

APSL Working Party – April 2020

- **Coronavirus *Force Majeure***

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Introduction

This paper sets out the conclusions of the APSL working party established in April 2020 with the aim of establishing suitable drafting to be used by the profession during the Covid-19 emergency in relation to commercial investment sale agreements and agreements for lease.

This document is intended to assist the profession by reducing the time spent negotiating bespoke clauses.

Fee earners proposing to adopt any part of this paper are free to share it in its entirety with other firms as necessary.

This paper does not bind any of the firms represented by the working party. This paper also does not constitute legal advice and users must form their own view as to the suitability of the drafting for a particular scenario.

Comments arising from use of this document should be fed in to the working party via: tom.hubbard@dwf.law.

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Chapter 1 – Short form Coronavirus Force Majeure Wording (for unconditional agreements)

Notes:

- I) The working party has adapted the Practical Law wording [COVID-19 delay clause for residential sale and purchase contracts](#) for use in unconditional investment sale agreements and (with appropriate amendments) agreements for lease where only the mechanics of completion are likely to be affected by the crisis. (**Note:** As of 16.04.20 Practical Law have published a commercial version of their delay clause¹.)
- II) In the context of investment sale agreements and simple agreements for lease the working party took the general view that deviation from standard practice should be kept to a bare minimum. In particular it was thought that widely drawn force majeure provisions would be inappropriate in circumstances where such drafting would not have been present before the crisis.
- III) Chapter 3 contains a longer form clause dealing with conditional contracts.
- IV) Users should bear in mind that such a clause will primarily stand to the benefit of a buyer or tenant. When acting for a seller or landlord this sort of drafting should only be included with specific instructions. Where the parties have agreed such a principle then it should be included within the heads of terms. Suggested wording for this is set out in chapter 2.
- V) **Users should always consider the definition of Coronavirus Event carefully.** In most cases the view is that the shorter version provided within the clause will be sufficient. This provides for delays arising from compliance with the Coronavirus Regulations (but not any unilateral steps that a party might take in response to the pandemic). A wider version of this definition is set out in chapter 2 which also includes specific events. If that is used, users must consider and discuss each element with the client.
- VI) Due to the difficulty associated with proving/disproving the occurrence (or ending) of a Coronavirus Event there is no "deeming" provision relating to the end of a Coronavirus Event. As such the longstop date needs to be considered carefully. **The working party**

¹ **UPDATE 06.05.20** – the comparison between the PLC residential/commercial drafting set out in the earlier version of this document has now been removed.

recommends a longstop date not later than three months after exchange.

Optional wording for a deeming provision is set out at chapter 2.

- VII) If the contract is conditional or there are other substantive obligations which need to be discharged by either party ahead of completion then this wording will always require significant further amendment. In this setting the drafting should not be used in its unamended form and in particular it will be necessary to specify in detail the contractual obligations which need to be suspended, and further consider if it is necessary to widen (or narrow down) the definition of "Coronavirus Event". Except for the simplest of conditional agreements, users should start with the long form version in chapter 3 which is designed for conditional sale contracts and agreements for lease.
- VIII) The drafting does not include provision for expert determination or arbitration. Given the time scales it is considered that the remedy would be to rescind the contract on the long stop date and then bring a claim for breach of contract. Optional wording for an expert or arbitrator is set out at chapter 2. The working party concluded that expert determination was likely to be a more appropriate choice in this setting.
- IX) In the current environment users should consider including a provision that notices served under this clause (including a notice to complete) can be served by e- mail. Email addresses could be included for the purposes of Standard Condition 1.3.3 although they could be limited to notices served under this clause. Optional wording to this effect is set out at chapter 2.
- X) In some cases agreements for lease/development agreements may cross refer to a construction contract for force majeure purposes. In this setting great care should be taken when incorporating additional force majeure clauses since there is a risk they may conflict. It is a good idea to obtain a view from a construction lawyer before proceeding.
- XI) In such cases where the force majeure drafting is considered to be inadequate at present it may be possible to simply widen out the meaning of force majeure event to include a pandemic. Suggested wording is set out at chapter 2. It should be borne in mind however that such provisions may only operate in respect of works obligations – if this is the case then additional drafting may be necessary to extend the benefit of such provisions to other obligations in the agreement. For further consideration of this topic see chapter 3.
- XII) **Update 06.05.2020:** please see footnotes 5 & 11 regarding minor amendments to this clause.

XIII) **Update 02.06.20:** updates following user feedback, see accompanying comparite.

DEFINITIONS²

Affected Party	the party for whom a Coronavirus Event is preventing or delaying completion and if both the Buyer and the Seller are subject to a Coronavirus Event at the same time shall mean either or both of them as the circumstances require; ³
Affected Party Notice	a written notification that a Coronavirus Event is preventing or delaying completion by the Affected Party;
Coronavirus	the disease known as coronavirus disease (COVID-19) and the virus known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);
Coronavirus Event	an event or delay caused by, or arising from or in relation to compliance with the Regulations which prevents or delays completion of the sale and purchase of the Property under this Agreement by the Affected Party; ⁴
Coronavirus Event Cessation Notice	a written notification that a Coronavirus Event that was preventing or delaying completion by the Affected Party has ceased to have that effect;
Regulations	any Act of Parliament and any delegated law made under them to prevent or delay the spread of Coronavirus including the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, or any subsequent statutory amendment, modification or

² The drafting in these clauses is concerned with delaying completion because of a Coronavirus related issue. The only right to rescind comes if the Coronavirus Event continues for more than a certain period. You may also need to consider whether you wish to have additional drafting to allow for the situation where the financial circumstances of the parties change during a transaction such as to allow one or other parties to terminate and the effect that should have on the parties' remedies for non-performance.

