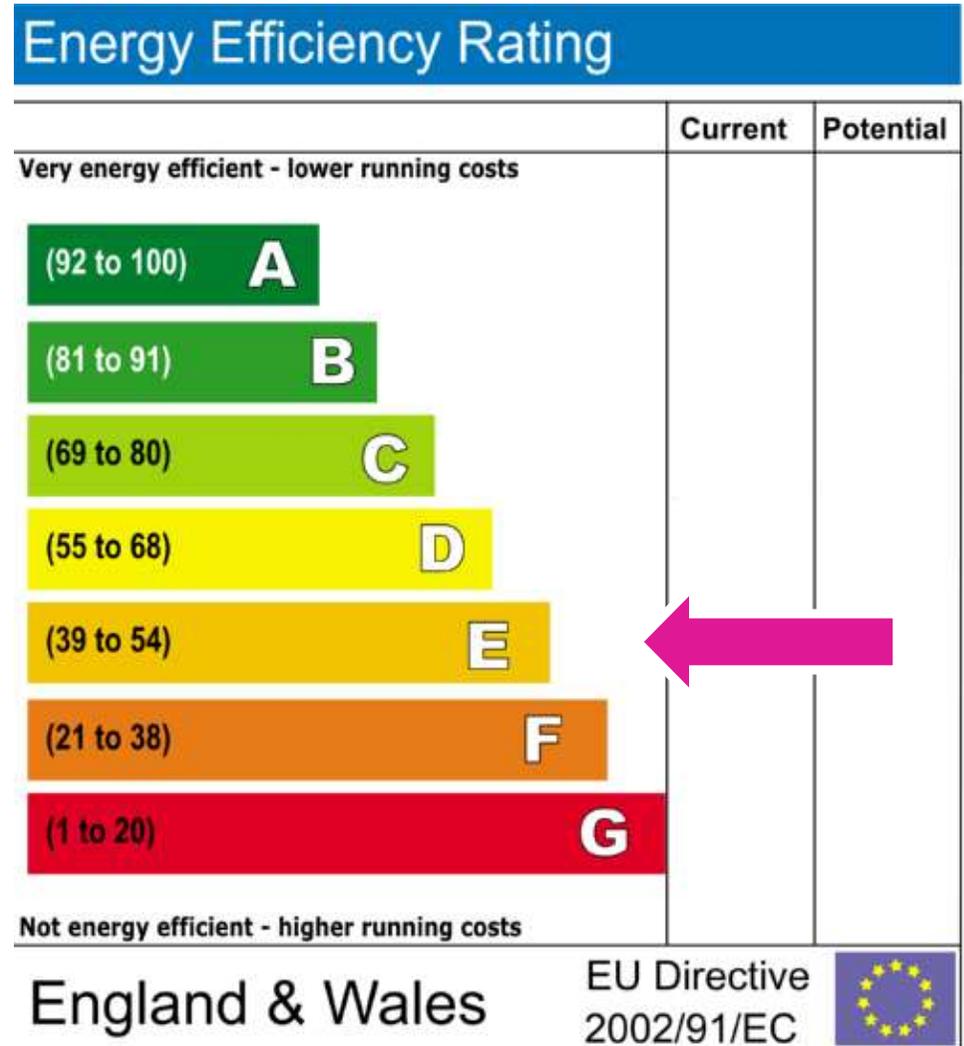

Are the MEES Regulations Fertile Ground for Litigation?

James Sutherland
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Background to MEES

- Introduced by legislation in 2015 to tackle the least 'energy efficient' properties in England and Wales.
- Requirement that all rented properties should be EPC 'E' rated or above.
- Fits into a wider strategy to tackle climate change – the Government has estimated that 18% of commercial properties currently hold the lowest EPC ratings (E and F).



