Case No: 3CL10014

IN THE CENTRAL LONDON COUNTY COURT

CHANCERY LIST

26 Park Crescent, London W1B 1HT

Date: 24/12/2013

Before :

HIS HONOUR JUDGE DIGHT

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Between :

MARTIN RETAIL GROUP LIMITED	**Claimant**
- and -	
CRAWLEY BOROUGH COUNCIL	**Defendant**

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- -

S.M. Booth (instructed by **Brabners Chaffe Street LLP**) for the **Claimant**
Jeremy Burns (instructed by **Sharpe Pritchard**) for the **Defendant**

Hearing dates: 5 September 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE DIGHT

His Honour Judge Dight :

1. I am asked to determine a preliminary issue in an unopposed application for renewal of a business tenancy under Part II of the Landlord and Tenant Act 1954 ("the '54 Act") in which a dispute has arisen concerning the terms of the user clause of the proposed new lease ("the New Lease"). The holding comprises shop premises which the claimant tenant proposes they be permitted to use for all uses in Class 1 as set out in Part A of the Schedule to the Town and Country Planning (Use Classes) Order 1987. By paragraph 10(c)(4) of their Claim Form the claimant sought the incorporation into the New Lease of a user clause which "shall include, but not be limited to, the sale of alcohol, convenience goods, the installation and operation of an ATM machine and National Lottery terminal and equipment". The defendant objected to the suggested term and, by paragraph 2 of its Acknowledgment of Service, proposed "that the permitted uses should expressly exclude the sale of alcohol, grocery, convenience goods and other uses falling within Class 1 as set out in Part A of the Schedule to the Town and Country Planning (Use Classes) Order 1987" ("the Proposed User Clause"). The claimant's response was that the proposal was unlawful on the grounds that it was prohibited by competition legislation and would therefore be void.

2. On 2 January 2013 I directed that

> "The issue as to whether the User Clause proposed by the Defendant at paragraph 2 of its Acknowledgment of Service contravenes the Competition Act 1998 as amended by the Competition Act 1998 (Land Agreement Exclusion Revocation) Order 2010…be tried as a preliminary issue."

3. I wish to emphasise, as I did at the hearing of the preliminary issue, that the decision which I make is confined to the question of whether the particular clause proposed in paragraph 2 of the defendant's Acknowledgment of Service is unlawful, not whether some other differently formulated clause would be valid. This judgment therefore focuses on the precise proposal contained in the Acknowledgment of Service.

Background Facts

4. By a lease ("the Existing Lease") dated 22 March 2001 the defendant granted to the claimant a tenancy for a term of 10 years from the date of grant in respect of the shop premises and garage at 6 Furnace Parade, Furnace Green, Crawley, East Sussex ("the Premises"). By sub-clause 2(21) of the Existing Lease ("the Existing User Clause") the claimant covenanted, insofar as material:

> "NOT to use the shop forming part of the premises for any purpose whatsoever other than as a retail shop nor to carry on upon such premises any trade business or manufacture other

> than the retail trade of newsagents tobacconist confectionary stationery and the sale of books toys records fancy goods and greeting cards".

By sub-clause 2(22) of the Existing Lease the claimant entered into an additional positive obligation

> "TO keep the shop forming part of the premises open for trading purposes at all times customary in the locality for the trade or business described in the preceding sub-clause and to use his best endeavours to develop and improve the said trade or business and not to do or permit or suffer to be done anything to injure such trade or business"

5. The claimant would like to be able to sell a wider range of goods from the Premises than the user clause in the Existing Lease would permit. In particular it would like to sell groceries, including fresh foods, beers, wines, spirits and household goods as indicated in the Proposed User Clause which have been described in the course of the hearing as convenience goods and the proposed shop as a convenience store.

