OUTER HOUSE, COURT OF SESSION

[2021] CSOH 103

CA99/21

OPINION OF LORD BRAID

In the cause

SAPPHIRE 16 S.A R.L (FORMERLY KNOWN AS ORION IV EUROPEAN 16 S.A.R.L)

Pursuer

against

MARKS AND SPENCER PLC

Defender

Pursuer: O'Rourke QC, Tariq; DLA Piper Scotland LLP
Defender: Dunlop QC, McWhirter; DWF LLP

15 October 2021

Introduction

[1] Marks and Spencer PLC (the defender) wishes to close its store at 5-8 The Plaza, Righead Gate, East Kilbride, Glasgow G74 1LF which it leases from the pursuer, and which is part of East Kilbride Shopping Centre. It has significantly reduced the stock and staff there. One of its obligations is to keep open and to trade from the store. The pursuer has brought this action in order to enforce that obligation.

[2] On 28 July 2020, following an opposed motion hearing, I made an interim order that the defender:

> "re-open the whole of the premises at 5-8 The Plaza, Righead Gate, East Kilbride … by 24 August 2020, and thereafter for so long as it remains the tenant of the said

> premises in terms of the Lease…to keep them open for business during normal business hours (that is to say, 8am to 6pm on Monday, Tuesday, Wednesday, Friday and Saturday, 8am to 8pm on Thursday, and 10am to 5pm on Sunday) as a retail store with related administrative offices, stockrooms and staffrooms, or otherwise as a shop as that term is employed in the Town and Country Planning (Scotland) Acts 1947 to 1969 and Statutory Instruments made thereunder or any re-enactment or amendment thereof, and to keep the premises sufficiently staffed, stocked, furnished and otherwise equipped for that purpose".

[3] The store remains open inasmuch as some (but not all) of the entrance doors are unlocked. It now trades as an outlet store with limited staff. From within the shopping centre, it appears to be closed. The questions which arise are: (1) whether the defender's manner of trading is in breach of the order; and, if so, (2) whether the defender is thereby in contempt of court.

[4] The pursuer asserts that the defender has wilfully disobeyed the order. Its breach minute, and the defender's answers thereto, came before me for proof on Friday 24 September 2021. The witnesses who gave evidence were, for the pursuer: John McGowan, Private Investigator; Ian Irvine, the managing agent of the East Kilbride Shopping Centre, within which the store is situated; and Geoffrey Rimmer, the Centre Director; and, for the defender, three of their employees: Robert Morray, Head of Location Planning; William Smith, Property Director; and John Frost, Head of Business Continuity. With the exception of Mr McGowan, who spoke to the terms of a Report which he had prepared, no 6/18 of process, the witnesses gave their evidence-in-chief by adopting witness statements or affidavits, that evidence being supplemented by additional questions in chief and by cross-examination. No issues of credibility arise: I accept all the witnesses as truthful, and as generally reliable to the extent that I accept that their recollection of events is accurate, albeit in some instances I have attached little weight to certain answers given (by way of example, to Mr McGowan's expression of opinion on the appropriateness of the way

in which stock is displayed within the store); and, as will be seen, I do not wholly accept the reasons given by the defender's witnesses as to why the Mall doors into the store remain closed.

[5] Due to the *quasi* criminal nature of the proceedings, and the perceived need to play video footage in court for all parties to view (although as it transpired, the technology did not permit this), the proof was conducted as an in-person court hearing.

The principal action

[6] To put the interim order into context, it is necessary to say something of the principal action and the background to it. The action was raised in July 2020 as an ordinary action, being remitted to the commercial roll only on 17 August 2021. The lease of the store was entered into between East Kilbride Development Corporation and the defender and is dated 17 and 21 March 1972, the pursuer having subsequently acquired the landlord's interest. The lease was granted for a period of 99 years and 3 months from 28 February 1972 with an ish (expiry date) of 28 May 2071. The store is one of many retail units forming part of the East Kilbride Shopping Centre. Mr Irvine explained that the Centre itself is made up of six separate shopping centres which gradually assembled into one. The store lies in the Plaza Shopping Centre. It has been occupied and operated as a Marks & Spencer store since the 1970s. It has four floors. The second and third floors comprise, respectively, a storeroom and office space. With the exception of part of the first floor which contains a loading bay, the ground and first floors constitute the retail space, extending to about 27,400 square feet. There are two entrances to the store, one from the Mall within the Plaza Centre, the other from Righead Gate, which is a street lying to the north east of the store. Before the Centre was built the Righead Gate entrance was the sole entrance to the store. The pursuer avers

that until the first lockdown in March 2020, approximately 30% of the sales floor space was designated for food, which was sold on the ground floor, with the remaining 70% designated for general merchandise including, in particular, clothing. The general merchandise space was spread over the ground and first floors. The pursuer also avers that normal business hours at the store have for the past several years been as set out in the interim order, above. The defender does not formally admit what proportion of space was devoted to each category of merchandise sold by it but the figures averred by the pursuer appear not to be disputed. Likewise, the defender does not admit what the normal business hours were, or are, but nothing turns on that for present purposes.