Legislative Framework

**Energy Performance of
Buildings (England and
Wales) Regulations 2012**

The “EPC Regulations” - sets out the EPC regime

**Energy Efficiency (Private
Rented Property) (England
and Wales) Regulations
2015**

The “MEES Regulations” – sets out the legislative requirements for MEES.

**Non-domestic Private Rented
Property Minimum Standard –
February 2017**

Guidance – Not legally binding

The MEES Regulations

Timescales

**From 1
April 2018**

The MEES Regulations apply to new leases and the renewal/extension of current leases.

**On or after
1 April
2020**

The MEES Regulations will apply to all leases on domestic properties

**On or
after 1
April 2023**

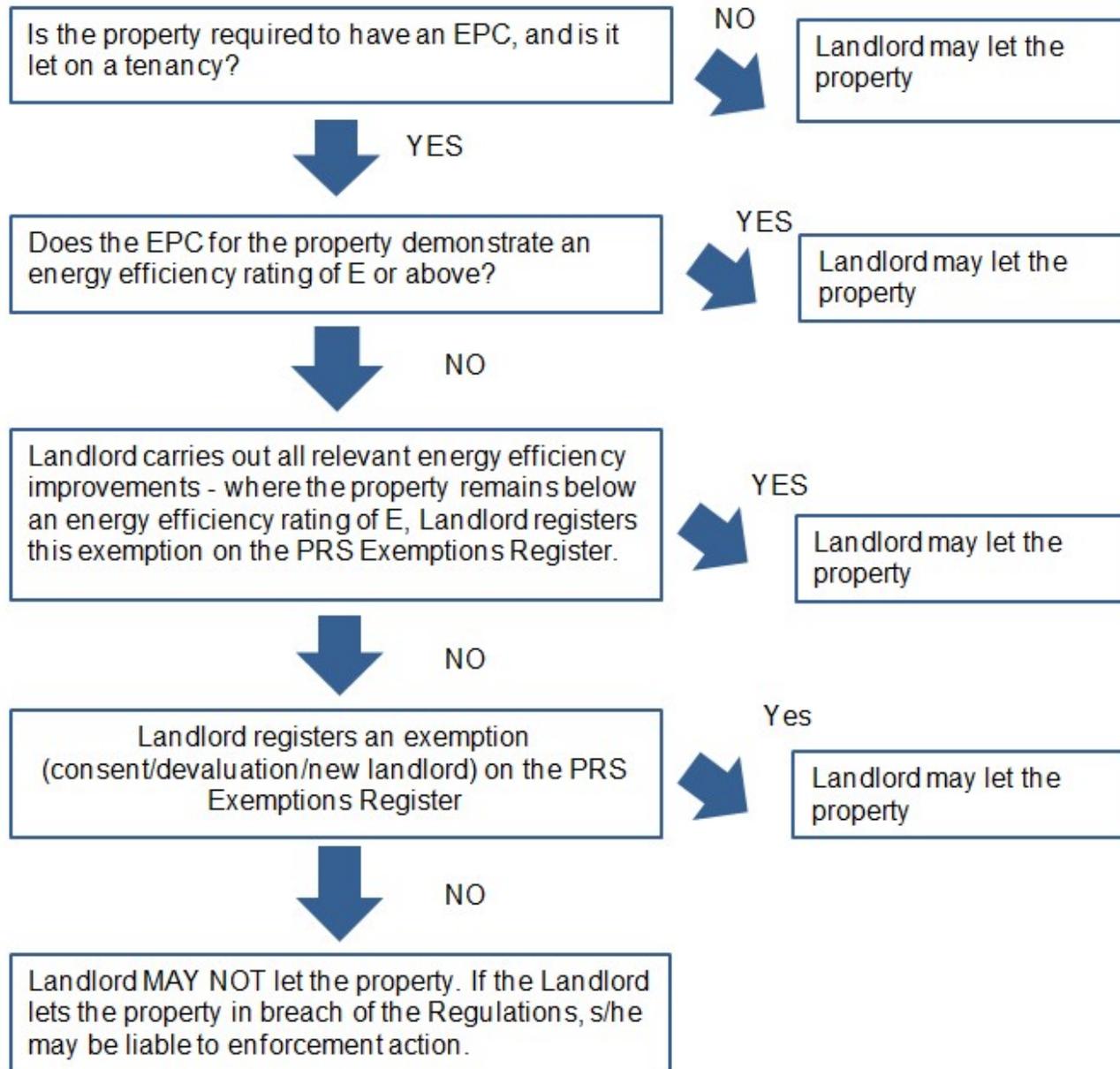
The MEES Regulations will apply to all leases on commercial properties

