

## WICKED insights into the role of green leases

Julia Patrick, Research Associate, Environmental Change Institute, University of Oxford,  
julia.patrick@ouce.ox.ac.uk

Professor Susan Bright, Law Faculty, University of Oxford, susan.bright@law.ox.ac.uk

### Introduction

Improving the energy performance of existing rented commercial buildings is a key part of meeting the UK's carbon reduction targets. In 2008, a special issue of this journal<sup>1</sup> highlighted the role of commercial leases in influencing environmental and energy management of buildings, and the emergence of "green leases" as a tool to support more effective environmental performance, suggesting that a "Green Lease may well become a benchmark for the successful letting of property".<sup>2</sup>

This article explores the way in which green leases have evolved since then, using evidence from the Oxford University-based "WICKED" research project that investigates energy management in the UK retail sector.<sup>3</sup> Drawing on evidence from interviews with industry participants (landlords, tenants, property management companies, lawyers and industry associations) as well as analysis of various documents (toolkits, model leases, and company reports) the article considers the drivers for adopting (or resisting) green leases, the more common clauses found within green leases, and their potential impact. Although the WICKED project has focused on the retail sector, which exhibits particular complexity, many findings are more broadly applicable, with interviewees (particularly property companies) commenting on issues relevant to their wider portfolios.

Whilst a number of studies have explored aspects of the evolution and uptake of green leases,<sup>4</sup> there is little evidence about the extent to which green clauses are incorporated into standard legal precedents or adopted in signed leases, and how this maps against different types of company, property, sector and location. In addition, little is known about the practical impact of green lease clauses once they are adopted. To help address some of these gaps, the Oxford University-based "WICKED" project set out to investigate further the role and impact of leases in relation to energy management, as part of a broader, interdisciplinary investigation of energy management practices and issues across the UK retail sector. The project, running from July 2014 to July 2016, has proved particularly timely given the forthcoming introduction of minimum energy efficiency standards (MEES) for commercial buildings, an issue that has featured heavily during the project. MEES,

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<sup>1</sup> Conv. 2008, 6, 485.

<sup>2</sup> S. Bright, "The green lease: an introduction" [2008] 6, Conv. 485.

<sup>3</sup> Working with Infrastructure, Creation of Knowledge and Energy Strategy Development. The WICKED project is funded by the Engineering and Physical Sciences Research Council. See [www.energy.ox.ac/wicked](http://www.energy.ox.ac/wicked)

<sup>4</sup> E.g. S. Bright and H. Dixie [2014]. Evidence of green leases in England and Wales. *International Journal of Law in the 21st Century*, 6(1/2), 6–20; Hinnells, M., S. Bright, A. Langley, L. Woodford, P. Schiellerup, & T. Bosteels. (2008). The greening of commercial leases. *Journal of Property Investment & Finance*, 26(6), 541– 551. doi:10.1108/14635780810908389 .

introduced in the 2015 Energy Efficiency Regulations,<sup>5</sup> have provoked renewed discussion about the role of leases, and green clauses, in managing the energy efficiency performance of commercial buildings.<sup>6</sup>

With certain exceptions,<sup>7</sup> MEES will make it unlawful from April 2018 to let properties that fail to achieve the minimum standard of EPC rating E. The policy goal is to incentivise the improvement of properties that fall below this standard but, as will be seen below, the interaction of lease wording and the MEES provisions may sometimes undermine this. Industry responses to, and views on, MEES have varied greatly across different participants, reflecting the broader picture of diversity in approaches to energy management generally, and in the role of lease clauses within this.

Before presenting findings from the WICKED project, the article explains the background and context of green leases and the WICKED project. There is a brief overview of the research approach used, with fuller details given in the Annex. The article then presents key findings emerging from WICKED interviews, centred around various themes: the landlord-tenant relationship and the significance of the split incentive; uptake and content of green leases; the drivers behind the adoption of green leases, as well as the reasons for resisting their use; and the impact that green leases have – or may have – in practice. This is followed by a brief discussion of the emerging picture and some concluding thoughts on the role of leases within energy management practices.

## **Background and context: energy management, the landlord-tenant relationship and green leases**

### *Energy management challenges and opportunities in the retail sector*

Improving the energy efficiency performance of existing rented commercial buildings is considered a key component of – and opportunity for – meeting the UK's carbon reduction targets.<sup>8</sup> Energy use in non-domestic buildings accounts for about 12% of the UK's emissions and it has been estimated that about 60% of today's non-domestic buildings will still exist in 2050.<sup>9</sup> Within the commercial buildings sector, more than half of properties are rented.<sup>10</sup>

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<sup>5</sup> The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 No. 962, <http://www.legislation.gov.uk/ukdsi/2015/9780111132432/contents> [16 March 2016]

<sup>6</sup> E.g. B. Farnell [2015] "MEES: Opening the floodgates for green leases?", UK Green Building Council, <http://www.ukgbc.org/resources/blog/mees-opening-floodgates-green-leases> [16 March 2016]; BSDR [2014], "Green leases and minimum energy performance standards", <http://www.bsdr.com/green-leases-and-minimum-energy-performance-standards.aspx> [16 March 2016]; J. Patrick, S. Bright, C. Jaksch [2015], "Still going green?", Estates Gazette, 29 August 2015, pp.50-52, EGI, <http://www.egi.co.uk/legal/still-going-green/> [16 March 2016]

<sup>7</sup> The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 No. 962, <http://www.legislation.gov.uk/ukdsi/2015/9780111132432/contents> [16 March 2016], Reg 25 and Chapter 4.

<sup>8</sup> See e.g. Department of Energy and Climate Change (DECC) (2014), "Private Rented Sector Minimum Energy Efficiency Standard Regulations (Non-Domestic) (England and Wales) – Consultation on implementation of the Energy Act 2011 provision for energy efficiency regulation of the non-domestic private rented sector"

<sup>9</sup> Carbon Trust (2009), "Building the Future Today", <https://www.carbontrust.com/resources/reports/technology/building-the-future> [30 June 2016]

The retail sector presents particular opportunities and challenges within this: it is the second highest energy consuming sector with a total cost of energy in 2013 of £3.2 billion.<sup>11</sup> Energy management in the retail sector is seen within the industry as both a complex challenge and a significant opportunity, and for rented buildings the landlord-tenant relationship has been highlighted as one important aspect of this.<sup>12</sup>

### *The landlord-tenant relationship and split incentives*

Barriers to realising energy efficiency opportunities are well rehearsed and include issues relating to the underdeveloped market in energy efficiency products and services, the paucity of understanding and information about energy efficiency opportunities and savings, lack of trust, and behaviour barriers that lead to energy efficiency being undervalued. In the landlord-tenant context there is also the 'split incentive'.<sup>13</sup> The Government's recent consultation on MEES<sup>14</sup> highlights this as a particular barrier and defines it as a situation where "the costs of energy efficiency improvements are borne by landlords, while the benefits (lower energy bills) accrue to current or future tenants".<sup>15</sup> The Government's impact assessment in relation to MEES explains: "In principle, in a well-functioning market, rent levels should fully reflect differences in a property's energy efficiency thus overcoming this split incentive issue. However, the presence of other market failures, such as imperfect information on the costs and benefits associated with energy efficiency measures, [means that] rents may not fully reflect differences in energy efficiency. This leaves landlords with little incentive to make energy efficiency improvements."<sup>16</sup>

