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Evidence of green leases in England and Wales

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Abstract

Purpose – This paper aims to report on research that investigates the use of green clauses in leases of office and retail premises in England and Wales.

Design/methodology/approach – The authors examined 26 recent leases of green build properties registered at HM Land Registry. The green clauses discovered were classified and compared with the model form green clauses promoted by the London-based Better Building Partnership's Green Lease Toolkit.

Findings – Of the 26 leases analysed, 18 contained some form of green provision.

Research limitations/implications – As the sample selected was not representative, a larger study is needed to detect trends in green leasing. This research method does not show the impact of green clauses on property management.

Practical implications – This research illustrates the types of clauses that have been used in leases but also shows that green leasing principles are not yet the industry standard. Many new, long leases still make no reference to environmental practices.

Originality/value – This is the first research to be done examining the green content of agreed leases and develops a methodology that can be used for future research.

Keywords Environmental performance, BBP Green Lease Toolkit, Commercial property, Green clauses, Green leases, Leasehold innovation

Paper type Research paper

1. Introduction

This paper reports on a research project examining how much “green” there is in a sample of office and retail leases with registered leasehold title in England and Wales. The meaning of “green” is considered more fully later in this paper but for now a green lease might broadly be considered as one which purposively supports and facilitates the adoption of leasehold practices that enable the improvement of the environmental performance of buildings and their use. The aim of the research was to find out if signed leases (as contrasted with precedent leases) ever contain green provisions; and, if so, what form these clauses take.

This research is inevitably backward looking as registered leases reflect deals negotiated in the past – the leases in our sample were signed during the period 2008-2013. Our sample was small and, as explained in the Section 3, the sample chosen

The authors are extremely grateful to assistance from HM Land Registry in helping them to narrow down titles to obtain copies of, and also from the retailer referred to in this report for supplying them with copies of agreed leases. This research was made possible by a grant from the Research Support Fund, Law Faculty, University of Oxford and research funding from New College, Oxford.



is not representative. Table II provides a summary of key aspects of each lease examined, and the material is presented anonymously with each title referred to by an alphabetic descriptor. The expectation was that we would find little green in the sample leases. It is surprising, therefore, to find that two-thirds of the leases examined in this project contain “green” provisions, and that this is not confined to office leases. Although some of these leases had only passing reference to green concepts, several reflected a significant joint commitment by the landlord and tenant to manage and use the space in a sustainable way. As we explain below, we focussed research on green buildings, expecting these to be the most likely to display green leases. The flip-side of our findings is worth commenting on: even in this context – buildings designed for high environmental performance – one-third of leases granted had no provisions aimed at supporting practices leading to better environmental performance. Given that these were long-term leases – of between nine and 25 years – this means that the parties are effectively locked into legal arrangements in which it may be difficult to make environmental upgrades in future years.

2. The adoption of green leases

Although the idea and language of green leases was largely unheard of in England before 2007, there are now a number of toolkits available, giving tips and precedent wording for inclusion in leases, such as the Green Lease Toolkit issued by London’s Better Building Partnership (BBP)[1]. A number of the major landlords have announced the adoption of green leases as standard (for example, Hammerson, Legal & General)[2], and Marks & Spencer announced in Spring 2013 that it was introducing green clauses in new leases and for existing leases through memorandum of understandings (MoUs)[3].

Nonetheless, little is known about how widespread the use of green leases is in the commercial property market, or how many green clauses survive the negotiation process. Most anecdotal evidence suggests there is strong market resistance to green leases, and that uptake is especially low in the retail sector[4]. A common perception is that if there is a commitment to pursue environmental goals it is preferred to support this by use of a non-legally binding MoU or by reference to a *Tenant Handbook*. One advantage of an MoU is that it can be used alongside leases that were entered into prior to the development of the green lease concept, and both handbooks and MoUs provide easier opportunities for adjustment of policies over time. When green

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- [1] The Toolkit was first introduced in 2009. The Toolkit was revised in 2013 and this latest version is available at: www.betterbuildingspartnership.co.uk/working-groups/green-leases/green-lease-toolkit/ (accessed 12 September 2013). The 2009 version is used as the comparator in this article as it is the 2009 version that was current at the time most sample leases were entered (some sample leases pre-date the 2009 version). The 2009 version is available at: www.betterbuildingspartnership.co.uk/download/bbp-green-lease-toolkit-1.pdf (accessed 12 September 2013).
- [2] See www.hammerson.com/about/responsibility/sustainability/ (accessed 22 July 2013); www.legalandgeneralgroup.com/media-centre/press-releases/2011/group-news-release-986.html (accessed 22 July 2013).
- [3] See <http://corporate.marksandspencer.com/page.aspx?pointerid=8beddfecd4c24a04ac2d41728eb3dcd4> (accessed 22 July 2013).
- [4] Roundtable (*Estates Gazette*, 2010; Wessing, 2010; Orton, 2012; College of Estate Management, 2013).

leases are announced, there is seldom much detail available to non-parties about what this means, and the precise content of agreed leases is often perceived as commercially confidential. The sensitivity of lease documents is such that some leases, for example Lease D in our sample, contain a provision requiring that the parties treat the lease as confidential to the parties, their professional advisers and bankers.

