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The What, Why, and How of Green Leases in Singapore

With the increasing expectations of disclosure and scrutiny by stakeholders – regulators, investors, customers, employees, and civil society – of the ESG governance and performance of businesses, given that the environmental performance of a building is often a key element of a business’s environmental footprint, it is becoming inevitable for business to pay greater attention to the environmental performance of the buildings they operate or even merely occupy.

This update offers an overview of green leases in Singapore, explaining what they are, why they matter, and the considerations and pitfalls to look out for when structuring green leases and drafting green covenants.

What is a Green Lease?

The Building Control Authority (“**BCA**”) describes a green lease as “an agreement between landlord and tenant which sets out environmental objectives on how the building is to be improved, managed and/or occupied in a sustainable manner”. It is a short form for an “environmentally friendly leasing arrangement”.¹

It is not necessarily the case that any the green clauses therein are always intended to be legally binding. Green clauses come in all manner of shades of green, ranging from light green, where the green ‘obligations’ are merely aspirational; to the dark green lease, where the breach of obligations can result in legal consequences, including termination of the lease.

The green covenants of a lease also cover a wide scope. Jones Lang LaSalle (“**JLL**”) noted in their recent report on green leases² that some of the most adopted themes in green leases in the Asia Pacific region include data sharing, transparency, energy efficiency and waste management; and foresee that more corporates asking for social and governance clauses to be made part of commercial leasing agreements, thus broadening the scope of green leases to responsible leases.

Why Green Leases?

JLL reported that 42% of corporates have already adopted green leases, and another 43% plan to adopt them by 2025. Of 340 corporate sustainability professionals interviewed, 65% believed that green leases will replace conventional leases by 2025.

Some of the reasons for adopting green leases, as garnered from Asia Pacific corporate sustainability professionals, are that green leases can help them achieve savings through energy efficiency; comply with their organisation’s sustainability targets; improve the working environment and promote employee wellbeing; help enhance corporate brand image; accelerate net zero carbon ambitions.³

BCA also points to the possible synergies in cooperation between building owners and tenants to address traditional structural barriers to implementation, such as split incentives and interests between building owners and tenants, by ensuring that the parties with influence over key aspects of environmental performance obtain some benefit from implementing the improvements. Green leases can also improve transparency and accountability through providing an agreement between both landlord and tenant ensuring that the parties identify and address problems promptly and efficiently together.⁴

¹ BCA, *Green Lease Toolkit: Green Schedule – Part of Green Mark 2021* (September 2021) <https://www1.bca.gov.sg/docs/default-source/docs-corp-buildsg/sustainability/20210917_green-lease-toolkit_upload.docx?sfvrsn=a94a4e7d_2>.

² JLL, “Green Leases: Setting the Tone for Responsible Leases”(30 September 2022) (“**JLL Report**”) <<https://www.jll.com.sg/en/trends-and-insights/research/green-leases-setting-the-tone-for-responsible-leases>>.

³ *Ibid.*

⁴ *Supra* n 1.

Compliance with Statutory Requirements to Report on Environmental Issues

In Singapore, where there are many instances of mandatory reporting of aspects of the environmental performance of business, the adoption of green leases to facilitate cooperation between landlords and tenants helps both parties to discharge their duties and report favourably on their own environmental performance.

Mandatory reporting requirements include:

