

FORSTERS



Green Leases - what is the state of play?

Lorna Dolan, Ed Glass

F

www.forsters.co.uk

Agenda

Green Leases - what is the state of play?

- What can occupiers expect from landlords?
- What is the “market” position?
- What is the position on statutory renewal?
- How can representatives cut through negotiation and delay at heads of terms stage?
- Where is the “market” heading?
- Shared experiences/ Q&A



Nearly 10 years and counting...

MEES and the tenant perspective

Ed Glass and Nick Hogg
23/04/2016

The Minimum Energy Efficiency Standards may be mainly a landlord problem, but Ed Glass and Nick Hogg explain why tenants should also take note

Putting MEES first

Ed Glass and Nick Hogg
08/08/2015

The Minimum Energy Efficiency Standards are set to bite eventually on commercial property. Ed Glass and Nick Hogg explain why they should be at the forefront of buyers' and sellers' minds now

Progress on energy use is essential

Thu 13 July 2023

Renewing with MEES

Ed Glass
15/08/2015

Key principles on a 1954 Act renewal following O'May

Effectiveness of energy performance certificates called into question

LEGAL & PROFESSIONAL
By Mitchell Labiak | Fri 2 November 2018

Experts believe more investment is needed to make EPCs fit for purpose.



Navigating the Evolving Landscape of Energy Efficiency Regulation

ESG In Property Podcast • By LifeProven ESG Property Company • Nov 28, 2023



00:00

31 March 2023

Cutting to the chase on the revised Minimum Energy Efficiency Standards regime

Returning to the familiar ground of sustainability in commercial real estate, podcast host Miri Stickland chats with Senior Associate Ed Glass and Senior Knowledge Development Lawyer Louise Irvine about forthcoming energy efficiency regulatory changes taking effect on 1 April 2023.

We discuss the impact of the changes to the Minimum Energy Efficiency Standards (MEES) regime, the key issues landlords, buyers and sellers need to be aware of to avoid acting unlawfully and how landlords can best future-proof their leases.



More Than Law – The Forsters Podcast • Cutting to the chase on the revised Minimum En...

In this episode we were joined by:

- [Edward Glass](#), Senior Associate in our [Commercial Real Estate](#) team
- [Louise Irvine](#), Senior Knowledge Development Lawyer in our [Commercial Real Estate](#) team



EPC/ MEES – True or False?

Question	Answer	Commentary
A new EPC for a property, when registered, will supersede an earlier EPC?		
A landlord can enter a property to carry out works to comply with MEES?		
From April 2030, the minimum requirement for new and existing commercial lettings will be EPC B?		

EPC/ MEES – True or False?

Question	Answer	Commentary
A new EPC for a property, when registered, will supersede an earlier EPC?	True	Landlords will restrict a tenant's ability to obtain its own EPC, so protecting its EPC position
A landlord can enter a property to carry out works to comply with MEES?		
From April 2030, the minimum requirement for new and existing commercial lettings will be EPC B?		

EPC/ MEES – True or False?

Question	Answer	Commentary
A new EPC for a property, when registered, will supersede an earlier EPC?	True	Landlords will restrict a tenant's ability to obtain its own EPC, so protecting its EPC position
A landlord can enter a property to carry out works to comply with MEES?	False	There is no automatic right to enter, and so landlords will often insert in a lease
From April 2030, the minimum requirement for new and existing commercial lettings will be EPC B?		

EPC/ MEES – True or False?

Question	Answer	Commentary
A new EPC for a property, when registered, will supersede an earlier EPC?	True	Landlords will restrict a tenant's ability to obtain its own EPC, so protecting its EPC position
A landlord can enter a property to carry out works to comply with MEES?	False	There is no automatic right to enter, and so landlords will often insert in a lease
From April 2030, the minimum requirement for new and existing commercial lettings will be EPC B?	False	The expectation is that thresholds will rise, and so landlords are future proofing their leases

EPC B by 2030?



