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RESEARCH ARTICLE

# What does Covid-19 teach us about English contract law?

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## Abstract

This paper examines how English courts have responded to the contract problems generated by the Covid-19 pandemic and considers what this tells us about future contract law development. In relation to consumers, the case law on pandemic-affected contracts, though limited, indicates that traditional contract doctrine does not necessarily produce beneficial outcomes for consumers. This further diminishes the importance of the common law in the consumer contracting context. In the commercial sector, contracting parties were encouraged by government and other organisations to co-operate with one another and act in good faith during the crisis, but this has not influenced the courts applying contract law in the pandemic aftermath. The emerging case law suggests that contract law has retained its commitment to certainty, freedom of contract and sanctity of contract, notwithstanding the extraordinary circumstances around the outbreak and its unpredictable effects on contracts. The unalloyed application of formal contract law in the post-pandemic case law augments the position of relational norms as extra-contractual in English law, putting the further judicial development of relational contract principles in doubt. The paper concludes that despite the considerable social and economic upheaval caused by the pandemic, its impact on contract law development is likely to be minimal.

**Keywords:** English contract law; Covid-19; relational contracts

## Introduction

The Covid-19 (Covid) public health emergency destabilised societies and economies across the world. Rules to tackle the spread of infection were announced with little warning, affording scant opportunity for advance preparation by firms and individuals. In line with other countries impacted by the virus, the UK Government mandated the closure of non-essential retail and entertainment businesses, and imposed tight restrictions on movement and social gatherings (colloquially known as ‘lockdown’).<sup>1</sup> A consequence of the measures taken to curb transmission of the virus was that almost overnight many contracts became impossible, illegal, prohibitively costly or potentially harmful to public health to carry out. Consumers found that events they had planned for months or years, such as weddings and holidays, were cancelled or delayed. Businesses faced severe disruption and significant cost overruns. Production facilities were closed, or their operation curtailed, and many viable firms suddenly found themselves on the brink of insolvency. Business responses to the crisis were diverse. Some businesses terminated contracts – relying, sometimes opportunistically, on contract terms (force

<sup>1</sup>Professor of Contract Law, Birmingham Law School, University of Birmingham, UK. I thank the anonymous reviewers at *Legal Studies* for their constructive feedback on an earlier version of this paper. The usual disclaimer applies.

<sup>2</sup>The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. The devolved legislatures of Wales, Scotland and Northern Ireland enacted their own distinctive sets of Covid regulations.

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majeure) or legal doctrine (frustration) to excuse non-performance or justify withdrawal.<sup>2</sup> Others adopted more collaborative strategies, seeking to renegotiate agreements or co-operate with counterparties in an effort to maintain relationships and mitigate the effects of the crisis. An unprecedented series of government interventions into contract enforcement followed, in order to keep the economy afloat and ensure the continued supply of essential goods and services.

Since few contracts were entirely unaffected by the pandemic, it appeared inevitable that legal claims would arise requiring judicial engagement with various aspects of contract law: interpretation of express contract terms on ‘material adverse change’ or force majeure; implied terms to allocate unanticipated pandemic risks; the doctrine of frustration where a contract had become impossible or illegal to carry out; public policy where performance posed risks to public health; principles of unjust enrichment where paid-for goods and services were not supplied; consideration and estoppel where the outbreak compelled the parties to amend their agreement. Given the range of potential disputes, one might have expected the pandemic to present opportunities for courts to reconsider aspects of contract doctrine. In the early days of the pandemic, a range of scholars considered how contract law might respond to the issues generated by the crisis, focusing particularly on frustration<sup>3</sup> and contract adjustment.<sup>4</sup> This preliminary analysis was valuable but understandably speculative, considering the possibilities, rather than the realities, of legal intervention. As the dust settles and disputes over pandemic-affected contracts begin to move through courts and other fora, we can begin to examine how contract law has responded to the contract problems produced by the outbreak, and assess what, if anything, has changed as a result. This paper undertakes this task, presenting an initial evaluation of the post-Covid contract law landscape.

Admittedly in legal terms it is still early days, but on the evidence to date it appears to be very much business as usual for contract law in the courts. We begin in section 1 by examining the impact of the crisis on consumer contracts. There are relatively few cases, but nevertheless the indications are that the pandemic has exerted little influence over common law reasoning in the consumer sphere. There have been no bold attempts in the lower courts to modify contract law rules (or contracts themselves) to respond to the circumstances of the pandemic, notwithstanding that the application of traditional contract law doctrine, frustration in particular, to consumer contracts can yield poor outcomes. Section 2 turns to the commercial context. Here, we see courts double-down on formal contract enforcement in keeping with the precepts of traditional contract law, which is to say, the disavowal of any public interest dimension in contract legal reasoning, the commitment to freedom of contract and support for ex ante risk allocation, and the disinclination to look beyond express terms as the source of the parties’ obligations. Section 3 examines the role of relational norms during the crisis, noting that the appeals to commercial contractors to co-operate with one another and negotiate solutions has not influenced the application of contract law subsequently, rendering it doubtful that nascent common law innovations, such as the recognition of relational contracts, will be anything other than isolated and rare exceptions to the operation of traditional contract law. More generally, the Covid episode demonstrates the tenacity of the formal contract paradigm. Despite the various legal issues unleashed by the emergency, we conclude that there is unlikely to be any ‘long-Covid’ effect on the common law of contract.<sup>5</sup>

## 1. Consumer contracts and the pandemic

In the initial stages of the crisis, there was very little reliance on private law to manage the economic and social disruption. Relief from the immediate consequences of the pandemic for consumers came

<sup>2</sup>S Dadush ‘Prosocial contracts: making relational contracts more relational’ (2022) 85 *Law and Contemporary Problems* 153.

<sup>3</sup>C MacMillan ‘Covid-19 and the problem of frustrated contracts’ (2021) 32 *King’s Law Journal* 60 at 61.

<sup>4</sup>H Beale and C Twigg-Flesner ‘COVID-19 and English contract law’ in E Hondius et al (eds) *Coronavirus and the Law in Europe* (Cambridge: Intersentia, 2021) p 461 and, in the same volume, H MacQueen ‘“Coronavirus contract law” in Scotland’ p 491, especially from p 497 ff.

<sup>5</sup>C Twigg-Flesner ‘The potential of the COVID-19 crisis to cause legal “disruption” to contracts and contract law’ in Hondius et al, above n 4, p 1091.

by way of a package of support measures from the UK Government designed to shore-up households and prevent financial hardship. These measures included legislation imposing a moratorium on landlords evicting residential tenants for non-payment of rent.<sup>6</sup> Mortgage payment holidays, generally lasting around three months with potential for further extension, were introduced. Guidance was produced for lenders concerning payment deferrals in cases of unsecured consumer debt. These schemes were overseen by the regulator, the Financial Conduct Authority (FCA). The FCA directed firms to treat customers fairly, with forbearance and due consideration.<sup>7</sup> These general expectations about conduct were supplemented with more detailed guidance on specific matters, such as repossessing goods supplied on credit where the goods were needed by the consumer.<sup>8</sup> Although the financial difficulties faced by consumer debtors were ameliorated by direct government intervention, none of these measures modified or extinguished the underlying obligations. Tenants could claim relief against eviction, but they were still expected to pay rent as it fell due. Enforcement was only deferred.<sup>9</sup> In other consumer contract contexts, government intervention was notably absent. The legal rights of consumers *qua* purchasers fell largely to be determined by existing contract law principles. These principles were not always easy to identify or apply in the pandemic context, resulting in under-enforcement of consumer rights. We examine this below.

### (a) *The common law role*

In many cases where consumers were negatively affected by business closures or restrictions on travel, it was relatively simple to identify the consumer's rights under legislation or regulatory provisions. For example, if lockdown laws resulted in a package holiday or flight cancellation customers could claim a full refund, though not any additional compensation, under specific regulations developed for the travel industry,<sup>10</sup> enforced by regulators such as the Competition and Markets Authority (CMA).<sup>11</sup> The common law provides similar entitlements – if a consumer pays in advance for goods or services that are not provided there is notionally a right to a refund through general principles of contract and unjust enrichment – but the consumer would not have to rely on these principles in making their claim.

