

COVID-19 and English Real Estate

July 2020 snapshot

As both England and Wales navigate their way out of lockdown, here is an updated snapshot summarising in one place the key COVID-19 legal developments affecting commercial real estate in these jurisdictions.

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

Contents

Significant developments since our previous snapshot alert on 9 June 2020	2
The key legal restrictions of lockdown	2
Key restrictions on enforcement action by commercial landlords	5
What enforcement action can landlords still take?	6
Impact of COVID-19 on existing and proposed real estate documentation	6
Key government initiatives	7
Practicalities – signing documents during lockdown	9
Looking ahead	10
What is going on in the market?	10



Significant developments since our previous snapshot alert on 9 June 2020

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

- Both the English and Welsh lockdown regulations have been completely overhauled. See “The key legal restrictions of lockdown” for a summary of the new regulations.
- The Corporate Insolvency and Governance Act 2020 was enacted and came into force on 26 June 2020. One notable provision contained in the Act is the temporary restriction on the use of statutory demands for winding-up petitions – see “Key restrictions on enforcement action by commercial landlords” for an overview, otherwise for more information on the Act generally, [please click here](#).
- The UK government issued its UK Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic. See “Government initiatives” for more information.
- The temporary moratorium on forfeiture and the temporary changes to Commercial Rent Arrears Recovery have both been subject to further change. See “Key restrictions on enforcement action by commercial landlords” for an overview.
- Parties are now beginning to look beyond lockdown and are starting to plan for recovery. [On 30 June 2020 the Prime Minister announced](#) plans to “build, build, build” our way out of the current crisis and gave details of Project Speed. Subsequently,

on 8 July 2020, the Chancellor unveiled [A Plan for Jobs 2020](#) which includes various measures (such as the temporary changes to residential SDLT) of relevance to the property industry. At the same time, non-government bodies, such as the British Property Federation, have also begun publishing their thoughts about the role of property in the recovery of the economy post COVID-19 ([click here to view the BPF’s COVID-19 recovery roadmap](#)).

- The Land Registry has confirmed that it will, subject to various conditions, start accepting electronic signatures on certain registrable deeds in the near future. For more information, please see “Practicalities – signing documents during lockdown”.

The key legal restrictions of lockdown

Since our previous snapshot alert, the regulations governing lockdown in England and Wales have been completely overhauled. The previous regulations in both jurisdictions have been revoked and replaced with:

- (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.

Like the previous lockdown regulations, 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	<p>There is now only one miscellaneous category of business that must remain closed (subject to various exceptions). That category focuses on indoor leisure based businesses, such as casinos and nightclubs. The businesses affected are set out in Schedule 2 of the regulations.</p>	<p>There are three main categories of business which must remain closed (subject to various exceptions):</p> <ul style="list-style-type: none"> • indoor premises selling food and drink for consumption on the premises; • most indoor leisure and cultural facilities; and • holiday accommodation. <p>In addition, there remain in place specific restrictions on crematoriums and community centres.</p>
General obligation to maintain social distancing and work from home	<p>There is no general provision equivalent to Regulation 12 of the Welsh Regulations requiring parties to take reasonable steps to ensure social distancing or to take into account official guidance. Instead, social distancing advice continues to be only contained in the government's guidance. That guidance is also more lenient insofar as it recommends keeping two metres away from people as a precaution or one metre when you can mitigate the risk by taking certain other precautions.</p> <p>Further, there are no obligations in the regulations requiring persons to work from home where practicable – instead this topic is covered by the government's guidance which recommends that, until 1 August 2020, people who can work from home should continue to do so. Thereafter it will be at the discretion of employers as to how staff can continue working safely.</p>	<p>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. 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. In addition, the regulations require 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.</p>
Restriction on movement	<p>There is no general restriction on movement.</p>	<p>There is no general restriction on movement.</p>

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 for relevant authorities to close certain public paths and access land.
Restrictions on gatherings indoors	<p>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:</p> <ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> • 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. <p>Subject to various conditions including a requirement to take all reasonable measures to limit the risk of transmission of coronavirus, 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.</p> <p>Anything that could be classified as an indoor rave involving more than 30 persons is specifically banned.</p>	<p>Subject to numerous exceptions, no person may, without a reasonable excuse, gather indoors with any other person apart from:</p> <ul style="list-style-type: none"> • members of their household¹; • their carer; or • a person to whom they are providing care.
Restrictions on gatherings outside	<p>Subject to numerous exceptions, no person may, without a reasonable excuse, gather outdoors with any other person apart from:</p> <ul style="list-style-type: none"> • members of their household or of no more than one other household¹; • their carer; or • a person to whom they are providing care. <p>There is a specific exception for certain organised outdoor activities comprising no more than 30 persons.</p>	
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.	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.

¹ Note that the Welsh Regulations now include provision for two 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 two households that have chosen to be treated as a single household.