Nor is much known about the picture internationally. The Federal Government in Australia encourages Green Lease Schedules to be used in all commercial leases of Federal Government-owned property and for leases entered into by the Federal Government as a tenant of privately owned commercial property (Australian Government, 2013). Notwithstanding the lead taken by the Australian Government it does not appear yet that Green Lease Schedules are common place or have had any significant impact in the private sector (Byrne, 2012). Globally, there is scant evidence about the content of agreed leases (Bright and Roussac, 2012).

This research project shows that green leases are being entered into in England and Wales. The project does not provide information on how frequently green leases are used, and neither does it look at the adoption or content of MoUs (these are not public documents). It is, however, the first project to provide empirically based evidence about the content of early green leases in England and Wales.

3. Methodology

The aim of our research was to examine the wording of leases that have been entered into post-2007 in order to see if these leases contained any green provisions, and, if so, to find out what kind of terms were being agreed to.

3.1 *Selecting leasehold titles*

Given difficulties in approaching parties directly for copies of agreed leases, and concerns over confidentiality of leases, we relied on leases recorded on the public land register. The sample is not representative. It was intentionally small (we examined 28 leases), in large part because of budget limitations but also because the research was intended to test the methods used. The sample excludes short leases as registration under the Land Registration Act 2002 is only compulsory for leases of more than seven years; as average lease length is now less than seven years this means that only a subset of the market has been examined (British Property Federation/IPD Ltd, 2012). Documents that take effect outside the lease, such as handbooks and MoUs are not available on the register and so we have no information about green arrangements entered into outside of the lease. Further, because the expectation was that little, if any, “green” was likely to be found, titles were selected predominantly from leases of quality green buildings as our assumption was that these are the most likely properties to incorporate green principles into leasing practices.

In selecting properties we sought to use leases from a variety of locations and offering a mix of different landlords and tenants. We therefore used a number of different approaches to identify the leasehold titles that we wished to obtain copies of. Table II shows that whilst the majority of our sample leases are in London, there is a regional spread. The regional descriptors are based on the government offices for the regions that were established across England in 1994[5].

[5] Although they closed in 2011, the regions are still available on ons.gov.uk for statistical use.

One method was to identify green buildings by reference to BREEAM rated properties and properties referred to in the BBP Best Practice Case Studies[6], the Building Research Establishment Environmental Assessment Method (BREEAM) is a UK-based rating system that was launched in 1990. BREEAM rated properties were found by internet searches using the BREEAM and BBP web sites, together with general media and press searches, with a focus on recently constructed properties. Most of our sample are leases of BREEAM rated new and refurbished buildings (almost two-thirds of our sample have an “excellent” rating). We also selected some titles by starting with the identity of the parties, choosing those with stated policies of negotiating “green” leases, or professing to have “green” credentials, and looking at developments they have recently been involved with. In the event, it proved surprisingly difficult to source information directly from landlords’ and tenants’ web sites and press releases as to their use of “green” leases.

The Land Registry’s public search facility was then used to discover the leasehold titles for our selected properties. Obtaining leases from the Land Registry was by no means straightforward, notwithstanding it being a public record. The public interface of the Land Registry allows properties to be searched by address and postcode only (not by date, or by party). Further, for most properties chosen our search returned numerous leasehold titles, as the properties were usually multi-occupied[7]. Given that the earliest claimed use of a “green” lease in the UK was in 2007, our search needed to be confined to leases registered in 2008 or later so as to avoid producing (and having to pay for) irrelevant titles. We therefore had to rely on the assistance of a personal contact at the Land Registry to supply us with much of the information we required, and to whom we are extremely grateful. In addition, a major retailer who we had identified as being committed to green leasing practices provided us with seven recent leasehold agreements; these are included in our sample as they are publically registered leases, but as they were supplied direct to us we avoided Land Registry costs.

