

Lancaster Market – Legal Implications

1. Appendix B of the report provides Members with a number of financial options for appraisal of Lancaster Market. This appendix will briefly provide the Council with an overview of the current legal position with regard to the Market Hall and will provide analysis of the legal implications of each proposed option to be considered by Members.

Background

2. Lancaster City Council (LCC) entered into a lease with Centreville Property Investment Limited on 23 September 1996 for the use and occupation of the Lancaster Market Hall. The lease was subsequently assigned to Allied (Lancaster) Ltd. This is a building consisting of two floors designed for the use as an indoor market. This lease is for a term of 99 years and will end on 24 June 2094. In accordance with the terms of this lease LCC has divided the Market into units and has sub-let these units to various tenants.

Position with regard to the Head-lease

3. The lease between LCC and Allied (Lancaster) Ltd is called a head-lease and Allied (Lancaster) Ltd is referred to as the head-landlord. LCC pays the head-landlord an annual rent and has various obligations under the head-lease. As the head-lease is for a fixed term of years LCC cannot 'get out' of its obligation under the lease and is liable to perform its obligations until 24 June 2094. The only ways in which LCC can 'get out' of its obligations to the head-landlord would be:
 - a. To buy the freehold from head-landlord;
 - b. To pay the head-landlord to release LCC from its lease; or
 - c. To claim that the head-landlord are in breach of their obligations under the lease entitling LCC to treat the lease as brought to an end.
 - d. To transfer the Head Lease to another Head Tenant (with the Head Landlord's consent)
4. There have been no breaches of obligations by the landlord.
5. The lease contains a user clause that currently restricts the use of the market to retail use. When the Marketgate Shopping Centre was developed, the market was seen as being an anchor tenant which had the ability to draw customers through the shopping centre and therefore increasing footfall to the centre as a whole. Any significant changes to the market or to its use, would need appropriate approval from the head-landlord.

Sub-tenants

6. A property can be sub-let to a business or person by way of a licence or lease. It will depend on the type of tenant, their proposed use of the site

and the landlord's desire to control the site as to whether a licence or lease will be granted.

7. A licence provides both the licensee and the licensor greater freedom with regards to terminating an agreement and vacating a stall. A lease will provide both a landlord and tenant with greater security. The tenant will trade in the knowledge that he/she has the stall for a fixed period and this will hopefully transfer into goodwill and develop customer relations. For the landlord, he/she has the security of knowing that a stall will be filled for a fixed term and that he/she will get a fixed return for the rent of the property. Whether or not a trader has a licence or lease is a question of law.
8. The Landlord and Tenant Act 1954 (the Act) provides that in certain circumstances leases will enjoy statutory security of tenure. This means, that where the Act applies a tenancy can be protected from termination unless the landlord has a statutory reason to terminate the tenancy (for example, he can show he is to redevelop his property) or unless there is a breach of the agreement allowing him to forfeit the lease (e.g. tenant fails to pay rent). In addition to this, the Act provides that a landlord or tenant can only end their tenancy following the procedure provided for in the Act.
9. A tenancy subject to the Act (meeting certain conditions) can only be terminated after either the landlord has served a notice under Section 25 of the Act or the tenant has served a notice under Section 27 of the Act. In addition to this, at the end of a fixed term a tenant can apply to the Court for a new lease under Section 26 of the Act. This may happen where a landlord refuses to grant a lease or refuses to grant a lease on the terms proposed by the tenant.
10. If a landlord serves a Section 25 Notice on a tenant he/she is entitled to ask the landlord for a new lease. Should the landlord refuse a new lease or refuses a lease on the terms the tenant has suggested then the tenant can apply to the Court, in accordance with Section 24 of the Act, for a new lease and for a determination of the terms of the lease.
11. A landlord may, having served a Section 25 notice on a tenant, make an application to the court for either the termination of the lease or for determination of the terms of the new lease.

The Council's position regarding its sub-tenants/Licensees

12. Under the terms of the Head-Lease, LCC has the right to sub-let part or all of the Market Hall.
13. LCC currently has 24 tenants in Lancaster Market Hall. Depending on the tenant and the purpose/type of occupancy, LCC has given traders either a lease or a licence to trade from their stall. Some traders have signed leases/licences and returned them to LCC and some traders have failed to provide LCC with signed lease/licences. It has previously been reported to both cabinet and Council that the traders' leases expired on 31 March 2010 but traders remain in occupation on the terms of those leases.
14. On 27 September 2010, in accordance with Section 25 of the Act the Council served a notice on each of the Market tenants (except three

tenants who had already served section 26 Notices on LCC). Taking a considered approach the Notice was served on all traders, whether or not they were given a lease or had a licence. This was done as a 'catch all' approach to ensure that all traders were given adequate protection and to ensure that the Council was not dragged into a litigious dispute over whether a stall occupier, in law, was or was not a tenant.

