

SPECIFIC PERFORMANCE OF A TENANT'S COVENANT

The Message: The Courts are sometimes prepared to grant immediate injunctions requiring tenants to perform their obligations to their landlords.

The Case: In granting injunctive relief in favour of a freeholder against the tenant/developer of a Shopping Centre, the High Court has demonstrated how the Courts are prepared to assist in the pursuit of justice and are not to be deflected by technicalities (*Capita Trust Co (Channel Islands) Ltd-v-Chatham Maritime J3 Developments Ltd and Others*) (25 August 2006).

The Claimant is the owner of the Dockside Outlet Centre in Chatham which comprises some 80 units. The Defendant is the headlessee and developer. The Centre specialises in factory outlet stores but has been performing badly. The headlease requires the Defendant to use reasonable endeavours to market units and manage the Centre in a good and efficient manner.

Unfortunately for the Claimant, the headlease to the Defendant contains a break clause whereby the Defendant can terminate the headlease in 2008. If it does so, this will have the previously unforeseen effect of also terminating all the underleases granted to the retailers in occupation and will allow them to either vacate or negotiate better terms for staying on. Apparently, the Claimant is suing its former solicitors because of this.

A letting of a Unit to an anchor or magnet tenant would considerably improve the performance of the Centre and, in August 2006, terms had been substantially agreed for a letting by the Defendant to Marks & Spencer. Clearly, such a letting would be in the interests of both the Claimant and Defendant but the Defendant was refusing to grant the Underlease unless it received a payment of some £2.6 million from the Claimant for agreeing to forego exercising the break clause.

As Marks & Spencer were threatening to withdraw, and the Claimant was not prepared to pay the £2.6 million required by the Defendant, the Claimant applied for an immediate mandatory injunction to require the Defendant simply to complete the letting without foregoing its break rights. Most injunctions prevent a party from taking certain steps but a mandatory injunction requires a party to take certain action and such relief is granted rarely at a preliminary stage as it is usually irreversible.

The Defendant raised a number of technical issues in support of its defence that it had no liability to grant the Underlease. Notwithstanding that terms had been agreed and such a letting would clearly help attract other tenants and considerably increase footfall, the Defendant contended that it was not obliged to proceed as the proposed lease to Marks & Spencer was not in the standard form provided for by the headlease.

The Judge held that the obligation to market the premises and secure lettings overrode the provision to grant leases in a standard form and he also dismissed all the other technical arguments raised by the Defendant. He was sufficiently confident that there was no sustainable defence that he was prepared to grant the injunction before any full trial of the issues but the Defendant argued that previous case authority established that a Court could not order a tenant to specifically perform a covenant of this nature and the Claimant only had a remedy in damages.

Whilst it is true that a Court will not order specific performance of a covenant which requires a tenant to carry on an activity that is difficult to supervise, such as complying with a keep open covenant, the Judge made it clear that the Court can make an order that simply requires a party to achieve a clearly defined result. Accordingly, he held that he could grant an injunction to require

the Defendant to complete the Underlease, the terms of which were already agreed. He was particularly minded to do so as, otherwise, the Claimant would suffer considerable loss which would be very difficult to quantify.

The Claimant, therefore, succeeded in this battle and, hopefully, has now been able to reach some agreement for the break rights to be foregone or assigned so the future of the Centre can be assured.