6. The contractual term of the Existing Lease expired by effluxion of time on 21 March 2011 at which point rent was payable at a rate of £14,370 per annum. Prior to expiry the defendant had served a notice on the claimant under section 25 of the '54 Act to terminate the tenancy but which stated that it would not oppose a claim to the court for a new tenancy. Accordingly the claimant commenced proceedings on 21st February 2012 in the Horsham County Court seeking a new tenancy of the holding for a term of 10 years at a rent of £14,540 (subject to a review in the fifth year of the term) and proposed, among others, the term in dispute. By clause 6.10.1 of the draft New Lease the defendant proposed that the claimant enter into a covenant "to use the Premises for the Permitted User only and the "Permitted User", as proposed by the defendant, is defined in the "Particulars" in clause 1 of the draft as follows:

> "The Premises as a retail shop for the business of Newsagent Tobacconist Sweet Confectioner Stationer Bookseller and for the sale of toys CDs fancy goods greeting cards and the installation and use of an ATM and Lottery Sales…"

It is to be noted that the proposal in paragraph 2 of the Acknowledgment of Service, being the subject matter of the preliminary issue, is more specific in that it proposes an express prohibition on the sale of "alcohol, grocery, convenience goods and any other uses falling within Class A1" of the Use Classes Order.

7. The claim was ultimately transferred into the Chancery List at this court.

8. In default of agreement between landlord and tenant as to the terms of a tenancy granted by order of the court under the '54 Act (other than terms as to the duration of the new tenancy and as to the rent payable thereunder) section 35 of the '54 Act provides that those other terms "shall be such as may be agreed between the landlord and the tenant or may be determined by the court; and in determining those terms the

court shall have regard to the terms of the current tenancy and to all relevant circumstances". If the Proposed User is unlawful, because it is breach of competition legislation, then it seems to highly likely that the court would decide that, in default of agreement, it could not be imposed on the parties under section 35. However, I reach no concluded view on that proposition because it was not fully argued before me.

9. Crawley was designated a "New Town" in 1947 and was developed after the Second World War with 13 new housing estates each of which had its own parade of local shops. 11 of those parades are still owned by the defendant which operates them under a letting scheme similar to that which governs the letting and user of the Premises. I am told that there is no document setting out the letting scheme in writing or the policy pursuant to which it is operated but that the policy has been established over the years since the 1950's and is known to the council officers. Nor does there appear to be any written evaluation of the letting scheme containing data about the scheme or analysis of it. Each lease granted pursuant to the scheme has the effect of restricting the user of the relevant premises to a particular trade or business hence the restricted user relating to the Premises contained in sub-clause 2(21) of the Existing Lease which I have set out above.

10. The Premises are located within one of the 11 parades of shops located in the centre of a residential housing estate known as Furnace Green. Furnace Green is south east of Crawley town centre, has approximately 2,400 households and approximately 5,730 residents. The majority of the residential accommodation is or was owned by the defendant council. The parade, of which the defendant is the freehold owner, comprises 11 ground floor retail units with residential accommodation on the upper two storeys. The Premises are not in fact occupied by the claimant itself but by a subsidiary trading company called McColls Limited who carry on business under the name "Martin's".

11. The 11 retail units in the parade are occupied by the following businesses each of which is subject to a user clause which restricts the tenant to the business or trade described below:

    (1) "New Yummy", a Malaysian and Thai takeaway restaurant;

    (2) "The Accountancy Shop", a firm of accountants;

    (3) "Profilo Hair Design", a hairdresser;

    (4) "Second Hand Clothes/Bric a Brac", a second-hand shop;

    (5) "Frizzy's", a bakery;

    (6) the claimant;

    (7) "Premier Furnace Green Supermarket", a grocer permitted also to sell alcohol;

    (8) "Williams The Chemist", a dispensing chemist;

    (9) "Kleenest", a dry cleaner,

    (10) "Profile Flooring Limited", a flooring shop; and

(11) "Fish Plaice", a fish and chip shop.

There is a number of parking spaces in Weald Drive, the road in front of the parade, which can accommodate approximately 30 cars. It is common ground that the provision of parking spaces at the parade was integral to its design and that the retail units within the parade were intended to serve the needs of both pedestrians and car users.

12. I was provided with a certain amount of information about some of the convenience stores nearest to the Premises:

(1) the nearest store is Tesco Express, 1000 metres from the Premises, which is on a developed site not owned by the defendant to reach which a shopper would have to cross a railway line;

(2) there are two convenience stores on the Tilgate estate (still owned by the defendant) which are 1200 and 1500 metres from the Premises and form part of a parade or group of 21 retails units. I am told that the defendant's letting scheme permits two units in that parade to be operated by similar users because of the larger total number of units that exist there.