In total we acquired 28 leasehold titles. Two of these had to be excluded from our analysis: Lease E was not for office or retail use (and we wished to contain our analysis to office and retail leases), and Lease N was incomplete as the Land Registry holds an incomplete copy (although Lease N evidently contains several green provisions). Just to add to the complexity of the research methods: the official copies of leasehold titles are supplied by the Land Registry in hard copy only which necessitated further time and expense getting these copies scanned so that we could analyse them.

3.2 Identifying “green” leases

An important question is what constitutes a “green” clause. Prior to receiving the leases, we compiled a “green” checklist (using a variety of online sources, in particular the BBP Green Lease Toolkit (2009)), envisaging that we would use it to record clauses found in our sample. However, it soon became apparent on reading the leases that this checklist was not suitable. The “green” clauses did not fit neatly into boilerplate categories. Instead we have grouped clauses into the broader categories shown in Table I that accommodates the variation in wording found in our sample leases.

[6] Available at: www.betterbuildingspartnership.co.uk/media/case-studies/ (accessed 12 September 2013).

[7] For example, for one property we identified there were 21 leasehold titles registered. The lease we selected from this property is Lease L in our sample.

<i>Green clauses</i>	
Sustainability statement	Landlord and tenant state desire to improve and be accountable for the energy efficiency of the property wherever possible (see Hammerson's clause)
Environmental plan	Parties to agree or use reasonable endeavours to agree some form of EMP/MoU/sustainability plan. Usually includes policies designed to reduce emissions, energy use, and waste. Usually a "good faith" statement without legal obligation, but sometimes legally binding. Sometimes one party (landlord or tenant) has to put plan in place
To comply with environmental plan	Obligation to comply with environmental plan (may be tempered by qualification, e.g. Lease S: "to the extent that it is economic and practically feasible")
Alterations and repairs	Alterations and/or repairs clause makes reference to environmental impact of works. May take negative form (e.g. not to make alterations/repairs that have an adverse impact on energy performance) or positive form (e.g. to use sustainable materials, to have regard to environmental impact)
Data sharing	Clause requires one or (usually) both parties to share data on resource use, including energy usage. Often express statement that information to be treated as confidential. Sometimes expressed to be legally binding, more commonly it is a "good faith" statement without legal obligation
Services	Landlord is able to carry out services in environmentally sensitive manner (see the Hammerson's clause)
Environmental improvements	Lease provides for party (usually the landlord, sometimes the tenant) to make improvements/carry out works/implement initiatives aimed at improving resource efficiency
Not to damage environmental performance	Clause contains obligation not to do anything that harms environmental performance. May take a variety of forms, commonly not to adversely affect the environmental performance certificate rating
Yielding up	Reinstatement not required at end of lease if this would have negative environmental impact, possibly subject to landlord's ability to require reinstatement if reasonable having regard to future intended use
Green planning permission	Obligation to comply with environmental goals incorporated into planning permission, such as travel plans, service management plans
<i>Green reference clauses</i>	
Carbon reduction costs	Clause makes reference to recovery of CRC costs. May enable landlord to recover costs from tenant, or expressly state that tenant is not liable to pay landlord's CRC costs. Costs variously defined: sometimes extensive recovery allowed to include landlord's costs in registering and administering as CRC participant
Energy performance certificates	Clause may require access, etc. to enable preparation of EPC, or require one party to obtain/provide copy of EPC
	NB: clauses that prohibit conduct that damages EPC are considered as "green clauses"

Table I.
Classifying green clauses

For the purposes of this research, we have defined a green clause as one which "is designed to facilitate the property being used in a resource efficient manner and which takes account of energy efficiency and other sustainability goals and measures". It is not, therefore, confined to clauses relating to energy use but incorporates a variety of measures designed to improve the environmental performance of the building, such as sustainable waste management and the use of materials from sustainable sources.

Even with this working definition, deciding which clauses to consider green for this project was not straightforward. We have distinguished between:

- Clauses that are designed to influence the conduct of the parties so as to either have a positive impact, or avoid an adverse impact, upon environmental performance (green).
- Clauses that may incidentally impact in some way upon environmental responsibilities or good estate management (not green).

The distinction is best illustrated by referring to some of the clauses that have not been included as green clauses in our research. First, some clauses are designed to prevent environmental harms or to protect one or other party from environmental liability. Lease C (an office lease), for example, includes an obligation on the tenant not to “cause or permit any environmental damage”, defined as including damage to human health or the environment which would also be a breach of a statutory or regulatory obligation. This is classified as a “no-green” lease for our purposes. Likewise, there are various common lease clauses that may well enable the landlord to impose environmentally focussed obligations on the tenant but which are not designed with this primary end in mind. So, for example, Lease A contains a provision that requires the tenant to comply with reasonable regulations made “in the interests of good estate management [...] having as their object the [...] management and general amenity of the Building”. We would not count this as a green clause. Third, nearly all leases specify that the tenant must comply with legislation; again, this will include any mandatory environmental requirements but we do not include this as a green clause.

