
ENFORCEMENT OF THE TERMS OF THE HEAD LEASE OF THE ARLINGTON SITE, MARGATE

To: **Cabinet - 22 January 2013**

Main Portfolio Area: **Commercial Services**

By: **Corporate & Regulatory Services Manager**

Classification: **Unrestricted**

Ward: **Margate Central**

Summary: **To review the terms of the Council's Head Lease of the Arlington site and to agree the steps to be taken by officers to ensure compliance with terms of the Head Lease by the tenant.**

For Decision

1.0 Introduction and Background

- 1.1 On 19 May 1965, the Council's predecessors in title, the former Margate Borough Council granted a 199 year lease ('the Lease') of a 4.49 acre site fronting Marine Terrace Margate ('the Arlington Site') to Bernard Sunley Investments (Margate) Limited. The site originally comprised a casino and corporation car park but by the date of the grant of the Lease the tenant had substantially completed the redevelopment of the site in accordance with the terms of a development agreement entered into with the Borough Council on 17 October 1961, namely the construction of a multi storey residential tower block with a number of ground floor retail units floor to be known as Arlington House, a public house and a number of other retail units to be known as Arlington Square and a coach/car park and a petrol filling station with a show room to the rear. As a result, the term of years granted by the Lease was defined to commence from 1 October 1961 at a ground rent of £7,500 per annum payable by equal quarterly instalments in advance. (The Lease made no provision for this sum to be uplifted with inflation).
- 1.2 The Lease was granted on 'clear lease' terms, that is to say as a tenants full repairing and insuring lease, meaning in theory that the Landlord should not have to incur any expenditure on the site and that the ground rent would therefore represent pure profit.
- 1.3 On 31 March 1969 Bernard Sunley Investments (Margate) Limited transferred the tenant's interest in the Lease of the Arlington site to Metropolitan Property Realizations Limited ('MPRL') and on 1 April 1974 the newly created Thanet District Council automatically succeeded to the Landlord's interest in the Lease of the site.
- 1.4 A copy of the Head Lease is attached for information as **Annexe 1** and the Lease Plans are attached as **Annexes 2, 3 and 4**. In essence, Clause 3(xix) and Schedule 2 of the Lease stipulate the uses to which each part of the site can be put although the Tenants can apply for a change of use to any part of the site and the Council cannot unreasonably withhold its consent to such a change of use. This will be a relevant consideration if MPRL is ultimately successful in obtaining planning permission for a retail food store and ancillary customer car park on the part of the site currently reserved for coach and public car parking. However, in that event in accordance with clause 3 (xii) of the Head Lease MPRL will also require the Council's consent Council to carry out the necessary alteration works, although, again, the Council cannot unreasonably withhold its consent to the

carrying out of such works. However, there is no restriction in the Head Lease at all concerning sub letting and MPRL will be free to sub-let the rear portion of the site to e.g. Tesco's, should they wish to do so.

2.0 Current Issues.

- 2.1 A number of the current long leaseholders of the flats in Arlington House (the Council's sub-tenants) have expressed concerns about the poor management of the wider Arlington site by MPRL. Although it is not the Council's responsibility to enforce the terms of the long lease-holders leases with MPRL nor does the Council have the right regulate the conduct or actions of the managing agents appointed by MPRL, the long leaseholders at Arlington House are entitled to expect the Council to require MPRL in a planned and systematic way to comply with the covenants and other obligations on the part of the tenant contained in the Head Lease to the extent permitted by the terms of the Lease and any relevant statutory limitations, whereas, until recently, enforcement action by the Council has largely been re-active. The Council should also not be deterred from taking enforcement action by the fact that MPRL are likely to try to pass on all costs and expenses incurred by them in complying with terms of the Head Lease to the sub-tenants. That being so, consideration is now given to the enforcement of tenant's covenants generally and then to the major tenant's covenants contained in the Head Lease:-