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<sup>10</sup> Property Industry Alliance (PIA) (2015), "Property Data Report 2015", <http://www.ipf.org.uk/resourceLibrary/pia-property-data-report-2015.html>

<sup>11</sup> The Green Construction Board (2015), "Three Years On Report, March 2015 – Reducing Carbon Reduces Cost", <http://www.infrastructure-intelligence.com/article/mar-2015/followership-key-driving-reducing-carbon-reduces-cost-message-down-supply-chain> [19 April 2016]

<sup>12</sup> E.g. British Retail Consortium (BRC) (2014), "A Better Retailing Climate: Driving Resource Efficiency", [http://www.brc.org.uk/ePublications/ABRC\\_Driving\\_Resource\\_Efficiency/index.html#/4/](http://www.brc.org.uk/ePublications/ABRC_Driving_Resource_Efficiency/index.html#/4/) [30 June 2016]; British Council of Shopping Centres (BCSC) and CBRE (2015), "Sustainable Shopping Centres- Energy, Performance and Value", [https://www.bcsc.org.uk/news/view?id=67&x\[0\]=news/list](https://www.bcsc.org.uk/news/view?id=67&x[0]=news/list) [30 June 2016].

<sup>13</sup> E.g. DECC (2012), "The Energy Efficiency Strategy: The Energy Efficiency Opportunity in the UK", [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf) [30 June 2016]; European Commission (2011) Energy Efficiency Plan 2011. COM(2011) 109, European Commission, Brussels, [http://ec.europa.eu/clima/policies/strategies/2050/docs/efficiency\\_plan\\_en.pdf](http://ec.europa.eu/clima/policies/strategies/2050/docs/efficiency_plan_en.pdf) [30 June 2016]; Carbon Trust (2009) "Building the Future, Today", <https://www.carbontrust.com/resources/reports/technology/building-the-future> [30 June 2016]; Axon, C. J., Bright, S., Dixon, T., Janda, K. B., & Kolokotroni, M. (2012). "Building communities: Reducing energy use in tenanted commercial property". Building Research & Information, 40(4), 461 – 472.

<sup>14</sup> DECC (2014), "Private Rented Sector Minimum Energy Efficiency Standard Regulations (Non-Domestic) (England and Wales) – Consultation on implementation of the Energy Act 2011 provision for energy efficiency regulation of the non-domestic private rented sector", [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/338398/Non-Domestic\\_PRS\\_Regulations\\_Consultation\\_v1\\_51\\_No\\_Tracks\\_Final\\_Version\\_30\\_07\\_14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338398/Non-Domestic_PRS_Regulations_Consultation_v1_51_No_Tracks_Final_Version_30_07_14.pdf) [30 June 2016]

<sup>15</sup> *Ibid.*, p.18.

<sup>16</sup> Department of Energy and Climate Change (DECC) (2015), "Consultation Stage Impact Assessment for the Private Rented Sector Regulations",

These problems are commonly reflected in – and arguably reinforced by – the legal arrangements between landlords and tenants, in the form of leases. Typically commercial leases will not allow the costs of landlord energy efficiency improvements to be recovered from tenants, nor will they allow tenants to carry out structural alterations.<sup>17</sup>

The retail sector has certain features which, arguably, magnify split incentives. Typically, occupiers are more likely than office tenants to be in control of their own energy supply and of fit out of their premises; they tend to focus more on sales and footfall than cost reduction; and location is considered a dominant driver of value and may override the significance of any energy efficiency features.<sup>18</sup>

### *Green leases and memoranda of understanding*

The Better Buildings Partnership (BBP)<sup>19</sup> has played a leading role in promoting the use of green clauses in the UK, developing a “Green Lease Toolkit” which includes model clauses and guidance “to enable owners and occupiers of commercial buildings to work together to reduce the environmental impact of their buildings”.<sup>20</sup> The BBP toolkit includes “Model Form Green Lease Clauses” as well as a model Memorandum of Understanding (MOU) and accompanying advice. MOUs have been promoted as non-binding agreements that can be used alongside and to supplement existing leases. The most notable example of the use of green MOUs is UK retailer M&S who, working in partnership with BBP members, has entered into 65 green MOUs with BBP members, based on the BBP toolkit.<sup>21</sup> Beyond the BBP, the concept of green clauses has been picked up more widely in the industry, in particular through the development of the “Model Commercial Lease”,<sup>22</sup> which includes a number of model leases tailored to different sectors and situations (e.g. offices, shopping centres, industrial units), each containing sustainability or “green” provisions covering landlord-tenant cooperation on environmental and energy management.

### *Regulatory and industry context*

Alongside these developments, the UK Government has introduced a range of regulatory measures over the years, to require and encourage energy efficiency improvements in the

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/335073/Consultation\\_Stage\\_Impact\\_Assessment\\_for\\_the\\_PRS\\_Regulations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335073/Consultation_Stage_Impact_Assessment_for_the_PRS_Regulations.pdf) [19 April 2016]

<sup>17</sup> E.g. Bright, S.J. (2008) “Drafting green leases”. *Conveyancer*, 72, 498–517; Roussac, A.C. and Bright, S. (2012), “Improving environmental performance through innovative commercial leasing: an Australian case study”, 4 *International Journal of Law in the Built Environment* 6.

<sup>18</sup> See e.g. British Council of Shopping Centres (BCSC) and CBRE (2015), “Sustainable Shopping Centres- Energy, Performance and Value”, [https://www.bscs.org.uk/news/view?id=67&x\[0\]=news/list](https://www.bscs.org.uk/news/view?id=67&x[0]=news/list) [30 June 2016]

<sup>19</sup> A partnership of large and institutional commercial property owners which supports sustainability initiatives in the commercial built environment. See <http://www.betterbuildingspartnership.co.uk>

<sup>20</sup> See <http://www.betterbuildingspartnership.co.uk/green-lease-toolkit> [30 June 2016]; Kathryn B. Janda, Susan Bright, Julia Patrick, Sara Wilkinson & Timothy J. Dixon (2016): “The evolution of green leases: towards inter-organizational environmental governance. *Building Research & Information*, <http://dx.doi.org/10.1080/09613218.2016.1142811> [30 June 2016]

<sup>21</sup> M&S (2015), “Plan A Report 2015”, p.21, <http://corporate.marksandspencer.com/media/6e633a181b124309bab60137c8171017> [30 June 2016]

<sup>22</sup> See <http://modelcommerciallease.co.uk>

commercial built environment. These include Building Regulations, the Carbon Reduction Commitment (CRC) Energy Efficiency Scheme<sup>23</sup>, the Energy Saving Opportunities Scheme (ESOS) and Energy Performance Certificates (EPCs) which are required when buildings are constructed, let or sold and which rate properties based on age, size and fabric of the building.<sup>24</sup> MEES, however, are the first measure to explicitly address issues associated with rented commercial properties, including the split incentive. From April 2018 it will be unlawful to let non-domestic properties (including lease renewals or extensions) which have an EPC rating of F or G unless all recommended energy efficiency improvements with a payback period of 7 years or less have been carried out. Landlords will be exempted from this prohibition where tenants or third parties have refused consent to relevant energy efficiency improvements, or where such an improvement would adversely affect the value of the relevant property by more than 5%.<sup>25</sup>

In parallel a number of industry initiatives and benchmarks encourage the development of sustainable buildings. In the UK, the Building Research Establishment Environmental Assessment Methodology (BREEAM)<sup>26</sup> sets a common standard for assessing and comparing the environmental impact of commercial buildings. An earlier (2011) version of BREEAM specifically awarded points for the adoption of green leases, but BREEAM's most recent version no longer does so, instead rewarding the use of green fit-out agreements.<sup>27</sup> At international level, the Global Real Estate Sustainability Benchmark (GRESB) compares annually the environmental performance of global real estate portfolios, including the adoption of green lease clauses as part of the assessment criteria under the category "stakeholder engagement".<sup>28</sup>

These initiatives have all been designed to support the development of more sustainable buildings and create a host of drivers and influences that property owners will need to consider when investing, developing and managing their buildings. Some of the ways in which these initiatives play out in practice are explored in our findings below.