[7] The pursuer also avers that the defender is an anchor tenant which is of importance in attracting customers to the Centre. The defender disputes that it is an anchor tenant but can hardly dispute that it was until 2020 one of the major retailers within the Centre and helped to attract customers to the Centre although that is not formally admitted in its defences.

[8] The clause in the lease which has given rise to the action is Clause TENTH, which obliges the defender, subject to the written consent of the pursuer not unreasonably to be withheld, not to use the store

> "... for any purpose other than a retail store and relative administrative offices, stockrooms and staffrooms, or otherwise than as a shop in the sense in which that term is or may be employed in the Town and Country Planning (Scotland) Acts 1947 to 1969 and Statutory Instruments made thereunder or any re-enactment or amendment thereof ..."

The clause then provides that

> "the [defender] shall be bound to keep the [Unit] open for business during normal business hours and to maintain lighting in the shop display windows each day from sunset until eleven o'clock pm."

[9] Also relevant is Clause FIFTH, by which the defender was taken to be bound

> "to erect and complete on the subjects leased within two years of the said date of entry and thereafter to maintain in good order and repair during the whole currency hereof ... a substantial retail store and relative offices … the value of which shall be not less than Three hundred thousand pounds ..."

[10] In the principal action, the pursuer seeks (among other things) declarator that the defender is in breach of its obligations under clause TENTH by failing to keep the whole of the store open for business during normal business hours; and an order ordaining the defender to re-open the whole of the store.

The events giving rise to the interim order

[11] The events giving rise to the interim order were spoken to by Mr Rimmer. When Covid restrictions were introduced in March 2020, the store remained open for the sale of essential foodstuffs from the Foodhall, access to which was gained from the Righead Gate entrance, but otherwise the store was closed, as required by the Coronavirus legislation in force at that time. The doors into the store from the Mall were locked about two weeks later and a high, full unit width white wall, separating the Foodhall from the ground floor clothing area, was erected. Black film was applied to the full glass frontage and doors within the Mall and notices were applied to the doors, directing customers wishing to purchase food to the Righead Gate entrance. When Covid restrictions were lifted, the pursuer expected that the defender would resume trading as previously; but it did not. On the contrary, the sale of food was greatly depleted to the extent that by 21 July 2020 there was but one shelving unit, offering for sale biscuits and juice. There was no stock within the clothing area and the white wall remained in place. A sign on the door now directed

customers to the defender's store within the Kingsgate Retail Park, elsewhere in East Kilbride.

[12] The defender's witnesses made no secret of the fact that the change in the defender's manner of trading was driven by a long-term (since at least 2018) strategic desire to rationalise its operations in the Glasgow area (including East Kilbride) by closing the store and focussing instead on the Kingsgate store. The reasons for this commercial decision were spoken to by Mr Morray and by Mr Smith. As Mr Morray put it in cross-examination, his starting point (in deciding which stores to operate) was to have the store in the location he wanted to have it; which, due to changes in shopping habits over the years, was not within the East Kilbride shopping centre. Clearly, that desire is at odds with the contractual obligation in the lease to keep this store open for business until 2071. In summary, the defender perceives that it has too many stores and wishes to reduce the space devoted to clothing and home products within stores. Separately, as regards food, it decided to centralise the sale of food to its customer base in East Kilbride within the Kingsgate store, as it is considered to offer a better shopping environment.

[13] The defender's desire to close the store was featured in an article published in the Daily Record on 16 July 2020, under the headline "Further blow for East Kilbride as Marks & Spencer confirm closure of flagship store". The article reported the defender's management as having confirmed that the store would close and could do so imminently; that operations at the store were being wound down with immediate effect; and that only a small number of staff would remain. A spokesperson for the defender was quoted as having said:

> "Over the coming days, customers will see a significant reduction of our current offer in the store as we continue discussions with our landlord with the aim to set a final

> date for the closure of the store. We hope to be able to share a closing date with the local community as soon as possible."

The pursuer avers that the article was the first intimation it had of any intention on the part of the defender to reduce its trading from the store. In particular, there had been no prior discussions between the parties to set a date for the store to close, as the article had suggested. The defender's position is that the article was misleading but given that the defender's long term wish is admittedly to close the store, nothing turns on that.

[14] It was against all of this background that the action was raised and interim orders sought. The pursuer's motion for interim orders called before me on 27 July 2020. The pursuer's submission was, in summary, that the lease properly construed, obliged the defender to operate a substantial retail store; that it was not doing so; that the manner in which it was trading was in breach of clause TENTH; that at the very least the pursuer had averred a *prima facie* case; and that the balance of convenience favoured it, since irreparable damage could be done to the Centre were the store to close. The primary interim order sought was one of specific implement requiring the defender to re-open the store in full. It was recognised that a decision on the long-term trading future of the store could be taken only after a substantive hearing on the merits of the action.