³ It is equally possible for both Buyer and Seller to be simultaneously affected by different Coronavirus Events. The drafting accommodates this, as well as the same party being affected by multiple events at the same time or in sequence. If we move to a period of partial "lock down" then it may also be that one party is affected when the other is not and the drafting also reflects this possibility.

⁴ Note the possible alternative wording in chapter 2, a buyer is likely to seek widely drawn wording, whereas a seller may want to be as specific as possible to prevent this clause being misused.

replacement of them or any regulation or designation under the Coronavirus Act 2020⁵.

1. SUSPENSION OF REMEDIES

1.1 Subject to clauses 1.2 and 2.2 if, due to a Coronavirus Event, an Affected Party is unable to complete on the Completion Date at the time specified by this Agreement neither party shall be in breach of this Agreement or liable for any delay in performing, or failure to perform, any of its obligations under this Agreement. In particular (but not limited to) neither party shall be liable to pay compensation or any incidental losses or costs to the other in respect of late completion and neither party may serve notice to complete during the period in which completion is delayed.⁶

1.2 Each party agrees with the other party that they shall:

1.2.1 act in good faith in respect of all matters referred to or contained in this clause 1;

1.2.2 serve any Affected Party Notice on the other party as soon as reasonably practicable (and in any event no later than [NUMBER] working days) after becoming aware that they are an Affected Party;

1.2.3 serve any Coronavirus Event Cessation Notice on the other party as soon as reasonably practicable (and in any event no later than [NUMBER] working days) after the relevant party ceases to be an Affected Party;⁷ and

1.2.4 use [reasonable endeavours] [all reasonable and commercially prudent endeavours] to mitigate the effect of any Coronavirus Events on the completion of this Agreement.

⁵ **UPDATE 06.05.20** – the definition "Regulations" has been revised so as to be consistent with the long form clause. The previous wording was narrower: "*the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, or any subsequent statutory amendment, modification or replacement of them.*"

⁶ This needs to be discussed and agreed with the client in each instance. If agreed they need to understand that any increased costs (which will almost certainly be inevitable if completion is delayed) will fall solely on them. There is no question as to who is at 'fault' for a Coronavirus Event delaying completion.

⁷ **UPDATE 02.06.20** - it should be noted that the drafting only provides for an Affected Party to serve a Coronavirus Event Cessation Notice. Users may wish to amend to allow **both** parties to serve such a notice – particularly when there is a concern that an affected party may not act in good faith, or may be slow to serve notice.

- 1.3 For the avoidance of doubt, either party may serve more than one Affected Party Notice if they are subject to more than one Coronavirus Event and the provisions of this clause 1 shall apply to each Affected Party Notice so served.
- 1.4 If both the Buyer and the Seller are an Affected Party simultaneously then any suspension under clause 1.1 shall, so far as practicable be concurrent, and not cumulative in effect for so long as both the Buyer and the Seller are an Affected Party.

2. DELAYED COMPLETION

- 2.1 Subject to clause 2.2, if either party is unable to complete on the Completion Date due to a Coronavirus Event, completion shall take place [NUMBER] working days⁸ from and including the date of service of the Affected Party's Coronavirus Event Cessation Notice in respect of that Coronavirus Event, provided that there is no other subsisting Affected Party Notice on the expiry of that period.
- 2.2 [If completion has not taken place by [LONG-STOP DATE]⁹, then [either the Seller or Buyer/a party]¹⁰ may rescind this Agreement at any time after that date by notice in writing to the other.]¹¹ [If this Agreement is rescinded in accordance with this clause, [the deposit is to be repaid to the Buyer without accrued interest and] [Standard] [Commercial] Condition 10.2 shall apply.]

⁸ Given that the parties will not necessarily have much notice of a Cessation Notice being served on them you will need to allow sufficient time for them to make alternative arrangements for things like removals and so on.

⁹ You must retain a long-stop date after which the parties can withdraw from the Agreement. Otherwise you run the risk that the Agreement itself may become void for uncertainty as there is no way of knowing when or if a Cessation Notice will be served which would leave all parties obliged to complete when there is no certainty as to when that will happen (if at all). The drafting simply provides for termination on notice after the expiry of a fixed date. If the agreement already has provisions dealing with an ultimate or final longstop date then please consider the second option contained in the conditional version of this clause in chapter 3 which cross refers to existing longstop provisions.

¹⁰ You will need to consider which party(ies) are able to determine the agreement where parties other than Buyer and Seller are involved.

¹¹ **UPDATE 06.05.20** – 2.2 has been revised so as to be consistent with the long form wording set out in chapter 3. The previous wording provided as follows: "*Notwithstanding the provisions of clause [X], if **OR** If], due to a Coronavirus Event, either party is unable to complete by [LONG-STOP DATE]¹¹, then either party may rescind this Agreement at any time after that date, provided that a party who is not the Affected Party may only rescind this Agreement before receipt of the Affected Party's Coronavirus Event Cessation Notice in respect of that Coronavirus Event.*"

Chapter 2 – Additional Drafting Options

[HEADS OF TERMS]

The documentation will contain [reasonable] provisions to allow for delays caused by the Coronavirus Regulations and any mandatory measures introduced to prevent or delay the spread of COVID 19 (or any related virus). Any time period expressed in these HoTs or in the documentation [(save for the ultimate longstop date)] will be extended by such period as may be reasonable in the light of such regulations and/or measures in force at the relevant time. Similarly the Buyer/Tenant will be given a reasonable extension to the rent free period under the lease to reflect any delay in being able to carry out fit out works or take up occupation due to such regulations and/or measures. The parties will act in good faith and will use reasonable endeavours to minimise any such delays in so far as they are reasonably able to do so.