13. At the trial of the preliminary issue I heard evidence from David Davenport, the General Manager of the claimant, who verified his witness statement of 4 September 2012 and told me that while the essential business carried on at the Premises is that of a traditional newsagents, approximately a third of the space in the Premises have been used for a Post Office, a use which has continued for many years and which the claimant has no intention of changing. He understands that there is no objection to the user clause in the New Lease specifically including that use. Mr Davenport explained that while the claimant intended to continue to sell newspapers, magazines and ancillary goods it wanted to run a convenience store from the Premises. His plain view was that the Proposed User would prevent the claimant from "capitalising on the surrounding market place and [would result] in a significant loss of potential trade…the Property is ideally situated to take advantage of the local market, but the existing user clause prevents McColls from doing so". In the course of his evidence he accepted that the claimant is a nationwide business with 1272 units, including 5 in Crawley, with substantial resources but he made the following specific points:

a) there were many shops in the country which had been opened in competition with the claimant;

b) there were many shops local to units owned by the claimants which undercut them;

c) the claimant was not necessarily in a better position to sustain a price war than smaller businesses which did not have similar overheads and purchasing structures for goods, economies of scale not being the only factor in analysing profitability;

d) it is possible that other similar shops owned by small traders operating near units owned by the claimants were equally profitable;

e) that in his view the presence or absence of competition was only one factor taken into account by small traders in determining whether to commence trading;

f) he did not accept that small businesses were more likely to take a lease in premises in a similar parade if they were protected in their trade as part of a letting scheme such as that which operates in Furnace Parade;

g) in his view the relevant market for convenience stores for the purposes of competition law considerations was within a radius of ½ mile of the Premises, a distance which he thought customers would be prepared to walk to shop at such a store. For example, if a local resident wanted to buy a pint of milk he or she would only be prepared to walk a reasonable distance to do so and would rather shop in Furnace Parade than walk to Tilgate Parade which was approximately 15 minutes away on foot. He went on to say that if the local resident wished to buy a whole range of household goods then he or she would be prepared to travel a greater distance (perhaps by car) to a larger store and that would amount to a different market for the purposes of the legislation;

h) given the restrictions in the Existing User and the terms of the letting scheme Mr Davenport's view was that Premier Furnace Green Supermarket (at number 7 Furnace Parade) was afforded a monopoly over the relevant market.

14. I also heard evidence from Richard Neal who is employed by the defendant as an Asset Surveyor. He verified his three witness statements dated 6th and 16th July and 28th August 2012. His view is that widening the Existing User would be to the detriment of the local community and the shopping parade as a whole and in support of that latter contention Mr Neal made reference to various national and local planning policy documents. As to the letting scheme which operated in respect of each of the local shopping parades owned by the defendant he said, in paragraph 16 of his first witness statement:

> "This planned origin gave the opportunity in Crawley to provide a locally-based network of neighbouring shopping centres and parades, evenly distributed around a modern and accessible town centre".

In paragraph 19 he went on to say:

> "Crawley Borough Council's reasons for creating and maintaining these letting schemes was and is that it is in the interests of the community to have a range of different traders and retail outlets available to local residents. A successful parade is one which is diverse and vibrant with many small traders and not one dominated by a larger supermarket."

15. Mr Neal expressed the view orally that:

(1) the letting scheme was beneficial to all the tenants of the parade, including the claimant which enjoyed the benefit of the restrictions on the other tenants preventing them from trading as newsagents in competition to the claimant;

(2) smaller businesses were less likely to prosper and therefore less likely to take a lease of premises on a parade where their trade was not protected;

(3) the letting scheme was not financially advantageous to the defendant since its effect was potentially to depress or limit market rents;

(4) there is no evidence to show that the effect of the letting scheme has been to increase prices on the parades where it operates;

(5) the letting scheme is a flexible policy and although the defendant would refuse an application to use premises for a trade or business which already existed on Furnace Parade it might permit a similar trade. For example while the defendant would refuse permission for a second hairdresser to set up business on the parade it might grant permission for a barber or a beautician;

(6) it would be unfair on the other traders on the parade for the claimant to be released from the particular restriction which affected them while the others remained subject to their respective restrictions.

