



Basingstoke
and Deane

BRIEFING NOTE

BDBC COMMERCIAL AND COMMUNITY PROPERTY ASSETS

LANDLORD AND TENANT REPAIRING OBLIGATIONS

LEASE PROVISIONS AND MANAGEMENT PROCEDURES

JANUARY 2019

Report to

OVERVIEW AND SCRUTINY COMMITTEE

Update for Overview and Scrutiny Committee.

Purpose of this Report: Members of the Overview and Scrutiny Committee have asked how the Council manage repairing obligations across the property portfolio where buildings and land are leased to third parties. This briefing note provides an explanation of how Property and Legal Services deal with this important Landlord and Tenant issue.

Background: For the purposes of this note, the BDBC property portfolio divides into three main categories:

1. Community assets such as Community Halls
2. Direct let investment properties on leases of less than 25 years
3. Ground lease investment properties, typically 125 to 250 years

Liabilities for repair and maintenance are determined principally by the terms of the **lease** in place. The lease is a formal contract between landlord and tenant setting out which party is to maintain the property and how the building or land is to be used.

Typically, an investment property let to a single tenant on either a short or long term lease will be on a **Full** Repairing and Insuring basis. This means that the tenant is responsible for all repairs, maintenance, renewals and insurance.

A tenant occupying a mutli-occupied building such as an office building or shopping centre will occupy typically on an **Internal** Repairing and Insuring basis. This means that the tenant is responsible for internal repairs, maintenance and renewals and the landlord is responsible for undertaking structural, external and common part maintenance and arranging insurance for the building. It is usual practice for the landlord to operate a service charge account in such cases so that landlord costs are recovered proportionately from each tenant.

The lease arrangements for community buildings such as community centres and theatres is less commercial and depends upon the strategic relationship, services provided and funding arrangements. Typically, in these cases the tenant will be responsible for **internal** maintenance only and the landlord will be liable for all structural and external repairs and maintenance without a service charge recovery.

The BDBC Property Portfolio: The Council currently has 772 individual leases to tenants of which 224 are industrial lettings, 99 are office leases and 72 are for retail properties. The remainder (377) are an eclectic mix of uses including agricultural land, allotments, car parks, community facilities, depots, open spaces, sports and recreation uses.

Of the 224 Industrial leases 120 (53%) are on long term ground leases. Nearly 70% of the Council's rental income is derived from long term ground leases.

Glossary of terms

Term	Definition
Freehold reversionary Interest	The value of the freeholder's legal interest at lease expiry.

BDBC Procedure for Enforcing Tenant Repairing Obligations: Our approach to enforcement depends upon which category the asset falls into ie Community Building, Direct Let or Ground Lease.

1. **Community Buildings:** The Council's Property team undertake Condition Surveys every two years identifying outstanding landlord and tenant repairs. Landlord repairs are prioritised and scheduled as part of the Council's Capital Programme. Tenant organisations are notified of their outstanding obligations although completion of these works depends upon the extent of tenant's financial resources. Often a tenant will apply for a grant or other community support in funding their repairing obligations.
2. **Direct Let Properties:** In these cases we rely upon BDBC annual external inspections and initial discussions with a tenant where disrepair has been identified. If discussions fail, we have the ability to serve an Interim Schedule of Dilapidations during the term of the lease or a Terminal Schedule of Dilapidations at the expiry of the lease. In these cases external specialist Surveyors are instructed to act for BDBC. The most commonly served is a Terminal Schedule at the end of a lease so that the landlord's ability to re-let the premises is as far as possible protected. Negotiations conclude with either the tenant undertaking the repairs or a cash settlement enabling the landlord to either undertake the works or offer a suitable inducement to the incoming tenant. Recent examples of these include the following cases:

Date	Address	Acted for BDBC
13/12/18 ongoing	Shop 2 599 Abbey Road, Popley	Stephen Davies of Gregory Associates
04/09/15	Units 7 – 9 Joule Road, Houndmills	Paul Bailey of Paul Bailey Associates
26/10/12	Eastlands One Ground Floor Suite	Paul Bailey of Paul Bailey Associates

3. **Ground Lease Properties:** These are lettings to developers and corporate occupiers who have agreed to enter a lease of Council land in return for a rent calculated by reference to the value of the land or the value of the building to

be constructed or a factor of both. The majority of BDBC ground leases were let in the late 1960's and early 1970's for periods generally of 125 or 150 years and some of 250 years.

