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Real Estate Litigation Possession and Enforcement Tool Kit for England and Wales, Scotland and Republic of Ireland

Dentons UK Ireland & Middle East LLP

Launch

Introduction

Welcome to Dentons' COVID-19 Real Estate Litigation Possession and Enforcement Tool Kit. Drawing on our extensive experience, this tool kit sets out guidance on the effect of COVID-19 legislation and civil procedure practice on enforcement and possession in England and Wales, Scotland and the Republic of Ireland. It also provides you with contact information should you need any further help from the world's largest real estate team to navigate through these unprecedented times.

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Debt Recovery

- A number of potential debt recovery options remain available to residential landlords (the majority of options have not been significantly impacted by COVID-19). Potential options include:
- **Court Proceedings** – A court claim can be brought in respect of the recovery of rent arrears or service charges. Pre-action protocols will still apply.
 - Landlords should be mindful that the courts are currently experiencing significant delays due to COVID-19 lockdown closures.
- **Guarantee** – Landlords are free to pursue a guarantor in respect of a tenant's breach, subject to the terms of any guarantee.
- **Insurance** – Subject to the terms of the policy, landlords may be able to make a claim against their insurance for any loss of rent or service charges.
- **Security Deposit** – Where there is a security deposit held, landlords may be able to use this to offset any arrears, subject to the rules of the deposit scheme in which it is held.
- **Statutory Demand** – Landlords can serve a statutory demand on the tenant for payment of rent arrears. Where the tenant has rent arrears of at least £5,000 and payment is not made within three weeks, the landlord can commence bankruptcy proceedings against the tenant. Landlords need to be mindful of the prospects of recovery against a tenant who may have few assets.

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Possession

- Since March, the majority of possession proceedings for residential property were stayed until 20 September 2020.
- Following the stay being lifted, landlords may have to file a reactivation notice for proceedings to recommence. [Click here](#)
- In an attempt to further protect residential tenants from eviction, residential landlords must now comply with extended minimum notice periods for possession proceedings for residential tenancies.
 - From 29 August 2020 until 31 March 2021, fault-based notices under s.8 of the Housing Act 1988 (such as a notice to recover possession following non-payment of rent) must now give six months' notice in most cases in order to be valid.
 - Shorter periods will continue to apply for a small number of exceptions, such as nuisance, substantial rent arrears or anti-social behaviour.
 - Until 31 March 2021, the notice period for non-fault-based notices under s.21 of the Housing Act 1988 (i.e. a notice to recover possession of a property at the end of the tenancy term) has also increased to six months.
- Following the lifting of the stay on possession proceedings, landlords should expect significant delays in progressing their claim at court. In order to address the backlog of cases and the anticipated increased demand due to the impact of COVID-19, the courts will prioritise certain categories of cases.
- Where an order for possession is made, landlords must now provide at least 14 days' notice of eviction.
- Please note, on 17 November 2020 a stay on the execution of a writ of possession came into force until 11 January 2021.

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Squatters

- Any claim against squatters is exempt from the rules brought in to protect residential tenants and homeowners from eviction.
- All rights and remedies against squatters therefore remain unchanged, with the ability to obtain a possession order swiftly still available.
- However, prevention is better than the cure. Any empty premises should be properly secured – to the extent possible, instal alarm systems and additional locks.

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Mortgage Repossession

- Following the lifting of the stay on possession proceedings on 20 September, it is now possible for mortgage firms to begin possession proceedings where customers have failed to keep up with their mortgage repayments.
- The Financial Conduct Authority (FCA) has, however, published guidance for firms in light of the impact of COVID-19.
 - The guidance advises that possession proceedings should not be started unless all other reasonable attempts to resolve the situation have been made (such as payment deferrals or extension of the mortgage term).
 - Additionally, the guidance advises that mortgage repossession claims should not be commenced or continued before 31 January 2021.
- The FCA considers that ignoring this guidance would be an express breach of the regulatory conduct rules.
- Where possession proceedings were previously commenced, mortgage firms may have to file a reactivation notice for proceedings to recommence.