[15] After also hearing from senior counsel for the defender, I preferred the submissions made for the pursuer, including those on balance of convenience, and ordained the defender to reopen the store in the terms set out above. That order having been granted, there was no need for an interim interdict. I allowed the defender until 24 August 2020 to comply with the order, recognising that to restock and re-staff the store might take a little time.

Events since the order was granted

[16] Much of the evidence given by the pursuer's witnesses was devoted to describing what steps were taken by the defender in the immediate aftermath of the interim order but it is unnecessary to refer to that in detail, standing the fact that the essential facts as to the trading position which has prevailed since 24 August 2020 (the date by which the defender had to comply with the order) are either agreed by joint minute or are not in dispute. It is also unnecessary to say much about the trading hours. There was a period, following the 2021 lockdown, when the defender did not open the store during certain hours (three in total) specified in the order. However, it is now accepted by the pursuer that this was down to a genuine error which had, by the time of the proof, been rectified and nothing currently turns on the hours during which the store is open.

[17] Following the granting of the order, those within the defender's organisation responsible for ensuring compliance with it, after taking in-house legal advice, resolved to implement a proposal which had previously been discussed (according to Mr Smith), viz, operating the store primarily as an outlet store, that is, a store which sells clearance products, usually at a reduced price. Mr Smith stated in his evidence that no two Marks & Spencer stores are the same, which I accept if all that is meant is that the defender has stores of different sizes, and the range of stock within different stores may therefore necessarily differ. However, it was accepted by Mr Morray that he was unaware of any other Marks & Spencer store of this size, in a shopping centre, which operated as an outlet store. Mr Morray also accepted that, prior to 2020, the store offered a relatively standard Marks & Spencer offering.

[18] Following the decision to operate it as such, the store has been furnished and staffed as an outlet store, also selling a limited range of furniture. The parties have agreed by joint

minute that since 24 August 2020 the store has been open to the public during normal business hours (aside from closures due to further Covid restrictions, with which the pursuer takes no issue, and subject to what I have said above about the opening hours). Furniture and outlet mens clothing are sold on the first floor. Outlet women's clothing and outlet lingerie are sold on the ground floor. The Foodhall is no more. The entrance to the store from within the Mall remains closed (other than for emergency exit purposes), never having re-opened since April 2020. The entrance at Righead Gate remains open and is the only means by which customers may enter the store.

[19] Those bare facts do not paint the whole picture. Although not formally agreed in the joint minute, there was undisputed evidence that the displays within those windows of the store which look on to the Mall have been removed and those windows continue to be blacked out. There are no signs on the closed doors within the Mall (or on the windows) directing shoppers to the Righead Gate entrance, or, indeed informing them that the store remains open for business. Mr McGowan gave evidence, which I readily accept, that to all intents and purposes the store appears closed. That is borne out by the evidence of Mr Irvine in his supplementary affidavit that the majority of feedback from customers of the Centre is to ask why the store has closed and when it will re-open; and that other retailers have provided similar feedback and have also asked when the store will re-open. (Since that evidence is said to be based upon feedback, I do not regard it as anecdotal, as the Dean of Faculty sought to categorise it in submissions. It is true that no detail was given as to how many customers or retailers have formed the view that the store is closed, but that is a different point: it is all too easy to see why that view would be formed.) There are some contra-indications within the Centre itself, not least that the store is still listed in the store guide as being open. The value of that is lessened by the fact that certain lines which it is

listed as selling, such as health and beauty products, and children's wear, are in fact no longer sold by the defender in the store.

[20] As for those shoppers who have the knowledge, or wit to ascertain, that the store is open, what sight greets them upon entry? The extent to which the store has been stocked, furnished and staffed was spoken to by Mr Rimmer in his Supplementary affidavit of 30 July 2021 and by Mr McGowan, who carried out two covert visits to the store, on 24 and 26 July 2021. The extent of the stock then within the store is shown in various photographs within Mr McGowan's report and in video footage captured by him (No 6/23 of process), and also in photographs annexed to Mr Rimmer's supplementary affidavit. (With parties' agreement, standing the technology difficulty referred to above, I viewed the video during an adjournment.) Whether or not the stock can properly be described as "sparse" or laid out in a haphazard fashion, as Mr Rimmer and Mr McGowan would both have it, nonetheless Mr Smith accepted in his evidence that there had been a reduction in offering, albeit he steadfastly refused to accept this as "significant" (notwithstanding that a spokesperson for the defender was earlier quoted as describing the proposed reduction as such in the Record article of July 2020). While questions of sufficiency of stock are inevitably subjective, on viewing the photographs and the video footage one is struck by the contrast between the present somewhat meagre level of stock in comparison to the floor space available, and that which was previously within the store (as can be gleaned from the photographs at pages 21 to 23 of Mr McGowan's report); and indeed in comparison to the level of stock in the defender's store within the Regent Centre, Hamilton which was also visited and filmed by Mr McGowan. The floor space in that store is considerably more densely populated by stock than that at the Centre store. For comparison purposes it is also interesting to observe that in the Hamilton store, as here, there are two entrances: one within the Mall of which the

store forms part, the other in a nearby street leading directly into the Foodhall. In that store, the doors at both sets of entrances were open for customers to use.

