

COVID-19 and Scottish Real Estate a snapshot

As life under lockdown begins to feel like the new norm, we have summarised here the key COVID-19 legal developments that affect commercial real estate in Scotland and we look ahead at what is on the horizon.

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The key legal restrictions of lockdown in Scotland

The Coronavirus Act 2020 came into force on 26 March 2020 and contains powers enabling the Scottish Ministers to issue directions which place restrictions on premises and/or events and gatherings. However the main rules governing lockdown in Scotland are contained in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020/103, which came into force on 27 March 2020. On 21 May 2020, the Scottish Government published a route map setting out a phased approach to gradually

ease lockdown. An amendment to the Regulations was passed on 29 May 2020 to implement the first phase of easing of lockdown. Much of the detail on the restrictions (and easing thereof) is also set out in Scottish Government guidance.

The Regulations contain two types of restriction – restrictions on businesses, and restrictions on individuals. The table below summarises, at a very high level, the restrictions on a number of key types of business in Scotland:

Type of business	Requirements	Key exceptions
Restaurants/cafés/pubs/bars	<ul style="list-style-type: none"> Must cease business/services to the extent that they sell food or drink for consumption on the premises. 	Room service in hotels; some workplace canteens.
Leisure/entertainment including cinemas, theatres, spas, hairdressers, sports courts, swimming pools, funfairs, playgrounds, gyms, outdoor markets and car showrooms	<ul style="list-style-type: none"> Must cease business/services. 	Outdoor tennis and bowls courts, outdoor food and livestock markets and some venues can be used to broadcast performances outside the premises whether via the internet or as part of a radio or television broadcast.
Shops/library services	<ul style="list-style-type: none"> Must cease business/services except for distance selling (e.g. via the internet, telephone or post). Must close any premises not required for distance selling. Must not admit anyone to the premises who is not required for distance selling. 	Long list of exceptions including (but not limited to) food retailers, newsagents, pharmacists, petrol stations, banks, funeral directors, post offices, laundrettes, dental and other medical services, vets, certain storage and distribution facilities, car parks, garden centres, any business which provides "take-away" food and any business that takes preparatory steps for re-opening whilst closed to the public.
Holiday accommodation	<ul style="list-style-type: none"> Must cease business. 	Providing accommodation to: the homeless, those unable to return to their main residence, those who use it as their main residence, those who need accommodation while moving house or those attending a funeral.

The regulations contain a number of express provisions requiring the person responsible for the business to take all reasonable steps to ensure a distance of two metres is maintained between any persons on the premises.

In addition, the regulations contain two key restrictions on individuals:

- first, a restriction on movement – that individuals should not leave their home without reasonable excuse (which includes obtaining basic necessities, medical supplies and money for your own household or that of a vulnerable person, exercising with members of one other household or accessing critical services); and
- second, a restriction on gatherings – that individuals should not gather in a public place in groups of more than two unless all the persons are from no more than two households or other limited reasons (such as attending a funeral or providing assistance to a vulnerable person).

A breach of any of these regulations will attract a penalty. For your first fixed penalty, the fine in Scotland is £60 (dropping to £30 if you pay within 28 days). The second penalty notice would be £120, and each subsequent penalty notice doubles the previous penalty until the maximum of £960 per penalty is reached.

The Regulations do not however contain the full detail of the Scottish Government guidance on each of these restrictions. For example, the phase one guidance is that you can meet another household in either an outdoor public place or private garden, but that these meetings should maintain social distancing of two metres and not include more than eight people in total. This guidance is not currently enshrined in the Regulations and cannot therefore be enforced. However, the First Minister is monitoring compliance

closely and has indicated that if these restrictions are not complied with, they will be added to the Regulations to protect the safety of the wider population. Another example is that Scottish Government guidance on phase one allows non-contact outdoor activities such as golf and angling. Also, it is worth bearing in mind that even if certain measures are not contained in the Regulations, they are still relevant to issues such as workplace risk assessments.

Scottish-specific COVID-19 legislation

The Coronavirus Act 2020 applies UK-wide, although with various separate Scottish provisions. In addition, two Acts of the Scottish Parliament have been passed to make emergency COVID-19 provisions.

- **Coronavirus (Scotland) Act 2020:** This Act came into force on 7 April 2020. It is due to expire on 30 September 2020, although it can be extended by the Scottish Ministers. It includes, amongst other things, a protection against irritancy; allowance for electronic submission of deeds for registration; extension of planning permissions and business improvement districts; and temporary moratoriums on diligence. We cover some of these in a bit more detail below.
- **Coronavirus (Scotland) (No. 2) Act 2020:** This Act came into force on 27 May 2020. It includes, amongst other things: changes to certain bankruptcy laws; the introduction of shorter notice periods for students to terminate tenancies of Scottish purpose-built student accommodation; and various emergency provisions for care homes (see [our article on implications for the care sector](#)).