During the term of a ground lease, it is expected that buildings will be replaced by the head lessee three or four times due to inherent building obsolescence and changes in demand for building types. Therefore, the building that a freeholder may inherit at the end of the lease is not going to be the same building as at the start of the lease.

Due to statutory limitations surrounding the extent to which a tenant of a ground lease is obliged to repair a building, enforcement of repairing obligations on ground leases is problematic and incurs significant legal expense. Disrepair in these cases is addressed according to the degree of damage caused to the landlord's freehold reversionary interest (ie at the end of the lease) and whether the landlord wishes to forfeit (terminate) the lease and take direct responsibility for the building.

Consequently, BDBC has taken a balanced and industry standard approach to enforcement action for repairs on ground leases, weighing up the potential for a successful claim against the cost of doing so. We are currently however, pursuing legal action for recovery of vacant possession of one specific building because it is so dilapidated that it represents (i) a health and safety hazard, (ii) is a blight on the local community and (iii) where demolition is the preferred outcome.

All properties let on ground leases are inspected by the Council's Property team externally at least once per year.

Outlined in the next section are the four routes by which a landlord can seek to enforce the repairing obligations in directly let properties and ground leases.

These highlight the challenges in securing a successful claim that are far greater with ground leases than direct let shorter term leases.

Landlord's Options for Enforcing Repairing Obligations:

1. **Claim for Damages:** If a tenant breaches a covenant, the landlord is entitled to claim damages for breach of that covenant. However, the Leasehold Property Repairs Act 1938 restricts a landlord's right to damages. Action requires formal service of a Section 146 Notice (under the Law of Property Act 1925) putting the tenant on notice of disrepair. The landlord can only proceed with a damages claim if consent of the Court is given. In most cases, the Court will find in favour of the tenant because of the provisions of Section 18(1) of the Landlord and Tenant Act 1927. This statute limits the amount of damages available to the reduction in value of the landlord's reversionary interest ie at the point of lease expiry. Given that most BDBC head leases have at least 60 years remaining, it is difficult to prove that the current condition of the property has an impact on the future freehold value when an entirely different building will exist. Furthermore, a damages claim will not result in the necessary works of repair being undertaken.

2. **Forfeiture:** Forfeiting the lease is only an appropriate remedy if the landlord wants vacant possession. Forfeiture will be an available option provided the lease contains an express right of re-entry for breach of covenant. This area of law is fraught with case law, the precise service of notices and counter notices and ultimately the Court's preference to find in favour of the tenant who is most frequently granted relief from forfeiture.
3. **Seek Specific Performance:** Specific Performance is a decree by the Court requiring the tenant to perform repairing obligations. It is an equitable remedy which means that the Court has complete discretion and will only be awarded where damages are not an adequate remedy. However, the Court must weigh up the landlord's interest in having the covenant performed against the consequences to the tenant if the Order is made eg the cost is prohibitive. This remedy is only available in unusual circumstances and cannot be relied upon.
4. **Jervis v Harris Clause:** Considering the difficulties in compelling a tenant to carry out repairs during the term of a lease, most modern leases contain a clause that allows the landlord to enter the property, carry out the works and then recover the costs. These clauses are known as Jervis v Harris clauses following the decision in this 1995 Court of Appeal case. If the lease does not contain an appropriate clause or notices are incorrectly served and timings not strictly complied with, the landlord's entry into the property may constitute a trespass and amount to a breach of quiet enjoyment. Even if procedures are followed, there may be issues with gaining access to the property and there are likely to be disputes over the specification of works and associated costs. Although most of BDBC's leases contain an appropriate clause, the Council would have to pay for the works and pursue a claim against the tenant in damages. If a tenant disputes the specification or cost of repair, resolution through the Courts could take a considerable amount of time and incur additional expense and there is no guarantee that the full cost of the works would ever be recovered.

In the request for this report, Members asked that the Ice Rink, Leisure Park, Basingstoke was given as an example to understand the approach to managing the condition of that particular asset.

The position was explained in some detail to Members of CEP Committee on 27 July 2018

<https://democracy.basingstoke.gov.uk/ieListDocuments.aspx?CIId=133&MIId=1274>.