### *The evolution of green leases*

As mentioned above, not much is known about the extent to which green clauses are being adopted in the retail – or wider commercial – sector in the UK. At the international level, the 2015 GRESB report states that 60% of participants (large property companies and

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<sup>23</sup> To be abolished following the recent announcement in the 2016 Budget: HM Treasury (2016), "Budget 2016", <https://www.gov.uk/government/publications/budget-2016-documents/budget-2016> [22 March 2016]

<sup>24</sup> Department of Energy and Climate Change (DECC) (2014), "UK national energy efficiency action plan", <https://www.gov.uk/government/publications/the-uks-national-energy-efficiency-action-plan-and-building-renovation-strategy> [22 March 2016]

<sup>25</sup> Following certain events, the prohibition may not bite for 6 months: see The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 No. 962, <http://www.legislation.gov.uk/ukdsi/2015/978011132432/contents> [16 March 2016] Reg 33.

<sup>26</sup> BRE. (2014). "BREEAM UK new construction, non-domestic buildings. Technical Manual: Version: SD5076 – Issue: 3.0". [http://www.energyratingservices.co.uk/\\_assets/pdfs/SD5076-BREEAM-UK-New-Construction-2014-Technical-Manual-ISSUE-3.0-UK.pdf](http://www.energyratingservices.co.uk/_assets/pdfs/SD5076-BREEAM-UK-New-Construction-2014-Technical-Manual-ISSUE-3.0-UK.pdf) [30 June 2016]

<sup>27</sup> Parker, J. (2014). BREEAM 2014. Retrieved 6 August, from <http://www.flattconsulting.com/Articles/breeam-2014.html> [30 June 2016]

<sup>28</sup> Global Real Estate Sustainability Benchmark (GRESB) (2016), "2016 GRESB Real Estate Reference Guide", <https://www.gresb.com/realestate2015/downloads> [30 June 2016]

investment funds) had included 'sustainability-specific' clauses in their leases.<sup>29</sup> Previous UK studies have focused on relatively small samples and on larger companies that typically operate in the prime market and/ or in the office sector.<sup>30</sup> Recent studies by the British Council of Shopping Centres suggest that retailers tend to resist green clauses, and may even be introducing 'anti-green' clauses, e.g. explicitly excluding environmental improvement works from service charges, so that landlords are unable to recover any costs associated with such works.<sup>31</sup> In relation to the impact and role of green leases, studies have tended to identify the potential benefits of green lease clauses, in line with the BBP general objectives around enhancing environmental performance and landlord-tenant cooperation,<sup>32</sup> but no empirical assessment of their impact has been carried out to date.

Within its broader study of energy management practices the WICKED project provides qualitative empirical findings on green leases: their role and content, drivers for using or resisting them, and their impact.

## Research approach

Findings from the WICKED project are based on analysis of views gathered through semi-structured interviews with industry experts and participants. The project team carried out 29 interviews with 38 representatives of 25 different organisations, including property owners, retailers, letting and property management companies, energy management companies, law firms and legal experts, and industry intermediaries and experts. Half of the interviewees were reflecting on their own company's approach and experience; whilst the remainder were commenting from a broader perspective that reflected the spread of views within broad industry groupings or a range of clients. More than a third of interviewees were lawyers, reflecting the particular aim within WICKED to drill down to the content of leases. Lawyers are also able to provide a wider perspective on market diversity (perhaps according to client size and type, property types, etc), which gave some, albeit limited, insight into practice in the secondary market as well as experience amongst SMEs. The

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<sup>29</sup> Global Real Estate Sustainability Benchmark (GRESB) (2015), "2015 GRESB Report", <https://www.gresb.com/realestate2015/downloads> [30 June 2016]

<sup>30</sup> E.g. S. Bright and H. Dixie [2014] "Evidence of green leases in England and Wales". International Journal of Law in the 1270 Built Environment, 6(1/2), 6–20; Langley, A., Hopkinson, L. and Stevenson, E. V. 2010. "Green Leases: An opportunity to develop a sustainable approach for tenanted commercial buildings in the UK." Presented at: *5th International Conference on Improving Energy Efficiency in Commercial Buildings (IEECB'08)*, Frankfurt, Germany, 10-11 April 2008. Published in: Bertoldi, P. and Atanasiu, B.eds. *Proceedings of the 5th International Conference on Improving Energy Efficiency in Commercial Buildings: IEECB Focus 2008*, Vol. 1. Luxembourg: Office for Official Publications of the European Communities, pp. 247-256

<sup>31</sup> British Council of Shopping Centres (BCSC) and CBRE (2015), "Sustainable Shopping Centres- Energy, Performance and Value", [https://www.bcsc.org.uk/news/view?id=67&x\[0\]=news/list](https://www.bcsc.org.uk/news/view?id=67&x[0]=news/list) [30 June 2016].

<sup>32</sup> E.g. Langley, A., Hopkinson, L. and Stevenson, E. V. 2010. "[Green Leases: An opportunity to develop a sustainable approach for tenanted commercial buildings in the UK.](#)" Presented at: *5th International Conference on Improving Energy Efficiency in Commercial Buildings (IEECB'08)*, Frankfurt, Germany, 10-11 April 2008. Published in: Bertoldi, P. and Atanasiu, B.eds. *Proceedings of the 5th International Conference on Improving Energy Efficiency in Commercial Buildings: IEECB Focus 2008*, Vol. 1. Luxembourg: Office for Official Publications of the European Communities, pp. 247-256; Roussac, A.C. and Bright, S. (2012), "Improving environmental performance through innovative commercial leasing: an Australian case study", 4 International Journal of Law in the Built Environment 6.

majority of interviewees, however, represented opinions and experience amongst the larger companies more likely to operate in the prime property market.

Interview evidence was supplemented by analysis of company strategy reports, green lease clauses in company templates, and model green lease clauses promoted by industry partnerships, and a review of policy documents and industry reports. More detail on WICKED's research approach is set out in the Annex.

The findings display a range of views, experiences and practices. Further, as will be seen, the emerging picture is not all in one direction – although it would be neat to present some bold statements about when, which and how green clauses are used the reality is that there is a hugely varied market and picture and a diversity of opinions.

## Interview findings

Findings are summarised under the following five sub-themes, (1) the significance of the landlord-tenant relationship, (2) the uptake and content of green clauses, (3) drivers of green clauses, (4) resistance to green clauses, and (5) the impact of green clauses. As mentioned above, given the qualitative nature of the investigation, findings in relation to uptake and content are particularly tentative; however, they provide useful context and a sense of the overall market within which considerations in relation to drivers and impact play out.