[DEEMED SERVICE OF CESSATION NOTICE]

provided that such notification shall be deemed to have been given on the third working day after the relevant party ceases to be an Affected Party¹²

[NOTICES BY EMAIL]

[Standard] [Commercial] Condition 1.3 applies to this Agreement;

For the purpose of [Standard] [Commercial] Condition 1.3.3(b) the following e mail addresses are given:

[Buyer] [Tenant]

[insert appropriate Conveyancer email address]

[Seller] [Landlord]

[insert appropriate Conveyancer email address]

[FORCE MAJEURE - PANDEMIC EXTENSION]

pandemic, epidemic or other public health emergency (in either case whether national or international) and any public health measures (or reasonably expected public health measures) taken in connection with any of them ¹³

¹² A deemed service provision may be considered to be unnecessary and the parties may prefer to rely on the long stop date and the fact that a failure to serve a notice when appropriate to do so would be a breach of covenant. However the drafting is included for ease should the parties want to include it.

¹³ Where there is an extant definition of Force *Majeure* ensure that wording as below or similar is present and if not extend definition to suit.

[CORONAVIRUS EVENT]

"Coronavirus Event" means an event or delay caused by, or arising from or in relation to Coronavirus that prevents or delays completion of the sale and purchase of the Property under this Agreement [or the performance of any of its other obligations under this Agreement,] including (but not limited to):

- (a) unanticipated absences or unavailability of staff at the Buyer's Conveyancer, Seller's Conveyancer¹⁴, the providers of any insurance policy required to enable the [sale and purchase][letting] to proceed or any lender or other finance provider, and any material loss of, or disruption to, any of their facilities;
- (b) any illness, quarantining or self-isolation (including, but not limited to, precautionary self-isolation) of the Buyer, the Seller or (in the case of a body corporate) their respective directors or key personnel [where the decision to quarantine or self-isolate is [reasonable] **OR** [recommended or mandated] by the Regulations];
- (c) any recommended or mandatory measures introduced by local regional or central government pursuant to the Regulations;
- (d) any disruption of, or interruption to, any services such as electronic transmission of monies, the Document Exchange or the postal service;
- (e) any disruption of, or interruption to the services of a local authority or any other public body from whom a consent is required [as a condition of this Agreement or] for the carrying out of the Seller's Works;
- (f) unanticipated absence or unavailability of any consultants required to carry out inspections, surveys, testing or to prepare reports required in connection with a [Planning Application or as a] precondition of carrying out the Seller's Works or restrictions imposed under the Regulations restricting access to the Property for the purpose of carrying out such inspections, surveys, testing and reports;¹⁵
- (g) unavailability of essential service suppliers including (but not limited to) shopfitters, movers or storage facilities and providers of utility connections to the Property;

¹⁴ Note the reference to 'unanticipated' absences – poor planning to cover for colleagues on annual leave is not unanticipated. Similarly, to the extent that staff are 'furloughed' will not necessarily relieve a party of its obligation to perform.

¹⁵ As with other Coronavirus Events the impact may be indirect but the effect will be substantially the same if the Landlord/Developer is unable to submit or proceed with planning for want of reports and surveys e.g. from wild bird surveys to reports from the bat man.

- (h) [any inability to procure witnesses for the signature or lawful execution of any deeds, documents or forms (including (but not limited to) the transfer) required under this Agreement];¹⁶
- (i) any delay in carrying out any pre-completion inspection of the Property, or obtaining any standard pre-completion searches, that a prudent buyer would make between exchange and completion provided the relevant party has taken reasonable steps to secure the same in good time[**OR**; [or]]
- (j) [any withdrawal by a lender or other finance provider, or expiry of, or material adverse variation to an offer of finance or insurance policy needed by the Buyer];¹⁷
- (k) [[OTHER CORONAVIRUS EVENT]].

[DISPUTES CLAUSE]

Any dispute or question which arises between the parties as to [the occurrence or cessation of a Coronavirus Event] [or the construction or effect of this clause 1] is to be determined by an independent solicitor with at least [15] years' experience in practice in commercial real estate in England & Wales ("**the Independent Solicitor**").

The Independent Solicitor shall be appointed either by agreement between the parties or, in the absence of agreement, by the President for the time being of The Law Society, or any person authorised to make appointments on the President's behalf, on the application of either party.

[In determining such dispute or question the Independent Solicitor shall act as an expert and their determination shall be final and binding upon the parties [save in the case of manifest error or injustice or as to the proper application of the law] and the expert will:

- a) invite the parties to submit their reasons why a Coronavirus Event has occurred (or ceased) together with any relevant supporting information and documentation;
- b) give the parties the opportunity to make counter submissions; and
- c) give written reasons for his decisions, which will be binding on the parties;]

OR

¹⁶ This is a purely practical point. It is acceptable for an adult family member (who is not also a party to the transaction themselves) to witness a signature of a spouse or other family member. However, for parties living alone this may not be practicable.

¹⁷ At present FCA have recommended to lenders that they extend any existing offers of finance for up to three months. Many lenders are already withdrawing new lending on particular terms so this is likely to be a fluid situation.

[Any referral of a dispute or question to the Independent Solicitor shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1996.]

