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COVID-19 and real estate in England and Wales
September 2020 snapshot

In this updated snapshot we summarise, in one place, the key COVID-19 legal developments affecting commercial real estate in England and Wales.

To see our previous snapshots issued on:

- 9 June 2020, **please click here**.
- 22 July 2020, **please click here**.

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Significant developments since our previous snapshot alert on 22 July 2020

Even with the summer break, there have still been some significant developments since the date of our previous snapshot alert, namely:

- We have continued to see a relaxation of the lockdown rules in England and Wales. However, as national lockdown measures are eased, there has been an emergence of local lockdown measures to deal with COVID-19 surges.
- The Land Registry has changed its policy and confirmed that it will, until further notice, accept certain electronic signatures on registrable documents.
- 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

The key lockdown measures are set out in the following, both of which have been further amended since the date of our last snapshot alert:

- (for England) the Health Protection (Coronavirus, Restrictions) (No.2) (England) Regulations 2020/684 (English Regulations) as amended; and
- (for Wales), the Health Protection (Coronavirus, Restrictions) (No.2) (Wales) Regulations 2020/353 (Welsh Regulations) as amended.

Both of the above were made pursuant to the Public Health (Control of Disease) Act 1984.

The table below summarises and contrasts, at a very high level, the key provisions of both the English and Welsh Regulations.

Type of business	English Regulations	Welsh Regulations
Restrictions on businesses and services	Nightclubs, dance venues and sexual entertainment venues continue to be subject to the requirement to cease to carry on business.	Theatres, venues authorised to be used for the supply of alcohol by a premises licence or club premises certificate where live or recorded music is provided for the public or members of the venue to dance, sexual entertainment venues, concert halls and skating rinks all continue to be subject to the requirement to cease to carry on business.
General obligations to maintain social distancing, wear face masks and/or work from home	The English Regulations are not quite as prescriptive as the Welsh Regulations. There is no equivalent general provision to that of Regulation 12 of the Welsh Regulations (although there are some specific requirements relating to gatherings – see below). Instead, most of the social distancing requirements for England are set out in the guidance that accompanies the English Regulations. So, for example, there is no specific reference to the 2 metre rule in the English Regulations themselves. The obligations to wear face masks in England are contained in separate regulations.	Regulation 12 imposes a general obligation on businesses that are allowed to open and on premises where work is being carried out to undertake all reasonable measures to ensure social distancing and to limit face-to-face interaction (this includes reference to the 2 metre rule). One measure suggested by Regulation 12 is the collection of contact information, and its retention for 21 days, for persons attending the premises. Regulation 12A sets out the Welsh requirements for the wearing of face masks on public transport. Regulation 13 requires parties to have regard to the official guidance about the reasonable measures that should be taken to minimise the risk of exposure to coronavirus. The previous requirement that, where it is reasonably practicable to work or provide voluntary or charitable services from the place where a person is living, that person may not leave the place where they are living, or remain away from that place, for the purposes of work or to provide voluntary services has now been revoked.
Restriction on movement	There is no general restriction on movement.	There is no general restriction on movement.

Type of business	English Regulations	Welsh Regulations
Power to restrict access to public places	Regulation 6 sets out a power for the Secretary of State to restrict access to a specified public outdoor place, or to public outdoor places of a specified description, if it thinks that giving such a direction responds to an imminent threat to public health, is necessary to prevent, protect against, control or provide a public health response to the incidence or spread of coronavirus and is a proportionate means of achieving that purpose.	There is no equivalent provision in the Welsh Regulations but, arguably, sufficient powers are vested in the Welsh Ministers by the Coronavirus Act 2020 to achieve a similar result. There are provisions in the Welsh Regulations allowing relevant authorities to close certain public paths and access land.

