

# Legal alert

April 2017

## LANDLORDS COMPLYING WITH MINIMUM ENERGY EFFICIENCY STANDARDS ("MEES")

MEES are minimum energy efficiency standards introduced by the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 ("Regulations"). They set a new minimum EPC standard of E rating for non-domestic property. An EPC gives an energy efficiency rating from A to G and is valid for 10 years. Data suggests that at least 18% of UK commercial property will be affected by the new Regulations.

From 1 April 2018 it will be unlawful to grant a lease or permit a lease renewal of a property with an EPC rating below E. From 1 April 2023, this requirement will extend to existing leases. In February the Department for Business, Energy & Industrial Strategy issued new guidance for landlords and enforcement authorities.

### Who bears the costs of improving sub-standard properties?

So after 1st April 2018 a landlord seeking to let a property below an E rating must first undertake upgrade works, or risk facing a fine. Landlords letting premises for less than 3 months face a fine of up to £50,000, and for 3 months or more a fine up to £150,000.

The costs of upgrade works may be passed to the tenant if the lease permits this. Where the lease is entered into before 1st April 2018 and expires before 1st April 2023, there is no requirement to undertake upgrade works. Where the lease is entered into before 1st April 2018 and expires after 1st April 2023, the landlord will face a fine after the 1st April 2023 if a building below E rating continues to be let. The party responsible for undertaking / paying for the upgrade works is determined by the lease. This will be a commercial negotiation in each case.

### Issues on a renewal of a 1954 Act protected lease

On renewal of a lease under the Landlord and Tenant Act 1954 the parties can apply for changes to existing leases to make those leases compatible with changes in the law. The landlord could justify provisions which allow the landlord entry to the Premises to carry out works to raise the energy efficiency of the building but whether or not the upgrade costs could be passed onto the tenants will depend on the terms of the existing lease.

### Exemptions for landlords

It should be noted that where a tenancy is for less than 6 months or more than 99 years it will not need to meet MEES. There are also the following specific exemptions to note:

- Third party consent: certain energy efficiency improvements may require third party consent before they can be installed into a property. This exemption applies where the landlord cannot carry out such works because they do not have the tenant, superior landlords or planning authorities consent. The Landlord must demonstrate to the enforcement authority that a "reasonable effort" has been sought to obtain consent.
- Property devaluation: where the landlord has obtained a report from an independent surveyor advising that the installation of a specific energy efficiency measure would reduce the market value of the property or the building it forms part of, by more than five per cent.

- Recently becoming a landlord: for example, a new lease being granted under Part 2 of the LTA 1954, it would be unreasonable for landlords to be required to comply with Regulations immediately. This exemption will last for six months and give the Landlord time to carry out the works.
- Listed buildings: an EPC is not required where compliance with certain minimum energy efficiency requirements would unacceptably alter the character or appearance of a listed building, for example external solid wall insulation, replacement glazing and solar panels.
- 7 year payback test: where the expected value of savings on energy bills that the works are expected to achieve over 7 years is less than the cost of the works.

### Drafting suggestions being advocated

In light of the Regulations, the following drafting suggestions for landlords are being advocated in the property market for leases:

- a provision explicitly restricting the tenant's ability to make alterations or do acts which worsen the EPC rating of the property below an E rating;
- a landlord's right of entry to undertake upgrade works;
- restricting the tenants ability to commission a new EPC so as to minimise the chances of the emergence of a poorer rating;
- a tenant obligation to inform the landlord of any new EPC obtained;
- the tenant to pay for upgrade costs either via the service charge (for a lease of part of the property) or through a tenant covenant (in respect of a lease of whole); and
- a tenant obligation to carry out energy efficiency works that are needed to keep the property from becoming sub-standard.

### Summary

In practice many leases are currently widely drafted from the landlord's perspective. They often include tenant's covenants to comply with existing laws to carry out works to the premises and not to do any act on the premises that may result in the landlord incurring a fine. In addition, service charge heads of costs often include the costs of compliance with laws in respect of the building. To be absolutely certain that any upgrade costs are undertaken and/or funded by the tenant, leases need to be carefully reviewed.