[21] However one describes the quantity of stock, the overall impression of the level of stock within the store is that it is more redolent of a store destined for closure, than of one which is open for business as usual. This is borne out by statements by staff working at the store. These include the comment "There's no much choice" made to Mr McGowan on his first visit to the store on 24 July 2021 (Report no 6/18 of process, page 29). Mr McGowan considered that it was only natural to ask if the store was closing down to which the reply was "Well, that's the intention but we don't know when. It could be next week or next year or ten year." On 26 July 2021, another member of staff said to Mr McGowan, in reply to a question as to whether the store would be an outlet store from now on: "No, we're closing down…waiting on a date." The other striking feature of the photographs and the video footage is, perhaps not surprisingly given the limited nature of the stock, that not a single customer can be observed, despite Mr McGowan visiting at around lunchtime on a Saturday (in his report he did record seeing one customer, other than himself). I did fleetingly think I had spotted several customers on the video footage but on closer inspection they turned out to be mannequins. As for the furniture, there are a few items on display, although how any customer who happened to find their way to the first floor and who then decided to buy (say) a sofa, would in practice manage to take it home, remained unclear. Overall, the impression gleaned from the photographs and of the video footage, is not of a store open for business as usual.

[22] As regards staff numbers, the evidence was that at any given time there were approximately three members of staff visible within the store (in comparison to 10 to 15 previously, per Mr Morray's best estimate). The defender allocates 400 staff hours per week

to the store. Mr Morray did not disagree with the suggestion put to him in cross-examination that this equated to 5.8 members of staff. On the occasion of Mr McGowan's visits some members of staff (security) were wearing high visibility jackets and none was wearing the defender's livery. Indeed the impression given was that the security staff outnumbered sales staff. Mr Smith said that on his visit to the store, the day before the proof, staff members were wearing M&S livery.

[23] As already noted, the Foodhall is no longer operating as such. As also noted, the only entrance currently open to the store is at Righead Gate, which gives access to what was previously the Foodhall. The signage above that entrance still states "M&S Foodhall".

[24] As the proof developed the issues narrowed and crystallised, in comparison with those in the pleadings and the Notes of Argument. In particular, senior counsel for the pursuer conceded in submissions – properly, having regard to clause TENTH, which simply requires the defender to operate the premises as a retail store or otherwise as a shop – that the defender was entitled to reach the decision not to sell food from the store; and no issue is now taken with the decision to close the Foodhall. Thus some of the criticisms levelled at the defender in the pursuer's Note of Argument and in cross-examination – such as whether the decision to close the Foodhall was deliberately taken so that the defender would not require to open the store during any lockdown – simply fly off. Further, that concession, which is part of a wider acknowledgement that it is for the defender to decide what sort of shop it should run, does, as the Dean of Faculty submitted for the defender, necessarily involve an acceptance that equally the defender is entitled to operate the store as an outlet store if it wishes to do so. The particular factual matters which are relevant to the pursuer's complaints about how the store is being operated are therefore focussed on: (a) the defender's failure to re-open the Mall entrances to the store (coupled with the continuing

black-out of the windows); and (b) the reduction in both staff numbers and the level of stock within the store. I shall therefore say a little more about the evidence, and submissions, on each of these matters.

The doors

[25] Whereas the pursuer regards the entrance doors from the Mall as the main doors to the store, the defender claims that they are the back doors, the principal doors being those in Righead Gate. It points out that Righead Gate is the postal address of the store and that when the store was erected in the early 1970s, the Mall did not even exist. That may be, but nonetheless there are in total five double doors (one set of three, and, further along, another set of two) within the Mall, compared to three double doors at Righead Gate. As a matter of fact, the doors in the Mall were open to customers until they were closed in April 2020 due to the lockdown. Whilst it may be unfair to portray the Righead Gate entrance as merely being in some sort of back-water lane, as Mr McGowan did – he accepted in cross-examination that there are shops on either side – nonetheless the fact is that before the interim order (or at least, until April 2020), customers were able to, and did, access the store from within the Mall and presumably had done so since the Mall was opened (there was no direct evidence on that point, but it is inconceivable that when the Mall was built, the defender would not have wished shoppers using the Mall to have easy access to their store, which doubtless explains the five double doors). As things stand today, shoppers are not only unable to do that, but are likely to be, and at least some of them are, left with the impression, from the locking of doors combined with the blacking out of windows and the absence of signage, that the store is closed. There is signage within the Centre directing customers to the Mall entrance but not to the Righead Gate one (which is consistent with the