Where the consumer's legal rights depended on the common law of contract the situation was less straightforward. If the consumer was prevented from travelling because of lockdown laws, for example, the legal claim to a refund depended on the operation of a thicket of rules around illegality and frustration.<sup>12</sup> These rules did not necessarily work in the consumer's favour. Though international travel was heavily restricted worldwide, operating flights was not illegal, and most airlines permitted passengers to rearrange travel for a later date, or switch to an alternative destination, with no financial penalty. In the nineteenth-century case of *Waugh v Morris*, it was held that where the parties did not know at the time the contract was agreed of the illegality (triggered, ironically, in this case by statutory rules implemented to curb the spread of an infectious disease), the contract would not be void 'if the

<sup>6</sup>Coronavirus Act 2020, s 81 and Sch 29.

<sup>7</sup>FCA *Consumer Credit and Coronavirus: Additional Guidance for Firms*, September 2020, para 1.7; FCA *Mortgages and Coronavirus: Updated Draft Guidance for Firms*, 22 May 2020, updated 17 August 2021, <https://www.fca.org.uk/publications/guidance-consultations/mortgages-coronavirus-updated-draft-guidance-firms#revisions>; FCA *Coronavirus (Covid-19): Information for Firms on Consumer Credit*, 4 December 2020, updated 17 March 2023, <https://www.fca.org.uk/coronavirus/information-firms-consumer-credit>.

<sup>8</sup>FCA *Consumer Credit and Coronavirus*, *ibid*, para 6.

<sup>9</sup>See UK Government *Guidance for Landlords and Tenants*, 28 February 2022, <https://www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities/coronavirus-covid-19-guidance-for-landlords-and-tenants#rent-payments>, section 1.

<sup>10</sup>Eg EC No 261/2004 Denied Boarding Regulation, and Package Travel and Linked Travel Arrangements Regulations 2018, retained by Regulation 261/2004/EC134 Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019.

<sup>11</sup>See, for example, *Competition and Markets Authority v Truly Holdings Ltd and Others* [2022] EWHC 386 (Ch).

<sup>12</sup>MacMillan, above n 3, at 66–67.

performance in any other way was legal and practicable'.<sup>13</sup> Clearly, in the Covid context, the length of the anticipated delay to travel plans would be material in working out what was 'practicable' for the consumer to accept. But if the contract could be performed, no refund would be due.

Some international airlines exploited the legal complexity by continuing to operate scheduled flights and refusing to issue refunds to customers who could not take their trip because of bans on non-essential travel.<sup>14</sup> The CMA eventually abandoned its investigation into this practice, bemoaning 'a lack of clarity in the law' concerning whether a consumer was entitled to a refund in these circumstances.<sup>15</sup> It was left to individual consumers to mount legal challenges to airlines on a case-by-case basis.<sup>16</sup> A court is likely to pay close attention to the carrier's terms and conditions in determining the consumer's entitlements under private law, although terms will not be binding on the consumer if they are found to be unfair under the test set out in the Consumer Rights Act 2015 (CRA 2015). Contract terms may permit an airline to substitute an alternative remedy to a refund, but this will not bind 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.<sup>17</sup> However, previous attempts to invalidate contract terms using the statute have generally not fared well in the courts because of the narrow interpretation placed on the test by judges.<sup>18</sup> There is no guarantee, therefore, that individual claims against airlines will be successful or that cases will progress to the senior courts where authoritative precedents can be set.

### (b) *The limitations of frustration*

The regulator's lament about the difficulties of applying contract law to the wrecked plans of consumers was apposite. The rules around frustration were potentially relevant where the Covid outbreak and subsequent lockdowns prevented contract performance, but the characteristically blunt operation of the doctrine was not always appropriate for the more nuanced situations produced by the pandemic. Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd* described frustration as

when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.<sup>19</sup>

When it occurs, frustration ends the contract by operation of law. Both parties are relieved of their remaining obligations under the agreement.<sup>20</sup> If the claim of frustration fails, the contractual obligations continue unabated, irrespective of the severity of the changed conditions. The requirement that the 'circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract'<sup>21</sup> is difficult to satisfy. Additional hardship or expense is

<sup>13</sup>(1872–73) LR 8 QB 202 at 207 per Blackburn J.

<sup>14</sup>Ryanair: no refunds for flights during Covid lockdown in England' (*The Guardian*, 2 November 2020), <https://www.theguardian.com/business/2020/nov/02/ryanair-refunds-flights-covid-lockdown-england-loss-cancellations>.

<sup>15</sup>CMA Press Release 'CMA closes investigation into British Airways and Ryanair' 7 October 2021, <https://www.gov.uk/government/news/cma-closes-investigation-into-british-airways-and-ryanair>.

<sup>16</sup>See eg 'Woman single-handedly takes on BA and wins' (*BBC News*, 28 February 2023), <https://www.bbc.co.uk/news/uk-england-birmingham-64788448>.

<sup>17</sup>Section 62(4).

<sup>18</sup>See eg *ParkingEye Ltd v Beavis* [2016] AC 1172; *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696.

<sup>19</sup>[1981] AC 675 at 700.

<sup>20</sup>For a review of the requirements see *Canary Wharf (BP4) T1 Ltd & Others v European Medicines Agency* [2019] EWHC 335 (Ch) at [21]–[29].

<sup>21</sup>*Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729 per Lord Radcliffe.

not sufficient to frustrate a contract. Subsequent illegality will usually lead to a finding of frustration, but this depends on the facts. A temporary or partial suspension of performance will generally not frustrate a contract, but the position is not entirely clear.<sup>22</sup> Airlines could advance credible arguments that where performance was only delayed, and alternatives such as free-of-charge amendments to travel plans or credit vouchers had been provided, the carriage contract had not become impossible to perform. Similarly, there will be no frustration if the risk of the alleged frustrating event has been allocated to one of the parties in the contract.<sup>23</sup> Express terms that, for example, permitted airlines to change flights because of circumstances beyond their control, or limit or deny remedies where the consumer cancels the contract, may forestall any claim that the contract is frustrated, although, as we have seen, such terms in a consumer contract may be reviewable for fairness under the CRA 2015.

Even if travel was possible, the Covid outbreak may have rendered the journey pointless. Contract law has previously recognised ‘frustration of purpose’ where unforeseen events deprive the contract of its main objective, altering ‘the foundation on which both parties proceeded’.<sup>24</sup> An enquiry about contract purposes is not confined to an examination of the express contract terms. Courts have sought to identify the ‘root of the contract’ or the conditions ‘essential to its performance’,<sup>25</sup> drawing the ‘necessary inferences ... from surrounding circumstances’.<sup>26</sup> Thus in *Krell v Henry*, an agreement to hire rooms from where it was intended to view the coronation procession of Edward VII was frustrated when the coronation was cancelled because of the king’s illness. This was notwithstanding that the purpose of the hire was not mentioned in the contract, and it was still possible for the hirer to use the rooms. Both parties understood the occurrence of the coronation as the foundation of the transaction, and this was borne out by the facts, including the price premium paid for the rooms.<sup>27</sup> As one modern decision stated, ‘the common purpose does not have to be contractual’.<sup>28</sup> On this basis, it might be argued that closure of a holiday resort because of anti-Covid regulations frustrates an independent contract for a flight to the resort. While *Krell* provides some historical support for this kind of argument, the decision has had little influence on the law of frustration subsequently and the case may be very much of its time.<sup>29</sup> Establishing a common foundation for the agreement shared by both parties may prove challenging today when many modern consumer contracts are concluded remotely over the internet on the basis of a dense set of seller terms and conditions.<sup>30</sup> This tends to militate against courts drawing too many inferences from the context about what is in the contemplation of the parties regarding contract purposes. In the above example, the airline will be indifferent to the reason for the customer’s travel. If the contract benefits identified from the contract (the flight) can still be provided it is unlikely the contract will be frustrated because the consumer essentially bears the risk that their circumstances might change.<sup>31</sup>

The limitations on the doctrine of frustration render it of little assistance to the consumer. In addition, the financial consequences of ending the contract can be harsh. The CMA communicated its

<sup>22</sup>The High Court in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB) denied that there was a doctrine of temporary frustration, at [211]. The point was not considered in the Court of Appeal. Regarding partial frustration, in *James B Fraser & Co Ltd v Denny Mott & Dickson Ltd* 1944 SC (HL) 35, Viscount Simon opined (obiter dictum) ‘it may be that the supervening impossibility of fulfilling some minute provision may not be regarded as going to the length of preventing substantial performance of the contract as a whole’, at 40. See also MacQueen, above n 4.

