



Sustainability in Commercial Property

Saving the Planet a Covenant at a Time - Do Green Leases Have a Future?

In 2008 the arrival of the 'Green Lease' was heralded as imminent amongst many of the more progressive commentators in the UK commercial property market. The 2002 European Parliament Directive on the energy performance of buildings [1] which eventually gave rise to the requirement for Energy Performance Certificates and Display Energy Certificates in the UK along with a general trend in the market place towards sustainability, energy efficiency and corporate social responsibility were identified as the main drivers of the greening of commercial leases.

In 2009, with many directors more concerned with saving their companies from insolvency than saving the planet it may seem that the move towards green leases will not gain momentum. There may, however, still be sound commercial reasons in some circumstances for landlords and tenants to consider lease provisions which improve the environmental performance of buildings.

What is a Green Lease?

The London Climate Change Agency identifies a green lease as a lease of commercial property including a legal basis for monitoring and improving energy performance at a building and providing mutual obligations on landlords and tenants to achieve efficiency targets [2].

There are different degrees or shades of green that a green lease can take but essentially they contain provisions which place obligations on one or other or both of the parties designed to improve the environmental performance of the premises. Environmental performance could include not only energy efficiency but also, for example, water and waste management.

Green leases have been in use in Australia for some time and there has been a recent increase in their use in the US. The Australian Government have developed eight standard green lease schedules and in early 2007 the Centre for Research in the Built Environment (CRiBE), based at Cardiff University, published a set of model green leases clauses [3].

In April 2009, the Better Buildings Partnership, in conjunction with a number of other organisations, published the Green Lease Toolkit, which includes a set of best practice recommendations and a further batch of model green lease clauses.

Typically a green lease will include provisions along some or all of the following lines

• Repair

The repairing obligations on either or both of the parties might require them to carry out repairs to specific environmental standards and/or using sustainable materials.

• Energy Efficiency

The lease could specify targets for energy efficiency to be met by either or both of the parties with such targets potentially linked to financial penalties.

• Service Charge

Where a tenant makes savings through sustainable behaviour such as waste management or reducing energy usage this could be reflected in the service charge paid by that tenant.

• Alterations

Tenants could be prohibited absolutely from carrying out alterations which would affect the energy performance of the building.

• Dilapidations

A proportion of a dilapidations claim could be waived where the tenant has improved the energy efficiency rating of the building.

• Rent

Rent abatements could be linked to environmental benchmarks agreed between the landlord and the tenant or penalties on review applied where benchmarks have not been met.

There is scope for numerous other provisions to improve a building's environmental performance. What will be appropriate for any particular green lease will depend upon the objectives and relative bargaining powers of the parties and of course the nature of the premises. While some landlords and tenants might wish to ensure that environmental provisions are enforceable in Court or carry identifiable financial implications others may be satisfied to simply set aspirational or target environmental goals. There are, however, inherent difficulties with most of the potential green clauses and careful drafting of the lease is required to overcome these where landlords and tenants decide to proceed with a green lease.

