

## Six Weeks of Lockdown: A Property Litigator's Review

1. Although it is only six weeks since the Prime Minister directed that the UK enter a period of "lockdown", the period which has followed has seen developments in the law relating to the use and occupation of residential and commercial property and the conduct of litigation at an unheard-of pace. Regular policy announcements at the now daily Downing Street press conferences have been followed rapidly with secondary legislation or departmental guidance to implement them. As the political discourse is gradually moving to focus on easing the restrictions, we pause to review the events of last few weeks.
2. In this article, we consider the impact of the legal framework now affecting residential and commercial property litigation.

### The Lockdown

3. On 16 March 2020, the Prime Minister escalated the advice that had previously been given concerning the social distancing measures required to slow down the transmission of Covid-19. This was followed, four days later, with the announcement that cafes, bars and restaurants were required to close together with other areas of the entertainment industry (such as theatres and cinemas), and given effect on 21 March 2020 by the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020/327.
4. On 23 March 2020, in response to the increasing urgency of the pandemic, the Prime Minister imposed a stringent lockdown until further notice to curb the spread of the disease (or "flatten the curve" as it is described). The Coronavirus Act 2020 made a speedy journey through Parliament and was given royal assent on 25 March 2020. This made sweeping emergency provision in relation to numerous areas of public life.
5. The "Business Closure" Regulations which had come into force on 21 March were repealed on 26 March 2020 when the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 ("the Restriction Regulations") were brought into force. In short, they have compelled the closure of (or radical restriction in trade from) premises such as restaurants, cafes, bars and pubs, cinemas, theatres, nightclubs, gyms, museums and galleries and impose restrictions on the movements of all individuals.
6. The impact of these measures on landlords and tenants alike cannot be overstated. Despite sizeable business support announced by the Chancellor, it has been reported that only 48.2% of rent was collected by the major

listed retail landlords last quarter<sup>1</sup>. Many tenants have requested rent freezes or discounts (Boots, McDonalds and others have openly stated they have sought rent reductions from some of their landlords<sup>2</sup>) - with some major chains, such as Burger King and Yo Sushi!, reported not to have paid the last quarter's rent at all. A powerful group of tenants are now campaigning for a 9-month rent-free period for the hospitality sector (with a commensurate term extension so that rent is not lost<sup>3</sup>). As tensions rise, there have been accusations of bad faith and exploitative behavior on the part of some tenants. Shopping centre giant Intu has announced it is considering legal action against tenants whom it suspects are able to meet rental obligations but are 'not engaging' in negotiations. It received only 29% rent due it in March. Unsurprisingly, a number of landlords have already petitioned for the winding-up of their tenants.

### **Measures to Protect the Real Estate Sector**

7. We have sought to highlight, below, the principal areas in the real estate sector where the Act and Regulations have had the most significant effects, and the legislative measures taken by the Government to mitigate their adverse impacts.

#### ***(1) Residential Tenants***

8. The slowdown of economic activity gave rise to concerns about the ability of residential tenants to pay their rent, and the impact of the restrictions on those required to vacate their dwellings.
9. To that end, schedule 29 to the Coronavirus Act, introduced by s.81, makes provision for protecting residential tenants from eviction. Broadly, this is achieved by extending the periods of notice required to be given to tenants who hold under the various categories of residential tenancy (principally, regulated tenancies, secure tenancies and assured tenancies) before possession proceedings may be commenced (and in the case of statutory tenancies, introducing a notice period of at least three months where no notice was previously required). It was presumably envisaged that for claims already in the system, a general stay would be imposed (see below) to extend the moratorium on possession claims to residential tenants who were already beyond the notice procedure.

