

## Totaland Law

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# Granting leases of solar panels - an alternative to capital outlay

Householders and businesses wishing to generate their own electricity by installing solar photovoltaic (PV) panels may find it more cost-effective to lease space to a renewable energy developer than to fund the high cost of installation themselves.

### The feed-in tariff

Since April 2010, those generating their own electricity supply of 5MW or less using renewable energy sources can receive an income by directing surplus supplies to the national grid, under the 'feed-in tariff scheme' (FITS). However installing equipment is costly and recouping the capital outlay may take several years.

### Leasing space to a renewable energy developer

Renewable energy developers may take a lease of part of a property, commonly roof space or open land, and deal with installation and planning at their cost. Once installed, the system needs to be accredited to FITS. The developer may supply the landlord with free electricity and receive an income from the surplus out of which it may pay rent to the landlord.

If it is feasible, then a business leasing arrangement could be viable. However, there are additional points to consider.

The technology behind PV panels is still relatively new, and it remains to be seen whether lenders and buyers will see it as enhancing or detracting from the value of property. If property is charged to a lender, the lender must consent to the lease. It will want to satisfy itself that:

- the installation does not affect the market value of the property
- the installation is properly maintained and repaired, including the infrastructure
- the developer cannot claim security of tenure under the Landlord and Tenant Act 1954 which might prevent the lender dealing free from the lease.

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### From the Editor

Welcome to the March 2011 edition of Totaland Law, Thomson Snell & Passmore's newsletter highlighting some key issues and topical news affecting those involved in property and land-based organisations.

If you would like any further advice on any of the issues covered, please contact [Sarah Easton](#).

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If the property is already let to one or more tenants, the landlord will also need to consider how the lease affects existing tenants.

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Insurers will want to know if the installation could be a fire risk needing additional fire protection and whether the lease provides adequate obligations on the tenant to maintain and repair it.

Other lease terms to consider:

- a term of years long enough for the developer to recoup its capital costs
- an option to break the lease if the system fails to be accredited or to produce sufficient supplies or loses accreditation
- a suitable rent review procedure
- rights of access for repairs into parts of the building or land that houses the infrastructure

- guarantees or a bond to cover the cost of removal of the installation if the developer goes into administration, breaches the terms of the lease or accreditation fails in the future.

If the property is already let to one or more tenants, the landlord will also need to consider how the lease affects existing tenants, whether they will be entitled to a free electricity supply and whether their rents will be affected e.g. by surrendering part of their premises for the developer's installation or its rights of access. ■

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## Guarantees: enforceable or not, part two

Landlords and their advisers should consider the tenant's financial strength bearing in mind that its guarantor may fall away if the lease is transferred before the end of the term. In the [June 2010 edition](#) of *Totaland Law* we considered the **Good Harvest Partnership LLP v Centaur Services Limited** case. We take a look at what has happened since.

It is clear that the courts are reluctant to decide that a guarantee will extend beyond a tenant's transfer of a lease.

Unfortunately the proposed appeal of the **Good Harvest** case did not happen as the parties settled out of court. Luckily for us, there has since been a further case: **K/S Victoria Street v House of Fraser (Stores Management) Limited**.

In **Good Harvest**, Centaur guaranteed the tenant, Chiron's, obligations. When Chiron transferred the lease, Chiron and Centaur both gave guarantees of the new tenant's covenants. The judge decided that Centaur's new guarantee was unlawful.

In **House of Fraser**:

- House of Fraser (Store Management) Limited (HFMS) took a lease, guaranteed by House of Fraser Limited (HF); and
- HFMS agreed that, by April 2006, it would assign the lease to another group company. In doing so, HF would give a further guarantee of the new tenant's obligations.

The court held that HF's second guarantee of the new tenant's obligations was unlawful.

It is clear that the courts are reluctant to decide that a guarantee will extend beyond a tenant's transfer of a lease. This may have an effect on landlords' usual practice.

It is standard practice for a tenant to give an Authorised Guarantee Agreement (AGA) when it assigns. Under an AGA, the outgoing tenant guarantees the new tenant's commitments in the lease. If a tenant had a guarantor, the guarantee is likely to extend to the tenant's obligations not only in the lease, but also the AGA.

While the **House of Fraser** case did not directly rule on this point, it now seems questionable whether such a covenant can be enforced.

If you are about to grant a lease with the benefit of a guarantee, seek legal advice on this point before it is too late.

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## Energy performance certificate (EPC) - do you need one?

People have become accustomed to providing an EPC on the sale or rent of property. However, there are situations where the need for an EPC is less obvious.