<sup>23</sup>*Taylor v Caldwell* (1863) 3 B & S 826.

<sup>24</sup>*Robinson v Davison* (1871) LR 6 Exch 269 at 275 per Kelly CB.

<sup>25</sup>*Krell v Henry* [1903] 2 KB 740 at 748 per Vaughan Williams LJ.

<sup>26</sup>*Ibid*, at 749.

<sup>27</sup>*Ibid*, at 751. Counsel for Mr Henry (the hirer) remarked that the price (£75) for two days’ hire, not including nights, was ‘equivalent to many thousands a year’, at 746.

<sup>28</sup>*Canary Wharf*, above n 20, at [41].

<sup>29</sup>MacMillan, above n 3, at 68.

<sup>30</sup>See generally C Mitchell *Vanishing Contract Law: Common Law in the Age of Contracts* (Cambridge: Cambridge University Press, 2022) pp 78–86.

<sup>31</sup>*Cf Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683 at 690: the purpose of a ship-hirer was of no concern to the ship-owner, hence defeat of the hirer’s purpose did not frustrate the contract to hire the ship.



expectation that a consumer would be refunded in full where they had paid money under a contract that was later frustrated.<sup>32</sup> This expectation did not correspond with the legal position. Under the common law, the loss (or benefit) from a frustrated contract lies where it falls. The severity of this was mitigated by the Law Reform (Frustrated Contracts) Act 1943, which provides that money paid to the other party before the frustrating event can be recovered from that party. However, the Act also allows a court to order that the enriched party can retain a portion of the money to cover expenses, ‘if it considers just to do so, having regard to all the circumstances of the case’.<sup>33</sup> The application of this provision can lead to counterintuitive results. In one decision, *Neil Willis v Offley Place Hotel*, a wedding reception due to take place at the hotel on 21 March 2020, at a cost of £8,800, was cancelled by the venue the day before when the government announced the first lockdown.<sup>34</sup> The judge in the Oxford County Court held the contract for the reception was frustrated. Contrary to the CMA’s view, the court decided the venue was entitled to deduct expenses amounting to two-thirds of the sum paid by the claimant bridegroom, even though he received no benefit from the money he had paid. The court noted that the wording of section 1(2) did not stipulate that the claimant must benefit from the expenditure.

The decision to allocate to the consumer a disproportionately high share of the loss caused by the lockdown is hard to defend. The result is particularly unappealing as it follows from the exercise of a judicial discretion conferred by the 1943 Act, a statute which pre-dates the rise in consumer contracting that occurred during the second half of the twentieth century.<sup>35</sup> Though the outcome in the case largely stems from the unfortunate timing of the lockdown announcement, the liability imposed for expenses following the finding of frustration exposes the consumer to an unacceptable degree of risk. This risk is not voluntarily assumed under the contract (the contract no longer exists) but is imposed *ex post* by judicial decision. As the justice of the case is the most important consideration, a judge might have compared the situation where a contract term purported to permit the venue to retain two-thirds of the customer’s advance payment where the contract was cancelled by the venue before performance. Such a term could be challenged under the provisions of section 62(4) of the CRA 2015. The result in *Willis* is against the policy of consumer protection that no doubt informed the CMA’s thinking on the right to a refund when a consumer contract could not be performed. Even under the basic principles of classical contract law, where justice corresponds to an exchange of assumed benefit to both sides, it is difficult to detect the substance of the bargain where over half the price is paid and nothing received in return. This is not a harsh or bad bargain – it is no bargain at all. Evidently, the decision in *Willis* creates no precedent and could safely be ignored, but the outcome illustrates the difficulties encountered by consumers when their refund entitlements were determined by the operation of traditional contract law rules.

It might be argued that much of the above criticism is misdirected: consumer law is created by legislators and enforced by regulators acting in the public interest; it is not a judicial task to mould common law doctrine to fit a consumer protection agenda for which it was not designed. There are, of course, compelling reasons why judges abjure policy considerations when resolving disputes about contract rights. The constitutional and institutional constraints on courts were identified recently by Lord Burrows in *Philipp v Barclays Bank UK plc*.<sup>36</sup> Lord Burrows denied that courts could address social problems (in this case, authorised push payment bank fraud) by imposing novel common law duties on parties. Dealing with this form of fraud was a matter for regulators and legislators, who had the necessary expertise and resources, rather than judges.<sup>37</sup> The extent of the social upheaval created by Covid may only have strengthened the judicial conviction that contract

<sup>32</sup>CMA Guidance: *Statement on Coronavirus (COVID-19), Consumer Contracts, Cancellation and Refunds* 28 August 2020.

<sup>33</sup>Section 1(2).

<sup>34</sup>*Neil Willis v Offley Place Hotel*, Oxford County Court, 7 April 2021.

<sup>35</sup>See generally P Gurney ‘The battle of the consumer in postwar Britain’ (2005) 77 *Journal of Modern History* 956 at 957.

<sup>36</sup>[2023] UKSC 25.

<sup>37</sup>*Ibid.*, at [6] and [22]–[24].

law has little to contribute to the achievement of policy goals.<sup>38</sup> But disengagement from policy cannot be absolute, as the English Commercial Court understood recently when considering the effect of an arbitration clause in a consumer contract. The judge refused to enforce against a consumer the final award of an arbitration conducted in San Francisco under Californian law because it was contrary to the public policy of consumer protection enshrined in the CRA 2015. This was notwithstanding that the consumer had accepted the arbitration process by agreeing to the contract terms.<sup>39</sup>

The common law rules of contract may not have been developed with consumers in mind, but effective regulation of consumer contracts often depends not only on the operation of specialised regulatory regimes but also on the interpretation of common law rules provided by judges through case law. The application of these common law rules is rarely moderated to suit consumer contracting contexts. The pandemic shows how the common law may erect barriers to regulators pursuing their consumer protection mandate. The undesirable consequence is that consumers may be left with no effective mechanism to clarify what rights they have and to enforce them. This deficiency is already being addressed by government through proposals to allow regulators to enforce consumer law directly without going through the courts for an authoritative determination of the legal position.<sup>40</sup> As a result, the judicial interpretation of contract law principles will become less significant to the operation of consumer law. The corollary to this is that consumer contract issues will exert even less influence over common law development, augmenting the position of contract law as a set of default rules designed for businesses. I have examined this problem in more detail elsewhere,<sup>41</sup> and it suffices to say here that the Covid episode provides further evidence, if it were needed, that the common law of contract has divested itself of any consumer-welfarist component in favour of the market-individualism that predominantly serves the interests of the commercial contracting community.<sup>42</sup>

## 2. Commercial contracts and Covid

Outbreaks of infectious disease are not uncommon, and the economic risks associated with them are often specifically allocated within contract terms.<sup>43</sup> The disruption caused by the pandemic and the actions taken to control it were largely unanticipated by commercial contractors, however. Businesses had little influence over the national response to the crisis and almost no time to plan for it. These factors have not influenced common law reasoning in post-pandemic contract disputes, despite the evident tension between reasonable commercial actions taken in response to the pandemic and the contract law rules. For example, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* the Supreme Court held that the presence of a ‘no oral modification’ clause in a contract prevented any informal oral variation of the agreement from taking effect.<sup>44</sup> Given that firms had to react quickly to constantly changing pandemic circumstances, it seems inconceivable that a joint decision to vary a contract, hastily taken by the parties during the height of the crisis in order to mitigate its effects, might be unenforceable in law because of a failure to comply with the formal process for modification set out in the contract. Similarly, the Supreme Court’s tolerance for the use of superior economic power to force a party to accept new and less favourable terms,<sup>45</sup> contrasts sharply with the appeals made to commercial parties during the emergency to act reasonably, co-operate with one another and forgo self-interest for the national good. The reliance on business relations to assuage the contract challenges produced by the pandemic implicitly recognised there was little role for contract law during

<sup>38</sup>See DA Hoffman and C Hwang ‘The social cost of contract’ (2021) 121 *Columbia Law Review* 979.

<sup>39</sup>*Payward Inc and Others v Maxim Chechetkin* [2023] EWHC 1780 (Comm).

<sup>40</sup>See Digital Markets, Competition and Consumers Bill, Part 3 Enforcement of Consumer Protection Law, cl 139.

<sup>41</sup>Mitchell, above n 30, ch 3.

<sup>42</sup>JN Adams and R Brownsword ‘The ideologies of contract’ (1987) 7 *Legal Studies* 205.

