

Exiting the lockdown – property and development disputes and their resolution

30th April, 2020

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The issues

- Significant economic costs of shutdown within a short period of time
- Gradual relaxation of restrictions
- Protracted period of social distancing making dispute resolution more difficult

Office for Budget Responsibility

- Real GDP falls 35 per cent in the second quarter of 2020, but bounces back quickly

(Source: OBR Coronavirus reference scenario

https://cdn.obr.uk/Coronavirus_reference_scenario_commentary.pdf)

Office for Budget Responsibility

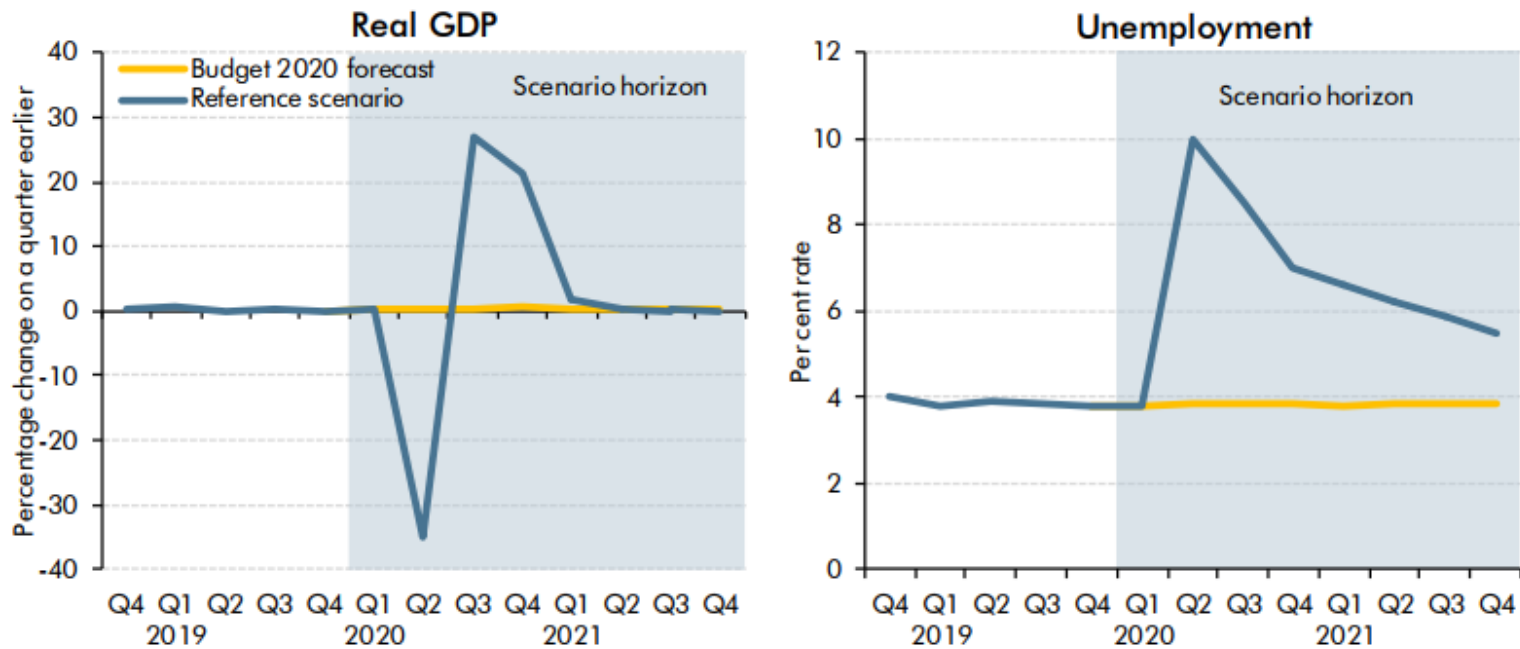
Table 1.2: Output losses by sector in the second quarter of 2020

Sector	Per cent	
	Weight in whole economy value added	Effect on output relative to baseline
Agriculture	0.7	0
Mining, energy and water supply	3.4	-20
Manufacturing	10.2	-55
Construction	6.1	-70
Wholesale, retail and motor trades	10.5	-50
Transport and storage	4.2	-35
Accommodation and food services	2.8	-85
Information and communication	6.6	-45
Financial and insurance services	7.2	-5
Real estate	14.0	-20
Professional, scientific and technical activities	7.6	-40
Administrative and support activities	5.1	-40
Public administration and defence	4.9	-20
Education	5.8	-90
Human health and social activities	7.5	50
Other services	3.5	-60
Whole economy	100.0	-35

(Source: OBR Coronavirus reference scenario)