15. Since serving the Notices on the traders the Council has sought to negotiate the terms of a new lease. This provided that the tenant would pay LCC an increased rent (by 2.5%) and service charge. Provision was made for a redevelopment break clause to be inserted into the new lease and the tenancy was to be for a fixed period of four years.
16. A redevelopment break clause would allow the Council to 'break' the lease or bring it to an end before the expiry of the fixed period specified in the lease. The break would only become operative once the Council had served a section 25 notice on the tenants on the grounds that the Council is to redevelop the market. If the tenants disputed such a notice or the Council's reasons for terminating the lease, the tenants could apply to the court for a new lease and a determination as to whether or not the Council is entitled to rely on the break clause.
17. A copy of the proposed lease was sent out to all of the traders, the Market Association and to their legal representatives (where applicable). However, the market traders have opposed the terms of the new lease.
18. In accordance with Section 29 of the Act, LCC, in agreement with the solicitors representing most of the tenants, on a number of occasions, extended the period by which the parties had to apply to the Court for a determination of the new lease under Section 24 of the Act. This was done to enable the parties to try to reach an agreement on the terms of the agreement. The deadline was finally extended until 20 May 2011.
19. Unfortunately by 20 May 2011, no agreement had been reached despite numerous meetings between Council officers, Market Traders' Association and its tenants. Accordingly, 16 businesses (some having more than one stall or tenancy) have lodged claims with the Lancaster County Court for a new lease under the Act.
20. LCC has not opposed the tenants' claim for a new tenancy. However, the Council has objected to the traders' proposed terms of a new lease. This is because they have rejected the Council's original proposed terms. Specifically, they have sought a lease without provision for a break clause. In some cases, they have opposed the increase in rent and service charge.
21. In accordance with court procedure the Council has filed an 'Acknowledgment of Service' setting out its opposition to the terms of the tenants' proposed new leases. Accordingly, the Court is to schedule a Case Management Conference in order to provide the parties with directions to trial.
22. In the meantime and in accordance with the Cabinet's resolution of 26 July 2011, officers have sought to ascertain, on a without prejudice basis, whether or not, the tenants would agree to a proposed ground floor plan.

The tenants have been informed that both Cabinet and Council are looking at the possibility of such a move on the basis that the tenants would bear the cost of relocation and the fitting out of their unit.

23. With regard to the tenants who have not sought to protect their position by lodging a claim with the Court, officers are seeking, as with the protected tenants, a resolution to the terms of their tenancy.

Financial options for appraisal and their legal implications

24. This appendix follows the indexation of options at paragraph 3.1 and 3.2 of appendix B:

Option A

Move tenants to the ground floor but maintain current rents and service charges (As recommended by Cabinet in July and a version of Option 2 within that attached report)

25. For this option to work practically, all of the affected current tenants will have to agree to a move to the ground floor and will have to agree the new location of their stall. In effect the tenants who would have to move either from their current location on the ground floor or from the first floor would have to agree to surrender their current lease/licence and accept new leases on the ground floor.
26. If not all of the affected tenants agree to move to the ground floor (or those already on the ground floor do not agree to move to allow a new layout to be agreed) the Council could be left with a situation where some tenants remain on the first floor and pursue renewal of their existing leases. In this scenario, the Council could look to remove the first floor tenants by obtaining a redevelopment break clause in the remaining tenants' lease. Alternatively the Council could look to bring the remaining first floor traders leases to an end at the end of the new contractual term.
27. However, we do not know, at this stage, how many tenants will agree to a move to the ground floor or whether a thriving indoor market could be created on this floor. If not enough tenants agree to a rearranged ground floor market then it is unlikely that this option would work.
28. The level of rent and the terms of the lease generally would have to be agreed with the traders. If this is not possible it may be necessary for the court to determine the new terms of the lease and the rate of rent. The Council can set the level of service charge in accordance with the proposed lease. This could be either charged at a discounted rate or at a full rate.
29. If a move to the ground floor is possible then the need for a redevelopment break clause may be removed. The aim of this option is to provide a further opportunity to cultivate a thriving indoor market.
30. Members will have to consider whether such an option is realistically possible. Thus the Council will have to be satisfied that all the affected

traders will agree to accommodate the move to the ground floor. Otherwise, Members will have to be content for the majority of the tenants to be moved to the ground floor and for further action to be taken to terminate the tenants remaining on the first floor. Unless the Council is able to obtain a redevelopment break clause this could not be done until the end of the remaining tenants' new four year lease. It could not be done immediately and may be difficult to achieve.