- Section 22FJ of the *Building Control Act 1989* empowers the Commissioner of Building Control to require the owner of a building to provide information on the electricity consumption by users of the building, the consumption of other types of energy by users, the consumption of chilled water supplied to the cooling system of the building and other information relating to the building, the users of the building and their energy usage.
- Sections 27 and 28 of the *Energy Conservation Act 2012* require a corporation which has operational control over a business activity carried out in a single site and which has attained the energy use of 54 terajoules threshold derived from a specified fuel or energy commodity and attributable to a prescribed industry sector to make annual submissions to the National Environment Agency (“NEA”) on its energy consumption and production and an energy efficiency improvement plan. Prescribed transport facilitate operators must submit similar reports to the Land Transport Authority, Maritime and Port Authority of Singapore, or Civil Aviation Authority of Singapore.⁵
- Section 30A of the *Environmental Public Health Act 1987* empowers the Director-General of Public Health to require the owner, occupier or lessee of a work place to furnish information on any waste produced in that workplace, and submit to him a waste reduction plan containing information on the targets for waste reduction, measures to reduce waste, the progress of any waste reduction measure and any other particulars relating to waste reduction. Currently, the premises subject to such requirements include hotels with more than 200 rooms and shopping malls with more than 4,600 m² of net lettable area, factories with more than 20,000 m² of gross floor area (“GFA”), warehouses with more than 50,000 m² of GFA, and convention/exhibition centres with more than 8,000 m² of GFA.⁶
- Regulation 40BB of the *Public Utilities (Water Supply) Regulations* requires a consumer who holds one or more water accounts with the Public Utilities Board (“PUB”) for water supplied by the PUB to a site used in connection with any business activity carried out at the site (whether or not by the consumer) in excess of 60,000 m³, to submit water usage information to the PUB. A consumer that consumes more than 60,000 m³ of water on a site (whether or not supplied by the PUB) in carrying out any of the consumer’s business activities at the site must also under regulation 40H submit water usage information and water efficiency plans to the PUB.
- Section 27C of the *Resource Sustainability Act 2019* will, when it comes into force, require the building manager of a prescribed building (the person responsible for maintaining the building) to submit to the NEA annual reports on the food waste in the building that is treated by onsite or sent to licensed disposal facilities for treatment. Occupiers of prescribed buildings (including tenants) must also submit to their building managers annual reports on the food waste report provide onsite facilities for the segregation of food waste and occupiers of such buildings to separate their food waste from other waste generated in the buildings and dispose the food waste in the facilities provided by the building managers. Building occupiers must also submit to the building managers of their buildings, information about the amount of food waste that is treated onsite or by the occupiers or sent by the occupiers for treatment offsite.
- Section 12 of the *Carbon Pricing Act 2019* requires any person who has operational control over a business facility at which business activities from prescribed industry sectors emit reckonable GHG emissions equal to or above 2,000 tCO₂e annually to make annual submissions to the NEA on emissions in respect of the business; and if the annual reckonable emissions are equal to or more than 25,000 tCO₂e, pay carbon tax on these emissions.

⁵ *Energy Conservation Act 2012*, Part 4, Division 2.

⁶ NEA, “Mandatory Waste Reporting” <<https://www.nea.gov.sg/our-services/waste-management/mandatory-waste-reporting>>.

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- Rules 711A and 711B of the Singapore Exchange (“SGX”) Listing Rules require an issuer to issue an annual sustainability report disclosing, *inter alia*, climate-related disclosures consistent with the recommendations of the Task Force on Climate-related Financial Disclosures, including the issuer’s direct and indirect greenhouse gas emissions, its targets for managing its climate-related risks and opportunities, and its performance against these targets. Disclosures are currently generally on a ‘comply or explain’ basis, but are mandatory or will be mandatory for the financial; agriculture, food and forest products; energy; materials and buildings industry; and transportation industries.⁷ Public consultations are ongoing to make it mandatory for all listed issuers and large non-listed companies to submit annual climate reports from 2025 and 2027 respectively.⁸

Alignment with Government Policy – Achieving Green Mark Certification

Green leases that at least include provisions relating to energy, water, waste, environmental management and procurement including materials, fit-out as well as facility management practices can also contribute to the attainment by building owners of the Green Mark GM: 2021 Certification Standard for their buildings.⁹ This is a green building rating launched in Singapore in 2005 to evaluate a building’s environmental impact and performance and encourages the industry and professionals to collaborate and develop green building solutions, raising Singapore’s built environment’s sustainability standards.¹⁰ Points awarded for the adoption of green leases vary depending on the extent of the net lettable area in the building covered by green leases.¹¹

Contents of Green Leases

According to the JLL Report, clauses commonly found in green leases in the region include:

- (a) sharing of data on energy, water and waste;
- (b) adoption and achievement of building performance goals;
- (c) a joint commitment to energy-efficient fit-outs like lighting and sensors;
- (d) commitment to renewable energy procurement;
- (e) waste management and recycling obligations; and
- (f) submetering to track energy usage.