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Reactivation Notice

- A reactivation notice will be required in order to resume possession proceedings which commenced at court prior to 3 August 2020 and still need to progress to obtain a possession order.
- The reactivation notice (in prescribed form) needs to outline what the claimant landlord knows about the effect of COVID-19 on the tenant and their dependants.
- If the reactivation notice is not sent to the court by 29 January 2021, the claim will automatically be stayed.
- Any proceedings brought on or after 3 August 2020 do not require a reactivation notice to proceed. However, a notice which sets out what the claimant landlord knows about the effect of COVID-19 on the tenant and their dependants needs to be served on the tenant 14 days before any hearing, with two copies brought to the hearing.
- The rules in respect of reactivation notices are a temporary measure, in force until 28 March 2021.

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Forfeiture

- Commercial landlords have a right to forfeit a lease where the tenant is in breach of their obligation. This would typically include non-payment of rent.
- To help protect business tenants impacted by COVID-19, the Coronavirus Act 2020 temporarily suspended commercial landlords' rights of forfeiture for non-payment of rent.
- This suspension initially applied from 26 March to June. However, this was further extended to 31 March 2021.
- On 15 September, this moratorium on the landlord's right to forfeit for non-payment of rent was further extended to 31 March 2021.

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Debt Recovery

- A number of potential debt recovery options remain available to commercial landlords (the majority of options have not been significantly impacted by COVID-19). Potential options include:
- **Commercial Rent Arrears Recovery (CRAR)** – Under CRAR, a landlord can arrange for an enforcement agent to sell a tenant's goods in order to recover outstanding rent arrears. Please see here for more details of COVID-19-related changes. [Click here](#)
- **Court Proceedings** – A court claim can be brought in respect of (i) the recovery of rent arrears, or (ii) any other breach of tenant covenant. The remedies sought can vary depending on the breach (from an order for performance of a covenant to payment of damages in lieu of the breach). Pre-action protocols will still apply.
 - Landlords should be mindful that the courts are currently experiencing significant delays due to COVID-19 lockdown closures.
- **Rent Deposit** – Where there is a rent deposit held, landlords are still able to draw down in order to recover outstanding arrears, subject to the terms of the rent deposit deed 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.
- **Insurance** – Subject to the terms of the policy, landlords may be able to make a claim against their insurance for any business interruption.
- **Rent Concession Agreements** – Landlords are free to agree rent concessions and/or repayment terms with their tenants. Landlords should be mindful that the tenant's liabilities may be restricted by the terms of that agreement.

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Commercial Rent Arrears Recovery (CRAR)

- Under CRAR, a landlord can arrange for an enforcement agent to sell a tenant's goods in order to recover outstanding rent arrears.
- Before the enforcement agent can do so, the landlord must give seven clear days' notice to the tenant.
- Before COVID-19, the tenant had to be in rent arrears of at least seven days.
- On 15 September, the minimum rent arrears for CRAR were increased to:
 - 276 days' rent from 29 September 2020 until 24 December 2020; and
 - 366 days' rent from 25 December onwards.

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Statutory Demand

- A statutory demand is a written demand for payment of a debt, such as rent arrears.
- Historically, if the value of the rent arrears exceeded £750 and payment was not made within 21 days, the landlord would be entitled to commence winding-up proceedings against the tenant.
- While a statutory demand can still be made, a moratorium on presenting winding-up petitions to the court following a statutory demand has been imposed until 31 March 2021.

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Winding-up

- Temporary restrictions on winding-up petitions were imposed in March.
- Until 31 March 2021, commercial landlords are not permitted to present a winding-up petition to the court unless they can show that:
 - the tenant's financial position has not worsened as a result of COVID-19; or
 - the tenant would not have been able to pay the rent arrears even if their financial position had not worsened.

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Commercial Possession

- While commercial landlords are currently unable to recover possession due to non-payment of rent, it is still possible for landlords to forfeit for a breach of other covenants.
- In March, the majority of possession proceedings were stayed until June. This was extended to 20 September 2020.
- In order to address the backlog of cases arising from the stay and the anticipated demand expected due to the impact of COVID-19, the courts will prioritise certain categories of cases and new notice requirements will apply. This is likely to delay the possession process significantly.
- Where possession proceedings were previously commenced, landlords may have to file a reactivation notice for proceedings to recommence. [Click here](#)

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Squatters

- With more commercial premises remaining empty during the pandemic, they are at risk of being occupied by trespassers.
- Any claim against squatters is exempt from the rules brought in to protect commercial tenants from eviction.
- All rights and remedies against squatters therefore remain unchanged, with the ability to obtain a possession order swiftly still available.
- However, prevention is better than the cure. Any empty premises should be properly secured – to the extent possible, instal alarm systems and additional locks, board up possible routes into the property (e.g. windows and roof lights), erect hoarding around the premises to limit access and employ a security team to monitor the activity in and around the premises.