The professional costs of appointment and fees of the Independent Solicitor, including costs connected with the appointment of the Independent Solicitor (but not the legal and other costs of any party in relation to a dispute) must be paid in such proportions as the Independent Solicitor directs, or if no such direction is made, then equally by the parties.

Chapter 3 – Long Form Coronavirus Force Majeure Wording (for conditional agreements)

Notes:

- I) The drafting is intended for agreements subject to one or more pre-conditions and includes additional drafting for situations where the parties (usually the Landlord/Developer) are undertaking works prior to the sale or letting of the property. For more straightforward contracts and agreements without conditional elements please see the wording set out in chapter 1.
- II) There are a number of references to terms of art that will vary in use and meaning within the context of individual development agreements. Rather than attempt to cover all the possible permutations the parties are simply referred to as the Buyer and Seller and the parties may need to be described differently according to the nature of the conditional transaction. In a number of places, the drafting makes reference to 'a party' rather than specifically the Buyer and Seller as it is more common that there may be additional parties involved in these types of transaction such as guarantors. You should consider carefully whether these provisions have specific impacts in the context of the individual transaction which require amending (in particular in relation to the parties' ability to terminate).

- III) The following terms are used (but not defined) and will need to reflect the drafting in the transaction document. For reference, these terms are intended to have the following meanings:

Act of Parliament. This may be defined either as a specific term or within a general interpretation provision. It may also include reference to delegated or subordinate legislation which will affect the definition of Regulations in the agreement.

Building Contractor. The Seller's contractor appointed to carry out the Seller's Works.

Longstop Date. In the context of a more involved conditional agreement, the longstop date for satisfaction of any pre-conditions of the agreement. In a straightforward agreement this would replace the Works Longstop Date as the final date for completion of the transaction.

Planning Application. The planning application for the Seller's Works or any change of use so far as this is a condition of the agreement.

Seller's Works. The development works being undertaken by the Seller in relation to the proposed transaction

Target Date. If used, the proposed anticipated completion date for the Seller's Works or satisfaction of other conditions in complex transactions where there could be a variety of target dates.

Unconditional Date. The date on which the agreement becomes unconditional following satisfaction/waiver of any relevant pre-conditions.

Works Longstop Date. The final date by which the Seller's Works must be completed (failing which a right to terminate will accrue).

- IV) The short form drafting takes the view that the benefit of a delay clause is principally for the Buyer/Tenant. It is more likely that this drafting is more for the benefit of a Seller/Landlord, though it includes drafting for either party to request an extension of time under the Agreement to comply with its respective obligations.
- V) Users should always consider the definition of Coronavirus Event carefully. The drafting suggests a list of possible events that could delay the transaction. Some will be applicable only before the agreement becomes unconditional, some after and some at any stage in the transaction. Bear in mind that a more expansive definition may be more narrowly construed. If the parties have any specific concerns then it would be prudent to include them in the list of possible Coronavirus Events.
- VI) Again, unlike the unconditional version, the drafting puts the relevant Affected Party to proving (to the extent possible) both the existence of the relevant Coronavirus Event and the amount of time the party is seeking by way of extension of time. The other party can either agree the terms of the Affected Party Notice or refer the matter for third party determination. If the other party fails to respond within the relevant period it will be deemed to have accepted the Affected Party Notice.
- VII) The drafting includes provision for expert determination or arbitration. Whilst some suggested drafting is included there is likely to be an existing dispute resolution provision in the agreement and the suggested wording may not be applicable. The working party did conclude that expert determination was likely to be a more appropriate choice in this setting rather than a full arbitration.
- VIII) In the current environment, users should consider including a provision that notices served under this clause (including a notice to complete) could be served by e-mail. Email addresses could be included for the purposes of Standard Condition 1.3.3 although they could be limited to notices served under this clause. Optional wording to this effect is set out at chapter 2.
- IX) In many agreements for lease/development agreements these will cross-refer to a construction contract for force majeure purposes. In this setting great care should be taken when incorporating additional force majeure clauses since there is a risk they may conflict. It is a good idea to obtain a view from a construction lawyer before proceeding.
- X) In such cases where the force majeure drafting is considered to be inadequate, at present it may be possible to simply widen out the meaning of force majeure event to include a pandemic. Suggested wording is set out at chapter 2. It should be borne in mind however that such provisions generally only operate in respect of works obligations – if this is the case then additional drafting may be necessary to extend the benefit of such provisions to other

obligations in the agreement. Be aware of creating conflict between extensions of time awarded to a Building Contractor under the Building Contract and whether such extensions should be reflected in the main agreement. It is unlikely the parties will want different extensions of time awarded by different experts/arbitrators under the relevant agreements and the suggested wording operates on the basis that the award of an extension of time to the Building Contractor is sufficient to constitute an extension under the agreement without having to go through the Affected Party Notice procedure.

XI) **Update 02.06.20:** updates following user feedback, see accompanying comparite.

DEFINITIONS¹⁸

Accepted Coronavirus Event Any Coronavirus Event referred to in an Affected Party Notice which has been accepted under the provisions of clause 1 or, in the event of dispute, determined as having occurred pursuant to clause [6];

Affected Party

- (a) for the period prior to the Unconditional Date the party who is obliged to perform relevant obligations under this Agreement; and
- (b) for the period after the Unconditional Date either party

for whom a Coronavirus Event is preventing or delaying (as the case may be) either the performance of its obligations under this Agreement or preventing completion and if both the Buyer and the Seller are subject to a Coronavirus Event at the same time shall mean either or both of them as the circumstances require;¹⁹

Affected Party Notice a written notification that a Coronavirus Event is either:

- (a) preventing completion by the Affected Party; or
- (b) preventing or delaying the Affected Party from performing any of its other obligations under this Agreement

and which shall:

- (c) specify the nature of the Coronavirus Event together with [evidence that/an explanation as to why]²⁰ it is impeding the performance of the Affected Party's obligations under this Agreement; and

¹⁸ The drafting in these clauses is concerned with delaying completion because of a Coronavirus related issue. The only right to rescind comes if the Coronavirus Event continues for more than a certain period. You may also need to consider whether you wish to have additional drafting to allow for the situation where the financial circumstances of the parties change during a transaction such as to allow one or other parties to terminate and the effect that should have on the parties' remedies for non-performance.