Closer to home, BCA’s recommendations for green clauses include provisions for:

- (a) sub-metering to track energy and water usage;
- (b) operation and occupation of buildings to achieve/retain the relevant BCA Green Mark certification;
- (c) use only of paints, sealants, cleaners and adhesives that are low VOC;
- (d) minimisation of exposure to fine particulates;
- (e) use only of natural, solvent free and hydrocarbon free cleaning products;
- (f) use only of NEA-registered pesticides and vector control products which are suitable for use indoors;

⁷ SGX, “Sustainability Reporting” <<https://www.sgx.com/sustainable-finance/sustainability-reporting>>.

⁸ Accounting and Corporate Regulatory Authority, “Public Consultation on Turning Climate Ambition into Action in Singapore - Recommendations by the Sustainability Reporting Advisory Committee” <<https://www.acra.gov.sg/legislation/legislative-reform/listing-of-consultation-papers/public-consultation-on-turning-climate-ambition-into-action-in-singapore-recommendations-by-the-sustainability-reporting-advisory-committee>>.

⁹ *Supra* n 1.

¹⁰ BCA, “Green Mark Certification Scheme” <<https://www1.bca.gov.sg/buildsg/sustainability/green-mark-certification-scheme>>.

¹¹ BCA, *Green Mark 2021: Whole Life Carbon* <https://www1.bca.gov.sg/docs/default-source/docs-corp-buildsg/sustainability/20211027-carbon-criteria_simplified_r1-1.pdf>.

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- (g) use of energy efficient and environmentally responsible lighting, and capped lighting wattage based on floor area;
 - (h) use of water efficient fittings; and
 - (i) sufficient and accessible waste segregation and recycling receptacles and use of such receptacles.

Practical Considerations

The Legal Structure and Nature of Green Covenants

Green leases are not merely a matter of tacking green provisions to an otherwise standard lease. Other considerations necessarily come into play. As noted above, green obligations can be structured as a non-legally binding arrangement, such as a memorandum of understanding, or as an enforceable part of the lease agreement with legal consequences for non-compliance.

Adopting non-legally binding arrangements offers the flexibility of updating or changing the relevant green clauses to suit circumstances. Furthermore, as the green clauses are ultimately non-legally binding clauses, the inclusion of ambitious obligations are unlikely to be sticking points in negotiations, thus allowing leases to be finalised without undue negotiation delay. Non-legally binding green obligations can also alleviate concerns that imposing onerous provisions on tenants might adversely affect the desirability of renting the property without conferring any commensurate benefit on landlords.

On the other hand, legally binding green leases may signal a greater commitment and more certainty on the part of both landlord and tenant to cooperate in meeting their green objectives.

Remedies

If a party breaches a green covenant that is intended to be legally binding, the innocent party may face various obstacles seeking legal recourse.

Assuming the obligation is sufficiently precise or certain to be enforceable in the first place, the innocent party may not be able to seek damages for a breach unless it can prove that the breach has caused it to suffer a loss and can quantify the loss. This may prove challenging for the breach of some obligations, e.g. a failure to provide certain sustainability data or the provision of incorrect or inaccurate sustainability data; in other case, the loss may be minimal, e.g. a failure to install water efficient fittings. Often, contracting parties use a liquidated damages clause to require the breaching party to pay a pre-agreed compensation sum to the innocent party. However, in such circumstances, the pre-agreed compensation sum must be a genuine pre-estimate of the loss, otherwise it will be regarded as an unenforceable penalty clause. Hence, the same difficulty may arise. If parties intend for liquidated damages to be paid upon the breach of a green lease obligation but it is difficult to pinpoint the nature of loss and determine the quantum of such loss, then how are parties to agree on a genuine pre-estimate of the loss?

Seeking an order for specific performance is another potential remedy, but this remedy is also not a straightforward one. It is a discretionary remedy, and the courts may be reluctant to grant such an order, especially if it involves judicial oversight of a continuing obligation which requires excessive oversight to monitor for compliance.

If the innocent party is unable to claim for loss or apply for specific performance, it may rely on self-help remedies, such as the right to terminate the lease upon breach of the green obligations under the lease. From a practical perspective, however, parties may not want to deem a breach of a green lease obligation so serious as to warrant termination, especially if no loss is suffered.

