

Green obligations

Jake Davies assesses how the environmental duties imposed on developers by their end users are best dealt with



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'Damages for breach of a BREEAM clause in a contract should be easily ascertainable where market value is attached to environmental standards for the relevant development and costs in connection with energy usage will be easy to demonstrate.'

Corporate entities are under increasing pressure to take account of environmental issues. This is the result of both concern with public image and the more stringent regulations introduced by new legislation such as the Climate Change Act 2008, which creates obligations for energy use.

For many companies not engaged in manufacturing, it is their commercial premises that have the largest impact on their carbon footprint and bring them within the ambit of environmental legislation. Developers of new commercial properties in England are increasingly placing contractual demands on their design consultants and building contractors to ensure that new buildings are designed and constructed in compliance with not only statutory requirements but also voluntary standards. In the past, such clauses were regarded by the construction industry as aspirational 'green-washing', to be accepted and ignored in much the same way as are clauses relating to 'partnering', 'local employment' and 'year 2000 compliance'. Following recent legislation, however, failure to meet objective and measurable standards can result in claims for damages following a breach of contract.

In the English commercial property market, the 'green standard' most commonly referred to in construction documentation is that established by the Building Research Establishment Environmental Assessment Method (BREEAM).

What is a BREEAM clause?

Unlike building regulations, the BREEAM standards are not statutory obligations that a development must comply with, but (according to its own website):

... the leading and most widely used environmental assessment method for buildings. It sets the standard for best practice in sustainable design and has become the *de facto* measure used to describe a building's environmental performance.

If a party wants the environmental standards that BREEAM establishes to be met, the obligation must be contractually created. A BREEAM clause differs from other aspirational building standards (such as 'a high-quality office development suitable for use by financial institutions') because the Building Research Establishment will provide an assessor to identify whether or not the BREEAM standard specified in the contract has been met.

BREEAM standards are divided into 'passed', 'good', 'very good' or 'excellent', and based on compliance with the BREEAM versions of standards applicable to different types of development. Clauses requiring that consultants and contractors design and build to BREEAM standards are increasingly common in building contracts and consultants' appointments.

Damages for breach of a BREEAM clause

Damages should be easily ascertainable for a breach of contract in cases where market value is attached to environmental standards for the relevant development and costs in connection with energy usage are easy to demonstrate (both costs of energy usage and, in the future, taxes on energy consumption).

Another head of damages could be a diminished rental value for a building which has not hit specified environmental standards. Furthermore, it is possible that state subsidies and grants which might apply to 'zero-carbon'

buildings might be lost, and reputational damage could give rise to further loss.

As a hypothetical example, Ethical Bank requires new headquarters. An agreement for a lease entered into by Ethical Bank might require the building to meet the BREEAM 'excellent' standard so that Ethical Bank could advertise its corporate responsibility to its customers, while saving electricity and polar bears. Any developer agreeing to provide such a building would have to ensure that those standards were met; otherwise an obligation to take the lease (and pay rent) may never arise if conditions relating to environmental efficiency have not been met. If the rent on Ethical Bank's premises was to be £500,000 a year for 20 years, for example, then it is perfectly conceivable that a loss of £10m could be suffered if BREEAM standards were not achieved and Ethical Bank's obligation to take the lease fell away.

Developers should ensure that obligations owed to end users of buildings are mirrored in any building contracts and/or consultants' appointments entered into to meet those obligations. Any losses the developer suffers, so far as they are 'reasonably foreseeable', should be recoverable from the professional team and/or contractor who failed to meet the design or build standards required by the end user.

Negotiating a BREEAM clause

Where enhanced environmental standards are written into appointments and/or contracts, the parties should be aware of the need to meet those standards. If assessment of satisfaction of those standards is in the hands of a third party, such as a BREEAM assessor, consultants and/or contractors would be wise to seek to caveat any such obligation with a 'reasonable endeavours' qualification.

An example of a clause that should be acceptable to consultants and building contractors is:

The [consultant/building contractor] shall use reasonable endeavours to see that, on completion, the Works achieve a BREEAM rating of [insert desired rating] with regards to [insert relevant BREEAM scheme] and shall liaise with the Employer's BREEAM assessor to facilitate its assessment of the Works.

However, a clause that creates an absolute obligation to meet a certain

environmental standard as determined by a third party assessor should be avoided wherever possible. This is because however clear the BREEAM schemes are, and however consistently the assessment process is applied, there is always a risk that the employer's assessor will not accept that the relevant standard has been met.

The future

It is likely that legally enforced environmental construction standards will continue to proliferate and, as a consequence, today's best practice will almost certainly be tomorrow's minimum requirement.

The construction industry's current focus is on the energy efficiency of completed structures rather than the methods of construction ('the embodied carbon footprint'). It seems probable

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that, in the future, the power required to manufacture and assemble the materials from which a building is constructed will be considered alongside that required to heat and light the premises. The industry as a whole will soon have to deal with drivers affecting design and construction methods, as well as considering the environmental performance of completed buildings.

It is conceivable that such an approach will lead to buildings being designed and constructed to last longer, and/or consideration being given at the design and construction stage to the recyclability of materials used. Refurbishment rather than demolition and rebuilding may increasingly become the industry model. The cost of disposing of buildings in landfill sites has already led to an increase in the recycling of materials from demolished structures. Statutory obligations designed to further push developers and contractors down this route will probably continue to develop.

The Carbon Reduction Commitment regime put in place by the Carbon Reduction Act 2008 (due to come into force in 2010), as well as increasing focus on this issue in the commercial sector, will mean that damages for

breach of design and construction obligations relating to energy efficiency will become increasingly common. It is conceivable that liquidated damages for breach of such obligations could become commonplace in construction contracts and consultants' appointments, with penalties in excess of those for late completion.

The process of certifying practical completion may become more complex as assessment of whether contractual specifications have been met becomes increasingly stringent.

The regime put in place by the Energy Performance of Buildings Directive (creating the need to ensure that all commercial property is measured for energy efficiency and that that information is readily available) is likely to further raise this issue in the minds of occupiers. As a result, it will

be an increasingly important concern for the construction industry (assuming that energy efficiency will affect sale and rental values).

Conclusion

The UK government's current commitment to reducing greenhouse gas emissions is to achieve an 80% decrease by 2050 compared to 1990 levels. By certain standards of measurement, the UK is on course to achieve these reductions, probably more by luck than judgement, due to a significant increase in gas-fired power stations (replacing coal-fired power stations) since 1990. The current recession has also helped in terms of power consumption. If targets are to be met, however, more will need to be done to deal with energy consumption in the built environment and it is to be expected that this need will increasingly take the form of legal and financial obligations on energy end users.

In seeking to minimise legal and/or financial obligations, end users will increasingly demand that their designers and contractors produce buildings that minimise energy consumption. Where they fail to meet the required standards, damages are certain to accrue. ■