The Regulations - Scope

- Regulations apply to buildings required to have an EPC (Energy Performance of Buildings (England and Wales) Regulations 2012)
 - EPC Exemptions

Religious buildings, Industrial sites, workshops and non-residential agricultural properties with a low energy demand, holiday lets
 - EPC Triggers
 - New properties built
 - Existing properties sold/leased (excluding lease renewals?)
 - Significant alterations
-

Compliance Decision Process – from April 2018



Relevant Energy Efficiency Improvements

- Landlord has flexibility on how to improve the energy efficiency of his property to achieve an EPC “E” rating.
 - Relevant improvements are those recommended in “relevant recommendations report”, a report prepared by a surveyor or a Green Deal Advice report.
 - Commercial properties must meet the ‘Seven Year Payback Test,’ i.e. improvements should only be carried out where they are expected to deliver, within seven years, energy bill savings of at least the cost of purchasing/installing, plus interest at the Bank of England base rate.
 - If relevant works have been done and the property remains below an “E” rating, this exception must be registered.
-

Exemptions

Consent Exemption

Available where, in the previous 5 years, a landlord has been unable to increase the EPC rating due to the tenant not cooperating or third party consent being refused.

Devaluation Exemption

Available where, in the previous 5 years, the EPC rating has not increased due to an independent surveyor's report which states that making an improvement may devalue the property by more than 5% of its market value.

Temporary Exemption

Available to Landlord until six months after a certain event occurs, such as grant of a renewal lease under the 1954 Act.

N.B (1) exemptions must be registered on the PRS Exemptions Register

N.B (2) exemptions do not pass over on a sale

The MEES Regulations

Enforcement

Compliance Notices

A request for information which will enable the enforcement authority to decide whether a breach has occurred.

Financial Penalties

Breach less than 3 months – fine greater of £5,000 and 10% of the rateable value of the property). Cap of £50,000.

Breach over 3 months – fine greater of £10,000 and 20% of the rateable value of the property . Cap of £150,000.

Access to Carry out Relevant Energy Efficiency Improvements

- **No new rights of access granted under the EPC or MEES Regulations**
 - **Therefore, reliant on existing rights of access under lease**
 - **No obligations upon tenant to grant consent or to act reasonably – unless imposed by lease**
 - **If consent refused, may fall within Consent Exemptions in Regulation 32(1)(a) or 32(1)(b).**
 - **Landlord therefore may want to consider widening access rights in new leases – NB: balance against loss of potential exemption.**
-

Dilapidations

- **Potential supercession argument available to tenant if works of repair/reinstatement under lease would be incompatible with Landlord's future works to bring non-compliant premises up to standard.**
 - **NB: landlord has flexibility as to which works to undertake, therefore may be dispute over whether particular works are necessary to bring premises up to E rating.**
 - **Fact that premises are non-compliant will also be potentially relevant to s.18 valuation.**
 - **Also consider potential impact of works to sub-let part of premises to EPC for whole building if there is a headlease in place – landlord may need to undertake works to ensure that headlease does not become non-compliant in 2023.**
-