### *The landlord-tenant relationship and split incentive*

One of the issues explored in the interviews was the extent to which split incentives hinder investment in energy efficiency improvements. In summary, whilst interview findings indicated split incentives have some effect, the issues were raised in diverse and nuanced ways. In practice the landlord-tenant relationship and split incentives are only part of the picture as to why improvements may not be undertaken.

Typical lease provisions do not allow for the recovery of improvement costs. According to one lawyer:

“Some service charge clauses may try and include the cost of improvements but tenant lawyers will tend to strike out anything like that to improve the value of the reversion.” (Interviewee 18)

Interviewees gave examples of (generally hypothetical) situations (for example in relation to lighting upgrades in common parts) where a landlord might wish to pass on the costs of energy efficiency improvements through the service charge. Tenants would usually resist this. For landlords there is a tension between wanting to pass all costs on through the service charge, particularly where they perceive no clear link to rental or capital values, but also a pressure to keep the service charge below a certain level or within a certain budget. One property management company suggested that whilst there was an issue with the split incentive, in practice this could be overcome in most cases, for example by recovering improvement costs through the service charge spread over a number of years.

As one property owner explained, however:

“it’s not always been clear-cut that if you upgrade lighting, whether a) your leases allow you to do that because it’s an improvement and, in general, you shouldn’t really. Tenants don’t like funding improvements. And b) you have other pressures on the service charge and ideally, you try to keep the service charge below a certain level” (Interviewee 16)

Passing on costs through the service charge may also bring its own complications. Resources, data requirements, and the complexity of accounting arrangements associated with sharing or recovering improvement costs can be a deterrent. The representative of one property management company explained the problem:

“I’ve seen some cases where the fund or the property company will pay for something upfront and then charge it back through the service charge over the course of years and that’s a good way of doing things. But someone needs to think that through and come up with that mechanism. ... So just the kind of accountancy of doing these things is really complex and that means that something that should be quite straightforward... and there’s real frustration I think there. Everybody can see there’s a really obvious thing to do, but the complexity of just getting that paid for and the number of man hours involved in working out how that... you think the actual improvement only cost £3,000 but the amount of fees involved in working out who pays for what and when, and that’s been £10,000 worth of professional fees of people getting involved and working it out.” (Interviewee 30)

There is also a general reluctance by tenants to pay for improvements, regardless of lease provisions; as one lawyer described it, “Generally tenants don’t like paying for improvements” (Interviewee 19). Another lawyer, acting in-house for a retailer, explained:

“...the last thing you want is to have to deal with energy efficiency improvements which are only going to increase the capital value for the landlord...’ (Interviewee 28)

Some suggested that the wording of the lease was less relevant than what could be agreed with tenants outside the lease on a case-by-case basis, taking into account financial benefits, potential disruption, the specific measures in question and whether they could be considered replacement (e.g. LED lighting), and the overall service charge budget.

A few respondents suggested that the advent of MEES might lead landlords to circumvent the split incentive by carrying out improvements following the end of a lease, when the relevant property becomes vacant, and then attempting to increase the rent to recoup costs.

Others saw the route to overcoming the “landlord-tenant split” more in terms of improving general engagement and communication and/ or providing information to help address any design-performance gap, working with agents and property managers as appropriate. One property company explained the “Soft Landings” approach they adopt:

“Soft Landings is originally a BSRIA initiative that was developed by BSRIA and the Government have adopted it for their public buildings, ... It’s essentially looking at when you’re developing a new building and making sure that the transition between that... so the handover is as smooth as possible and as part of that, we’ve identified the need to ensure that agents are kept up to speed because they’re the ones that

are going out and speaking to the tenants and getting them to come in. So they're well placed to be able to engage with tenants and it's getting the right people. I think that's the main things that we need to consider in terms of the landlord-tenant split." (Interviewee 11)

Several respondents made the point that certain retailers do (in any event) carry out effective energy management, and/ or prefer to control their initiatives and confine them to their own operations and premises, and thus prefer not to have leases prescribe approaches.

Other related issues and barriers that prevented improvements happening included:

- landlords' lack of access to "upfront" cash to pay for improvement works;
- paybacks that are seen as too long, particularly with short leases;
- fear of increased business rates associated with improvements; and
- general distrust and an adversarial relationship between landlords and tenants. One lawyer commented that the 'biggest thing to take away is that the landlord-tenant relationship is a battleground' (Interviewee 29).

### *Uptake and content*

The picture on the uptake and content of green lease clauses is mixed; but whilst it is not possible to quantify or draw firm conclusions about prevalent market practice, the interview responses do suggest some broad trends.

In terms of content, we categorised clauses into two broad types. First are "improved performance clauses": these tend to be general, non-binding and aspirational or positive, expressed in terms of a broad commitment to cooperate and/ or improve environmental performance. The second, which we termed "protection and compliance clauses", are generally considered to be binding, and aim to prevent the worsening of environmental performance and ensure compliance with statutory requirements, often with reference to EPC ratings. Some clauses arguably straddle both categories, as described below, such as the right for the landlord to enter the tenant's premises to carry out environmental improvements.

In terms of uptake, green clauses are more commonly used by large landlords in the prime market (both in leases and MOUs). Participants also suggested that green clauses are much more common in the office sector than the retail sector, although there were suggestions that green clauses are becoming more common for shopping centres. Clauses requiring tenant alterations not to affect EPC ratings adversely were seen as fairly standard across both office and retail sectors as well as with smaller and medium sized companies. Indeed, one law firm commented that this clause was now "standard", even though that firm did not see "many green clauses" (Interviewee 19). Some leases allow the landlord access to carry out energy efficiency upgrades, but very few provide for cost recovery. More generally, beyond larger landlords and prime properties respondents suggested that the uptake of green lease clauses is very limited.

Table 1 below provides an overview of the types of clauses that are being adopted to varying degrees in leases. These clauses largely reflect what is found in the BBP toolkit and Model Commercial Lease (the main exception being that the BBP toolkit does not provide for cost recovery for environmental improvements). Most of our evidence about these clauses is from interviewees' descriptions rather than seeing signed leases: due to commercial

confidentiality and resource constraints, the project team had access to only two company precedents. In practice, it appears that BBP landlords (and their law firms) generally base their standard clauses on the BBP model clauses, at least as a starting point. Our findings, therefore, give an overview of the general *types* of clauses found, but they do not provide detailed information on the *exact content* of clauses, and so we cannot be sure of the extent to which they may contain caveats related to consent, reasonableness, good faith or similar.

**Table 1: Types of green clauses found in UK commercial leases**

| Improved performance clauses                                                            | Protection and compliance clauses                                                                                                         |
|-----------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| Parties agree to cooperate on/ commit to sustainability                                 | No tenant alterations with adverse impact on EPC rating/ environmental performance (almost 'standard')                                    |
| Landlord to provide forum to discuss sustainability                                     | Responsibility for CRC costs                                                                                                              |
| Parties to agree (and use) environmental management plan                                | EPCs: restrictions on when tenant can obtain EPC and/ or on assessor ( <i>rare</i> <sup>33</sup> )                                        |
| Parties to share data                                                                   | Reinstatement – no reinstatement required where this would adversely affect the environmental performance of the building ( <i>rare</i> ) |
| Landlord right to instal sub-meters                                                     |                                                                                                                                           |
| Landlord improvements must take account of environmental impact                         |                                                                                                                                           |
| Landlord right to enter premises to make environmental improvements                     |                                                                                                                                           |
| Tenant alterations must take account of environmental impact/ use sustainable materials |                                                                                                                                           |
| Landlord right to recover cost of environmental improvements ( <i>rare</i> )            |                                                                                                                                           |

Whilst it is suggested that Table 1 provides a fair reflection of the range and types of green clauses, it is worth noting that two interviewees questioned whether “protection and compliance clauses” can be considered “green” at all. In relation to CRC cost recovery, for example, one lawyer commented: “are you just getting people to sign provisions which help you as landlords .. or are you actually getting them to sign leases which assist in the environmental performance of the building?” (Interviewee 36). Nevertheless, we do consider these as green clauses, partly because they are commonly included in discussions of green leases and feature in the BBP toolkit, but also because they are ultimately linked to preserving environmental performance.

