

Permitted Use Restrictions and Competition Law – When is a Restriction Too Restrictive?

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For a long time, **land agreements**, namely agreements between businesses which create, alter, transfer or terminate an interest in land, were excluded from the application of the **UK's Competition Act 1998 (CA '98)** as a matter of policy. That exclusion was revoked with effect from 6 April 2011, and such agreements must, as a result, be assessed in light of the prohibitions contained in the CA '98. The recent case of *Martin Retail Group Limited v Crawley Borough Council* (Case 3CL 10014) focused on whether a use restriction contained in a lease breached the CA '98's Chapter One Prohibition against agreements which restrict, prevent or distort competition and, if so, whether it was capable of exemption.

The use restriction in question related to a parade of shops in a housing estate. Each of the 11 retail units was leased by Crawley Borough Council (the **Council**) under terms which restricted each unit to particular use, each different from the other. Martin Retail Group (**MRG**) wanted to extend the permitted use of one of the sites from a general newsagents to also be permitted to sell groceries, but the Council refused on the basis that there was already a grocery store on the parade. The issue of whether this restriction constituted a breach of the CA '98 was tried as a preliminary issue. At that trial, the Council conceded that the proposed user clause was restrictive of competition and, therefore, fell within the Chapter One Prohibition. In such circumstances, the Judge concluded that the burden fell on the Council to prove that the restriction met the conditions for exemption. The Judge considered, however, that the Council failed to do so, citing in particular a lack of reliable evidence.

This case is notable for a few reasons. Firstly, it is a standout example of competition law being used to resolve bilateral disputes in relation to micro-markets – indeed the Judge noted that the permitted use clause would have restricted competition in the sale of convenience goods within that particular parade of shops. Secondly, this appears to be a case in which the appellant has achieved a successful outcome using competition law but without having to resort to detailed economic or legal argument. This is largely thanks to the Council conceding that the CA '98 applied to the restriction in question, and the Judge not, therefore, fully engaging with the technical question as to whether the use restriction, or the letting scheme as a whole, had an anti-competitive effect. It does, however, demonstrate that positive litigation relying on competition law need not always be such a risky business and can, instead, reap significant rewards – particularly with a naïve defendant and an enthusiastic judge.

Finally, it is a timely reminder that competition law permeates all sectors and areas of commercial activity, including restrictions on the use of land. Whilst this case may have its flaws, it is one of very few cases that directly tackles the impact of competition law on land agreements in a judicial setting, so cannot be overlooked. All entities which benefit from, or indeed are subject to, such restrictions should take heed.

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