

# Green innovations leave landlords red faced

Some developers are finding renewable technology more trouble than it is worth. Denise Chevin reports

It may have won a string of environmental awards, but a housing association that opted to build this green housing scheme in the south-east of England has been left regretting its decision.

Speaking on the condition of anonymity, the social landlord reels off a catalogue of problems that have beset the blocks of flats: "The biomass boiler has to be de-ashed every two weeks, for which we have to employ a caretaker; the boiler is using twice as many fuel pellets than we budgeted for and the electricity bill to run it is huge; residents aren't happy with the recycled rainwater that flushes the toilets; and the filters in heat-recovery units have to be changed four times a year, which is not practical with tenanted properties."

He adds: "The photovoltaic panels are about the only thing working as we expected."

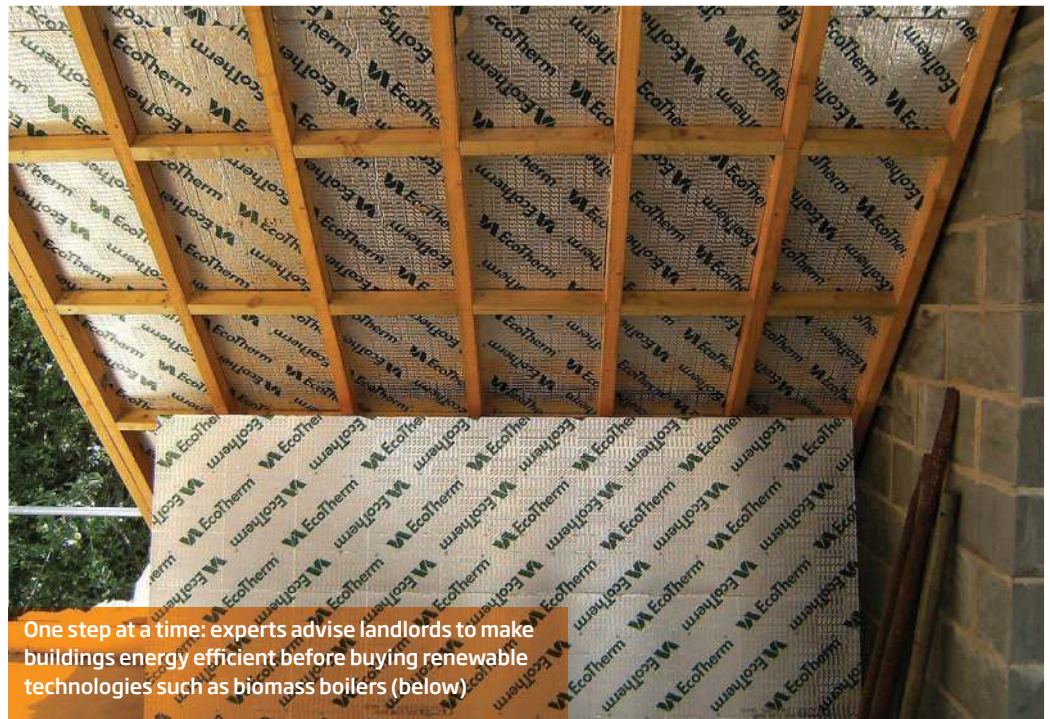
This experience is not unique. As landlords and developers strive to improve their developments' green credentials, many are finding that popular renewable technologies, such as biomass boilers and ground-source heat pumps, bring a host of teething problems and surprises.

This is not because there is anything inherently wrong with the kit, says Terry Keech, head of sustainability at Calfordseaden. Rather, it is because the technology is more complex than landlords and occupiers anticipate.

"Even before renewables are introduced, building energy management systems – the computer systems that control services such as heating and lighting – can waste energy because they are not set up properly," he says. "Renewables simply exacerbate this."

"The developer might not explain to the tenants how the system works, or the maintenance staff may not understand the fine-tuning necessary. So you end up with systems that fight with other bits of kit, run inefficiently and land you with energy bills three to four times higher than expected."