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Irritancy and Recovery of Possession

- There is no moratorium on irritancy in Scotland.
- A landlord can terminate a lease where a tenant is in breach of its lease obligations and fails to remedy the breach within a certain time period.
- The Coronavirus (Scotland) Act 2020 extended the minimum notice period for monetary breaches (e.g. a failure to pay rent) from 14 days to 14 weeks. This protection will apply until 31 March 2021 at the earliest.
- For non-monetary breaches (e.g. using premises in breach of the user provision or failing to maintain) the time period required is less certain and must be “fair and reasonable” in the circumstances. The impact of COVID-19 will factor into a court’s assessment of what is “fair and reasonable”.
- Once a lease has been irritated, landlords can obtain a court order, as normal, for removal/ejection of a tenant and, when required, such orders can be enforced by Sheriff Officers.

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Summary Diligence

- Most commercial leases will contain a “warrant for preservation and execution” and will have been registered in the Books of Council and Session.
- This allows a landlord to enforce payment of rent (and sometimes other sums, such as service charges and insurance premiums) without first having to go to court, using a suite of remedies known as “summary diligence”.
- The COVID-19 emergency legislation does not presently affect a landlord’s ability to use summary diligence.
- The remedies available are as follows:
 - Charge for Payment [Click here](#)
 - Arrestment [Click here](#)
 - Attachment [Click here](#)
 - Inhibition [Click here](#)

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Charge for Payment

- A Charge for Payment is a formal demand served by Sheriff Officers which, if not satisfied within 14 days:
 - will provide a basis for a landlord making an application to wind up a tenant [Click here](#)
 - will allow a landlord to carry out an attachment [Click here](#)

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Arrestment

- An arrestment is a freezing order which can be served by a landlord on third party debtors of a tenant.
- If successful, an arrestment catches funds up to the value of the arrears owed.
- Arrestments are most frequently served on a tenant's bank, but they can also be served on a tenant's trade or other debtors.
- Any funds arrested, up to the value of the arrears, are automatically released to the landlord after 14 weeks, unless there is a challenge by the tenant via application to the Sheriff Court.

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Attachment

- Attachment involves Sheriff Officers attending at the tenant's business premises and attaching (seizing) movable property belonging to the tenant, such as stock or equipment.
- Ultimately, the property attached can be sold at a court-supervised auction to satisfy the arrears owed.
- It is also possible to attach (seize) cash (in any currency and including cheques and promissory notes) in the tenant's business premises.
- Any "cash" seized is released to a landlord automatically, unless there is a challenge on the basis that it does not belong to the tenant.

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Inhibition

- An Inhibition can be registered in the Public Register of Inhibitions. This, in effect, prevents a tenant from selling any heritable (or long leasehold) property in its ownership or granting further security over it unless and until the arrears owed are paid.

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Court Proceedings

- Court proceedings are only necessary where a landlord cannot recover sums by Summary Diligence [Click here](#)
- The Scottish courts are currently processing actions for payment more or less as normal.
- Once a landlord obtains an order for payment, it can enforce payment using the same suite of remedies as are available as Summary Diligence [Click here](#)

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Guarantee

- A landlord is free to pursue a guarantor in respect of a tenant's breach, subject to the terms of the guarantee.
- Most guarantees in Scotland are capable of being enforced using Summary Diligence [Click here](#)

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Rent Deposit

- Where there is a rent deposit held, a landlord is able to draw down in order to recover outstanding arrears, subject to the terms of the rent deposit agreement and the tenant's solvency.
- A tenant's obligation to top up the rent deposit fund is usually capable of being enforced using Summary Diligence [Click here](#)
- A failure to top up a rent deposit fund is also usually a breach of the lease, providing grounds for irritancy [Click here](#)

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Statutory Demand

- A statutory demand is a written demand for payment of a debt, such as rent arrears.
- Historically, if the value of the rent arrears exceeded £750 and payment was not made within 21 days, the landlord would be entitled to commence winding-up proceedings against the tenant.
- While a statutory demand can still be made, a moratorium on presenting winding-up petitions to the court following a statutory demand has been imposed until 31 March 2021.

