

# SPF VOICE

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## COVID-19: together we will find a way through



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MD Dowbrae Property Consultancy

I write this a matter of minutes after the First Minister announced the closure of schools and less than 48 hours since the Government's Covid-19 advice switched dramatically. It's quite possible that things could alter dramatically again between preparation of this piece and publication.

First and foremost, my thoughts are with any of you directly affected by the Coronavirus; I sincerely hope that you, your friends and/or your families make a full and speedy recovery.

In the business context, we will all be impacted by this. None of us yet know to what extent.

The chaotic uncertainty of what we are currently enduring is tough to comprehend and as a result it's very difficult to know what to do or how to react - it's easy to become paralysed between the search for guidance and the urge for action.

We need to get back to basics and bring things into the realms of our own understanding.

I have been fortunate to have enjoyed a varied career, but as a result this has brought episodes of uncertainty. In each case, the way to deal with the initial shock and confusion is to find the safe and solid ground of

knowledge. And what we know is that our industry is intrinsic to society. We know that the products and services we supply will be required beyond the end of this crisis. We know that what we are facing is in no way caused by us and nor is it as a result of anything we've done.

So, we know that we just need to find a way through.

Easier said than done. But if we don't yet know how to do this, then we at least need try to establish some points of reference as to how we'll go about it. My own personal approach will be based on **respect, responsibility** and **resilience**. The SPF approach will be to **listen, learn** and **engage**.

If you think local or national government could be doing more, then we want to hear about it. We want to understand how we can help. We maintain a strong relationship with Scottish Government and know that there is a willingness to work with us.

Stick with us – together we will find a way through.

Take care and stay safe.

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# POLICY INSIGHTS

## UK STEPS UP TO COVID-19 AND INFRASTRUCTURE CHALLENGE

The coronavirus crisis has led to rapid and era-defining change in UK fiscal and economic policy. In a series of multi-billion pound intervention packages aimed at minimising the economic impact of COVID-19 (and some £624bn of infrastructure investment in this UK Parliament), UK Chancellor Rishi Sunak has had to put aside traditional public finance orthodoxy to meet the public health emergency. As the pandemic's full impact on the economy became apparent, the supportive measures announced during the UK Budget, including rates relief, loan finance and grants for SMEs, retail, leisure and hospitality sectors, were quickly overtaken by further interventions worth a staggering £330bn+. Sunak announced further interventions still, with an unprecedented offer to pay 80% of salaries, to a maximum of £30,000 per year, for workers 'furloughed' by businesses who had in many cases seen their cash-flow disappear overnight.

## SCOTTISH GOVERNMENT COVID-19 ACTIONS

The Scottish Government has used the consequential funding from the UK for coronavirus to support to the business community. In addition, Cabinet Secretary for Finance Kate Forbes has frozen the poundage at '19-20 level. However, as members have argued, the support needed is not only about tax and finance. There are also concerns with regulatory pressures as the coronavirus causes authorities to work from home and the regular run of political decision-taking is interrupted. We have written to the Scottish Government to highlight these issues for planning and building services, including where a business seeks to leave one lease and move to a new build that could be affected by development delays in light of the restriction on building site activities. We are also in discussions on any potential changes to the law on leases in Scotland, following the UK Coronavirus Bill changes to forfeiture for non-payment of rent. For residential lettings, Scottish Ministers have extended the three month period for mandatory grounds for eviction on grounds of non-payment of rent to six months and added wider guidance for landlords during the crisis.

## SPF GIVES EVIDENCE TO HOLYROOD ON LAND REFORM AGENDA

Alan Cook of Pinsent Masons and Chair of the SPF Commercial Real Estate Committee gave evidence to the Scottish Parliament's Environment, Climate Change and Land Reform Committee on the draft Register of Persons Holding a Controlled Interest in Land Regulations. Ongoing concerns about potential criminalisation was a key feature of the session. We made it clear that policing and verifying the process required a unique skill set and suggested a two-tier system with a warning if a person has not complied. If they then fail to act then a report could be made to Police Scotland and the Crown Office. On the same day, Rachel Oliphant of Pinsent Masons took part in a less formal roundtable discussion with the same Committee on the Right to Buy Land to Further Sustainable Development Regulations. There was general agreement that detailed guidance is needed and that this final right to buy power is unlikely to be widely used. Concern was raised around intra-group transfer, which could frustrate the process.