<sup>43</sup>Most obviously in insurance contracts: *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* [2021] AC 649.

<sup>44</sup>[2019] AC 119.

<sup>45</sup>*Pakistan International Airline Corpn v Times Travel (UK) Ltd* [2023] AC 101.



a public health crisis. We discuss the role of relational norms during the Covid emergency in section 3. Below, we examine the response from the courts to the commercial contract issues arising from the pandemic thus far, noting that the Covid context has exerted little influence over case resolution.

**(a) *The tenacity of pacta sunt servanda***

Most contract disputes arising out of the pandemic involve claims that obligations were discharged or modified either through the operation of contract terms or the defaults of contract law. The emerging case law maintains a strict approach to contract enforcement, in keeping with the basic principle of *pacta sunt servanda*. Where the contract terms are interpreted as allocating pandemic losses to one of the parties, the courts will enforce that risk allocation.<sup>46</sup> Claims that a ‘material adverse change’ or ‘force majeure’ clause excuses a party from their obligations have been closely scrutinised by courts. Lockdown laws are generally treated as an irrelevance to performance, one of the ‘vicissitudes of business’ that contractors should expect.<sup>47</sup> Other common law jurisdictions have adopted a similar position, rejecting arguments that the pandemic justifies withdrawal from a contract.<sup>48</sup>

Clearly every case must be decided on the basis of its facts. But the strict approach to enforcement taken by the courts so far presupposes that one party has assumed the risk of pandemic losses or, to put it another way, that these risks have been priced into the contract, even where the agreement predates the outbreak and did not anticipate it.<sup>49</sup> In many cases, it is doubtless correct to conclude that a particular risk has been allocated to a party because the contract wording clearly says so.<sup>50</sup> In other instances, such as when the pandemic consequences were unforeseen or where the contract wording is vague, it may be less obvious who assumes responsibility for a risk. The parties may invite a court to decide on risk allocation by using open-textured contract language that permits contract adjustment, renegotiation or outright abandonment where a ‘material adverse change’ occurs in the contracting environment. The meaning of ‘material adverse change’ is not self-evident but can only be interpreted in the context of what has occurred. Courts have, however, tended to adopt reductive interpretations of the contract language in pandemic cases – notably where the obligation is to pay money – largely denying that the unexpected effects of the Covid outbreak are a material change, and eschewing consideration of the wider contract background.

To illustrate, in one decision it was held that the suspension of Premier League football matches and the later resumption of games under a reorganised fixture list played in empty stadia, was not a ‘fundamental change’ to the format of the competition justifying a reduction in fees payable to the League under a contract for the broadcasting rights.<sup>51</sup> It is of course well-known that courts do not enquire into the adequacy of consideration, so whether the broadcasting rights to a game played without supporters are inherently less valuable is not something a court would investigate. But it has been shown that the presence or absence of fans may have a tangible effect on the outcome of games such that it is not unreasonable to suggest that an elite club football match conducted without fans is a fundamentally different entity to one played in the presence of supporters.<sup>52</sup> It may well have ‘gone without saying’ at the time the contract was made that fans would be there, creating the atmosphere

<sup>46</sup>See eg *Westminster City Council v Sports and Leisure Management Ltd* [2021] EWHC 98 (TCC), at [51].

<sup>47</sup>*Westminster City Council*, *ibid* at [48].

<sup>48</sup>In Canada see *Cineplex Inc v Cineworld Group plc* 2021 ONSC 8016; in Australia see *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* [2023] HCA 6.

<sup>49</sup>J Morgan ‘Frustration and the pandemic’ (2021) 137 LQR 563; *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm); *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB).

<sup>50</sup>See eg *Cineplex v Cineworld*, above n 48, where ‘outbreak of illness’ was specifically excluded from the scope of a ‘material adverse effect’ clause.

<sup>51</sup>*The Football Association Premier League Ltd v PPLive Sports International Ltd* [2022] EWHC 38 (Comm).

<sup>52</sup>Lack of fans removes home advantage, significantly altering the complexion of games: D McCarrick et al ‘Home advantage during the COVID-19 pandemic: analyses of European football leagues’ (2021) 56 *Psychology of Sport & Exercise* 102013.

of the game and enhancing its entertainment value. Predictably, however, the court took the view that there was no gap in the contract and no need for an implied term: a football game was still being played and could be broadcast. Reasonable expectations about the presence of fans played no role in the determination of what the purchaser was buying or what constituted a ‘fundamental change’ to the event. Parties faced with the possibility that the court would imply a term or hold that the situation had fundamentally altered might have been encouraged to renegotiate the price of the rights to reach some mutually acceptable resolution. Instead, the judicial tendency to interpret and apply contract terms in an absolute manner encourages the parties to stand their ground, deterring the kind of contract compromises, adjustments and loss-sharing that were reasonable, even vital, in the face of the extraordinary pandemic circumstances.

As we saw in relation to consumers, contracts will be discharged where the pandemic or its effects are treated as a frustrating event. This will be rare in a commercial contract. There is relatively little case law from the English courts examining the operation of frustration on a commercial agreement affected by the pandemic.<sup>53</sup> Complex contract terms will usually allocate the risk of otherwise frustrating events to one of the parties (or will be taken to have done so), rendering the doctrine irrelevant. Thus, in one case, an airline that could not operate flights remained liable for payments under the aircraft leasing agreement. The contract was ‘drafted to make it clear that [the lessee’s] obligation to pay rent continued in almost any conceivable circumstances’.<sup>54</sup> A plea of ‘frustration of purpose’ is also unlikely to be successful. Frustration of one party’s purpose will not frustrate the entire contract.<sup>55</sup> Contracting parties and judges may both prefer courts to prioritise contract terms over legal doctrine. The parties will prefer it because it maintains their control over the contract content. For the courts, upholding the pre-pandemic contract relieves the judge from the task of risk allocation through implied terms or the operation of the doctrine of frustration, potentially triggering a discretionary financial adjustment under section 1(2) of the Law Reform (Frustrated Contracts) Act 1943. In a choice between two uncertain processes for determining the allocation of risks arising from the pandemic (interpretation of the contract terms or the default statute) it is perhaps thought desirable for courts to commit to party autonomy and apply the contract terms, rather than the legal defaults. The drawback of this approach is that it produces uncompromising all-or-nothing results which may be contrary to a commercial expectation, likely to be particularly potent during a pandemic, that the risks arising from an unforeseen event will not be imposed solely on one party unless the contract unequivocally indicates this.

Whatever challenges the pandemic presented for commercial contractors, courts have shown they will not lightly depart from the core principles of freedom and sanctity of contracts. The view that ‘the contract either binds or does not bind’ is as accurate today as it was when this statement was made in 1943.<sup>56</sup> The absence of a common law *via media* between unalloyed contract performance and discharge for frustration is unfortunate, but not surprising. English courts have little latitude within traditional contract doctrine to mandate contract compromises or adjustments. Implied terms provide no solution if the contract is interpreted as complete and entire. The equitable doctrine of rectification cannot be used to revise the underlying bargain, only the mistaken expression of it.<sup>57</sup> The principle of promissory estoppel offers some protection to a contractor who relies on an informally agreed variation to an agreement,<sup>58</sup> but is not easily established and, being derived from equity, has limited scope (it is a ‘shield and not a sword’). It is also uncertain whether the estoppel principle affords temporary or permanent relief against a party reasserting the terms of the original contract. It has been argued that a power of equitable adjustment exists in Scots contract law, and that this could be used to modify

<sup>53</sup> Although see eg *Salam Air*, above n 49.

<sup>54</sup> *Salam Air*, above n 49, at [51].

<sup>55</sup> *Herne Bay*, above n 31.

<sup>56</sup> *James B Fraser v Denny Mott & Dickson*, above n 22, per Lord Wright, at 43.

<sup>57</sup> *Cherry Tree Ltd v Landmain Ltd* [2013] Ch 305 at [134].