In addition to the development of green lease clauses, the BBP also introduced the concept of green MOUs to sit alongside existing leases. Whilst this paper focuses on the use of green clauses in leases, the WICKED interviews generated some observations about the use of MOUs. The WICKED team has previously reported on the use of MOUs by retailer M&S and its BBP landlords, which represents one particular illustration of MOUs being used to record and support cooperation on environmental and energy efficiency matters for buildings

<sup>33</sup> Landlords are starting to consider and introduce these in light of MEES.

already subject to existing leases.<sup>34</sup> Beyond this case, views from interviewees on the use of MOUs were mixed, with some suggesting that they were not being taken up because they were considered ineffective and too time-consuming to negotiate; whilst others suggested that they are used and can be more appropriate and effective than leases in supporting cooperation between landlords and tenants because they are explicitly non-binding (and even when they are discussed but not signed).

## Drivers

The drivers behind the development of green leases in the UK need to be considered in the context of the broader climate change agenda, reflected in increasing government legislation, combined with the emergence of the concept of 'green leases' in Australia<sup>35</sup> and its import through the UK BBP.

The three key drivers most commonly mentioned by interviewees were "compliance" or "protection", in particular in relation to "MEES"; a desire to improve environmental performance; and "green credentials" and related themes. In addition, many respondents highlighted the role of the BBP in driving the development of green leases. The first two drivers mirror the two key categories of green clauses identified above, whilst the third can be thought of as adding an additional layer of purpose or, in some cases, an underlying driver.

Alongside these key drivers, the most common comment, however, was that there is great "diversity" in the commercial property sector and the situations and drivers that affect the adoption of green leases. Respondents pointed out that market drivers and practice vary hugely across different types and sizes of property owners, different individual retailers, different types and conditions of retail premises, different locations, economic conditions and market dynamics at the time of negotiation, as well as the awareness and experience of legal advisers and property management companies.

Whilst it is therefore difficult to generalise from the findings, some of the comments in relation to the three key themes are summarised below.

As will be seen below under "Impact", the analysis of interview findings revealed a high degree of overlap between drivers and impact: comments on drivers can also be seen as comments on the potential or intended impact of green leases. This is, of course, in a context where green lease clauses are still relatively novel and the perception of benefit is largely qualitative and, to some extent, aspirational.

### (1) Compliance

Interviewees variously commented on compliance, protection or risk as drivers for the adoption of certain "green" clauses, in particular in relation to CRC, EPC ratings and, more

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<sup>34</sup> Kathryn B. Janda, Susan Bright, Julia Patrick, Sara Wilkinson & Timothy J. Dixon (2016): "The evolution of green leases: towards inter-organizational environmental governance, Building Research & Information", <http://dx.doi.org/10.1080/09613218.2016.1142811>

<sup>35</sup> See e.g. Woodford, L. (2007), "The Green Lease Schedule", In Proceedings of ECEEE Summer Study, (Colle Sur Loop, France), pp. 547– 556. Stockholm: European Council for an Energy-Efficient Economy

recently, MEES. The representative of one property company commented, “You will always end up in a lease with non-negotiable issues about risk management, not with opportunities. A lease is not that sort of document. MEES will probably be managed through leases, and provisions about not harming ratings” (Interviewee 16). Compliance was seen as THE core driver by some: referring to MEES, one representative of a property management company summed it up as “we need to know whose cost this ultimately falls with” (interviewee 4). Whilst many made reference to the role of MEES as a driver, some (including professional support lawyers with access to wider legal networks) suggested that the prospect of MEES had not yet actually resulted in much new drafting, either because existing provisions relating to statutory compliance and EPC ratings were considered adequate, or because companies were adopting a “wait and see” approach, with some scepticism that the Government was going to see through the introduction of MEES.

## (2) Improved environmental performance

The second broad driver covers a number of overlapping themes that are related to the desire to facilitate landlord-tenant cooperation so as to improve environmental - and ultimately business - performance, reflecting an internal business driver. This may translate into provisions that promote cooperation on environmental matters through, e.g, regular meetings and data sharing.

Interviewees talked about green clauses as potentially creating a framework for cooperation or providing potential leverage on green issues, often on the basis that this was a non-binding commitment. Some also made the point that whilst a desire to cooperate on energy management might act as a driver to adopt green lease clauses, these clauses may in practice be more reflective of this desire than a vehicle for actually improving cooperation. This theme is picked up further under ‘Impact’ below. In contrast, some preferred to see encouragement of cooperation sit outside the lease arrangements.

## (3) Green credentials

Interviewees identified a third broad category of drivers relating to green credentials, broadly reflecting a motivation to record and demonstrate environmental and energy management efforts to the “outside world”. These were expressed variously in terms of “reporting”, “GRESB/investors”, “green credentials”, “CSR/ image” and/ or “wider sustainability strategy”. They tended to be raised in relation to larger companies, in particular large institutional property companies but also larger retailers.

Investors were identified by some as a general driving force behind landlord efforts to develop energy management and broader sustainability strategies. The link to green leases seems to play out in different ways. First, participants commented that some landlords seek tenant data to report more fully - and improve their scores - under GRESB. Data sharing provisions in leases were seen as a way of enabling landlords to require such data, although from some responses there was a suggestion that such requests would be met even in the absence of lease clauses. Second, the existence of green lease clauses in itself scores points under GRESB. Third, participants suggested that investor interest generally is causing institutional landlords to develop a portfolio of environmental and energy management initiatives, of which green leases can form a part. It was also suggested that this general response to investor interest predates GRESB although others commented that GRESB has made this interest more specific with investors making continued investment dependent on

improved GRESB scores, or with GRESB seen as a demonstrable tool for managing – as yet uncertain – environmental risks.

Beyond specific investor interest in the sustainability practices of institutional landlords, and beyond GRESB, many respondents described more generally that green leases might be used (both by property owners and retailers) as way of demonstrating green credentials to different stakeholders, including customers, shareholders and tenants, often as part of a company's wider CSR efforts.

## *Resistance*

As well as commenting on the drivers for adopting green clauses, interview respondents also talked about different reasons for resisting them.

A perception of additional costs associated with negotiating and/ or implementing green clauses was raised as a concern by several respondents. As one lawyer put it, “anything that could ... put an extra penny on the bottom line is resisted by tenants with the utmost vehemence” (Interviewee 23). One respondent drew a distinction between broad and non-binding clauses, which were seen as acceptable, and prescriptive clauses, which were associated with additional cost burdens. Another suggested that the prospects of operational cost savings might perversely put tenants off for fear of higher rent in the future.