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<sup>1</sup> Compare with a normal Q1 collection rate of 80%. <https://www.egi.co.uk/news/hidden-dangers-of-government-raid-on-landlords-revealed/>

<sup>2</sup> <https://www.bbc.co.uk/news/business-52520109telegraph;>  
<https://www.egi.co.uk/news/landlords-blast-exploitative-retailers-as-winding-up-petitions-rise/>

<sup>3</sup> <https://www.egi.co.uk/news/cwg-backs-hospitalitys-call-for-nine-month-rent-holiday/>  
 (paywall)

## **(2) Forfeiture**

10. Section 82 of the Coronavirus Act targets “business tenants” (who fall within the scope of Part II of the Landlord and Tenant Act 1954) and provides that a right of re-entry or forfeiture may not be exercised during the period from 26 March 2020 to 30 June 2020. The moratorium may be extended by statutory instrument. However, this is merely a moratorium on exercising one remedy in respect of arrears of rent (whether those arrears accrued prior to or during the relevant period). For this purpose, “rent” is given a broad definition, applying to any financial payment due pursuant to the lease. These measures do not affect the underlying obligation to pay and therefore once the “relevant period” ends, landlords will be entitled to forfeit business leases for rent which accrued during the period of lockdown. Accordingly, a number of high street occupiers have doubted whether this goes far enough to help them survive<sup>4</sup>. Moreover, at this stage, all other remedies remain available to landlords for enforcing non-payment of rent.<sup>5</sup>

## **(3) Stay of Possession Proceedings**

11. On 26 March 2020, a Government announcement of the measures to be introduced to protect tenants referred to a suspension of all “housing possession claims” from the following day<sup>6</sup>. On 27 March 2020, Practice Direction 51Z was introduced to the Civil Procedure Rules. The practice direction provided that “*all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force*”. Unlike the announcement the previous day, the practice direction was not restricted to “housing” possession claims. It was of potentially wide-reaching effect, imposing an immediate and automatic stay on all claims for possession of land, whatever the nature of the land and whatever the nature of the claimant’s rights to possession of that land. The terms of the announcement were subsequently corrected.
12. Paragraph 3 of the practice direction contains two important exceptions. First, it does not apply to a claim for an injunction. Secondly, it does not prevent a possession claim from being issued, although presumably once issued, it is automatically stayed, so it will sit in the Court system awaiting

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<sup>4</sup> <https://www.ft.com/content/95599cf5-522e-4475-961b-dcofiag00eac>

<sup>5</sup> The application and limitations of s.82 have been considered by Martin Dray: <https://www.falcon-chambers.com/publications/articles/coronavirus-the-impact-on-forfeiture-of-business-leases-for-non-payment-of->

<sup>6</sup> [https://www.gov.uk/guidance/government-support-available-for-landlords-and-renters-reflecting-the-current-coronavirus-covid-19-outbreak?utm\\_source=2073cc74-35fi-4c38-be38-40d575f20697&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/guidance/government-support-available-for-landlords-and-renters-reflecting-the-current-coronavirus-covid-19-outbreak?utm_source=2073cc74-35fi-4c38-be38-40d575f20697&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)

the lifting of the stay and the period for service will not run until after the 90-day stay has ended.

13. The first of these exceptions was considered by the High Court in *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB), where an NHS Trust required possession of a hospital bed from a patient who was medically fit for discharge but refused to leave. The Court granted an injunction to require the patient to vacate the hospital. This was held to fall within the exception in paragraph 3 of the practice direction. Although possession can be obtained by an injunction, there are important differences in the means of enforcement of an injunction and a possession order<sup>7</sup>.
14. As noted above, PD51 is stated to apply to “*all proceedings for possession brought under CPR Part 55*”. This therefore applies not only to conventional claims against tenants or former tenants or mortgage possession claims but also claims against trespassers. Clarification as to whether this was, indeed, intended, was sought in a letter to the Master of the Rolls from the Property Bar Association and Property Litigation Association. The Master of the Rolls responded on 20 April 2020 and the following day an amendment was made to PD51Z, which provided that it did not apply to (a) claims against trespassers “*to which rule 55.6 applies*”, (b) applications for interim possession orders and (c) applications for case management orders where directions are agreed.
15. The ambit of the first of these exceptions is opaque. Rule 55.6 is a provision for service of possession claims against persons unknown. Frequently, named defendants are joined to a claim against persons unknown. It is not clear what the status of such a claim would be<sup>8</sup>.
16. PD51Z also leaves a good deal of uncertainty surrounding the status of directions for complying with possession claims. On 30 April 2020, the Court of Appeal heard argument in the case of *Arkin (As Fixed Charge Receiver) v Marshall*, decided on 15 April 2020 by the Central London County Court (including written submissions from the Housing Law Practitioners’ Association which was permitted to intervene in the appeal). Judgment was reserved and is expected imminently. This is a mortgage possession claim which was already in train when the automatic stay came into force. The County Court Judge held that he had no power to lift the stay to permit the parties to comply with directions which had been given

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<sup>7</sup> The circumstances in which an injunction might be granted in lieu of a possession order and the decision in *University College London Hospitals Trust v MB* were considered by Tom Rothwell and Fern Schofield in this article: <https://www.falcon-chambers.com/publications/articles/almost-as-of-course-injunctions-restraining-trespass-the-stay-on-possession>.