Enforcement of Covenants Generally

- 2.2 There is no direct contractual relationship between the Council and MPRL as the Council is a statutory successor to the Margate Borough Council and MPRL are the assignees of Bernard Sunley Investments (Margate) Limited. Nevertheless under the doctrine of privity of estate which still applies to leases granted before 1 January 1996 (before the Landlord and Tenant Covenants Act 1995 came into force the Council will be able enforce restrictive/negative tenants covenants (e.g. a restriction on use) and all positive covenants (e.g. a covenant to repair) which 'touch and concern' the land and 'have reference to the subject matter of the Lease' meaning in theory (if not always in practice) that all the major tenant's covenants in the lease are enforceable by the Council against MPRL.
- 2.3 The methods of enforcement are four fold - forfeiture, action in damages, injunction, and specific performance. In addition, where in the event of a breach of a positive covenant the lease gives the landlord the right to enter and perform the covenant and then recover its costs from the tenants, the landlord will also have an action in debt recovery. However, the Lease of the Arlington site only confers default powers on the Council if MPRL fail to keep the open part of the site clean and tidy and free from weeds or if MPRL fail to effect proper insurance. In addition, as the costs to the Council in effecting insurance in default is prescribed by the Lease to be recoverable as rent, the Council can also consider forfeiture as an alternative to debt recovery action.

Forfeiture

- 2.4 Forfeiture is an application to court to terminate the lease and can be instituted 'as of right' in relation to rent arrears or other sums of money due under the lease prescribed to be recoverable as rent, e.g. Landlord's insurance premiums. However, in order to enforce all other tenant's covenants by this remedy a landlord must first serve a notice under section 146 of the Law of Property Act 1925 - a 'notice before forfeiture' which gives the tenant the opportunity to remedy the breach before formal forfeiture proceedings are taken. There are also significant statutory restrictions on the use of forfeiture proceeding for a breach of tenant's repairing obligations in the form of the Leasehold Property Repairs Act 1938 - considered in more detail later in this report. It is also the case that the courts 'lean against forfeiture' because, if successful, the tenant is deprived of his lease. Accordingly, even where an order in forfeiture is granted, the court will normally grant the tenant 'relief from forfeiture' - meaning that so long as the tenant undertakes to now comply with terms of the lease (and does so) the lease will be continued subject to the right of the landlord to revert to the court if the tenant does not.

Action in Damages

- 2.5 A landlord will always have the right to recover damages for breach of a covenant by a tenant - assuming of course that the landlord can prove that he has suffered quantifiable financial damage to his reversionary interest as a direct result of the breach. However, actions in damages for breaches of repairing covenants are also subject to the significant statutory restrictions imposed by the Leasehold Property Repairs Act 1938.

Injunction

- 2.6 This is a remedy which typically is used to enforce against a breach of a restrictive covenant, e.g. a covenant requiring land to only be used in a particular way. However it is a discretionary remedy and the court may award damages instead an injunction as well as in addition to it. Additionally, the courts are unlikely to grant an injunction if the landlord only suffers trivial damage to the value his reversionary interest.

Decree of Specific Performance

- 2.7 This is similar to an injunction but used to require a tenant to perform a positive obligation in the Lease - e.g. to keep the premises in repair. Although a superficially attractive remedy, it is little used in practice because it cannot be used to circumvent the statutory restrictions contained in the Leasehold Property Repairs Act 1938 and, as a discretionary remedy, the courts will hardly ever grant a decree of specific performance if the landlord can be adequately compensated in damages or can only prove insignificant loss.

3.0 Major Covenants in the Head Lease

- 3.1 The major covenants in the lease of the Arlington Site are now considered in turn, including, where potential or actual breaches are identified, recommendations on what action can or should be taken (if any).

To Pay Rent - Clause 2

- 3.1.1 This covenant is being complied with.

To Insure - Clauses 3 (iii) and (iv)

- 3.1.2 The terms of the Lease require MPRL to insure the whole of the Arlington site in full reinstatement value against loss or damage by fire storm or tempest, subsidence and aircraft in the joint names of the Council and MPRL with a reputable insurance company approved by the Council. MPRL are required to produce each year the policy or policies of insurance maintained by them along with evidence of payment of the annual premium. The proceeds of any claim on the policy are required to be deposited in a joint bank account nominated by the Council to be used in the re-instatement of the premises with MPRL making up any shortfall out of its own monies. In default of these requirements the Council can itself insure the Arlington site and recover the premium costs from MPRL as additional rent - i.e. the Council can consider instituting forfeiture proceedings for non payment of rent without having to serve a notice before forfeiture. MPRL are also required to insure to full value all plate glass windows in the premises and to expend all claims monies received in the reinstatement of any damaged plate glass.
- 3.1.3 Currently MPRL do not carry insurance on the rear car park, nor until prompted recently by the Estates team has insurance been maintained in the joint names of the Council and MPRL. In addition, MPRL have yet to produce evidence that they carry plate glass insurance.
- 3.1.4 It is therefore recommended that Cabinet agrees to the Council affecting insurance on the car park and re-charging the annual premium costs and that MPRL be formally requested to produce evidence of their plate glass insurance policy. It is further recommended that