<sup>58</sup> *Central London Property Trust v High Trees House* [1947] KB 130.

contract obligations in the light of the Covid outbreak.<sup>59</sup> It is doubtful that a similar power to adjust exists under English law. Even if it did, judges would be reluctant to use it because of their general antipathy towards equitable interventions into commercial contracts and the fear of undermining certainty.<sup>60</sup>

English courts may be more favourably inclined towards the parties' attempts to contract for the duties they owe to one another when faced with a significant and unanticipated change in circumstances, but even this may not provide a complete solution for parties claiming a right to alter the agreement in response to unexpected events. Parties can include obligations to renegotiate or end contracts in cases of substantial hardship or material changes in the economic environment. In many cases these terms will require interpretation and, as we saw above, the bar is set very high over what constitutes a material change or serious hardship. A commercial contractor is usually required to accept some degree of adversity during performance, and the hardship pleaded must be sufficiently weighty to trigger an obligation to adjust the bargain (usually by reopening price terms).<sup>61</sup> There is also the possibility that terms stipulating renegotiation of contracts may fail for uncertainty, or be interpreted as unenforceable agreements to agree, although parties can usually avoid these outcomes by including a dispute escalation process, such as referral to an industry expert or arbitrator, to resolve contentious issues.<sup>62</sup> In addition, the focus on express contract terms in determining risk allocation places contract interpretation at the centre of the analysis when courts are faced with the commercial effects of the pandemic. This remains the case even where the contract was negotiated and agreed well before the outbreak. Unlike the operation of other contract doctrines, the inherent flexibility of interpretation gives courts an opportunity to factor the broader consequences of the pandemic into legal reasoning. However, courts have largely applied plain meaning contract interpretation methods, circumscribing the impact of the emergency on commercial agreements. We consider this further below.

### **(b) The significance of contract interpretation**

Contract interpretation formed the basis of the most significant contract decision produced by the Covid outbreak to date: the test case of *Financial Conduct Authority v Arch Insurance (UK) Ltd*.<sup>63</sup> One aspect of this complex litigation concerned the interpretation of disease clauses in business interruption insurance policies taken out by firms that subsequently had to close under national lockdown regulations. Precise policy wording varied between insurance companies, eight of whom were represented in the litigation, but policies typically stated that cover was provided for business interruption 'following any occurrence of a notifiable disease within the vicinity [or a specified radius, eg, 25 miles] of the premises'. Insurers initially resisted claims under the policies, arguing that cover was limited to localised outbreaks of a notifiable disease where the authorities had specifically responded by closing businesses in the immediate vicinity. It did not cover business losses caused by a pandemic that resulted in a nationwide lockdown. The Supreme Court noted that 'some 700 types of policies across over 60 different insurers and 370,000 policyholders' were potentially affected by the outcome of the litigation.<sup>64</sup>

The dispute pitted reasonable business expectations against the wording of an insurance policy that had anticipated the outbreak of disease, but not the extreme measures taken to control it. The Supreme Court ultimately concluded that the businesses were covered, although their lordships differed on the interpretation method applied to the policies to reach this outcome. The majority of the Supreme

<sup>59</sup>MacQueen, above n 4.

<sup>60</sup>*UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] 2 Lloyd's Rep 621, per Gloster LJ at [347]; *Yeoman's Row Management Ltd v Cobbe* [2008] WLR 1752, per Lord Walker at [85] and [91].

<sup>61</sup>*Superior Overseas Development Corpn and Phillips Petroleum (UK) Co Ltd v British Gas Corpn* [1982] 1 Lloyd's Rep 262 at 269.

<sup>62</sup>*Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch).

<sup>63</sup>Above n 43.

<sup>64</sup>*Ibid*, at [3].

Court (Lord Hamblen, Lord Leggatt and Lord Reed) relied on the plain language of the clauses. Cover would only be provided where the notifiable disease had occurred within the specified radius of the insured business. There was no cover for losses caused by occurrence of the disease outside that radius.<sup>65</sup> But the businesses were not required to demonstrate a direct causal link between the identified Covid case within the radius and their individual business closure. The minority reached the same outcome through a more purposive interpretation method. Lord Briggs and Lord Hodge emphasised the pandemic context rather than the linguistic meaning of the clause. Lord Briggs remarked

construction requires the court to put itself into the mind of the reasonably informed reader of the contract in issue, so as to understand what that hypothetical person (rather than an insurance lawyer) would think that the parties meant by the words which they have used, in the relevant context. To my mind, that person would ask: do clauses with the radius limitations provide cover for the adverse business consequences of a national reaction to a national pandemic disease?<sup>66</sup>

In many respects *Arch Insurance* is an exceptional decision. Evidently, the Supreme Court could not consider the merits of every insurance claim in the unique context of each affected business. As a test case, *Arch Insurance* was a starting point, a decision taken on the basis of assumed facts and a representative sample of policies with the aim of providing immediate guidance both to the insurance industry and affected policyholders. Its focus was therefore on important matters of general principle, such as what an ordinary policyholder, not an insurance expert, might reasonably understand about the cover provided based on the policy documents.<sup>67</sup> Certainly, the case has not ended the litigation on the interpretation of business interruption insurance policies and their application to pandemic-related losses.<sup>68</sup>

The Covid pandemic was an essential, defining and inescapable element of the context in *Arch Insurance*. Other cases that lack the important public interest dimension of *Arch* have mostly disregarded the Covid context, tending to uphold the plain meaning of contracts and the risk allocation contained therein. In *London Trocadero*,<sup>69</sup> the tenants of premises used as a cinema maintained that there was no obligation to pay rent during lockdown periods when operating the cinema was illegal. The tenants sought to reverse the alleged unjust enrichment of the landlord, who still claimed full rent for unusable premises. The tenants advanced three arguments in support of their contention: first, the operation of a rent cesser clause in the contract; second, an implied term expanding the rent cesser clause to cover the Covid-induced illegality of continuing the business; third, the failure of the basis of the contract, viz., that the premises were intended by both parties to be used as a cinema.

Each of these arguments was dispensed with by applying plain meaning interpretation methods to the contract terms. First, the rent cesser clause only operated where there was physical damage to the property or destruction by an 'insured risk' which, on the wording of the clause, did not include pandemics.<sup>70</sup> Secondly, an implied term was not necessary either on the business efficacy or the officious bystander test. The risks were allocated by the contract and there was no gap in the agreement. Thirdly, the inability of the premises to trade as a cinema did not constitute a failure of the basis of the contract.<sup>71</sup> The critical finding was that the landlord had given no undertaking that the tenant would be

<sup>65</sup>Ibid, at [71], [74].

<sup>66</sup>Ibid, per Lord Briggs, at [321]–[322].

<sup>67</sup>Ibid, per Lord Leggatt and Lord Hamblen, at [77]–[78].

<sup>68</sup>See eg *Corbin & King Ltd and Others v Axa Insurance UK plc* [2022] EWHC 409 (Comm); *London International Exhibition Centre & Others v RSA & Others* [2023] EWHC 1481 (Comm).

<sup>69</sup>*Bank of New York Mellon (International) Ltd v Cine-UK Ltd and London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and Others* [2022] EWCA Civ 1021 at [138]; *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd and Others* [2021] EWHC 2591 (Ch) at [72] ff.

<sup>70</sup>*London Trocadero* (CA), ibid, at [126].

<sup>71</sup>Ibid, at [123].

able to use the premises as permitted.<sup>72</sup> The risk that the premises could not be used as a cinema was borne by the tenant. As with the argument for an implied term, there was no gap in the contract to be filled by unjust enrichment. To suggest otherwise would subvert the contract regime.<sup>73</sup>

The disinclination to consider what must have been the implicit understanding of the parties – the premises were to be used as a cinema and this would generate the rental income – is a manifestation of the view that commercial leases have no social context, they are ‘just leases’.<sup>74</sup> Of course, to say the leases have no context is to make a judgement that the substance of the exchange is defined and circumscribed wholly by the express terms (to provide premises; to pay rent for them) and that this is an exhaustive statement of the main obligations. Commercial leases are particularly susceptible to this discrete mode of analysis and interpretation. In *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* it was held that a lease for premises to house the EMA, an agency of the EU, was not frustrated by Brexit. The EMA had ‘the capacity, post the withdrawal of the United Kingdom from the European Union, to continue to use and/or dispose of the Premises and that it continues to have the capacity to pay rent (and perform its other continuing obligations) under the Lease’.<sup>75</sup> More implicitly, the strict approach embeds a conception of commercial tenancies as fundamentally competitive and adversarial relationships where landlords and tenants approach the lease ‘from their own commercial standpoint ... the [l]ease represents the outcome not of a common purpose but of rival negotiations driven by *different* objectives’.<sup>76</sup> This view of lease obligations is not confined to courts. The Commercial Rent Arrears (Coronavirus) Act 2022 established a binding arbitration process to resolve disputes between landlords and commercial tenants over rent arrears accrued during the pandemic. Arbitrators were given powers to write-off or reduce arrears, or to extend payment times, in accordance with principles of preserving or restoring a viable business, maintaining the solvency of the landlord and ensuring that, where possible, the tenant met its payment obligations in full.<sup>77</sup> Arbitrations conducted under the statutory scheme have generally upheld the landlord’s right to full payment,<sup>78</sup> albeit by allowing tenants to repay in instalments.<sup>79</sup> The remedial flexibility given by the statute and the relational tenor of its accompanying Code of Practice (the landlord and tenant should negotiate about ‘sharing the burden’<sup>80</sup>) has not translated into positive action by arbitrators to apportion or share pandemic losses.

