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COVID-19 Interactive Tool Kit for Real Estate Agreements in England, Wales and Scotland

Dentons UK

[Launch](#)

Introduction

Welcome to Dentons' COVID-19 Interactive Tool Kit for Real Estate Agreements in England, Wales and Scotland. Drawing on our extensive experience, this tool kit sets out some key pointers for anyone dealing with any existing or new real estate agreements/contracts/missives (for example, agreements for lease, agreements for sale, development agreements and forward funding agreements). 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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What do you need help with?

An existing agreement

Click here for help with existing agreements, whether they are agreements for sale, lease or development or forward funding agreements.

A new agreement

Click here for some pointers on what to consider if you are negotiating a new agreement.

Who to contact at Dentons for further help

Click here for details of who to contact if you need further help and advice.

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What are your obligations and can you continue to comply?

- A basic but important step is to identify, with the help of your advisers, your key obligations pursuant to the agreement and assess whether you will still be able to comply.
- Particular attention should be paid to whether or not an obligation is absolute (so you have to perform no matter what), conditional (for example, dependent on another performing), qualified (for example, reasonable and prudent endeavours) or changeable (so it may be subject to time extensions or other variations depending on the circumstances).
- Be mindful that just because an obligation has become more difficult or more expensive to perform as a result of COVID-19 does not necessarily mean that you will be relieved from that obligation or that the obligation will be suspended during COVID-19 disruption. For example, an agreement that places you under a reasonable endeavours obligation to seek planning permission will now be much harder to perform, but that does not necessarily mean that you can, without the agreement of the other party, simply stop trying.
- When considering whether you will still be able to comply, account should be taken of:
 - your reliance, if any, on other parties performing their obligations (e.g. a developer relying on a building contractor to undertake certain works, or a landlord relying on a lender giving their consent);
 - the possibility of the situation getting worse. For example, going forward there may be further restrictions and limitations (for example, shortages of materials, difficulties finding tenants etc.); and
 - your objectives.
- For more information on conditional agreements, please [click here](#).

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What are your counterparty's obligations and can they continue to comply?

- As well as considering your own obligations, it is strategically important that, together with your advisers, you consider the obligations of all counterparties to the agreement and assess their ability to continue to comply.
- If it is apparent that your counterparty will be unable to perform (for example, not being able to complete works on time because contractors are unavailable, or being unable to secure new tenants on a development site in the current market) or their performance will be materially different to what is prescribed in the agreement (for example, using different materials or completing on a different date), you need to plan in advance how to respond.
- Consider with your advisers whether it would be sensible to have a conversation with your counterparty to find out how they have been affected by the COVID-19 disruption and to discuss working together to find solutions to the difficulties that you are both likely to be facing.
- While legal enforcement remains a possibility, it is worth remembering that the legal system has also been disrupted. As such, it is worth considering whether your agreement prescribes any escalation or alternative dispute resolution procedure that could be utilised in the event of default or dispute with your counterparty.
- Ultimately, while legal enforcement remains an option, co-operation may be the best approach.

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Is the agreement terminable because of COVID-19?

- Your advisers should check the terms of the agreement to see whether it contains any termination provisions that might be engaged either directly or indirectly by the disruption caused by COVID-19. They will also need to check the conditions that apply to such provisions.
- Some agreements may contain a force majeure clause. A force majeure clause relieves parties from the consequences of non-performance in the event of circumstances beyond their control. Typically, it allows parties to suspend performance or terminate the agreement. If your agreement contains a force majeure clause, your advisers will want to look for specific references to "epidemics" or "pandemics", or to quarantines or other forms of government intervention. If the current situation is covered, they should check whether, under the terms of the agreement, you are entitled to terminate.
- Your advisers may also want to consider whether the agreement has been frustrated (brought to an early end) as a result of the COVID-19 disruption. To argue frustration you have to show that there is some form of intervening illegality or failure of common purpose that renders performance of the agreement impossible or so radically different from the parties' expectations that frustration is justified. As such, the threshold is set very high and so this could be difficult (but not necessarily impossible) to argue.
- If the agreement is terminable, your advisers should consider what effect termination would have on any inter-related agreements (for example, associated pre-lets, funding agreements or construction agreements).

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What are the key deadlines?