“We have reviewed the responses to our consultation on minimum energy efficiency standards in the non-domestic private rented sector and are working hard to review the policy design to ensure it remains fair and appropriate for landlords and tenants. We plan to publish this in due course. The proposed timelines within the original consultation will require updating to allow sufficient lead in time for landlords and the supply chain”

<https://assets.publishing.service.gov.uk/media/65393f4ae6c968000daa9b0e/ccs-annual-progress-report-2023-government-response.pdf>

What can occupiers expect from landlords?

The “vehicle”: a green lease or something else?

- Non legally binding memorandum of understanding
- Non legally binding “sustainability guides”
- Letter of consent in relation to utility data
- Legally binding “sustainability guide”
- Legally binding lease

Why?

- ESG investment criteria
- Practical ESG requirements
- Regulation



What can occupiers expect from landlords?

What is inside the “vehicle”?

- Legally binding commitments
- Typically, heavily weighted towards tenant compliance (not mutual)
- Tiered approach – light, medium, dark – but some non-negotiables



Right here right now...



What can occupiers expect from landlords?

The BBP Green Lease Toolkit

<https://www.betterbuildingspartnership.co.uk/green-lease-toolkit-0>

<https://insights.forsters.co.uk/post/102j5e7/bbp-green-lease-toolkit-better-boilerplate-provisions>

- Green Lease Clauses
- Green Lease Essentials
- Heads of Terms Guidance

The parties are committed to ensuring the Premises [and/or Building] are managed and used sustainably and with regard to the Environmental Performance (which will include energy and water consumption, waste, greenhouse gas emissions, [biodiversity, resilience] and other adverse environmental impacts) of the Premises [and/or Building] and the lease will contain provisions which achieve the following...[OPTION 3]



Also: <https://www.betterbuildingspartnership.co.uk/owner-occupier-engagement-sustainability-unlocking-potential-collaboration>

What is the current “market” position?

The non-negotiables

	Theme Area	Heads of Terms (OPTION 3)	Certificate of Title
		ESSENTIALS	
1.	Data Sharing and Metering:	provision which a) ensures the Landlord and the Tenant regularly and transparently share data regarding at least the use of energy, water and waste of the Premises and the Building (including common parts) and where agreed other Environmental Performance [and Social Impact] data (with confidentiality obligations in respect of the data) and with Tenant consent to its suppliers providing energy and water data to the Landlord and b) ensures that an metering equipment can be installed in the Premises to capture energy and water usage [and c) ensuring that where smart building technology is installed the parties will not do anything which adversely affects that]	CLLS: “The Letting Document provides for the <u>landlord and the tenant</u> to share data that each <u>holds</u> relating to the environmental performance of the Property and the Premises, subject to each being obliged to the other to keep shared data <u>confidential</u> ”
2.	Tenant’s Alterations:	provision restricting Tenant alterations which adversely affect the Environmental Performance, EPC rating or other environmental rating of the Building or the Premises [and provision giving the Tenant the right to do alterations which improve the Environmental Performance, EPC or other environmental rating, with Landlord's consent not to be unreasonably withheld]	CLLS: “The tenant may not carry out any alterations which adversely affect the energy performance certificate rating for the Property”
3.	EPCs:	provision governing when, and the process by which, an EPC is obtained by a Tenant, giving the Landlord control over this so as to ensure consistent and high quality EPCs are commissioned	
4.	Landlord’s right to do works:	provision to avoid paralysis of the Environmental Performance/EPC rating of the Premises and the Building during leases (which may affect the tenant consent MEEs Exemption) as follows: o The Landlord to have a right to carry out works to improve the Environmental Performance of the Premises [with Tenant consent] if this is possible without material adverse impact on the Tenant’s occupation; o [set out any agreement in respect of a cost contribution from the Tenant to the extent of resulting savings;] o [The Landlord will not be liable for interruption to services caused by works to common parts/equipment which improve the Environmental Performance/EPC rating but will use reasonable endeavours to minimise any disruption/interference]	

What is the current “market” position?