Office for Budget Responsibility

Chart 1.3: Real GDP and unemployment: reference scenario versus Budget forecast

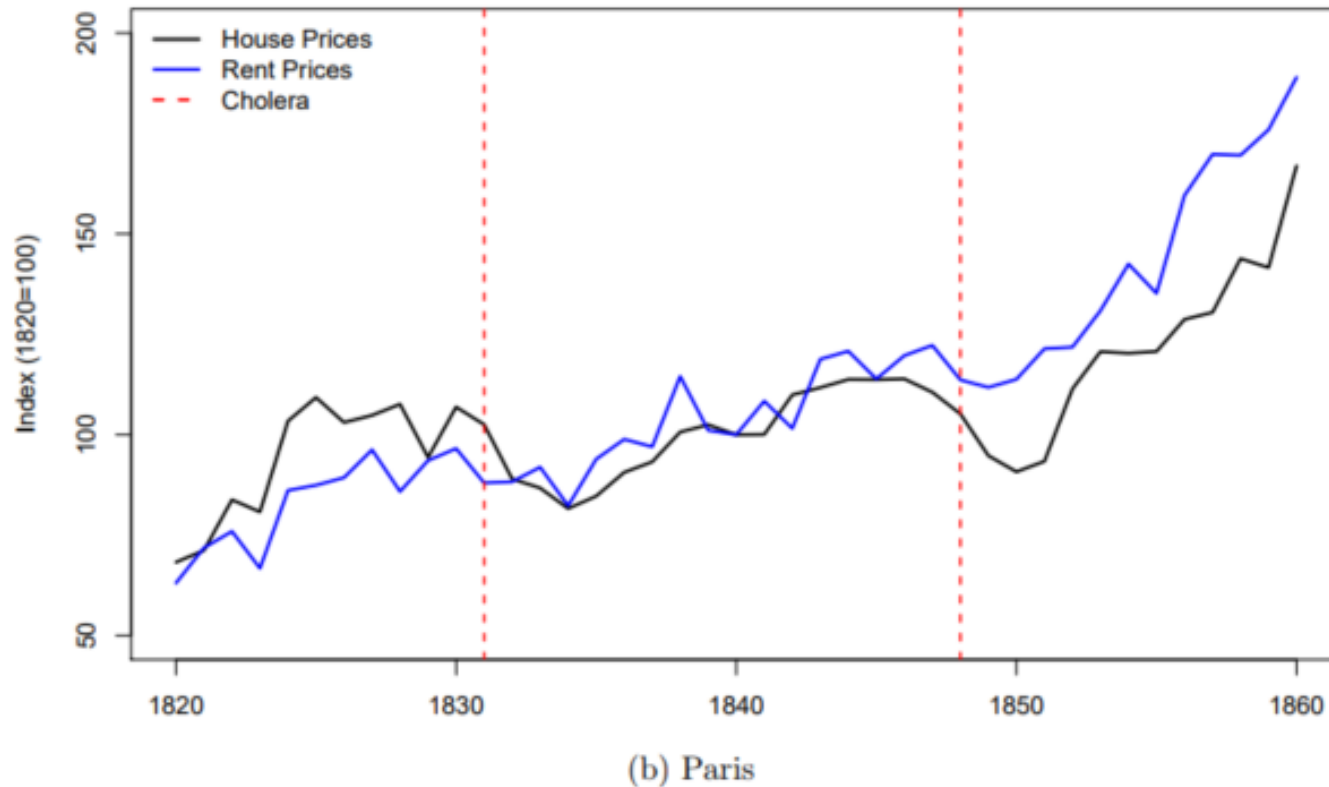


Source: ONS, OBR

1.25 Table 1.3 summarises the results of the economic scenario.

(Source: OBR Coronavirus reference scenario)

Historic data – housing prices and rents around epidemics in Paris in the 19th century



(Source: Francke, Marc and Korevaar, Matthijs, Housing Markets in a Pandemic: Evidence from Historical Outbreaks (April 16, 2020). Available at SSRN: <https://ssrn.com/abstract=3566909> or <http://dx.doi.org/10.2139/ssrn.3566909> . Figure 3, p.14.)

What we are discussing today

- Can I get out of this agreement?
- COVID-19 and the commercial property sector
- Dispute resolution and COVID-19

Can I get out of this agreement?



Can I get out of this agreement?

- Just a pause? Or time to cancel?
- May well be reluctance to continue with some developments, at least on the same terms
- Either attempt to escape such agreements or re-negotiate them

Can I get out of this agreement?



- *Taylor v Caldwell*
(1863) 3 Best & Smith
826, 122 E.R. 309

Picture: Surrey Music Hall, ca 1858

(source:

https://en.wikipedia.org/wiki/Taylor_v_Caldwell#/media/File:Surrey_Music_Hall.jpg)

Can I get out of this agreement?