Some mentioned a lack of awareness, fear or suspicion of non-standard or unfamiliar clauses, particularly on the part of some lawyers, or a tendency to strike out clauses that are perceived as conferring benefit only on the other party (“mostly, as a tenant you would cross out as much as you can” (Interviewee 19, lawyer)). Indeed, one view is that lawyers are not only unlikely to initiate the use of green leases (for example, “green clauses will generally be driven by the client.....Unless there's a very good reason we don't tell clients what to do” (interviewee 23, lawyer)), but may actively resist green clauses: “...if the solicitor is unfamiliar with a clause .....they will just take it out” (Interviewee 3, retailer). Again, the picture is not all one way. A law firm may include green provisions in its standard precedents, but overall it seems to be clients that are leading the inclusion (or not) of green clauses in leases, and lawyers are often putting a “great big red pen through [green] stuff” (Interviewee 34, lawyer).

Several participants highlighted retailers as being particularly resistant to green clauses, compared to other tenants, with suggestions that this reflects a particular focus on costs and the service charge, as well as the importance of branding and fit-out.

Another perspective was that some retailers feel they are already engaged sufficiently in environmental and energy management practices and either do not want to relinquish any control, or are concerned that agreeing to green clauses may reduce their CSR credit. One lawyer explained this in the following terms:

“When you think about green issues you're largely talking about CSR; and the things you can put in your CSR report for the world to see. If you're a tenant even if your green credentials are fantastic, if you sign up for green lease, the accusation can be levelled: you're only doing this because you're obliged to. So even a very green tenant may not want to sign up because they want to be able to say I'm doing this off my own bat, not because I'm obliged to” (Interviewee 26)

## Impact

The previous sections illustrate the broad range and variety of possible green clauses, and the diversity of drivers and scenarios that influence their adoption. In addressing the impact of green lease clauses, interview responses similarly reflected this diversity, and there were mixed views about the role – or potential role – of green clauses. Whilst many regarded the lease as either irrelevant or unhelpful to the improvement of environmental performance, for those who identified (potential) impacts, these tended to reflect the three key drivers of (1) compliance or protection, (2) improved environmental performance and (3) green credentials.

Findings in relation to these key themes are described below. Figure 1 illustrates how the drivers, content and impact of green clauses were broadly related to each other in the interview findings.

### (1) Lack of relevance or impact

A common theme amongst participants was the lack of relevance or impact of green leases, with respondents suggesting that they either failed in practice to do what they set out to do (e.g. regular landlord-tenant meetings or data sharing) or simply were an inappropriate mechanism for fostering cooperation and improving environmental performance. Interviewee comments included:

“On their own, leases don’t do anything. If you’re not backing up with action what’s in the lease, nothing happens.” (Interviewee 16)

“it doesn’t matter what you put in the lease because actually what matters is what happens on the ground.” (Interviewee 34)

Related to this is the perceived inflexibility of the lease as an instrument for supporting and catalysing landlord-tenant cooperation and better energy management. For example, one lawyer took the view that: “The lease is very static, it’s very difficult to put these sorts of provisions in because they will naturally evolve over time.” (Interviewee 32)

Instead, improved environmental performance was seen by many as the result of other factors, such as relationship building, communication, resources and evidence of financial benefit, with landlord-tenant collaboration on energy efficiency measures taking place “outside the lease” (16). One interviewee suggested: ““To be honest, it’s kind of when you can forget about the lease and just go with common sense that it works best and you say, you know what, we all know this is the right thing to do so let’s try and do it.” (Interviewee 30)

Property owners, property management companies and retailers all highlighted examples ways in which there had been cooperation on energy management regardless of lease provisions. Indeed, for many the lease seemed largely irrelevant for day to day issues, talking about the idea of the “lease in a cupboard” (Interviewees 2, 38), wondering whether leases are simply locked away and never looked at, and in one case suggesting that this was desirable, as the lease was fundamentally a “binary” document (Interviewee 23). Related to this, several participants raised the difficulty of capturing and communicating relevant provisions and obligations to relevant staff such as property managers. One representative

of a property company explained: “it’s all very well agreeing something in the lease but then the people on the ground need to know what’s been agreed” (Interviewee 7).

A related theme concerned the enforceability of green clauses. Whilst participants questioned the enforceability of green clauses in general – referring mainly to the general and broad cooperation and sustainability clauses, some thought that certain clauses e.g. seeking to prevent worse EPC ratings and other clauses dealing with MEES compliance could in principle be enforceable. As one lawyer put it,

“the clauses that say ‘thou shalt not carry out alterations which adversely affect the EPC’.. those that are very specific about tenants’ covenants, ARE enforceable in the same way as any other tenant’s covenant is enforceable. ... The ones around energy management plans, or building management committees and cooperation AREN’T” (Interviewee 36).

Another lawyer similarly explained:

“I think the ones that are negative in nature probably are enforced because they tend to come up at the consent level.. ‘thou shalt not do any works’ and ‘it has to come to the landlord for approval’.. the more positive ones such as ‘we all come together and talk about stuff and give each other data and set targets’ .. I can’t see that the landlord would ever say ‘I’ll forfeit your lease; what they might say is ‘we’re not going to renew your lease, we want tenants who have bought into all of this’.” (Interviewee 38)

In practice enforcement was seen as dependent on the nature of the breach and the appropriateness of potential sanctions such as forfeiture and market dynamics. Some emphasised that companies would be less likely to agree green clauses if they were considered binding or enforceable, and some seemed to regard the non-binding nature of general cooperation provisions or sustainability commitments as desirable, reflecting the view that legally binding clauses could be unhelpful or were ineffective in promoting cooperation and joint initiatives (see further below, under ‘negative or unintended impacts’). For example, one lawyer explained: “No-one is going to sign up to those and so it’s better to take a more gentle approach and have these softer green lease clauses in which you can then have the opportunity to change behaviour and convert people” (Interviewee 36).

A couple of lawyers suggested that general cooperation or sustainability clauses, whilst non-binding, could have interpretive force by informing courts’ interpretation of other clauses such as ‘reasonable consent’ provisions in the alterations clause (preventing tenant alterations from worsening environmental performance or EPCs).

There was also a general sense that participants had not really considered enforceability much, and that this question was irrelevant in the context of green clauses. Indeed, some participants see green clauses as potential tools for leverage on green issues regardless of their legal enforceability, referred to as the “soft power dynamic” by one respondent (interviewee 18).

## (2) Negative or unintended impacts

Some participants suggested that green clauses, or the process of introducing or negotiating green clauses, could even be counter-productive and make things more difficult and complicated, hampering cooperation and improved environmental performance. In the words of one property manager:

“They said as soon as landlords try to get more prescriptive, it’s almost like the mindset switches and rather than being about collaboration, it’s now about compliance, and the mindset switches into I’ve got to do these specific things but no more, and it just changes”. (Interviewee 24)

Their comments suggested that the involvement of lawyers and the generally more prescriptive nature of lease clauses create a “binary” or more adversarial arena more suited to compliance than collaboration. Similarly, leases were described as being relevant only when particular issues arise rather than for day-to-day operations.