In summary, although the facility may be regarded as a "community facility" by the users and supporters, the rink is currently let on a 115 year lease from 2000 to an investment landlord SSL (Standard Securities Ltd), who in turn sublets the rink to Planet Ice (Basingstoke) Ltd. The rink is therefore run as a commercial business venture just like the Hollywood Bowl, Gala Bingo or the Odeon Cinema also on the

Leisure Park. The council let the long lease of the ice rink for an initial premium but receives no rent for the duration of the 115 year lease. The responsibility for repair lies with the council's direct tenant SSL who have mirror obligations in their sublease with Planet Ice (Basingstoke) Ltd.

Based on surveys carried out by Planet Ice, the issue with the rink is caused by the rink lifting in the middle as a result of long term freezing of the chalk subsoil below; this has expanded when frozen. This lifting has damaged peripheral structures such as the spectator stands, albeit the rink itself is still capable of being shaved flat (now being thicker ice at the sides than the middle). It is unclear when the issue became apparent but no specific reference was made to it in July 2011 when a joint inspection was carried out by the council's surveyor and representatives of Planet Ice. The issue was first flagged to the council in 2013 and the increasing impact was raised with Building Control and Environmental Health in 2016. Officers have been in discussions with both our tenants and sub-tenants to find a solution, bearing in mind the financial obligation to repair lies with the tenants but we do want a solution that keeps the rink operating. Planet Ice advise they are treating the symptoms only and that the full remedy would be to remove the whole ice pad, dig out the frozen subsoil then refill the large hole and relay a new rink and associated freezing pipe network – this would be a very significant cost, which the owner of Planet Ice (Basingstoke) Ltd has indicated the company cannot afford unassisted.

SSL has agreed to provide a degree of revenue financial assistance by absorbing the rink's proportion of the Leisure Park service charge (levied by the council) and Planet Ice (Basingstoke) Ltd is prepared to keep the rink operating until such time as the longer term options for a new rink, as part of the Leisure Park regeneration, can be developed. This assumes no major change in the rate of deterioration of the rink's condition.

The council has and continues to consider seeking to enforce its repair rights against the head lease, Standard Securities Ltd. The outcome of such legal action is by no means certain, particularly as to whether Planet Ice (Basingstoke) Ltd would continue as operator. This would depend on whether head lessee would accept the repairing obligation/cost and not seek to pass it on to their own tenant. The council has to balance the costs of such action, likelihood of success and any impact to the local community should that result in the operation ceasing.

An alternative strategy would be not to allow the short-term approach above and to seek to put the rink back into good repair, in accordance with the current lease obligations, immediately rather than let it continue in its current poor state. This would require significant investment as highlighted. The approach would require the council to either seek to enforce the existing lease obligations or directly contribute in combination with other parties. The difficulties and costs of overcoming the problems with the ice pad and the general age and condition of the facility as a whole may make this impractical and unviable

As with all long leases, the four options available are those set out above in this report. The option to force the tenant to carry out repairs is an equitable remedy of the Court and hence the outcome cannot be guaranteed. In terms of the next steps,

Officers have instructed an independent survey be carried out as a prelude to further discussions with our immediate tenant.

Summary and Conclusion: Property maintenance and enforcement of repairing covenants across the BDBC portfolio is recognised as an important issue. Annual inspections are undertaken on all properties and formal Condition Surveys completed every two years on Community Buildings. Property and Legal Services prioritise cases according to social, economic and physical need. Where remedies are clear and within the Council's gift to pursue, we take appropriate action which means that to a large extent, repairing covenants are enforced on Direct Let properties and Community buildings.

The most contentious and difficult area of enforcement, however, concerns the ground lease portfolio where outcomes are uncertain and remedies expensive to pursue. In practice, the repair of buildings subject to a ground lease often becomes a more pressing issue for the head lessee whose financial interest is in most cases more directly affected than the Council's interest. Where a building has reached the end of its economic life, which is an increasing trend across the Council's portfolio, the head lessee is motivated to negotiate terms for a re-structured lease of sufficient length to enable the development of a new or refurbished building. In this way, BDBC's ground lease portfolio is physically regenerated and financially set on refreshed lease terms for the next 30 years of the building's design life. Our involvement in and resourcing of lease re-structuring is extensive and currently extends to thirty cases where ground leases are being re-negotiated to facilitate either redevelopment or refurbishment by the head lessee or third party Developers.