¹⁹ It is equally possible for both Buyer and Seller to be simultaneously affected by different Coronavirus Events. The drafting accommodates this, as well as the same party being affected by multiple events at the same time or in sequence. If we move to a period of partial "lock down" then it may also be that one party is affected when the other is not and the drafting also reflects this possibility.

²⁰ Evidence may or may not be available depending on the nature of the Coronavirus Event but the 'proof' a party may require will probably vary depending on the nature and value of the transaction.

- (d) include the Affected Party's best estimate of the length of time that the Affected Party reasonably believes it will be prevented from performing its obligations under this Agreement.

Coronavirus

the disease known as coronavirus disease (COVID-19) and the virus known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);

Coronavirus Event

means an event or delay caused by, or arising from or in relation to Coronavirus that prevents or delays completion of the [sale and purchase/letting] of the Property under this Agreement or the performance of any of the other obligations under this Agreement, including (but not limited to):

- (a) unanticipated absences or unavailability of staff at the Buyer's Conveyancer, Seller's Conveyancer²¹, the providers of any insurance policy required to enable the [sale and purchase / letting] to proceed or any lender or other finance provider, and any material loss of, or disruption to, any of their facilities;
- (b) any illness, quarantining or self-isolation (including, but not limited to, precautionary self-isolation) of the Buyer, the Seller or (in the case of a body corporate) their respective directors or key personnel [where the decision to quarantine or self-isolate is [reasonable] **OR** [recommended or mandated] by the Regulations];
- (c) any recommended or mandatory measures introduced by local, regional or central government pursuant to the Regulations;
- (d) any disruption of, or interruption to, any services such as electronic transmission of monies, the Document Exchange or the postal service;

²¹ Note the reference to 'unanticipated' absences – poor planning to cover for colleagues on annual leave is not unanticipated. Similarly, to the extent that staff are 'furloughed' will not necessarily relieve a party of its obligation to perform.

- (e) any disruption of, or interruption to the services of a local authority or any other public body from whom a consent is required [as a condition of this Agreement or] for the carrying out of the Seller's Works
- (f) unanticipated absence or unavailability of any consultants required to carry out inspections, surveys, testing or to prepare reports required in connection with a [Planning Application or as a] precondition of carrying out the Seller's Works or restrictions imposed under the Regulations restricting access to the Property for the purpose of carrying out such inspections, surveys, testing and reports;²²
- (g) unavailability of essential service suppliers including (but not limited to) shopfitters, movers or storage facilities and providers of utility connections to the Property;
- (h) [any inability to procure witnesses for the signature or lawful execution of any deeds, documents or forms (including (but not limited to) the transfer) required under this Agreement];²³
- (i) any delay in carrying out any pre-completion inspection of the Property, or obtaining any standard pre-completion searches, that a prudent buyer would make between exchange and completion provided the relevant party has taken reasonable steps to secure the same in good time[**OR**; [or]]
- (j) [any withdrawal by a lender or other finance provider, or expiry of, or material adverse

²² As with other Coronavirus Events the impact may be indirect but the effect will be substantially the same if the Landlord/Developer is unable to submit or proceed with planning for want of reports and surveys e.g. from wild bird surveys to reports from the bat man.

²³ This is a purely practical point. It is acceptable for an adult family member (who is not also a party to the transaction themselves) to witness a signature of a spouse or other family member. However, for parties living alone this may not be practicable.

variation to, an offer of finance or insurance policy needed by the Buyer];²⁴

(k) [[OTHER CORONAVIRUS EVENT]].

Coronavirus Event Cessation Notice a written notification that an Accepted Coronavirus Event has ceased to have that effect;

Regulations any Act of Parliament and any delegated law made under them to prevent or delay the spread of Coronavirus including the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, or any subsequent statutory amendment, modification or replacement of them or any regulation or designation under the Coronavirus Act 2020.²⁵

1. **AFFECTED PARTY NOTICES**

1.1 If at any time a party becomes an Affected Party, it shall serve an Affected Party Notice on the other party[ies] as soon as reasonably practicable (and in any event no later than [NUMBER] working days) after becoming aware that they are an Affected Party.

1.2 Following receipt of an Affected Party Notice a receiving party shall within [NUMBER] working days of receipt of such notice serve a counter notice stating either that:

1.2.1 it accepts the Affected Party Notice and the extension of time requested; or

1.2.2 it disputes the Affected Party Notice (as to whether the Coronavirus Event claimed or the extension of time requested) in which case the matter shall be referred for determination in accordance with clause [6].

1.3 If a receiving party has not served a counternotice within the period specified in clause 1.2 it shall be deemed to have accepted the Affected Party Notice.

²⁴ At present FCA have recommended to lenders that they extend any existing offers of finance for up to three months. Many lenders are already withdrawing new lending on particular terms so this is likely to be a fluid situation.