## INFLUENCING ENERGY EFFICIENCY POLICY

While climate change has fallen out of the headlines due to more immediate concerns, the Scottish Government's drive towards achieving net-zero carbon is accelerating. Both new and existing buildings are in line for updated regulations that could have significant impacts on the way we create and manage our built environment. Perhaps the most ambitious proposal from the government is that homes consented from 2024 would be required to have low carbon heating, with a more phased approach for the non-domestic sector. Our Sustainability and Building Design Committee recently met with the government team tasked with developing these new standards, and we have committed to working with them to ensure that development viability remains a key consideration. Changes to Section 63 regulations for non-domestic buildings are also on the horizon with a consultation on new regulations expected later this year. The SPF is one of a small number of private sector organisations within the Scottish Government's S63 working group developing recommendations to Ministers, which are expected to be submitted by summer.



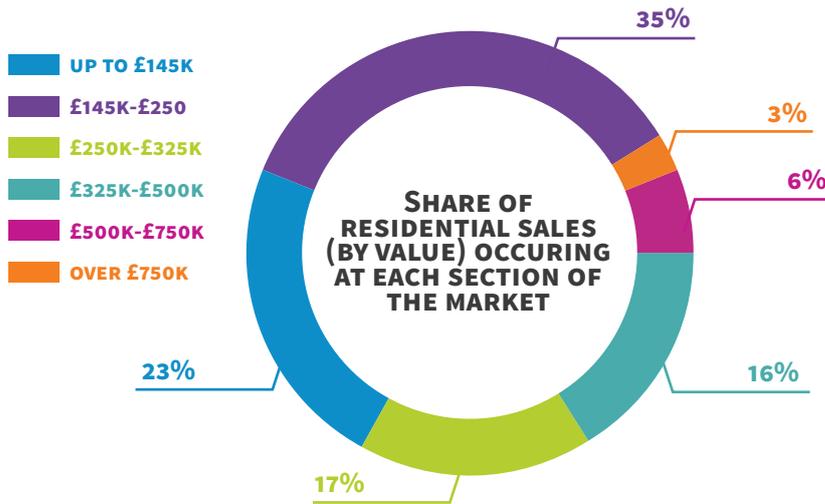
# £19.02BN 103,510

TOTAL VALUE OF SCOTTISH RESIDENTIAL PROPERTY SALES (2019)

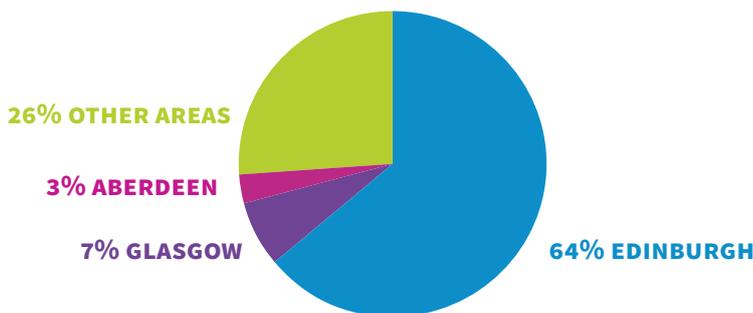
TOTAL NUMBER OF SCOTTISH RESIDENTIAL PROPERTY SALES (2019)

