

How Far Can Landlords Go in Introducing Green Lease Provisions and Where Can Tenants Push Back?

Section 35 LTA 1954, MEES, and the O'May Principles

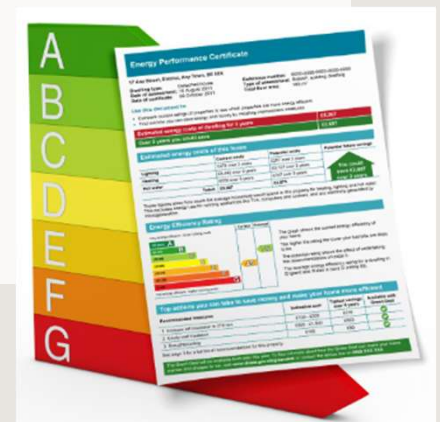
The Two Regimes

Section 35 LTA 1954

- Terms of renewed business tenancy
- Lord Wilberforce: language is "elastic"
- *"something between an obligation to reproduce existing terms and an unfettered right to substitute others"*

MEES / PRP Regulations 2015

- Minimum Energy Efficiency Standards
- Restricts letting of sub-standard properties
- Minimum band E for private rented property



Practical Scenarios

1

Lease Expiry

MEES compliance gap

2

Mid-Term Review

Tenant fit-out undermines energy performance

3

Investment value

Absence of green lease provisions diminishes reversion

4

Portfolio Reporting

Landlord contractually blind to consumption

The Sliding Scale of Green Lease Provisions



Informational / Cooperative

Data sharing, energy monitoring,
smart metering, access for audits

No capital cost

Behavioural / Operational

Waste segregation, restrictions
on carbon-intensive fit-out

Identifiable cost

Capital Improvement

External wall insulation, boiler
replacement, window upgrades

Unpredictable cost

The O'May Principles

O'May v City of London Real Property Ltd [1983] 2 AC 726

Lord Hailsham:

- 1 "Almost complete discretion" as to other terms
- 2 The starting point is the current tenancy

Lord Wilberforce:

Burden on the party seeking change - "strong and cogent evidence" - but no intention to "petrify" the terms of the lease.

- Reynolds & Clark §8-049, endorsed in Kwik-Fit v Resham [2024] EWCC 4

The Involuntary Insurer

Lord Wilberforce, O'May:

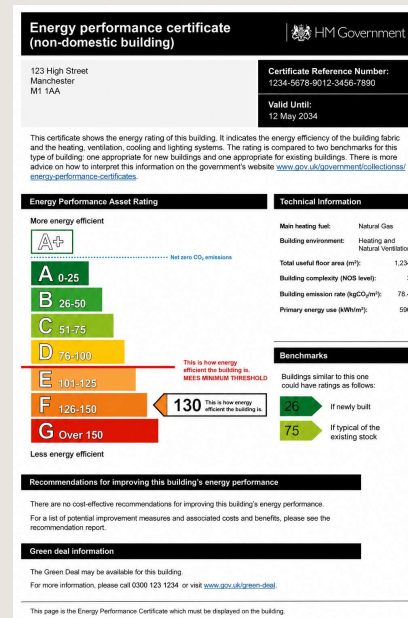
“They risk incurring a liability which is unpredictable and which may in the event of a structural defect be very great. They had no power of precautionary inspection and no means of verifying that work for which they are charged was necessary at the time, or was truly repair and not improvement.”

The same language. The same risk. A different category of works.

The MEES Framework

What MEES Does

- Prescribes minimum band E for non domestic property
- Restricts the letting of sub-standard properties



What MEES Does Not Do

- Does not compel works
- No open-ended improvement obligation
- Sub-standard lease remains valid and enforceable

The Landlord's Case

Regulatory Change

1

A "relevant circumstance" - the Act does not "petrify" the lease. Changed regulatory landscape justifies new terms.

Market Practice

2

Green lease provisions are increasingly standard. But "**not decisive**" per Lord Wilberforce.

Proportionate Provisions

3

Note the *Waler* distinction between identifiable and unknowable costs. Well-defined, capped obligations stand strongest.

Data-sharing = strong case. Capital improvement = steep uphill battle.

The Tenant's Arsenal

1

Burden on the Landlord – “what is your justification?”

Burden is entirely on the party seeking change. Tenant need only resist.

2

MEES limits

Regulatory baseline– why should tenant bear more?

3

Repair / Improvement Distinction

Wates v Rowland [1952] 2 QB 12— green works are improvements, not repairs.
Different legal basis required.

The Waaler Principle

Waalers v Hounslow LBC [2017] 1 WLR 2817

Lewison LJ:

“take particular account of the interests of the lessees, their views on the proposals and the financial impact of proceeding”

“A real difference between works which the landlord is obliged to carry out ... and work which is an optional improvement.”

“it would be quite impossible for the lessee to form any idea of the extent of his potential liability”

Waalers question: can the tenant assess what the obligation will cost?”

Further Tenant Points

No Double Recovery - tenant can challenge where third-party funding received

Exemptions - devaluation exemption (reg. 32): market value reduction > 5%

Length of Term

1

Short-Term Lease: capital investment cannot be recouped but informational obligations remain proportionate

2

Longer-Term Lease: stronger case for future-proofing - but *O'May* requires provisions to be defined / capped - not open-ended

3

Drafting: review points, regulatory-change triggers, capped expenditure

Unresolved Questions

1 How does the court weigh evolving environmental policy? How far ahead should it look?

2 Where is the line between MEES compliance and aspirational ESG?

3 The “involuntary insurer” tension – long term investment vs unpredictable cost.

Inconsistencies in the Authorities

Market practice = relevant but "no inherent necessity" to follow it.

At what point does ubiquity shift the balance?

Rent adjustment - "not necessarily fair compensation".

But *Hyams* and *Edwards & Walkden* suggest a more flexible approach

Practical Litigation Points

For Landlords

- Start at the lighter end of the scale
- Specific, proportionate, referable to identifiable objectives
- Market evidence - but do not over-rely
- Financial burden must be quantifiable and bounded
- Accept caps or cost-sharing mechanisms
- Property-specific evidence — not generic net zero policy

For Tenants

- Landlord's burden – so stand on existing terms
- Challenge characterisation: MEES compliance or discretionary improvement?
- *Waler*: is the tenant's exposure identifiable and bounded?
- MEES cost caps as a benchmark - why should the tenant bear more?
- Involuntary insurer within *O'May*
- Concede the lighter end of the scale - be seen to act reasonably

Essential Fairness

1

Section 35 is well equipped - *O'May* principles pre-date but accommodate the green agenda

2

The answer depends on what the landlord is asking for - lighter end strong; heavier end resisted

3

Significant questions remain untested - but the framework is there

So, still “elastic” ...

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