

MEES – Overview of issues for commercial leases

Minimum Energy Efficiency Standards Regulations (“MEES”)

MEES were brought into force by The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 and seek to impose minimum energy efficiency standards for properties. This is done by reference to the Energy Performance Certificate (“EPC”) rating of the property.

This Information Sheet provides an overview of some of the issues currently facing landlords of commercial properties as MEES start to take effect.

By way of a re cap, what do MEES say?

MEES take effect in two stages. They apply to both domestic and non-domestic properties but this Information Sheet focuses on commercial properties only. Unless an exemption applies:

- By 1 April 2018, all properties caught by MEES must be improved to a specified minimum energy efficiency standard (EPC rating E) before they can lawfully be let to tenants.
- From 1 April 2023 where a lease is already in place, a landlord must not continue to let a property with an EPC that has a rating lower than an E.

Are just lettings affected?

Yes, unlike the EPC Regulations, MEES only apply on lettings and not on sales.

Is a letting granted in breach of MEES enforceable?

Whilst it will be unlawful to grant a lease of a substandard property after 1 April 2018 unless an exemption applies and is registered, the tenant will still have a valid lease and it will be enforceable.

Which commercial leases are caught?

MEES will apply to leases granted for a term of more than 6 months but less than 99 years – so most commercial leases will be affected.

Some leases of less than 6 months may also be caught where the tenant has previously been in occupation or has a right to renew or extend the term.

Some commercial properties will fall outside the scope of the MEES because EPC certificates are not required for that type of property – for example, properties without heating, air conditioning or ventilation equipment and some listed buildings (but see below in respect of listed buildings).

Traps for the unwary

Will MEES apply on the letting of a listed building?

Unfortunately the guidance on whether a listed building needs an EPC has always been unclear. Until recently the approach usually adopted by agents was that on sale or lettings, listed buildings did not need EPCs. In an attempt to clarify the position the Government’s guidance on EPCs was updated in December 2017. Rather unhelpfully this just indicates that a listed

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

MEES – Overview of issues for commercial leases

Continued

building will only be exempt from the need to have an EPC if compliance with MEES would unacceptably alter its character or appearance; examples are given of the type of energy efficiency works that are likely to be unacceptable, such as double glazing, new doors and external flues. As a result, you should assume an EPC is required for a listed building, and that MEES apply, unless you have sought advice on the type of energy efficiency works that could be required and discussed whether their impact is acceptable with your local authority.

Voluntary EPCs

If an EPC has been obtained on a property when there was no legal requirement to obtain one, will MEES apply on a letting? A voluntary EPC may have been obtained on a property of a type that does not legally require an EPC (for example a place of worship or some listed buildings) or for a property that would require an EPC had that property been put on the market to sell or rent but it was obtained when the property was not on the market. The current view is that where the property is normally of a type that requires an EPC on construction, sale or rental, MEES will bite if a voluntary EPC is in place. This is likely to be more of concern as we approach 2023, when it will be illegal to continue to let a commercial property that has an EPC rating lower than E.

Lease renewals

Do MEES apply to lease renewals where the tenant is taking a further lease of its existing space? The guidance is contradictory. The EPC guidance reissued in December 2017 still states that an EPC is not required on a lease renewal – although there is nothing in the legislation to support

this view. The MEES guidance, however, contains a case study which clearly states that an EPC is required on a lease renewal. Until the matter is resolved it would be prudent to take the more cautious approach and assume that MEES do apply.

The second area of uncertainty that arises is what happens at the end of the term if the lease is protected under the Landlord and Tenant Act 1954 (the “1954 Act”). Under the 1954 Act when the contractual term of the lease expires there is a statutory continuation of the tenancy until it is terminated or renewed in accordance with the provisions of the 1954 Act. Do MEES apply to the statutory continuation of the tenancy? Whilst no new lease has been granted, there is an argument that this “extension” of the existing tenancy does trigger MEES, which will result in a landlord of a property holding a substandard EPC rating being in breach of MEES as soon as the contractual term expires unless it has registered an exemption.

Until both matters are resolved it would be prudent to take the more cautious approach and assume that an EPC will generally be required on a renewal and that if a property has a valid EPC in place, MEES will apply to 1954 Act leases that are allowed to “roll on” after the expiry of the contractual term. Consequently landlords need to monitor leases that are about to expire and consider how they are going to comply with MEES when the term expires.

Exemptions

There are four main types of exemption a landlord may rely on where it intends to let out a sub-standard commercial property after 1 April 2018, or needs to continue to let after 1 April 2023:

MEES – Overview of issues for commercial leases

Continued

- **No relevant improvements:**

There are no relevant energy efficiency improvements that can be made to the property or all relevant energy efficiency improvements have been made. For the purposes of this exemption an improvement will be relevant if the savings on energy bills it produces for the property, over no more than 7 years, are equal to or greater than the cost of the improvement works.

- **Inability to obtain consent:**

Despite reasonable efforts, within the preceding 5 years the landlord has been unable to obtain the consent of the tenant or a third party (e.g. superior landlord, mortgagee, planning authority) to the making of the relevant improvements.

- **Devaluation:**

An independent surveyor's report within the preceding 5 years states that any relevant energy efficiency improvement would result in a reduction of more than 5% of the market value of the property or the building of which it forms part.

- **Temporary exemptions:**

A temporary six month exemption is available where a landlord is renewing a lease pursuant to part 2 of the Landlord & Tenant Act 1954 and certain other limited circumstances such as where a lease is granted pursuant to a court order. It is also available where a landlord is acquiring a substandard property after 1 April 2023 that is already let.

Exemptions will last a maximum of 5 years. Although it should be noted that an

exemption based on failure to obtain a tenant's consent will expire when the tenancy is assigned or terminated.

Exemptions are not transferrable although, as stated above, there will be a 6 month exemption available to landlords who acquire an already let substandard property after 1 April 2023.

What do you need to do now?

If you have a let property that has a rating of F or G that is coming up for renewal or you are marketing to let, then you need to double check that you have complied with MEES. Even if an exemption under MEES applies it needs to be registered in the central PRS Exemptions Register to be valid.

To ensure that landlords are not suddenly hit with requirements to carry out works, or to register exemptions on 1 April 2023, they need systems in place to monitor their portfolios to identify potentially substandard properties and to track whether any registered exemptions have expired.

What happens if a landlord fails to comply?

There are financial penalties for breaching MEES. For commercial properties, the minimum penalty is between £5,000 and £10,000. The penalty is calculated using either 10% or 20% of the property's rateable value up to a maximum cap of £150,000. The higher rateable value will be used to calculate the penalty where the breach has been in existence for more than 3 months at the time the penalty notice is served.

MEES – Overview of issues for commercial leases

Continued

There is of course also the risk of reputational damage for landlords who are found to have flouted the rules.

Further information

This Information Sheet has been prepared to highlight some of the key issues relating to MEES. It is based on our understanding of MEES as at March 2019 and may be affected by subsequent changes to the regulations and non-statutory guidance. For more information, please contact Sarah Easton on 01892 510000 or email at:

sarah.easton@ts-p.co.uk

© Thomson Snell & Passmore LLP All Rights Reserved