

Energy Performance Certificates

If a landlord and tenant have already entered into an agreement to lease a property in which there is no heating system and the landlord agrees to install a heating system before the lease is completed, is an Energy Performance Certificate necessary and if so when should it be produced?

Which properties require an EPC?

The Energy Performance of Buildings (Certificates and Inspectors) (England and Wales) (Regulations 2007) define a building that requires an EPC as "a roofed construction having walls, for which energy is used to condition the indoor climate." This includes buildings that have fixed heating, mechanical ventilation or air conditioning. Buildings that only have water heaters or electric lighting do not fall within the EPB Regulations 2007, and therefore do not require an EPC.

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In the agreement for lease scenario above, the property is not a "building" according to the definition in the EPB Regulations 2007 when the agreement for lease is entered into, but only when the lease is completed.

When does liability to produce the EPC arise?

When a building is to be constructed, sold or rented out, the seller or landlord must provide any prospective buyer or tenant with a valid EPC and a recommendation report, free of charge, at the earliest opportunity (*regulation 5, EPB Regulations 2007*) and, at the latest, when any one of the following trigger events occur:

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- The seller or landlord provides written information about the building to a person who has requested information.
- A prospective buyer or tenant views the building.
- A contract is entered into to sell or rent out the building.

Therefore in our agreement for lease scenario, the EPC should have been produced before exchange of the agreement for lease (at the latest), even though at that point the property would not have had any heating installed. If the landlord is already in breach of the EPB Regulations 2007, he should issue the EPC to the tenant as soon as possible.

So, as an EPC may be required before the heating system is installed, on what basis is the building assessed for the purpose of producing the certificate?

Answer – the building should be assessed hypothetically based on the building's use class under the planning legislation. This applies irrespective of whether fixed services have ever been installed previously in the building, or whether the building is newly constructed on a "shell and core" basis, where not all the services, especially lighting, mechanical ventilation and cooling, will be installed. The activity within the building should be assessed in line with business activity typical of the



use class and the most energy intensive fit-out adopted in line with Part L of the Building Regulations in force (ensuring the building conforms to energy performance standards) in force when the building was built.

Where insufficient information is supplied (because, for example, there are no services installed), Part L defaults to the "least energy efficient" rating allowed. Therefore for the purposes of assessment, the most energy intensive fixed services fit-out allowed under Part L, will be assumed. Any subsequent fit-out will need to comply with Part L of the Building Regulations 2010.

What if the landlord were to just let the property on a "shell and core" basis?

For shell and core buildings not all the services will be installed

(especially lighting, mechanical ventilation and cooling) at the point where the building is sold or let. In the case of units that are let as bare structures without services, but where they will be fitted out and there is the expectation that energy will be used to condition the indoor climate, an EPC should also be provided.

The EPC should be based on the maximum design fit out specification as used for compliance with Part L of the Building Regulations (in respect of the building's use class in planning legislation).

Section 25 Notice Under the Landlord and Tenant Act 1954

What are the implications on a landlord where a tenant remains in occupation after the expiry of a section 25 notice under the Landlord and Tenant Act 1954 (LTA 1954)?

Let's assume:

- 1 The landlord has served a section 25 notice.
- 2 The notice does not oppose the grant of a new lease.
- 3 The parties have not entered into a new lease.
- 4 Neither party has applied to the court to determine the new lease terms.
- 5 Neither party has applied to the court to extend the time in relation to 4 above.
- 6 The termination date specified in the section 25 notice has expired.
- 7 The landlord wants to gain possession of the premises without having to offer the tenant a new lease.

A business tenant has a statutory right to a new lease at the end of the contractual term of its existing lease provided that it occupies the premises for the purposes of its business. The lease can only be terminated by one of the prescribed methods which are:

- A section 25 notice under which the landlord does not oppose the grant of a new lease (as above).
- A section 25 notice under which the landlord gives one of the statutory grounds for opposing

the grant of a new lease.

- A section 26 request from the tenant requiring a new lease.
- A section 27 notice terminating the lease and confirming that the tenant does not require a new lease.

In our current scenario, the section 25 notice will have stated the date when the existing lease will come to an end. This cannot be before the contractual expiry date and must give at least 6 months' but no more than 12 months' notice to the tenant.

By the expiry date, one of the following events must have happened:

- Either the landlord and tenant have entered into a new lease.
- Either the landlord or the tenant has made an application to the court to terminate the lease or determine the terms of the new lease or
- The landlord and tenant have agreed to extend the date specified in the section 25 notice which extends the date when one of the parties has to make the application to court.

In our example, none of the above has taken place by the expiry date in the section 25 notice and therefore the tenant's lease will come to an end on the expiry date. The tenant has lost its right to renew.

Before the expiry date in the section 25 notice, the tenant should be put

on notice that a) the landlord requires the tenant to move out of the premises on the expiry date, and b) if the tenant does not move out by then, the landlord will start possession proceedings. Any deadlines for the parties to apply for court extensions must have passed before the tenant is told to move out.

If as a result of a change of heart, the landlord is willing to allow the tenant to enter into a new lease of the premises, the landlord should ensure the tenant enters into an express tenancy at will. Such tenancy should commence on the expiry date and gives the parties some breathing space whilst they negotiate the terms of the new lease. The new lease does not have to give the tenant security of tenure and could be outside the scope of the LTA 1954. The advantage of a tenancy at will is that it does not confer security of tenure on the tenant.

The longer the parties wait between the expiry of the existing lease and the grant of a new lease, the greater the possibilities for arguing that the tenant has a periodic tenancy. The courts may infer a periodic tenancy where the landlord demands rent after the expiry date and before any new lease is entered into. A periodic tenancy can arise expressly or by implication and the main difficulty it creates is to confer security of tenure, so the landlord is back to square one and is required to serve a new section 25 notice to terminate the periodic tenancy!

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For further information about Property, please contact:

Georgina Calvey

Senior Associate and Head of Property

Tel: 020 7317 6757

Email: georgina.calvey@magrath.co.uk

Magrath LLP solicitors 66/67 Newman Street London W1T 3EQ
tel 020 7495 3003 fax 020 7317 6766 www.magrath.co.uk

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