

Urgent: New Proceedings

The Secretaries of State for:

- (1) The Home Department
- (2) Health & Social Care
- (3) Business, Energy and Industrial Strategy

c/o Treasury Solicitor
102 Petty France
Westminster
London
SW1H 9GL

By email

Date 26 September 2020

Your ref

Our ref

Direct Dial

Direct Fax

Email

Dear Sirs

The Queen (on the application of (1) Simon Dolan (2) Lauren Monks & (3) Cripps Barn Group Limited v (1) The Secretary of State for the Home Department; (2) The Secretary of State for Health and Social Care (3) The Secretary of State for Business, Energy and Industrial Strategy

We act for Simon Dolan, Lauren Monks and Cripps Barn Group Limited ("Cripps").

Our clients challenge various measures recently introduced – or about to be introduced – by the Government, ostensibly to address the Coronavirus outbreak. The details of the measures being challenged are set out later in this letter and listed again at the conclusion to it.

This letter before action has been sent to the "New Proceedings" email address at the offices of the Treasury Solicitor, but given the matter's urgency, we are copying it to [REDACTED] at the Government Legal Service in view of their position as the Government's legal representative for the Secretary of State for Health & Social Care in the ongoing separate judicial review matter involving Mr Dolan & Ors.

Due to the urgency of this matter, it is not possible to give the usual notice period for a pre-action protocol letter to the defendants since, if our clients' requests are not met, they will be making an application to the Court for urgent interim relief.

Please confirm that you agree the proceedings should be brought against the three Secretaries of State referred to above or whether it should include, in addition, the two other Ministers who signed the relevant legislation. Alternatively, if you consider that the Secretary of State for Health and Social Care would be the appropriate sole defendant no doubt you will let us know.

A OUR CLIENTS

Mr Dolan

The Secretaries of State will be familiar with Mr Dolan as we previously wrote to the Home Secretary on behalf of Mr Dolan in June following her announcement of the threatened introduction of new restrictions requiring travellers to England to self-isolate following their arrival. Mr Dolan is also continuing to challenge the Secretary of State for Health and Social Care and the Secretary of State for Education in the existing judicial review proceedings in action No. CO/1860/2020 which are currently under appeal.

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Mr Dolan successful businessman and entrepreneur who owns several businesses in the UK. He is a UK citizen but resides in Monaco.

Ms Monks

Ms Monks is a UK citizen and an observant member of the Roman Catholic church, living in England with her son.

Cripps

Cripps is a company incorporated in England & Wales which operates in the hospitality and leisure sector, specialising in the provision of wedding events.

Cripps' business was established in 1990 and our client was incorporated in 2008. Our client operates at seven venues; six are converted agricultural barns in English countryside locations; the seventh is a giant yurt in a walled garden on an estate in Staffordshire. Each premises is licensed to conduct civil weddings and equipped to manage wedding events on behalf of its customers who are the brides and bridegrooms getting married.

In the year ended 31 March 2020, Cripps employed over 350 people, organised 950 events and had a turnover of £13.8M. A little over 70% of Cripps' turnover is generated from catering and bar services with the rest comprised of venue hire and the provision of accommodation.

B THE ISSUES IN THE CLAIM

The background

In March 2020, in response to the spread of the novel coronavirus known as SARS-CoV-2, the virus which causes the respiratory illness Covid-19, the authorities in the UK introduced drastic measures aimed at slowing the spread of the infection. This included what has become known as the "lockdown". The lockdown involved the most significant and serious curtailment of civil liberties ever imposed on the citizens of the UK since it has been a democracy.

It remains a source of contention as to whether the lockdown was strictly necessary for the reasons given at the time (i.e. primarily to protect the National Health Service from being overwhelmed by a surge of hospital admissions for Covid-19) and whether it should have continued for as long as it did, bearing in mind the huge harms the lockdown was creating. In mid-April, the Government introduced "five tests" which it said needed to be satisfied before the lockdown could be eased or tightened again. These were all based around Covid-19 and its impact on the NHS. There was no suggestion at the time by Ministers in their public statements concerning the five tests, that a wider cost-benefit analysis was being undertaken weighing up the impact on non-Covid considerations.

As the severity of the Covid-19 pandemic eased during the summer, the Government applied the five tests and belatedly started to slowly relax the lockdown measures. This culminated in the making of new regulations on 3 July 2020 which largely, but not entirely, revoked the earlier highly restrictive lockdown measures. By this time the numbers of cases and deaths attributed to Covid-19 had been drastically reduced. However, after 3 July, in response to what were perceived as localised outbreaks of the disease, the Government began to introduce area lockdown measures in places such as Leicester. These included severe restrictions, but were confined to specific areas of the country.

