

## **A recent County Court decision is the first reported case in which a lease user clause has been held to be unenforceable by breaching competition law.**

### **Context**

Since the revocation of the Land Agreements Exclusion Order came into effect in 2011, land agreements (lease, transfers etc) have been subject to competition law. However, since then there has only been one other reported case involving the application of competition law to land agreements (and, there, competition arguments were rejected).

### **Background**

Martin Retail Group ("Martins") leased a newsagents in a parade of 11 shops owned by Crawley Borough Council ("the Council"). The parade also contained an independent supermarket, and the nearest other convenience store was a kilometre away. All of the shops in the parade (and in 10 other parades owned by the Council in a residential housing estate in Crawley) were subject to the Council's letting scheme, which restricted the user of the premises to a particular trade or business. When its lease came up for renewal, Martins wished to widen the permitted terms of its lease under the user clause to include groceries, alcohol and other convenience goods. This request was rejected by the Council.

### **The decision**

The Court held that:

- the user clause was anti-competitive. The relevant market for "convenience goods" was within a "relatively short walking distance". (In these circumstances, it would then be normal for the Court to consider whether the proposed user clause had an anti-competitive effect on the relevant market. However, the Council conceded this point. The Court therefore concluded that the user clause granted a monopoly to each shopkeeper in the relevant market without consideration of its actual effect on the market.)

- the user clause did not meet the criteria for individual exemption under the Competition Act 1998. Much of this turned on the facts of the case - both parties relied upon hearsay and assertions of employees. Neither of these were held to amount to evidence. As such the Council (in seeking to rely on an exemption) failed to discharge the burden of proof (given the lack of admissible evidence) required to show that the relevant restriction was indispensable to achieving the benefits, and that there was no alternative, weaker, restriction which would achieve the same benefits.

It is not clear why this case was not transferred to the High Court, as other cases involving argument on competition issues are.

### **Lessons to be learned**

- Each case turns on its own facts. Here, these include the detail, duration and impact of the relevant provision, the circumstances of the property concerned, and the extent to which alternative sites are available;
- Parties to existing or proposed land agreements may now seek to rely on competition arguments more frequently (even though this decision is of no binding authority since only at County Court level);
- It may be easier to prove that a restriction does not have an appreciable effect on competition than it is to prove that the restriction meets the criteria for individual exemption. In this case the effect on competition was conceded by the Council and there was no real analysis of the appreciability of the effect of the restriction;
- A party claiming exemption will need evidence from an independent third party who can be cross-examined on it; witness statements (e.g. from an employee) will not suffice; and
- user clauses that, in effect, grant local monopolies, even where the intention is to create market diversity, may not be enforceable if the parties cannot prove that they meet all the criteria for exemption.

**Case:** Martin Retail Group Limited v Crawley Borough Council [2013] WL 7090797