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PROPERTY

KEEP ON KEEPING OPEN

The law relating to keep open clauses has been reasonably well settled, since the decision in *Highland and Universal Properties Ltd v Safeway Properties Ltd* in Scotland, and the contrasting English position, determined in the case of *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*. The recent Outer House decision in the case of *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Limited and Kwik Save Group plc* does not upset the status quo. It was not in dispute that there was a valid and enforceable keep open clause in the lease of the premises, instead the arguments concerning the enforcement of the keep open provision revolved around the fact that there was a sub-lease in place.

A chequered history

Douglas Shelf Seven Limited (DSS) was the landlord (entitled under a long ground lease) of a shopping centre in the Whitfield Area of Dundee, in which the largest unit was leased to the Co-operative Wholesale Society (CWS). The centre was in an area that was somewhat isolated from the central areas of Dundee, and over the years had seen an assortment of retail mixes with both local and national retailers and uses coming and going. This, within an area in the 1990s of high unemployment, poor housing and environment, and serious social problems, had meant that it was always challenging to keep the centre let and operating.

Whitfield was the subject of urban regeneration initiatives in the late 1980s, but the shopping centre did not reflect the social improvements that local housing started to benefit from. Units closed, the public house premises in the centre ceased trading and the centre's long term prospects were described in 1993 as "bleak".

Keep open for retail trade

CWS had been the tenant of the premises since 1977. The lease required the premises to be used for the retail trade or business of a supermarket primarily for the sale of food with off licence as an ancillary use. A keep open clause in the lease required CWS "to keep the premises open for retail trade during the usual hours of business in the locality, the shop display windows being kept dressed in a suitable manner and in keeping with a good class shopping centre." Trading had been intermittent over the years.

CWS had granted a sub-lease of the premises to predecessors of Kwik-Save in 1993. The sub-lease provided that the premises were to be used as a supermarket, and although it did not specifically contain any keep open provision, contained an...
obligation on the sub-tenant to fulfil the obligations of a non-monetary nature undertaken by CWS. A Kwik Save subsidiary traded from the premises before closing in 1995.

The landlord's claim

DSS raised an action against CWS seeking damages for breach of the keep open clause. They claimed that the closure of the supermarket premises had reduced the capital value of the whole centre, and resulted in a loss of income to them, in terms of rent and service charges from the other units which were unlet or vacant as a result.

Much evidence was led not only about the history of the occupation and vacant periods of all the units at the centre, and the general pattern of struggling traders during the late 1980s and early 1990s, but also about the different valuation bases that could be used in determining the diminution in value of the centre as a result of the effect of the closure of the supermarket.

Whose obligation was it?

CWS accepted that there was a valid and enforceable keep-open clause in its lease, but contended that it was no longer under any obligation to ensure continuous trading from the premises, having granted the sub-lease, which they maintained had the effect comparable with delegation of performance of the obligations to the sub-tenant, with the result that CWS were discharged from the obligation. Given that the then landlord had consented to the grant of the sub-lease – by which the sub-tenant was bound to comply with the terms of the CWS lease, including the keep open obligation – CWS could not be liable for the failure on the part of the sub-tenant to comply.

This argument did not however meet with approval. While the landlord's consent to the grant of the sub-lease made vicarious performance of CWS's obligations possible, it did not release them from their obligations under their lease. During the period that Kwik-Save's subsidiary had occupied and traded from the premises, CWS had fulfilled its keep open obligations...the premises persisted, so that when Kwik-Save's subsidiary ceased to trade, CWS was in breach of the keep open clause.

Anchoring the obligation

Much was made of the fact that the supermarket was the "anchor" store in the centre. CWS submitted that nothing in either the user clause or the keep open provisions required the premises to be occupied as an anchor store for the centre, nor to operate, (as it had done prior to closure) as a discount supermarket stocking an attractive range of products at discounted prices, which, it was contended, would encourage visitors to the centre.

However, together the keep open clause and the user clause in the lease imposed an obligation to trade as a supermarket, and the evidence clearly demonstrated that the supermarket was always intended to act as an anchor for the centre, and had always had that effect. The commercial rationale for having a keep open clause is to attract shoppers, which would in turn support other traders in the centre and underpin its rental value.

It must have been reasonably foreseeable by CWS that a breach of the keep open clause would result in a reduction in value for the centre as a whole and also cause loss of rent from other smaller units in the centre. Although the centre had other...
problems, such as design defects and poor location, which contributed to its reduced value, the court held that the breach of the keep open clause had had an overall adverse effect on the value of the centre and awarded damages assessed on a broad basis.

The differing approaches to keeping open

The courts take different approaches to the effect of keep open obligations, north and south of the border.

The definitive case in Scotland on keep open clauses is Highland and Universal Properties Ltd v Safeway Properties Ltd (2000 SC 297). Safeway was the main anchor tenant, trading as "Presto", of a unit in a shopping centre at Wester Hailes in Edinburgh, under a lease containing a clause requiring them to keep the premises open throughout normal hours of business. Safeway also took the decision to cease trading from the unit, in defiance of the clause in their lease, and the landlords sought specific implement (an order requiring performance of the obligation). Safeway, in contesting the competence of the courts to order specific implement of the lease in these circumstances, provided an opportunity for a thorough exploration of the application of this remedy in the context of keep open clauses, and the Inner House of the Court of Session resoundingly supported it as an appropriate remedy in these circumstances, and found in favour of the landlords, confirming their entitlement to enforce the clause.

The Safeway case is in marked contrast to the House of Lords decision in Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd (1998 AC 1 (HL) two years earlier, which states the current definitive position in England. In that case, in which the facts are broadly similar to the Scottish case, Argyll Stores, the anchor tenant, subject to a lease with a keep open clause, this time in a shopping centre in Sheffield (and occupying it co-incidentally as a Safeway store), nonetheless decided to close the store, for economic reasons, without having found a replacement tenant. In that case however the House of Lords denied the landlords the remedy of specific enforcement of the keep-open clause, reverting to the trial judge's decision for damages to be assessed.

Scots and English law differ in their approach to the specific enforcement of contracts. In English law the general rule is that specific enforcement will not be allowed, except in certain types of cases, for example, where the order was required to achieve a particular end result, such as completing a building contract. In the Argyll Stores case, where the obligation was to carry out a continuous activity - to carry on a business - required constant supervision. The terms of the keep-open covenant in that case was considered by the English court to be insufficiently precise to be capable of specific performance, given that it said nothing about the level of trade, the area of the premises within which trade was to be conducted, or even the kind of trade. In any case, it is settled practice in England that an award of damages is the usual remedy. In Scots law the opposite may be considered to be the ruling position: specific enforcement is likely to be the rule, with judicial discretion to refuse it only for exceptional reasons.

The full text of the judgement in the Douglas Shelf Seven case is available from the Scottish Courts website at:

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