<sup>8</sup> These amendments to PD51Z were considered by Cecily Crampin and Julia Petrenko in <https://www.falcon-chambers.com/publications/articles/staying-for-clarification>.

by giving disclosure and exchanging their witness statements, in order to be ready for a trial later in the year (after the 90-day stay).

17. In the letter from the Master of the Rolls to the PBA and the PLA referred to above, the stay was justified primarily by reference to the need to shield the court service from the burden of having to deal with claims of this sort (which form a significant plank of the work of the County Courts) during the lockdown period. This justification would not apply to the work to be conducted by the parties outside of court in complying with directions. It is hoped that the judgment of the Court of Appeal will bring some clarity to the application of PD51Z.

#### ***(4) Other Remedies***

18. As noted above, ss.81 and 82 of the Coronavirus Act (above) impose restrictions on landlords seeking possession, but not on pursuing other remedies. On 23 April 2020, the Government announced two further temporary measures to protect tenants from enforcement action in respect of arrears of rent.
19. The first was to restrict Commercial Rent Arrears Recovery, which is a statutory remedy under the Tribunals Courts and Enforcement Act 2007 (replacing the old common law remedy of distress). Using “CRAR”, a landlord of commercial premises (not residential) may take control of a tenant’s goods where rent is unpaid, using the services of an enforcement agent employed by the County Court. On 24 April 2020, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 were laid before Parliament and came into force on the same day. The effect of these measures is to extend the level of arrears which entitles a landlord to invoke the CRAR process from 7 days’ rent to 90 days’ rent, to give commercial tenants additional breathing space during the lockdown period. This is tied to the “emergency period” under the Restrictions Regulations and is capable of being extended by statutory instrument<sup>9</sup>.
20. The second measure announced on 23 April 2020<sup>10</sup> by the Business Secretary was a moratorium affecting statutory demands served between 1 March and 30 June 2020 and winding up petitions presented between 27 April and 30 June 2020 against tenants unable to meet liabilities due to Covid-19. Both these dates may be extended in line with the moratorium on commercial lease forfeiture.

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<sup>9</sup> Anthony Tanney has summarised these measures in a recent article: <https://www.falcon-chambers.com/publications/articles/commercial-rent-arrears-recovery-new-coronavirus-measures>.

<sup>10</sup> <https://www.gov.uk/government/news/new-measures-to-protect-uk-high-street-from-aggressive-rent-collection-and-closure>

21. The moratorium is to be implemented by the Corporate Insolvency and Governance Bill. So far we know that:

(1) the ban applies to commercial property landlords only.

(2) there is no absolute prohibition on the presentation of winding-up petitions, but they must first be reviewed by the Court, which will dismiss petitions where the company's inability to pay is the result of Covid-19. Although it is not clear, it is assumed the burden of proof will fall on the tenant to demonstrate this.

(3) the Bill does not appear to affect action against guarantors.

22. Service of a statutory demand or notice of a winding up petition will often lead a solvent tenant to pay, and is frequently the first port of call for landlords. As the solvency of commercial tenants is being tested to the limit in the current climate, the Government has sought to address perceived "aggressive rent collection" by landlords making use of the insolvency regime. However, the proposed restrictions have not been well received by landlords and are being challenged by a number of bodies (including the British Property Foundation, Revo and the Estates Gazette<sup>11</sup>)- so it remains to be seen what form the Bill eventually takes.

### **(5) Pubs**

23. The effect of the Restriction Regulations is particularly pronounced in the hospitality industry. Although at the time of writing, the Government is preparing to announce the roadmap to a gradual easing of the lockdown, it is generally acknowledged that pubs, restaurants and cafes are likely to be subject to social distancing rules of some nature for longer than other sectors. The impact on the businesses which operate in this sector will be immense.