Restrictions on gatherings indoors	Subject to a number of exceptions, the regulations prohibit gatherings of more than 30 persons (whether indoors or out) in any of the following settings:
	• private dwelling, including a houseboat;
	• on a vessel, other than a houseboat or a vessel used for public transport; or
	• on land which is public outdoor space that is not:
	  • operated by a business, a charitable, benevolent or philanthropic institution or a public body as a visitor attraction; or
	  • part of premises used for the operation of a business, charitable, benevolent or philanthropic institution or a public body.
	Subject to various conditions including a requirement to take all reasonable measures to limit the risk of transmission of coronavirus (taking into account government guidance) and to undertake a risk assessment, there is an exception where the gathering has been organised by a business, a charitable, benevolent or philanthropic institution, a public body, or a political body.
	Anything that could be classified as an indoor rave involving more than 30 persons is specifically banned.
		Subject to numerous exceptions, no person may, without a reasonable excuse, gather indoors with any other person apart from:
		• members of their household[1];
		• their carer; or
		• a person to whom they are providing care.

Restrictions on gatherings outside		Subject to a number of exceptions, no person may, without a reasonable excuse, participate in a gathering outdoors that consists of more than 30 people. There is now a limited exception for certain organised outdoor events consisting of no more than 100 people that have been approved in writing by the Welsh Ministers.

1 Note that the Welsh Regulations now include provision for four households to be treated as a single household in certain circumstances. The reference to "household" in relation to restrictions on gatherings (both indoors and outdoors) includes reference to four households that have chosen to be treated as a single household.

Type of business	English Regulations	Welsh Regulations
Restrictions on organising or facilitating gatherings	No person may hold, or be involved in the holding of, a section 63 gathering. A section 63 gathering is, in essence, an indoor gathering with more than 30 persons which would otherwise constitute a rave. Subject to various exceptions, there is also a wider restriction on holding, or being involved in the holding of, a gathering which consists of more than 30 persons which is not a section 63 gathering.	There is a specific restriction on organising certain unlicensed music events: • which consist of more than 30 people; • which contravene the general restrictions on gatherings; • at which music is played or performed for the purpose, or for purposes which include the purpose, of entertaining; and • where the playing of music is a licensable activity.
Fixed penalty notices	The first fixed penalty notice attracts a fine of £100 commuted to £50 if paid within 14 days. The maximum fixed penalty notice for a repeat offender is £3,200. If there has been a contravention of the restrictions on organising or facilitating certain gatherings, the fixed penalty is automatically set at £10,000 and there is no reduction for early payment.	The first fixed penalty notice attracts a fine of £60 commuted to £30 if paid within 14 days. The maximum fixed penalty notice for a repeat offender is £1,920. If there has been a contravention of the restriction on organising certain unlicensed music events, the fixed penalty is automatically set at £10,000 and there is no reduction for early payment.

It will be apparent from the table above that, across England and Wales, there has been a significant relaxation of the rules since the beginning of lockdown. While this means that most premises and businesses can now re-open, government guidance, continuing restrictions on gatherings and regulations concerning the wearing of face masks mean that it is still not quite "business as usual". Further, while businesses may be open, the issue of whether people are visiting them is another matter. Reports in the press indicate a reluctance in some areas to return to "life as normal", in particular in relation to the return of the workforce to the office.

Another trend that we are seeing in England is the emergence of localised lockdown measures to control spikes in the incidence of COVID-19. It is necessarily a fast changing situation but one which we suspect will become more prevalent as the government in England tries to avoid a second national lockdown.

Key restrictions on enforcement action by commercial landlords

There continue to be significant restrictions on commercial landlords taking enforcement action against their tenants:

- Section 82 of the Coronavirus Act 2020 imposes a temporary moratorium on **forfeiture** for non-payment of rent (rent being any sum payable pursuant to the tenancy). The moratorium applies to all business tenancies that fall within Part 2 of the Landlord and Tenant Act 1954 (broadly, all commercial tenancies save for those of less than six months' duration) whether or not the tenancy has been contracted out of security of tenure. While originally only in place until 30 June 2020, the moratorium has now been extended by secondary legislation to 30 September 2020. The big question is whether or not the government will extend this moratorium even further.
- The rules relating to **Commercial Rent Arrears Recovery** (CRAR) were amended by the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (SI 2020/451) and the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No.2) (Coronavirus) Regulations 2020. As amended, the minimum amount of net unpaid rent that must be due before CRAR is used has increased from seven days' rent to 189 days' rent while the moratorium on forfeiture of commercial leases is in place pursuant to the Coronavirus Act 2020.
- Schedule 10 of 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 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 continuing 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.