²⁵ **UPDATE 02.06.20-** Note that the definition "Regulations" **does not** include the guidance dealing with social distancing. The drafting focuses on events or delays arising or relating to compliance with the Regulations, not the official guidance which sits alongside.

1.4 A party may serve an Affected Party Notice under clause 1.1 on each occasion that it is an Affected Party and the process in clauses 1.1 and 1.2 shall be repeated as many times as necessary.

2. EXTENSIONS OF TIME

[EITHER]

2.1 [Any extensions of time agreed by the parties or determined under clause [6] [or certified by the Seller under clause [NUMBER]] shall, in addition to extending the period for compliance with the [Seller's/parties'] obligations in this Agreement, postpone the Longstop Date by a period equivalent to such extensions.

2.2 Extensions of time agreed by the parties or determined under clause [6] [or certified by the Seller under clause [NUMBER] may run concurrently or consecutively as the circumstances shall require.]²⁶

[OR]

2.3 [On each occasion that an extension of time is agreed or awarded, the parties shall sign a memorandum to that effect and shall, in addition, record any revision to the following date(s):

2.3.1 the Longstop Date;

2.3.2 the Target Date;

2.3.3 the Works Longstop Date;

2.3.4 [ANY OTHER FIXED DATES].²⁷

2.4 Extensions of time agreed by the parties or awarded by the [Expert/Arbitrator] in respect of Coronavirus Events may run concurrently or consecutively as the circumstances shall require.]²⁸

²⁶ In a simple agreement for lease (such as where the Seller is undertaking minor works for the Buyer's benefit) the agreement may not have provisions for postponing the Longstop Date where the Seller is prevented from completing works by events outside of its control. This clause adds some simple drafting to push back any final date for completion (Longstop Date) by the equivalent period of any agreed extensions of time.

²⁷ The clause assumes that other dates such as Access Date, Practical Completion Date etc. are all references to periods that are capable of moving as the project develops. In certain circumstances longstop dates will be absolute, regardless of whether or not extensions of time have been given to one or other parties so will need to consider whether and to what extent these dates should be allowed to be pushed back.

²⁸ There is no strict requirement for a memorandum to record extensions of time and the impact of extensions on these key dates could simply be automatic. However, it is suggested this may be good practice as it is possible there will be multiple Coronavirus Events affecting the parties which will make keeping track of these dates increasingly difficult without a formal record of what the revised dates should be.

2.5 [Notwithstanding the provisions of clause 2.1, the [Works] Longstop Date shall in no circumstances be later than [INSERT DATE].]²⁹

3. **[EXTENSIONS UNDER THE BUILDING CONTRACT]³⁰**

3.4 Where the Building Contractor is awarded an extension of time under the Building Contract for matters equivalent to a Coronavirus Event (whether as a matter of force majeure or otherwise) the extension certified under the Building Contract shall:

3.4.1 be deemed to be a period agreed or determined for the purposes of clause **Error! Reference source not found.** of this Agreement; and

3.4.2 the Seller shall not be entitled to any further or additional extension of time under this Agreement in respect of the same matters.]

4. **SUSPENSION OF REMEDIES**

4.1 Subject to clauses 4.2 and 5.2 if, due to a Coronavirus Event, a party has properly served an Affected Party Notice that party shall not be in breach of this Agreement or liable for any delay in performing, or failure to perform, any of its obligations under this Agreement during the period equivalent to whichever shall be the shorter of:

4.1.1 any extensions of time referred to in clause 2;

4.1.2 any reduced period of such extensions of time referred to in clause 4.2.3.

In particular (but not limited to) that party shall not be liable to pay compensation or any incidental losses or costs to the other in respect of late completion and neither party may serve notice to complete during the period in which completion is delayed.³¹

This clause 4.1 is without prejudice to any other liability that either party may have in respect of any other breach of the terms of this Agreement not arising because of a Coronavirus Event.

4.2 Each party agrees with the other party that it shall:

²⁹ **UPDATE 02.06.20-** This is to avoid a scenario where the Longstop Date is pushed out indefinitely.

³⁰ This is a matter to be discussed with your construction colleagues. Depending on the drafting in the Building Contract, pandemic or epidemic may already be provided for as a force majeure event entitling the Building Contractor to an extension of time. As the Landlord/Developer is usually entitled to an extension of time equivalent to those properly awarded to the Building Contractor; this clause simply prevents duplicate or conflicting extensions of time being awarded under the various agreements. Where there is no Building Contract in place and the Seller can self-certify extensions of time then the definition of Coronavirus Event should be amended to enable the Seller to claim for events delaying it in carrying out works to the Property as appropriate.

³¹ This needs to be discussed and agreed with the client in each instance. If agreed they need to understand that any increased costs (which will almost certainly be inevitable if completion is delayed) will fall solely on them. There is no question as to who is at 'fault' for a Coronavirus Event delaying completion.

- 4.2.1 act in good faith in respect of all matters referred to or contained in clauses 1 to 3 above;
 - 4.2.2 serve any Coronavirus Event Cessation Notice on the other party as soon as reasonably practicable (and in any event no later than [NUMBER] working days) after the relevant party ceases to be an Affected Party;³²
 - 4.2.3 if a Coronavirus Event Cessation Notice is served prior to expiry of a previously agreed or determined extension period, agree to the reduction of such period to the extent relevant; and
 - 4.2.4 use [reasonable endeavours] [all reasonable and commercially prudent endeavours] to mitigate the effect of any Coronavirus Events on its obligations under this Agreement.
- 4.3 If both the Buyer and the Seller are an Affected Party simultaneously then any suspension under clause 4.1 shall, so far as practicable be concurrent, and not cumulative in effect for so long as both the Buyer and the Seller are an Affected Party.