- Your advisers should identify the key deadlines set out in the agreement. Common deadlines in agreements include completion dates, target dates and long-stop dates.
- Once a deadline has been identified, the next step is to consider whether the agreement makes any provision for that deadline to be extended. Long-stop dates are normally fixed. Completion dates in conditional agreements and target dates are often extendable subject, in each case, to a long-stop date.
- If a deadline is extendable, in what circumstances does the extension apply and for how long? Very few, if any, existing agreements will specifically deal with disruption caused by a global health pandemic. However, that does not mean that the extension cannot be triggered by some of the consequences of the COVID-19 disruption. For example, an agreement dependent on works may not set out an extension of time for a health pandemic but may set out an extension of time for shortages of labour and/or materials – two things that are likely to be consequent on COVID-19 restrictions.
- Consideration should be given as to who benefits from the deadline and what the consequences would be if that deadline were moved. So, for example, an agreement to develop student housing may have a completion deadline that allows occupation for the start of the next academic year, but moving that deadline back by a few months could have serious consequences for the student accommodation provider.
- Any remedies for missing a deadline should also be identified. Do not overlook the possibility of remedies (for example, liquidated damages) where a deadline such as a target date is extended. For more information on remedies [click here](#).
- Consideration should be given as to whether or not to vary a deadline, or to vary the remedies arising as a result of missing a deadline – please [click here](#) for guidance on variations.

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What are the remedies for non-compliance?

- Whether you anticipate being unable to comply yourself, or whether you fear non-compliance by a counterparty, it is prudent to get your advisers to identify in advance the remedies that could apply in the event of default. This could help to inform your strategy for dealing with the obligations set out in the agreement.
- Remedies can take many forms, such as:
 - damages (and liquidated damages);
 - price adjustments;
 - step-in rights;
 - right to terminate;
 - automatic termination of the agreement; and/or
 - right to take possession.
- For details of the remedies that could apply in the event of non-completion of a sale or letting, please [click here](#).
- In addition to considering the remedies that could apply, consideration should also be given to the commercial consequences that may arise in the event of default. For example, it might be that late completion of a lease of a retail store will have less of an impact on the tenant in the current climate if it is a store of a type that cannot currently trade. This may influence any negotiations for variations.

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Practicalities given the disruption caused by COVID-19

- Putting aside each party's strict legal rights under the agreement, with the help of your advisers you need to ask yourself whether those obligations/provisions are still practicable given the disruption caused by COVID-19.
- For example, most agreements contain clauses dealing with the delivery of notices. Most require the delivery of physical documents. In the current climate, that may not be practical and the parties may, instead, need to consider email delivery. For more information on notices served by email, [click here](#).
- Another example would be apportionments of rents in sale agreements. At the time the agreement was concluded, the parties may have been confident that each tenant paid a certain amount of rent quarterly in advance. Following recent events, parties may well have agreed variations to the rental payments, perhaps reducing, waiving or deferring the rent. Also, rental payment patterns may have changed. This may not be taken into account in the apportionment provisions and will need to be thought through ahead of completion.
- Some other examples of clauses that may need to be modified include:
 - obligations to register documents at certain registries (for example, the Land Registry/Registers of Scotland);
 - the mechanics for completion – consideration may need to be given to the use of powers of attorney and/or electronic signatures; and
 - clauses requiring inspection/valuations of premises.
- If you are considering a variation, [click here](#).

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What are your objectives and priorities?

- Amidst all the disruption caused by COVID-19 it is important that you are clear what your objectives and priorities are, as these will influence the approach you (and your advisers) will take towards existing agreements.
- For example:
 - if, from a business perspective, you need more time to fulfil an obligation, the emphasis will be on reviewing the provisions (if any) in the agreement for extending deadlines and, if necessary, considering the possibility of a variation to those deadlines;
 - if you want to retain a pre-let tenant for new premises, then the focus will be on keeping the pre-let agreement alive and not on the provisions for termination; or
 - if you still need works to be completed on time but the preferred materials are not available, then the focus will be on workaround strategies.

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Do you need/want to vary the agreement?

