

COVID-19 and Scottish commercial real estate

September 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](#).
- 22 July 2020, [please click here](#).

Contents

Significant developments since our previous snapshot alert on 22 July 2020	2
The key legal restrictions of lockdown in Scotland	3
Enforcement action by commercial landlords in Scotland	5
What enforcement action can landlords still take?	6
Impact of COVID-19 on existing and proposed Scottish real estate documentation	6
Key UK and Scottish Government initiatives	7
Practicalities of completing deals during lockdown in Scotland	10
Looking ahead	10
What is going on in the market?	11



Significant developments since our previous snapshot alert on 22 July 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:** Scotland remains in Phase 3, although there have been some significant changes that have taken place as we progress through that phase. As activity has increased, we have seen a number of local clusters of cases that recently led to the temporary tightening of lockdown restrictions in Aberdeen City. See [Key legal restrictions of lockdown](#) below for a summary of the existing restrictions.
- **Proposals to extend the duration of the Scottish Coronavirus emergency legislation:** The Scottish Government has decided to extend the temporary provisions of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020 for a further six months. The impact of this is discussed throughout the remainder of this alert.
- **Economic recovery plans:** on 5 August 2020, the Scottish Government published its [economic recovery implementation plan](#). This set out that the Scottish Government's first priority has been to protect jobs and businesses, and then restore business and consumer confidence, offer support to protect and create new jobs, accelerate investment in green technologies and infrastructure, and support all parts of Scotland to recover (including weathering the impact of Brexit).
- The High Court has finished hearing the Financial Conduct Authority's test case on business interruption cover and a decision is expected this month. The test case examines whether insurers are liable to pay out against business interruption policies in respect of COVID-19 disruption.

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 continued to evolve.

Whilst we have remained in Phase 3 of the easing of lockdown we have continued to progress through that phase with various amendments to both Regulations and supplementary [Guidance](#). This guidance should be consulted in conjunction with the Regulations, particularly when carrying out workplace risk assessments.

Most significantly, the full time return to school of Scottish children from 11 August has supported the

return to work for many. However, it is now mandatory for the hospitality sector to collect customer details for Test and Protect, and new statutory guidance has been published which prohibits use of background music and audio from televisions in such settings. Face coverings are now mandatory in an increased range of indoor settings. Organised contact sports, certain outdoor live events, driving lessons, and face-to-face advice services have been allowed to resume and child contact centres, bingo halls, amusement arcades and casinos, snooker/pool halls, skating rinks, indoor bowling, funfairs, gyms, indoor fitness studios, swimming pools and indoor sports courts have been allowed to reopen. 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, the only businesses that must remain closed are indoor theatres, nightclubs, concert halls or soft play centres. The businesses affected are listed in schedule 1 part 2 of the Regulations.</p> <p>Additionally, in terms of Scottish Government guidance, indoor live events should not take place yet and neither should stadia open nor certain outdoor live events with focused standing (such as music concerts or fireworks displays) 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 yet re-open. 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	Requirements
<p>Restriction on public gatherings</p>	<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>A couple of new exceptions have been added which allow (a) organised exercise and (b) organised activities which take place (i) indoors or outdoors for people under 18 and (ii) outdoors for people over 18. The activities or exercise can be organised by businesses, clubs, charities or not-for-profit organisations, places of worship or sporting/activity governing bodies.</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>Restriction on parties in private dwellings</p>	<p>The Regulations prohibit anyone from attending a party in a private dwelling.</p> <p>A 'party' means a social gathering where 16 or more people, who are members of more than one household, are present together but excludes: (a) funerals, marriage ceremonies or civil partnership registrations; or (b) gatherings for work or voluntary or charitable services, childcare, education or training, or an act of worship.</p> <p>A 'private dwelling' excludes hotels, hostels, campsites, caravan parks, members clubs, boarding houses, B&Bs, care homes, boarding houses, student accommodation, army, navy or air force accommodation, prisons, young offenders institutes, secure accommodation and remand centres.</p>
<p>Face coverings</p>	<p>The Regulations require face coverings to be worn on public transport, in shops and now in an increased list of indoor settings such as indoor cultural attractions, banks, cinemas, community centres, libraries, museums, places of worship, post offices, indoor leisure facilities, bingo halls, bowling alleys, casinos, indoor funfairs, indoor fitness studios, gyms, swimming pools, other indoor leisure centres and indoor skating rinks. These are all subject to certain limited exceptions.</p>

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.

Local authorities have also been given new powers to act in respect of specific premises that are breaching guidelines. These include powers to close and restrict entry to such premises, powers to impose

prohibitions or restrictions in relation to specific events, and powers to restrict or prevent access to public spaces. The police also have powers to break up and disperse parties in private dwellings. These new powers came into effect on 28 August 2020.

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 temporarily (initially 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. The Scottish Government is currently extending this protection until 31 March 2021. That said, some Scottish landlords have already decided to serve the 14-week pre-irritancy notices so that if monetary breaches were not remedied within that period, they would have the option to terminate the lease. It remains to be seen whether or not a landlord would follow through on the ability to irritate its lease in this market where the availability of alternative new tenants would be limited, but it would serve to keep landlords' options open. See our [article on 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. One procedural barrier to summary diligence being able to take place on the back of a lease was

the ability to register it in the Books of Council and Session, which was not possible during lockdown. Registers of Scotland have now, however, reopened the Register of Deeds, which allows leases to be so registered, and (once extracts have been obtained) paves the way for summary diligence to take place.

