

# COVID-19 and Scottish Real Estate

## July 2020 snapshot

As Scotland gradually navigates its way out of lockdown, here is an updated snapshot summarising in one place the key COVID-19 legal developments affecting commercial real estate in Scotland.

To see our previous snapshot issued on 9 June 2020, please [click here](#).

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## Significant developments since our previous snapshot alert on 9 June 2020

The commercial, legal and political response to COVID-19 is constantly evolving. The following are some of the most significant changes for Scottish commercial real estate since our previous snapshot alert:

- **Lockdown regulations:** The Scottish legal restrictions of lockdown have changed radically. Restaurants, bars, cafes and pubs are now allowed to re-open, as well as shops, holiday accommodation, libraries, cinemas, museums, galleries, hairdressers and barbers, albeit with additional safety precautions and physical distancing requirements in place. The two-metre physical distancing requirement remains the default, but has been reduced to one metre for shops, public transport and hospitality (subject to conditions). The Scottish housing market has restarted. There is no longer a general restriction on movement. However, it is now mandatory to wear a face covering on public transport and in shops. See [Key legal restrictions of lockdown](#) below for a summary of the existing restrictions.
- **Statutory demand restrictions:** The Corporate Insolvency and Governance Act 2020 was enacted and came into force on 26 June 2020. One notable provision contained in the Act is the temporary restriction on the use of statutory demands for winding-up petitions, which will apply until at least 30 September 2020. See [Enforcement action by commercial landlords](#) below for an overview. For more information on the Act generally, [please click here](#).
- **Code of Practice:** The UK government issued its UK Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic. See [Key UK and Scottish Government initiatives](#) below for more information.
- **Economic recovery plans:** [On 30 June 2020 the Prime Minister announced](#) plans to “build, build, build” our way out of the current crisis and establish a new infrastructure delivery taskforce named Project Speed. This includes an intention to accelerate infrastructure projects in Scotland and improve road, rail, air and sea links between the four nations to create a more connected kingdom. Subsequently, on 8 July 2020, the Chancellor unveiled [A Plan for Jobs 2020](#) which includes various measures of relevance to the Scottish property industry.
- **LBTT cut:** A temporary cut in land and buildings transaction tax (the Scottish equivalent to SDLT) has been introduced for purchases of Scottish residential property.
- **Property completions:** Registers of Scotland have extended their new digital submission service, first launched during lockdown, to cover most types of applications. For more information, please see [Practicalities of completing deals during lockdown](#) below.



## The key legal restrictions of lockdown in Scotland

Since our previous snapshot alert, the regulations governing lockdown in Scotland (the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, made pursuant to the Coronavirus Act 2020) have been amended numerous times. On 21 May 2020, the Scottish Government published a route map setting out a phased approach to gradually ease lockdown, and we entered Phase 3 as of 10 July. The Scottish Government has also published an [extensive collection of COVID-19 guidance](#). In fact, much of the detail on the lockdown restrictions (and easing thereof) is set out in Scottish Government guidance rather than the Regulations. This guidance should be consulted in conjunction with the Regulations, particularly when carrying out workplace risk assessments.

The table below summarises, at a very high level, the existing restrictions in Scotland.

Restriction	Requirements
Restrictions on businesses and services	<p>In terms of the Regulations, there is now only one type of business that must remain closed (subject to various exceptions). This is indoor leisure-based businesses. It includes theatres, nightclubs, bingo halls, casinos, swimming pools, soft play, indoor gyms, amusement arcades and bowling alleys. Funfairs (indoors or outdoors) must also remain closed. The businesses affected are listed in schedule 1 part 2 of the Regulations.</p> <p>In terms of Scottish Government guidance, live events (indoors or outdoors) should not take place.</p>
Obligation to maintain physical distance	<p>The Regulations require the person responsible for operating a business to take all reasonable steps to ensure that the "required physical distance" is maintained between any persons on the premises. The default required distance is two metres. However, for shops, public transport and hospitality (i.e. pubs, restaurants and cafés), the required distance is one metre. In those cases, appropriate additional mitigating measures should be implemented to reduce the elevated risk associated with the shorter distance.</p>
Restrictions on non-essential offices and call centres	<p>While the Regulations do not require non-essential offices to remain closed, Scottish Government guidance is that they should not re-open before 31 July. Working from home should remain the default position.</p>
Restriction on individuals' movement	<p>There is no longer a restriction on movement. The prohibition on individuals leaving their homes (without a reasonable excuse) has been lifted.</p>

