

## COVID-19

# Disposals and Acquisitions: Agreements for Lease and Property Sale and Purchase Agreements

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The COVID-19 crisis has raised a number of concerns for parties to commercial property contracts. In relation to contracts that are currently being negotiated, the parties will likely need to have discussions about pushing out completion timelines and/or including conditionality linked to the lifting of the current restrictions.

In relation to contracts that have already been entered into but not yet completed, COVID-19 raises the prospect of delays and the possibility that conditions in conditional contracts cannot be fulfilled within time frames originally agreed between parties. This note looks at some of these issues and the options available to the parties.

### Contracts currently in negotiation

It is likely that some contracts under negotiation prior to the start of the current crisis have been temporarily put on hold; for those that are still proceeding, the parties will need to consider whether they can comply with their respective obligations at the prescribed time.

Parties may want to consider extending deadlines for performance where, for example, works need to be carried out before completion, or making contracts conditional where, for example, search results remain outstanding. There will clearly be complexity in determining what is reasonable and appropriate in these circumstances.

Parties may also want to consider the introduction of a specific COVID-19 clause in the contract. The clause would allow either party to serve notice on the other requesting suspension where a “coronavirus event” is preventing or delaying completion, subject to a longstop date. Once the relevant event has ceased, a further notice would be served which would then trigger completion a set number of days later. The clause would also provide that neither party would be liable for breach of contract nor for payment of compensation where completion cannot occur on the agreed completion date, or where there is a delay in carrying out any obligations under the contract as a result of a coronavirus-related event. The definition of a “coronavirus event” will be a source of considerable negotiation.

The current crisis is also having an impact on pre-contract due diligence. Search providers are still operating but face significant disruption given the requirement for remote working and the inability to carry out site inspections. Searches are therefore largely confined to desktop searches with further investigations, where issues are identified, having to be postponed for the present time. The timing for delivery of local authority searches is also somewhat patchy at present, with some councils providing a near-normal service, while others are experiencing significant delays in turnaround times due to remote working and redeployment of staff within councils. Some local authority highway searches are proving particularly challenging due to limited access to records and plans.

In the circumstances, buyers may want to consider search indemnity insurance, which will provide cover for any reduction in value of a property arising out of any issues that would have been revealed by searches had they been carried out. A “no search” policy is appropriate where no searches have yet been undertaken by the buyer, and it is likely that search results will be significantly delayed or not obtainable. A “search delay” policy is appropriate where searches have already been submitted but the results have been delayed due to the COVID-19 crisis. Where searches have already been carried out but they have now expired i.e. they are more than 3 months old, a “search validation” policy may be appropriate. Buyers should always check with their lenders first though to ensure that they are happy to rely on an insurance policy rather than searches. It should be noted too that insurance policies only cover local authority, local land charges, drainage and water, environmental and chancel repair searches. They do not cover utility searches and these would need to be applied for in the usual way.

Valuations are also a major concern for buyers and borrowers at the current time. With access to buildings restricted and market uncertainty as to the value to ascribe to certain assets, many transactions may not get off the ground until valuers can once again carry out inspections and they have greater clarity on the impact of this crisis on the market.

## Conditional Contracts

### *Common Conditionality Provisions*

Both Agreements for Lease and Property Sale and Purchase Agreements often contain some degree of conditionality. This could be for instance in relation to longstop dates by which a party must complete works, obtaining a relevant consent, receiving planning permission or arranging for a side agreement/title alteration.

The COVID-19 crisis has significantly increased the risk of one or more parties being unable to comply with the conditions in such contracts. For example:

- **Construction:** Most works, from fit-out works to larger construction projects, have now been halted. Depending on the duration of the current lockdown, this may affect the ability to complete required works in the time frame prescribed by the contract.
- **Planning Permission:** With officials from local planning authorities now operating remotely and largely unable to undertake site visits and planning committee meetings having been suspended, planning permissions are being significantly delayed. Even when committees resume there is likely to be a considerable backlog of applications to review. These delays will have a direct impact on the timing for satisfaction of planning conditions in a wide range of contracts.
- **Licences:** Where a contract condition requires a licence or other consent to be issued before it takes effect, the parties may struggle to engage with the third party or obtain signatures, especially from local authorities or hospital trusts.
- **Search results and Land Registry applications:** Contracts with conditions involving the provision of clear searches or completion of Land Registry applications are also likely to be problematic in the current climate. At present, the Land Registry is continuing to operate but turnaround times are greatly increased.