Mall entrance having been a prime source of accessing the store prior to lockdown). The defender's actions have had the predictable and inevitable effect that the number of shoppers entering the store has been "limited" (Mr Irvine's supplementary affidavit, paragraphs 5-8); in other words, few shoppers do so. Mr Irvine also gave evidence, which I accept, that the Plaza Centre, ie the Mall rather than Righead Gate, is where most of the East Kilbride Shopping Centre shoppers go.

[26] As to why the defender has not re-opened the Mall doors, Mr Morray explained the reasons for the closure of the doors as being, first, Covid-related and, second, to assist with reduced customer footfall and sales, to enable the staff to concentrate elsewhere in the store and for security reasons, namely to help to prevent shoplifting. In his view, the Righead Gate doors were sufficient to meet customer demand.

[27] While it is self-evidently correct that there is no provision either in the lease or in the order expressly requiring the Mall doors to open, the defender's reasons for not re-opening them, having been ordered to re-open the store, do not stand up to scrutiny. The reference to Covid is hard to understand. If the Righead Gate entrance can safely be used by customers entering and leaving the store, then so, too, can the greater number of Mall doors (where there is even more scope, if so desired, to use separate doors for entrance and exit). Further, the much busier Hamilton store apparently operates two entrances, and it was not suggested that the risk of Covid transmission is any greater in East Kilbride than in Hamilton. As for the argument about security, it does not explain why the defender is more concerned about shoplifting now than it was pre-Covid, when it had more stock and more customers who might steal it, nor does it explain why the defender has chosen to keep open the Righead Gate entrance and not the Mall entrance. If, as a consequence of opening both sets of doors, more staff are required then so be it, given the requirement in the order to

have the store sufficiently staffed. As regards the argument that the Righead Gate doors are adequate to meet demand, it is circular. The more difficult it is to enter the store, the fewer the shoppers who are likely to enter (and so the fewer entrances that are required). Conversely, if the Mall doors were also open, more shoppers would likely enter (and the Righead Gate doors might then be insufficient to meet demand). The point might also be made that by operating the store in the way it has chosen to do, the defender itself has driven down demand.

[28] Finally in relation to the doors, if one steps back and takes a holistic view of a decision to have, as the *only* entrance to a store which does not have a Foodhall, a set of doors beneath signage proclaiming Foodhall, it appears perverse.

Staffing and stock

[29] The defender maintains that the staff levels are sufficient to meet demand, having regard to the low level of sales within the store; the pursuer, that the sales are depressed because of the reduction in staff and stock. Again the argument is circular: if the defender had more stock, the sales may increase and it would require more staff. The pursuer maintains that the store is inadequately stocked having regard to its area of 27,400 square feet. The defender contends that it is an adequate level of stock to meet demand. Again, the argument is a somewhat circular one. Again, the point can be made that it is the defender's actions which have driven down demand. I will revert to the sufficiency of the staff and stock below.

Submissions

[30] Senior counsel for the parties adopted their respective Notes of Argument, upon which each of them elaborated in oral submissions. Senior counsel for the pursuer submitted that the defender is in breach of the order in respect of (a) a failure to re-open and keep open the whole Unit, by failing to open the doors, as discussed above; and (b) a failure to keep the store sufficiently staffed, stocked, furnished and otherwise equipped. In substance, the pursuer's submission is that the same breaches which led to the making of the interim order (including the reduction of stock; the locking of the Mall entrance and blacking out of the windows; and the reduction in staff) have all been persisted in. Those failures being the product of deliberate decisions, the defender should be held to have wilfully breached the order and should be found to be in contempt of court. Even if not in contempt, the defender had nonetheless breached the order and should now be ordered to comply with it.

[31] The Dean of Faculty, for the defender, submitted in reply that the order could not require the defender to do more than it was obliged to do by the lease; that it had done all that was required of it by both the order and the lease, in that it had kept the store open and was trading from it. There was nothing in either the order or the lease which required any particular doors to be open, provided that the defender allowed access to the store, as it was doing. The manner of operation was a matter for the defender, and it could not be held to be in breach of the order by dint of not trading very well. There was no provision such as that which was present in *Co-Operative Wholesale Society* v *Saxone Ltd* 1997 SLT 1052 requiring the defender to operate the store as a "high class shop". The lack of precision in the lease, and consequently the order, as to what the defender was required to do was not merely a factor to be taken into account but a complete defence to the accusation that it had

wilfully disobeyed the order of the court. It was not the function of the court to micro-manage how the defender operated the store. The court should not be required to give a potentially unlimited series of rulings in relation to how the defender was running its business. In this last regard reliance was placed upon what Lord President Rodger said in *Highland and Universal Properties Ltd* v *Safeway Ltd* 2000 SC 297 at 302-303, under reference to remarks of Lord Hoffman in *Co-Operative Insurance Society* v *Argyll Stores (Holdings) Ltd* [1998] AC 1 to the effect that courts in Scotland did not traditionally undertake that exercise.