We have also adopted a category called “green reference”: this identifies clauses which take account of energy efficiency measures and other sustainability goals but do not directly influence environmental performance. Drawing the line between green and green reference has been especially hard, and we have had to make a judgement call. An example is a clause that refers to energy performance certificates (EPC). An EPC is required by national laws whenever a building is built, sold or rented, and it provides information about the building’s energy performance as well as a recommendation report which contains suggestions for the improvement of the energy performance of the building. Several sample leases had a clause requiring the tenant to obtain a new EPC if work done by the tenant invalidates a valid EPC. We label these kinds of clauses as “green reference” rather than “green” as they are not primarily designed to improve environmental performance, even though they may well support the pursuit of green goals. Provisions for the recovery of CRC costs (costs payable by participants in the UK’s scheme for the purchase of carbon allowances, the CRC energy efficiency scheme) are also considered as “green reference”. Although one of the policy aims of the CRC scheme was to drive uptake of cost-effective end use energy efficiency measures there is no consensus on whether this policy goal is best achieved by the landlord or the tenant bearing the costs of the CRC, and so it is inappropriate to categorise CRC costs recovery as supporting the pursuit of improved environmental performance (Bright, 2010).

Table I shows the categories of green provisions that we have used.

Table I refers to a clause used by the property company Hammerson, which was a very early adopter of green leases. Their web site refers to the adoption of a “light green” clause in its standard UK lease in 2007 and states that by 2010, 1,250 green

leases has been signed across Hammerson's portfolio[8]. The wording of Hammerson's sustainability clause is also accessible from their web site, and is quoted here in full:

The Landlord [and] Tenant [and Surety] desire to improve and be accountable for the energy efficiency of the Premises and the Centre wherever possible. As part of this commitment to improve energy efficiency the Landlord [and] Tenant [and Surety] wish to promote the reduction of emissions from the Centre, the reduction and/or recycling of waste from the Premises and the Centre and ensure the environmental sustainability of the Centre resources by implementing the measures contained or referred to in this clause. The parties shall:

- co-operate and use all reasonable endeavours to agree (and thereafter comply with) an energy management plan to aid the sustainability of resource use at the centre;
- co-operate and use all reasonable endeavours to agree and operate initiatives to reduce, reuse and/or recycle waste from the premises and the centre;
- maintain and share (subject to clause 1[a confidentiality clause]) all energy data and other information reasonably required to monitor the energy and resource consumption at the premises and the centre;
- use reasonable endeavours to ensure that the services are performed and the premises and centre used in accordance with the energy management plan (if any) and in such a way as to and to agree [*sic*] improvements to the services which would reasonably improve energy efficiency; and
- the provisions of this lease shall be considered accordingly.

Several of our sample leases contain clauses similar to this. On our chart, it is reflected in four headings: "sustainability statement", "environmental plan", "data sharing", and "services". As a matter of contract law there are interesting questions as to the enforceability of terms referring to "reasonable endeavours" and "co-operation", and also the extent to which the "environmental commitment" that the sustainability clause displays might influence the way in which terms are interpreted. The note accompanying the Hammerson's clause[9] refers to the final line of the clause as an "interpretation" clause which can be "used to drive sustainable initiatives through the service charge (i.e. to hopefully justify any slight increase in cost)". In recent years there has been a move in English contract law towards allowing the background context to influence the manner in which contract terms are construed, particularly following Lord Hoffman's principles set out in the case of *Investors Compensation Scheme Ltd v. West Bromwich Building Society*[10], as further explained in *BCCI v. Ali*[11]. What is clear is that Hammerson's advisers intended the final line of their sustainability clause to influence the way in which the terms of the lease would be interpreted.

The sustainability clause is also significant in that it represents a shift from the traditional adversarial relationship between landlords and tenants towards a more collaborative model. In a (surprising) high court case, *Yam Seng Pte Limited v. International Trade Corporation Limited* a term was implied imposing a duty of good

[8] See www.hammerson.com/about/responsibility/sustainability/ (accessed 18 July 2013).

[9] This note states that it summarises the work and recommendations of the leasing team at Hammerson and the legal teams at Eversheds and BLP following a meeting on 6 March 2007.