16. Mr Neal summarised his view as to the effect of widening the Existing Use, in paragraph 27 of his first witness statement, as follows:

> "Premier Furnace Green Supermarket is owned and run by a local family firm. The Claimant has already shown interest in taking over this business. If Martin McColl at number 6 was allowed to trade in competition with Premier Furnace Green Supermarket at number 7, then I anticipate that in the short to medium term the following undesirable consequences would be likely to ensue: firstly Martin McColl would cease to be a newsagent properly so-called, thus eliminating this type of shop from the Parade, and depriving the local consumers of a specialist newsagent. Secondly, Martin McColl, as a large national business enjoying economies of scale, would be likely to undercut and out-compete number 7, thus making number 7 more vulnerable to closure or take-over by Martin McColl. If that occurred, Martin McColl would then be able to establish itself as the largest trader dominating and monopolising the supermarket trade which immediately previously was being carried out separately by the two separate shops. Thirdly, certain other smaller traders will feel less inclined to try to trade in the Parade, in the face of a large dominant trader. The overall effect would be to make the Parade a less vibrant and diverse shopping experience for the local community, and probably in the long term, a more expensive and less competitive one."

17. Both parties provided some, limited evidence of the views of local residents and local traders. The letters relied on by the defendant supported the council's stance on the grounds that it facilitated the creation and sustainability of small businesses and fostered diversity, while a "free for all" would lead to a price war, a reduction in diversity and a reduction in footfall. The authors of the petitions and letters relied on by the claimant wanted the claimant to stock a wider range of goods, such as eggs, mild and washing powder, and were of the view that they were cheaper than equivalent retailers.

The law

18. As originally enacted the Competition Act 1998, to which I will refer in its amended form as "the Competition Act", did not apply to what are described as land agreements. "Land agreements" were defined in Article 3 of the Competition Act 1998 (Land Agreements and Revocation) Order 2004 insofar as material as "an agreement between undertakings which creates, alters, transfers or terminates an interest in land, or an agreement to enter into such an agreement" and Article 4 of that order provided that what is described below as the "Chapter I prohibition" was not to apply to such agreements. That exclusion was removed by Article 2 of the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010, with effect from 6 April 2011.

19. It is common ground that a lease is a land agreement for the purposes of the Competition Act.

20. It is agreed that there are only two sections of the Competition Act which are relevant to the matters which I have to decide:

> "Section 2 Agreements etc. preventing, restricting or distorting competition.
>
> (1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

21. The prohibition described in section 2 is referred to in the Competition Act as "the Chapter I prohibition". At the trial of the preliminary issue the defendant conceded that the arrangements contained in the Proposed User Clause would be restrictive of competition within section and therefore the issue which I have to determine is whether the Proposed User Clause would be an exempt agreement within the meaning of section 9 of the Competition Act.

22. Section 9 of the Competition Act provides as follows:

"Section 9 Exempt agreements

(1) An agreement is exempt from the Chapter I prohibition if it—

(a) contributes to—

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit

> of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied."

23. In his closing submissions counsel for the defendant also conceded that subsection 9(2) placed the burden on his client of proving that the Proposed User Clause would be an exempt agreement within the meaning of subsection 9(1).

24. The only authority to which I was referred was the case of *Williams v Kiley (t/a) CK Supermarkets Ltd)* [2002] EWCA Civ 1645. The Court of Appeal held that where 5 leases of shops in a parade contained dovetailed positive and restrictive covenants protecting the tenants from competition by others in the parade such as to create a "reciprocity of obligation" the judge at first instance had been correct to conclude that the arrangements had given rise to a letting scheme. The judge was also right to conclude that in considering whether a tenant had acted in breach of the user covenant to operate as a "grocery and general store" by selling a significant quantity of a particular type of goods (in that case tobacco and confectionary) was a question of degree and if it was sufficient in scale to amount to a distinct trade then it would be a breach of covenant. The court enforced the letting scheme, and the positive and restrictive covenants, notwithstanding that it was the first time that an English court had done so.

25. In the course of his judgment Lord Justice Buxton examined the alleged purposes behind the letting scheme in that case and held as follows (para 45):

> "The present case was unusual, as a building or letting scheme, because the agreements seek to regulate the commercial activities to be carried out on the respective plots. The regulation is imposed, not for the usual reason of preventing activities that harm the general amenity of the neighbourhood; but rather to limit each lessee to the trade that he had undertaken, and to protect him from competition in that trade from fellow lessees. The landlord's interest in such a regulation is not far to seek. As a local authority he would wish to make a range of trades available for local residents, and it is no doubt the case that, as in a commercial shopping centre, lessees are much more likely to be willing to take the leases and in so doing provide that service if they have the assurance of a protected trade within the centre. However, although we were not shown any other examples in English law of a letting scheme being found in commercial circumstances, the principles underlying building schemes can plainly be extended to such a case, and researches conducted by [Carnwarth LJ] and referred to in para 8 of his judgment revealed several Canadian cases in which shopping centres have been found to be at least potentially subject to a letting scheme."