Decision

[32] In the course of submissions parties referred to a number of cases in which keep open clauses have been considered by the courts: *Grosvenor Developments (Scotland) PLC* v *Argyll Stores Ltd* 1987 SLT 738; *Retail Parks Investments Ltd* v *Royal Bank of Scotland plc (No 2)* 1996 SC 227; *Co-Operative Wholesale Society* v *Saxone Ltd*, above; and *Highland and Universal Properties Ltd* v *Safeway Ltd*, above. However, the point at issue in those cases was whether it was competent, and if so, appropriate, to enforce a keep open clause by way of specific implement. It has long been settled that such an order is, in appropriate cases, competent. In the present case, the competency and appropriateness of making an order are not currently in question, given that the interim order has already been made and has not been reclaimed (appealed). To the extent that the cases consider the degree of precision required in an order, again, that ship has already sailed in this case.

[33] Nonetheless, the cases mentioned, particularly *Retail Parks* and *Highland and Universal Properties*, contain helpful *dicta* as to the extent to which the court should take into account the possible difficulty of enforcement of any alleged breach of the order in deciding whether to make an order in the first place; and, insofar as the cases comment on how the

court should approach an alleged breach, they contain useful guidance for present purposes. In *Retail Parks*, the leading case, Lord McCluskey at pages 240 to 241 formulated six general statements of the legal considerations to be kept in mind when a court is considering whether to make an order. Of these, the relevant ones for present purposes are the fourth – that an order may specify the end to be achieved, without specifying the means by which it is to be achieved; the fifth – that in considering the precision necessary in an order, the court should consider the commercial realities; and the sixth – the possible difficulties for the debtor in the obligation in knowing what is required of him should be considered against the background of the enforcement procedures available if a breach is alleged. In effect, the import of what Lord McCluskey said about this was that the need to prove a breach beyond reasonable doubt, and the requirement to establish that the defender had wilfully disobeyed the order of the court, operate as a form of safety net in the event that the court's order turned out to be lacking in precision.

[34] Applying those observations to this case, the first point to make (which I derive from the fifth of Lord McCluskey's six statements) is that it is legitimate to read the order against the background that the defender was well aware of how it had traded at the store for the past 40 years or so (and how it trades at other locations) – namely as a Marks & Spencer store offering a relatively standard offering (as Mr Morray described it) to which access was historically taken from the Mall as well as from Righead Gate. Consequently, there was no room for any doubt whatsoever that if it resumed trading in that manner, it would not be in breach of the order. The reason why the present dispute has arisen is not because of any uncertainty in the mind of the defender as to the obligation which it has been under since the inception of the lease, but because of its commercially inspired wish to close the store, and the decision, in pursuance of that aim, to change the manner in which it traded from the

store by converting the store to an outlet store, reducing its stock and staff and by changing the means by which the store could be accessed.

[35] The next point to make is that, as both parties accepted, it is perfectly possible in any given case that a defender will be found to have breached a court order, yet not to be in contempt of it. This is the "safety net" referred to above, in cases where it might not be entirely clear precisely what has to be done in order to comply with an order.

[36] Further since the order need specify only the end to be achieved rather than the means by which that is to be done, it cannot be a complete answer to the pursuer's complaint of breach of the order that the order did not in terms require the defender to re-open the Mall entrance, or specify how it was to trade once re-opened. There will always be a tension between the need to be precise on the one hand, and the need not to innovate upon the parties' contract on the other. It does not follow that the order may not be granted, as the cases make clear, or that once granted, it may not be enforced.

[37] Before leaving Lord McCluskey in *Retail Parks*, it is also worth noting what he had to say about the difficulties potentially faced by large commercial undertakings in knowing what they may or may not do to avoid breaching a lease, namely that the court had no duty to advise such undertakings as to "how close to the wind they can sail in order to avoid a breach of an undertaking that they have freely entered into with legal advice in a probative lease" (p 243). As he went on to observe a few lines later: "one does not have to be able to define a breach in advance in order to be confident of recognising it when it appears".

[38] With all these observations in mind, the first question to resolve in the present case is whether the defender has in fact complied with the order. If it has, the complaint of contempt of court must fail. If the defender is in breach, it is necessary then to consider whether that breach is sufficiently serious to amount to a contempt of court. I do not

consider that anything that Lord Rodger said in *Highland and Universal Stores*, above, can be read as discouraging the court from such an exercise. Indeed, once an order has been made, it then simply becomes a question of fact as to whether or not the defender has complied with it. It is implicit in the making of an order that the court will be prepared to enforce it, should the need arise.