↑ £638M  
3.5% UP FROM 2018

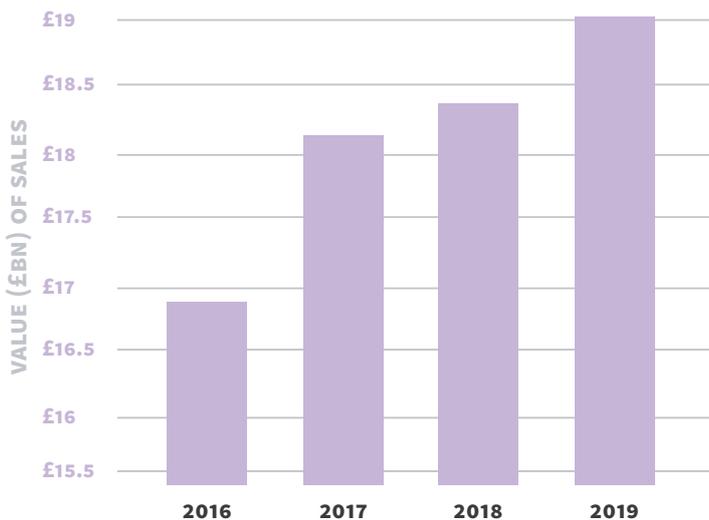
↑ 1,800  
1.8% UP FROM 2018



**SHARE OF RESIDENTIAL TRANSACTIONS (BY VALUE) ABOVE £750K**



**TOTAL VALUE OF RESIDENTIAL PROPERTY SALES IN SCOTLAND**



DATA FROM REGISTERS OF SCOTLAND

### OVERVIEW

With total sales of £19.02bn, the Scottish residential property market grew last year, with sales up 3.5% from the 2018 total of £18.38bn. The number of residential property sales also grew in 2019 to 103,510, up by 1,800 (1.8%) on the previous year.

Using the current LBTT banding (and an additional £500k level), sales of properties between £145k and £250k captured the largest share of the market by value, at just under a third, while sales of properties below £145k accounted for the second highest share of the market at 23%.

### CITIES

The City of Edinburgh continued to perform strongly in 2019 with £3.28bn in sales over the year, accounting for almost a fifth of the total value of sales in Scotland. Edinburgh also captured the lion's share of the upper section of the market, with 64% of the total value of properties sold above £750k occurring in the city.

Glasgow City recorded £1.92bn of residential property sales in 2019, an increase of £54m (2.9%) on the total for 2018. The city made up 10.1% of the total value of the Scottish residential market by value in 2019.

Meanwhile, the total value of residential property transactions rose in Aberdeen City, following declines in 2018 and 2017. There was £780m in residential sales in 2019, £6m (0.8%) higher than the total for 2018, although sales in 2019 were down by £24m (3.0%) compared to 2017.

# REGIONAL SPOTLIGHT



## ABERDEENSHIRE

Councillors in Aberdeenshire **agreed** their proposed LDP2, which will allow new Head of Planning Paul Macari to launch its consultation ahead of seeking to adopt the plan in 2021. The proposals will be formally consulted on for an 8-week period beginning 27 April and lasting until 19 June. Although a new Development Plan Scheme has been approved, members are advised to check ahead of seeking to attend any events announced, given the current COVID-19 constraints.

## EDINBURGH

Edinburgh Council, supported by the Scottish Futures Trust, has approved proposals for a major mixed use and long-awaited development of the Granton Waterfront. The £1.3bn proposals include some £196m of regeneration projects invested in by the council along with the Port of Leith Housing Association, Link Group and Places for People. The proposals seek to reduce car usage, enhance public transport and provide a 35% affordable housing element. They also include a medical centre, school, cycling and walking routes. Detailed design guides are now available on the council **website**.

## SOUTH OF SCOTLAND

The new **South of Scotland Enterprise Agency** formally begins life on 1 April 2020. The agency is designed to promote investment into the south of Scotland region and support businesses in the area. The agency will aim to bring forward inclusive growth in the Scottish Borders and Dumfries and Galloway authority regions, supporting skills and community engagement with their local economy.

