CIGA, and latter secondary legislation effectively suspended directors' personal liability for wrongful trading during the pandemic. It achieved this by section 12 of CIGA introducing an assumption that a director was not responsible for a company's worsening financial position.

This was initially introduced to apply from 1 March 2020 to 1 September 2020 and was subsequently reintroduced, to mitigate the impact of the second lockdown, for the period 26 November 2020 to 30 June 2021. Importantly, the re-introduction was not retrospective; the normal liability position therefore applied between 1 September and 26 November 2020.

The suspension is no longer in force but for those dealing with issues arising during this period further guidance on the operation of CIGA in this area can be found here.

Override of Contractual Termination Clauses

CIGA significantly expanded the scope of the restrictions imposed on the ability to invoke ipso facto clauses when a counterparty to a supply contract enters insolvency. In short, the legislation prevents certain suppliers from terminating their contractual obligation to continue to supply a company which has entered into a relevant insolvency procedure.

The change was a permanent one to the insolvency landscape and is addressed in detail here.

Introduction of Moratorium Process

CIGA introduced a free-standing moratorium procedure for companies that require breathing space from creditor action, with the aim of allowing the company to be rescued as a going concern. Our previous article here, outlines the procedure and entry requirements in detail.

The procedure is intended to be quick and low cost, with the directors remaining in control of the day-to-day running of the company, overseen by a monitor (who must be a licenced insolvency practitioner). Initially, a company was only unable to obtain a moratorium if it was currently subject to a moratorium or insolvency procedure.

The recent changes which hailed the easing of some of the restrictions on creditor action which were introduced by CIGA mean that a company will no longer be eligible for a moratorium if it has had the benefit of one in the past 12 months, if one is currently in force or

COVID INSOLVENCY UPDATE (CONTINUED)

Simon Newman and Christopher Pask

if the company currently is (or has been in the last 12 months) subject to an insolvency procedure. Eligibility criteria are set out in Schedule ZA1 to the Insolvency Act 1986.

Restrictions on Issuing Winding Up Petitions

On the 1 October 2021, the temporary restrictions in Schedule 10 of the Corporate Insolvency and Governance Act 2020 (CIGA) were replaced[1]. This lifted previous blanket restrictions on issuing winding up petitions against companies impacted by COVID-19, and replaced them with less stringent and more refined restrictions which are due to remain in place until 31 March 2022.

The most significant of these new restrictions is an increase of the Petition threshold to £10,000; and a requirement to give the debtor company 21 days' to put forward settlement proposals following which a Petition may be presented. As one might expect in a forum where form is treated almost as importantly as substance, there are various formal requirements set down which must be satisfied to achieve this.

Full details of these changes were covered in an article published upon them coming into force which can be found here.

As a result of these changes, winding up Petitions become a viable tool for many creditors once again from 1 October 2021.

For those still dealing with Petitions under the original and twice extended restrictions, guidance from when those restrictions came into force can be found here.

Case law on Disputed Petition Debts

With the majority of restrictions on winding up petitions being relaxed from 1 October 2021, *Fenton Whelan Ltd v Swan Campden Hill Ltd* [2021] EWHC 2470 (Ch) provides a timely reminder that the bare assertion that a debt claimed in winding up proceedings is disputed is unlikely to be sufficient to establish a substantial dispute.

The petitioner had previously acted as a development manager for the redevelopment of a property in Kensington, providing management services to the Company pursuant to a development manager agreement ("the Agreement").

The Company failed to make instalment payments due to the Petitioner under the Agreement and a petition was presented in respect of those sums.

The Company opposed the petition asserting i) that the petitioner had failed to carry out its obligations under the Agreement with due care and skill and ii) that it had a number of cross claims which would exceed the petition debt including allegations of fraudulent misrepresentation, receipt of 'secret profits' and a claim arising from an alleged whistle-blower who suggested overcharging had taken place.

In rejecting all of the grounds of opposition to the petition, the court held that the Company had failed, on the proper construction of the Agreement, to dispute a debt raised under the Agreement within the agreed time frame.

Further, the allegations of fraudulent misrepresentation had not been fully or clearly pleaded, there was no basis upon which the court could read fiduciary duties into the agreement and there was no sworn evidence before the court from the alleged whistle-blower nor any evidence that overcharging had taken place. In the circumstances, all of the assertions made were no more than unsubstantiated statements of belief which failed to meet the minimum threshold to establish that the counterclaims were genuine.

The case emphasises the importance of being able to properly and fully evidence assertions made in response to a winding up petition.

The court re-iterated three general principles which both petitioners and companies involved in winding up proceedings are well advised to keep in mind:

1) That where grounds of opposition are advanced in respect of a petition, the onus of showing that those grounds are serious and substantial lies on the company: *Orion Media Marketing Ltd v Media Brook Ltd* [2002] 1 BCLC 184, [2003] BPIR 474. It is up to the company to meet that evidential burden: *Re a Company* [2016] EWHC 3811 (Ch).

2) That (just as in other proceedings) allegations of fraud made in opposition to winding up proceedings must be fully and clearly particularised. A failure to do so may lead to those allegations being treated with considerable care by the court.

3) That when framing grounds of opposition, care must be taken to differentiate between a disputed debt on the one hand, and a counterclaim/set off on the other. It is not acceptable to frame an issue as a dispute in evidence and, at trial, to seek to re-frame that dispute as a counterclaim.

Looking forward

The government's monthly insolvency statistics for September 2021 indicate that a total of 1,466 company insolvencies were recorded in September. This is the highest since March 2020 and an indication that that company insolvencies are returning to pre-Covid levels.

Another point which emerges is that some of the procedures introduced by CIGA have had very limited use; only 14 companies used the moratorium procedure and only 9 restructuring plans were registered at Companies House.

The removal of restrictions on winding up petitions may well lead to an increase in the use of those options, now that creditors are able to take more immediate and effective action against debtor companies.

Should anyone require assistance in dealing with any of the above matters, please contact clerks@1chancerylane.com

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[1]The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021 - https://www.legislation.gov.uk/uksi/2021/1029/made/data.pdf

1 Chancery Lane
London, WC2A 1LF

clerks@1chancerylane.com
020 7092 2900