Various COVID-19-related statutory instruments have also been passed by the Scottish Parliament.



Enforcement action by commercial landlords in Scotland

There are a number of measures that restrict or limit the enforcement action commercial landlords can take against their tenants in Scotland:

- **Protection against irritancy:** Irritancy (the Scottish equivalent of forfeiture) allows a landlord to terminate a lease where the tenant is in breach of its obligations and has failed to remedy that breach within a specified time period. The Coronavirus (Scotland) Act 2020 has extended the minimum notice period for remedying monetary breaches (e.g. a failure to pay rent) from 14 days to 14 weeks, and the Act allows the Scottish Ministers to extend this period still further. See our [article on this irritancy protection](#) for more information.
- **Summary diligence:** ‘Summary diligence’ is the suite of remedies available to a landlord under registered Scottish leases whereby a landlord can seek to recover arrears of rent (and sometimes other sums) without having to go to court. Summary diligence was unavailable during lockdown but now, as we move into phase 1 of the Scottish Government’s route map, certain remedies are available again. However, these are more limited than before.
- **Court action:** Ordinarily, a landlord can recover arrears of rent and other sums via a court action for payment. Since lockdown, the Scottish courts have been closed to all but essential/urgent business. However they are now beginning to re-open to business other than that deemed to be essential/urgent.
- **Statutory demands for payment and winding-up:** The UK government has announced that it intends to introduce measures for statutory demands and winding-up petitions issued to commercial tenants to be temporarily voided. These measures are contained in the Corporate Insolvency and Governance Bill, which applies UK-wide (albeit with separate provisions for Scotland) and is expected to become law by July 2020 and to have retrospective effect.

For more information, please consult [our article on landlords’ remedies under Scottish commercial leases during COVID-19](#), which is being updated on a regular basis.

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

Remedy	What is involved and are there any restrictions?
Rent Deposit	Where there is a rent deposit, landlords are still able to draw down in respect of a breach, subject to the terms of the rent deposit agreement and the tenant's solvency.
Guarantee	Landlords are free to pursue a guarantor in respect of a tenant's breach, subject to the terms of any guarantee.
Administration	Whilst there are restrictions on serving statutory demands and commencing winding-up proceedings, there are no such restrictions on applying to the court as an unsecured creditor for the appointment of an administrator. This would, however, be a costly process and one that may not be commercially viable, particularly where the landlord's debt will rank behind that owed to any secured creditors.
Insurance	Subject to the terms of the policy, landlords may be able to make a claim against their insurance for any business interruption.





remedies still available.

Impact of COVID-19 on existing and proposed Scottish real estate documentation

For information generally on the impact of COVID-19 on:

- Leases, both existing and new – take a look at our [COVID-19 Interactive Lease Tool](#); and
- Other types of real estate contracts (including missives/agreements for lease/sale; development agreements etc), both existing and new – take a look at our [COVID-19 Interactive RE Agreement Tool](#).

While COVID-19 drafting is frequently being requested on new documentation, it is not always being accepted. At the present time there does not appear to be a “market” position on these types of clauses and instead their inclusion in new documentation is very much transaction specific.

What we have seen within the market is a desire for parties to work together and be reasonable in order to successfully navigate these unprecedented times.

UK and Scottish Government initiatives

There are plenty of government initiatives, both UK and Scottish, out there to help support businesses through the current difficulties including:

- **Business rates relief:** The Scottish Government

has introduced a 100% business rates relief for the year 2020/21 for properties with specified uses in retail, hospitality and leisure in Scotland. This includes news publishing premises and has also been extended to the aviation industry. All commercial properties in Scotland will also get a 1.6% rates relief, which effectively reverses the change in poundage for 2020/21. Property owners do not have to apply for these reliefs – the intention is that they will automatically be applied by the relevant local authority. The reliefs were implemented by the Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020.

- **Relaxation of some planning and licensing restrictions:** The Scottish Government has provided that during the current exceptional circumstances, planning enforcement action should not be taken against pubs or restaurants which are providing take-away or food delivery services despite not having planning permission to do so. Similarly, planning enforcement action should not be taken in respect of non-compliance with planning controls on deliveries or store opening times. Of course, this does not override any private restrictions (for example, contained in leases) that prevent such activity.
- **Financial support:** A range of financial support is being provided, from VAT deferral to the Coronavirus Business Interruption Loan Scheme and the Bounce Back Loan Scheme. More details on these initiatives can be found on the [UK government's](#) and [Scottish Government's](#)

business support pages.

Practicalities of concluding and completing deals during lockdown in Scotland

Lockdown has had implications for the practicalities of completing real estate deals in Scotland, but less so for concluding contracts.

