



PROTECTING YOUR PROPERTY ASSETS AND ASSOCIATED LEGAL RIGHTS

COVID 19 (coronavirus) has defied international borders, spreading globally almost contemporaneously. In its slipstream comes an economic tsunami that is changing the way business is done and re-defining the economic fundamentals and assumptions that have, for decades, underpinned the growth of international trade.

EXISTING CONTRACTS

Where you have already exchanged contracts for the acquisition of a property (or lease) and are awaiting completion, consider potential **delays in the banking system** or **failure to complete on time** due to **logistical issues** such as inability to procure vacant possession or delays in bank transmission of funds on completion.

LATE COMPLETION ISSUES

In respect of **existing property contracts**, the obligations to complete will be determined by the terms of the existing contract.

On a property sale or acquisition, parties may have agreed to complete on a fixed completion date with the provision of vacant possession (an unconditional contract). Alternatively parties may agree a provisional future date subject to discharge of certain pre-conditions by an agreed longstop date (conditional contract).

A failure to procure completion by an agreed contractual completion date in respect of an unconditional contract, or by the contractual longstop date in respect of a conditional contract where a party is in default, will result in a fundamental breach entitling the other party to rescind the contract or bring it to an end. To give effect to that procedure, a notice to complete must formally be served by the party requiring completion against the party in default, thus making time of the essence of the contract.

The Standard Commercial Property Conditions (third edition), which are incorporated into most current commercial property contracts, provide that completion will then take effect within 10 working days of service of that notice excluding the day on which the notice is given. If the parties fail to complete within that timeframe, the contract may be rescinded and the party requiring compliance may pursue the party in default for damages.



If the seller is holding a deposit and is not the defaulting party, it may forfeit (keep) that deposit. If it is holding a deposit of less than 10% of the purchase price, it may request the balance of the 10% deposit and reserve its other rights to pursue for damages. It may also then re-sell the property following lawful rescission.

Certain contracts may have varied the above position - for example by shortening or lengthening the time period under which a notice to complete will take effect.

Action: Check your contract now to ensure the completion and related notice periods are clear and that you are comfortable with the timeframes bearing in mind the current situation. If you need to lengthen the timeframe, take steps to contact the other party to negotiate or request a contractual variation. This will provide you with more flexibility to keep the contract alive in order to avoid the service of a notice to complete on formal default. Ensure you are capable of receiving any notices under the contract. If necessary contact the other party to update contact details, including requesting service by email.

Without such a variation, the terms of the existing contract will bind and the contractual consequences for breach including rescission of the contract will flow. Seek legal advice where your position is unclear.

DOES COVID-19 ALLOW YOU TO WITHDRAW FROM A PROPERTY CONTRACT?

Where an English contract contains a force majeure clause, it will usually deal specifically with defining what comprises a force majeure event and how the parties' obligations are affected by such an event.

Even if the event is covered as a force majeure, other requirements may need to be satisfied to constitute a force majeure event. If COVID-19 is not specifically covered, one would need to consider whether it is the sort of event that might fall within general contractual force majeure wording (if there is one) or where there has been a Government decision or administrative action preventing performance included in the force majeure clause. One may then consider whether the events could have been avoided or overcome to enable contractual continuity.



Finally, the question of “causation” is relevant. The causation test here is “but for” COVID-19 would you have been able to complete? And bear in mind that a duty of mitigation will apply - have you taken reasonable steps to avoid or prevent the effects of the force majeure event?

Action: Check if your contract contains a force majeure clause. Most English property agreements do not include such a provision and instead allocate risk between the parties by way of insurance in respect of the property from the date of exchange of contracts. Does the property insurance cover an event such as COVID-19? Most do not. With the onset of COVID-19, that is likely to change.

Parties may need to review existing obligations where completion is prevented. For example, this could be as a result of Government lockdown, manpower shortage or infrastructure issues. A case-by-case negotiation will be required depending on the property, the needs of the parties, and by reference to anticipated events. Seek advice if your position is unclear.

I HAVE NOT YET SIGNED - SHOULD I PROCEED?

CALL OPTIONS

Rather than entering into a traditional real estate contract, buyers may consider a call option enabling them to call for completion of a property on agreed terms within a pre-agreed time from exercise of the option. This enables parties to seek to circumvent the COVID-19 self-isolation risks, delays due to banking systems, and issues arising on replies to enquiries or failure or inability to procure normal pre-exchange and completion searches as a result of COVID-19.

It introduces flexibility and affords buyers time to secure a lower risk approach. By securing commercial interest (and locking out other market interest) an option provides the space to deal with issues outside the traditional real estate transactional timeframe. It pre-supposes a seller that can move quickly and facilitate completion within the timeframe anticipated under the option.



CONDITIONAL CONTRACTS

Conditional contracts can be used to create a binding property contract subject to discharge of pre-completion obligations. Those obligations can be tailored to meet specific circumstances such as infrastructure, funding and search difficulties. It would be important to ensure that all possible conditions are carefully considered before entering into such a contract as one would be bound to complete in the usual way once conditions were discharged.

CAN I ESCAPE FROM MY LEASE?