Restriction on gatherings	<p>Subject to certain exceptions, the Regulations prohibit gatherings of more than two people in a public place unless all the persons are from no more than five households (if meeting outdoors) or from no more than three households (if meeting indoors).</p> <p>Scottish Government guidance sets out more detailed directions, e.g. those meeting should maintain physical distancing of at least two metres (except children aged 11 years or younger) and not include more than 15 (if meeting outdoors) or eight (if meeting indoors) people in total.</p> <p>Two households can be treated as a single household. The reference to "household" in relation to restrictions on gatherings includes reference to two households that have chosen to be treated as a single household.</p>
Face coverings	The Regulations require face coverings to be worn in shops and on public transport in Scotland, subject to certain limited exceptions.

A breach of the Regulations will attract a penalty. The first fixed penalty in Scotland is £60, dropping to £30 if paid within 28 days. The second penalty notice is £120, and each subsequent penalty notice doubles the previous penalty until the maximum of £960 per penalty is reached.

## Enforcement action by commercial landlords in Scotland

COVID-19 continues to have a significant impact on the ability of many commercial tenants to pay rent. There continue to be certain restrictions on commercial landlords taking enforcement action against their tenants, although we have seen the more practical of these restrictions ease along with the easing of lockdown.

- **Protection against irritancy:** Irritancy (the Scottish equivalent of forfeiture) allows a landlord to terminate a lease where the tenant is in breach of its obligations and has failed to remedy that breach within a specified time period. The threat of irritancy is normally one of the most powerful tools at a landlord's disposal. However, irritancy may not currently be an attractive option if a landlord would struggle to find a new tenant for the premises. In addition, the Coronavirus (Scotland) Act 2020 has temporarily (until 30 September 2020) extended the minimum notice period for remedying monetary breaches (e.g. a failure to pay rent) from 14 days to 14 weeks, and the Act allows the Scottish Ministers to extend this period still further. See our [article on this irritancy protection](#) for more information.
- **Summary diligence:** "Summary diligence" is the suite of remedies available to a landlord under registered Scottish leases whereby a landlord can seek to recover arrears of rent (and sometimes other sums) without having to go to court. Summary diligence was unavailable during lockdown but now, in Phase 3, it is available again.
- **Court action:** Ordinarily, a landlord can recover arrears of rent and other sums via a court action for payment. During lockdown, the Scottish courts were closed to all but essential/urgent business, but they are now functioning more or less as normal.
- **Statutory demands for payment and winding-up:** The Corporate Insolvency and Governance Act 2020 temporarily prohibits a winding-up petition from being brought against a company on the grounds that it is unable to pay its debts, or a winding-up order from being made on those grounds, where the inability to pay is the result of coronavirus. It also provides that statutory demands served between 1 March 2020 and 30 September 2020 cannot be used as the basis for a winding-up petition. The Act also introduces a new moratorium available to struggling businesses. As with the moratorium that arises in an administration, enforcement action will be restricted whilst this new moratorium is in effect. For more information on the Corporate Insolvency and Governance Act 2020, [please click here](#).

The overarching message from government is one of encouraging parties to co-operate to find a mutual way forward that allows each to survive the current crisis. As such, there is potentially a reputational angle for those looking to enforce obligations, or default from them, without good cause.

For more information about landlords' remedies in Scotland, please [click here](#). The table below outlines a non-exhaustive list of some other remedies which are still available.