- Below are some general pointers should it be decided that it is necessary or desirable to vary an agreement (you should take specific advice in every case):
 - the best advice is to record all variations in writing – while you may be on good terms with your counterparty today, things could change;
 - make sure any variation complies with all relevant legal formalities (for example, you cannot orally agree to postpone a completion date in a sale contract/missive);
 - check the agreement itself to see if it prescribes how the variation should be documented;
 - be very clear what the variation is, whether it is permanent or temporary, personal or not;
 - consider whether you are waiving, deferring or altering obligations;
 - check with your advisers to see whether any tax liabilities arise as a result of the variation;
 - check (or get your advisers to check) whether any third parties (for example, funders, guarantors and superior landlords) need to consent to the variation;
 - consider who is to bear the costs of documenting the variations (the cost could be shared equally);
 - consider, with the help of your advisers, whether any associated documents also need to be varied (for example, any underlying construction documents or the form of lease to be granted); and
 - be careful that the variation does not give rise to any unintended consequences (for example, negating the Landlord and Tenant 1954 Act contracting out procedure for an English/Welsh lease) – take legal advice to be sure.
- If you are seeking a variation from your counterparty, bear in mind that they may seek a concession from you in return – it may be worth pre-empting this before starting any negotiation.

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Remedies for failing to complete

Agreements for sale/agreements for lease

- It is important to identify the remedies for failing to complete and to take appropriate advice if you are considering enforcement action (such as serving a notice to complete).
- Normally agreements for sale/lease prescribe that if a party fails to complete on the nominated completion date, the other party (provided they are ready, willing and able to complete) may serve a notice to complete making time of the essence. If the parties still fail to complete after a set period of time (normally 10 working days), the party not in default, on expiry of that period, can rescind the contract.
- If the sale agreement (or agreement for lease) is rescinded in these circumstances, if the non-defaulting party is:
 - the buyer/tenant, they may be able to claim damages from the seller/landlord;
 - the seller/landlord, then any deposit is likely to be forfeited and they may also be able to claim damages from the buyer/tenant.

The innocent party has to take all reasonable steps to mitigate its losses flowing from the failure to perform. What is reasonable will need to be carefully assessed in each case.

- In Scotland, rather than rescinding an agreement, it is possible for a seller to sue the defaulting buyer for the purchase price. However, this will only be attractive in the rare case where the buyer has funds to complete but chooses not to and where prospects of re-sale are poor. Meanwhile, in England and Wales, an innocent party may, rather than rescinding the agreement, choose to keep the contract alive and seek an order of specific performance from the courts to compel the contract breaker to complete.
- Note that even if a deposit was not payable on exchange of the agreement, a 10% deposit may become payable under the terms of the agreement in the event of a default.
- Of course, even if you are entitled to serve a notice to complete, strategically you may not want to do so. Instead, having taken appropriate advice, you may decide that commercially it makes more sense to keep the contract alive and perhaps negotiate an extension to the completion date. For more information on variations, please [click here](#).

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Sale agreements: some additional considerations

These considerations are in addition to those set out in the remainder of this tool.

- In relation to the completion date, consideration should be given to, among other things, the following:
 - is it still achievable?
 - will the buyer have access to the required funds?
 - are the practicalities of funds transfer in place?
 - can possession be given? Will the property need to be cleared? This will be a particular issue if vacant possession is to be given at completion.
- Note that the full terms setting out the requirements for, and mechanics of, completion (including the procedure for serving notice for late completion) may not be expressly set out in the agreement itself. Instead, they may be incorporated by reference into the agreement (such as the Commercial Standard Conditions of Sale for English/Welsh sale contracts which are usually incorporated by reference).
- If the buyer or seller cannot perform, consider whether this is a permanent non-remediable issue where termination and damages may apply, or whether there are mutual benefits to the parties in deferring completion.
- Please [click here](#) for more information on the remedies for failing to complete.

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Agreements for lease: some additional considerations

These considerations are in addition to those set out in the remainder of this tool.

- Agreements for lease will give rise to an ongoing relationship between the parties – that of landlord and tenant. This factor will influence how the parties negotiate their way through any difficulties caused by COVID-19 disruption because post-completion they are still going to have to deal with each other.
- One issue that may need to be considered is whether or not there is any merit in the parties agreeing to defer completion. From the tenant's perspective, a deferred completion date will push back the commencement of its obligations under the lease (for example, to pay rent or to maintain the premises) while also preserving time-limited benefits (such as rent-frees for fitting-out purposes). From the landlord's perspective, it will retain control and, should it need to terminate the arrangement with the tenant (for example, if the tenant goes insolvent), it might be easier, if there are suitable termination provisions in the agreement, to do this prior to the lease being granted. On the other hand, once the lease is granted, responsibility for rates and outgoings (including security costs) will usually pass to the tenant and this could dissuade a landlord from agreeing to delay completion without some form of incentive in return.
- The agreed form of lease should be reviewed in the context of the COVID-19 crisis. Are the obligations on both landlord and tenant still capable of being performed? Are any additional provisions required? For further information on the impact of COVID-19 on lease drafting, please refer to our lease tool kit by [clicking here](#).
- For information on varying agreements, please [click here](#).