### (3) Compliance and protection

For several respondents the prospect of MEES has highlighted the potential role of the lease in supporting statutory compliance, in particular in dealing with the production of EPCs and maintenance of EPC ratings, as well as enabling improvements and avoiding future arguments about the cost of upgrades. For example, one lawyer explained:

“I think the way it feeds into leases.. from a landlord point of view I think the main effect is that .. there’s been drafting on EPCs since about 2008. I don’t see it’s changed hugely.. it mostly appears in alterations clause.. but there has been a recognition that EPCs are sometimes good and sometimes bad.. and the main change I think, especially in multi-occupied buildings; landlords – if the tenants do something that changes the EPC rating or might do, then they, the landlord, want to control that process. They want to be able to step in and do the EPC even if it’s a tenant sale or letting that’s triggered the requirement”. (Interviewee 38)

However, one interviewee thought that MEES would, at least initially, be dealt with “outside the lease” (Interviewee 32, lawyer), and two others suggested that existing provisions dealing with EPC ratings and statutory compliance might be sufficient to deal with MEES (Interviewees 24 (property and energy management company) and 26 (lawyer)).

More generally, there seemed to be an assumption that provisions requiring tenants not to worsen environmental performance or EPC ratings did - or could - have the effect of preventing such worsening, and that they would be enforceable.

Linked to MEES compliance, whilst there was general uncertainty around the link between energy efficiency improvements and rental and capital values, some suggested that although a positive impact on value was less likely, sub-standard properties would start to see a reduction in value, or “brown discount”. One lawyer explained: “some landlords are now saying it’s worth investing in stock, not because this necessarily makes it more valuable, but because it is less likely to reduce in value. MEES in particular are driving this as an issue and are ‘chipping off the price’” (Interviewee 23).

The link to statutory compliance was, however, not straightforward. Interviewees highlighted that clauses introduced to prepare for MEES could potentially undermine or hamper landlord-tenant cooperation on better energy management and environmental

performance. In particular, interviewees representing property owners, retailers and legal experts suggested that some retailers are starting to seek exclusions from statutory compliance costs related to MEES as they anticipate increased attempts by landlords to recover improvement costs. It was suggested that this kind of approach may lead to a reduction in informal opportunities to cooperate on energy efficiency investments. Similarly, it was suggested that landlords may seek to limit their access rights to carry out improvements in order to be able to rely on the statutory exemption from MEES under which landlords are not prohibited from renting out sub-standard properties where tenants have refused consent to relevant energy efficiency improvements.<sup>36</sup>

#### (4) Cooperation and improved environmental performance

Improved performance clauses were referred to as being like “an agreement between the parties to chat about environmental policies and management of the building” (Interviewee 28, in-house lawyer), or “greenery” (Interviewee 29, lawyer).

Nevertheless they are seen by some as a framework for engagement and discussion, a “basis upon which you can get the landlord to the table to discuss” (Interviewee 2, retailer in-house lawyer) or to promote “dialogue with occupiers” (Interviewee 18, lawyer). The representative of a property and energy management company explained it in the following terms:

“I’ve talked to a couple of lawyers on this and their view is that the best way to promote collaboration on these kinds of issues, and a broader range of energy and environmental issues, is to have Green Lease clauses that are actually on the face of it quite loose, and really don’t say much more than they require the landlord and the tenant to come together on a regular basis to discuss how to improve and enhance the environmental and energy performance of the building and don’t say a lot more than that, because they said their experience is that when those types of clauses are in place, you actually have quite a good chance of fostering a positive and proactive relationship” (Interviewee 24).

Indeed, several interviewees suggested that general and broad green clauses around cooperation and improved environmental performance *could* be used to encourage or provide additional impetus for parties to engage, or could serve as a useful “mechanism” to support environmental improvements where there was a strong relationship with tenants and in particular settings such as shopping centres. One lawyer suggested, “Clients have realised there can be genuine benefits from having a dialogue with occupiers.” (Interviewee 18).

In the case of one large retailer the introduction of green clauses through MOUs has reportedly resulted in increased dialogue and strengthened relationships with landlords: “What HAS happened as a result of the initiative is a better relationship with the sustainability people in the different companies” (Interviewee 3).

#### (5) Green credentials

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<sup>36</sup> Regulation 31, The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 No. 962, <http://www.legislation.gov.uk/ukdsi/2015/9780111132432/contents> [18 April 2016]

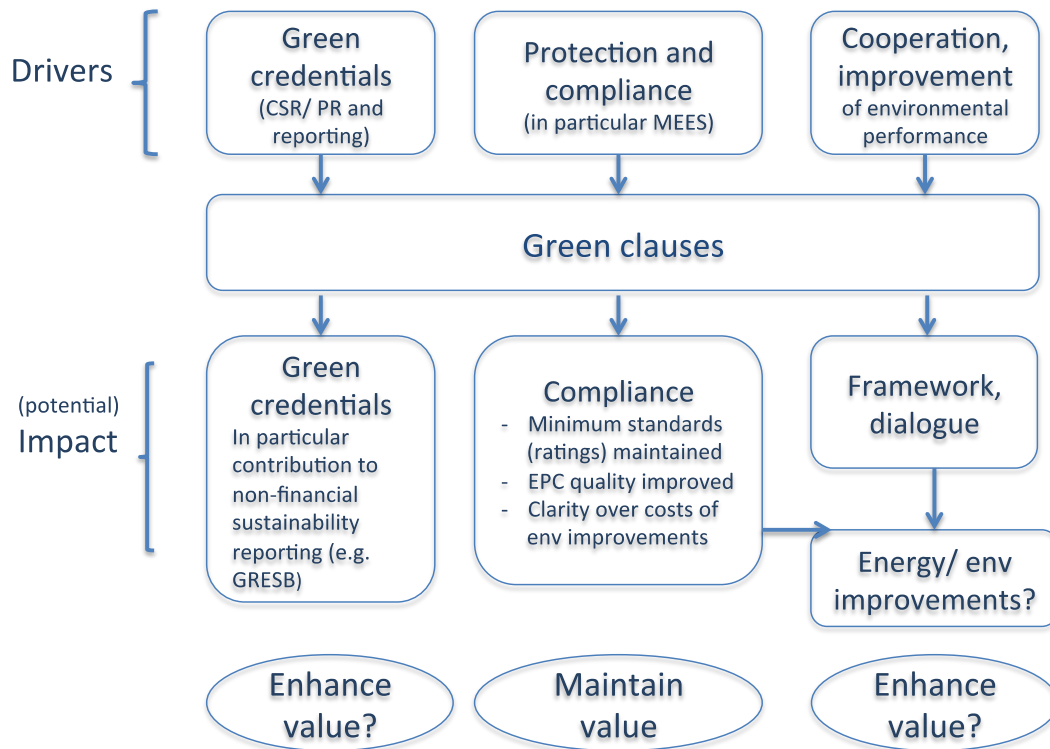
A few participants highlighted a slightly different perspective which saw green clauses operating as a reflection or evidence of a wider sustainability and CSR agenda, and a desire by participants to commit to and engage in cooperation and environmental improvements. More generally, participants described that green leases might be used (both by property owners and retailers) as way of demonstrating and supporting green credentials to different stakeholders, including investors, customers and tenants, often as part of a company's wider CSR efforts. One lawyer took the view that:

“One of the reasons... [green lease clauses are] introduced is because they do provide the legal framework, so I think clients do consider them desirable even if they don't reference that often and also I think it sends a very positive message, that there's a landlord who takes these things seriously. So it's intended in some ways as a very positive thing... It's sort of reflective of the landlord's motivation rather than necessarily driving any action..” (Interviewee 38)

Whilst respondents seemed to recognise the importance of green credentials or green image, they did not generally articulate how this might contribute to their business objectives. Some suggested that energy efficiency investments were ultimately likely to be reflected in improved asset value, but this was always expressed only as a possibility with uncertainty about the link between sustainability and value acknowledged.