24. Many pubs in the UK are held on tied tenancies, under which the tenant who runs the pub is obliged to purchase alcoholic beverages / other products from the landlord or a company associated with the landlord. These tenancies are now regulated by the Pubs Code Etc. Regulations 2016, under which the tied tenants have the right, in certain circumstances, to a new free-of-tie tenancy. The exercise of this option to take a "market rent only" tenancy is subject to arbitration by the Pubs Code Adjudicator. The six pub companies whose tenants are subject to the Pubs Code, have jointly agreed to

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<sup>11</sup> <https://www.egi.co.uk/news/hidden-dangers-of-government-raid-on-landlords-revealed/>

suspend the running of time limits under the Code until 30 June 2020 (to be subject to further review). In addition, the Adjudicator has been exploring with the pub companies ways to assist tenants who are unable to meet their liabilities for rent and other obligations during the lockdown period without any immediate prospect of reopening for trade.

25. It is unlikely that pub landlords (whether of tied pubs or free-of-tie pubs) will be compelled to waive rent liabilities, but any rush to bring claims for rent or (after the lifting of the stay under CPR PD51Z) possession claims is likely to lead to a number of empty pubs without anyone willing or able to open them again<sup>12</sup>.

### **Rights and Obligations in a Locked-Down Economy**

26. To date, all of the measures introduced by Parliament have been geared to a moratorium on the enforcement of debts and other obligations. In terms of the legal relationship between parties to leases and other agreements, the underlying obligations remain. Debts will continue to accrue as will interest (where there is provision in the contract). Once the moratorium on enforcement expires, landlords and other creditors will be entitled to take steps to recover the debts. As things stand, it is the market that will regulate the extent to which these debts are enforced. Until “normality” returns, landlords will think twice about evicting a tenant where there is no market for the premises and where tenants or others have been pushed to the brink of insolvency by the cessation of activity in so many areas of the economy.
27. In the meantime, extensive debate about the enforceability of obligations has arisen against the backdrop of the various measures introduced in the last six weeks. The arguments range far and wide. The following are examples:
- (1) There was a flurry of debate about whether and to what extent tenants’ obligations might be discharged. Many have mused about whether the pandemic and the associated restrictions will be considered to be a frustrating event, enabling a tenant to escape his leasehold obligations. Similarly, there has been renewed focus on the scope of force majeure clauses in contracts (although such a thing is almost unheard of in commercial leases, until now that is)<sup>13</sup>.

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<sup>12</sup> For a more in-depth view of the problems facing the pubs industry, see <https://www.falcon-chambers.com/publications/articles/the-pubs-code-and-the-crisis-in-the-hospitality-industry> by Jonathan Karas QC, Adam Rosenthal QC and Toby Boncey.

<sup>13</sup> This topic was considered by Mark Galtrey and Imogen Dodds: <https://www.falcon-chambers.com/publications/articles/coronavirus-a-frustrating-situation>.

- (2) As an alternative to the nuclear effect of a frustrating event, there has been focus on whether the pandemic has led to a temporary suspension of a tenant's liability for rent<sup>14</sup>.
- (3) An interesting more radical (and creative) approach which has been suggested is an implied term that tenants precluded by law from using their premises are temporarily and / or partially released from their rental obligations<sup>15</sup>.
- (4) Many property-related transactions were being negotiated and formalised when the lockdown took effect. Many continue to be negotiated. Most transactions will require a deed to be executed. Issues surrounding executing documents while adhering to social distancing measures have been considered, with specific reference to s. 1 of the Law of Property (Miscellaneous Provisions) Act 1989<sup>16</sup>.
- (5) The coming months are likely to see disputes brewing about the inability of contracting parties to comply with their obligations. Is a tenant who is unable to trade in breach of a keep-open covenant<sup>17</sup>? Can a notice to complete be given where a deadline for completing a contract of sale passes? To what extent will the Courts be prepared to grant equitable relief (specific performance / injunctions) and how will losses be compensated in damages?
- (6) Consideration has even been given to whether the State might be liable in damages for preventing occupation of business premises during the lockdown under the Human Rights Act 1998. This argument throws into focus the adequacy of the Government's compensation packages<sup>18</sup>.

