



Tenant mix covenant breaches competition law

Martin Retail Group Ltd v Crawley Borough Council [2014] EGILR 17 is the first case in which the Courts have applied competition law principles to tenant mix policies. The Court decided that restricting the use of a shop to a newsagent and for the sale of books, toys, CDs, fancy goods and greeting cards made it part of a "letting scheme" which prevented the tenants on a shopping parade from competing with each other, and was unlawful.

The legal background

In April 2011 the law governing the relationship between land law and competition requirements changed, bringing land transactions within the ambit of Chapter 1 of the Competition Act 1998 which prohibits anti-competitive agreements. Since then, any clauses in a lease or transfer which have as their object or effect the restriction of competition in the UK (or a part of it) will be void and/or unenforceable, unless they meet certain exemption criteria.

As described in our [briefing from May 2013](#), the guidance issued by the OFT (now the Competition and Markets Authority "CMA") in March 2011 explained that not all restrictive or exclusivity clauses in land agreements will be deemed to be anti-competitive. In some cases such clauses may not have an appreciable effect on competition in the relevant market (which can be the case even in small or local markets). Exclusivity in favour of anchor tenants and provisions designed to achieve an appropriate tenant mix may be capable of justification, for example, subject to the exclusivity being limited to a start-up phase. Justification may include a submission that a development would never have been built but for the anchor tenant's exclusivity period, or that the footfall in a shopping centre would be significantly enhanced by the draw of a particular tenant.

The facts of this case

Crawley Borough Council owned a parade of 11 shops on a housing estate at Furnace Green, Crawley, one of which was occupied by Martin Retail Group ("MRG"), trading as a newsagent with a post office counter. In another shop, Premier Furnace Green Supermarket ("Premier"), a local family business, traded as a groceries retailer.

When its lease expired in 2011, MRG requested a new lease with a wider user clause allowing use as a shop including, "*the sale of alcohol, convenience goods, the installation and operation of an ATM machine and National Lottery terminal and equipment*".

The Council countered that the user clause should expressly exclude the sale of alcohol, grocery, convenience goods and other uses falling within Class A1. Since Crawley's development as a New Town in the 1940s the Council has owned a shopping parade in each of the town's housing estates, and every shop on each parade has a user clause specifying its business type with a view to ensuring a good commercial mix. MRG claimed that the effect of this restriction would be to prevent it from competing with Premier at the Furnace Green parade, in breach of the rules in the Competition Act. The competition issues were examined by the county court as part of MRG's application for a new tenancy.

Did the user clause breach the Competition Act rules?

The Council conceded at trial that its proposed user clause would infringe the Chapter 1 Competition Act prohibition. The only question before the Court was whether the clause would meet the requirements for an exemption from that prohibition by:

1. contributing to improving production or distribution or to promoting technical or economic progress;
2. allowing consumers a fair share of the resulting benefit;
3. being indispensable to achievement of the objectives at (1) above; and
4. preserving competition in respect of a substantial part of the products in question.

The Council argued that the letting scheme was beneficial to all the tenants of the parade, and in particular that:

- smaller businesses were more likely to prosper under their scheme than without such protection;
- the Council did not benefit from the scheme since its effect was potentially to depress or limit market rents;
- the letting scheme did not result in increased prices; and
- the letting scheme is a flexible policy allowing similar if not identical uses. For example permission would be refused for a second hairdresser in a parade, but use as a barber or beautician might be allowed.

This did not convince the Court. Crucially, the Council failed to match its submissions to the exemption criteria. It did not offer evidence to explain or substantiate its tenant mix policy, such as written evaluations of the letting scheme containing data about the scheme and its effects. In the absence of any such evidence the judge said he would "*be doing little more than speculating if I accepted the defendant's proposition*". As a result, the Court held that the proposed user clause did not satisfy the requirements. The judge did concede that if the scheme were being set up from scratch and the restrictions were put in place to ensure that one of the units was occupied by an anchor tenant until that tenant's business had stabilised then he might have come to a different conclusion.

How will this judgement impact on landlord and tenants?

The case reminds us of the consequences of a restriction being found to be anti-competitive. The risks include:

- the offending clause (or possibly the whole agreement if the Court decides that the clause cannot be severed) being deemed to be unenforceable;
- exposure to private action by a third party arguing that its business was damaged by the infringement (for example a retail tenant might argue that its sales figures have suffered as a result of having to lease premises in a less desirable location, or not being able to find premises in the relevant area at all); and/or
- investigation by the CMA, with potential consequences including fines of up to 10% of each party's worldwide turnover.

Because this is a county court judgment, it may not be followed by a higher court. It was also a heavily fact-specific case. Notably, the Council did not substantiate its argument that its tenant mix policy was aimed at improving the distribution of goods, or economic progress, or choice for consumers.

Following this case, landlords would do well to ensure that tenant mix policies and their benefits are properly documented. Prospective tenants should bear in mind that competition law arguments could be useful where landlords have not carried out such assessments.

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