[10] [1998] 1 WLR 896 (HL) 912-3.

[11] [2001] UKHL 8, [2002] 1 AC 251 [39].

faith and fair dealing in a commercial relationship^[12] a sign that the law is evolving to accommodate co-operative contract ideals more readily. This makes it more likely the “flavour” of a sustainability statement will influence the way in which the legal rights and responsibilities of the leasehold parties are construed.

What would be of interest is to know what impact signing sustainability clauses has in practice; but to discover this would involve a much larger scale research project working with industry partners.

4. Findings

4.1 *The number of green leases*

Adopting this method of categorisation, Table II shows which of the leases contain green clauses, green reference clauses or “no-green”. This shows that of the 26 leases we analysed, 18 contain some green provision. If we exclude the “green reference” clauses and look only at those that more explicitly support environmentally sensitive practices (or avoid harmful practices) there is still a majority (15) that are green leases.

The sample is too small and too selective to draw any wide conclusions. It is difficult to be sure about the identity of landlords as the corporate name on a lease does not necessarily indicate whether it is a subsidiary of a larger property investment company. So far as we can tell (only) two landlords are landlords of two properties in our sample (these are indicated in Table II). The relatively high percentage of green leases cannot therefore be explained on the basis that there was a narrow sample of (green) landlords. It is the case, however, that seven of our retail leases are let to the same tenant; of these, three have green clauses (and a further two have green reference clauses). It may be that there is a higher use of green leases in London and the South East than elsewhere (of the 16 leases in these regions, 15 contain some green provision); if so, this would not be a surprising result, particularly in the light of the promotion of green leases by those landlords involved in London’s BBP, but it could well be that our selection of sample leases has some kind of bias. A much larger sample would be necessary to test this. Nor is there enough information to test whether retail leases generally do not contain green provisions; our sample only has two retail leases not supplied directly and neither of these contains green provisions.

4.2 *The content of the green leases*

As mentioned above, there is considerable variation in the wording used in the sample lease clauses – both as to the subject matter of the green provision (e.g. recycling, data sharing), but also the level of commitment that appears to lie behind it. Some clauses express binding legal commitments, others are expressly worded as non-binding aspirational clauses, others use the language of good faith and co-operation. Given the variety of ways in which the commitment is expressed, it would be very difficult to analyse our sample according to the “strength” of the commitment, and so our classification focuses instead on the substantive goal (data sharing, waste reduction, etc.).

Our table on categories (Table I) shows how we have grouped the different types of provisions. Table III shows how commonly these different categories were found in our green leases.

[12] [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep 526.

Table II.
Sample leases

	Date of lease (by month/ year)	Region	Use	New build or refurb?	BREEAM rating	Whole or part?	Length of lease, and tenant option to break (years)	Green clause	Green reference clause
A	October 2009	London	Office	New	Excellent	Part	10, break at 5	Y	N
B	December 2011	South West	Office	New	Excellent	Part	10, break at 5	N	N
C	May 2008	South West	Office	New	Very good	Part	9, break at 5	N	N
D	June 2010	London	Office	New	Excellent	Part	15, break at 10	Y	N
E	October 2010	London	Hostel	Refurb	Excellent	Whole	25	Excluded: not office or retail use	
F	December 2010	South West	Retail	Refurb	Excellent	Part	15	N	N
G	May 2012	West Midlands	Office	New	Excellent	Part	21, break at 10	N	N
H	February 2010	North West	Office	New	Excellent	Part	15, break at 10	N	N
I ^b	October 2012	London	Office	New	Excellent	Part	10, break at 5	Y	Y
J	November 2012	London	Office	Refurb	Very good	Part	10, break at 5	Y	N
K	September 2012	London	Office	Refurb	Excellent	Part	10	Y	N
L	August 2010	London	Office	New	Excellent	Part	15.5, break at 10.5	Y	Y
M	December 2011	London	Office	Refurb	Very good	Whole	15	Y	Y
N	March 2013	London	Office	Refurb	Excellent	Whole	10, break at 5	Excluded: incomplete lease	
O	February 2010	London	Retail	New	Outstanding	Part	15	N	N
P ^a	October 2010	London	Office	New	Excellent	Part	20.5, break at 15.5	Y	N
Q	April 2012	South East	Office	Refurb	Very good	Whole	15	Y	Y
R	October 2011	South East	Office	Refurb	Good	Part	10, break at 5	Y	Y
S	June 2010	London	Office	Refurb	Very good	Part	11.25	Y	N
T	July 2012	London	Office	Refurb	Excellent	Part	15.5	Y	Y
U	February 2011	London	Office	Refurb	Excellent	Part	10, break at 5	N	Y
V ^c	July 2010	Wales	Retail	Refurb	Excellent	Part	25, break at 20	N	N
W ^c	December 2012	East Midlands	Retail	Refurb	Very good	Part	15	N	N
X ^c	January 2012	North East	Retail	New	Unknown	Part	25.5, break at 15.5	N	Y
Y ^c	August 2010	South East	Retail	Refurb	Unknown	Part	25, break at 15	N	Y
Z ^c	January 2011	North West	Retail	Refurb	Excellent	Part	10, qualified break at 5	Y	N
Aa ^{b,c}	February 2013	West Midlands	Retail	New	Unknown	Part	25, break at 20	Y	Y
Bb ^{b,c}	December 2010	London	Retail	New	Excellent	Part	15, break at 10	Y	N