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Agreements incorporating development obligations: some additional considerations

These considerations are in addition to those set out in the remainder of this tool.

- There may be ongoing difficulties getting personnel and materials to site. Those difficulties will need to be recognised and possibly reflected in amendments to existing agreements that incorporate development obligations.
- Are the development obligations back-to-back with a contractor? Frequently, agreements have a target date which can be extended on certain grounds. However, it is unlikely that the grounds for extension in pre-COVID-19 agreements will specifically include a pandemic, although they often do include extension events under the back-to-back building contract with the main contractor. In turn, while most building contracts will not have identified a pandemic as an extension event, it is becoming increasingly likely that a contractor will be able to rely on force majeure or other specific provisions (such as the exercise by the UK government of any statutory power which directly affects the works) to secure an extension. As such, it is important that the whole “web” of connected agreements are considered together.
- Often, as highlighted elsewhere in this tool kit, there may be grounds for counterparties (tenants, funders as well as back-to-back contractors) to pause obligations and extend deadlines under one agreement. It is important to track these changes through all connected agreements to ensure that the variation of one agreement does not leave a party at an increased risk of breach of another agreement.
- For more information on the impact of COVID-19 on construction agreements, please [click here](#).

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Forward funding agreements: some additional considerations

These considerations are in addition to those set out in the remainder of this tool.

- Where forward funding agreements remain conditional:
 - Funders will likely pay close attention to the conditions precedent to see if there are any that may prevent or delay completion (and funds drawdown). It may be that it is not in the interest of the developer/owner to go unconditional, given this will normally trigger time running on obligations relating to construction that may not currently be deliverable. If so, the question is whether or not an agreement can be reached to extend the target and long-stop dates for satisfaction of those conditions precedent. If so, the parties may also want to agree that any continuing obligations to satisfy the conditions precedent are also suspended or allowed to progress at a slower rate.
 - Such agreements are frequently back-to-back with land assembly or pre-let agreements. Any suspension (or slowing) of obligations or extensions of target and long-stop dates need to be tracked through these connected documents.
- Where the forward funding agreement has already been triggered, land acquired and funds are being drawn:
 - Has work stopped? If not, is it likely to be compromised or delayed? Funds drawdown will typically be triggered by monthly certificates. These may well have been suspended. Are other expenses still running? Will the developer/owner be entitled to draw these?
 - It is likely that a review of the overall viability of the scheme will be needed. Is the developer/owner or the contractor a material credit risk? Will any back-to-back pre-lets survive the delay? Will the delay (and holding cost) result in the funding caps being insufficient to deliver the scheme?

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Forward funding agreements: some additional considerations

These considerations are in addition to those set out in the remainder of this tool.

- Normally, the ultimate sanction for a forward funder is to terminate and exercise its step in rights. In the current situation, this is unlikely to be helpful as the forward funder would be faced with the same problems as its developer/owner. As such, the forward funder will want to be confident that the developer/owner is disclosing all discussions it is having with its contractor and any pre-let tenants so that it can make informed decisions. In addition, the forward funder will want to approve any variations or concessions.
- If the upfront land payment was modest and drawdown has been limited, the forward funder may want to terminate and walk away from further exposure or agree a pause whilst preserving its termination rights. Relevant to the latter will be the long-stop dates for completion of works under any pre-let agreement and the commercial sensitivity of the same. For example, if the development is for student housing, what are the implications for the scheme if it is delayed to the following academic year?
- If the funds paid out mean that the forward funder is fully committed, then its choices will mirror those of its developer/owner under an existing agreement.
- What is the impact of delayed rental or other income on the overall funding?

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New agreements: some things to consider

Remember to discuss these
with your advisers

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Dispute resolution

- COVID-19 may well result in disputes just at a time when the courts will be feeling the impact from all the disruption. As such, parties may want to consider whether it is appropriate to include some form of dispute resolution mechanism in their agreements.
- The dispute resolution mechanism might be via an escalation procedure between the parties and/or through the use of a third party expert or arbitrator.
- Important points to consider include:
 - the finality of the decision (i.e. whether or not the jurisdiction of the courts is to be excluded altogether);
 - who bears the cost of the process;
 - the expertise that might be needed for the type of dispute envisaged (for example, would a surveyor, valuer or lawyer be best placed to decide?);
 - how quickly the parties need/want the dispute to be settled;
 - the ability to submit evidence to the party determining the dispute; and
 - the need to ensure that the process for resolving the dispute is either clearly set out in the agreement or elsewhere (for example, under relevant legislation).