in the event that MPRL does not promptly pay the insurance premium the Cabinet authorises forfeiture action so this is available as an alternative to a debt recovery action and that Council will not tolerate the flagrant breach of a covenant of this nature,

To Repair - Clause 3(vi)

- 3.1.5 As noted above the Lease is a full repairing lease, meaning in theory that the Council has three potential remedies in respect of identified disrepairs - (i) the right to take forfeiture proceedings to terminate the lease (begun by the service of a notice before forfeiture) or (ii), the right to give written notice of disrepair requiring MPRL to commenced the repairs within two months, failing which the Council can bring an action in damages for breach of covenant or, (iii), an action for specific performance.
- 3.1.6 However, the contractual position under the lease has been substantially modified by statutory intervention. The provisions of Section 1 of the Leasehold Property Repairs Act 1938 (as amended by Section 51(2) of the Landlord & Tenant Act 1954) applies to any lease granted for a term of seven years or more of which more than three years remain unexpired. The Arlington site lease is for 199 years with 147 years unexpired. So far as forfeiture for disrepair is concerned, the section provides that if a Landlord serves a notice before forfeiture in relation to lease to which the 1938 Act applies, the tenant may within 28 days of the date of service of such notice serve a counter-notice on the Landlord claiming the protection of the Section - the protection being that the Landlord cannot commence forfeiture proceeding without the leave of the court - which in all but exceptional circumstances will not be granted. Should the Landlord choose to enforce a breach of a repairing covenant by suing in damages the effect of the 1938 Act is much the same - the Landlord has to serve a notice on the Tenant at least one month before the date that the Landlord intends to institute proceedings and the Tenant can within 28 days serve a counter-notice claiming the protection of the section meaning that an action in damages can only be commenced with the leave of the court - which in all but exceptional circumstances will not be granted. In addition, it will not be possible to circumvent these restrictions by applying to the court for specific performance.
- 3.1.7 The rationale behind the statutory restrictions is clear- that in the enforcement of repairing obligation the courts are concerned with the damage caused by the breach to the value of the Landlord's reversionary interest - and the longer a lease has still to run, the less likely that a breach will have any impact on the value of that interest. In the case of the Arlington lease which still has 147 years to run, it is quite clear that even major breaches of the repairing obligations would have a negligible impact on the value of the Council's reversionary interest, whereas when the Lease has e.g. ten years left to run it is much more likely that the court would grant the Council leave to sue and/or commence forfeiture proceedings if the Council was able to prove that breaches of the repairing covenant substantially diminished the value of the Council's reversionary interest.
- 3.1.8 It is therefore the case that unless the Council is able to prove demonstrable harm to its financial interests as a result of breaches of the repairing covenant in the Lease, the Council will **not** be able to enforce compliance against MPRL through forfeiture action, an action in damages or specific performance - which in my view goes some way to explaining the Council's low key approach to date in relation to securing compliance with any perceived breaches of the repairing covenant in the Lease.

To Paint - Clause 3 (vii)

- 3.1.9 MPRL are required to paint the external woodwork, ironwork and other parts of the premises usually so painted with at least one undercoat and one gloss coat of first quality paint every four years. Internal painting should occur on a seven year cycle.
- 3.1.10 In my view there is a clear distinction between a maintenance covenant such as this clause and a repairing covenant. As, a result enforceability of the external painting covenant is not affected by Section 1 of the Leasehold Property Repairs Act 1938.