What did the order require the defender to do?

[39] It is axiomatic that in order to determine whether or not the defender has complied with the order, one must first determine what the order required of it - what does the order mean? The first and obvious point to make is that the order was not merely an interim interdict which preserved the *status quo* at that time. It required the defender to take positive action. When the order was made, of course, the defender's position was that the store *was* open, in that the Righead Gate entrance was open and that it was trading from the store, albeit in what might be described as a somewhat desultory fashion. That position was not accepted by the court (or, at any rate, the court held that the pursuer had pled a *prima facie* case that the manner of trading was in breach of the defender's obligations). What positive action, then, did the defender require to take? By ordering the store to *re*-open, it was clear that the court required more to be done than simply to *remain* open. Further, the order required the *whole* of the premises to be re-opened. The premises were not to be re-opened simply so that members of the public could enter them: once re-opened, they were to remain open for business. Thus, it can fairly be taken from the order that the whole of the ground and first floors (in other words, 27,400 square feet of retail space) were to be re-opened so that the defender might resume its business of selling products to shoppers.

[40] I also consider that the phrase "keep [the store] open for business" read in conjunction with the later requirement to keep the store "sufficiently staffed, stocked, furnished and otherwise equipped" carries with it a necessary implication that the order requires the defender to trade in good faith, and not to carry on business half-heartedly. I do not consider this to be a controversial proposition. It has its roots in the submissions for the pursuers in *Retail Parks*, referred to by Lord McCluskey at page 233, which drew upon the approach of the English courts, in particular *dicta* to the effect that, if granting an order enforcing a keep open clause, the courts could rely upon the good faith and business sense of the respondents not to run a business half-heartedly or inefficiently. This submission did not attract unfavourable comment from the Inner House. That it must be a correct statement of the law can be seen by taking an extreme example: suppose a person upon being ordered to keep premises open for business put up a sign saying "Closed" but nonetheless kept the door unlocked and a member of staff available to sell goods to any person who might happen to enter. It can hardly be suggested that such a person would not be in breach of the order. If that is correct, it then simply becomes a question of fact and degree as to whether the manner of trading in any given case is in good faith or not. The *dicta* referred to above were made in the context of the level of detail which required to go into an order of specific implement, and in particular the absence of any requirement for prolix detail. The other side of this coin can be seen in Lord McCluskey's observation referred to above that one does not have to define a breach in advance to be able to recognise one when it occurs.

[41] The final aspect of what the order required the defender to do, touched upon in the last paragraph, was to keep the premises "sufficiently staffed, stocked, furnished and otherwise equipped for that purpose" (the purpose in question being use as a retail store or otherwise as a shop). If there is any uncertainty in the order, this is where it lies, since the

question of what is sufficient is, to some extent at least, a subjective one. However, what is "sufficient" can also be informed by all the circumstances, including, significantly, the size of the retail space available in the store. There are also two further objective criteria against which sufficiency can be measured, namely, how much stock and staff were in the store previously; and how much stock and staff are in comparable stores (by which I mean, stores of a similar size, selling a similar type of product)?

Has the defender complied with the order?

[42] Having discussed what the order requires, I now turn to examine whether the defender has complied with it. In my view, it has not. In the first place, having regard to the context in which it was granted, I agree with the submission by senior counsel for the pursuer that, by failing to open the Mall entrance, the defenders have failed to re-open the whole Unit. It does not matter that the Mall entrance was not specified in the court's interlocutor: opening the Mall entrance was one of the means by which re-opening was to be achieved. Second, it is also doubtful whether the whole Unit has re-opened for business, when one has regard to the limited use which the defender is making of the available space. Again to take an extreme example, if the defender had but a single rack of clothing on each of the ground and first floors, it could hardly be said to have re-opened and to be trading from the whole Unit. Again if that is correct, it then simply becomes a matter of degree as to whether the volume of stock and staff is such that it can be said that the defender is trading from the whole Unit. This ties into the question of whether or not the defender has kept the store sufficiently staffed, stocked and furnished. As I have noted above, the arguments that there is sufficient stock on the one hand, and sufficient staff on the other, are circular, in that the level of the one is said to be dependent on the level of the other. However, a comparison

of the store as it is currently trading with the store as it traded previously and with the level of stock in the Hamilton store, also leads to the conclusion that the store is not sufficiently stocked or staffed; and that this is so tends to be confirmed by the fact that there is no other store of this size operated by the defender as an outlet store. In saying this, I acknowledge, as has the pursuer, that the defender is entitled to sell outlet products if it wishes; but if doing so, it must make full use of the available space.