In relation to GRESB, some landlords recognised that the mere existence of green lease clauses will have a tangible impact by adding to their GRESB scores, albeit fairly modestly. Whilst there were some suggestions that this serves PR purposes, others seemed to regard green leases as part and parcel of wider sustainability activities, and evidence of a cooperative attitude, but questioned whether green lease clauses themselves caused any action. One lawyer commented “It could be that a green lease is typical of a positive relationship with the landlord over these sorts of things.. but not the cause.” (Interviewee 21)

**Fig. 1: The role of green clauses in energy management and environmental performance – overview of interview findings**



## Discussion

Whilst the interview findings identify certain key themes, interview responses were diverse and nuanced, reflecting the variety in the retail sector and amongst respondents, as well as the range of “green” clauses and possible scenarios for landlord-tenant cooperation on energy management. In summary, whilst many interviewees questioned the relevance of green lease clauses and some highlighted negative consequences, others suggested that green clauses could support dialogue and cooperation between landlords and tenants, potentially help prepare for and comply with statutory requirements, in particular MEES, and demonstrate green credentials to external stakeholders.

The picture that emerges from these findings – to the extent that green clauses are considered of relevance – is of two parallel and competing forces, also reflecting a potential dichotomy in the meaning of “green clauses”. On the one hand, there is some support for the BBP’s vision of a “framework for engagement” that identifies “opportunities for collaboration”<sup>37</sup> and sees green leases as a tool for supporting a new kind of relationship between landlords and tenants which – as suggested in the BBP’s name – aims to make buildings “better”. Under this view, the advent of MEES provides additional impetus for landlord-tenant collaboration. Similarly, the inclusion of the GRESB “green lease” score under the heading of “Stakeholder engagement” indicates a possible trend towards a view of the commercial landlord-tenant relationship that is characterised by – and stands to benefit from – cooperation rather than the traditional adversarial approach. This view is echoed in interview comments around the enforceability of green clauses, where enforceability was rarely considered in relation to cooperation and aspirational

<sup>37</sup> Better Buildings Partnership (BBP) [2013], “Green Lease Toolkit”, p.2, <http://www.betterbuildingspartnership.co.uk/green-lease-toolkit> [30 June 2016]

environmental improvement clauses, and the non-binding nature of these clauses was considered desirable.

On the other hand, some interviewees spoke about compliance with MEES in terms that suggested a sharpening of adversarial stances in relation to initiatives associated with securing or maintaining certain EPC ratings. The traditional perspective of the landlord-tenant relationship being a battleground still holds considerable sway, with landlords interested only in money and tenants wanting to minimize outgoings and not pay for an improvement in the landlord's asset. Under this view, a renewed drive towards compliance could result in increased arguments over who should bear the costs of improvements. Far from promoting collaboration, this may lead to an avoidance of any possibility of joint initiatives, and a reversion to the familiar adversarial approach.

Whether these two forces will develop in parallel or whether one will dominate the other remains to be seen, but any future discussion of, and research into, green leases needs to be conscious of both.

## Conclusions

Notwithstanding the diversity of views on green clauses, eight years after this journal's special issue on green leases, they remain on the agenda.

The WICKED research suggests that some fairly broad patterns can be seen. For example, green clauses are more prevalent in lettings of prime properties, more common in office than retail leases, and are more likely to be seen as binding when serving 'compliance' goals than when seeking to improve environmental performance. There was, however, a great diversity of views expressed – some interviewees were very familiar with green leases and comfortable with the language of green, whereas others reported considerable scepticism and saw leases as largely irrelevant to energy management. Others still – including lawyers – had relatively little knowledge or experience of green leases. Further, it is lawyers who often stand in the way of agreement of green clauses. Nonetheless, it is suggested that the views of those who have adopted the use of green clauses generally consider that there is some value in them, albeit rather nebulous at this stage.

The findings suggest that individual property owners, retailers and their advisers should consider the role and potential value of green clauses in the context of specific relationships, properties and clauses on a case-by-case basis. Moreover, the use of green lease clauses for non-financial reporting (such as GRESB) and the BBP's role suggest that green lease clauses are becoming embedded within a more general trend of increasingly ambitious and sophisticated sustainability strategies, at least from the perspective of larger and institutional property companies. Leases are only one aspect of this larger picture and their importance compared to – and relationship with – other factors remains uncertain.

The potential dichotomy between improved environmental performance on the one hand, and compliance and protection on the other, and its implications for the role of leases, could benefit from further investigation. As questions around the link between sustainability and value start to become more settled in the industry, it may be that the lease is able to assume a further dimension, providing a bridge between these two competing camps by helping to clarify value implications and thereby supporting cooperation on cost-effective energy efficiency improvements.

In the meantime, it is to be hoped that leases will not stand in the way of improvements to the UK's commercial building stock that are necessary not only to ensure individual compliance with MEES, but a collective move towards better buildings that help meet the UK's carbon reduction targets.

### **Acknowledgements**

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## Annex

### Details of research approach

In exploring the role of green leases, the WICKED project considered a qualitative social science approach as particularly appropriate, given the complexity of issues and human behaviour and decision-making.<sup>38</sup> The research approach is guided by Strauss and Corbin's "grounded theory" concept,<sup>39</sup> with the aim of developing insights from the bottom up.

The project carried out semi-structured interviews with a range of participants across different categories, as set out in the table at Fig. 1.

**Figure 1: Categories and numbers of interviewees**

| Category                           | Number of organisations | Number of interviewees |
|------------------------------------|-------------------------|------------------------|
| Retailers                          | 3                       | 8                      |
| Property owners                    | 3                       | 5                      |
| Property management companies      | 4                       | 6                      |
| Industry association/ intermediary | 2                       | 2                      |
| Law firm/ legal expert             | 11                      | 15                     |
| Consultancy and research           | 2                       | 2                      |
| <b>Total</b>                       | <b>25</b>               | <b>38</b>              |

The sampling of interviewees set out to cover a variety of roles and perspectives in the market although ease of access within the timescales of the project meant that most respondents tended to represent, or have insights into, larger organisations.

The interview questions followed a broad common structure, covering introductory questions and background on the respondents and their organisations, followed by the uptake of green leases, drivers of green leases, negotiation of green lease clauses, content of green lease clauses, the role and impact of leases and green clauses, and the wider landlord-tenant relationship and energy management. Within these common themes, questions were tailored to the different contexts and expertises of individual respondents.

Using NVivo software, interview responses were analysed thematically (or "coded") through identifying concepts (themes) and sub-categories (sub-themes), to conceptualise the views of respondents and relate ideas to each other. The coding process identified a total of 206 themes, grouped under three overarching themes, "energy management" (with 87 sub-themes), "landlord-tenant" (12 sub-themes) and "leases" (104 sub-themes). Whilst individual themes were identified based on what respondents said, the overarching themes,

<sup>38</sup> Strauss, A., Corbin, J. (1998), "Basics of Qualitative Research. Techniques and Procedures for Developing Grounded Theory". 2nd ed. Thousand Oaks, London, New Delhi, SAGE Publications.

<sup>39</sup> *Ibid.*

which helped organise the material, were drawn from the project team's review of existing research and own knowledge of the issues.

Thematic analysis of interview transcripts was supplemented by document analysis of company strategy reports, green lease clauses in company templates, and model green lease clauses promoted by industry partnerships, and a review of policy documents and industry reports.