The legal approach to the interpretation of commercial leases is a stark reminder that English contract law rules are founded upon a default conception of contract as involving a power struggle between antagonistic strangers. It is well-known that this does not reflect the reality of many business relationships. More importantly, during the Covid pandemic it was recognised that insistence on strict contract compliance was not a reasonable commercial response to the emergency. At the height of the crisis, contract norms were relegated to secondary importance and contractors dissuaded from relying on their contract rights in favour of dialogue and compromise. This overt dependence on relational values was only a temporary holding measure, however. As we emerge from the pandemic, contract entitlements are being reasserted and upheld with force. This sequence of events – reliance on relational behaviours in a crisis; strict enforcement of contracts when the crisis abates – is instructive

<sup>72</sup>Ibid, at [155].

<sup>73</sup>Ibid, at [147].

<sup>74</sup>Ibid, at [90], [150].

<sup>75</sup>*Canary Wharf*, above n 20, at [166].

<sup>76</sup>*Canary Wharf*, above n 20, at [218].

<sup>77</sup>Commercial Rent Arrears (Coronavirus) Act 2022, s 15(1)(a) and (b).

<sup>78</sup>*Signet Trading Ltd v Fprop Offices (Nominee) 4 Ltd and Fprop Offices (Nominee) 5 Ltd* 11 July 2022, available at <https://www.falcon-chambersarbitration.com/crca/awards>.

<sup>79</sup>See eg *Horsham District Council v Bills Restaurants Ltd* [http://www.falcon-chambers.com/images/uploads/news/Final\\_award\\_-\\_Elizabeth\\_Fitzgerald.pdf](http://www.falcon-chambers.com/images/uploads/news/Final_award_-_Elizabeth_Fitzgerald.pdf).

<sup>80</sup>*Commercial Rent Code of Practice Following the COVID-19 Pandemic* 7 April 2022, para 15. <https://www.gov.uk/government/publications/commercial-rent-code-of-practice/commercial-rent-code-of-practice-following-the-covid-19-pandemic>.

regarding why the relational contract concept has struggled to gain a firm foothold in English law. This is examined in the next section.

### 3. Relational norms and the Covid crisis

#### (a) Informal reliance on relational norms

As the crisis unfolded, direct state action temporarily arrogated the operation of private ordering in the commercial sphere. For example, a landlord's right to forfeit a business tenancy for non-payment of rent was suspended by statute.<sup>81</sup> During the first lockdown, these hard legal measures were accompanied by voluntary codes and informal guidance requesting firms to forbear from asserting their contract rights, urging instead the adoption of more relational strategies. A code of practice, developed to inform negotiations between commercial landlords and tenants concerning rent payments and arrears, appealed to parties to 'act reasonably, swiftly, transparently and in good faith' to identify 'mutual solutions'.<sup>82</sup> The parties were pressed to 'do everything reasonable to enable otherwise viable businesses to continue operating through the period of recovery'.<sup>83</sup> There was also an expectation of honest communication between parties, information disclosure, and that refusals to make concessions would be explained and justified.<sup>84</sup>

A more general statement from the government about expected commercial conduct was found in the 'Guidance on Responsible Contractual Behaviour', first issued by the Cabinet Office on 7 May 2020.<sup>85</sup> The guidance acknowledged that it could not override the operation of contract rights or contract law.<sup>86</sup> Nevertheless, the statement encouraged 'responsible and fair performance and enforcement of contracts during [the] public health emergency' and advised those affected to be:

reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes) acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party ... the availability of financial resources, the protection of public health and the national interest.<sup>87</sup>

This direction was supplemented by examples of more specific areas where reasonable behaviour would be expected: issuing calls for payment or for extensions of time for performance; responding to force majeure or breach of contract claims; acting on requests for contract variations. Similar exhortations followed from other organisations, some advancing concepts of 'relational contract' and 'equitable readjustment' to make their point.<sup>88</sup> Encouraging reasonable behaviour and preventing dispute escalation was also motivated by the practical difficulty of bringing cases to trial. Courts were closed and hearings moved online, and there was justifiable fear that excessive litigation would lead to

<sup>81</sup>Coronavirus Act 2020, s 82(1).

<sup>82</sup>Ministry for Housing, Communities and Local Government *Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic* June 2020, updated 6 April 2021, withdrawn 9 November 2021: <https://www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector/code-of-practice-for-commercial-property-relationships-during-the-covid-19-pandemic>), at paras 14 and 17.

<sup>83</sup>Ibid, at para 2.

<sup>84</sup>Ibid, at para 20.

<sup>85</sup>Cabinet Office 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' 7 May 2020, updated 30 June 2020, available at <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency>.

<sup>86</sup>Ibid, at para 7.

<sup>87</sup>Ibid, at paras 10 and 14 respectively. What this requires is set out at para 15.

<sup>88</sup>The British Institute of International and Comparative Law (BIICL) recommended the development of a 'breathing space' for commercial contractors during the pandemic: 'Breathing space – a concept note on the effect of the pandemic on commercial contracts', 27 April 2020, <https://www.biicl.org/newsitems/16411/biicl-publishes-concept-note-1>.



court overload and spiralling costs. Mediation and negotiation were encouraged,<sup>89</sup> and various arbitration schemes were created to deal with pandemic-related contract disputes.<sup>90</sup> The nudge to firms to be flexible and reasonable in their dealings with one other recognised that resort to formal law was not the most effective way to deal with the problems of delay, non-performance and financial hardship caused by the crisis. Lipshaw has observed that the assertion of contract rights often conflicts with what the public may perceive as ‘doing the right thing’, particularly in a global emergency.<sup>91</sup> The call for co-operation and negotiation acknowledged that privileging legal rights during the outbreak would have negative social effects. Contract law does not require that one acts reasonably or justifiably in exercising contractual entitlements, but insistence on full contract enforcement during the pandemic risked particularly severe consequences – pushing viable businesses into insolvency, threatening livelihoods and the supply of essential goods and services, and impeding the economic recovery.

Clearly, many contracting parties would not have to wait to be instructed by the government before working together in response to a crisis. Empirical studies consistently demonstrate that businesspeople expect mutual co-operation in their contractual dealings, motivated by the desire to achieve the planned economic outcomes from the agreement, maintain the business relationship and protect reputation.<sup>92</sup> It seems that the extraordinary circumstances around the pandemic did not alter this general business tendency towards co-operation, and indeed may have enhanced it. Soper conducted an empirical study of business attitudes during the Covid outbreak. He found a greater willingness amongst the contract managers surveyed (drawn from a variety of sectors) to collaborate in formulating workarounds to the challenges presented by the pandemic, a mindset that many respondents hoped would continue after the crisis.<sup>93</sup> In this respect the government plea for co-operation could be dismissed as preaching to the converted and unlikely to influence the behaviour of those not already inclined towards compromise. Parties in more adversarial contract settings (such as commercial leases) or that saw the pandemic as an opportunity to be exploited (through price-gouging, for example<sup>94</sup>) needed measures stiffer than coaxing to encourage the requisite attitude.

The proliferation during the pandemic of codes and guidance on reasonable conduct reflects some of the core claims of relational contract theory regarding business relationships: the inability of moment-in-time planning documents to reflect the contractual agreement as a dynamic entity where readjustment and renegotiation may be expected; the impossibility of comprehending the agreement outside of its social and economic environment; the importance of co-operation.<sup>95</sup> The encouragement of relational-type behaviours during the pandemic might instil an expectation that contract law will become more receptive to the role played by relational norms in business contracting. Any optimism here is misplaced. While parties were encouraged to co-operate, they were also counselled by influential bodies to take legal action to enforce contract rights where necessary.<sup>96</sup> The use of non-binding guidance to communicate advice about commercial conduct also ensured that contract rights

<sup>89</sup>Ibid, at para 17.