- Frustration
 - **'The Coronation cases'**
 - Coronation of Edward VII and Queen Alexandra was scheduled for 26 June 1902
 - King fell ill with appendicitis, postponed to 9 August
 - *Krell v Henry* [1903] 2 KB 740
 - *Herne Bay Steam Boat Co. v Hutton* [1903] 2 KB 683

Can I get out of this agreement?



- Frustration
 - ‘The shortage case’
 - *Davis Contractors Ltd v Fareham UDC* [1956] AC 696

Can I get out of this agreement?

- Frustration
 - **Modern property cases**
 - *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675
 - *Canary Wharf (BP4) T1 Ltd v European Medicines Agency a* [2019] EWHC 335 (Ch), [2019] L & TR 14

Can I get out of this agreement?

- Force majeure provisions
 - Contractual term, not a rule of law
 - *Lebeaupin v Crispin & Co* [1920] 2 K.B. 714 - definition
 - *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495) - impossibility
 - *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102, [2019] 4 All ER 1145 - causation

Can I get out of this agreement?

- Waiver? Estoppel? Variation?
 - *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 – variation and re-negotiation
 - *PM Project Services Ltd v Dairy Crest Ltd* [2016] EWHC 1235 (TCC) - estoppel

COVID-19 and the commercial property sector



COVID-19 and the commercial property sector

- Getting paid your rent...
 - Section 82 of the Coronavirus Act 2020
 - Insolvency? *Maud v Aabar Block SARL*[2015] EWHC 1626 (Ch)

COVID-19 and the commercial property sector

CRAR - Section 77(3) Tribunals, Courts and Enforcement Act 2007:

(3) CRAR is exercisable only if the net unpaid rent is at least the minimum amount immediately before each of these—

- (a) the time when notice of enforcement is given;
 - (b) the first time that goods are taken control of after that notice.
- (4) The minimum amount is to be calculated in accordance with regulations.

COVID-19 and the commercial property sector

CRAR - The Taking Control of Goods and
Certification of Enforcement Agents (Amendment)
(Coronavirus) Regulations 2020 – amends reg.52
of the Taking Control of Goods Regulations 2013

COVID-19 and the commercial property sector

52 Minimum amount of net unpaid rent for CRAR to become exercisable

- (1) Subject to paragraph (2), the minimum amount of net unpaid rent for the purposes of section 77(3) of the Act is an amount equal to 7 days' rent.
- (2) Where the notice of enforcement is given after the coming into force of the 2020 Regulations and during the relevant period, the minimum amount of net unpaid rent for the purposes of section 77(3) of the Act is an amount equal to 90 days' rent.
- (3) (3) In paragraph (2), “relevant period” has the same meaning as in section 82 of the Coronavirus Act

COVID-19 and the commercial property sector

- Forthcoming government proposals as to insolvency announced 23 April 2020
 - *Maud v Aabar Block SARL* [2015] EWHC 1626 (Ch)
 - *Shorts Gardens LLP v London Borough of Camden Council* [2020] EWHC 1001 (Ch) (27 April 2020) Snowden J – likely to be restricted in scope to arrears caused by COVID-19 and to certain sectors

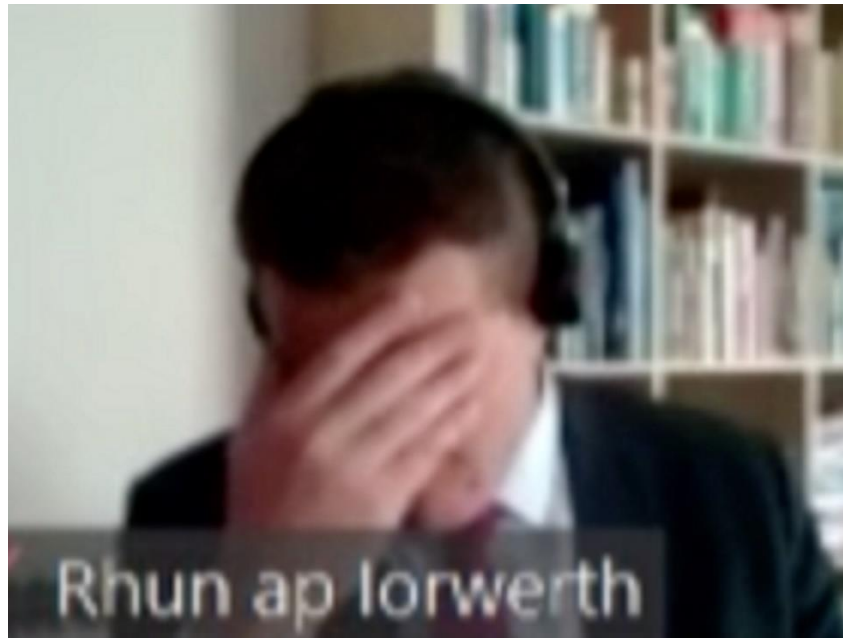
COVID-19 and the commercial property sector

- Stay open covenants
 - Forcing the business to stay open?
Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1
 - What damage has been done? *Costain Property Developments Ltd v Finlay & Co Ltd* (1989) 57 P & C. 345 (1988)

COVID-19 and the commercial property sector

- Rent negotiations – what is the new ‘market rent’?
 - Concessions such as fit out costs, rent holidays, etc
 - What is the valuation date?
 - The end, or the renaissance, of turnover rent?