As a result of Government lockdown or COVID-19 infections, tenants may find they are forced to close their premises (office premises, retail premises or otherwise). They may find they are required to pay rental for premises that whilst capable of use are not capable of economic yield due to lockdown. Losses may not be covered under the usual property insurance if no physical damage has occurred to the property, and so it may be a risk against which a landlord has not insured against under the lease. Certain tenants such as retail tenants may also be obliged to keep premises open and may suffer penalties if they fail to do so. A tenant would need to rely on its business interruption insurance to cover such loss. **Action:**

- Landlords and tenants may wish to check their insurance policies and clarify what is covered, what is not covered as an insured risk and whether their own (separate) business interruption insurance provides protection against any gap in coverage that this situation represents.
- Tenants may seek to open negotiations with landlords pending the outcome of these reviews and, if possible, seek a rental holiday or re-gearrent review with ability for landlords to recoup COVID-19 rental holidays at a future date, particularly where a number of such leases may be held within a landlord's trading portfolio with loss gaps identifiable on insurance and on trading. It would be important for landlords to consider how such arrangements are agreed, whether by variation to existing leases or otherwise and to check underlying valuation assumptions.
- As a landlord's property valuation and funding requirements will be linked to ongoing real estate revenue stream, it could be useful to negotiate with tenants who are experiencing short-term logistical supply line and trading difficulties. This will be a commercial value judgment in many cases.
- The requirements of funders and investors on both sides of these contractual relationships will carry particular weight in any such negotiations; they should be brought on board in negotiations at an early stage as time will be of the essence in reaching workable commercial outcomes.



FORCE MAJEURE AND LEASES

A lease in common with most property contracts will generally not include a force majeure clause. A lease is not just a contract: it takes effect as a proprietary interest in land. It comprises a right of ownership that would not normally entitle termination as a result of an extraneous event that does not touch or concern either party directly.

FRUSTRATION AND LEASES

In the absence of a force majeure provision, parties may seek to rely on the fact their contract or agreement has been 'frustrated' by COVID-19 events (i.e. rendered incapable of performance and thus preventing completion).

Once again, the fact that an area is subject to lockdown may not, of itself, prevent a property from being used (i.e. it is physically capable of use) even if that use is not profitable due to the enforced exclusion of clientele and staff from the property. Is it legally or physically impossible for you to perform your obligations under the contract? Perhaps the argument that your supply chain is interrupted (e.g. through lockdown) may be of relevance here.

If a lease includes a keep open obligation, there may be an argument that the contract is incapable of performance. The product shift necessary to procure the use prescribed by the lease may become impossible due to Government and workforce lockdown either in the place of manufacture or at distribution supply chain bottlenecks. However, these are issues that have not yet been litigated and the situation is unfolding.

PROCEDURAL ISSUES WITH LEASE COMPLETION - LANDLORD AND TENANT 1954 ACT EXCLUSIONS

If a lease is to be excluded from the security of tenure provisions under the Landlord and Tenant Act 1954, it may be impossible to procure the swearing of a statutory declaration before a lawyer due to lockdown issues. Parties should therefore ensure there is sufficient time to procure a simple declaration from the buyer before completion and that this has been sworn within the necessary timeframe to ensure it operates to validly exclude on completion.



SIGNATORIES - WHAT STEPS SHOULD I TAKE?

Parties will need to consider the failure or inability to obtain signatories. They should mitigate against such risks and ensure they have all necessary electronic or alternative mode of execution available to avoid a breach which may be foreseeable on completion. If it remains impossible to procure performance, parties would need to consider an extension or enforcement of existing terms to either procure performance or enable rescission.

FINANCIAL STEPS AND MANAGEMENT ISSUES

On 17 March the Chancellor, Rishi Sunak, announced a number of measures designed to assist businesses and property owners through this continuing period of uncertainty:

Business rates holiday

Business rates are taxed on commercial property, based on the value of a company's premises. Mr Sunak announced he would give **all retail, hospitality and leisure business a one-year holiday from their rates bill.**

Grants

Mr Sunak said that about 700,000 of the nation's smallest companies will receive a £10,000 grant to help them in the months ahead. A further **£25,000 grant** will be available for **retail, hospitality and leisure businesses operating from small premises with a rateable value for tax purposes of between £15,000 and £51,000.**

Action: Check your business rates threshold and, if applicable and your business falls within the above categories, apply for the benefit of such grants and/or reliefs as applicable to assist in the forthcoming months.

Small business loans

Small and medium-sized companies may have limited reserves to help them through a lean period and many fear failure without an urgent flow of funds. **Falling into this category, of course, are food retailers, many of whom are perhaps not unexpectedly reporting a downturn in trade of 50%-70% during this period.** In the light of the most recent Government advice, Mr Sunak has announced an expansion of the COVID-19 Business Interruption Loan Scheme (previously announced by the Government) under which the Government will underwrite the risk of bank loans to such small and medium-sized companies.



Action: Any impacted businesses should review the above COVID-19 Business Interruption Loan Scheme in more detail, check the terms of their existing bank facilities, and establish whether the facility they use falls within the category of lenders that are covered by this policy. If this is applicable to your business, Mr Sunak has said he would increase the amount businesses can borrow from such lenders from £1.2m to £5m at affordable rates with effect from 17 March 2020; the first six months of the finance will now be interest-free. If your business is at risk from funding shortfall during this period, you may wish to check terms of existing facilities and review these in the light of the new advice. The scheme is to be launched next week and is based on the Enterprise Finance Guarantee, a similar program set up to help small companies cope with the fallout of the global financial crisis.

LOOKING FORWARD

This is a developing situation and there is no doubt work practices and transactional restructuring requirements will evolve rapidly. The nature of real assets and their use may recalibrate until stability returns. Methods of restructuring involving refinancing, renegotiating, use of options and more long-term conditionality than we have seen in traditional contractual legal practice may be employed. Whatever the concerns, the business and legal world stands ready, willing and able to supply the documentary workarounds to protect businesses and livelihoods during this period of uncertainty and change.

To find out more about anything covered in the article, or to discuss the potential impact of COVID-19 on the commercial property market, please contact Fionnuala Nolan or another member of Thrings' Commercial Property team.



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