Notes: ^asame landlord; ^bProbably same landlord (different corporate name used); ^csame tenant

Type of clause	Leasehold title																Aa	Bb
	A	D	I	J	K	L	M	P	Q	R	S	T	U	X	Y	Z		
<i>Green clauses</i>																		
Sustainability statement		*		*			*			*							*	
Environmental plan		*		*		*	*			*	*						*	
Comply with environmental plan				*						*								
Alterations and repairs	*	*	*	*	*		*		*	*	*						*	
Data sharing	*	*	*	*	*	*	*		*	*	*	*					*	
Services	*	*	*	*	*	*	*		*	*	*						*	
Environmental improvements				*	*	*	*		*	*	*						*	
Not to damage environmental performance	*				*				*									
Yielding up									*		*	*						
Green planning permission									*								*	
<i>Green reference clauses</i>																		
Carbon reduction costs			*			*			*		*	*	*				*	
Energy performance certificates			*			*	*		*	*	*	*	*			*	*	

Table III.
Green and green
reference clauses in
sample leases

Looking only at clauses designed to promote better environmental behaviour, the most common clause found is one that provides for data sharing between the parties (found in 12 leases), followed by clauses that require environmental considerations to be taken into account in relation to alterations and/or repairs (ten leases), and recognition that service provision can take account of environmental considerations (ten leases).

4.3 Less common green provisions found

Amongst our sample leases were some clauses that were “one-offs” and that could not be easily classified.

Here, are some examples:

- A clause that referred to green works carried out and financed by the tenant and which contained an express disregard for the effect of these green works on rent review.
- The lease refers to a legally binding MoU, to include an environmental management plan (EMP) which contains measurable targets, and which will be binding on successors.
- Reference to setting measurable targets.
- The landlord is to use reasonable endeavours to minimise the carbon levy (effectively, to reduce the CRC costs: this is in two leases).
- On rent review, not to disregard any works done by the landlord which would reduce utility charges or improve environmental performance.

5. Comparing findings to the BBP Green Lease Toolkit (2009)

The BBP Green Lease Toolkit was released in 2009 as an aide to help owners and occupiers of commercial buildings to work together to reduce the environmental impact of their buildings. In addition to guidance on best practice green lease principles, and a model form MoU (particularly geared for use alongside existing leases),

it contains a suite of model form clauses for inclusion in new and renewal leases. The intention was not to provide a rigid framework but to offer non-contentious light green, and flexible, draft clauses available for use by parties seeking to implement green lease principles, adapted as appropriate to the circumstances. The idea was that it would provide a kind of “minimum kit” of issues to be addressed and as such provides a useful reference point to see how the clauses found in our sample compare. The following headings are those found in Section 4 of the BBP Guide (2009) as the issues to be covered by model form green lease clauses.

5.1 Co-operation obligation

The BBP Guide (2009) encourages the parties to co-operate in the pursuit of sustainability and efficiency goals, and the suggested wording is that “in good faith and without legal obligation” they agree and implement an MoU. Only five of our sample leases contained a similar provision. As with the BBP clause they usually do not create enforceable legal obligations, but the wording found was usually closer in style to the Hammerson’s clause rather than, as with BBP, linking to an MoU. Of course, we have no way of knowing whether the parties had separately agreed to an MoU outside the lease. There is one exceptional lease that refers to a detailed and legally binding MoU (Lease R).

5.2 Environmental management plan

The BBP Guide (2009) refers to the EMP being developed either by the managing agent (or other party responsible for the operation and management of the building) or the Building Management Committee (BMC; see next heading). The particular form of wording used was not found in any of our sample leases as the BBP clause focuses on the role of the managing agent, but the commitment to developing some form of EMP was relatively common, being found in eight of our sample leases.