### **Litigating in Lockdown**

28. The Courts and Tribunals have reacted swiftly to the crisis and have brought into effect a number of measures, via practice directions rules and

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<sup>14</sup> See the article by Kester Lees: <https://www.falcon-chambers.com/publications/articles/rent-during-covid-19-landlords-still-hold-the-strongest-hand>.

<sup>15</sup> This was debated by Nat Duckworth here: <https://www.falcon-chambers.com/publications/articles/does-a-tenant-really-have-to-go-on-paying-rent-during-lockdown-perhaps-we-s>

<sup>16</sup> See <https://www.falcon-chambers.com/publications/articles/witnessing-an-execution-what-does-si-of-the-law-of-property-miscellaneous-p> (Oliver Radley Gardner and Cecily Crampin) and <https://www.falcon-chambers.com/publications/articles/witnessing-deeds-in-the-age-of-social-distancing> (Tricia Hemans).

<sup>17</sup> This was considered by Jonathan Karas QC and James Tipler: <https://www.falcon-chambers.com/publications/articles/still-open-all-hours-tenants-covenants-to-keep-business-premises-open-and-t>.

<sup>18</sup> Considered in this article by Stephen Jourdan QC and Ciara Fairley: <https://www.falcon-chambers.com/publications/articles/tenants-locked-out-from-their-human-rights-do-business-tenants-prevented-fr>.



guidance to minimise disruption to the administration of justice so far as possible.

29. The key developments are as follows:

*Courts*

- (1) On 22 March 2020 the Remote Hearings Protocol was issued<sup>19</sup>. It was revised<sup>20</sup> on 31 March 2020. It applies to all hearings, including trials and applications in the County Court, High Court and the Court of Appeal (Civil Division). Specific points to note include:
  - i. short interlocutory applications and some witness cases can be heard remotely. In our experience, many cases involving live testimony have proceeded successfully. What is a “short” hearing is something of an elastic concept: a number of hearings of two or three days, or even longer, have proceeded remotely;
  - ii. parties should, where required, prepare an electronic bundle of documents and authorities, which should be indexed and paginated. The bundles should be provided to the judge’s clerk, or the judge (where no clerk / official is available) and to all other representatives and parties “well in advance of the hearing”;
  - iii. bundles must be filed on CE-File, or sent to the court by link to an online data room. Email is also permitted;
  - iv. under CPR 39.9(1), hearings will be recorded, if technically possible, unless the judge has dispensed with recording. Unofficial recordings are prohibited;
- (2) Practice Direction 51Y was signed on 25 March 2020<sup>21</sup>. It clarifies the manner in which the court may exercise its discretion to conduct hearings remotely in private. The court may exercise the power to hold a remote hearing in private where it is not possible for the hearing to be simultaneously broadcast in a court building. It also confirms that the court may not conduct a remote hearing in private where arrangements can be made for a member of the media to access the remote hearing. It will remain in force for no longer than the Act.

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<sup>19</sup> Superseding previous guidance, *Business and Property Courts of England and Wales: Protocol regarding remote hearings* (revised 19 March 2020).

<sup>20</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil.GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf)

<sup>21</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

- (3) On 2 April 2020 Practice Direction 51ZA came into force<sup>22</sup>. It permits parties to agree an extension of up to 56 days (rather than 28 days) in all cases without formally notifying the court, provided that a hearing date is not put at risk. It also amends PD 51Y by making clear that a person seeking permission to listen to or view a recording of a hearing may do so by request and is not required to make a formal application. This direction ceases to have effect on 30 October 2020.
- (4) At the outset of the crisis, there were a number of unsuccessful applications to adjourn hearings in light of the challenges presented by the pandemic: see for example *National Bank of Kazakhstan and Others v Bank of New York Mellon and Others* and *One Blackfriars Limited (In Liquidation), Re* [2020] EWHC 845 (Ch) in which Mr John Kimbell QC sitting as a Deputy High Court Judge conducted a PTR for a five-week trial due to start in June 2020. He offered the following comments at [37]:

“If a remote trial is ordered pursuant to the Remote Hearings Protocol, then it seems to me that the Coronavirus Regulations permit, for example, a witness to travel to a solicitors’ office or to any place equipped with a high-quality video link to give evidence, or for counsel to do the same thing to make submissions. The Coronavirus Regulations would also, in my judgment, permit an employee of a remote trial service provider to travel to any location (including a witness’ home) to assist with the set-up and oversight of the operation of a remote trial technology. I have no doubt that everyone involved in such an operation would have the common sense to ensure that the social distancing rules are followed.”