31. Members should be aware that there is no guarantee that should there be some traders left on the top floor that the Council will be able to move them to the ground floor before the end of their new four year lease. Indeed, there is no absolute certainty that they could be moved to the ground floor at the end of their four year term. To move the remaining tenants to the ground floor will depend on the Court finding that it is appropriate for a redevelopment break clause to be inserted into the remaining tenants' lease.
32. Following this and assuming the courts do grant the insertion of a redevelopment clause into the remaining tenants' leases, the Council may have to convince the court that it is reasonable to terminate their leases on the grounds that the Council intends to redevelop the first floor. Again there is no guarantee that the courts will agree to this.
33. Should Council decide to move all the tenants to the ground floor Members will have to specifically consider whether they still require a redevelopment break clause inserting into the ground floor leases.
34. The Market tenants are currently in dispute with the Council as to whether such a break clause is needed/ reasonable. If Members consider that a redevelopment break clause is needed (for example to ensure the option of redevelopment can be considered before the expiry of the fixed four year lease) then it is likely that the court will have to decide whether this is necessary.

Option B

Move tenants to the ground floor but charge a commercial rent and full recovery of service charges (another variation of Option 2 within the Cabinet report)

34. The legal implications in this option are the same as in option A. The level of rent would have to be agreed between the Council and the Market Traders or the court would have to determine the level of rent.
35. The Council can set the level of service charge in accordance with the proposed lease. This could be at either a discounted rate or at a full rate.

Option C

Keep the current layout and maintain rents and service charges at current levels (effectively Option 3 within the Cabinet report)

35. The level of rent will have to be agreed by the Market traders and the Council. Otherwise, the court will have to determine what it considers is a reasonable rate of rent. The service charge can be determined by Members in accordance with the proposed lease.
36. The Council may consider that it needs to keep its options open re possible redevelopment of the market before the end of the 4-year lease period. If this is the case, Members may want to ensure that the lease contains a redevelopment break clause allowing the Council to close the Market in the event that it seeks to redevelop.
37. As explained above, the market traders are opposed to the Council's proposed redevelopment break clause. Unless the stall holders agreed to the insertion of the break clause the issue would have to be resolved by the court. The court may or may not consider such a break clause reasonable.

Option D

Keep the current layout but charge a commercial rent and full recovery of service charges (effectively Option 4 within the Cabinet report).

38. The legal implications for this Option are the same as in Option C.

Option E

Close the market after any new lease term expires, but maintain rents and service charges in the interim.

39. As with the options already discussed, the level of rent would have to be agreed between the tenants and the Council. Otherwise, the court would have to determine the level of rent.
40. To terminate the leases at the end of the four year period the Council would have to serve appropriate section 25 notices on the tenants. Should any of the tenants oppose the termination and request a new lease the Council would have to oppose the tenants' application for a new lease on one of the grounds set out in Section 30 of the Act. For example it would have to show one of the following grounds: persistent delay in paying rent, failure to repair, substantial breaches of other terms of the lease, that there is suitable alternative accommodation elsewhere offered to the tenant, that possession is required for letting or disposing of the property as a whole, that the property is to be demolished or redeveloped or that the Council intends to occupy the premises. It should be noted that in the context of this option, "the property to be demolished" does not refer to the market hall building, but rather to the individual stalls which are the areas let to traders.
41. Should the Council successfully oppose the grant of a new lease by relying only on one of the non-fault grounds (Section 30 (e) (f) and/or (g) of the Act) then the Council will have to consider whether any of the tenants are entitled to compensation under Section 37 of the Act.

Option F

Seek to close the market through agreement before the new leases are created or expire, but maintain current rents and service charges in the interim.

42. It is assumed that the Council would not insist on a redevelopment break clause if this option was chosen. As explained above the level of rent would have to be agreed in the interim or would require the court to determine the level of rent.
43. In order to end the tenants' leases in these circumstances it may be necessary to make payments to traders as referred to in the financial appraisal. This is in accordance with section 37 of the Act.
44. Whether or not payment to all the traders is necessary will depend on whether or not there are any grounds for forfeiture. If a tenant is in breach of his or her lease allowing the Council to forfeit the lease then it would be preferable to end the lease on this ground. If this is the case then there will be no need to pay compensation to the defaulting tenant.