5. DELAYED COMPLETION

- 5.1 Subject to clause 5.2 if a party is unable to complete on the Completion Date notwithstanding the extensions of time referred to in clause 2 due to the subsistence of an Accepted Coronavirus Event, then completion shall take place [NUMBER] working days³³ from and including the date of service of the Affected Party's Coronavirus Event Cessation Notice in respect of that Coronavirus Event, provided that there is no other subsisting Affected Party Notice on the expiry of that period.
- 5.2 [If completion has not taken place by [the Longstop Date (as extended in accordance with clause 2)]³⁴, then [either the Seller or Buyer / a party]³⁵ may rescind this Agreement at any time after that date by notice in writing to the other.]³⁶ OR [If

³² **UPDATE 02.06.20-** It should be noted that the drafting only provides for an Affected Party to serve a Coronavirus Event Cessation Notice. Users may wish to amend to allow **both** parties to serve such a notice – particularly when there is a concern that an affected party may not act in good faith, or may be slow to serve notice.

³³ Given that the parties will not necessarily have much notice of a Cessation Notice being served on them you will need to allow sufficient time for them to make alternative arrangements for things like removals and so on.

³⁴ You must retain a long-stop date after which the parties can withdraw from the Agreement. Otherwise you run the risk that the Agreement itself may become void for uncertainty as there is no way of knowing when or if a Cessation Notice will be served which would leave all parties obliged to complete when there is no certainty as to when that will happen (if at all). The first option simply provides for termination on notice after the expiry of a fixed date. If the agreement already has provisions dealing with an ultimate or final longstop date then use the second option and cross-refer to the relevant provision in the agreement to prevent duplication.

³⁵ You will need to consider which party(ies) are able to determine the agreement where parties other than Buyer and Seller are involved.

³⁶ **UPDATE 02.06.20-** Double check to see whether or not there are other extant longstop provisions in the agreement that may be relied upon – see the alternative drafting which follows.

completion has not taken place by the Works Longstop Date (as extended in accordance with clause 2.1) then [clause [NUMBER] shall apply.]³⁷

5.3 [If this Agreement is rescinded in accordance with this clause 5 [the deposit is to be repaid to the Buyer without accrued interest and] [Standard] [Commercial] Condition 10.2 shall apply.]

6. **DISPUTES CLAUSE**³⁸

6.1 Any dispute or question which arises between the parties as to [the occurrence or cessation or subsistence of a Coronavirus Event] [a dispute regarding the Affected Party Notice (as to whether the Coronavirus Event claimed or the extension of time requested) under clause 1.2.2] [or the period of extension of time referred to in clause 2.2 or any reduction thereof] is to be determined by an independent solicitor with at least [15] years' experience in practice in commercial real estate in England & Wales ("the Independent Solicitor").

6.2 The Independent Solicitor shall be appointed either by agreement between the parties or, in the absence of agreement, by the President for the time being of The Law Society, or any person authorised to make appointments on the President's behalf, on the application of either party.

6.3 [In determining such dispute or question the Independent Solicitor shall act as an expert and their determination shall be final and binding upon the parties [save in the case of manifest error or injustice or as to the proper application of the law] and the expert will:

6.3.1 invite the parties to state their reasons why a Coronavirus Event has occurred (or ceased or is subsisting) or (as appropriate) in relation to the period of any extension of time or reduction thereof together with any relevant supporting information and documentation in support of their reasons or any associated extension of time claimed;

6.3.2 give the parties the opportunity to make counter submissions; and

6.3.3 give written reasons for his decisions, which will be binding on the parties;]

OR

³⁷ Where the agreement provides for termination following the passing of a relevant longstop date then you should cross-refer to the relevant provisions within the agreement.

³⁸ A form of disputes resolution wording is included although in most instances conditional sale contracts or agreements for lease will contain their own provisions. If so, then these provisions can be incorporated or adapted to suit the wording of the agreement.

- 6.3 [Any referral of a dispute or question to the Independent Solicitor shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1996.]
- 6.4 The professional costs of appointment and fees of the Independent Solicitor, including costs connected with the appointment of the Independent Solicitor (but not the legal and other costs of any party in relation to a dispute) must be paid in such proportions as the Independent Solicitor directs, or if no such direction is made, then equally by the parties.

Chapter 4 – Variation Agreement Schedule

Notes:

- l) The drafting here is intended for inclusion in a variation to an existing agreement for sale or lease where the parties have agreed to suspend performance of certain obligations and push out longstop dates.

THE SCHEDULE

[Variations]

1. Clause [number] is amended to incorporate the following additional definitions:

[Continuing Obligations]	the obligations on the part of [the [Seller][Landlord]] [and] [the [Buyer][Tenant]] [in [set out the relevant operative obligations contained in the Agreement]] contained in the Original Agreement; ³⁹
Coronavirus	the disease known as coronavirus disease (COVID-19) and the virus known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);
Recommencement Date	[insert fixed date][the day following the expiry of the Suspension Period];
Regulations	any Act of Parliament and any delegated law made under them to prevent or delay the spread of Coronavirus including the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, or any subsequent statutory amendment, modification or replacement of them or any regulation or designation under the Coronavirus Act 2020;
Relevant Obligations	[all] the obligations on the part of [the [Seller][Landlord]] [and] [the [Buyer][Tenant]] [in [set out the relevant operative obligations contained in the Agreement]] contained in the Original Agreement;
Suspension Period	from and including: [insert suspension period commencement date]