- (5) HHJ Eyre QC has also given detailed guidance on the approach to applications for an adjournment and extensions of time due to Covid-19 in *Municipio de Mariana v BHP Group Plc (formerly BHP Billiton)* [2020] EWHC 928 (TCC)<sup>23</sup>.

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<sup>22</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus>

<sup>23</sup> Summarised by Stephanie Tozer QC and Fern Schofield  
<https://www.linkedin.com/pulse/april-2020-top-3-property-cases-fern-schofield>

### *Tribunals*

(6) The First Tier Tribunal (Property Chamber) and the Upper Tribunal (Lands Chamber) have issued a substantial amount of guidance<sup>24</sup>. It is important to note the following publications:

- i. a Pilot Practice Direction was issued by the Senior President of Tribunals on 19 March 2020<sup>25</sup>. The Practice Direction applies to all appeals and applications in the First-tier Tribunal and the Upper Tribunal, (save for paragraphs 10 and 11 which apply solely to the FTT Property Chamber). It provides for triaging, remote hearings, and inspections;
- ii. the FTT immediately undertook a review<sup>26</sup> all of cases listed for hearing or mediation in (at least) the four-weeks following 23 March 2020 to establish whether they should proceed, be postponed for a paper determination, or re-listed. All Residential Property hearings were then postponed until after 29 May 2020;
- iii. on 26 March 2020 a short FTT Practice Direction<sup>27</sup> was issued requiring all new applications, appeals, correspondence and case management documentation for current and new applications to be lodged with the Tribunal by email. It provides applications may be made to any office of the First-tier Tribunal (Property Chamber) (Residential Property). It also suspends Practice Direction – *Property Chamber, First-tier Tribunal, Areas in the Property Chamber*;
- iv. on 10 April 2020 the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020<sup>28</sup> came into force. They cease to have effect from when section 55(b) (public participation in proceedings conducted by video or audio) of the Coronavirus Act expires for all purposes (presently 30 June 2020 but subject to extension). Rule 8 amends the Tribunal Procedure

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<sup>24</sup> See Paul Letman's article First Tier Tribunal, Property Chamber & Upper Tribunal (Lands Chamber) (<https://www.falcon-chambers.com/publications/articles/first-tier-tribunal-property-chamber-upper-tribunal-lands-chamber>).

<sup>25</sup> <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice-Direction-Final-For-Publication-CORRECTED-23032020.pdf>

<sup>26</sup> See the statement from the Chamber President: [https://www.falcon-chambers.com/images/uploads/documents/200319\\_-\\_Property\\_Chamber\\_Practice\\_Guidance\\_-\\_Covid\\_19.pdf](https://www.falcon-chambers.com/images/uploads/documents/200319_-_Property_Chamber_Practice_Guidance_-_Covid_19.pdf)

<sup>27</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/2020\\_03\\_26\\_First-tier-Tribunal-Lodging-Applications-and-Documents-by-Email-Property.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_26_First-tier-Tribunal-Lodging-Applications-and-Documents-by-Email-Property.pdf)

<sup>28</sup> <http://www.legislation.gov.uk/uksi/2020/416/made>

(Upper Tribunal) (Lands Chamber) Rules 2010<sup>29</sup>, and rule 9 amends the FTT Property Chamber Rules 2013 to include provisions about remote and private hearings.

- v. on 15 April 2020 the FTT Property Chamber issued a users' guide<sup>30</sup> relating to each of its 3 jurisdictions (Residential Property, Land Registration and Agricultural Lands & Drainage). The Land Registration Division has its own FAQ (dated 15 April 2020)<sup>31</sup> which covers communications, extensions of time and remote hearings;
- vi. a more general FTT 'guidance for users' was issued on 29 April 2020<sup>32</sup>. It sets out in detail how the Tribunal proposes to deal with its current caseload together with new applications and appeals. In particular, it states all hearings which necessitate in person hearings are deferred until it is safe to do so. It states *'[b]efore the end of May, we will decide whether any face to face hearings listed after that day will also need to be postponed.'* All hearings which can proceed will be carried out with Skype for Business or Cloud Video Platform. There will be no inspections of properties for at least 6 months. All communications are to be by email;
- vii. guidance on the conduct of proceedings in the Upper Tribunal, Lands Chamber issued on 24 March 2020 was revised on 1 May 2020<sup>33</sup>. To note:
  1. it will be for the Judge or Member to whom a matter has been allocated to determine the procedure to be adopted. Before deciding whether a hearing is necessary and how it will be conducted the Tribunal will ask the parties for their views.
  2. the Tribunal is currently equipped to use Skype for Business. It seeks to make all remote hearings available to media representatives.