- **Signing legal documents** – In Scotland, the lockdown has not been too problematic for the practicalities of conclusion of contracts for the sale or lease of property. This is because in Scotland: (firstly) such contracts usually take the form of letters signed by the parties' respective solicitors as agents, without the parties themselves having to sign; and (secondly) it is perfectly valid for a contract to be concluded by sending the signed documents via email.
- **Completing transactions** – This has been more of an issue in Scotland. Registers of Scotland's offices closed at the very start of the lockdown, and at that point applications could (generally) only be submitted to them in hard copy, paper format. As completion documents could not be registered, many completions ended up being postponed. In response, the Coronavirus (Scotland) Act facilitated an alternative interim solution for certain completions, and also made it legally permissible for submission to be made to Registers of Scotland electronically. Registers managed to get a digital submission system up and running by the end of April for certain transactions (and opened it up further at the end of May). This means that many transactions can now complete, as long as completion does not involve a breach of the social distancing rules.

Looking ahead

Looking ahead, there are some notable events on the horizon:

- The **enactment of the Corporate Insolvency and Governance Bill**.
- The **easing of lockdown** by the Scottish Government over the coming weeks and months in accordance with its route map. In various respects, the Scottish Government is taking a more cautious approach than is being taken in England. Scotland is watching with great interest to see what impact

and consequences the easing measures have in England, as this may give us a glimpse of what we can expect to happen north of the border in the near future.

- The **code of practice** with the commercial sector in relation to the high street. Last month the UK government announced that it would be working with leading businesses and trade associations to publish a code of practice to support the high street and to provide clarity and reassurance over rent payments. The code of practice is expected to be published before the next English quarter day (24 June) and the UK government has committed to engage with the devolved administrations to ensure the code applies across the UK.
- The 30 September 2020 **expiry, or extension**, of the Coronavirus (Scotland) Act and Coronavirus (Scotland) (No. 2) Act.
- The **Scottish quarter days** (28 February, May, August and November) are different to the English quarter days. We await data and intel about levels of non-payment of rent on the recent quarter day of 28 May.

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.

Market commentary

- **Housebuilding:** Whilst housebuilders certainly maintain a healthy appetite for land acquisition, the lack of certainty in respect of the valuation of that land poses a problem at present, largely due to a lack of comparable evidence and this has inevitably slowed the market. The hope and expectation is that this will become less of an issue in the coming weeks and months and so we should see an increase in new deals. There has been no notable drop-off in instructions for existing or new strategic land acquisitions as housebuilders and landowners alike take comfort in a concluded deal which sets an agenda for the later determination of the price. However, Scotland might experience a continuing clog in the new housing supply chain, as the Scottish Government has required all non-essential construction work in Scotland to cease. Now that we are in phase one of the easing of lockdown, the

construction sector can start planning and making pre-start site preparations with a view to moving to a soft restart in phase two.

- **Hotel and leisure:** Hotel and leisure assets have been hit hard by the effects of COVID-19 with re-opening not expected until phase three of the Scottish Government's route map. Even then, there is likely to be a shift in demand, with fewer overseas guests and a greater focus on the domestic market. As with other sectors, we have seen some negotiation in the market for rent support packages for hotel and leisure occupiers. However, hotels and leisure tend to be long-term assets. This means parties have been able to consider longer-term solutions, which would not necessarily be available for short-term leases such as those found in sectors like retail and offices.
- **Logistics:** Although there has been some market disruption, logistics has, overall, been one of the most resilient sectors. While some landlords and tenants have agreed rent deferrals, others have been negotiating new deals to accommodate operator supply chain demands (for example, requesting additional flexible space or seeking consent to carry out works to accommodate future supply chain investment). We expect logistics occupiers to continue seeking last mile delivery space to meet their own customer-driven performance metrics as well as new development demand involving the repositioning of distressed retail assets to cater for e-commerce and supply chain requirements. We also anticipate that there will be a "flight to quality" for those prepared to deploy capital in a market where competition for the asset is less intense.
- **Retail:** In the retail world, landlords seem to appreciate that their tenants are particularly hard hit. We have seen some willingness to allow flexible rent-free periods for new leases which are calculated by reference to when retail lockdown ends, and even some rent suspension clauses to guard against the possibility of future outbreaks. This is arguably the sector that will need to reinvent itself the most to survive this pandemic and we have seen many retailers already responding to this by diversifying their offering. Only time will tell if consumers' shopping habits have changed for good or if we will revert to our pre-pandemic shopping habits.
- **Offices:** There has been some slowdown in the transactional and leasing market since the onset of lockdown. We await seeing whether, and if so the extent to which, the office leasing market experienced a shortfall in rent and service charge collection on 28 May (the first Scottish quarter day since lockdown started). We have seen an increased number of lease re-gears where landlords and tenants have worked together to recalibrate leases (for example, through enhanced rent-free periods in return for lease extensions). COVID-19 has clearly created some uncertainty across the office sector (including serviced offices) as occupiers rethink their requirements and remote working policies. It is likely that a return to office working will come sooner for England than Scotland. What implications this will have remain to be seen, but it is likely that any long-term shift in practices and office rents will be seen in England first.

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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