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March 2010

quarter day

Carbon Reduction Commitment: irrecoverable costs for landlords?

A brief reminder of what the Carbon Reduction Commitment (**CRC)** involves, in case you missed our client seminar on this topic earlier this month.

Basically, the scheme requires large energy users to offset their carbon emissions by buying carbon allowances from the Government. The scheme comes into force on 1 April this year. Although the first allowances will not need to be bought until April 2011, there is still plenty of work to be done by businesses that fall within the scheme.

If your business used more than 6,000 MW of electricity in 2008 – which equates to about £500,000 at current prices – you will be affected. The Government estimates that up to 30,000 businesses nationwide will fall within the scheme. But even if you are not directly affected, read on, as the CRC will have an impact in other ways, particularly in relation to leases.

So, how will the system work? At the end of 2009, the Environment Agency, which is responsible for administering the scheme, wrote to large energy users asking them to provide details of their 2008 electricity consumption. Those organisations that exceed the 6,000 MW threshold must register to join the CRC scheme by the end of September this year or face large fines.

Organisations that qualify for the scheme will have to buy carbon allowances to cover their carbon emissions. For the first two years of the scheme, these will be purchased direct from the Government at a fixed price of £12 per tonne. In this first phase, the minimum use of 6,000 MW will translate into carbon allowances costing approximately £40,000: a significant sum. After this, a market will be set up where the allowances will be openly traded.

Low energy users will be able to sell excess allowances to heavy users. Revenue from the scheme will not be kept by the Government but will be returned to the participants depending on their position in a league table.

Those organisations that have managed to cut their energy consumption will receive a partial refund, whereas those who finish lower down the table will receive nothing. The idea is that businesses will make significant energy savings, not just to save money but also because of the benefit to their reputation that will result from a good showing in the league table.

Even if you do not have to register to join the CRC, it is still likely to affect you. Unless the tenant has an independent electricity supply (check meters do not count), the tenant's usage will count towards the landlord's consumption. This is going to be particularly relevant for multi-let properties.

If a tenant's consumption pushes the landlord over the 6,000 MW limit, the landlord is, understandably, going to want to pass at least some of its CRC costs on to the tenant. But how? Adding the costs to the service charge would be the obvious answer but that is not as straightforward as it seems. Does the lease entitle the landlord to pass on the cost? Existing leases almost certainly won't. Even in new leases, it is by no means clear how the landlord's CRC costs, which are spread across its entire

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portfolio, should be apportioned among individual tenants. Should there be a flat charge, or should wasteful tenants pay more? If the landlord subsequently receives a reimbursement from the scheme, should this be shared with the tenants? How does the landlord deal with the mismatch between the CRC year, which runs from April to March, and its service charge year? And what happens if a landlord within the scheme sells to someone outside the scheme, or vice versa?

Early signs are that there is no clear consensus within the industry about how to deal with CRC. Some landlords have indicated that they will take the cost on the chin. Others want to pass the cost down to their tenants but are unsure how to go about it. Most are biding their time, waiting to see what others do. We will keep you updated on what is a rapidly changing picture. In the meantime, we would be delighted to help if you have any queries on this complex regime.

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Property deals will now need to be Competition-Act compliant

The Government has announced that, with effect from 6 April 2011, the exclusion for agreements that relate to interests in land from the provisions of the Competition Act 1998 will come to an end. This will mean that existing and future land contracts or leases which contain competition restrictions will need to be assessed for competition law compliance like any other commercial agreement.

When the Competition Act 1998 first came into force, there was the concern that, because each and every agreement that contained clauses affecting competition had to be notified to the Office of Fair Trading (**OFT**), it would be faced with a flood of notifications of property-related agreements.

To avoid this, agreements relating to land were excluded from the scope of the Act. The system of seeking prior clearance from the OFT changed a few years ago. Parties to agreements are now expected to review the competition arrangements themselves and, in effect, to “self-certify” that the agreements do not infringe competition law.