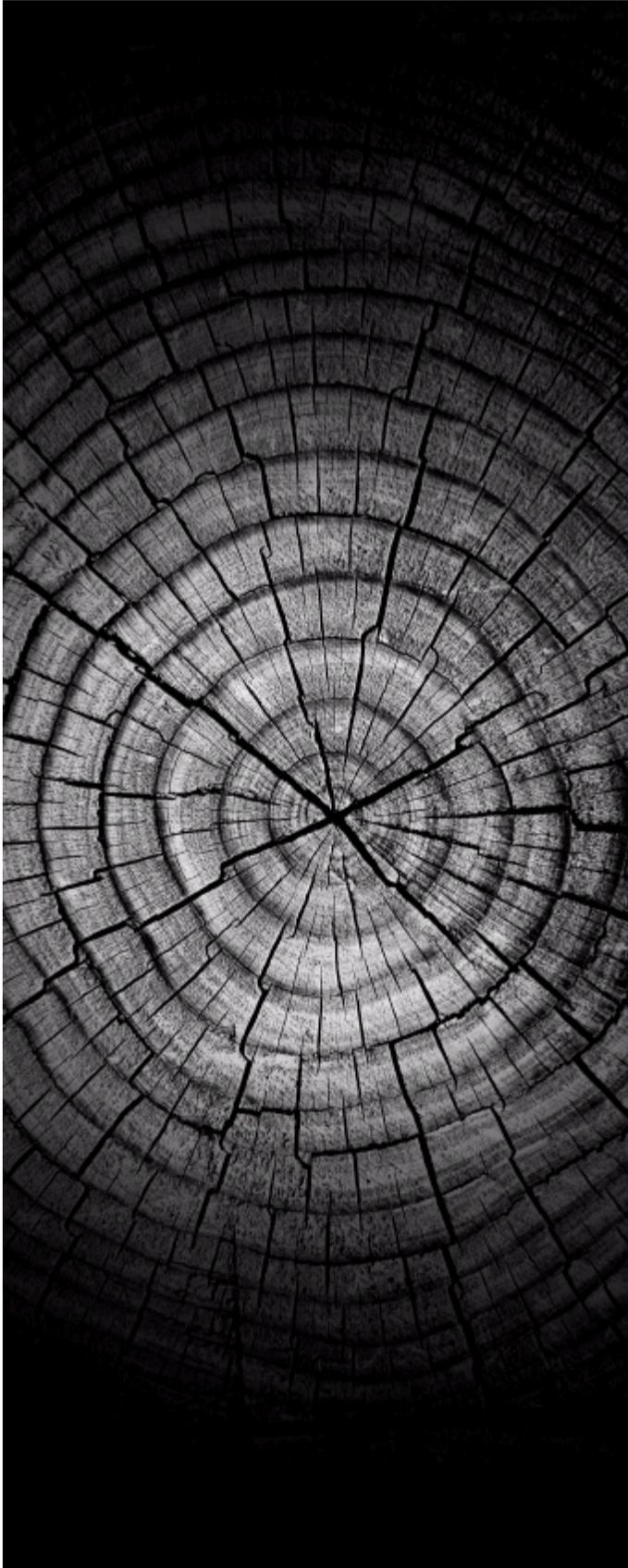
The New Drivers of Change

Government policy on sustainability and environmental performance of buildings is now prolific. While much of it is at present more relevant to developers of new buildings and great strides in energy efficiency and sustainability are being made in that respect the Government's Carbon Reduction Commitment may compel owners, occupiers and managers of existing building stock to address their building's environmental performance.

The Government anticipates that a carbon cap and trade scheme will be introduced in 2010. The scheme will involve mandatory emissions trading for 5,000 large organisations including supermarket chains, hotel chains and office based organisations.



Once the scheme is introduced there should be a very clear financial incentive for organisations to reduce carbon emissions and therefore the environmental performance of their premises. Green leases are a mechanism by which that might be achieved. Smaller organisations may follow.



Over recent years local authorities and other public sector organisations have been compelled to develop environmental policies that have now begun to filter down to their property management. Covenants on the part of the tenant to observe the landlord's environmental policy with a copy scheduled to the lease have become more common. While this may see green leases, of a type, used more regularly it may cause concern for some tenants, particularly if the lease contains a forfeiture clause allowing the landlord to determine the lease upon breach of any covenant.

Action Required?

Landlords may wish to consider whether now is an appropriate time to review their standard form commercial leases with a view to including green provisions. Tenants may find it more common to be offered green leases, particularly by local authorities or other public sector organisations. Whether the tenant is seeking the inclusion of green covenants to improve their own environmental performance or resisting the greening of the lease on offer an understanding of green lease issues is essential for proper negotiation.

Some landlords and tenants, particularly those with an eye on the Government's carbon cap and trade legislation programme may wish to take the opportunity to place themselves at the forefront of building energy efficiency and sustainability and explore the potential for green leases to assist them in achieving that.

The Green Lease Toolkit

The Better Buildings Partnership Working Group believes that "it is essential for owners and occupiers to work together to improve the sustainability and reduce the environmental footprint of commercial buildings". [4]

Over the next four months members of the BBP will trial the operation of the green lease principles set out in the toolkit. The toolkit correctly highlights that opportunities to introduce green lease clauses are limited and that, therefore, existing landlords and tenants should adopt a Memorandum of Understanding on efficiency issues.

The memorandum is essentially an agreement between the parties to collaborate to improve the environmental performance of the premises and in particular, one would expect the owners and occupiers of new, highly BREEAM rated buildings to embrace the principles. The publication of the toolkit has moved green leases further into the mainstream.

James Atkins is a solicitor in the Commercial Property team at RadcliffesLeBrasseur with a particular interest in the energy efficiency and environmental performance of buildings.

He assists with the property aspects of major corporate transactions while dealing with and advising on a varied caseload of occupational landlord and tenant work and other property matters.

For more information on any of the matters mentioned in this briefing or to comment on Green leases generally, please contact James Atkins - james.atkins@rlb-law.com



Footnotes:

1. Directive 2002/91/EC of the European Parliament and of the council of 16th December 2002

2 . www.LCCA.co.uk

3. Incorporating Environmental Best Practice into Commercial Tenant Lease Agreements - Good Practice Guide Part 1 Langley, A & Stevenson, V 2007 - see www.green-leases.co.uk

3. Better Buildings Partnership: Green Lease Toolkit p. 4 available from www.bitc.org.uk

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LONDON: 5 Great College Street, Westminster, London, SW1P 3SJ, Tel +44 (0)20 7222 7040, Fax +44 (0)20 7222 6208

LEEDS: 6-7 Park Place, Leeds, LS1 2RU, Tel +44 (0)113 234 1220, Fax +44 (0)113 234 1573

CARDIFF: 25 Park Place, Cardiff, CF10 3BA, Tel +44 (0)29 2034 3035, Fax +44 (0)29 2034 3045