Remedy	What is involved and are there any restrictions?
Rent deposit	Where there is a rent deposit, landlords are still able to draw down in respect of a breach, subject to the terms of the rent deposit agreement and the tenant's solvency.
Guarantee	Landlords are free to pursue a guarantor in respect of a tenant's breach, subject to the terms of any guarantee.
Administration	Whilst there are restrictions on serving statutory demands and commencing winding-up proceedings, there are no such restrictions on applying to the court as an unsecured creditor for the appointment of an administrator. This would, however, be a costly process and one that may not be commercially viable, particularly where the landlord's debt will rank behind that owed to any secured creditors.
Insurance	Subject to the terms of the policy, landlords may be able to make a claim against their insurance for any business interruption. Relevant to this will be the outcome of the Financial Conduct Authority's test case on business interruption cover which is being heard this month.



## Impact of COVID-19 on existing and proposed Scottish real estate documentation

For information generally on the impact of COVID-19 on:

- leases, both existing and new – take a look at our [COVID-19 Interactive Lease Tool](#); and
- other types of real estate contracts (including missives/agreements for lease/sale; development agreements etc), both existing and new – take a look at our [COVID-19 Interactive RE Agreement Tool](#).

While COVID-19-specific drafting is still being requested for some transactions, there is, as yet, no “market” position on the acceptability of such clauses. While tenants and buyers are keen to protect themselves against a second wave of COVID-19 or future pandemics, landlords and sellers are equally keen not to rush into creating a new market norm.

## Key UK and Scottish Government initiatives

### New initiatives

UK Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic (Code)

To view the Code, [please click here](#). This voluntary Code was introduced by the UK government on 19 June 2020 and is intended to apply until 24 June 2021. It applies UK-wide and has been endorsed by the Scottish Government. The main objective behind the Code is to provide the right support to those in the chain of commercial property payments, from customers, to tenant businesses, to commercial landlords and lenders, so that the economy can recover swiftly.

The Code encourages parties to work together to create a shared recovery plan. It encourages various principles, including transparency and collaboration, and acting reasonably and responsibly. It confirms that tenants who are able to pay their rent in full should continue to do so. Tenants who cannot pay in full should communicate with their landlord and pay what they can, taking into account the principles of the Code. In turn, landlords should provide support to tenant businesses if they are able to do so, having regard to their own financial commitments and fiduciary duties.

The Code makes various suggestions as to how the parties could work together (for example, agreeing to defer or reduce rental payments). However, ultimately as the Code is voluntary and does not change the underlying legal relationship or lease between the landlord and tenant (and any guarantor) its success will depend on how well and willing parties are prepared to work together.

Initial feedback on the Code suggests that:

- further guidance on the kind of financial disclosure parties should be undertaking would be helpful; and
- the continuing restrictions on enforcement action (for example, the protection against irritancy) can in some cases act as a disincentive to parties coming to the table to negotiate.

Temporary change to the nil rate band for residential LBTT in Scotland

The Scottish Government has temporarily increased the nil rate band for residential LBTT (i.e. land and buildings transaction tax – the Scottish equivalent of SDLT) in Scotland from £145,000 (or £175,000 for first-time buyers) to £250,000. This temporary change applies:

- to residential properties purchased between 15 July 2020 and 31 March 2021; and
- to both individual and corporate purchasers.

[Please click here to see Revenue Scotland's guidance on this temporary change](#) including tables setting out the revised LBTT bands. No change has been made to the rates of LBTT for commercial transactions, or to the additional dwelling supplement.