In the light of this change of practice, the Competition Commission recommended to the Government that a fresh look should be taken at the blanket exclusion for land agreements which, it was felt, was encouraging anti-competitive behaviour in property transactions. The Government has decided to end the exemption altogether.

Part 1 of the Competition Act 1998 prohibits agreements or arrangements (express or tacit) between businesses which may affect trade within the UK which have, as their object or effect, the prevention, restriction or distortion of competition within the UK, and which may affect trade within the UK. The effect on trade must be appreciable.

This prohibition typically covers exclusivity deals under which one party agrees not to enter into contracts with competitors of the other party. In the case of a land transaction, this may take the form of a landlord agreeing not to let to any competitor of a tenant. Such a restriction will (once the exemption is removed) be caught by the Part 1 prohibition unless it falls within a few exceptions. The two most common exceptions are:

- the transaction has no appreciable effect: this is assumed if the share of each of the parties of any market affected by the transaction (typically, this will be the market share of the tenant in its own market) is under 15 per cent; and
- the parties can show that the prohibition contributes to improving production and distribution of costs or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

The bulk of restrictions agreed between parties to property transactions will be covered by the market share exception, but a more detailed analysis of the arrangement will be needed where one of the parties has a high market share in its particular market. Supermarkets will be particularly vulnerable in light of their high share of the groceries market.

Although there is a year-long transition period, the removal of the exemption will mean that existing agreements, even those concluded in the last ten years, will immediately be subject to the Competition Act. Landlords who have agreed to competitive restrictions in agreements should review the arrangements now to determine whether or not they comply with the rules.

From a landlord’s perspective, one favourable point is that if it is subject to a restriction on leasing to competitors of a tenant, it is possible that such restriction will be unenforceable by the tenant from 2011. However, it does need to be borne in mind that the competition authorities have power to raise fines on businesses who enter into anti-competitive agreements of up to 10 per cent. of their annual turnover, so it is best to ensure that offending restrictions are removed from arrangements altogether.

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Towering regulation: new registration requirements for tower cranes

New health and safety regulations coming into force on 6 April 2010 raise a number of potential issues that developers and landlords may need to be aware of. Tower cranes are essential pieces of plant in the construction industry and, to some extent, it is possible to follow the fortunes of the economy by counting how many cranes are hovering over the skyline of our major cities.

During the last construction boom, the total number of tower cranes in use quadrupled in just a few years, and this led to concerns about whether safety standards were being rigorously maintained.

It is an important issue because, whilst relatively rare, accidents involving tower cranes tend to be "catastrophic" – they almost always result in death and/or serious injury – and they can involve members of the public, who are exposed to danger because cranes frequently oversail the public highway or other buildings neighbouring the construction site.

Following two accidents in 2007, there was pressure on the Health & Safety Executive (**HSE**) to take action to try to improve safety standards, and after a consultation with the construction industry in 2009, the Notification of Conventional Tower Cranes Regulations 2010 (**Regulations**) have been produced.

The Regulations provide for the creation of a register of "conventional tower cranes" in use on construction sites. Such cranes are also often called "assisted erected cranes" (and differ from "self-erected cranes", which are mobile and can be driven on to and off the construction site without extra equipment) and have been singled out for registration because they are often on site for a period of months and are more commonly involved in the sorts of accidents that the HSE is hoping to eliminate.

The definition of a construction site is borrowed from the CDM Regulations 2007 and is very broad: "any place where construction work is being carried out", and the only sites where the Regulations do not apply are ships and sites designated by the Ministry of Defence.

It is the duty of an employer to register (or re-register) a tower crane within 14 days of the crane undergoing a "thorough inspection" or a "periodic inspection", as defined in the Lifting Operations and Lifting Equipment Regulations 1998. These inspections must take place after initial installation and then periodically whilst the crane remains on site, so a single crane may well need to be registered several times during a construction project.