The negotiables

	Theme Area	Heads of Terms (OPTION 3)
		ESSENTIALS
5.	Cooperation	provision for cooperation which sets out the shared aim of the parties to improve the Environmental Performance [and Social Impact] of the Premises and the Building and their agreement to cooperate to achieve this
6.	Sustainability Group	provision for the parties to communicate on adequacy of data sharing relating to the Environmental Performance, travel plans [and Social Impact] and to discuss environmental sustainability [and Social Impact] issues [and to seek agreement on strategies for reduction targets] [and for the Landlord to set up a forum for discussion which the Tenant shall attend]
7.	Sustainable Use:	provision that the Landlord and the Tenant will not use more energy and water than reasonable for their actual use of the Premises and the Building, will use reasonable endeavours to ensure the efficient use of energy and water and will properly operate equipment/facilities to maintain the Environmental Performance of the Premises and the Building
8.	Waste:	provision requiring the Landlord and Tenant to minimise the amount of waste that is sent to landfill and maximise the amount that is recycled [and to share waste data] [with provision for a landlord’s waste policy and/or a recycling target]
9.	Reinstatement:	<p>provision requiring the Landlord to serve notice if it does not require alterations to be reinstated and have due regard to any adverse impact on Environmental Performance (disregarding waste) in requiring reinstatement.</p> <p>where reinstatement is required the Tenant will, minimise the amount of waste that is sent to landfill and maximise the amount that is recycled [and share the waste 3 data] [with provision for a landlord’s waste policy and/or a recycling target and/or agreement on and compliance with a recycling plan]</p>
10.	Renewable Energy:	provision which promotes the procurement of renewable electricity via a [green tariff] [from 100% renewable suppliers] for the Premises and the Building [where available at commercially reasonable rates] [with obligations to source this via on-site generation or a power purchase agreement where feasible and not cost prohibitive]

What is the current “market” position?

The “cherry on top”

	Theme Area	Heads of Terms (OPTION 3)
11.	Social Impact:	provision that the parties will respond to any surveys related to Social Impact and that both parties will comply with applicable anti-slavery and trafficking laws and procure as far as possible that their contractors and agents do so
12.	Restrictions on Landlord’s adverse works:	provision to prevent the Landlord carrying out works to the Building which would adversely affect its Environmental Performance, EPC rating or other environmental rating
13.	Circular Economy:	provision for both parties to apply circular economy principles to work by either of them to the Premises or the Building via use of a hierarchy of sustainable materials
14.	Standards:	provision that the Tenant shall not use the Premises in a way that adversely affects any environmental rating for the Premises [or the Building]
15.	Service Charges:	<p>provision that: o In providing Services the Landlord should act in an environmentally responsible way and is entitled to have regard to the Environmental Performance of the Building o Where additional costs are incurred for Services carried out having regard to the Environmental Performance the Tenant will not challenge the additional costs [provided that the costs are no more than 10% higher than they otherwise would have been]</p> <p>Services to include: - Dealing with waste - Installing meters - Installing tech to monitor and control Environmental Performance - Steps to reduce water use and capture rainwater - Taxes on carbon emissions and other environmental impact of the Premises or the Building - Landlord’s obligations under any green lease provisions save where provided otherwise</p>

“Social Impact” (a) economic, environmental and social benefits to the Community which include: i) local employment opportunities; ii) apprenticeship and training opportunities; iii) support for local businesses and suppliers; iv) local Community engagement and volunteering; v) engagement with local schools and other educational establishments; vi) promotion of public transport and other environmentally friendly and cost efficient means of transport; and vii) promotion of health and wellbeing (including mental health) or (b) the impact of the Premises [and the Building] on the physical, mental and social health of the occupiers;