<sup>90</sup>Eg the Pandemic Business Dispute Resolution Service is a collaboration between two of the leading global dispute resolution organisations, the Centre for Effective Dispute Resolution and the Chartered Institute of Arbitrators: <https://www.cedr.com/commercial/mediationschemes/pbdrs/>.

<sup>91</sup>JM Lipshaw ‘Between rights and rites: the ironies of crisis and contract’ (2022) 85 *Law and Contemporary Problems* 77 at 85.

<sup>92</sup>See seminally S Macaulay ‘Non-contractual relations in business: a preliminary study’ (1963) 28 *American Sociological Review* 55; H Beale and T Dugdale ‘Contracts between businessmen: planning and the use of contractual remedies’ (1975) 2 *British Journal of Law and Society* 45.

<sup>93</sup>CH Soper ‘Contractant behaviour in the pandemic: a real-world survey’ (2022) 6 *Journal of Strategic Contracting and Negotiation* 87 at 95–98.

<sup>94</sup>SS Fung and S Roberts ‘Covid-19 and the role of a competition authority: the CMA’s response to price gouging complaints’ (2021) 12 *Journal of European Competition Law & Practice* 734.

<sup>95</sup>RE Speidel, ‘The characteristics and challenges of relational contracts’ (2000) 94 *Northwestern University Law Review* 823 at 823–824.

<sup>96</sup>See eg H Dodds et al ‘The BIICL guidelines: concept note 3 on guidelines for the resolution of disputes following the 2020 pandemic’, p 1, [https://www.biicl.org/documents/10696\\_concept\\_note\\_3\\_guidelines\\_english\\_bd.pdf](https://www.biicl.org/documents/10696_concept_note_3_guidelines_english_bd.pdf).

were preserved through the emergency until such time as they could be reasserted and enforced through the operation of contract law. In one case, an international airline relying on a ‘termination for convenience’ clause cancelled various purchase agreements it had with an Italian company for the manufacture and delivery of aircraft seats.<sup>97</sup> The airline was prompted to terminate after the manufacturer invoked an ‘excusable delay’ provision under the purchase agreements, citing the difficulties in sourcing supplies and testing products in light of the stringent anti-Covid measures adopted by the Italian government. The High Court supported the airline’s right to terminate, justified by the plain words of the contract unfettered by the Covid context, considerations of fair and reasonable commercial conduct, or duties of good faith.<sup>98</sup> If this decision is any indication, the relational strategies encouraged by government and adopted by firms during the crisis will have limited impact on common law development. Rather, the pandemic may have augmented and reinforced the ambivalence of English law towards the relational dimension of contract. We explore this further below.

### *(b) Relational contracts in English law*

In contracts scholarship, a distinction is often drawn between the legally enforceable contract and the expectations the parties have of each other generated by the wider business relationship. A contracting partner may be expected to display qualities of trustworthiness, willingness to co-operate and flexibility when responding to problems or the need to gap-fill during lifetime of an agreement. These expectations about conduct will rarely appear in the formal contract. A business deal that relies heavily for its success on the observance of these expectations and norms, perhaps at the expense of the legal statement of terms, may be called a relational contract. Problems in relational contracts will usually be resolved by negotiation and adjustment as necessary, underpinned by a desire to maintain the business relationship into the future. This contrasts with discrete transactions that prioritise the separation of the legal contract from its social or commercial context. Discrete agreements tend to focus on advance contract planning, strict adherence to the contract terms, and legal remedies.<sup>99</sup> In a discrete contract law (classical contract law is often taken as the exemplar) the formal contract assumes special, often exclusive, significance as the source of obligations, reducing the agreement to a transaction uninfluenced by the relationship between the parties or the broader contracting or social environment.

Lower courts in England have endorsed the basic proposition that the robust approach to the pursuit of self-interest in traditional contract law may need modifying in some circumstances. Thus, a category of relational contracts has been recognised in the case law, and the expectations raised in such contracts given substance by an implied term of good faith between the contracting parties.<sup>100</sup> The significance of this development should not be overstated, however.<sup>101</sup> The burgeoning jurisprudence around relational contracts is exceptional, an enclave within a largely formal law that presents contracting as adversarial and competitive.<sup>102</sup> The relational concept is generally confined to where the default model of contract – an exchange between economic equals conducted at arm’s length – is not appropriate because the contracting environment calls for communication, co-operation and loyalty between the parties.<sup>103</sup> These relational features have been identified only in certain contexts: long-term contracts,<sup>104</sup> contracts

<sup>97</sup>*Optimares SpA v Qatar Airways Group QCSC* [2022] EWHC 2461 (Comm).

<sup>98</sup>*Ibid.*, at [94].

<sup>99</sup>D Campbell ‘Ian Macneil and the relational theory of contract’ in IR Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil*, D Campbell (ed) (London: Sweet and & Maxwell, 2001) pp 3, 21.

<sup>100</sup>See eg *Yam Seng Pte Ltd v International Trade Corpn* [2013] 1 Lloyd’s Rep 526; *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm).

<sup>101</sup>See generally Mitchell, above n 30, pp 181–189.

<sup>102</sup>Zhong Xing Tan ‘Disrupting doctrine: revisiting the doctrinal impact of relational contract theory’ (2019) 39 *Legal Studies* 98 at 100.

<sup>103</sup>*Alan Bates and Others v Post Office Ltd (No 3)* [2019] EWHC 606 (QB) at [725].

<sup>104</sup>*Amev Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264.

between small businesses or sole traders,<sup>105</sup> and agreements between parties in a quasi-employment relationship.<sup>106</sup> Though accepted in lower courts, appeal courts have not given unequivocal support to doctrinal advances that bear a relationalist imprint. It is feared the development will undermine certainty for commercial contractors by making the exercise of contractual rights subject to vague, other-regarding standards or the operation of an ill-defined notion of fair dealing.<sup>107</sup> Accordingly, more recent decisions have stressed that a term of good faith will only be implied if the usual doctrinal test are satisfied.<sup>108</sup>

Perhaps counterintuitively, the entreaties to commercial contractors to act reasonably and in good faith during the pandemic are not likely to result in these values being more readily incorporated into contract legal reasoning. Practically, the reliance on relational modes of behaviour to resolve contract performance problems will tend to keep disputes away from courts. The emphasis on negotiation, compromise and settlement outside the contract framework has forestalled the possibility that the hurried concessions made during ‘wartime’ might be interpreted as formal contractual entitlements when ‘peacetime’ conditions resumed. Judges who may have been tempted in the extraordinary circumstances of a health emergency to modify enforcement of contractual rights on the grounds of public policy, or to develop rules around loss-sharing and adjustment, have not, so far, had the opportunity. There is little chance to consider whether the usual discrete commercial contract law rules around contract enforcement, contract interpretation, and the drastic effects of frustration, achieve defensible outcomes since contract law has largely been insulated from engagement with the effects of the pandemic. As it is, it will be the most intractable disputes, such as those involving commercial leases or complex business agreements reduced to a dense set of express terms, that will reach trial and where, as we have seen, courts will uphold the pre-pandemic statement of risk allocation. The quarantining of the general principles of contract law from contamination by the effects of the crisis will keep the law relatively stable. This will no doubt be welcome to most commercial parties and their lawyers. Contract variations made during the pandemic, such as rent concessions and deferrals, may form a fertile area for disputes about the effect of contract doctrines like the part payment rule in consideration or the operation of estoppel. But by keeping these issues away from the courts there will be minimal disturbance to existing contract law norms. Even if disputes on contracts affected by Covid do reach the stage of trial and judgment, there appears to be little appetite amongst judges to take opportunities for common law development that may be presented. One member of the Court of Appeal in *London Trocadero* remarked that the unprecedented restrictions imposed by the coronavirus legislation presented ‘no reason to disregard or disapply fundamental principles of the law of contract or to extend the law of unjust enrichment beyond its proper bounds’.<sup>109</sup>

In more principled terms, while the informal guidance produced during the pandemic was suffused with relational contract norms – preserving the relationship; maintaining values of co-operation, flexibility, reciprocity, solidarity; and propriety of means<sup>110</sup> – and these relational behaviours may have been essential to keeping contractual relationships alive during the crisis, these qualities are not, outside of a few exceptional circumstances, treated as a matter of legal entitlement. English contract law continues to resist the implication that commercial relationships are underpinned by norms of good faith (whatever the content of this) by default. As we have seen, there was no requirement for contract law to expand the role of good faith or co-operation in dispute resolution after the pandemic as these values were pursued through non-legal means. As most of the guidance produced was non-binding, English courts have generally paid no attention to it. The idea that there are essentially separate and distinct substitute worlds of contracts and relations has survived the pandemic.