- **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, with most hearings progressing by telephone or video conference.
- **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 **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. Whether or not the protections in the Act will be extended beyond 30 September is not yet known, although there is speculation that they will be. 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.](#)



What enforcement action can landlords still take?

The table below outlines a non-exhaustive list of some other remedies that 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 was heard in July. It is hoped that the judgment will be available in September.

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](#).

There continues to be an interest in the acceptance of COVID-19 rent suspension clauses. It remains too early to determine the market's final position on this issue. What is becoming apparent is that the prevalence of these clauses is mainly within the retail and leisure sector.

Key UK and Scottish Government initiatives

New initiatives	
Extension to the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act (the “Emergency Legislation”)	<p>The Scottish Government has already published draft legislation extending the effect of the Emergency Legislation for a further six months. This means that the provisions in the Emergency Legislation, which were due to expire on 30 September 2020, will now expire on 31 March 2021. This includes the protection from irritancy mentioned above, protection for debtors in the form of the moratorium from diligence and the increased protections from eviction for residential tenants.</p>
Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020	<p>Draft regulations have also been published setting out certain pre-action requirements for landlords under residential assured/short assured and private residential tenancies who wish to commence proceedings for repossession on the grounds of rent arrears. These are due to come into force on 19 September 2020.</p>
Increased Government funding	<p>In line with the principles set out in the economic recovery implementation plan, the Scottish Government has recently announced the following interventions to support the economy:</p> <ul style="list-style-type: none">• funding has been doubled for the Flexible Workforce Development Fund, (which helps employers upskill and reskill their existing workforce),• a further £1.5 million will be invested in Business Gateway’s Digital Boost programme (which supports small and medium-sized enterprises to use technology to improve productivity, increase resilience and create new opportunities).• food and drink businesses have been awarded a share of £5 million to invest in infrastructure, purchase new equipment and upgrade or replace facilities.• £10 million has been announced for recruiting and retaining apprentices, including additional funding for the Scottish Government’s Adopt an Apprentice programme.• £60 million will be invested in a Youth Guarantee to give all young people access to work, training or education.• £3.8 million is to be made available to the National Trust for Scotland to aid the heritage organisation’s recovery from the impacts of COVID-19.• Funding to deploy low carbon heat in existing social housing has been fast-tracked. The vast majority of the investment made through the Social Housing Net Zero Heat Fund will be made in the coming year to support the start of construction on shovel-ready projects.

New initiatives

Extension to planning permissions

The Emergency Legislation extended the period by which a planning permission, listed building consent and conservation area consent (the “Consents”) would lapse if development had not begun. These periods are going to be further extended so that if (a) a planning permission is due to lapse between 7 April and **31 March 2021** and (b) a listed building consent or conservation area consent is due to lapse between 27 May 2020 and **31 March 2021**, then the period within which development is to be commenced is extended to **30 September 2021**.

Potential future extension of permitted development rights

In their [economic recovery implementation plan](#) the Scottish Government pledged to review national planning policies and the extension of permitted development rights, removing the need to apply for planning permission for priority areas of development to support economic recovery. Further consultation on these proposals is expected in the Autumn.

Continuing initiatives

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

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.

Continuing initiatives

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.

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 [UK government's](#) and [Scottish Government's](#) business support pages.



Practicalities of completing deals during lockdown in Scotland

As explained in our previous snapshot alerts, the fact that Registers of Scotland's offices closed at the start of the lockdown prevented most completions occurring as, at that point, applications could (generally) only be submitted in hard copy, paper format. Fortunately, enabled by the Scottish emergency Coronavirus legislation, Registers of Scotland quickly managed to develop digital solutions for registration of almost all types of deed. Unlike in England and Wales however, electronic signatures are still not able to be registered (except in very limited circumstances), and, whilst copies of "wet ink" signed deeds can now be registered online

with Registers of Scotland, further legislation would be required to allow the more widespread use of electronically signed deeds north of the border.

Since the last snapshot alert Registers of Scotland have also re-opened the Register of Deeds which still need to proceed on the back of paper applications. This allows otherwise unregistered leases to be registered in the Books of Council and Session and (once extracts have been obtained) allows summary diligence to proceed. For further information on summary diligence, please see [Enforcement action by commercial landlords in Scotland](#) above.

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 was heard in July. It is hoped that the judgment will be available mid-September. However, that may not be the end of the matter – given the high stakes, whatever the outcome, it would be unsurprising if the decision was appealed.
- **Localised lockdowns:** We have already seen a local reintroduction of lockdown measures in the City of Aberdeen during August. The Scottish Government has announced a £1 million support fund for local businesses affected by the measures, and the measures have now been released. However, the prospect of other local measures

being introduced appears increasingly likely as other clusters of cases are being experienced across the country as a result of increased mobility and activity.

- **What happens when Government support is gradually withdrawn?** With the employee furlough scheme being wound down and the restrictions on statutory demands/winding-up under the Corporate Insolvency and Governance Act 2020 all due to expire by the end of September, autumn/winter 2020 promises to be rather interesting, unless these provisions are extended, as many other support schemes are set to be.

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. 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";
- [please click this link](#) to view our recent webinar "COVID-19 and the industrial and logistics sector"; and
- [please click this link](#) to view our webinar "How will COVID-19 change the senior living sector in the UK and internationally?"

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.