

# MEES – are you ready for the changes from 1<sup>st</sup> April 2023?

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962), ('MEES Regulations') have been around for some time now with the aim of improving the energy efficiency of private rented property in the England and Wales, as required by the Energy Act 2011. If you are a landlord of commercial premises, you may be familiar with the need to obtain an Energy Performance Certificate ('EPC') and ensure that the property has an 'E or above' rating when granting a new lease or renewing an existing lease. However, there are important changes coming into effect from April 2023 which you should be aware of.

## What's new from April 2023?

The prohibition on granting a new lease of premises with an EPC rating below E is being extended so that from 1<sup>st</sup> April 2023, it will apply to all existing leases of commercial property as well, meaning that a landlord may be in breach of MEES Regulations if it continues to let non-domestic property which has a valid EPC with an energy performance asset rating of F or G. This means that if you already have a letting in place (especially if the lease was entered into pre-April 2018) and a valid EPC exists for it, you must assess the EPC rating to ensure that it is not a sub-standard property i.e., it has an energy performance asset rating of below E.

It is worth noting that 1 April 2023 is not a trigger to obtain a valid EPC, just to assess the rating and deal with sub-standard property, if an EPC already exists. A landlord may therefore wish to delay and control the obtaining of an EPC if one does not already exist (if it is legally able to do so), if it is concerned that the property may be sub-standard and the letting continues after 1 April 2023.

Where an EPC does exist for a continuing letting and the property is sub-standard, the Landlord must either:

- make sufficient energy efficiency improvements to the property so that it is no longer sub-standard; or
- claim one of the "legitimate reasons" not to do so and validly register this on the PRS Exemptions Register.

## Is the Lease still valid?

Regardless of whether the landlord is in breach of the MEES Regulations, a lease of sub-standard property

will remain valid and both parties must still comply with its provisions. Neither party can terminate the tenancy on grounds of non-compliance with the MEES Regulations nor can a landlord require the tenant to vacate because the property is sub-standard. Failure to comply with the MEES Regulations only means that the landlord may be subject to enforcement for non-compliance and the consequences are detailed below.

## What are legitimate reasons?

There are several exemptions or legitimate reasons not to make the required improvements to sub-standard property.

- **Consent exemption** - this applies where the undertaking of improvement works is not permitted by the lease or where the lease may expressly require approval from the tenant, and the Landlord has requested consent from the tenant to undertake the necessary improvement works to the property but the tenant has refused.

This exemption also extends to a refusal by a third party whose consent is needed to undertake such improvements works, despite reasonable efforts by the landlord to obtain such consent. Third parties may include a local authority, lender, superior landlord/tenant etc. Furthermore, even if the third-party consents to the proposed energy efficiency improvement, if the consent is subject to a condition which the landlord cannot reasonably comply with, then it will fall within this exemption. For example, if the condition reduces the landlord's ability to let the property or involves unreasonable costs, then it will be considered unreasonable.

The relevant energy efficiency improvements are treated separately. If refusal of consent or an

unreasonable condition applies to one or more of the required improvements but not all, then the landlord will have to carry out such part of the works as are consented to, even if they do not bring the property up above the minimum energy efficiency standard, to avoid being in breach of the letting restrictions.

The exemption lasts for five years after which time the landlord must repeat the process or carry out the works and the exemption must be registered on the PRS Exemptions Register.

- **Devaluation exemption** – this applies where a landlord has obtained a report from an independent surveyor which states that making the relevant energy efficiency improvements would result in a 5% or more reduction in the market value of the property, or the building of which it forms part.

Once again, a five year period applies and the landlord must register this exemption on the PRS Exemptions Register.

- **Temporary/New Landlord exemption** – this applies to give a landlord a six-month period to comply with the prohibition on letting of sub-standard property where a landlord is obligated to enter into a letting, has just acquired an interest in the sub-standard property or a lease has been granted by order of the Court. In such circumstances the landlord will not be in breach of the prohibition on letting sub-standard property, if the landlord has not carried out the relevant energy efficiency improvements, until expiry of the six-month period.

Please note that this exemption only applies where the landlord has registered the claim to this exemption on the PRS Exemptions Register.