The Government had also introduced controversial travel regulations in June which imposed a requirement on incoming travellers to self-isolate for 14 days on their return to England. (The devolved Governments imposed similar laws). For the first time, the public have been forced by law to wear face coverings in certain settings such as in shops, travel hubs and on public transport.

However, as the enormous damage caused by the lockdown measures continued to be acutely felt, the Government began to encourage the population to return to work and for children to return to school from which the vast majority had been effectively excluded since the end of March. It promoted the idea of eating out at restaurants to support the leisure sector and subsidised meals to encourage people to go out in the evenings.

By the time the schools went back, according to the figures published by NHS England on 10 September, as at 3 September, out of 110,031 occupied hospital beds in England, just 468 contained Covid-19 patients. At the same date, out of 2513 patients occupying mechanical ventilation beds in England, there were only 58 such patients suffering from Covid-19. ONS statistics meanwhile were indicating that Covid-19 deaths were now only a tiny percentage of the overall numbers of deaths of people in the UK. There has also been much comment and debate among experts about the significance of increased numbers of cases at a time when England's Covid-19 testing capacity has been massively increased when compared with previously. The flaws in the PCR test used to test for Covid-19 such as its ability to generate false positives in people who have long recovered from their illness, is another factor that has attracted comment. Hospital admissions, according to NHS England's situation report published today, showed that daily admissions in England for patients diagnosed with Covid-19 fell slightly from 290 on 23 September to 259 on 24 September.

Meanwhile, figures published throughout the pandemic by NHS England have continued to show clearly that for the vast majority of the working and school aged population, for those who were not already suffering from other pre-existing medical conditions, the risks of dying from Covid-19 are statistically minute. For example, according to NHS England's statistics published on 24 September, since the pandemic started in February, as of 4pm on 23 September there were only 39 recorded deaths in English hospitals of people under the age of 40 years old who were not already suffering from a pre-existing illness. (And we note that any person who dies within 28 days of a positive test for Covid-19 is included in these statistics, irrespective of whether their death was actually caused by the virus). Even for the under 60 age group in the whole of England, 309 deaths of those without pre-existing conditions have been recorded in English hospitals according to the latest figures. These figures all apply to a period of nearly 7 months and represent a tiny fraction of the thousands of deaths from all causes that have occurred in England during that period in those age groups.

We think it is hardly surprising, in those circumstances, that there have been increasing calls in some quarters (and not just from Mr Dolan) for there to be more of a focus on protecting clinically vulnerable people, whilst allowing as far as possible, the rest of the population to resume their lives and livelihoods. The alternative, argue opponents of lockdown measures, is the destruction of the economy and all that goes with it as well as terrible consequences for public health (including for sufferers of serious non-Covid illnesses).

The Rule of Six Regulations

It was thus a considerable surprise that after the first week of September at a point where the pandemic was fading, the Government began making noises about tightening, rather than easing further, the lockdown measures that remained in place.

On 9 September 2020, the Prime Minister Boris Johnson, held a press conference with his senior scientific advisers and announced a significant tightening of national restrictions. These were ostensibly aimed at curbing the spread of Covid-19 and, we were told, were going to be implemented into law by the Government. This was in response to data presented by the Chief Medical Officer Chris Whitty at the same press conference. Mr Whitty's presentation indicated an acceleration in the numbers of new cases of Covid-19 in Spain and France as well as the UK. The presentation contained no data, however, concerning hospitalisation figures for the UK or of deaths due to Covid-19. Nor was anything said about NHS critical care bed capacity. Mr Whitty's theme was that early action was needed to prevent matters becoming worse. His presentation clearly showed that the sharpest increases in new cases of Covid-19 were in the younger, less vulnerable age groups.

It was not until 13 September 2020, however, that the first legislation to implement the new restrictions was made and signed into law by the Home Secretary.

This legislation in question was the *Health Protection (Coronavirus, Restrictions) (England) (No.2) (Amendment) (No.4) Regulations 2020 No.986* ("the Rule of Six Regulations). The Rule of Six Regulations came into effect at 12.01am on 14 September 2020 and were laid before Parliament at 10.30am on 14 September. In common with most of the other related "Health Protection" regulations introduced in

connection with the lockdown, they were implemented using the "emergency procedure" under the Public Health (Control of Infectious Disease) Act 1984 ("the 1984 Act") and contained the following certificate:

"In accordance with section 45R of that Act the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament."

