

Energy efficiency UK property owners would be well advised to take note of France's recent legislation on green leases, writes Christopher Brigstocke

A recurring theme of recent government policy aimed at making buildings in the UK more sustainable has been the challenge of addressing the "split incentive" problem within the landlord and tenant relationship. In essence, this is between the owner, who has the ability to make energy efficiency improvements to his property, and the occupier, who will benefit from those improvements through reduced energy bills.

The government hopes that the Green Deal will solve this problem by making the bill payer rather than the property owner responsible for the costs associated with the Green Deal improvements. However, this fails to take account of the complexity of energy provision arrangements that can apply in multi-tenanted commercial properties, where the bill payer can be both the property owner and occupier in respect of different parts of the property.

Leases do not usually provide mechanisms for owners and occupiers to carry out improvements to their properties in a manner that is entirely satisfactory to either party. The question to be considered is whether **green leases** - which have been around as a concept for a while but have not as yet been fully realised - can be used to provide solutions to the challenges presented by the Green Deal.

50 shades of vert

Green lease clauses have become an increasingly common feature of commercial leases largely as result of the launch of the Better Buildings Partnership's **Green Lease** Toolkit in 2009. This contains a series of recommendations to owners and occupiers for the inclusion of clauses encouraging the sharing of data and co-operation on energy efficiency strategies. However, these clauses have tended not to be included in the lease itself but rather in a non-legally binding memorandum of understanding.

This voluntary approach, while sensible, has resulted in limited uptake of **green lease** clauses within the industry to date. However, the forthcoming Minimum Energy Performance Standards (MEPS) regulations, which will be introduced prior to 1 April 2018 under the Energy Act 2011, are beginning to stimulate the introduction of "darker green" clauses in new leases. These entitle the owner to carry out energy efficiency improvements to the property and pass the cost of doing so onto the occupier directly through the service charge.

It is likely that such clauses will become more common in new leases but the particular challenge presented by MEPS is what the impact will be on any existing lease that does not contain such clauses.

This question requires urgent consideration within the property industry and it is instructive to take note of the "Grenelle" legislation that has recently been introduced in France. This effectively mandates **green leases** not only in relation to new lettings but existing lettings too.

From 1 January 2012 it has been a requirement to insert an environmental appendix into all new lease contracts made in respect of premises of more than 2,000m² that are to be used as offices or retail space. As from 13 July 2013 an environmental appendix must also be inserted in existing leases in respect of the same categories of premises.

The implementation decree, published last December, gives little guidance on the contents of the appendix but, as a minimum, the parties are required to share data, review the environmental performance of the property at regular intervals, and to commit to a programme of improvement of the environmental and energy performance of the property. Significantly, it is left to the parties to decide how the costs of such improvements should be apportioned between them.

There is no sanction for failure to introduce an environmental appendix into a lease and it appears that the French government is hoping that compliance will become the norm and that sanctions will not be necessary.

Comme les francais?

It will be interesting to observe the impact of the new regulations on the commercial property rental market in France. No doubt the UK government will be paying close attention to the effectiveness of these regulations and may well be tempted to introduce similar regulations if there appears to be any danger that the Green Deal will be thwarted by the split incentive problem.

The UK government will also be conscious of article 19 of the recently introduced Energy Efficiency Directive. Under this article, EU member states are required to evaluate and, if necessary, take appropriate measures to remove regulatory and non-regulatory barriers to energy efficiency which expressly include:

"the split of incentives between the owner and a tenant of the building, or among owners, with a view to ensuring that those parties are not deterred from making efficiency-improving investments that they would otherwise have made by the fact that they will not individually obtain the full benefits or by the absence of rules for dividing the costs and benefits between them".

The European Commission will be undertaking an assessment of progress made by member states in implementing this directive next summer. In the meantime, UK property owners would be well advised to start taking some leasing lessons from their French counterparts.

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