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Winding-up

- Temporary restrictions on winding-up petitions were imposed in March.
- Until 31 March 2021, commercial landlords are not permitted to present a winding-up petition to the court unless they can show that:
 - the tenant's financial position has not worsened as a result of COVID-19; or
 - the tenant would not have been able to pay the rent arrears even if their financial position had not worsened.

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Student Accommodation

- The Coronavirus (Scotland) (No. 2) Act 2020 introduced the option, for students residing in halls of residence and purpose-built student accommodation, to terminate their tenancies (for “a reason related to coronavirus”) by giving not less than 28 days’ notice.
- This protection will remain in place until 31 March 2021 at the earliest.

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Mortgage Repossession

- The emergency legislation introduced in Scotland does not contain any measures preventing or restricting mortgage repossession proceedings.
- The Financial Conduct Authority (FCA) has, however, published guidance for firms in light of the impact of COVID-19.
- The guidance advises that possession proceedings should not be started unless all other reasonable attempts to resolve the situation have been made (such as payment deferrals or extensions of the mortgage term).
- Whilst the current guidance does not prevent lenders commencing or continuing repossession claims, it provides that repossession orders should not be enforced until after 31.1.21 (and this protection may be extended by further guidance).
- The FCA considers that ignoring this guidance would be an express breach of the Regulatory Conduct Rules.

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Possession

- The emergency legislation introduced in Scotland temporarily changes the law in respect of recovering possession of properties subject to private residential lettings.
- The key changes are that:

The notice periods for recovery of possession, on any ground, have been extended (and is six months in most cases); and

A blanket protection against eviction introduced by The Health Protection (Coronavirus) (Protection from Eviction) (Scotland) Regulations 2020, initially for the period 11.12.20 - 22.1.21, will apply until 31.3.21 in all local authority areas subject to level 3 or level 4 restrictions.

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Debt Recovery

- Proceedings for an action of payment of rent arrears can be brought at the First Tier Tribunal in the normal way.
- Any order for payment made by the tribunal can be enforced using the same suite of remedies as are available as Summary Diligence [Click here](#)
- A landlord's ability to pursue the sequestration/bankruptcy of an individual tenant is restricted (until at least 31 March 2021) to where the individual owes at least £10,000 (ordinarily, the limit is £3,000).

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Forfeiture

- Despite initial uncertainty, the Irish government has introduced further legislation to make it clear that landlords are permitted to serve termination (including forfeiture) notices on commercial tenants. As such, there are presently no restrictions imposed on the exercise of forfeiture rights or the ability of a landlord to bring proceedings against a commercial tenant to secure re-entry or possession of a commercial premises.
- A landlord may be entitled to peaceably re-enter a commercial premises where a tenant has failed to remedy a breach of the lease. The requirements for effecting re-entry vary depending on the nature of the underlying breach.
- Typically, a landlord is not required to serve a forfeiture notice (as a precursor to re-entry) where the underlying breach relates to the non-payment of rent and re-entry is effected on foot of such breach. This is based on the assumption that the underlying lease contains a proviso for re-entry (which is the norm).
- A forfeiture notice should, however, be served where the breach and basis for re-entry do not relate to the non-payment of rent. Where a forfeiture notice is required and has been validly served, a landlord may be entitled to peaceably re-enter a commercial premises, provided that the tenant has failed to remedy its breach of the lease within the time period specified in the forfeiture notice.
- In either scenario, a landlord should ensure that re-entry can be effected in a peaceful manner and should desist where resistance is encountered. Careful consideration should be given to the process of effecting peaceable re-entry and the cataloguing and handling of the tenant's inventory and stock once peaceable re-entry has been achieved.

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Service of Notices

- The emergency legislation introduced in the Republic of Ireland does not affect the right of a landlord to serve a termination notice on a commercial tenant. Prior to serving a termination notice, a landlord should carefully consider the basis for such termination and whether the tenant has accrued statutory renewal rights, as this will impact a landlord's strategy for securing vacant possession of a commercial property and development timeframes where a landlord plans to redevelop or refurbish the premises.

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Winding-up Petitions

- In circumstances where a tenant owes significant levels of arrears, a landlord (or other creditor) may petition the Irish courts to wind up a tenant entity.
- For the “interim period” of 21 August 2020 to 31 December 2020, the minimum debt threshold for a creditor(s) to petition the Irish courts to wind up a debtor company has been increased from €10,000 (for a single creditor or €20,000 for the aggregate debt owed to creditors) to €50,000.