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Termination rights, force majeure and MAC clauses

- When entering into a new agreement, consideration should be given to what, if any, termination rights (above and beyond the usual rights for that type of agreement) are needed.
- If it is intended that an event of default or some other circumstance should trigger termination, the parties should consider whether the agreement should automatically be determined by the trigger or, alternatively, whether the trigger should simply give the non-defaulting party the option to terminate. The latter option may be helpful if the parties want some flexibility to overlook minor and temporary breaches.
- Should a force majeure clause be included in the agreement? If it is an agreement that already typically includes such a clause, the issue will be whether the drafting should be specifically extended to cover health pandemics such as COVID-19. A force majeure clause is one that suspends and possibly ends the obligations on a party to perform obligations where that party is prevented from performing the same by events outside its control. Generally force majeure events are unforeseeable and unavoidable. As time passes and the risks of COVID-19 are becoming more foreseeable, it is becoming more important to insert specific drafting rather than relying on generic force majeure provisions to mitigate the risks.
- For more information on force majeure clauses in construction contracts, please [click here](#).
- While not currently a common feature of real estate agreements, going forward parties may also consider including a material adverse change clause (or MAC clause) in their agreements. A MAC clause would allow one party to withdraw from the agreement if a material adverse change occurs between exchange/conclusion and completion of the obligations. The main challenge of such a clause (assuming it is agreed in principle) will be the drafting of the definition of “material adverse change”.

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Framing obligations

- When entering into a new agreement, parties will want to consider how to frame the obligations they are assuming.
- Parties should consider whether a particular obligation should be:
 - absolute (so the obligor has to comply no matter what);
 - conditional (if so, conditional on what?);
 - qualified (for example “reasonable endeavours” or “reasonable and commercially prudent endeavours”); or
 - changeable (for example, subject to suspension in the event of COVID-19 disruption).
- It might be appropriate to include a clause suspending performance of all or some obligations during periods of severe COVID-19 disruption. For more information, [click here](#).
- It could be that during periods of COVID-19 disruption certain obligations are downgraded (for example, instead of being absolute, a party must use reasonable endeavours).
- Parties should bear in mind that, even when the current COVID-19 disruption subsides, there is always the potential for future disruption either from COVID-19 or some other health pandemic.
- For more information on providing for extensions of deadlines, [click here](#).

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Due diligence

- COVID-19 has managed to disrupt all areas of life. This includes the ability for parties to undertake due diligence.
- To varying degrees, the following may be affected by COVID-19 restrictions:
 - surveyor/valuer access to sites to undertake surveys and valuations;
 - the ability of local authorities, utility providers and other bodies to process the usual conveyancing searches; and
 - the various registries to deal with information and registration requests.
- As a consequence, it is possible that there will be a rise in reliance on insurance products and carve-out clauses in agreements to cover the resulting gaps for deals that are otherwise progressing despite the disruption.
- Further, it is also likely that there will be greater due diligence on the financial resilience of counterparties to any new agreement. Extra security (such as a parent company guarantee or rent deposit deed) may be requested as a consequence.

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Extensions of time

- Wherever a deadline (including a completion date) is included in a new agreement for performance of an obligation or satisfaction of a condition, the parties should consider whether an appropriate mechanism should also be included to extend that deadline in response to any disruption caused by COVID-19.
- Some less obvious examples of obligations that include timelines that may need to be extended include:
 - obligations to register documentation with various public bodies (for example, the Land Registry/Registers of Scotland);
 - obligations to deliver executed documents ahead of completion; and
 - obligations to return documentation to another party.
- This consideration should apply not only to obligations but also to incentives. For example, if you are a tenant entering into an agreement for lease with provision for a fit-out rent-free to be granted at the start of the lease, do you want provision for that rent-free to be extended proportionate to any delay incurred completing the fit-out due to COVID-19?
- If parties are going to agree to this type of clause, they should consider whether:
 - it should be a one-off extension or whether the extension provisions should apply whenever there is disruption from COVID-19 (or any other health pandemic/emergency);
 - the extension should be to a fixed date or proportionate to the period of disruption; and
 - whether the extension is for the whole obligation or only part (for example, if it is a payment obligation, whether some of the payment is due now but the rest at a later date).