5.3 Building Management Committee

The BBP Guide (2009) contains drafting for establishing a BMC that will consider the adequacy and improvement of data sharing on energy and water use and waste production/recycling; as well as agreeing targets and strategies to reduce energy use and water consumption, etc. Only one of our sample leases had a process for setting up a BMC (Lease R), although, of course, it may be that with others there is a process for regular communications and discussion set up through the EMP, or outside of the formal lease arrangements. It may be the case that BMCs are best suited for larger, multi-let buildings: most of ours were multi-let although we do not know the number of other tenants sharing the space, or the size of the buildings.

5.4 Data sharing and metering

Sharing data is seen as crucial to green lease principles and the BBP Guide (2009) provides for confidential sharing of data (and alternative wording for the installation of sub-meters). We do not know what proportion of our buildings are sub-metered, but given that we sought to focus on quality green buildings we assume that all, or nearly all, are. This would mean that data sharing is technically possible, yet although this was the most frequent clause found in our sample leases a majority of our sample leases still did not contain an express commitment to share data. Further, not all of the data sharing provisions were expressed as clearly binding legal obligations. Lease Bb,

for example, states: “The parties agree to co-operate with each other in providing such information as either party shall reasonably require relating to energy and water usage [...]”.

5.5 Flexibility/improvements

The BBP Guide (2009) recommends that the lease allow unilateral action to be taken (should the parties fail to reach agreement) so that the parties can implement measures aimed at reducing energy or water use or improving waste management. The draft BBP wording refers to the landlord carrying out works with the tenant’s agreement (but a footnote suggests that this might be deleted, enabling the landlord to take unilateral action) subject to the finished works not adversely impacting the tenant’s use of the property. It also enables the tenant, with the landlord’s consent not to be unreasonably withheld, to carry out alterations which improve resource efficiency. Seven of our sample leases made some kind of provision along these lines, but there is considerable variation in the wording used. Lease A, for example, uses a form of wording quite different to that of the BBP Guide (2009):

The owner and the occupier shall each co-operate with the other [...] in a reasonable manner in respect of any energy saving or carbon reduction initiative that the Owner may acting reasonably with regard to the cost thereof choose to implement in relation to the Building and the Occupier may choose to implement (but not so as to breach any of the Occupier’s Covenants) in relation to its use of the Property (Lease L has a similarly worded clause).

The clause in Lease A is contained within the service charge schedule, but the wording is somewhat awkward, especially as it refers to occupier initiatives as well as owner initiatives. The BBP Guide (2009) clearly states that it makes no recommendations as to how the cost of installing any equipment or making other physical changes in order to improve sustainability will be borne, or how any associated savings will be allocated. Not all of the clauses in our sample leases are worded the same way, but several implicitly or expressly enable the landlord to recover the cost through service charges. It would be interesting to monitor how these clauses work in practice, both as to the kind of works installed pursuant to them and as to recovery of costs.

Lease Bb has an interesting variation on such a green improvement clause. In this lease, there is a mechanism whereby the landlord is able to replace plant and equipment that is beyond economic repair with more efficient equipment (that is, even if this would constitute an “improvement” rather than “repair”), and potentially (the wording is complex and qualified) pass the excess cost on to tenants.

The problem of the “split-incentive” is a notorious obstacle to improving the environmental performance of tenanted commercial space; the landlord has limited financial incentive to install eco-efficient plant and machinery because the cost of servicing the building is borne by its tenants. Outside of the UK there are instances of leases being drafted to permit recovery of environmental upgrade costs associated with capital works directly benefiting the tenants through a special amortisation charge applied to the tenant. The Australian property company, Investa, has such a “green improvement” clause in its precedent lease and since 2009 this has been agreed to in approximately 50 per cent of negotiations (Bright and Roussac, 2012). As part of PlaNYC (an initiative to promote a greener New York City) an energy aligned lease has been developed which similarly enables the building owner to pass through capital expenses set against the predicted savings to tenants (Plan, 2013). The PlaNYC web site reports that since June 2012 the City of New York has signed three leases for over

400,000 square feet using the Energy Aligned Clause. None of our sample leases contained any provisions designed to enable the landlord to amortise capital spent on energy efficiency improvements in this kind of manner.

