

## **"EXCLUSIVES - DRAFTING CLARITY AMONGST THE CHAOS"**

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## EXCLUSIVES – DRAFTING CLARITY AMONGST THE CHAOS

### Exclusive vs. Restrictive

Definition of an 'exclusive' - the right to be the only one in a shopping centre to offer particular goods or services - the covenant is personal to the parties to the contract, but will also bind assignees who covenant in favour of the other contracting party.

Definition of a 'restrictive' - a negative covenant in favour of dominant lands whereby the servient lands will not be used to offer particular goods or services - if the covenant 'touches and concerns' the lands it will bind the lands (not just the parties, i.e. it will apply to any assignee whether or not they covenant in favour of the other contracting party).

### Whose perspective?

Tenant prefers a restrictive covenant that blocks all competition i.e. "not to lease or allow any other premises in the Shopping Centre or on the Lands as they may be expanded from time to time, nor any other lands owned or controlled by the Landlord within \* kilometres from any point of the Shopping Centre or the Lands, to be used for any purpose competitive with the Tenant's business from time to time operated or permitted to be operated in the Leased Premises".

Landlord prefers an exclusive that is narrow and provides generous exceptions i.e. "the Tenant shall have the exclusive right to carry on in the Shopping Centre, as it exists as of the date hereof, the principal business of the retail sale of children's footwear, provided that this exclusive shall not apply to the premises or business of (i) any existing tenants or occupants of the Shopping Centre, and their successors, assigns or replacements, (ii) any tenant or occupant of rentable premises in the Shopping Centre leasing in excess of \*,000 square feet of GLA, (iii) any supermarket, department store, grocery store, drug store, variety store, convenience store, dollar store and (iv) any tenant or occupant of rentable premises in the Shopping Centre selling children's footwear as an incidental component of another principal use, or as one component of a broad assortment of merchandise".

### Scope

The intent of these clauses is to protect the tenant from competition. What degree of protection?

Certain businesses inherently provide a narrow platform for a retailer to be profitable (e.g. specialty products/services such as the sale of freshly-made health juices, the provision of laser skin treatment services) whereas others (e.g. grocery store, business supply store, department store) are far-reaching in scope. Generally speaking, the narrower the use clause, the more comfortable a landlord will be in granting broad protection from competition of the same calibre as the benefiting tenant. A broadly-based business such as that of a supermarket cannot expect to have any protection from competition on its entire product mix, but it may obtain some protection from competition in the same form. Precision of wording is important to satisfy whatever the objective is. The size of the Shopping Centre and the merchandise plan/mix impact greatly on the scope of the protection available.

### Evolving Uses

Increasingly, the power of the brand in modern businesses encourages retailers of traditional uses (e.g. sale of clothing) to expand outside their original offering to include products/services not initially contemplated when the use clause in the lease was written. In drafting exclusives or restrictive covenants, care must be taken to ensure that the flexibility within many existing use clauses is recognized, as the landlord may not be in a position to prevent existing retailers from evolving into a competitive situation. We know today that a clothing retailer will brand its own cologne, jewellery, wallets, key chains, footwear, sunglasses and many other accessories (even furniture!), and we can anticipate that, when writing a restrictive or exclusive covenant in favour of a new tenant. But we don't know what the next ubiquitous branded merchandise or service item might be (e.g. labelled water bottles). Care must be taken to ensure that an exclusive/restrictive is written in a manner that will afford the desired protection, yet withstand the inevitable dynamic changes in retailing over the life of the lease.

## **Use it or Lose It**

One of the features of a typical exclusive/restrictive is a required condition that the protected tenant not be entitled to the benefit of the clause unless it is itself in possession of and carrying on business in the whole of the Leased Premises for the purposes of the use sought to be protected from competition. Tenants generally resist this feature on the basis that the protection is paid for in the rent and ought to be provided throughout the lease term, whether or not the tenant is carrying on business in the protected field. Landlords are generally not eager to 'reserve' or 'block out' a use for someone who is not carrying it on. Case law suggests that the landlords may win out on this issue even if the feature is not written into the clause itself<sup>1</sup>. Landlords may also attempt to set minimum occupancy thresholds. Examples of 'required conditions' to an exclusive/restrictive are set out in the attached appendix of sample clauses.

## **Remedies**

If an exclusive/restrictive is violated, an injunction may be available. A clause might provide for this or it might not. The presence or absence of the clause declaring the tenant's entitlement to injunctive relief will not dictate the outcome of a judicial proceeding of this nature, but it may be helpful to the tenant.

Alternative remedies sometimes secured by tenants, within the clause providing protection from competition, might include: (i) a daily penalty (usually subject to a cap), (ii) a rent reduction, (iii) lease termination by the tenant, (iv) a requirement that the landlord allow the tenant to commence legal action to stop the offending tenant, in the name of the landlord and at the expense of the landlord.

Many exclusive/restrictions state that any enforcement of the protection offered by the clause against an offending tenant/use will be done at the expense of the tenant holding the benefit of the protective clause. In the absence of such a statement, enforcement will be at the expense of the landlord unless it can obtain reimbursement from the offending tenant/user by virtue of lease terms or via Court order.

It is possible that, at law, a breach of an exclusive/restrictive might amount to a fundamental breach entitling the tenant to treat the lease as at an end and claim damages from the landlord.

## **Competition Act**

Out of concern that the Act might prohibit the restraint on trade inherent in an exclusive/restrictive, many landlords stipulate that the clause is not intended to and will not apply to the extent that it would give rise to any offence under the Act. As there is no known instance in Canada of an exclusive/restrictive actually giving rise to an offence under the Act, this type of wording is likely harmless to the benefiting tenant and indeed, may be potentially helpful should such an offence be alleged by the authorities. Sample wording is provided in the appendix of sample clauses.

## **Prohibited Uses**

If an exclusive/restrictive is granted, it is prudent for a landlord to add the restricted product/service to a list of prohibited uses to be attached to all other tenants' leases and incorporated by reference in their use clauses. A tenant would prefer, if necessary at all, to acknowledge that another (named) tenant enjoys the benefit of an existing restrictive/exclusive, and then attach the clause itself to the lease, with an acknowledgment that the tenant will not do anything to cause a breach of the exclusive/restrictive so long as it applies.

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<sup>1</sup> *Aktion Capital Corp v. Everything for a Dollar Store*; unreported, Ontario Superior Court of Justice File No.:02-CM-224716-CM1, decision of Hoy, J. dated May 3, 2002.

## **SAMPLE CLAUSES**

### Exclusive Covenant:

The Tenant shall have the exclusive right to sell shoes in the Shopping Centre.

### Restrictive Covenant:

With the intent that this covenant shall bind and run with the lands described in Schedule A, the Landlord covenants that no part of such lands (other than the leased premises) shall be leased or used for the purpose of the sale of shoes.

### Required Conditions:

So long as the Tenant:

- (a) is not and has not been in default of this Lease;
- (b) is \*\* and is itself in occupation of the Leased Premises; and
- (c) is continuously, actively and diligently carrying on in substantially the whole of the Leased Premises the principal business of the sale of \*\*;

the Landlord will grant to the Tenant the exclusive right etc.

### Competition Act wording:

The Landlord is not obliged to enforce the aforesaid covenant against any person if by doing so it shall be in breach of any laws. No provision of this Lease is intended to apply to the extent that it would give rise to any offence under the Competition Act (Canada) or any other statute. The Tenant shall indemnify and protect the Landlord from any losses or expenses incurred by the Landlord in connection with any claims or proceedings brought with respect to such covenant under the Competition Act (Canada) or any other statute or law of similar effect.