The English Regulations are much more permissive than the Welsh ones. For example, in England indoor areas in restaurants are now allowed to re-open, while in Wales premises which are indoors and used for the consumption of food or drink must remain closed. In addition, the English Regulations continue to omit any reference to the two-metre rule, while the Welsh Regulations contain specific obligations in this regard. As mentioned in our previous snapshot alert, even if certain measures are not contained in the Regulations (for example, social distancing advice), they are still relevant to issues such as workplace risk assessments. For more guidance on restart strategies (including guidance on risk assessments), [please click here](#).

In addition to the English Regulations, in England:

- the Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020/750 came into force on 18 July 2020 and bestow on local authorities the power to issue various directions to impose prohibitions, requirements or restrictions in relation to:
 - the entry into, departure from, or location of persons in, specified premises in the local authority's area;
 - the holding of an event in its area; and
 - access to a specified public outdoor place in its area or public outdoor spaces in its area of a specified description; and
- we have seen the first location-specific regulations in England in the form of the Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020/685 (as amended) imposing more stringent rules than those contained in the English Regulations.



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 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 more recently by 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 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.

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](#).

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



Key government initiatives

New initiatives

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

To view the Code, please [click here](#).

This voluntary Code was introduced on 19 June 2020 and 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.

Initial feedback on the Code suggests that:

- further guidance on the kind of financial disclosure parties should be undertaking would be helpful; and
- the continuing restrictions on enforcement action (for example, the extension to the moratorium on forfeiture) might in some cases disincentivise parties coming to the table to negotiate.

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

The Welsh Minister for Finance has announced 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.](#)

Continuing initiatives

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.

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

As set out in our previous snapshot alert, the Land Registry has responded to the practical difficulties generated by lockdown by agreeing in May 2020 to temporarily accept virtual signatures on some registrable documents. To recap, a virtual signature is created by a signatory printing off the signature page to a document, signing it in wet ink, then scanning and returning that signed page with the rest of the document to its lawyer by email.

The good news is that now the Land Registry has also confirmed that it is gearing up to accept electronic signatures generated by electronic signature platforms. This promises to revolutionise conveyancing in England and Wales and is a significant step forward. However, the Land Registry's acceptance of electronic signatures comes with a few catches:

- it will only accept electronic signatures created using electronic signature platforms;
- to use electronic signatures, all parties must be represented by a conveyancer. This means that, for example, a bank executing a DS1 without legal representation will not be able to sign electronically;
- not only must all parties be represented by a conveyancer, but it must also be a conveyancer that uploads the documents onto the signing platform and controls the signing process. As part of that process, the relevant conveyancer must populate the platform with the names, email addresses and mobile phone numbers of all signatories and witnesses. This precludes parties nominating signatories or witnesses at a later date;
- all signatories and witnesses must be subject to two-factor authentication. In practice, this means that contact with them will not be just via email (as the platform contacts signatories and witnesses by email) but will also be by way of a one-time password sent to them by text message. That password must contain a minimum of six numbers;
- where witnesses are involved, conveyancers must be satisfied that they were physically present to witness the signatory sign. The most likely solution to this will be the inclusion in documents of a statement to be signed by the relevant witness confirming that they were indeed physically present and saw the signatory sign; and

- the conveyancer submitting the electronically signed document to the Land Registry for registration must also certify that, to the best of its knowledge and belief, the Land Registry's requirements (which are to be set out in Practice Guide 8) for the execution of deeds using electronic signatures have been satisfied.

Looking ahead

Looking ahead there are some notable events on the horizon:

- Outcome of the Financial Conduct Authority's test case on business interruption cover. The Financial Conduct Authority's test case looking at whether insurers are liable to pay out against business interruption policies in respect of COVID-19 disruption is being heard this week (commencing on 20 July 2020) and is expected to last eight days. Eight insurers have agreed to be involved. The much anticipated judgment will be delivered either late in August or in early September.
- Market response to the UK Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic (Code). The Code is still in its infancy, having only been released a few weeks ago. Over the next six weeks, it will be interesting to see how the market responds to the Code and how parties feel it interacts with other government initiatives, particularly those restricting enforcement action against tenants.
- Easing of lockdown. Subject to the public health situation, we are likely to see further relaxation of the lockdown rules, in the near future. For example, in England, subject to transmission rates, the current intention is that:
 - from 25 July 2020, sports facilities and venues, including indoor gyms, fitness and dance studios, indoor swimming pools and indoor water parks, for example, will also be allowed to open; and
 - from 1 August 2020, among other things:
 - bowling alleys, skating rinks and casinos will be allowed to open;

- conference and exhibition centres will be able to re-open in order to enable pilots for business events to take place; and
- indoor performances to a live audience can begin to take place.

- What happens when government support is gradually withdrawn? With the employee furlough scheme being wound down and the moratorium on forfeiture and restrictions on statutory demands all due to expire not long after the September quarter day, autumn/winter 2020 promises to be rather interesting.

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

What is going on in the market?

To find out more about COVID-19's impact on the commercial property market, please look out for our sector-specific webinars. If you would like more information or would like to attend one of our webinars, please contact stacey.fraser@dentons.com. 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".



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.