However, the Lease does not reserve to the Council the right to carry out such decorations in default with the right to recover the expenses of so doing from MPRL, meaning that the only practical means of enforcement would be by way of an action in damages. In this regard, although the Council would not require the leave of the court to proceed it would be very unlikely to succeed as the Council could not at this stage prove any appreciable damage to the value of its reversionary interest by reason of the tenant's non compliance. In addition, so far as the internal painting covenant is concerned, statutory relief is afforded by Section 147 of the Law of Property Act 1925 against a landlords notice requiring the tenant to carry out internal decorative repairs. In essence the tenant can apply to court for relief on the grounds that the notice is unreasonable. As any want of internal decorative repair would not at this stage result in any diminution in the value of the Council's reversionary interest, it is likely that a court would view any notice as unreasonable.

- 3.1.10 Consequently, even if there are extant breaches of this covenant, they are unlikely to be enforceable by the Council against MPRL.

To Permit Public Access - Clauses 3(viii) and (xx)

- 3.1.11 Clause 3 (vii), which is the right of the public to use the roads pathways and ramps on the premises to access the shops and other parts of the site which are open to public (including any coach/car park on the site) is almost certainly being breached by the locked gate that prevent public access to Arlington Square and the car park behind. However, as there are currently no shops in Arlington Square for the public to visit and as the car park is not currently open to the public, there is little merit in the Council taking any action at present to enforce this covenant as open public access to a vacant shopping arcade may encourage vandalism, littering and anti-social behaviour. However, the position can be reviewed should the car park ever open to the public.

- 3.1.12 As to the car park, Clause 3(xx) of the Lease requires MPRL throughout the whole of the term to keep open and make available for use by the public on reasonable terms the coach/car parking facilities 'now existing on the premises', although should any of these facilities become unnecessary the clause can be varied by mutual agreement. However, it is the case the courts will hardly ever enforce a 'keep open' clause by specific performance on the grounds that it will often cause disproportionate financial damage to the tenant compared to the financial damage caused to the landlord e.g. where the tenant is thereby required to trade at a loss or to commit significant expenditure in order to comply with the covenant.

- 3.1.13 Nevertheless, there is a possibility that this covenant may be enforceable by the Council against MPRL by specific performance due to the fact that covenant does not prevent MPRL charging for the use of the car park to enable it to meet the costs of compliance. However, it is not recommended that enforcement action is considered at this stage as the car park may be re-developed within the next two years if MPRL obtains planning permission from the Secretary of State for the construction of a Tesco Express food store to the rear of the site and the Council gives the necessary landlords consents (all of which the Council cannot unreasonably withhold). This position can be reviewed in the event that planning permission is not granted or should the Council refuse to give the necessary landlords consents.

To Permit Entry By Landlord and Commence Repairs on Notice - Clauses 3(x) and (xi)

- 3.1.14 Clause 3 (x) entitles Council officers and agents with or without workmen to view the premises on two occasions each year and give notice in writing to MPRL of all defects, decay or wants of reparation identified by the inspection. Clause 3 (xi) of the Lease then requires MPRL within two months of receipt of a Landlords notice and at their sole cost to expeditiously proceed to carry out the identified repairs.

- 3.1.15 Clearly the Council has the right to inspect the Arlington site twice a year and to prepare and serve relevant defect/repair notices but should MPRL declines to comply with such a notice, Section 1 of the Leasehold Property Repairs Act 1938 will effectively prevent the Council from enforcing compliance by forfeiture action, an action in damages or by specific performance. Moreover, as the Lease does not give the Council in default the right to carry out the repairs and recharge the costs to MRPL, it will not be possible to secure compliance with the covenant in this way either.
- 3.1.16 Nevertheless it is still recommended that Council officers exercise bi-annual inspections at reasonable interval and prepare and serve any necessary notices on MPRL as this will encourage MPRL to keep the site in good repair as well as meeting some of the criticisms of the long leaseholders about the Council's management of the site.

To Maintain Amenity – Clause 3(xxiv)

- 3.1.17 This clause requires the open parts of the site but particularly any open space to be kept clean and tidy and free from weeds etc in order to maintain amenity. Moreover, if MPRL are in breach the Council can serve a Notice on MPRL requiring them to restore amenity failing which the Council can carry out the necessary remedial works itself and recover the costs from MPRL as a simple contract debt.
- 3.1.18 In this regard Council officers have recently met with the MPRL's managing agents to secure the removal of weeds and a general tidying up of public views into the site from Marine Terrace and given the co-operation of the managing agents it has not been considered necessary to serve formal notices. It is also recommended that the bi-annual site inspections also assess compliance with the amenity covenant and that enforcement action is taken as necessary.