# EVENTS



SPF Annual Conference 2020  
**Building Sustainable & Inclusive Growth**



# EVENT UPDATE

Reed-MIDEM, organisers of the international property conference MIPIIM, have now fully cancelled MIPIIM 2020 as an event in Cannes. Instead, a Paris-based MIPIIM 2020 is to be organised for all 2020 exhibitors and delegates in the autumn with a focus on technology. However, the renewed event is still subject to change depending on the status of the COVID-19 pandemic. In reference to 2020 MIPIIM costs, Reed are offering refunds as per terms and conditions of this year's booking, or a 100% credit note towards MIPIIM 2021, which is set to return to Cannes from 16-19 March 2021.

# INDUSTRY INSIGHT

## Impact of COVID-19 on Scottish commercial leases and construction documents

大成 DENTONS

Dentons is a full service global commercial law firm with a UK real estate practice of 200+ strong team, working from six offices and is complemented by expertise from a global team of more than 1,400 real estate professionals.

COVID-19 is set to seriously disrupt the Scottish real estate market. Restaurants, pubs and entertainment venues are closing. The already-struggling high street is being pushed to crisis point. Offices are sitting largely empty as employees work from home. In this article we look at the implications of COVID-19 for Scottish commercial leases and construction agreements.

### Scottish commercial leases

Landlords and tenants should read their leases carefully to identify potential impacts of COVID-19. The most important points to check are whether the pandemic might (a) entitle the tenant to refuse to pay rent; and/or (b) allow either party to bring the lease to an end before its contractual expiry date.

#### Impact on obligation to pay rent

**Rent suspension:** It is unlikely that the terms of an existing Scottish commercial lease would allow a tenant to withhold rental payments as a result of the global pandemic. Rent suspension clauses are generally triggered in the event of physical damage to or destruction of the premises/larger property. COVID-19 is unlikely to cause such damage or destruction, so in almost all cases the rent suspension clause will not be triggered. However, this does not prevent the parties from negotiating and agreeing a rent holiday.

**Turnover rent:** If a tenant is paying a turnover rent and its trade declines, then in theory less rent should be payable. However, watch out for any (a) keep open/trading clauses and seek advice on their enforceability; and (b) clauses providing that if there is no/low turnover, a base rent or last year's turnover will be applied.

#### Early termination of lease

**Force majeure:** It is highly unusual for Scottish commercial leases to contain a force majeure clause.

**Frustration:** A tenant might try to argue that its lease is "frustrated" (i.e. terminates early) as a result of the pandemic. However, the threshold test for proving frustration is high. For example, in the recent case of *Canary Wharf Limited v. European Medicines Agency* [2019] EWHC 335 (Ch), the European Medicines Agency was unsuccessful in its attempt to argue that Brexit would frustrate its lease. The fact that the lease contained alienation provisions that would allow the tenant to dispose of the lease if it could no longer continue its operations in the UK mitigated against a finding of frustration. While this is an English case, it is likely that a similar approach would be followed in Scotland. To successfully argue frustration, it must be shown that there is some intervening illegality or failure of common purpose that renders performance of the lease impossible or so different from the parties' expectations that frustration is justified.

COVID-19 itself is unlikely to trigger frustration. Against the backdrop of SARS and swine flu in recent years, a global pandemic was not beyond the realms of possibility. The parties could have negotiated provisions allocating the risk of a pandemic at the time of entering into the lease, although it has not been standard practice to do so. However, as the government introduces premises closures, bans on certain activities and potentially a national lockdown, tenants will have a stronger argument for frustration based on the illegality point. This is relatively uncharted territory and much will depend on the nature of the restriction (including its duration compared to the duration of the lease) and the actual terms of the lease involved.

**Insured or uninsured risk:** It is standard for Scottish commercial leases to set out termination rights which will apply on the occurrence of defined "insured" or "uninsured" risks. Could these rights extend to the risk of a global pandemic? The general consensus is not, as such rights tend only to apply in the event of physical damage to, or destruction of, the premises/

CONTINUED

# INDUSTRY INSIGHT

larger property.