What enforcement action can landlords still take?

With restrictions being placed on the traditional methods of enforcing against non-performing tenants, commercial landlords are being forced to revert to other enforcement measures. The table below outlines a non-exhaustive list of some remedies still available.

Remedy	What is involved and are there any restrictions?
CRAR	CRAR can still be used to seize a tenant's goods and sell them, offsetting the recovered sums against any rent arrears, but only where the arrears are equivalent to 189 days' rent or more. CRAR is suitable for recovery of rent arrears only.
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.
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 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.
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 will, 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 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; or
- other types of real estate agreement (including 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 government initiatives

New initiatives	
New planning use classes	A new use class (Class E) came into effect on 1 September 2020 to cover commercial business and service uses. Subject to a number of exceptions, uses falling within this new use class can change to another use in that same class without the need to obtain planning permission. The introduction of this broader use class should help businesses to repurpose premises more easily. Further use classes relating to learning and non-residential institutions (Class F2) and another for local community (Class F1) uses have also been created and subsume some of the existing use classes, and will again allow uses to change to other uses within that specific class. Permitted development rights for the new and remaining uses will be introduced in due course. For more information, please refer to our planning law blog.
Continuing 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 is intended to apply until 24 June 2021. 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, 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 then 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 changes to the nil rate band for residential SDLT and WLTT	**England** The government has temporarily increased the nil rate band of residential SDLT, in England, from £125,000 to £500,000. This temporary change applies: • for residential properties purchased from 8 July 2020 until 31 March 2021; and • to both individual and corporate purchasers. Please click here to see HMRC's guidance on these temporary changes including tables setting out the revised SDLT bands. **Wales** There has been a temporary increase in the nil rate band of residential WLTT, in Wales, from £180,000 to £250,000. The temporary change applies to purchases of residential property between 27 July 2020 and 31 March 2021 (inclusive). The temporary change does not apply where the higher residential tax rate would otherwise apply. Please click here to see the revised guidance on WLTT.
Business rates relief	**England** The existing business rates retail discount has been expanded to include the leisure and hospitality sectors. The relief applies to occupied retail, leisure and hospitality properties in England in the year 2020/21. There is no rateable value limit on the relief. Where it applies, there is a 100% discount on the business rates bill. Property owners do not have to apply for the discount – the intention is that it will automatically be applied by the relevant local authority. There has been no change in legislation to provide this discount. Instead, the intention is that local authorities will use their discretionary relief powers under section 47 of the Local Government Finance Act 1988 (as amended) to provide relief and will then be reimbursed by the government. **Wales** There is business rates relief aimed at businesses in Wales in the retail, leisure and hospitality sectors. There is a rateable value limit on the relief – it only applies to eligible ratepayers with a rateable value of £500,000 or less. Where it applies, there is a 100% discount on the business rates bill. As for England, there has been no change in legislation to provide this discount. Instead, the intention is that local authorities will use their discretionary relief powers under section 47 of the Local Government Finance Act 1988 (as amended) to provide relief and will then be reimbursed by the government.

Continuing initiatives	
Expansion of permitted development rights	Most notably in England, The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020, which came into force at 10.00am on 24 March 2020, permits the change of use of pubs (Class A4 (drinking establishments)) and restaurants (Class A3 (restaurants and cafés)) for the provision of takeaway food at any time from 10.00am on 24 March 2020 until 23 March 2021. Planning permission would usually be needed for such change of use, but this relaxation allows businesses to make this change without a planning application. Businesses are still required to tell the local planning authority if the building is being or will be used for takeaway food during this period. Of course, this does not override any private covenants (for example, contained in leases) that prevent a change of use. This is just one example of the planning changes brought about by COVID-19. To read more about the impact of COVID-19 on planning matters, please refer to our planning law blog.
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 government's business support pages.