Dispute resolution and COVID-19



[Source: https://www.independent.co.uk/news/uk/politics/welsh-health-secretary-swearing-mic-zoom-meeting-vaughan-getting-a9478986.html](https://www.independent.co.uk/news/uk/politics/welsh-health-secretary-swearing-mic-zoom-meeting-vaughan-getting-a9478986.html)

Dispute resolution and COVID-19

- Coronavirus Act 2020, section 55 and Schedule 25
 - Insertion of a new section 85A into the Courts Act 2003 to allow the public to see and hear court proceedings (along with new offences under sections 85B, 85C, and interpretation under section 85D)
- (Do not forget about the existing PD23A...)

Amendments to the CPR (not COVID-19 related)

- The 113th Update to the Civil Procedure Rules – came into force 31 March and 6 April
- PD 22 and PD 32 – statements of truth and witness translation
- Amendment to Form N5B and Form N11B due to the introduction of the Tenant Fees Act 2019

Amendments to the CPR – the COVID-19 response

- PD 51Y - video / audio hearings
- PD51ZA – extension of time limits
- PD51Z – stay of proceedings
- Various local courts closed - <https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak>

Amendments to the CPR – the COVID-19 response

- ‘Licence to trespass’? *UCL Hospitals NHS FT v MB* [2020] EWHC 882.
- Persons unknown?
- Challenge to the automatic stay in PD51Z - *Arkin v Marshall* (CA, 30 April 2020) following *Arkin (As Fixed Charge Receiver) v Marshall* [F00HF362 & F00HF363] (HHJ Parfitt 15/4/20 unreported)

Guidance relevant to the Business and Property Courts

- Large amount of guidance promulgated, then superseded
- <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>
- Each of the five B&PCs regional centres is producing its own guidance

Case management

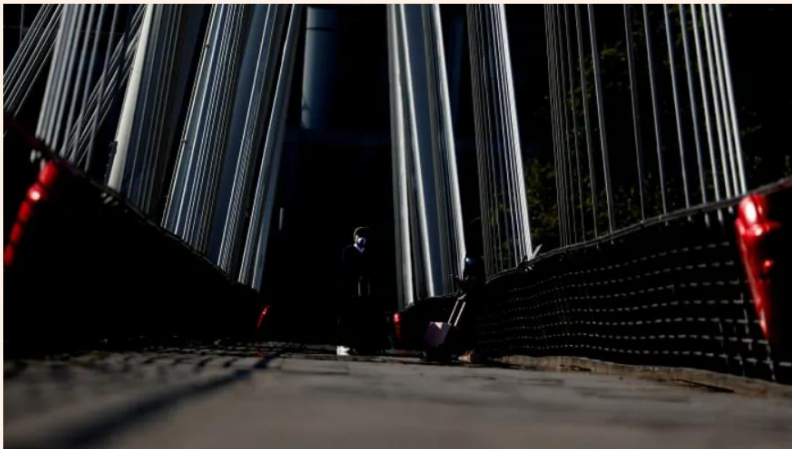
- *National Bank of Kazakhstan v Bank of New York Mellon* (Unreported, Teare J, 26 March 2020)
- *Re One Blackfriars Ltd, Hyde v. Nygate* [2020] EWHC 845(Ch)
- *Municipio de Mariana v BHP Group Plc* [2020] EWHC 928 (TCC)

What about ADR?

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Call to give companies ‘breathing space’ on coronavirus litigation

Senior UK judges and academics in plea for disputes to be resolved before reaching court in wake of crisis



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Jane Croft and Kate Beioley YESTERDAY



<https://www.ft.com/content/61bca6a9-1a12-4068-9b5d-1baa1b9dc063>

- Mediation / joint settlement meetings
- Negotiation
- Do not forget about arbitration...

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- Courts under more pressure than ever
- <https://www.39essex.com/chambers-launch-civil-liability-arbitration-and-adjudication-schemes/>

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- Series of webinars presented by 39 Essex Chambers on property, construction and related areas - <https://www.39essex.com/category/seminars/>
- Latest updates on COVID-19 related issues at <https://www.39essex.com/covid-19/>

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