**Breach by tenant – irritancy:** If a tenant becomes unable to pay the rent, the landlord may be entitled to “irritate” (i.e. terminate) the lease on the grounds of non-payment. However, this will not be an attractive option unless the landlord can find a new tenant who will be able to pay.

**Breach by landlord – rescission:** The use of and access to premises, and related common parts, would be restricted if a landlord closes the premises or the larger property due to COVID-19. This is most likely to arise in the case of shopping centres. A tenant would need to check its lease carefully for any landlord obligations which might be breached by such a scenario. It may be that the lease actually allows the landlord to close common parts in cases of emergency. The Scottish common law contractual remedy of rescission (i.e. termination on the grounds of material breach) does in theory apply to commercial leases. However, it is not often used for leases and the bar is set high. Other contractual remedies (such as specific implement or damages) might also be problematic – for example, if the action taken by the landlord was required by the government, or if the tenant would struggle to prove causation or loss.

**Break clause:** It is unlikely that an existing break clause (giving one or both of the parties the option of bringing the lease to an early end) would deal specifically with a pandemic situation. However, there may be a general break clause which parties could utilise. The tenant should look out for any conditionality requiring rent payments to be up-to-date.

## Going forward

It is not just existing leases that are affected. Landlords and tenants will need to re-evaluate their approach to new leases in light of the impact of COVID-19 and potential other future health crises. It is important to consider whether (and if so what) provisions should be made to mitigate these risks.

## Scottish construction documents

If works are delayed or disrupted as a consequence of COVID-19, the terms of the building contract must be consulted to determine what rights a contractor may have to claim time or money. The Scottish Building Contract Committee (SBCC) suite of contracts is commonly used for Scottish commercial developments. The standard SBCC forms are usually amended by a schedule of amendments (which should, of course, be reviewed) but the provisions which give rise to the recovery of loss and expense usually remain more or less as per the standard wording.

## Extension of time

**Force majeure:** In an unamended SBCC contract, a contractor is entitled to claim an extension of time (but not loss and expense) should an event of force majeure occur. Although the term “force majeure” is not defined by the SBCC contract, it will generally apply when a party has been unable to perform its contractual obligations because an unforeseeable and unavoidable event has occurred which has not been caused by either of the parties. The fact that the contractor finds the works more expensive or time-consuming to complete as a result of COVID-19 will not, of itself, trigger an ability to rely on force majeure. The contractor will need to show that it was impossible for it to perform its obligations under the contract directly as a result of COVID-19. For SBCC contracts which have yet to be entered into (or those only entered into after COVID-19 was known), force majeure or its equivalent will arguably not be applicable. The parties already know about the existence of COVID-19 so it is not “unforeseeable”. They would therefore need to include a bespoke amendment in the contract to allocate the risk of any delays caused by COVID-19.

**Exercise of statutory power:** If the circumstances allow, the parties may be able to rely on an extension provision which allows the contractor extra time to complete the works if the government or a local authority exercises any statutory power which directly affects the execution of the works. This may apply, for instance, if statutory measures are put in place to restrict freedom of movement. This would not apply, however, to the cessation of work following government advice or the adoption of best practice.

## Termination of contract

A force majeure event may entitle either party to terminate an SBCC contract. The event must have prevented the carrying out of the whole or part of the works for a period of time specified in the contract. The default position is two months. The notice requirements set out in the contract must be complied with for the termination to be effective.

## Conclusion

The key to conquering COVID-19 will be keeping calm and behaving responsibly and co-operatively. That advice applies equally to legal arrangements. Irrespective of whether you are landlord or tenant, contractor or employer, the starting point is to calmly understand your legal commitments. Do not assume that you will be automatically relieved from responsibility for performing them due to the public health crisis. If you agree a practical compromise with the other party, ensure that the arrangement is formally documented to avoid future legal wrangling.