

Competition Law, Local Authorities and Commercial Property.

Martin Retail Group Limited v Crawley Borough Council, Central London county court, Judgment of 24 December 2013.

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This recently published judgment decided in December 2013 should raise alarm bells for local authorities. A letting scheme which was designed to promote a 'diverse and vibrant' shopping parade for the benefit of the local community has been held to breach competition law. Tenants are likely to attempt to use this case as a precedent to upset similar letting schemes elsewhere and to argue against restrictive user clauses in leases and possibly even to obtain wider user clauses on lease renewal.

Background

The Coalition Government pressed ahead with plans to extend the reach of the Competition Act 1998 (the Act) by deciding to remove the exclusion for land agreements from the prohibition on agreements restrictive of competition. The effects of this decision are only just starting to be the subject of cases decided in the Courts. The issues raised are likely to be of significant concern to local authorities who grant retail leases.

The judgment

In this case, the claimant, Martins, wished to extend a user clause in a business lease to enable them to operate a convenience store which would compete *inter alia* with the local supermarket. The council wanted Martins (who operate a chain of convenience stores) to remain solely as newsagents and proposed a user clause for the renewal lease which would make it clear that Martins could not sell groceries or other convenience goods. The County Court found that the user clause contained an unlawful restriction of competition contrary to section 2 of the Act. It also found that the council had failed to establish that the council's policy grounds in restricting the commercial use of the land were justified under section 9 of the Act. The grounds relied upon by the Council included preserving the diversity of types of shops for the benefit of the community in the relevant locality.

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Analysis

The judgment, although understandable on the facts presented to the Court, contains at first sight a number of surprising features.

First, is that it was tried in the County Court at all. If a party's statement of case raises an issue relating to the application of the Act the court must transfer the proceedings to the Chancery Division of the High Court at the Royal Courts of Justice. (CPR Part 30.8). It is unclear from the Judgment how the claim ended up in the County Court.

Second, the Act only applies to "undertakings" i.e. entities engaging in economic activity. This is an autonomous concept in competition law and may therefore apply even when a local authority is not 'trading'. In this case it appears to have been assumed without argument that a council imposing certain user restrictions in a business lease is necessarily acting as an undertaking. However, in other cases the issue has been contested even where a local authority is seeking to impose restrictions on commercial activity where it also engages in the same activity e.g. in relation to the provision of off-street car parking (see *South Somerset District Council v Tonstate (Yeovil Leisure) Limited* [2009] EWHC 3308 (Ch), at [19].

Third, is the fact that the impact of the restrictions was determined on a preliminary issue without any oral evidence or cross-examination. While a preliminary issue can be a useful procedural tool it is crucial it is set up so as to ensure the Court has all the evidence it needs to decide the particular issue selected for determination.

In this case the Court noted the evidence before it was from employees of the parties whose evidence as the Court noted was *"to a material extent [the] expression of subjective opinion by them rather than evidence of primary fact"*. That evidence was also based on expressions of opinion received from local businesses and residents (none of which was adduced orally). This evidence extended to technical questions of market definition and the economic impact of the restrictions. It seems there were no policy documents adduced in support of the imposition of the restrictions in question and no expert evidence to assist the Court. In the circumstances the Court was not satisfied that the Council had discharged the burden on it to justify the existence of countervailing benefits that outweighed the restrictions. Where such questions fall to be resolved in competition cases the Court will very often receive expert opinion evidence on these sorts of issues.

Conclusion

This area is clearly one to watch. At first glance this case looks like unwelcome news for local authorities. Plainly it demonstrates that where competition law issues are raised in connection with the use of commercial property local authorities need to tread carefully. For understandable reasons competition law is generally not an area with which local authorities are particularly familiar.

However, competition law does not leave local authorities powerless to implement policies they may wish to pursue that involve restricting commercial activity. In the first place competition law only applies to economic activity. Local authorities more often than not do not engage in economic activity. Also, exemptions and exclusions under the Act can apply in a range of situations that may be relevant to local authorities. For example, the schedules to the Act provide exclusions for certain planning obligations contained in agreements made pursuant to local authorities' planning powers. Other agreements entered into may also be excluded where they occur pursuant to a legal obligation. Equally, an exemption may in principle be available where there are likely to countervailing benefits flowing from the restriction. However, if it becomes necessary to claim an exemption for a particular agreement because it restricts competition it is clear that a local authority must take care to ensure that in the final resort it will be able to satisfy a court with appropriate evidence that any restriction is in fact justified by the alleged countervailing benefits.¹



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The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

¹ The starting point in this regard should be the guidance issued by the Office of Fair Trading (now the Competition and Markets Authority) "Land Agreements. The application of competition law following the revocation of the Land Agreements Exclusion Order" of March 2011.