Practicalities – signing documents during lockdown

On 27 July 2020, the Land Registry announced that it would, until further notice, accept some electronic signatures on certain registrable documents. This was a significant announcement and another step on the way to digital conveyancing.

However, before rushing ahead to use electronic signatures, it is worth reading and noting the Land Registry's requirements for acceptable electronic signatures, which are set out in section 13 of Practice Guide 8. The table below sets out some of the key requirements. Failure to comply with the Land Registry's mandatory requirements for electronic signatures will result in any application to register the electronically executed deed being rejected and, in the absence of due registration, it will not have the intended legal effect.

Land Registry requirement	Comment
It is a deed that the Land Registry has confirmed can be electronically signed	The list of documents the Land Registry has identified that can be electronically signed is set out in paragraph 13.4 of Practice Guide 8. The list includes transfers, registrable leases, charges (including assignments and sub-charges), easements, DS1s, DS3s and rent charges.
All parties are represented by a conveyancer and have agreed to the use of electronic signatures and a signing platform in relation to the deed	Be careful. For example, a bank must be represented by a conveyancer when electronically signing a DS1 or DS3.
The electronic signature will be generated by an e-signing platform	It is worth noting that there are many types of electronic signature out there but the only type the Land Registry will accept is one generated through an e-signing platform.
A conveyancer is responsible for setting up and controlling the signing process through the platform and follows the signing and dating process set out in Practice Guide 8	This means that clients with access to e-signing platforms cannot set up the signing process unless they fall into the Land Registry's definition of conveyancer. A conveyance must be careful to follow the process set out in section 13.3 of Practice Guide 8 if they are to be sure of creating a deed that is acceptable to the Land Registry.
Access authentication must be applied to all signatories and also to all witnesses	The Land Registry requires that before any signatory or witness can access the documents within the e-signing platform, they have to input a one time passcode comprising a minimum of six numbers. The one time passcode should be generated automatically by the platform and then sent from the platform by text message to the relevant recipient. While most e-signing platforms have the functionality to apply access authentication to signatories few, if any, have the functionality to apply the same to witnesses. One potential workaround is to set up the witnesses as signatories. This, together with some of the other Land Registry requirements, mean that you will need to identify signatories and witnesses before setting up the signing process. This includes gathering their full names, email addresses and telephone numbers.

Land Registry requirement	Comment
Witnesses must be physically present to attest the signatory's signature	This is a requirement whenever a witness attests a signature irrespective of whether it is a wet ink signing or an electronic signing. In the context of the Land Registry and electronic signatures it has prompted the recommendation that each witness be asked to sign (as a matter of best practice) a statement confirming they were physically present when the signatory signed. That statement can be added at the end of the relevant attestation clause.
Completion of the deed is effected by dating it within the e-signing platform	So for Land Registry deeds, where electronic signatures are used, the deed must be dated within the platform rather than being printed off and dated in wet ink.
Certificate to accompany application to the Land Registry	The electronically signed and completed deed can be submitted to the Land Registry as a PDF but the application must be accompanied by the following certificate from the conveyancer making the application: "I certify that, to the best of my knowledge and belief, the requirements set out in practice guide 8 for the execution of deeds using electronic signatures have been satisfied".

The Land Registry also recommends that parties retain with their files a copy of the completion certificate or audit report generated by the e-signing platform at the end of the signing process. That certificate or report will record some of the key features of how the signing process was set up and conducted.

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 last month and a decision is expected shortly. 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.
- **September quarter day**. The third quarter day since lockdown is fast approaching and many will be watching with interest to see what rent collections are looking like across the various real estate sectors in England and Wales.
- **Will the moratorium on forfeiture be extended?** The moratorium is due to expire on 30 September 2020. The big question is whether England and Wales will follow the Scottish example and extend the moratorium yet further. If it is, landlords will need to carefully revise bespoke enforcement strategies while commercial tenants get further breathing space to trade.

The next six weeks are going to be interesting. The key question is the extent to which support for businesses and individuals is going to be withdrawn across England and Wales and also the extent to which we will see increasing local lockdown measures.

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?"

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.

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