Recent findings by the Carbon Trust have revealed that low-energy buildings are using on average three to five times more energy than expected. Rod Bunn, a building performance analyst with research body BSRIA, is working



One step at a time: experts advise landlords to make buildings energy efficient before buying renewable technologies such as biomass boilers (below)

with the Carbon Trust on a four-year monitoring programme. So far, the performance of 15 large commercial buildings and some domestic and smaller schemes have been scrutinised.

Bunn says: "Already we can see that these low-energy buildings aren't working operationally. Equipment can go one of three ways: the problems get fixed, it never works properly and ends up being switched off, or it costs a lot of money to run and becomes a millstone around the neck of the building owner."

He cites the example of the £30m West Ham Bus Garage, which opened in 2010, where the structure's biomass boiler completely burnt out.

A spokesman for Transport for London, which commissioned the building, said the problems were caused by the poor quality of the wood pellets that fuel the boiler.

He adds: "A new European standard has now been introduced, which should prevent this happening."

Bunn says problems like this are not unusual.

### No quick fixes

There is a consensus that landlords and occupiers do not take the efficient management and maintenance of buildings seriously enough. Paul Toyne, group head of sustainability at management consultancy

WSP, says: "Installing renewables requires a change in behaviour. We need to get into the mindset that these systems don't run by themselves – they need to be fine-tuned to get maximum performance."

To this end, WSP has formed a consortium with developer Brookfield and architect Woods Bagot to modify and upgrade the energy performance of existing buildings. As part of the service, they go back every month after their work is completed to monitor how the structures are working.

Miles Keeping, head of sustainability at GVA and chairman of the UK Green Building Council's policy committee, agrees that maintenance staff often lack the necessary skills. However, he says other factors can also lead to poorly running systems.

"The building might be designed for one type of user and then a more intensive energy user moves in, which causes problems," he explains. "There's a real need for designers, landlords and developers to work hand in glove with occupiers."

There is clearly need for changes in all these areas, some argue that we should be striving to make buildings as simple as possible if we are to really tackle the problem.

"Designers should reduce the energy demand of buildings before they bother to fit them with renewables," says Bunn. He points to the success of Ashburton Court, Hampshire County Council's 1960s-built office in Winchester.

The property was renovated in 2009 and won awards for its sustainable innovations. But its architect, Rab Bennetts, a director of Bennetts Associates, says the building is devoid of all "green bling".

PHOTOGRAPH: MARTIN PETTIT

## LEGAL CASE NEWS Warren Gordon

### No guarantees on tenants' assignees

**The message** A contractual requirement for a tenant's guarantor to guarantee an assignee's liability is invalid.

**The case** The issue of whether an outgoing tenant's guarantor can be required to guarantee that tenant's assignee remains a hot topic in property. The High Court decision in the case of Good Harvest (2010) caused consternation and uncertainty. Landlords fretted over its impact on property values and tenants worried their ability to assign – particularly between group companies – could be restricted. Good Harvest was settled, denying the Court of Appeal a chance to have its say.

There was considerable expectation over the Court of Appeal's decision in *K/S Victoria Street v House of Fraser (Stores Management)* and others (27.07.11), which relates to similar issues. The judgment answers many questions and provides more certainty on how to deal with guarantor's liability after the tenant it guarantees is released.

The case related to a sale-and-leaseback agreement, under which House of Fraser (Stores Management) sold a store for £46m to *K/S Victoria Street*, which then let it back for an annual rent of £2.25m for 35 years, with House of Fraser Ltd acting as guarantor.

For tax reasons, Stores Management, a subsidiary of House of Fraser, was chosen as the seller and initial tenant, but *Victoria Street* was not satisfied with its finances. The agreement therefore required Stores Management to assign to a financially healthier subsidiary and House of Fraser to guarantee that assignee's liability.

House of Fraser claimed these requirements were in breach of the Landlord and Tenant (Covenants) Act 1995. The High Court agreed the guarantee requirement was unenforceable. *Victoria Street* appealed.

