

# "GREEN" OBLIGATIONS IN CONSTRUCTION CONTRACTS

Increasingly, environmental issues are ones that corporate entities need to take account of - both for reputational reasons and also to deal with the increasing legislative burden surrounding this area, such as the Climate Change Act 2008 which creates obligations with regards to energy use.

For many companies not engaged in manufacturing, it is their commercial premises that have the largest impact upon their "carbon footprint" and bring them into contact with legislation dealing with the environment and environmental obligations. Therefore, developers of new commercial space in England are increasingly placing contractual obligations on their design consultants and building contractors to ensure that new buildings are designed and built to comply not only with statutory requirements but also to comply with voluntary standards. Whilst historically there may have been a perception within the construction industry that such clauses were simply aspirational "green washing", to be accepted and ignored in much the same way as clauses relating to "partnering", "local employment" and "Year 2000 compliance", failure to meet objective and measurable standards can give rise to damages for 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 Methodology ("BREEAM").

## WHAT IS A "BREEAM CLAUSE"?

Unlike Building Regulations, the BREEAM standards are not statutory obligations that a development must comply with. According to Breeam's website BREEAM is "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 obligations must be contractually created. Where a BREEAM clause differs from other aspirational building standards (such as "a high quality office development suitable for use by financial institutions") is that the Building Research Establishment will provide an assessor to identify whether or not the BREEAM standard specified in the contract has been reached.

BREEAM standards are: “passed”, “good”, “very good” or “excellent”, in connection with the various different BREEAM versions relating to different types of development. Clauses providing that consultants and contractors will design and build buildings to meet a specified BREEAM standard are increasingly common in building contracts and consultants’ appointments.

## DAMAGES FOR BREACH OF A BREEAM CLAUSE

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

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 even reputational damage could give rise to a further loss.

As a hypothetical example, Ethical Bank requires new headquarters. An agreement for lease entered into by “Ethical Bank” might require the building to meet BREEAM “excellent” standard so that Ethical Bank could advertise its corporate responsibility to its customers and also save 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 the rent on Ethical Bank’s premises was to be, say, £500,000 per year for a period of 20 years 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.

Any developer should ensure that obligations owed to end users of buildings are backed down into building contracts and/or consultant’s appointments and that any losses it suffers, insofar as they are “reasonably foreseeable”, should then be recoverable from the professional team and/or contractor who had 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 obligors under those documents 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 which 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.”

A clause that creates an absolute obligation to obtain a certain level of environmental standard as assessed by a third party assessor should be resisted if possible. However clear the BREEAM schemes are, and however consistent 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.

This article offers general guidance, it reflects the law as at December 2009. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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