³⁹ This may not be necessary if all the obligations are to standstill but it is advisable to consider if there are any obligations which are required to continue – e.g. confidentiality.

to and including: [insert appropriate suspension period expiry date] OR [the earliest of the day immediately preceding the Trigger Date and [insert fixed suspension period expiry date]]⁴⁰;

[Trigger Date

the date that is [1] calendar month after [the [Seller][Landlord]] [[or] [the [Buyer][Tenant]]] gives written notice to the [other;][the [Buyer][Tenant] [Seller][Landlord]] pursuant to the provisions of clause [insert notice provisions clause number];]⁴¹

2. Clause [number] is added: [This clause is inserted into the agreement:

3. The parties have agreed that in the light of the operational and legal issues posed by the Coronavirus pandemic and the Regulations performance of the Relevant Obligations will be suspended for the Suspension Period.

4. The parties agree that during the Suspension Period:
 - 4.1 the Relevant Obligations shall be suspended;
 - 4.2 no party shall be in breach of this Agreement, or liable for any delay in performing, or failure to perform, any of its Relevant Obligations under this agreement;
 - 4.3 no party shall be liable to pay compensation or any incidental losses or costs to the other in respect of late completion or any delay in performing, or failure to perform, any of its Relevant Obligations[;
 - 4.4 no party [may serve notice to complete on the other;]⁴²
 - 4.5 [the Continuing Obligations shall continue to be observed and performed].⁴³

5. From and including the Recommencement Date the parties shall perform the Relevant Obligations in accordance with this Agreement [save that []]⁴⁴.

⁴⁰ **UPDATE 02.06.20-** It is advisable to have a fixed date for the end of the suspension period so as to avoid the risk of indefinite suspension and the contract being void for uncertainty.

⁴¹ This is only necessary if the parties have agreed that one party may trigger recommencement of the obligations. If the obligations are only on the part of the Seller/Landlord, when acting for the Seller/Landlord it may be advisable to provide that only the Seller/Landlord is able to serve notice to trigger recommencement of the obligations. Similarly if the obligations are only on the part of the Buyer, amend this definition to provide that only the Buyer is able to service notice to trigger recommencement of the obligations. **UPDATE 02.06.20-** If such a provision is included consider the definition of Suspension Period – is this for a fixed period and if not is there is some other adequate fixed longstop date that can be relied on if the "Trigger Date" never occurs.

⁴² Think carefully about the overall circumstances and whether or not this is appropriate. Once the relevant obligations are discharged is it still appropriate for the agreement to be suspended?

⁴³ This may not be necessary if all the obligations are to standstill but it is advisable to consider if there are any obligations which are required to continue – e.g. confidentiality.

⁴⁴ If there are any anticipated changes to the obligations resulting from the delay insert amendments to the obligations here. Extensions to agreed dates are dealt within in clause 5.

6. The provisions of this clause [number] do not:
- 6.1 prejudice the rights of any party in respect of:
 - 6.1.1 a breach of the Original Agreement by any other which occurred before the date on which the Original Agreement was varied;
 - 6.1.2 a breach of this Agreement by any other which occurs on or after the date on which the Original Agreement was varied;
 - 6.1.3 the Relevant Obligations, any breach of this Agreement by any other which occurs on or after, the Recommencement Date;
 - 6.2 [suspend the Continuing Obligations or any party's liability to comply with the Continuing Obligations;]⁴⁵
 - 6.3 affect the rights of any party to determine the Agreement contained in clauses [insert relevant termination clauses] if such right to do so arises during the Suspension Period.
7. Clause [number] is amended: [The expression 'Completion Date' set out in clause [number] of the Original Agreement is varied so that the Completion Date is instead [insert date]] [and from [insert date of variation agreement] time is of the essence in relation to the Completion Date (as varied by this Agreement).]⁴⁶
8. Clause [number] is amended: [The following dates in the Original Agreement shall each be delayed by a period equal to the Suspension Period:
- 'Planning Longstop Date' set out in clause [number]
 - 'Works Longstop Date' set out in clause [number] and the Original Agreement shall be read and construed accordingly.]⁴⁷
9. Clause [number] is amended: [The expression 'Planning Longstop Date' set out in clause [number] of the Original Agreement is varied so that the Planning Longstop Date is instead [insert date].]
10. Clause [number] is amended: [The expression 'Works Longstop Date' set out in clause [number] of the Original Agreement is varied so that the Works Longstop Date is instead [insert date].]

⁴⁵ See footnote 35.

⁴⁶ Where varying the Completion Date if this has been provoked by the service of a notice to complete (following on from which the defaulting party has suggested a new completion date), you must make time of the essence in relation to the new date if you want to avoid having to serve another notice to complete in relation to that date.

⁴⁷ Use this only if the suspension period may be brought to an end by a Trigger Notice. If the suspension period is fixed then it is clearer (and preferable) to recalculate any longstop dates and set them out in this agreement – see the alternative drafting below. **UPDATE 02.06.20-** If such a provision is included then be wary of the risks associated with indefinite suspension – check to ensure there is an adequate fixed longstop date (e.g. "Final Longstop") that can still be relied on if the "Trigger Date" never occurs to crystallise this dates. See footnote 48.

11. Clause [number] is amended: [The expression 'Final Longstop Date' set out in clause [number] of the Original Agreement is varied so that the Final Longstop Date is instead [insert date].]⁴⁸

⁴⁸ **UPDATE 02.06.20-** The Final Longstop Date should probably be a **fixed date** in order to guard against uncertainty arising because of a "Suspension Period" that is not fixed.