If a "thorough inspection" does not take place within 14 days of the crane's installation, the employer is still required to notify the HSE, although less information needs to be supplied, and a full notification must take place once the "thorough inspection" has taken place.

The HSE has set up a website to allow notifications to be made online (www.craneregister.org.uk), and there is a flat fee of £20 for each registration.

The Regulations create a number of potential issues for developers and landlords:

- although the guidance that has been issued with the Regulations suggests that registration will be a matter for principal contractors or subcontractors who are responsible for the installation and operation of the crane, the Regulations say that an "employer" includes "a person who has control to any extent of the way in which a crane is used". This definition is broad enough that it could apply to developers and landlords;
- the Regulations have retrospective effect, so cranes that were installed before 6 April 2010 will still need to be notified to the HSE within 28 days of the Regulations coming into force; and
- the Regulations add to the list of administrative tasks that developers and landlords will need to ensure that their contractors are attending to. The chances that the HSE will detect breaches of the Regulations must be relatively high – it is rather difficult to miss a tower crane, after all!

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Good contractors will be aware of the Regulations and will have taken steps to ensure compliance, but for their own comfort, developers and landlords would be well advised to check with their contractors to make sure.

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Changes to section 106 agreements and the Community Infrastructure Levy

As most of you will probably be aware, the Government has been working up proposals for a new levy (the Community Infrastructure Levy or **CIL**), to sit alongside section 106 agreements, for several years. The Community Infrastructure Levy Regulations 2010 have now finally been adopted and come into effect from 6 April 2010.

The regulations confirm that local authorities have the power to introduce a levy but are not obliged to do so. The process which local authorities will have to go through before a levy can be adopted is both complex and time consuming. The principle of the introduction of a levy must first be enshrined in an authority's planning policy documentation and the authority must then also introduce a charging schedule.

This will set out the amount of the charge, based upon an analysis of the likely costs of infrastructure requirements, coupled with an assessment of the amount of development that is likely to come forward. In practice it is likely to be at least a couple of years before any local authorities introduce the levy and even then adoption is likely to be extremely patchy. A further more detailed note setting out how the levy will operate will be issued at a later date assuming that the legislation survives any change of government (the Tories have indicated that they will abandon the levy).

The main purpose of this note, however, is to alert you to the fact that the regulations have also changed the rules on what can be required under a section 106 agreement/undertaking.

From time to time the Government issues a circular setting out its policy on when section 106 obligations should be sought by local authorities and what types of obligation can be included.

Local authorities are required to have regard to Government policy in deciding whether or not to seek a section 106 agreement and also when deciding what it ought to cover. They can, however, ignore the advice and frequently do so. Whilst this has often been a source of intense frustration to developers, the failure of local authorities to follow Government guidance did not render the agreement unlawful. An agreement is a legally binding and enforceable obligation even if it contains provisions which are contrary to Government advice.

The new regulations make it much less likely that an authority will demand that an agreement is entered into where this would be in conflict with Government guidance. They also, however, make it much more dangerous for a developer to agree to enter into such an agreement anyway, just to obtain a consent.

The regulations state that from 6 April a section 106 agreement or undertaking may only constitute a reason for granting planning permission if it is: (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development.

Where, as is usually the case, an agreement or undertaking is entered into in support of a planning application it is going to be very difficult to argue that it was not taken into account by a local authority when the decision to grant planning permission was made.

In practice, therefore, if an agreement is entered which does not satisfy each of these criteria (which broadly equate to the principles set out in the circular advice), there is considerable danger that the planning permission to which it relates would be held to be unlawful if it were to be challenged in the courts.

While, therefore, developers are likely to welcome the fact that the regulations should help to reduce the demands that local authorities make when applications are being considered, they should be very wary of the increased risks of agreements presenting an opportunity for those opposed to schemes seeking to quash consents by an application for judicial review.

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