- **Regulation 25 or 29 applies/Viable Improvements made** – whilst this is not referred to as an exemption it has the same effect. This applies where a landlord has undertaken all the relevant energy efficiency improvements to the property or there are none that can be made (see below) and the property remains sub-standard.

A way to assess whether there are any improvements works which can be undertaken is to apply the cost consideration test. Under the seven-year payback test a landlord does not have to carry out energy efficiency improvements if it is not cost efficient to do so, i.e., where the expected value of savings on energy bills from the relevant energy efficiency

improvement over a period of seven years from the date of installation, is less than the cost of carrying out the relevant improvement work.

Once again, like all the exemptions above, this must be registered on the PRS Exemptions Register and reassessed/claimed every five years.

*If your non-domestic let property is sub-standard, you should therefore carefully consider with an EPC assessor whether you can claim the benefit of any of the above exemptions.*

### **Consequences of not complying with MEES**

Where a landlord is in breach of the MEES regulations, it may be liable to civil penalties by the enforcing authority, which may include either or both of the following:

- Financial penalties – see details below; and/or
- Publication penalty – entry of the details of the breach on the public part of the PRS Exemptions Register including the landlord's details. This would mean public exposure of the landlord's failure to comply with the MEES Regulations.

The financial penalties will depend on the type of breach:

1. Breach of the letting restrictions:
  - a breach of less than 3 months – fine of £5000 or 10% of rateable value of the property at the date of service of the penalty notice, up to a max of £50,000 (whichever is greater); or
  - a breach of more than 3 months – fine of £10,000 or 20% of rateable value of the property at the date of service of the penalty notice, up to a max of £150,000, (whichever is greater).
2. Registration of false or misleading information on the PRS Exemptions Register by a landlord – a fine of up to £5000.
3. Failure to comply with a compliance notice by a landlord – a fine of up to £5000.

It is not however clear how the enforcing authority will police this.

### **What should Landlords do now?**

- A. **Review your property portfolio to identify any sub-standard properties.**
- B. **Check if the property has a valid EPC issued for it.** If you do not know this, you can check the public EPC register – [Find an energy certificate](#) –

**[GOV.UK \(www.gov.uk\)](http://www.gov.uk)**

- *If the property has an EPC rating of E or above:*

You need not be concerned for now. However, the government is under pressure to reduce its carbon emissions as part of its commitment to reach net zero by 2050, and the minimum rating will be increased from E to C by 2027 and to B in 2030 so landlords should aim for a rating of B sooner rather than later.

- *If your property has an EPC rating of less than E you should:*

- instruct an EPC assessor to determine what energy efficiency improvements (if any) are required to improve the asset rating;
- assess the lease to see whether it reserves rights for you to carry out the improvement works, or allows for this with the approval of the tenant; and
- ask an EPC assessor whether any of the exemptions apply - if they do you must ensure that you have registered the exemption with the prescribed information on the PRS Exemptions Register before 1 April 2023.

- *If your property does not have a current EPC but will continue to be let after 1 April 2023, you may wish to control the tenant commissioning an EPC without legal reason. If the tenant is looking to renew, underlet or assign the lease this cannot be avoided, however subject to the terms of the Lease, you may be able to appoint your own EPC assessor.*

Moorcrofts commercial property team provides legal advice to owners and occupiers of commercial property. Our highly skilled team offers both professional and practical expertise allowing our clients to have confidence in the advice provided.

If you would like to discuss the impact of the MEES further, please contact our head of commercial property – **Julia Ferguson**.

**C. Review your existing lease terms**

Most older leases will not contain provisions allowing the landlord to carry out works to comply with the MEES Regulations however, since the introduction of the Energy Act 2011, it is becoming more common to see this specifically addressed in new leases or for what is known as green lease provisions to be included.

- Landlords should review the terms of their existing leases to see if there are any provisions which might assist in complying with the MEES Regulations and who should pay for the works.
- Landlords should seek legal advice as to whether to include provisions if any new letting dealing with responsibilities under MEES Regulations.

**According to recent data published by Savills some 185m sq of UK retail stock is at risk of becoming unlettable from April next year if landlords fail to take action. Whilst some institutional landlords are already investing in making their properties more energy efficient smaller investors and landlords of lower grade properties or single units have been slower to act. All landlords need to act now to review their portfolios, assess the energy efficiency of their properties and review their leases.**



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