

# Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd [2020] UKSC 36

An exclusivity covenant given by a landlord of a shopping centre to an anchor tenant was not declared unenforceable under the common law doctrine of restraint of trade.

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## Facts

A developer of a shopping centre in Northern Ireland granted in 1980 a long lease of part of the site to an anchor tenant (D). Under the lease, the developer covenanted that no part of the rest of the retail development would contain a retail unit measuring 3,000 square feet or more used for the purpose of trading in textiles, provisions or groceries. The developer subsequently transferred the reversion to the whole of the site to the respondent (P).

P was looking to reverse the decline in the shopping centre and sought a declaration that the exclusivity covenant was unenforceable.

## Issue

Was the exclusivity covenant unenforceable under the common law doctrine of restraint of trade?

## Decision

The Supreme Court took the opportunity to change the law in this area and adopted the 'trading society' test as the correct one to use to determine an issue such as this. Under this test, a covenant which restrains the use of land will not engage the restraint of trade doctrine if it was of a type which has "*passed into the accepted and normal currency of commercial or contractual or conveyancing relations*" and which may therefore be taken to have "*assumed a form which satisfies the test of public policy*".

As the exclusivity covenant entered into by the developer in 1980 was an accepted and normal type of covenant to find in a long lease of part of a retail centre let to an anchor tenant, the doctrine of restraint of trade was not engaged.

## Points to note/consider

1. Although this is a Northern Irish case, the Supreme Court used English case-law to arrive at its decision, so there is no reason to believe that the outcome of a similar case in England or Wales would be any different.
2. This decision is good news for beleaguered anchor tenants and serves as a clear warning to landlords who are considering ignoring similar exclusivity covenants in shopping centre leases in a bid to revive an ailing centre.

However, tenants should not overlook the fact that competition law could also come into play with exclusivity covenants such as these. In particular, the Chapter 1 prohibition on anti-competitive agreements in the Competition Act 1988 renders unenforceable agreements

operating in the relevant market that have an appreciable effect on the prevention, restriction or distortion of trade in that market (unless an exemption applies).

## Contact



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