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Rent Increases

- At the outset of the COVID-19 pandemic, the Irish government introduced a prohibition against rent increases for residential tenancies. This prohibition applied for the period commencing on 27 March 2020 and ending on 1 August 2020, which marked the end of the emergency period for the purposes of the relevant statute.
- A similarly worded protection was also included in subsequent legislation which commenced on 1 August 2020. These new provisions imposed a prohibition against rent increases from 1 August 2020 until the end of the new “emergency period” on 10 January 2021, which effectively secures a moratorium on rent increases from 27 March 2020 to 10 January 2021 when read in conjunction with its sister legislation. Rent increases which were implemented prior to 27 March 2020 are not affected.

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Termination Notices

- Landlords were temporarily prohibited from serving termination notices on tenants under the initial emergency legislation for the duration of the initial “emergency period”. The emergency period under this particular legislation commenced on 27 March 2020 but it has since lapsed as of 1 August 2020, which means that the prohibition against landlords from serving termination notices on residential tenants has now been lifted.
- A landlord seeking to terminate a residential letting for non-payment of rent must notify both the tenant and Residential Tenancies Board (RTB) in writing of the amount of arrears due to be paid. Such amount must be paid within 28 days from the later of the date on which the tenant and the RTB received this notification. This arrears notification must be served before a landlord may serve a termination notice for non-payment of rent. This latter notice must also be served on both the tenant and RTB.

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Termination Notice Periods

- The notice period for terminating a residential lease will vary depending on: (a) the duration of occupation; (b) when it was served; (c) the grounds which gave rise to the service of the notice; and (d) in the context of rental arrears, the circumstances which gave rise to such default i.e. whether the failure to pay rent is attributable to specific COVID-19 difficulties recognised in statute.
- Residential tenancies may now be terminated in accordance with the provisions of residential tenancy legislation, provided that the basis for termination is unrelated to the non-payment of rent, which benefit from extended termination notice periods for a set emergency period. New procedures have been introduced to assist residential tenants who are facing eviction for non-payment of rent.
- While the immediate section is principally focused on scenarios involving breaches, it should be noted that the notice period required to be served by a landlord on a tenant for non-default scenarios will vary from 28 days to 224 days depending on the duration of a tenancy. By comparison, if a tenant seeks to terminate (absent landlord default), the notice period ranges from 28 days to 112 days depending on duration of the tenancy.

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**Termination
Notice served
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- If a termination notice was validly served by a landlord prior to 27 March 2020 and the termination date was set for a date during or after the emergency period, a “revised termination date” is applied. The revised termination date will be (a) the date immediately after 1 August 2020 plus the number of notice days remaining on the commencement of the emergency period or (b) 10 August 2020 (whichever is the later of the two dates). In essence, these provisions froze the running of termination notice periods for such periods.

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Termination Notice served after 27 March 2020

- Additional protections have been introduced in favour of residential tenants facing evictions for non-payment of rent. Generally, a landlord is required to notify a tenant of outstanding arrears and to allow the tenant a prescribed amount of time to repay such amount before serving a formal termination notice.
- The process for terminating leases for other scenarios (which do not involve the non-payment of rent) remains unchanged and is governed by existing residential tenancy legislation.
- Where a landlord intends to serve a termination notice for non-payment of rent, the landlord must first serve a written notice on both the tenant and the Residential Tenancies Board (RTB) informing same of the arrears owed and allowing 28 days (permanently increased from 14 days) for such arrears to be repaid before serving a termination notice on both the tenant and the RTB.
- The notice period for the subsequent termination notice for non-payment of rent will vary depending on whether or not the tenant has issued a declaration (in the prescribed form) to the landlord and the RTB. In order to benefit from the below enhanced protection period, a tenant must self-declare that they fall within a protected category of individuals who have been adversely impacted by COVID-19. It is a criminal offence to make a false declaration under the applicable statute.
- Where a tenant has self-declared, the tenancy cannot be terminated before 11 January 2021 and the tenant must be given a minimum of 90 days' notice. If, however, the tenant has not self-declared, a landlord is only required to serve 28 days' notice on the tenant.
- Landlords should strictly adhere to the arrears and termination notice requirements and formalities detailed in residential tenancy to ensure that such notices are validly served. In particular, landlords should ensure that notices are also sent to the RTB within the prescribed time periods and monitor post delivered to its registered office or business address for any correspondence or declarations received from its tenants.

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Who to contact at Dentons

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England and Wales Lease Queries



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