

Balance of power

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Using commercial roof space for solar panels can be a complicated matter, explains Catherine Burke, but there may be ways to simplify the process and encourage the market to develop

Leasing a field to install a groundmounted solar photovoltaic (PV) system is relatively simple. The property ownership does not tend to be complex and developers will generally be dealing with an individual landlord or family. There may be a mortgagee whose consent is required, third parties with rights over the site that need to be released, or issues around the title, but these tend to be solved through insurance or appropriate contractual mechanisms.

Commercial buildings, however, are a different prospect. There is likely to be a complex web of ownership and occupation and a developer could waste a great deal of time speaking to the wrong person.

To take an example:

- ABC plc is the freehold owner of a four-storey building, Building A;
- ABC has granted a 10-year lease of the ground floor to tenant 1 who trades from that part. Tenant 1 has granted an underlease of part of the ground floor to subtenant 1, who trades from that part;
- ABC has granted a 20-year lease of the second and third floors to tenant 2 for office space; and
- ABC has granted a 15-year lease of the fourth floor including the roof (and therefore the airspace above it), to tenant 3 for office space.

Developer X wishes to investigate the possibility of taking a lease of the airspace above the roof at Building A for a 21-year term (the 20 years of support they will obtain under the feed-in tariff or Renewables Obligation plus a period to install and decommission). The developer approaches tenant 1 and/or subtenant 1, who think it is a great idea because they will benefit from cheaper electricity.

After a few weeks of discussing the power purchase agreement with them, the developer starts talking about leasing the airspace above the roof, only to be told that tenant 1 and subtenant 1 are not related to ABC plc, tenant 2 or tenant 3 and cannot give any rights over the roof.

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Frustrated, the developer checks the title to Building A and realises that ABC plc owns the freehold. It therefore contacts ABC estate department in an attempt to find the right person to talk to. Realising also that the roof has been leased to tenant 3 it starts discussions with Tenant 3, ignoring tenant 2 for the time being.

Even if things go well and ABC and all the tenants and subtenants at the building are in agreement, it is likely that the following will be required:

- since the unexpired terms of tenant 3's lease is less than the period required by Developer X, either the roof will have to be removed from tenant 3's demise, which will be complicated (there will need to be a surrender and re-grant with time and cost implications including liability for stamp duty land tax), or tenant 3 will grant a lease for the remainder of its term and the landlord grants a lease for the balance of the period required by the developer;
- since access through parts of the building will be required and works will be carried out in parts of the building other than on the roof, the formal consent of all of the tenants and subtenants is likely to be required;
- ABC and all or some of the tenants and subtenants at the building may have granted charges or mortgages, and the consent of any chargees and mortgagees will be required; and
- usually for a rooftop scheme to be viable, the power must be consumed and paid for onsite. One of the parties must therefore preferably commit to taking the power for the duration of Developer X's lease. ABC may be unwilling to do so because it is not in occupation and it may not want the management responsibility of recharging the tenants. Since none of the tenants' leases are for a sufficient duration to commit to take the power for 20 years, there is a risk that there will be times when the power is not purchased by anyone in the building. It would be possible for the landlord to be obliged to grant future leases that require the tenant to enter into a power purchase agreement with Developer X, but the landlord may feel that this could make the building less attractive.

For a relatively small rooftop system, the cost, complexity and time to complete the legal documentation may outweigh the benefits to the developer.

It will almost always pay dividends to do due diligence on the property ownership structure before spending too long talking to people who may not be able to grant the rights required. Although there may be some cost associated with this, it may well end up being money well spent.

Licence alternative?

A lease gives the tenant a right in the property which, if longer than seven years is registrable at the Land Registry. This is to make third parties aware of the rights granted, which are enforceable against anyone with a later claim to the property. A lease gives an exclusive right to occupy the premises, subject to any rights that the landlord may have reserved in the lease.

An alternative approach, often used with public sector buildings such as council offices, schools and hospitals, is to enter into a licence. A licence is a contractual right to remain in occupation and is only enforceable against the party granting the licence. It does not give an exclusive right to occupy the premises, so is inherently less secure than a lease and poses a greater risk in terms of access to the PV system. A licence cannot be registered at the Land Registry and a third party acquiring the property – a purchaser or a mortgagee – would not necessarily be bound by its terms.

It would be unwise to enter into a licence except in very limited circumstances. A funder is

unlikely to accept a licence as good security for a loan even if the terms include provisions that oblige the party granting the licence to fully compensate the developer for its losses in the event it was terminated early. This is because such an obligation is only as good as the financial strength of the party granting the licence or its guarantor.

Other options

This is the situation from a developer/installer point of view. However, if you are a property owner or occupier looking to install a PV system on a building, in addition to the lease and licence structures (in both cases the developer/installer owns the equipment and claims the financial support) a property owner/occupier could (subject to any necessary consents):

- purchase a system outright, in which case the terms of the supply and installation contract are key, together with any consents required from other persons with an interest in the property; or
- acquire a system on a lease basis. Some developers in the market have teamed up with providers of finance so that when the system has been installed, the finance provider pays the installer and leases the system on a hire purchase or conditional sale basis to the property owner or occupier. A person leasing the solar PV generating equipment is able to claim the feed-in tariffs.

A rooftop market?

The rooftop market works on relatively small margins. It requires high volume and low transaction costs. It is therefore important to have in place a process that is, to the extent possible, standard. This should include:

- a process for qualifying sites from a legal complexity point of view;
- early, limited due diligence on property ownership to ensure that you are speaking to the right stakeholders;
- standard form documents (lease or licence and power purchase agreement) that are fairly drafted to reduce the potential for negotiations (almost a 'take it or leave it' approach but recognising that some properties have greater potential and so are worth some limited negotiation); and
- a smooth and efficient process for reporting on title, execution of leases and registering leases at the Land Registry.

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Further information

- Related competencies include [Sustainability](#)
- This feature was taken from the RICS *Property journal* (November 2015)