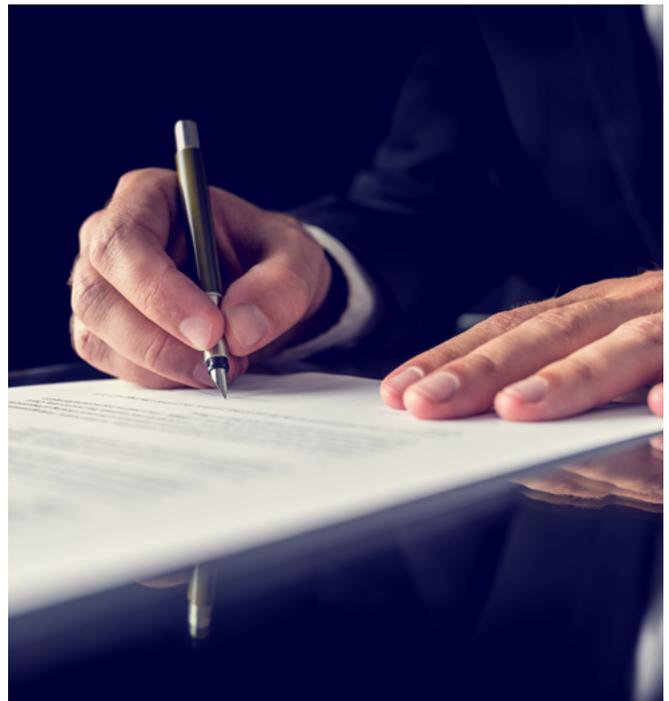
The Scottish Government has also announced an additional £50 million of funding for the [First Home Fund](#) this tax year, to support first-time buyers.

## Continuing initiatives

Business rates relief	The Scottish Government has introduced a 100% business rates relief for the year 2020/21 for properties with specified uses in retail, hospitality and leisure in Scotland. This includes news publishing premises and has also been extended to the aviation industry. All commercial properties in Scotland will also get a 1.6% rates relief, which effectively reverses the change in poundage for 2020/21. Property owners do not have to apply for these reliefs – the intention is that they will automatically be applied by the relevant local authority. The reliefs were implemented by the Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020.
Relaxation of some planning and licensing restrictions	As our previous snapshot explained, the Scottish Government has provided that during the current exceptional circumstances, planning enforcement action should not be taken against pubs or restaurants which are providing take-away or food delivery services despite not having planning permission to do so. Similarly, planning enforcement action should not be taken in respect of non-compliance with planning controls on deliveries or store opening times. In addition, the Scottish Government has now temporarily relaxed other planning rules to allow outdoor seating for pubs, cafes and restaurants. Of course, none of this overrides any private restrictions (for example, contained in leases) that prevent such activity.
Financial support	There is a range of financial support, from VAT deferral to the Coronavirus Business Interruption Loan Scheme and the Bounce Back Loan Scheme. More details on these initiatives can be found on the <a href="#">UK government's</a> and <a href="#">Scottish Government's</a> business support pages.

## Practicalities of completing deals during lockdown in Scotland

As explained in our previous snapshot alert, lockdown was not too problematic for the signing of Scottish real estate contracts. However, it did have implications for the practicalities of completing real estate deals in Scotland. Registers of Scotland's offices closed at the start of the lockdown and, at that point, applications could (generally) only be submitted in hard copy, paper format. As completion documents could not be registered, many completions ended up being postponed. Registers of Scotland managed to get a digital submission system up and running by the end of April for certain transactions, and have opened it up further in the past few weeks. This means that transactions can generally now complete, as long as this is done in compliance with the physical distancing rules.