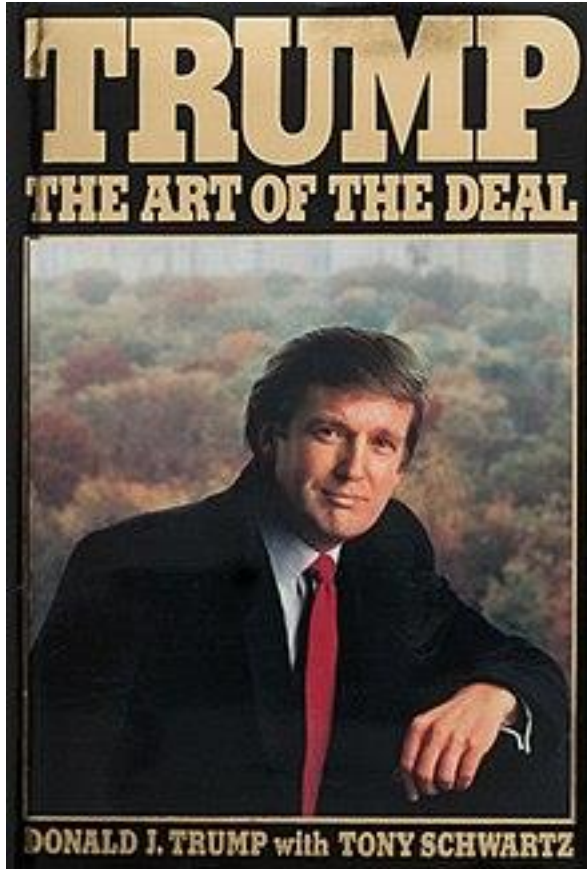


What is the position on statutory renewal?

1. The 1954 Act contains provisions dealing with what happens where the parties cannot agree on a given term of the new lease
2. No binding case law on “green lease” clauses
3. The court will determine “other terms” in accordance with existing principles in case law (O’May)
4. The burden of showing that any given ‘modernisation’ or change to the terms of the lease is **fair and reasonable** falls on the party arguing for that change. **What is fair and reasonable?**
 - Any change should not unfairly place a much greater burden on the other party.
 - Could the party resisting the change be adequately compensated by a consequential adjustment to the rent?
 - What is each party’s respective negotiating position having regard to current market conditions?
 - What are the terms of leases of other premises in the parade/area/building of which premises form part, and of which the landlord under this lease is also the landlord?

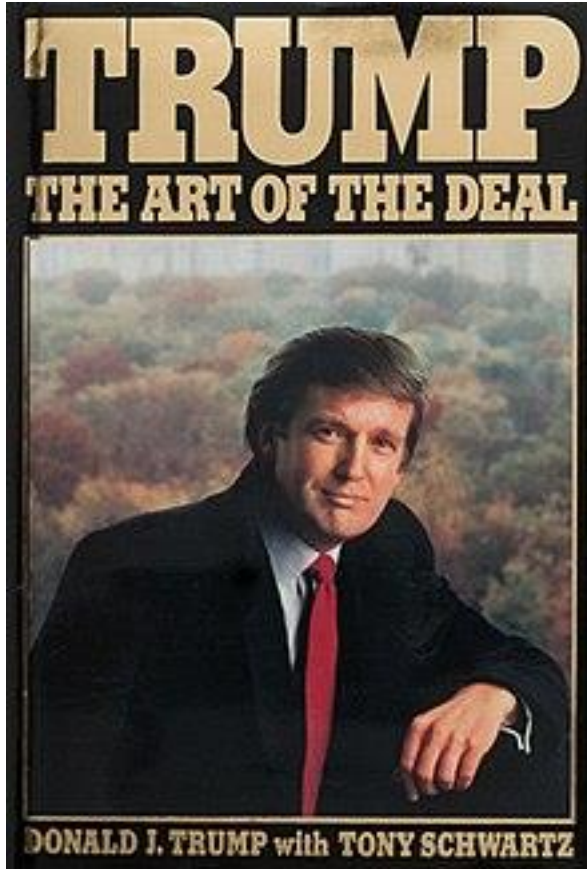
See *Clipper Logistics Plc v Scottish Equitable Plc* (decided on 7 March 2022). Non binding County Court, tenant friendly decision.