Not to Make Alterations Without Consent – Clause 3(xii)

- 3.1.19 There is no evidence of breach of this covenant. However the Council cannot unreasonably withhold consent to an application by MPRL for a Licence for Alterations. MPRL will need such a Licence in order to redevelop the rear of the site to provide a Tesco Express food store and ancillary customer car park.

Not To Assign – Clause 3 (xvi)

- 3.1.20 There is no evidence of breach of this covenant. However the Council cannot unreasonably withhold consent to an application by MPRL for e.g. a Licence to Assign part of the site to Tesco's. However if MPRL decides to proceed by way of the grant of an under-lease to Tesco's, it will not require the consent of the Council to do so.

Permitted User- Clause 3(xix)

- 3.1.21 There is no evidence of breach of this covenant as non use of e.g. the rear car park does not constitute a breach of the user clause. In addition, the Council cannot unreasonably withhold consent to an application by MPRL for Licence for a Change of Use. MPRL will require such a licence in order to redevelop the rear of the site to provide a Tesco Express food store and ancillary customer car park.

4.0 Suggested Approach

- 4.1 Subject to the substantial statutory limitations imposed on the Council, the Council should enforce the tenant's covenants in the Lease to the fullest extent, particularly in relation to insurance, inspection rights and the preservation of amenity. Moreover, should MPRL fail to obtain planning permission for the proposed Tesco Express food store or should the Council determine on lawful grounds to withhold any of the necessary landlords consents, the Council should consider the merits of taking enforcement action in relation to the

existing rear car park in the event that it is considered expedient or desirable to require MPRL to re-open the car park to the public.

5.0 Corporate Implications

5.1 Financial and VAT

5.1.1 It is considered that enforcement action can be met from within existing resources. In addition, the costs of effecting insurance or taking action to restore the amenity of the site can be recovered from MPRL.

5.2 Legal

5.2.1 As set out in the report.

5.3 Corporate

5.3.1 Fair and proportionate enforcement of the terms of the Lease may counteract perceptions that the Council has failed in the past to deliver effective Landlord management of the Arlington site

5.4 Equity and Equalities

5.4.1 There are no equity or equalities issues arising out of the report

6.0 Recommendation(s)

6.1 That the report be received and noted;

6.2 That Cabinet further notes the significant statutory limitations imposed on the Council in the taking of enforcement action against Metropolitan Property Realizations Limited in respect of perceived breaches of the tenants repairing and decorating covenants in the Head Lease.

7.1 That subject to the applicable statutory limitations the Council will seek to enforce compliance with the tenants covenants contained in the Head Lease of the Arlington site and in particular:-

- (i) the officers are authorised to effect buildings insurance on the rear car park and recover the premium costs from Metropolitan Property Realizations Limited by forfeiture action if necessary;
- (ii) the officers are instructed to require Metropolitan Property Realization Limited to provide evidence of its plate glass insurance policy;
- (iii) the officers are instructed to carry out bi-annual inspections of the Arlington site at reasonable intervals to include inspections for compliance with the obligations contained in the Lease to preserve the amenity of the site and keep it clean and tidy and free from weeds and to prepare and serve on Metropolitan Property Realizations Limited any notices considered necessary or desirable as a result of such inspections including, where possible, taking action in default and recovering the costs thereof from Metropolitan Property Realizations Limited as a simple contract debt.

6.4 That no action is taken at this time in relation to the rear car park on the site but that the officers report back to Cabinet when the Secretary of State has taken the decision whether or not to grant planning permission for a Tesco Express food store.

7.0 Decision Making Process

7.1 The recommendations in this report are non key executive decisions to be taken by the Cabinet.

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Annex List

Annex 1	Arlington Site Lease excluding Plans
Annex 2	Plan 'A' - Arlington Site Lease
Annex 3	Part of Plan 'B', - Arlington Site Lease
Annex 4	Remaining Part of Plan 'B' - Arlington Site Lease

Background Papers

Title	Details of where to access copy
None	N/A

Corporate Consultation Undertaken

Finance	Sarah Martin, Financial Service Manager
Legal	Judith Woodward, Senior Legal Executive
Communications	Justine Wingate, Corporate Information Manager