5.6 Restrictions on tenant's alterations and landlord's works

Under the draft wording in the BBP Guide (2009), if a tenant's proposed alterations will adversely affect an EPC rating or energy or water efficiency, the tenant has to provide information to the landlord and to "consider [and, where reasonable implement]" any suggestions the "landlord makes to [avoid/minimise] any such adverse effect". A footnote suggests that parties could go further and require the landlord's suggestions to be adopted, possibly limited by caveats as to their economic or practical feasibility. Ten of our sample leases had clauses requiring that any alterations and/or repairs undertaken by the tenant should take account of the environmental impact, but the wording varied considerably between the clauses.

In relation to proposed landlord works, the BBP draft provides that the landlord will consider reasonable suggestions made by the tenant to "[avoid/minimise] so far as reasonably possible, any adverse impact on an existing EPC [or DEC] rating or the efficiency of the use or water". Our sample leases did not contain similar wording.

5.7 Dilapidations clause

Acknowledging that removal of tenant's alterations at lease termination can lead to unnecessary waste and inefficiencies, the BBP Guide (2009) suggests a clause providing that the tenant is not required to remove tenant's environmental improvements unless this is reasonably required by the landlord having regard to its intended future use/re-letting of the property. Only two of our sample had clauses addressing this issue. Lease S had such a clause without the qualification relating to the landlord's future intentions.

5.8 Rent review

The BBP Guide (2009) discusses how environmental improvements should be treated on rent review and suggests principles for adoption. Only two sample leases refer to the relationship between environmental performance and rent review; both clauses are mentioned under the previous heading "Less Common Green Provisions Found".

5.9 Dispute resolution

The BBP Guide (2009) notes that the parties might wish to consider the interaction between usual remedies for breach of a lease and any green clauses. None of our sample leases do so.

5.10 Omissions

A clause commonly found in our sample leases (10 leases), but not within the BBP model form green lease clauses, was one which enables (or requires) the landlord to take account of environmental issues in service provision. An example is found in Lease Bb:

In providing the services and carrying out the works [...] the Landlord shall have regard to environmental good practice and energy and water efficiency [...].

6. Conclusion

The challenge of developing leases to facilitate improved environmental performance of commercial properties is an international one. There are occasional news reports of

green leases being signed in other European countries (particularly France and Germany), in the USA and Canada, in Australia and in South Africa. There is, however, no international database that contains illustrations of green leases clauses that are used.

This study has, however, developed a methodology that could be used to track the use of green leasing internationally. It is, however, very labour intensive. There is no easy way of obtaining copies of agreed leases and trawling through them for evidence of green provisions. As the method does not rely on the disclosure of lease contents by the parties it would be possible, with a large enough sample group, to make claims that are statistically relevant. Rolled out internationally, the details of how this can be done will vary according to different national means of recording land titles. There will always remain some kind of selection bias; in England and Wales this is because of the exclusion of short leases from the land register.

Our sample leases show that green lease principles have been used in commercial leases entered into in England and Wales during the years 2008-2013. The sample is not large enough, nor representative enough, to suggest any trends. The most frequently used green clauses in our sample are a commitment to data sharing, and to take account of environmental impact in both tenant alterations/repair clauses and in servicing commercial property. Almost a third of leases have a process in place for adopting an EMP. A number of the ideas within the BBP Green Lease Toolkit (2009) are reflected in the clauses seen, and it appears also that the wording of the Hammerson sustainability clause has been influential.

The flip-side of our findings is that long-term leases are still being entered into for green buildings which pay no attention to environmental issues. Although the limited scope of this study means that we can only speculate, there is unlikely to be significant penetration of green lease principles outside green buildings. It is also much less likely that small landlords will promote green lease principles (Hinnells *et al.*, 2008). Carbon emissions from the UK's non-domestic buildings are responsible for 18 per cent of the UK's total. These emissions need to reduce by at least 80 per cent by 2050 in order to assist UK's carbon reduction targets (Trust, 2009). The EU Energy Efficiency Plan acknowledges that there is a large untapped energy saving potential with existing buildings[13]. Lease terms must support initiatives that facilitate improved environmental performance if this potential is to be realised. Progress is being made on a voluntary basis, but it is slow and piecemeal. Much good work is being done through landlord-tenant engagement outside of the formal leasehold documentation and which is not visible from the public record, but this does need to be underpinned by the contractual relationships. It is a serious concern that green leases are not being more widely used, and are far from being the norm. It is important that market leaders demonstrate strong commitment to move the green lease agenda forward. It is hoped that the findings of this study – that green clauses are not simply idealistic models but are being used in practice – will help to build the momentum towards wider adoption of green leases.

[13] EU Energy Efficiency Plan 2011 COM (2011) 109 Final pp. 1-7.

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