The retort to this may be that since English law attaches prime importance to freedom of contract, parties who wish to develop a co-operative business relationship can achieve this by writing the

<sup>105</sup>*Yam Seng Pte Ltd v International Trade Corpn*, above n 100.

<sup>106</sup>*Bates v Post Office (No 3)*, above n 103.

<sup>107</sup>See eg *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789.

<sup>108</sup>*Candey Ltd v Basem Bosheh and Another* [2022] EWCA Civ 1103 at [35]–[36].

<sup>109</sup>See *London Trocadero (CA)*, above n 69, at [143] per Sir Julian Flaux C.

<sup>110</sup>IR Macneil ‘Values in contract: internal and external’ (1983) 78 *Northwestern University Law Review* 340 at 349.

appropriate duties, such as obligations of good faith, into their contract. A duty to act in good faith has been interpreted as requiring the parties to observe ‘reasonable commercial standards of fair dealing’,<sup>111</sup> and ‘to act honestly ... [avoiding conduct] which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people’.<sup>112</sup> But good faith duties have also been dismissed as non-binding ‘commercial mores’<sup>113</sup> and senior judges have expressed scepticism that fairness plays any role in commercial contracts.<sup>114</sup> A recent decision from the Court of Appeal has determined that there are no identified minimum standards incorporated into a good faith duty that a contracting party subject to the duty must observe.<sup>115</sup> In addition, an express duty of good faith will not moderate the exercise of other rights stipulated in the agreement that may be inconsistent with the duty. Given these limitations, it is doubtful that including good faith duties in the contract provides a complete answer for parties wishing to re-create co-operative pandemic attitudes in non-pandemic times.

More broadly, the commitment to upholding the pre-pandemic risk allocation contained in the terms of the contract reinforces the tilt back towards a more classical-style of contract law manifest in the case law over the past two decades. The Supreme Court reoriented contract interpretation in a more formal direction in *Arnold v Britton*<sup>116</sup> and *Marks and Spencer plc v BNP Paribas Securities Services Trust Co Ltd*.<sup>117</sup> The decision in *Pakistan International Airlines Corp v Times Travel Ltd* has indicated that commercial contractors are entitled to pursue their commercial self-interest, provided they do not breach the contract or violate any existing rules around duress, unconscionability or other vitiating factors. The Supreme Court endeavoured to keep lawful act duress within narrow bounds, pointing out the importance of clarity and certainty in commercial contracts.<sup>118</sup> Lawful act duress in English law may seem to have little connection to relational contract – the concept of a relational contract does not appear in the Supreme Court judgments. But if one takes the view that the decision in any particular contract case is a specific manifestation and application of a more abstract underlying principle or value in the law, then relationalism’s counterpoint – discreteness – suffuses the judgment. This endorsement from the highest court of the values of self-interest, party autonomy and certainty as the hallmarks of contract law is a setback for the further development of a legal category of relational contracts.

The forbearance from allowing the pandemic to influence contract legal reasoning will also keep contract law free from any social welfare concerns surrounding the enforcement of private law rights. Indeed, the acontextual approach that judges have adopted in the post-Covid contract case law is a positive advantage in this respect. Courts generally tasked with upholding individual contractual obligations are admittedly not well placed, for well-known reasons of competence and legitimacy,<sup>119</sup> to assess how the exercise of contract rights should be weighed against any competing public interest concerns. Apart from the constitutional limitations on the judicial role, it may also be feared that subverting individual freedom of contract and party autonomy in favour of the collective interest may cause mischief in later cases that have no obvious public interest dimension. In addition, with the effects of the pandemic receding with time, the doctrinal deficiencies that may have been exposed initially by Covid will appear less problematic, vindicating the pre-eminence accorded to stability in the law. Courts may be unwilling to allow the relative strictness of the common law approach to hardship, change of circumstances, unanticipated events, and so on, to be undermined by what might turn

<sup>111</sup>*Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch).

<sup>112</sup>*Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm) at [98].

<sup>113</sup>*Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [87].

<sup>114</sup>Lord Sumption ‘A question of taste: the supreme court and the interpretation of contracts’ (2017) Oxford University Commonwealth Law Journal 301 at 310.

<sup>115</sup>*Re: Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371.

<sup>116</sup>[2015] AC 1619.

<sup>117</sup>[2016] AC 742.

<sup>118</sup>Above n 45, at [1], [3] per Lord Hodge.

<sup>119</sup>See eg AJ Casey and A Niblett ‘The limits of public contract law’ (2022) 85 Law and Contemporary Problems 51 at 56 ff.

out as a once-in-a-generation occurrence. There is little likelihood, therefore, of Covid disrupting legal development or turning the law away from the stable and predictable path of existing default rules around which commercial parties are expected to contract.

### Conclusion: what does the Covid outbreak teach us about contract law?

It is time to draw together the threads of this survey of the post-Covid legal landscape and consider what the pandemic teaches us about contract law. First, we see that consumers are still poorly served by the common law of contract. It is well known that the contract law rules developed by judges were not designed to respond to the problems of mass consumer contracting in markets, and the pandemic has done nothing to alter this. If anything, the crisis highlighted the deficiencies of general contract law as a tool of consumer protection. This may not matter too much when consumers can rely on regulators to enforce contractual rights against firms, but, as the pandemic demonstrated, consumers and regulators may also have to rely on the operation of contract law principles which may operate to thwart regulatory objectives.

Secondly, the manner in which courts are enforcing Covid-affected contracts is indicative of broader judicial attitudes around commercial contract law and business relationships that pre-date the pandemic. Chief amongst these is a commitment to uphold the contractual allocation of risk and the reluctance to further develop principles of relational contract law. Despite the encouragement given to contracting parties to display relational behaviours in their dealings with one another, it appears unlikely that the pandemic will advance further the reception of relational norms into contracts legal reasoning in England. The choice to champion relational values during the pandemic through extra-contractual and voluntary measures reinforces the view that relational norms are ‘non-legal’, and that flexibility, conciliation, co-operation, pragmatism, and the pursuit of fair, reasonable, proportionate and good faith responses to the crisis, lie outside the sphere of contract law. The idea that the precise point of contract law is to facilitate an *acontextual* exchange supports the understanding that relations and contracts are substitutes, not complements. In view of this, the extraordinary circumstances around the pandemic seem unlikely to make judges reconsider the role of relational contract in law or expand its scope. The crisis may simply entrench the idea that *contract law* operates on a field of individualism and self-interest,<sup>120</sup> notwithstanding that, as the pandemic demonstrates, contract law can only maintain its strict approach to enforcement because non-enforceable relational norms keep performance on track.

Finally, the post-Covid case law demonstrates that there has been no change to the basic judicial expectation of commercial contracting parties, viz, that they will perform the contract as agreed, even in circumstances where performance may have become more difficult, more onerous or more costly. It is trite that legal contracts are designed to compel performance in circumstances when a deal that appeared optimal when made is no longer optimal when performed. Enforcing the terms will also have the incentive effect of encouraging the parties to include specific provisions in their contract to deal with the impact of pandemics, thus replacing state intervention with private ordering via contract entitlements. Express terms may allow for readjustments or renegotiation of obligations in the event of a global crisis, or the suspension of performance in an emergency, or an obligation to forbear from taking legal action for a period of time in specified circumstances.<sup>121</sup> Courts will be required to interpret these provisions, and there is always the danger that the terms will not have the effect the parties seek, but express contractual stipulations as to expected behaviour in a crisis may be more readily enforced by courts than vaguer promises that the parties will ‘negotiate with one another in good

<sup>120</sup>D Campbell *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford: Oxford University Press, 2022) p 359.

<sup>121</sup>JC Lipson and NM Powell ‘Contracting Covid: private order and public good (standstills)’ (2021) 76 *Business Lawyer* 437.

faith' when faced with the consequences of some unforeseen catastrophe. Indeed, given that we are unlikely to witness any major developments in the common law arising from the outbreak, the advent of the pandemic-proof commercial contract (insofar as this can be achieved) may be the only legacy for contracts from the Covid episode.