



resumed occupation but for the pandemic so that there is a degree of continuity of business use, that will likely be sufficient to retain 1954 Act protection, even if the business is not in fact trading on the relevant date. Second, if the tenant is forced to vacate a property by matters beyond their control then they retain the protection of the 1954 Act, provided that they continue to assert a right to occupation (*Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 1 WLR 533, [1976] 2 All ER 205).

However, another area which may lead to litigation is where a party is obliged to give vacant possession of property, either on the expiry of a lease or pursuant to an obligation in a sale agreement. What if a (former) tenant or vendor claims that it is unable to provide vacant possession because it cannot safely instruct its staff or contractors to empty a property? It seems unlikely that the 2020 Regulations would altogether prevent the clearance of a property, provided that any necessary safety measures are put in place. If it did, then there may be a defence to a claim for breach of the covenant on the grounds of supervening illegality, but in practice it is rather more likely that the performing party would not be relieved of liability. Relatedly, the suspension on possession proceedings might have an impact on the quantification of damages where a tenancy ends and a sub-tenant remains in occupation. In those cases, if the sub-tenant has security of tenure, the head landlord will 'inherit' the sub-tenant and may have a claim for damages for breach of covenant for the period during which they are kept out of possession. Where the sub-tenant has an AST this would usually be a relatively short term problem because a s 21 notice can be served and possession recovered under the summary procedure. However, if the sub-tenant has acquired a temporary status of irremovability due to the general stay on possession proceedings, is the departing tenant liable for damages to take account of that extended period? The test is whether the loss is a reasonably foreseeable consequence of the landlord's breach and while one might forcefully argue that this whole crisis is the definition of unexpected, the converse (and in the writer's view more persuasive) argument is that the intermediate tenant should bear the consequences of their breach just as they would if the sub-tenant dragged out possession proceedings by raising hopeless defences.

### Contracts for sale and development agreements

Moving away from landlord and tenant issues, the pandemic has also caused acute difficulties for the completion of contracts for sale and the performance of development agreements. Again, the government has issued detailed guidance on the sale and purchase of properties during the pandemic ('Government advice on home moving during the coronavirus (COVID-19) outbreak', Ministry of Housing, Communities & Local Government, published on 26 March 2020 and last updated on 21 May 2020 (<https://bit.ly/2OsHQXd>), but important issues of law remain as yet unresolved. The question of frustration and *force majeure* have been touched upon above but there are many other issues, three of which, in particular, deserve a mention.

- ▶ First, queries have been raised about whether one can safely serve a contractual notice at a time when it is known that the premises at which the notice is to be served are closed at the time the notice can be expected to be delivered. Expect arguments to follow which will test the limits of deemed service provisions under s 196 of the Law of Property Act 1925 and s 7 of the Interpretation Act 1978. But beware; if there is no applicable deeming provision incorporated it will likely be necessary to prove receipt for the notice to be valid.
- ▶ Second, practical problems of witnessing signatures on transfers and other conveyancing documents appear largely to have been overcome by the use of technology, with electronic signature of documents now widespread. It has been settled law for some time that an electronic signature is valid, provided that there is sufficient evidence of an intention on the part of the signing party

to attest the document. A more difficult question, and one which may well be tested in the near future, is whether a deed can be validly witnessed by a person who is not physically present when it is signed.

- ▶ Pursuant to Law of Property (Miscellaneous Provisions) Act 1989, s 1(3) an instrument is validly executed as a deed by an individual if it is signed in the presence of a witness who attested his signature (see also s 44 (2) of the Companies Act 2006 in relation to documents executed by a company, which uses similar wording). In 2019, the Law Commission concluded that this wording requires the witness to be physically present, while noting that in *Shah v Shah* [2002] QB 35, [2001] 4 All ER 138 Lord Justice Pill said that he could 'detect no social policy which requires the person attesting the signature to be present when the document is signed'. It would seem, therefore, that where a transaction must be completed by the execution of a deed, a party cannot witness a signature via Zoom or Skype. However, in these extraordinary times, it seems eminently possible that the courts might be persuaded to accept that 'presence' can include a 'virtual presence'. The absence of obvious policy reasons to the contrary is even more apparent when complicated and high-value litigation is being fought via remote hearings.
- ▶ Third, while anecdotal evidence suggests that many pre-COVID-19 contracts did complete during the lockdown period, for those that did not, then expect disputes to reach the court regarding the retention of deposits paid to the vendor. The government guidance cited above urges parties to act fairly and reasonably in relation to deposits, but the standard contractual position (absent an extreme case where frustration can be prayed in aid) will be that if the buyer defaults the vendor can retain any deposit paid (standard conditions).

One anticipates, therefore, that at least in some instances buyers who could not (or did not want to) complete as a result of COVID-19 will look to the jurisdiction created by s 49(2) of the Law of Property Act 1925 to mitigate the rigours of that outcome. Pursuant to s 49 (2), the court may direct the return of a deposit to the buyer wherever it thinks fit, but the authorities indicate that exceptional circumstances are required to justify overriding the contractual result (*Midill (97PL) Ltd v Park Lane Estates Ltd* [2008] EWCA Civ 1227, [2008] All ER (D) 99 (Nov)). The pandemic has certainly created extraordinary circumstances, but it is dubious whether the mere fact that the contract was due to complete during lockdown will, of itself, be sufficient. The court is likely to require solid evidence that completion was prevented by practical difficulties and not merely because the buyer got cold feet, fearing a downturn in the market, before invoking the jurisdiction. The court has generally taken the view that market risks are thrown on the buyer, whether the pandemic will be a sufficiently exceptional market event to change that view remains to be seen.

### Comment

The above discussion is, of necessity, no more than a flavour of the myriad issues which have already arisen directly from the COVID-19 pandemic. In truth, it is harder to think of aspects of property law which will remain untouched. Whether this discussion has succeeded in identifying the key disputes or not, it seems inevitable that over the coming months, the courts will be forced to grapple with hard cases which may well have the effect of shaping property law for years to come.

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