The “art of the deal” – Top Tips



Heads of Terms – Option 1	Practical thinking
After setting out the essential commercial terms add a provision that the terms of the lease will contain the landlord’s standard green lease clauses and provide a copy of these with the heads of terms.	...however any clauses must be consistent with the following principles: (1) mutuality; (2) reasonableness (particularly in the context of the tenant’s anticipated use of the property); and (3) “no hand in pocket”.
Heads of Terms – Option 2	Practical thinking
The parties are committed to ensuring the Premises and the Building are managed and used sustainably and with regard to the Environmental Performance (which will include energy and water consumption, waste, greenhouse gas emissions, [biodiversity, resilience] and other adverse environmental impacts) of the Premises and the Building and the lease will contain provisions which cover the following areas:	
<ul style="list-style-type: none"> cooperation on and a forum for discussion about the Environmental Performance [and social impact] of the Building and the Premises; 	...to be in good faith and [without legal obligation]/[only with an obligation to cooperate (not implement)]
<ul style="list-style-type: none"> the sharing of relevant data; 	...by both parties that they <i>may</i> hold relating to environmental performance [i.e. without any liability to procure that data] subject to confidentiality
<ul style="list-style-type: none"> the sustainable use of the Premises and the Building; 	...by the landlord and the tenant without any obligation on the tenant to carry out works or act in a manner that is contrary to its business interests
<ul style="list-style-type: none"> the prevention of works by either party which would have an adverse impact on the Environmental Performance of the Premises and the Building and the protection of environmental ratings; 	...but in relation to the Premises the restriction is only such that there can be no [material] adverse effect on the current EPC rating
<ul style="list-style-type: none"> some rights for the Landlord to carry out works to improve the Environmental Performance of the Premises and the Building; 	<p>...but only with the consent of the tenant and always at the cost of the landlord [with a disregard on rent review].</p> <p>...landlord right to install at its own cost (i.e. not service charge item) meters with tenant consent (not to be unreasonably withheld or delayed) subject to safeguards as to tenant inconvenience/ disruption</p>
<ul style="list-style-type: none"> minimising waste to landfill and maximising the recycling of waste; 	...by both parties where reasonable [(including with a landlord obligation to cooperate with the tenant to minimise at the point of reinstatement)]
<ul style="list-style-type: none"> the use of circular economy principles when carrying out works; 	...by both parties where reasonable and in the case of the tenant assuming this is not contrary to its business interests
<ul style="list-style-type: none"> the promotion of the procurement of renewable energy; 	...by both parties [where there is an obligation to consider renewable alternatives but without legal obligation to procure those]/ [where there is a legal obligation to use only where in the business interests of the tenant]
<ul style="list-style-type: none"> Environmental Performance being taken into account in service charge provisions to some extent 	...but only in so far as this relates to common areas/ tenants deriving common benefit and is cost effective in terms of options available

The “art of the deal” – Top Tips



Alternative approaches (under the heading in HOTS “Green”/ “ESG” clauses or similar):

ALTERNATIVE OPTION 1: *The landlord and the tenant agree that as for legal obligations, the lease will conform to the requirements of the **Certificate of London Law Society [8]th Edition** i.e. mutual data sharing and restrictions on alterations that adversely affect EPC rating. No other requirements.*

ALTERNATIVE OPTION 2: *The landlord and the tenant agree that as for legal obligations, these may follow the current form “**Model Commercial Lease**”*

ALTERNATIVE OPTION 3: *The landlord and the tenant agree that the relevant clauses will be no more onerous than those anticipated by the “light” Green Lease essentials in the BBP toolkit and mutuality shall apply*

Where is the market heading?

1. Increasing lender requirements i.e. CLLS
2. Increasing mutuality
3. Increasingly “boilerplate”
4. Increasing reference to other ESG principles e.g. EVCPs, solar
5. Growth of “responsible”/ “rainbow” leasing
6. (Possibly) increasing monetary incentives to foster collaboration (carrot not stick)

Wish list

1. 1954 Act reform
2. Dilapidations reform
3. Industry acceptable “costs” wording



Resources

- <https://www.forsters.co.uk/services/real-estate/sectors/real-estate-sustainability>
- <https://insights.forsters.co.uk/>

Some recent commentary:

- <https://insights.forsters.co.uk/post/102j8bq/the-student-race-to-net-zero>
- <https://insights.forsters.co.uk/post/102j7er/sophistication-in-esg-drafting>

Landlord and Tenant ESG Requirements

When ESG is discussed in the context of leasing, the focus is usually squarely on the “E” of the trio, environmental. But the social and governance issues should not be overlooked.



MEES and EPCs for Commercial Property

An EPC is a certificate issued by an assessor which provides information about the energy efficiency of the building in question. MEES Regulations are designed to incentivise landlords to make energy efficiency improvements to properties that have a substandard EPC rating.