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<sup>29</sup> giving force of law to the Practice Direction on Video/Audio hearings issued by the Senior President of Tribunals on 2 April 2020

<sup>30</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/14-Apr-20-Property-Chamber-First-Tier-Tribunal-Help-for-Users.pdf>

<sup>31</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Land-Registration-Division-FAQs-15.4.2020.pdf>

<sup>32</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Property-Chamber-First-Tier-Tribunal-Guidance-for-Users.pdf>

<sup>33</sup> <https://www.judiciary.uk/wp-content/uploads/2020/05/Presidential-Guidance-on-the-Conduct-of-Proceedings-in-the-Lands-Chamber-Upper-Tribunal.pdf>

3. consideration will be given to whether an unaccompanied, external site inspection will meet the needs of the case and safely take place;
  4. an Appendix sets out the requirements for electronic hearing bundles.
  5. the guidance emphasises that although the Tribunal will be sympathetic to requests for extensions of time resulting from the current circumstances, they should not be taken for granted and a proper explanation why it is required should always be provided.
- ii. the Lands Chamber users' guide was also updated on 1 May 2020. It notes that the preferred method of communication with the Chamber remains email ([lands@justice.gov.uk](mailto:lands@justice.gov.uk)). From 29 April 2020, parties will be able to pay the fees necessary to issue proceedings or make an application online<sup>34</sup>.
30. These rules and practice directions are under constant review, in order to react to challenges as they arise and give effect to the Lord Chief Justice's clear ambition that as many hearings as can safely proceed will do so.
31. Legislation for the relaxation of some aspects of the current lockdown is expected in the coming weeks. It remains to be seen what further implications this will have for litigation. There are some who hold up the success of remote hearings as heralding a new era of civil litigation by Zoom or Skype (or similar). Others, we suspect, will be keen to return to the more familiar surroundings of the courtroom or hearing venues when it is safe to do so.
32. In the meantime, the Honourable Justice Croft, Caroline Shea QC, Kester Lees and Tricia Hemens contemplate the practical difficulties of achieving justice in a digital space<sup>35</sup>. Falcon Chambers have offered some guidance on the various platforms<sup>36</sup> available and coping with remote hearings<sup>37</sup>.

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<sup>34</sup> See also <https://www.judiciary.uk/wp-content/uploads/2020/04/Payment-of-fees-to-the-Upper-Tribunal-Lands.pdf>

<sup>35</sup> <https://www.falcon-chambers.com/publications/articles/coping-with-remote-hearings>

<sup>36</sup> <https://www.falcon-chambers.com/splash/views/video-conferencing>

<sup>37</sup> <https://www.falcon-chambers.com/splash/views/coping-with-hearings>

**What does the future hold?**

33. In recent days the Government has started to introduce, gradually, the idea of a phased release from the lockdown. It is clear that there will be no immediate return to a pre-pandemic way of life. A number of the measures above will remain with us for some time to come. Just as the policy of closing down swathes of society has necessitated spontaneous legislative action from Parliament, so will the release from the current status. We will no doubt see more measures brought into force by Parliament, some which will mitigate the effects of those above, others which will replace them with different measures tailored to the status quo from time to time.
34. Further state assistance for tenants will almost certainly be necessary, especially in the leisure and retail sectors. For example, the Government is now in talks over a proposal known as the “the furloughed space grant scheme” in a bid to prevent more collapses following the June quarter. In short this would see landlords accepting lower rents from tenants, who would be subsidised by the Treasury.
35. The pace of change is not going to let up and the legal landscape for the next few months and beyond remains uncertain.

**Adam Rosenthal QC**  
**Camilla Chorfi**

**4 May 2020**