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Price adjustments/ remedies

- Consideration should be given to whether any pricing contained in the agreement might need to be adjusted in certain circumstances. For example, the parties could agree that, if the buyer waives compliance with a particular obligation or condition (for example, a letting condition), the price is adjusted downwards in accordance with a formula prescribed by the agreement.
- Another consideration is whether or not to “protect” the pricing in the agreement. For example, with option agreements to acquire land, should a minimum value be set to ensure that any temporary dips in the market do not unreasonably affect the price paid?
- Where the agreement makes provision for costs (for example, development costs), should a contingency be built in for COVID-19 disruption or escalation in prices?
- Careful consideration will be needed around the types of remedies that should apply to any non-performance. For example, where there is a target date that is missed due to COVID-19 disruption, should a lower rate of damages apply than in circumstances where the target date is missed due to other reasons?
- Where the remedy is termination – should termination be automatic or only upon the giving of notice by the aggrieved party?

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Inspections/ valuations

- Even after COVID-19 restrictions are relaxed in some areas, there is still the possibility of more restrictions in the future. As such, it may not be viable for a party's surveyor or representative to inspect the property. If this is the case and the agreement requires a party to inspect the premises, should the relevant inspection be postponed? Are there any ways of avoiding the requirement of inspection?
- Where an inspection cannot take place, should a party be given a longer time to raise issues?

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Consents

- Particular attention should be paid to any provisions in the agreement requiring the consent of any of the parties to it or the consent of a third party.
- Where the consent of one of the parties is required, it will be important that there is a workable scheme for the service of information and notices that will trigger the requirement to consider granting consent. For more information on notices, [click here](#).
- In addition, provisions which deem consent to have been given if a response to a request is not received within a set timeframe should be carefully considered. If a party agrees to such a clause, it should ensure that there is a robust system in place to ensure notices are received and processed and that sufficient time is allowed for the relevant organisation to consider and respond to the matter.
- If the consent of a third party is required:
 - how easily can that consent be obtained in the current climate? For example, a consent from a local authority may take longer as the demands on their time increase; and
 - what are the practical difficulties in the current climate for applying for that consent? For example, does the third party insist upon hard copy written notices?

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Notices

- The COVID-19 pandemic is forcing many businesses to reconsider how they operate, with many asking their employees to work remotely. One practical consequence of this is that legal notices being sent to business premises may not be picked up or forwarded to the relevant recipient within the relevant time periods for responding. As such, important deadlines may be missed.
- This issue should be considered when drafting new agreements. For example, parties should consider whether the notice provisions in any new agreement should take account of the potential for disruption. Options include considering whether service by email might be appropriate and building in the option to nominate alternative addresses/recipients for service.
- Considerations concerning notices by email include:
 - which email address should be nominated? Should a separate email address be set up specifically for the service of notices? Who should have access to that email address?
 - if an email is sent on a non-working day or outside normal working hours, whether receipt should be deemed to be the beginning of business hours on the next working day;
 - the kind of information the notice must contain (for example, an email heading that it is a legal notice and a description of the clause and agreement pursuant to which it is being sent);
 - whether the usual methods of service (for example, post and hand delivery) should be disapplied;
 - the kinds of notices which should be capable of being served by email; and
 - whether service by email should only be allowed during periods of COVID-19 disruption.

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Option to suspend obligations

- One clause that we may see becoming more popular in new agreements is a suspension (or pause) of obligations clause. Such a clause would legislate for the suspension of all or some of the obligations under the agreement for the duration of any period of severe disruption caused by COVID-19 or some other health emergency.
- Two of the key elements of a suspension of obligations clause will be:
 - the obligations that will be suspended (query whether the parties mean to suspend or waive those obligations); and
 - what will trigger the start and end of that suspension?

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Funding

- If funding is required, it would be prudent to consider what is available in the market as early as possible.
- In the current market, funders may (unsurprisingly) seek strong propositions backed by borrowers with a proven track record, who can offer adequate or enhanced security for the loan.
- Where an agreement involves any conditionality (depending on the nature of the agreement and conditions) a funder is likely to require (amongst other things):
 - evidence that the relevant conditions can be satisfied by a given date/long-stop;
 - acceptable step-in rights before the agreement can be terminated (to allow the funder (or a nominee)) to step in and satisfy the conditions itself; and
 - suitable COVID-19 protective drafting/clauses within the agreement.
- What form "suitable" drafting will take will depend on the deal itself, but is likely to require building in extensions to target dates or the ability to terminate if certain milestones are not achieved by a given date.