### Options in Respect of Conditions

The terms of all contracts are different and will need to be reviewed carefully to establish whether the conditions can be satisfied in the current climate and within the time limits stated. Particular attention will need to be focused on deposits paid, and the terms on which they may be retained or will need to be repaid if the contract cannot be completed.

Where it is anticipated that it will not be possible to comply with one or more of the conditions, the parties should consider:

- **Extending the deadline for compliance:** The parties may agree that all that is required is an extension of the deadline for satisfaction of the condition. This should be relatively easy to document by way of a variation agreement but the real challenge will be to determine how long the extension should be. At present it is difficult to predict when the COVID-19 restrictions will be lifted, with the UK Government undertaking a review at three-weekly intervals. The parties may therefore want to consider linking the deadline to the lifting of the restrictions, or a date shortly after the restrictions are lifted, but subject to a final backstop if the current situation runs on for longer than expected.
- **Renegotiating terms:** The parties may decide that, rather than simply extending the deadline for compliance, they should take the opportunity to review the contract in the round and decide whether there is scope perhaps to dispense with some of the problematic conditions in return for the inclusion or removal of other provisions. This may also involve a renegotiation of the price or the rent as appropriate. Landlords and sellers are likely to be highly incentivised in the current climate to ensure that deals go through in some form, rather than the contract failing to become unconditional as a result of some issue outside of both parties' control. It should be noted though that under English law there is no implied duty on either party to negotiate in good faith.
- **Termination:** Where any conditions cannot be met by the relevant longstop date, then it is likely that one or both parties will have the option to terminate the contract. It should be noted that termination is not usually automatic but rather the failure to comply with the condition allows the non-defaulting party to serve notice to terminate should it wish to do so. In these circumstances, the parties will need to consider carefully their obligations in relation to deposits paid/held and the return of documents and cancellation of entries on the title at the Land Registry.

## Unconditional Contracts

In respect of unconditional property contracts set to complete on a fixed date, it is business as usual and the interests of all parties should not be materially affected by the COVID-19 crisis. The consequences of either party failing to complete will be governed by the terms of the contract. Unless the contract provides otherwise, failure to complete on the due date does not of itself give rise to a right of termination as time is not of the essence in relation to completion. Instead, the non-defaulting party will be required to serve a notice to complete, giving the defaulting party usually 10 working days within which to complete. Failure to comply with this notice will entitle the non-defaulting party to rescind the contract and may result in a claim for damages, as well as forfeiture or return of the deposit.

Of course, having said that, the current circumstances may well have caused one or both parties to reconsider the merits of the contract, and it is always open to the parties to reach some further agreement varying the terms of the original unconditional contract.

## Force Majeure and Frustration

A force majeure provision has the effect of suspending or terminating a party's obligations under a contract when an event or circumstance beyond their control prevents them from complying with their obligations.

Typically property contracts do not contain an express force majeure provision and one will not be implied into contracts by the courts. If however a force majeure provision has been included in a contract, its effect will depend on the specific wording of the clause. Force majeure clauses have historically been interpreted narrowly by English courts and many do not directly provide for a pandemic such as COVID-19. The clause may though refer to government intervention preventing performance and this may be sufficient to trigger the provisions.

As an alternative to force majeure, the doctrine of frustration may apply where an unexpected event, which is outside the parties' control, affects performance of the contract. Frustration is relevant to both conditional and unconditional contracts, but the test for frustration in English law is set very high and will be difficult to achieve in relation to a property contract.

A frustrating event generally must:

- occur after the contract has been formed;
- affect a core contractual term and have been entirely beyond the contemplation of the parties when they entered into the contract;
- not be the fault of either party; and
- make further performance impossible, illegal or fundamentally different from that contemplated by the parties at the time of the contract.

This test is unlikely to cover changes in value or delays in performance due to COVID-19. In fact, as property cases relating to frustration have previously focused on physical damage to premises in relation construction projects or leases, it is unclear how courts would treat frustration of a sale contract due to the COVID-19 crisis. Where performance will only be delayed rather than rendered impossible, the likelihood is that a claim for frustration would be unsuccessful.

Where a frustrating event occurs, the contract is automatically terminated and the parties will generally be able to recover any sums paid for performance of future obligations (less expenses already incurred by the counterparty in preparation for performance).

The Dechert Corporate team has prepared an OnPoint which includes further practical steps and guidance for parties seeking to rely on force majeure or in receipt of a force majeure notice. It can be found using the following link: <https://www.dechert.com/knowledge/hot-topic/coronavirus-business-impact/english-law-disputes-considerations.html>.

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