Lease Renewals under Landlord and Tenant Act 1954

- **Regulation 27(1)(a) – Landlord must not**
on or after 1st April 2018, grant a new tenancy which falls within section 42(1)(b) of the Act, or let the property on such a tenancy as a result of an extension or renewal of an existing tenancy
- **‘Extension or Renewal’ not defined in Regulations. MEES Guidance refers to grant of lease to same tenant as before, but makes no mention of 1954 Act or statutory renewal.**
- **But, there is a Temporary Exemption in relation to 1954 Act renewals (Reg. 33(2)(e))**
- **Safest to assume that lease renewal does fall within Regulation 27, assuming there is a valid EPC in relation to the property.**

Lease Renewals under Landlord and Tenant Act 1954

- **What if there is no existing EPC? Is a new EPC required upon renewal?**
- **No exemption for lease renewals under EPC Regulations.**
- **However, EPC Regulations only require an EPC to be produced on a sale or letting. EPC Guidance states (page 12):**

“Not all transactions will be considered to be a sale or let. These will include... lease renewals or extensions.”
- **This is contradicted by MEES Guidance (para 8), which states that an EPC is required on a re-letting to a current tenant.**

Lease Renewals under Landlord and Tenant Act 1954

Rent Under Renewal Lease

- **What is open market rent if premises are let in breach of MEES Regulations?**
 - **Letting in breach of MEES Regulations does not invalidate lease. Therefore have to assume that there is a letting – rent will not be £0.**
 - **However, would hypothetical tenant discount rent, to reflect the fact that the landlord is letting a sub-standard property?**
 - **Disregard tenant's improvements under s.34(1)(c). If premises are only compliant as a result of tenant's works, consider impact on rent.**
-

Lease Renewals under Landlord and Tenant Act 1954

Other Terms of Renewal Lease

- **Court will assume that premises are capable of being lawfully let, even if this is not actually the case (IRC v Gray [1994]).**
- **Temporary Exemption (6 months) under Regulation 33(2)(e) of MEES Regulations where renewal lease granted under 1954 Act.**
- **Will Court be prepared to impose right of access to carry out Relevant Improvements during this period?**
- **Additional rights of access for landlord, bearing in mind prohibition on continued lettings of sub-standard properties from 2023? Would the impact of this term be rentalised?**

Applicability of MEES to Rent Reviews

- **Hypothetical letting will require an EPC.**
- **If hypothetical premises are/would be an F/G rating, then need to consider impact on valuation.**
- **Could be by reference to existing EPC (if < 10 years old) or new EPC, provided this is not prohibited by lease or RR assumptions.**
- **NB: Conditions for EPC ratings have become more stringent over time – an older EPC may indicate a higher rating than would now be the case.**
- **Can tenant unilaterally apply for a new EPC under terms of lease? Some new leases have restrictions on tenant's ability to do so in light of MEES.**

Rent Review

Notional Premises

- **What if assumed premises are different from actual fit-out? May need new EPC for hypothetical premises**
 - **What if we are asked to assume fit-out which has no/limited plant?**
 - **Will need an EPC, but assessment based on assumption that the property will be fitted out with the most energy intensive fixed services which would be allowed under Part L of the Building Regulations.**
-

Rent Review

What if actual/notional premises are F/G rated?

- Letting in breach of MEES regulations will not invalidate the lease.
 - Probably cannot assume that there is no transaction (or nil rent) – will be assumed that landlord is willing to let premises (*FR Evans (Leeds) v English Electric (1977)*)
 - Must also assume that tenant is willing to take premises in condition specified in RR clause, even if this would be unattractive in the market.
 - Must also assume that premises are capable of being lawfully let, even if this is not actually the case (*IRC v Gray [1994]*).
 - Do you assume that tenant will allow access? Alternatively, will hypothetical parties act to bring premises within consent exemption?
-

Rent Review

What is the assumed condition of the premises?

- Should not imply additional landlord works to premises pre-letting, even if reasonable landlord in the market would actually do such works (*IRC v Gray*).
 - Therefore cannot rentalise works which would be required to bring premises up to 'E' rating.
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