

**EXCLUSIVE COVENANTS
THE GIFT THAT KEEPS ON GIVING**

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At common law a restrictive covenant, such as an exclusive, is interpreted strictly against the person benefiting from it.

The common law doesn't like restraints on trade.

On the other hand, Courts have begun to understand that for a shopping centre to thrive it needs to have the right mix of tenants (*Russo v. Field* [1973] SCR 466).

Consider some examples:

(a) a 50's style diner franchise restaurant had an exclusive for restaurants of a similar nature as to menu and eat-in seating facilities - did not prevent a Tim Hortons from opening (*1575573 Ontario Inc. v. Armaiti Inc.*, 2016 ONSC 6113);

(b) grocery store tenant closed its supermarket in a shopping centre and opened directly across the street. Tenant did not have a continuous operation requirement. The Lease contained a covenant by Landlord not to lease to another seller of grocery, meat, produce, dairy or bakery products. The Lease also provided that there will be only one supermarket in the shopping centre. The Court refused summary judgment on the basis that the ambiguity in the lease couldn't be resolved based on the facts before it (*Euclid Center, L.P. v. K-Va-T Food Stores, Inc.* (US District Court for the Western District of Virginia case No. 1:15CV00014));

(c) Québec case - exclusive was for a business whose principal activity is the renting of movies. Second tenant operates a segregated video area in a grocery store. Court found that in the public's eyes the segregated video area was separate from the grocery store and, therefore, was a violation of the exclusive (*Laplante v. Immeubles Robin Inc.* (Québec Superior Court - 2014));

(d) Québec case - a restriction against a ladies fitness centre does not prohibit a mixed gender fitness centre (403-9971 Canada Inc. v. Place LaSalle Property Corporation and Les Entreprises Energie Cardio Inc. (Québec Superior Court - 2014);

(e) does a restriction against another drug store restrict another store from selling health and beauty aids? The Court looked to whether prescriptions were filled from the second store to conclude there was no breach (*Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.* 93 Ohio App. 3d 407;

(f) does a restriction in favour of ladies dresses protect against a store selling matched skirts and blouses? No according to the N.Y. Courts (*Weinberg v. Edelstein* 201 Misc. 343 (NY Sup. Ct. 1952)). Had the exclusive extended to 'ladies sports clothes', which was part of the use clause, the result might have been different;

(g) if Dunkin Donuts sells a few bagels does that offend a non-bagel provision - no -relatively speaking the bagels were only an incidental part of Dunkin (LPI/ Key West Associates, 749 So. 2d 564 Fla. App. 2000);

(h) does a prohibition against a food supermarket, butcher shop, seafood shop or grocery store prohibit some or all of the stalls in an Amish Farmers Market? The Court granted an injunction against two of the stalls - seafood and meat vendors. Interesting that the Court was prepared to conduct its inquiry on a stall by stall analysis rather than looking at the market as a whole (*Redner's Markets, Inc. v. Joppatowne GP Limited Partnership*, United States District Court for Maryland Civil Action no. RDB-L-11-1864); and

(i) does a restriction against the operation of a bar, restaurant or food service establishment of any kind prohibit a cake store selling food items for off premises consumption? If it does, the lease provides for a 50% abatement of rent. The Court found the abatement was a reasonable way of dealing with the issue of damages but sent the case back to the lower court to determine whether there was a violation given the vagueness of the phrase food service establishment of any kind (*Red Sage L.P. v. Despa Deutsche Sparkassen* 347 US. App. D.C. 75).

Some drafting tips:

1. Limit the exclusive to the tenant's core use. It should prohibit another tenant using its premises for the restricted activity as a primary use. Given the open ended and evolving nature of many use clauses today, the exclusive should simply not extend to another business carrying on the tenant's use.
2. Draft the exclusivity provision as clearly and specifically as possible; otherwise, can lead to a variety of interpretation issues with respect to the uses of existing and future tenants and what constitutes a breach of the tenant's exclusivity rights.
3. Depending on how big the shopping centre is, consider limiting the exclusive to the area in which the tenant is operating. If you go this route show the area covered by the restriction on a site plan rather than describing it in words. In any case the exclusive should only, in rare cases, apply to expansions of the shopping centre.
4. Consider whether the exclusive needs to be for the whole term and all extension terms.
5. Consider whether the exclusive should be applicable only to the current named tenant and not transferrable or assignable on a transfer or change of control.
6. The exclusive should cease to apply permanently if the tenant goes dark, whether as of right or in breach of the lease or stops using the premises for the restricted use.
7. Consider whether the exclusive should apply if the tenant is in default – if you go down this road, what is the effect of a tenant who cures its default?
8. Obviously put an exception in for existing tenants (and their assignees and subtenants) but also for any deals that are in the negotiation stage which it might be too late to change.
9. What is tenants remedy if you violate the restriction - termination? Lower base rent? Percentage rent only? Injunction against other tenant operating?
10. Change your lease form to make clear to future tenants that no matter what their lease provides, they can't carry on the restricted business.
11. Depending on the nature of the exclusive consider whether a small tenant really is a competitor – does a convenience store of 500 s.f. compete with a large supermarket?
12. The requirement that an incoming use “compete with the tenant” or even “compete directly with the tenant” narrows the restriction considerably.
13. Exclusives prohibiting another store whose sales exceed a fixed percent never work – percentage of sales can vary over time so the clause becomes almost, if not completely, unenforceable.

Some of the above summaries of cases were taken from:

- (i) Lisa Winnich, What Do You Mean My Exclusivity Clause is not Ironclad; ICSC Legal Update volume 32, issue 2 (2012)
- (ii) Joel Hall, Exclusives, ICSC California Retail Leasing Symposium, February 21, 2014
- (iii) Mariella Lo Pupa, Exclusivity Clauses in Quebec - ICSC Newsletter, 2015