

COVID-19 and Scottish commercial real estate

November 2020 snapshot

In this updated snapshot we summarise, in one place, the key COVID-19 legal developments affecting commercial real estate in Scotland since early September 2020.

To see our previous snapshots issued on:

- 9 June 2020, please [click here](#)
- 22 July 2020, please [click here](#)
- 4 September 2020, please [click here](#)

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Significant developments since our previous snapshot alert on 4 September 2020

The following are some of the most significant COVID-19-related developments for Scottish commercial real estate since our previous snapshot alert:

- **Lockdown regulations:** From 2 November 2020, Scotland's route map out of lockdown has been replaced by a five-level strategic framework, in an effort to manage the second wave of COVID-19 as we enter winter.
- **Extension of the emergency coronavirus legislation:** Various government protection measures have been extended, including the longer notice period required for irritancy for non-payment of rent, which will now remain in place until 31 March 2021.
- **Business interruption insurance case:** The English High Court handed down its judgment in the Financial Conduct Authority's test case on business interruption cover on 15 September 2020. The case considered the wording of various policies relating to business interruption cover. While the judgment was largely considered to be favourable to policyholders, leave has been granted for a "leap-frog" appeal to the Supreme Court and we wait to see what happens next.
- **Dentons tool-kits:** On 14 October 2020, Dentons launched its [Real Estate Litigation interactive possession and enforcement tool-kit](#) which is designed to help clients understand the current restrictions on, and opportunities for, leasehold enforcement action. This tool sits alongside our existing [COVID-19 Interactive Lease Tool](#) and [COVID-19 Interactive RE Agreement Tool](#), both of which have been recently updated.

The key legal restrictions of lockdown in Scotland

From 2 November, the Scottish Government has introduced a new five-level [Strategic Framework](#), which imposes restrictions by local authority area. This is an attempt to manage and suppress the second wave of COVID-19.

Level zero is the closest level to "normal" that can be hoped for without a COVID-19 vaccine being available. The highest level (Level 4) is the closest to the full type of "lockdown" that we experienced in March, but with schools, early learning and childcare remaining open.

Reviews of the level that each respective local authority area is in will take place on a weekly basis. The Scottish Ministers can elect to move the whole country into the same level, or adopt a more tailored approach for individual local authority areas, depending on the circumstances at the time. The protection level that has been allocated to each local authority area can be checked on the Scottish Government's website [here](#).

The five-level framework is implemented by the [Health Protection \(Coronavirus\) \(Restrictions and Requirements\) \(Local Levels\) \(Scotland\) Regulations 2020](#). Going forward, we anticipate frequent amendments to these regulations as the Scottish Government adapts to the changing risk profiles of different areas around the country.

The key restrictions set out in the current regulations are summarised in the table below. This is a high-level summary and does not set out the numerous exceptions to the various rules.





Activity	Level 0	Level 1	Level 2	Level 3	Level 4
Restrictions on individuals					
Socialising indoors	8 people from a maximum of 3 households.	No socialising inside homes			
	Children under 12 do not count towards the total number of people in the gathering or the number of households for gatherings inside homes	However, 6 people from a maximum of 2 households can socialise in public indoor places (such as hospitality venues in Levels 1, 2 and 3)			
Socialising outdoors¹	Children under 12 do not count towards the total number of people but do count towards the number of households in a gathering in a public indoor place				
	15 people from a maximum of 5 households in a public place	Until 18 November 2020, 6 people from a maximum of 2 households	6 people from a maximum of 2 households (in public outdoor spaces and private gardens)		
		From 19 November 2020, 8 people from no more than 3 households in public outdoor places. 6 people from a maximum of 2 households will remain the limit for gardens			
Children under 12 do not count towards the total number of people or the number of households for gatherings in a public outdoor place .					

1 Different rules apply for 12-18 year olds and under 12s.

Activity	Level 0	Level 1	Level 2	Level 3	Level 4
Restrictions on businesses					
Businesses and premises that must close (excluding hospitality)	Nightclubs, dance halls, discotheques and sexual entertainment venues are required to close across all levels				
			In Levels 2, 3 and 4 the following additional businesses must close: concert halls, night-time venues with dance floors and music, theatres, comedy clubs, soft plays, sports stadia, conference and exhibition centres, snooker/pool halls, bowling alleys, casinos and funfairs		
				Bingo halls and amusement arcades must close in Levels 3 and 4	
					In Level 4, the following additional businesses are required to close: cinemas, museums, galleries, betting shops, skating rinks, indoor fitness studios, gyms, swimming pools or other indoor leisure centres, libraries, close contact services, non-essential retail and holiday accommodation
Hospitality food and drink (socialising rules as set out above still apply)	Takeaways are permitted for alcohol and food across all levels				
	Eating and drinking while seated at tables is required at all levels				
	A range of exceptions (e.g. for hospitals, schools, student accommodation, airside premises and hotel room service) apply at all levels				
	Relevant public health advice and requirements (such as physical distancing, use of face coverings, collection of customer details and enhanced hygiene measures) also apply. Scottish Government hospitality sector guidance should be consulted				