The Rule of Six Regulations amended an earlier statutory instrument – the *Health Protection (Coronavirus, Restrictions) (England) (No.2) Regulations 2020* ("the No.2 Regulations") which had been made by the Secretary of State for Health and Social Care on 3 July 2020. The No.2 Regulations were also made using the emergency procedure although they had involved an easing of the previous lockdown measures then in force.

Since the coming into force of the No.2 Regulations, the Government had already introduced dozens of similar regulations applying to localised areas of England, in many cases containing even tougher restrictions on individuals and businesses. The No.2 Regulations had themselves been amended by the *Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020* ("the Gatherings Regulations") which significantly increased the size of the fixed penalty notice that must be levied on those organising certain gatherings to £10,000. The Gatherings Regulations were introduced under the emergency procedure and certified as urgent by the Secretary of State for Health & Social Care on 26 August and came into force on 28 August.

There was no mention anywhere in the Rule of Six Regulations of the change announced by the Prime Minister in his statement on 9 September, whereby it would become compulsory for venues such as pubs, bars and restaurants to collect customer contact details or require customers to use the new NHS track and trace mobile application. The legislation implementing these new rules *The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 No. 1005* were subsequently made on 17 September under the emergency procedure having been certified as urgent by the Secretary of State for Health and Social Care, and came into force in two stages on 18 and 24 September.

The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 No.1008 ("the Booking Regulations") were made on 17 September and signed by Nadhim Zahawi the Parliamentary Under Secretary of State for Business and Industry. These regulations were again made using the emergency procedure and certified as urgent. They came into force on 18 September. The Booking Regulations imposed obligations on pubs, cafes and any establishment providing food or drink for consumption on its premises not to take bookings for groups of more than 6 (unless falling within exemptions). But they went further and imposed obligations on the venue to "take all reasonable measures" to prevent "mingling" by one group with another and to ensure persons remain seated whilst consuming food or drink. The Booking Regulations are punishable via fixed penalty notices or by prosecution leading to fines.

The making of the Rule of Six Regulations was a serious blow to our clients. They represented a serious interference with our individual clients' civil liberties by once again restricting their ability to mix socially, including at home, with family members and friends beyond their own household (or "linked" household) or to attend and practice religious worship and to gather for the purposes of protest (except as part of a compliant organised protest). The economic impact of the Rule of Six Regulations was also severe.

For our client Cripps and no doubt large numbers of hospitality and events businesses throughout the country, the Rule of Six Regulations represented an especially serious development, which threatened to cause irreparable harm to Cripps' business.

The Rule of Six Regulations imposed a limit of 30 persons who could gather for a wedding reception. Also, whereas previously, Government Guidance on such events had not been binding in law, the Rule of Six introduced a new requirement to take specific account of that guidance.

The guidance for wedding receptions is itself full of numerous (onerous) restrictions and limits on activities and the freedom of people at a wedding event to engage with each other in any kind of celebratory way.

The guidance requires that people avoid singing, shouting, dancing and even stipulates what should happen during cake cutting and bouquet throwing.

The effect of the Rule of Six Regulations was thus to make life extremely difficult for Cripps to carry on its business since few couples wanted to limit the size of their wedding events to just 30 persons, let alone to be constrained by the guidelines. Further, Cripps' venues are designed to accommodate much larger groups and are not well suited to such small wedding events. In fact, the spaciousness of the venues is an advantage over smaller venues from the point of view of holding organised gatherings safely. Social distancing is easier to accommodate in such premises. Accordingly, our client could not understand why it should be prohibited from holding a well organised event for more than 30 people in a spacious converted barn, while smaller more cramped restaurants and bars would still be permitted to have a far greater numbers of people eating and drinking on their premises at the same time without any upper limit being imposed at all.

As a result of the introduction of the Rule of Six Regulations, our clients considered that these new restrictions ought to be challenged by way of an immediate judicial review, possibly to be accompanied by an application for interim relief.

The Curfew Regulations

However, shortly after the introduction of the Rule of Six Regulations on 14 September, and before any legal action could be mounted, speculation began in the press began that the Government was planning even more draconian restrictions to follow on soon after the Rule of Six Regulations.

There was mention in some quarters from as early as 16 September that measures such as a possible curfew would be imposed on venues. Then, over the weekend of 19-20 September, it was announced that the Prime Minister would be making a statement in the House of Commons and on television on Tuesday. It was expected that he would announce even tougher lockdown restrictions including possible curfews.

In view of these developments, our clients were not in a position to sensibly take legal action without first assessing how the ground might be shifting following the Prime Minister's announcement.

