OPENING AND OPERATING COVENANTS/GO–DARK RIGHTS

OPENING COVENANTS

- Point in time covenant
- Opening Covenant Example: Tenant covenants to **open to the general public** for a set period of time (usually one business day), within a certain number of days of the commencement date, fully fixtured, staffed and stocked from the **whole** of the premises
- Tenant considerations are to carve out certain circumstances that prevent it from opening on time
- Tenant may make opening conditional on co-tenancy of other tenants, amount of site work completed or payment of allowance
- Landlord may make substantial portion of allowance payable only once tenant opens its doors
- Landlord may include a penalty for failure to open as an amount of liquidated damages (i.e. $500.00 for each day) and provide a termination right if tenant fails to open when required
- Enforceability: what are landlord's remedies?

OPERATING COVENANTS

- Continuous covenant
- Difference from opening covenant is **duration**. Operating covenants are typically for the entire term but may be limited to shorter period
- If lease does not expressly require a tenant to operate, there is no obligation for a tenant to do so
- Operating Covenant Example: Tenant required to **continuously, actively and diligently** operate and remain **open to the public** from the **whole** of the premises throughout the term during **normal business hours** for the shopping centre
- Tenant may want to negotiate minimum hours in line with its normal hours of operation
- Tenant may want to be able to close shop for inventory, to carry out a transfer or for renovations
- If a lease requires a tenant to continuously operate and a tenant fails to do so, courts are unlikely to order a tenant to reopen and operate
- Enforceability: what are landlord's remedies?

TENANT GO-DARK RIGHTS	LANDLORD RECAPTURE RIGHTS
• Tenant may want an express right in the lease to go-dark and close shop, even if it means continuing to pay rent • Landlords will want to avoid go-dark rights, but it is a right that is often negotiated in anchor and major tenant leases • Landlords should require written notice prior to going dark and consider preconditions such as the right being personal to the tenant and the tenant not being in default under the lease • Landlord may want special tenant rights suspended during the period the tenant is not operating, including special signage rights, any exclusive, no build rights, options to extend, expansion rights, special parking rights, etc. • If tenant can go-dark, landlord needs a right of recapture	• This is an express right in favour of the landlord allowing it to terminate the lease in the event the tenant goes dark for a specified period of time • Period of time typically 60-90 days • Landlord will want to ensure the right can be exercised at any time after the tenant has failed to operate for the specified period, so that the landlord does not have to exercise right of recapture until it has found a replacement tenant • Tenant will want to carve out certain events that do not trigger the landlord's termination right, such as force majeure, events of damage, closures for renovations and to complete transfers • Tenants may also seek a grace period to void a landlord's termination of lease by re-opening for business within the landlord's notice period

ISSUES OF ENFORCEMENT	
Seek Injunction	Unlikely a court will order a tenant to reopen and operate
Cure the Default	Landlords not in position to run the tenants business
Make a Claim for Damages	As long as tenant is paying rent, landlord likely cannot quantify its damages
Terminate the Lease	This is a helpful remedy if landlord has another tenant lined up
Specific Remedy in Lease	A daily charge in the lease for each day the tenant fails to operate in violation of the operating covenant. If challenged by a tenant in court, such charges are likely not recoverable as these charges may be considered being penal in nature. (Canadian courts do not enforce penalties)