## Looking ahead

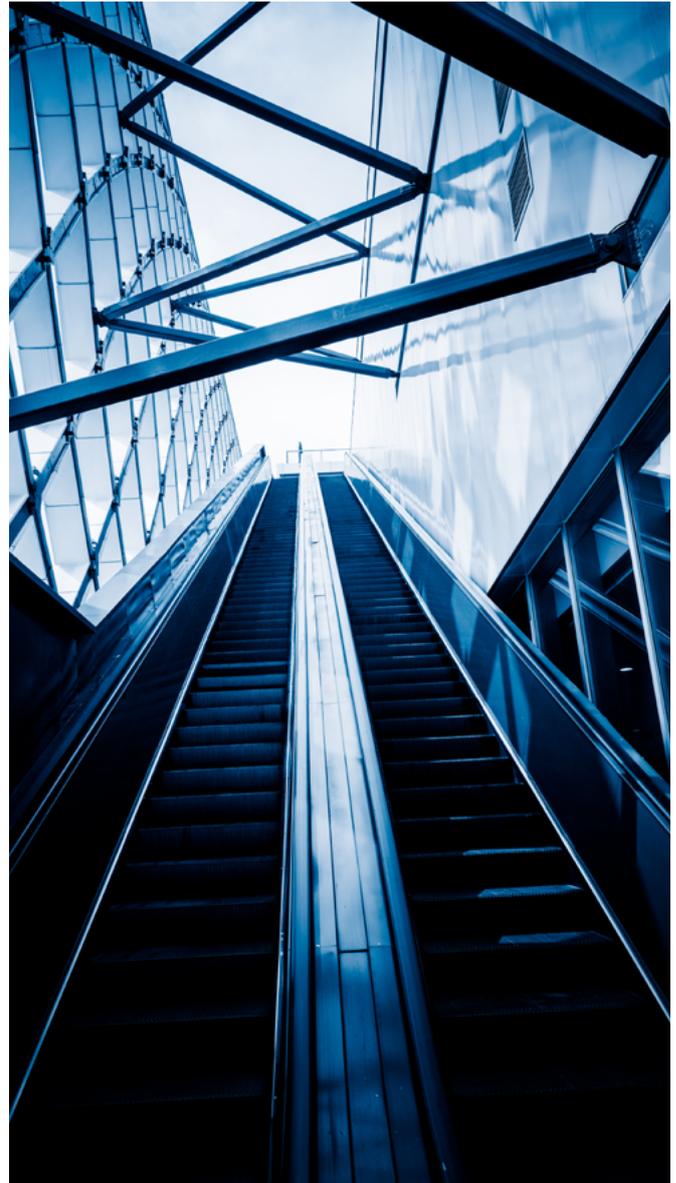
Looking ahead, there are some notable events on the horizon:

- **Outcome of the Financial Conduct Authority's test case on business interruption cover:** The Financial Conduct Authority's test case looking at whether insurers are liable to pay out against business interruption policies in respect of COVID-19 disruption is being heard this week (commencing on 20 July 2020) and is expected to last eight days. Eight insurers have agreed to be involved. The much anticipated judgment will be delivered either late in August or in early September.
- **Market response to the UK Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic (Code):** The Code is still in its infancy, having only been released a few weeks ago. Over the next few weeks, it will be interesting to see how the market responds to the Code and how parties feel it interacts with other government initiatives, particularly those restricting enforcement action against tenants.
- **Easing of lockdown:** Subject to the public health situation, we are likely to see further relaxation of the lockdown rules in the near future. It also remains to be seen what impact the easing of lockdown has on the prevalence of the virus, and whether any lockdowns or restrictions (local or otherwise) may have to be reintroduced in response.
- **Scottish quarter days:** Our next quarter day is 28 August, and we await seeing what will happen in terms of levels of non-payment of rent.
- **What happens when government support is gradually withdrawn?** With the employee furlough scheme being wound down and the irritancy protection and restrictions on statutory demands/winding-up all due to expire by the end of September, autumn/winter 2020 promises to be rather interesting.

It is clear from the above that there is still potential disruption to come. Look out for our updates, make use of the tools we have produced to help you and do not hesitate to contact us if you need any help navigating your way through the legal issues presented by COVID-19.

## What is going on in the market?

To find out more about COVID-19's impact on the commercial property market, please look out for our sector-specific webinars. If you would like more information or would like to attend one of our webinars, please contact [stacey.fraser@dentons.com](mailto:stacey.fraser@dentons.com). Otherwise, [please click this link](#) to view our recent webinar "How do the office and BTR markets need to adapt in response to COVID-19".



*NOTE: Information contained in our COVID-19 articles and publications is correct at the time of print. This is, however, a constantly evolving situation across the globe and specific advice and guidance should be sought as required.*