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Apportionments

- If the agreement is for a sale (whether leasehold or freehold/heritable) of a property subject to leases, careful consideration should be given to the apportionment provisions.
- As a result of COVID-19 disruption, it may be necessary to negotiate changes to the rental obligations contained in occupational arrangements. For example, rent may be waived, deferred or reduced and the pattern of rent payments may change (for example, from quarterly in advance to monthly in advance). The apportionment provisions in any new agreement may need to cover these possibilities.
- As arrears are likely to be more common, parties may want to pay more attention towards the associated provisions in any agreement.

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Management

- Where a property is being sold subject to leases and there is a delay between exchange/conclusion and completion, it is usual for the agreement to contain provisions governing how the seller will manage the property in the interim.
- Central to those management provisions will be the obligations relating to occupational arrangements. Given the disruption caused by COVID-19, consideration will be needed as to whether these provisions should be tightened or relaxed. For example, to what extent should the seller be required to liaise with the buyer prior to entering into side letters with struggling tenants to deal with rental payments? If the seller is permitted to enter into a side letter with a tenant, will the buyer agree to be bound by the same arrangement?
- If the property is vacant due to COVID-19 restrictions, does the buyer require any additional security measures and/or insurance between exchange/conclusion and completion, and who will pay for the same?
- At completion, the practicalities of handing over management of the property to the buyer will need to be considered.

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Enforcement

- What enforcement steps should a seller be permitted to take against a defaulting occupier in the period between exchange/conclusion and completion? To what extent does the seller need to assign any rights to enforce for breach to a buyer? These are all issues which parties will need to consider.
- Given the current restrictions on forfeiture/irritancy, the parties should also take advice on their rights post-completion to enforce against a defaulting tenant.
- Working with advisers, a party may want to work out a bespoke enforcement strategy for each tenant prior to completion.
- For more information on dispute resolution, [click here](#).

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- To understand more about the effect of COVID-19 on leases, take a look at our COVID-19 Interactive Lease Tool Kit by [clicking here](#).

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Works

- An agreement that is conditional on works being completed will require consideration of the impact of COVID-19 on those works, including:
 - the impact on the timetable; and
 - the cost of completing those works.
- Consideration should also be given to the following:
 - the ability to nominate or veto alternative materials or to make alterations to the works in response to COVID-19 disruption;
 - rights to extend target and long-stop dates due to COVID-19 disruption (for more information, [click here](#));
 - suspension of obligations during periods of COVID-19 disruption (for more information, [click here](#)); and
 - rights to terminate in certain circumstances (for example, if costs are going to exceed a certain amount).
- For more information on the impact of COVID-19 on construction agreements, [click here](#).

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Planning

- COVID-19 has caused significant disruption to the planning system. As such, careful consideration will need to be given as to how to frame any obligations relating to planning in the agreement. For example, conditionality on securing planning permission may require longer long-stop dates or extensions for public health emergency periods.
- Should there be provision in the agreement suspending any obligations therein to obtain planning permission in certain COVID-19 related circumstances? For more information, [click here](#).
- Please [click here](#) to view our planning law blog, which contains the latest planning information and guidance in light of the COVID-19 pandemic.

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- What impact could COVID-19 have on any other conditions contained in the agreement? For example:
 - if there is a funding condition, to what extent will any COVID-19 qualifications to valuations affect the availability of funding and to what extent should the deadline for satisfying this condition be extendable?
 - If the agreement is dependent on securing pre-lets, how realistic will that be in the current market? Also, the parameters setting out what will be an acceptable pre-let may need to be tailored to the current situation. So extendable rent-frees and suspension of rent clauses in event of COVID-19-related closures might need to be taken into account.

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Other sources of help

- To understand more about the effect of COVID-19 on leases, take a look at our COVID-19 Interactive Lease Tool Kit by [clicking here](#).
- For more planning advice, [click here](#).
- For more information on the impact on construction agreements, [click here](#).
- For more information on the impact of COVID-19 on legal arrangements and obligations, check out our global COVID-19 hub by [clicking here](#).

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