Activity	Level 0	Level 1	Level 2	Level 3	Level 4
Indoor hospitality (restaurants, cafés, bars and pubs)	Normal licensing times apply	Can stay open, and food and drink (including alcohol) permitted to be served on premises subject to last entry being 21:30 and premises being closed at 22:30	<p>“Drinks only” pubs must close</p> <p>Other indoor hospitality may stay open but (a) alcohol is only permitted with main meal; (b) last entry to the premises must be 19:00; and (c) premises must be closed by 20:00</p>	<p>“Drinks only” pubs must close</p> <p>Other indoor hospitality may stay open but (a) no alcohol can be sold or consumed on premises; (b) last entry to the premises is 17:00; and (c) premises must be closed by 18:00</p>	Must close
Outdoor hospitality (restaurants, cafés, bars and pubs)	Normal licensing times apply	Can stay open, and food and drink (including alcohol) permitted to be served on premises subject to last entry being 21:30 and premises being closed at 22:30	<p>“Drinks only” pubs must close</p> <p>Other outdoor hospitality can stay open and serve alcohol outdoors but (a) last entry to the premises must be 21:30; and (b) the premises must be closed by 22:30</p>	<p>“Drinks only” pubs must close</p> <p>Other outdoor hospitality can stay open but (a) no alcohol may be sold or consumed on the premises; (b) last entry to the premises is 17:00; and (c) premises must be closed by 18:00</p>	Must close

[Supplementary sectoral guidance](#) issued by the Scottish Government remains very important and should be consulted in conjunction with the regulations, particularly when carrying out workplace risk assessments.

The Scottish Government is also asking the public to comply with other advice which does not form part of the regulations. This includes not travelling into or out of Level 3 areas or above unless “essential”, avoiding car sharing and working from home where possible.

A breach of the Scottish regulations continues to be punishable on summary conviction by a fine, or by a fixed penalty. The first fixed penalty

in Scotland is £60, dropping to £30 if paid within 28 days. The second penalty notice is £120, and each subsequent penalty notice doubles the previous penalty until the maximum of £960 per penalty is reached.

Local authorities continue to have powers to act in respect of specific premises that are breaching guidelines. These include powers to close and restrict entry to such premises, to impose prohibitions or restrictions in relation to specific events, and to restrict or prevent access to public spaces. The police have powers to break up and disperse gatherings and to enter premises to prevent or stop offences under the regulations.

Enforcement action available to commercial landlords in Scotland

There continue to be certain restrictions on commercial landlords taking enforcement action against their tenants, including:

- **Extended notice period for irritancy:** The 14-week notice period currently required to irritate a lease on the grounds of a monetary breach (e.g. a failure to pay rent) will now apply until at least 31 March 2021.
- **Winding-up petitions:** The prohibition (introduced by the Corporate Insolvency and Governance Act 2020) on presenting winding-up petitions to the court following a statutory demand has been extended to 31 December 2020. Also extended to that date is the general prohibition on winding up a tenant unless it can be established that its business has not been adversely affected by COVID-19 and that the debt would have arisen anyway.

However, many other debt recovery remedies available to landlords in Scotland are unaffected by the COVID-19 emergency legislation. Please see our [recent article \(8 October 2020\) here](#) for details of the remedies still available.

For further help understanding what enforcement action landlords can currently take, please see our [Real Estate Litigation interactive possession and enforcement tool-kit](#) which was launched on 14 October 2020 and covers not only Scotland but also England, Wales and the Republic of Ireland.

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](#) which was updated on 13 October 2020; and
- other types of real estate contracts (including missives/agreements for lease/sale; development agreements etc.), both existing and new – take a look at our [COVID-19 Interactive RE Agreement Tool](#) which was updated on 27 October 2020.

Looking ahead

The response to COVID-19 is constantly evolving and we can expect further frequent changes to the lockdown rules in the near future. The First Minister has said that she cannot rule out the possibility of a national lockdown, or of certain local authority areas moving to the highest level of restrictions, in the coming weeks.

Looking further ahead, the run-up to the end of 2020 and beginning of 2021 will be a key period. During this time, we will have the next Scottish quarter day (28 November 2020), and certain protections under the Corporate Insolvency and Governance Act 2020 are due to expire (though they could be extended further). The festive period is also a crucial trading time for the retail and leisure sectors, so it will be interesting to see how much of a boost Christmas and staycations provide. Ultimately, however, top of real estate's Christmas wish list for 2020 will be a return to "normal".

What is going on in the market?

For information on COVID-19's impact on the real estate market:

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

NOTE: Information contained in our COVID-19 articles and publications is correct at the time of print. This is, however, a constantly evolving situation across the globe and specific advice and guidance should be sought as required.