On 21 September, Chris Whitty and Sir Patrick Vallance held a joint televised address at which they announced their concerns about rising Covid infections. They produced a chart suggesting that a possible scenario ("not a prediction") could see 50,000 cases of Covid-19 per day by October and 200 deaths per day by November, if further measures were not taken soon to curb a resurgence in infections. They did not take questions from the media following their announcement. Nor did they announce any new restrictions themselves.

The next day, on 22 September, the Prime Minister announced more restrictions would indeed be introduced. These were to include from the evening of Thursday 24 September, a 10pm curfew forcing pubs bars and restaurants to close at that time, enforced table-service only at such establishments, more rules on the wearing of face coverings to include, for example, shop staff and a reduction of the maximum permitted size of, inter alia, wedding parties to just 15 people.

The Prime Minister's announcement was followed by the implementation of the *Health Protection (Coronavirus, Restrictions)(England) No.2 (Amendment)(No.5) Regulations 2020 No.1029* ("the Curfew Regulations"). The Curfew Regulations were made (again using the emergency procedure) on 23 September by the Parliamentary Under Secretary for Health, Lord Bethell and primarily came into force at 5am on 24 September although some provisions do not come into force until 28 September.

Separate statutory instruments extending the compulsory wearing of face coverings were also made into law as the Prime Minister had indicated they would be. This was done via *The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 3) Regulations 2020 No.1026* ("the Mask Regulations"). The Mask Regulations were signed by the Secretary of State for Health and Social Care on 23 September and came into force on 24 September. They were again introduced using the emergency procedure.

The reduction in the Curfew Regulations to the maximum size of wedding ceremonies and receptions to just 15 persons threatens to do further, irreparable harm to Cripps' business (and no doubt many other

similar businesses). Obviously, a limit of just 15 persons is far too small for most weddings and would, in any event, be totally inappropriate for venues such as Cripps' barns which have a capacity of over 100. Customers of Cripps will understandably not wish to pay hire tariffs appropriate to such venues for such small wedding receptions.

The Curfew Regulations will thus completely destroy the ability of Cripps to operate its business.

Cripps' attempts to mitigate some of the damage caused by the various lockdown measures by seeking to operate some of its venues as restaurants will equally be frustrated by the above mentioned legislation and guidance. All of this will put the survival of a well-established and popular family business at risk – along with hundreds of jobs and livelihoods. The same is no doubt true for many other thousands of jobs in the events and hospitality industry throughout the country.

Further, Cripps has built a business which depends very much on the professionalism and experience of its staff and the high level of service they provide. If Cripps is forced to make large scale redundancies, it will find it very difficult, if not impossible to find and replace the skilled employees it will have lost, and to rebuild its goodwill.

Improper use of the emergency procedure

We note that as it has done throughout the pandemic, the Government has repeatedly used the "emergency procedure" in section 45R of the 1984 Act to pass legislation into law without the need for prior Parliamentary scrutiny and approval. In each case, the Minister has certified all of the relevant legislation as having been made under that emergency procedure because of its alleged "urgency", thus avoiding the need for prior Parliamentary approval.

We cannot see any objective justification for the Ministers concerned to have signed off on the regulations referred to above as being required as a matter of "urgency" so as to justify making them without prior Parliamentary approval.

In an interview given after the Rule of Six Regulations had come into force, Sir Graham Brady MP, Chairman of the Conservative 1922 Committee of MPs criticised the Government on precisely this point. For example, he observed during a radio interview on 21 September that there was no good reason why the Government could not have called a debate in Parliament about the Rule of Six Regulations themselves on the Thursday before they were made, there having been plenty of Parliamentary time available.

Likewise, in relation to the Curfew Regulations, the Government was able to schedule a televised address by its Chief Medical and Scientific Officers on Monday 21 September and the Prime Minister made announcements on Tuesday 22 September. The decision to make the new restrictions that would be put into the Curfew Regulations must presumably have been made before that. Yet the Curfew Regulations themselves were not made until 23 September and brought into force in the early hours of 24 September. The parts of the Curfew Regulations which have the effect of reducing the size of wedding gatherings are not due to come into effect until 28 September.

How can it be argued that there was sufficient "urgency" to introduce these measures so as to justify avoiding Parliament's involvement? No evidence has been produced in support of the measures or the urgent need to introduce them, such that a short delay to allow for Parliamentary scrutiny would not have been possible. Throughout this time, deaths from Covid-19 in England have continued to be an extremely small percentage of the total deaths recorded and hospital admissions for suspected or actual Covid-19 patients have not increased dramatically in line with new cases.