An EPC is still required even if the buyer or the tenant says that they do not want or need one.

### When an EPC is required

- Sale and leaseback - even though the result is that the property remains occupied by the same party an EPC is required.
- Multi-let properties - when selling the freehold of a multi-let building an EPC is required for each unit, and for the common parts if they share a common heating system.
- Reversionary leases - the grant of a new lease to an existing tenant for a term commencing on the expiry of the existing lease term requires an EPC.
- Short term lettings - for example to a charity shop at Christmas, require an EPC.

An EPC is still required even if the buyer or the tenant says that they do not want or need one.

### When an EPC is not required

Circumstances where an EPC is not required are limited. These include:

- the sale or rent of temporary buildings with a planned time of use of less than two years;
- industrial sites; workshops; and non-residential agricultural buildings with low energy demand where the air is not fully heated or cooled.
- An EPC is not required on the sale or rent of a building due to be demolished if:
  - the seller can show that the building is to be sold or let with vacant possession;
  - the seller can show that the building is suitable for demolition with the resulting site being suitable for redevelopment; and
  - the seller believes on reasonable grounds that the buyer or tenant intends to demolish.

- An EPC is not required on:
  - a lease renewal;
  - a lease extension or surrender; or
  - the grant of a licence to occupy.

### And finally...

Remember failure to provide an EPC when required can lead to a fine equivalent to 12.5% of the rateable value of the building. [Sarah Easton](#)

### Release from landlord's covenants

Recent cases have focussed on the liability of tenants after assignment of their lease. Landlords should remember they can also remain liable following a sale if the new landlord fails to comply with its obligations unless positive steps are taken. The tenant can agree in the lease to release the landlord from its obligations when he or she sells. If not, the landlord has two options.

- The most straightforward option is to obtain an express release from the tenant, but this is dependant upon the tenant's cooperation.
- The second option is to apply to the court for a release. Notice requirements and time limits are strict so legal advice should be sought. If the tenant objects, the landlord can apply to the court for a declaration that a release is reasonable.

In addition, the buyer can be required to provide an indemnity against any future breach of the lease. However the benefit of this depends on the buyer's financial strength.

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Much time and money can be spent by landlords and tenants before commercial leases are granted, but care should also be taken to ensure that the proper formalities are observed at the end of the term.

## Top ten tips for the final year of lease term

### Tips for landlords

1. Decide if you want your tenants to remain and find out what they intend. Seek legal and valuation advice. Is the lease protected or excluded?
2. If appropriate, start negotiating terms for a new lease early. If opposing renewal of a protected tenancy make sure you have evidence of your intentions.
3. Notices may need to be served to bring the current tenancy to an end. If renewal is opposed then notice must specify one or more of the prescribed grounds of opposition. Alternatively, notice must set out proposed terms of the new lease.
4. Inspect the premises. If necessary, prepare and serve a schedule of dilapidations giving the tenant sufficient time to comply. Start marketing the premises early to avoid a rent void.
5. Ask the tenant to leave the Health and Safety File, Energy Performance Certificate, Asbestos Survey Report at the premises. These will be needed by any new tenant.

### Tips for tenants

1. Check the lease at least 12 months before it is due to expire. Seek legal and valuation advice. Decide if you want to remain in occupation. Your options will depend on whether your lease is 'protected' under the Landlord and Tenant Act 1954, or is an 'excluded' lease.
2. If excluded, you will have no right to stay beyond the contractual expiry date but your landlord may still be keen to negotiate a new lease. Start that dialogue early.
3. If protected, you may have a right to a new lease broadly on the same terms at an increased rent. Both landlords and tenants can serve notice to kick start the process. There may be tactical advantages gained by doing nothing.
4. Strict time limits to respond to notices served will apply.
5. Ensure you have complied with your tenancy obligations. Alterations may need to be reinstated before the lease expires. Allow enough time for remedial works. Giving vacant possession means more than just leaving.

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## Cala Homes revisited

In the [last edition](#) of Totaland Law, we referred to the successful challenge made by Cala Homes against the Secretary of State decision to abolish Regional Strategies without primary legislation. Since 10 November, there have been further high court hearings between the parties. The latest was heard on 7 February, and perhaps unsurprisingly, the High Court ruled in favour of the Secretary of State. The judge ruled that there was no inconsistency between the concept of Regional Strategies forming a central element of the statutory system, and the concept that local planning authorities may take into account the fact that central government intends to abolish them by an Act of parliament.

Cala is considering lodging an appeal, but at the moment, the Government's intention is to make community participation a key element in its reform of the planning system.

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Although this newsletter highlights some key issues relating to property and land law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.