Rent Review

Where tenants take on green obligations to improve the environmental performance of their premises, e.g. undertaking energy efficiency works or using only eco-friendly fixtures or fittings etc, the value of the premises may increase, in turn warranting higher rents. Tenants thus find themselves in the unenviable position of not only having to bear the costs of undertaking green obligations and having to pay increased rent (upon a rent review

or for a renewal term) that was brought about by their undertaking of green obligations in the first place. In such instances, where the tenant has contributed significantly to improvement works, it may be appropriate to exclude such improvements from the assessment of market rent for the purpose of rent review or renewal.

Property Tax

In many leases, it is common for the landlord to bear the property tax but for the tenant to bear any increase in property tax. Where a tenant has contributed to the improvement works resulting in increase in property tax, it may be appropriate to exclude the tenant from responsibility for the increase in property tax.

Service Charge

If it is agreed that the landlord will undertake green obligations such as to carry out energy efficiency works or to install environmentally friendly equipment, machines, plants etc. in common areas, consideration should be given to whether the Landlord may pass the cost of such works to the tenants by increasing the service charge that the tenants have to pay, and if so, how such cost should be amortised.

Best Practices – Overcoming the Challenges

As discussed above, the green lease may not be attractive to a tenant and may not be enforceable by landlords. Yet, these challenges can be mitigated in various ways, including the following:

Reciprocity

First, green clauses can be drafted in a way that is reciprocal, i.e. obliging both landlord and tenant to do things in a sustainable way. A party may be unwilling to enter into a lease which imposes onerous green obligations on it without any corresponding undertaking or assistance by the other party. An example of a reciprocal clause is clause B6 IV of the Toolkit. Where recycling obligations are imposed on the tenant, clause B6 IV recommends that the landlord “provide weighing services for tenants to weigh their waste to be disposed of as well as recyclables to be sent for recycling”.¹² Where green leases are drafted in ways that promote cooperation between landlord and tenant, green goals and objectives are likelier to be accepted and achieved.

Demonstrability

Second, green obligations can be drafted in a way that is demonstrable. This entails green clauses setting clear standards of compliance or property management practices and activities so that it is easy to ascertain whether an obligation has been met. An example of a clause with clear standards of compliance is clause B2 VII of the Toolkit, which states that the use of high-pressure washer jet must “meet PUB’s water use criteria”, where such water use criteria is “not to exceed 6L/min”.¹³ Another example is clause A1 II of the Toolkit which requires the achievement or maintenance of “PUB’s water efficient building (WEB) (Basic) Certification”.¹⁴ These clauses set obligations with clear standards – the water use criteria is either met or not, and the certification is either attained or not. Clear and demonstrable obligations in turn allow (i) the performing party to know precisely what is required to satisfactorily discharge its green obligation and (ii) the enforcing party to easily ascertain whether an obligation has been met.

Monitoring and Enforcement

Third, if green clauses are legally binding and capable of monitoring and enforcement, they should also be monitored and enforced. Otherwise, the intended green outcomes that the parties hope to achieve when adopting the green lease will not materialise, and the lease will only be green in form and not in substance.

Other Clauses

In addition, drafters should consider how green clauses can affect the drafting of other clauses in the lease. For instance, a landlord may want to consider imposing restrictions on the tenant’s assignment or underletting of premises to any party which the landlord considers will not comply with the green lease, regardless of whether

¹² Supra n 1.

¹³ Ibid.

¹⁴ Ibid.

the obligations are legally binding. A landlord may also want to consider whether the tenant should be required to reinstate any tenant's alterations where this would adversely affect the environmental performance of the property. Moreover, a landlord should consider whether it has provided for sufficient rights in the lease to carry out its environmental performance reviews and measurements, and to carry out works to improve the energy efficiency of the building, regardless of whether this is required by legislation.

Conclusion

The concept of a green lease is certainly growing in popularity. The use of it, however, is still in the nascent stages. Presumably, parties are less likely to object to incorporating green clauses into the lease so long as they are not legally binding. This is obviously a good starting point, although one cannot help but question how effective it is to rely primarily on the parties' volition in undertaking optional green obligations. Where parties are willing to take on legally binding green obligations, other issues may need to be thought through, including the enforceability of obligations and remedies for breach.

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