Moreover, workers in shops have not previously been obliged by law to wear face coverings and have worked throughout the pandemic for many months without such an obligation, including when the lockdown was at its height. Yet suddenly, Ministers have certified that it is "urgent" that legislation be introduced to make such wearing of face coverings compulsory for all such workers in the whole of England. No evidence has been produced to justify this.

The imposition of huge £10,000 fixed penalty notices for organisers of certain gatherings along with other new criminal offences for failing to prevent customers "mingling" with each other or ordering food or drink

4. The decisions to introduce the Measures were not made on the basis of any specific scientific evidence that any of them would make any material difference to the transmission of Covid-19.
5. The making of the Measures relied on irrelevant considerations and failed to take into account relevant considerations, particularly in balancing the harms caused by the Measures and that as a result the Measures are, consequently irrational;

Our clients will serve the necessary evidence in support of these grounds with their proceedings.

D REMEDIES SOUGHT

Final remedies

Our clients seek:

1. to quash the Measures in their entirety or alternatively to return the Regulations to the same state as the original No.2 Regulations;
2. to quash the parts of the guidance restricting the numbers of persons who may gather in a restaurant, pub or café or alternatively an order that it be moderated to impose a limit greater than 30, that the court considers proportionate.
3. a declaration that the restrictions imposed by the Measures are unlawful and/ or not rational and/ or were not proportionate.

Interim injunctive relief

For the reasons explained above, our clients believe that the Regulations are unlawful, inter alia, because of the manner in which ministers have improperly certified them as being appropriate for the emergency procedure on the basis of "urgency" when they could and should have been laid before Parliament for scrutiny and debate before being made law.

The effect of their introduction will be to cause irreparable harm to, inter alia, our client Cripps and many businesses throughout the country unless they are quashed.

As Sir Graham Brady MP has put it:

"There is now no justification for ministers ruling by emergency powers without reference to normal democratic processes. It is essential that going forward all of these massively important decisions for family life, and affecting people's jobs and businesses, should be exercised with proper supervision and control."

Whilst Sir Graham's amendment to the forthcoming vote next Wednesday to renew the Coronavirus Act may well be approved by MPs, it will not have legally binding effect and will do nothing to prevent the serious and irreparable damage being caused by the Regulations. Hence our clients will be seeking to prevent the imposition of the Regulations and the serious harms they will cause by means of an application for urgent interim relief.

In order to reduce the scope of the issues and argument that would otherwise be before the Court on the interim injunction application, for the purposes of that application alone – but not the proceedings as a whole – the sole ground on which our client may choose to base the application for interim relief, is the improper use by Ministers of the s45R emergency procedure.

The fact that only some legislation implemented using the emergency procedure is challenged in these proposed proceedings should not be taken as an indication that our clients accept the legality of other statutory instruments that have become law on the same basis.

E **PROTOCOL FORMALITIES**

Proposed claimants: (1) Simon Dolan, (2) Lauren Monks and (3) Cripps Barn Group Limited

Proposed defendants: (1) The Secretary of State for Health and Social Care; (2) The Secretary of State for the Home Department; (3) the Secretary of State for Business & Industry

Interested Parties: None so far as we are aware

Claimants' legal advisers: Wedlake Bell LLP

Contacts: (1) Michael Gardner

[REDACTED]
[REDACTED]
[REDACTED]

Defendants' legal advisers: Government Legal Service (contacts to be confirmed)

Law/guidance challenged: *The Health Protection (Coronavirus, Restrictions) (England) (No.2) (Amendment) (No.4) Regulations 2020 No.986*

The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020 No.1008

The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 No.907

The Health Protection (Coronavirus, Restrictions) (England) No.2 (Amendment) (No.5) Regulations 2020 No.1029

The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 3) Regulations 2020 No.1026

Covid-19 Guidance for wedding and civil partnership receptions and celebrations updated on 24 September 2020

ADR: Our clients are ready to engage in alternative dispute resolution to resolve the issues raised in this letter if the measures under challenge are withdrawn.

F **TIME FOR RESPONSE**

If the Measures are not withdrawn or a satisfactory commitment made to withdraw or at least moderate them to our client's satisfaction by **5.30pm on Tuesday 29 September 2020**, our clients will issue proceedings and make an application on notice for interim relief in the Administrative Court against the Secretaries of State responsible for, in our clients' view, improperly certifying the Regulations as being appropriate to be made using the emergency procedure.

Yours faithfully

Wedlake Bell LLP

Wedlake Bell LLP

cc [REDACTED]