[43] But even if I am wrong in all of the foregoing, the half-hearted manner of trading is also such as to put the defender in breach of the order. One is led to the inexorable conclusion that the defender is not interested in attracting business to its store, and that it is doing the bare minimum which it considers it need do in order to comply with its obligations. Were it otherwise, it would not have closed a main source of access to the store; it would not have blacked out its windows giving the impression that the store was closed; it would not have failed to exhibit a sign directing customers to the entrance which did remain open; and arguably it would not have signage to a Foodhall that manifestly no longer exists. That the defender is trading half-heartedly is further confirmed by: the defender's avowed intention to close the premises; the low levels of stock within the store; the decision to trade as an outlet store when no other store operated by the defender of a comparable size, in a comparable location, is so used; the comments made by members of staff to the effect that the store is destined for closure; and the failure of staff consistently to wear M&S livery.

[44] If still further confirmation is required that the defender is not complying with its obligation to keep open for business in a good faith manner, the proof of the pudding, as it were, lies in the dearth of customers in the shop at a peak shopping time on a Saturday, and in the belief fostered among shoppers and other retailers that the premises are not open.

[45] One returns to Lord McCluskey's words, that one does not have to be able to define a breach in advance to be capable of recognising it when it occurs. When the defender's manner of trading is viewed as a whole, it is undoubtedly recognisable as a breach of an order designed to force the defender to re-open to prevent irreparable damage to the pursuer while the principal action is being determined. While each single action taken by the defender might not in itself have constituted a breach had it been done in isolation, viewed as a whole they undoubtedly do. In the modern vernacular, the defender has "pushed the envelope" by doing what it considers the bare minimum in order to comply with the order. It is not enough. The defender must do more.

Is the defender in contempt of court?

[46] As already observed, not every breach of a court order will amount to contempt. The relevant legal principles are not in dispute. A convenient and recent summary is to be found in *Transocean Drilling UK Ltd* v *Greenpeace Ltd* 2020 SLT 825, per Lady Wolffe at [54]. In brief, what must be proved, beyond reasonable doubt, is conduct which is wilful and which shows a disregard for the court. "Wilful" in this context means deliberate: *Aldridge, Eady & Smith on Contempt*, paragraph 16-227. The fact that a person does something which they have been interdicted from doing, or undertaken not to do, may imply a lack of respect for the court's order, or the undertaking: *Beggs* v *Scottish Ministers* 2005 1 SC 342 at [30]. The same reasoning can equally be applied to a person who does not do something they have been ordered to do.

[47] In considering whether or not the defender is in contempt of court, I do not accept that lack of precision in an order, or a degree of uncertainty as to the content of the relevant obligation, is necessarily always a complete defence to a charge of contempt, as the Dean of

Faculty submitted. As the Lord President said in *Highland and Universal Properties*, above, at page 302G to H, these factors are simply relevant when the court has to consider whether any breach of the order was deliberate and merits punishment. The question must always be whether the failure has been in deliberate defiance of the order of the court. As I have already stated and as has been observed in other cases, any uncertainty does not arise so much from the obligation, as from the defender's desire not to comply with it for the remainder of the lease.

[48] While the decision is in some respects a marginal one, I will on this occasion give the defender the benefit of the doubt, recognising that there is some degree of uncertainty and that those taking the decisions relied upon legal advice. I also have in mind that any penalty which I did impose would of necessity be a financial one; and that the defender may already have exposed itself to a damages claim in the event that a breach is ultimately established after proof. This does not of course mean that the defender is relieved of the obligation to comply with the order between now and final resolution of the case; nor does it mean that any future breach will not be held to be in contempt and met with a significant fine. However, I will decline to hold the defender in contempt at this stage.

Further procedure

[49] I will put the case out by order for the defender to decide what action it proposes to take to comply with the order and for parties to address me further on what orders should be made in light of this Opinion. I do not consider that this amounts to micro-management of the lease or that we will inevitably find ourselves back in court in another month, debating the next actions taken by the defender, as was the Dean's gloomy prognosis. The

defender can put the matter beyond doubt by trading as it did before, or as it does in its other stores.

[50] That all said, I am concerned about the course this action has taken since I made the interim order more than 14 months ago, when I might fairly have anticipated that given goodwill on both sides the action would have reached a final resolution by now. It appears that the order was "banked" as the Dean of Faculty put it and that the pursuer did not lodge the summons for calling until the instance had nearly fallen. While there may be good reasons for that, of which I am unaware, and while other remedies may have been open to the defender, the result is that the current position is most unsatisfactory. Now that the action has been remitted to the commercial roll, it is essential that it be resolved with all due expedition; and in particular that an early and definitive ruling is made on the proper construction of clause TENTH, and if the defender is in breach of it, the remedies to which the pursuer is entitled. The future progress of the action will also be discussed at the proposed by order hearing.