

## Beware of competition

**Supermarket landbanking** Clare Harman Clark reviews the importance of property arrangements complying with the Competition Act 1998

Landbanking is where an owner aggregates land without building on it immediately, but rather watches and waits while its value grows. The practice is common: research last year by property agent CBRE revealed that the big four supermarkets (Tesco, Asda, Sainsbury's and Morrisons) were holding on to 46.6m sq ft of land, of which only 2.8m sq ft was being built on.

It is also potentially anti-competitive. As far back as 2008, the Competition Commission (whose functions are now looked after by the Competitions and Markets Authority) suggested that grocers were landbanking in order to restrict the activities of rival operators.

Earlier this year Tesco revealed that it was abandoning plans to build 49 new stores, following a similar announcement by Sainsbury's in November 2015. This is clearly commercially-driven, as households opt to use convenience stores rather than doing a weekly shop at big out-of-town superstores. Nonetheless, rolling back store openings will only make the stockpiling of land less defensible.

### High Peaks

In addition to banking land, grocers have also sought to control its use by applying restrictive covenants.

This is key to a case currently being dissected by the Competition Appeal

more quickly and at a lower cost. However, it could place a significant strain on both the parties involved and the tribunal itself, and is likely therefore to be limited to simpler or simplified cases.

The Competition Act 1998 ("the Act") contains two prohibitions based on EU law. The Act prohibits agreements that may affect trade and which have as their object or effect the prevention, restriction or distortion of competition. It also outlaws the abuse of a dominant market position which has, or is capable of having, an impact on trade.

High Peaks alleges that Tesco has infringed both prohibitions, and hopes to secure damages and interest, as well as an injunction preventing the covenant from being enforced.

### Previous anti-competitive action

This is not the first time that grocers have faced pressure over failures to abide by competition law.

The Groceries Market Investigation (Controlled Land) Order 2010 focused in on this relatively high-risk sector, ordering the big supermarkets to release various pre-existing anti-competitive covenants within six months of the order. In addition, they were not to enter into further ones, as well as not enforcing any existing exclusivity agreements.

At the time, Tesco was ordered to

and there was already a grocery offering. The council eventually conceded that its letting scheme would restrict competition, but the case hinged on a special exemption on certain conditions under Chapter 1 of the Act. The judge ruled in favour of the tenant.

This case highlighted the importance of considering the impact of competition law on property arrangements. Freehold transfers, leases and assignments, easements and licences are all at risk of falling under the anti-competitive category.

Particular scrutiny may be put on arrangements where competitor parties aim to "carve up" a market, or in which competition is restricted by barriers to entry (or expansion) in a particular market. These actions are more likely to appreciably restrict competition where one or more of the parties has market power.

Shopping centre leases containing non-compete provisions for anchor tenants, for example; the allocation of planning permission between competitors; exclusivity agreements; and restrictive covenants all have the potential to prevent, restrict or distort competition. In these kinds of cases, courts will consider whether there is an appreciable effect on competition and trade. Appreciability is a question of fact in each case due to the absence of a universal legislative definition of the term.

Property arrangements such as freehold transfers, leases and assignments, easements and licences are all at risk of falling under the anti-competitive category

Tribunal, where the property developer, High Peak Developments Ltd ("High Peaks"), is challenging a restrictive covenant registered by Tesco when it sold land around its Whaley Bridge store in Derbyshire in 1997.

The restriction against the use of the land for the "sale of food convenience goods or pharmacy products" is now jeopardising High Peaks selling the land on to B&M Markets Ltd. The case comes down to whether Tesco's refusal to release the restrictive covenant breaches competition law.

High Peaks' action is the first of its kind and, significantly, High Peaks has applied for a fast-track designation. This is a new streamlined process introduced under the Consumer Rights Act 2015 that could prove attractive to smaller claimants, enabling them to secure injunctive relief

remove restrictive covenants on four sites in the UK (Trowbridge, Leytonstone, Elgin and Diss) where its market dominance was established, and it hit the headlines in 2014 for its slow progress in doing so.

### Other property arrangements

Land agreements, such as a freehold transfer or a lease, had been exempt from the Act until a repeal in April 2011. Since then, use restrictions in leases were considered most prominently by the county court in *Martin Retail Group Ltd v Cranley Borough Council* [2013] EW Misc 32 (CC); [2014] 1 EGLR 42.

The council had declined consent to expand the tenant's permitted use to allow it to sell alcohol and convenience goods, on the basis that, in the not unreasonable interests of good estate management, it was keen for a range of shops on its parade

There may still be many legitimate reasons why restrictions on land use are agreed or imposed and, helpfully, detailed examples of these are set out in Office of Fair Trading guidance issued in March 2011. However, where land is an important "input" to a related market, restrictions on use may breach competition law and no arrangement is immune to scrutiny.

As we wait to see how this potentially crucial case will pan out for High Peaks, lawyers will need to be primed for companies involved in the retail sector looking to analyse their property arrangements with the aim of conforming to competition law.

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