In relation to new tenancies completed on or after

1 January 1996, the act provides that if a tenant assigns its lease, it is released, but a landlord can demand it guarantees its immediate assignee under an authorised guarantee agreement (AGA).

The uncertainty was over whether the tenant's guarantor could be required to also guarantee the assignee. If such a requirement was held not to be permitted, it would be rendered void by the act's wide-ranging anti-avoidance provisions.

The Court of Appeal decided that the tenant's guarantor cannot be required to guarantee the assignee. Therefore, House of Fraser was not obliged to guarantee the assignee. However, *Victoria Street* could still require the assignment to the financially healthier company – the court rejected House of Fraser's argument that the lease's assignment provisions would in any event allow an assignment back to Stores Management.

The court then sought to address issues of particular interest to the industry on which it was not required to decide. Therefore, some of the comments, particularly on subguarantors, are not legally binding precedent, but will be regarded as persuasive because of the judges' seniority.

Their conclusion on the act's effect on existing guarantors was that a guarantor of a tenant cannot validly be required to commit itself in advance to guarantee the liability of a future assignee.

Although an assignor's guarantor cannot validly guarantee the liability of the assignor's assignee even if the guarantor wishes to do so, it can be required to guarantee the assignor's liability under the AGA, sometimes known as a "sub" or "parallel" guarantee. That is important for the industry, as the landlord can be more confident in looking to the financially strong guarantor following the assignment. It makes commercial sense, since the guarantor is often the crucial element in the tenant's covenant strength.

A final conclusion is that the guarantor can in any event validly guarantee the liability of an assignee on a further assignment.

The decision will cause concerns, but it will, hopefully, reduce the practical difficulties with tenant's guarantors.

Warren Gordon is head of real estate know-how at Olswang

#### Summing up: *K/S Victoria Street v House of Fraser (Stores Management)*

- The court said a tenant's guarantor is not required to guarantee that tenant's assignee.
- However, the guarantor can be required to guarantee a tenant's assignee under an authorised guarantee agreement.

"Renewables are expensive and often don't justify the cost," he says. "It's far better to spend the cash improving the fabric of the building. For example, by installing good-quality windows that open and are maintenance free."

Simon Cox, sustainability officer at Prologis, agrees. "We try to go down the energy-efficiency route before turning to innovative technologies, designing buildings that are as simple as possible to operate," he says.

One of the group's buildings that does feature renewable technologies is the SusCon building in Dartford, opened earlier this year in a joint venture with Dartford Borough Council.

Cox says: "On this building, which has a biomass boiler, we've introduced seasonal commissioning. As part of its contract, the installer has been asked to come back every season for the first 12 months to check that it is working properly."

#### Green for go

Given the cost implications, it is surprising that developers continue to focus on renewable technology over energy efficiency. One reason is that they are often install renewables to ensure planning permission. Over the past five years, councils have increasingly demanded that energy is generated on site. School buildings that have installed biomass boilers, for example, have received extra funding, says Bunn.

Credit chasing has been another driver, he says. Projects that include renewable technology win extra points in green assessments such as BREEAM.

However, attaining an "excellent" or "outstanding" BREEAM rating now requires the building to be efficient. This should help eliminate the sort of cynical manoeuvres described by Rab Bennetts, such as developers installing biomass boilers as a gesture, but then using the gas ones they installed as back-ups.

GVA's Keeping has a similar story: "I know of a large building in London's Midtown where the biomass boiler has never been turned on," he says.

However, Clare Hanmer, technology strategy manager at the Carbon Trust, points out that there are plenty of cases where biomass boilers have been the right solution. To ensure this, she says any installation contract must cover proper commissioning and training of relevant staff.

She adds that, although buildings monitored by the Carbon Trust may have used more energy than anticipated, 93% of those questioned said they had met their objectives and thought it was a good idea to install renewables.

"Of the 15 commercial buildings studied, 14 said they were 'very' or 'quite satisfied' with the result," she says. ■