26. His Lordship expressed concerns about the potential effect of competition law on the validity of such arrangements but, despite considering a number of principles relevant at the time (including the decision of Mocatta J. in *Re Ravenseft Properties Ltd's Application* [1978] QB 52), held that because the question of illegality had not been raised before the Court of Appeal and because they had not heard argument on the competition aspects of the letting scheme he could not venture a concluded view.

27. I should add that no argument has been addressed to me in connection with the Common Law doctrine that covenants in restraint of trade are invalid. I confine myself to a consideration of the position under the Competition Act 1998.

28. Returning to the Competition Act, I am told that there is no reported decision on the issues before me but I have been invited to consider the guidance issued by the Office of Fair Trading in *"Land Agreements. The application of competition law following the revocation of the Land Agreements Exclusion Order"* of March 2011. My attention has been drawn particularly to Chapter 5, headed "Applying the exemption criteria". Paragraph 5.3 contains the following guidance, which is a précis of the conditions set out in subsection 9(1) of the Act:

> "5.3 The four cumulative criteria which must be satisfied to qualify for exemption are as follows.
> - The agreement must contribute to improving production or distribution, or to promoting technical or economic progress.
> - It must allow consumers a fair share of the resulting benefits.
> - It must not impose restrictions beyond those indispensable to achieving those objectives.
> - It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question."

The authors of the guidance then look at each of the four criteria in turn:

> "Condition (i) – Efficiency gains
>
> 5.5 For exemption to apply, the benefits of the agreement must outweigh (or at least match) its negative impact on competition. Parties must therefore show that a restrictive agreement contributes to improving production or distribution, or to promoting technical or economic progress. These benefits are sometimes referred to as the efficiencygains or benefits of the agreement.
>
> 5.6 There is no exhaustive list of the types of efficiency gain which might satisfy this criterion. Examples might include:
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> • the creation of one or more new retail outlets
>
> • more efficient distribution of products, or
>
> • a greater range of products being available to consumers.

5.7 By way of illustration, one retailer (a department store) might be granted the exclusive right to operate in a shopping centre. This agreement may give rise to efficiency gains because the owner of the centre considers that the department store will attract considerable footfall to the centre.

Other retailers may benefit from the footfall generated by the department store, which also contributes to the profitability of the shopping centre overall.

Condition (iii) – Indispensability of the restrictions

5.8 The third criterion is that the agreement must not contain restrictions that go beyond those which are indispensable to achieving the benefits identified. For practical purposes, it is usually simplest to apply criterion (iii) before criterion (ii).

5.9 The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether the benefits could have been achieved by means of a less restrictive agreement. Put another way, a restriction will be considered indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement, or make it significantly less likely that they will materialise and there is no less restrictive means of achieving the benefits.

5.10 When considering whether there are other less restrictive means of achieving the benefits, parties are not required to consider purely theoretical alternatives, only those which are economically practicable.

This requires an assessment of the market conditions and business realities facing the parties to the agreement.

5.11 Using the shopping centre example referred to in paragraph 5.7 above, the department store may need to invest considerable amounts in order to set up its store within the shopping centre and may only be prepared to make this investment if it has a guarantee that it will be the only department store in the shopping centre for a certain period.57

5.12 Conversely, the indispensability criterion may not be met where a shopping centre owner is granting an exclusive right to a retailer to operate as a particular type of retailer in an area in order to ensure a particular mix of different types of retailer. Although customers may benefit from the shopping centre containing a mix of retailers (or from a more efficient use of space), this objective could potentially be achieved through covenants in lease agreements which restrict how different retail units may be used. Restrictions granting exclusivity to each retailer within the centre may therefore (while ensuring a

mix of retailers) go further than is necessary to achieve this type of benefit.

5.13 In many cases, the question of indispensability will also relate to the duration of a restriction. It is necessary to consider the duration of the restriction and whether it is longer than necessary to achieve the benefits identified. Generally, restrictions of a longer duration are less likely to be considered indispensable.

5.14 Such a restriction would be justified only for so long as is necessary to give the parties sufficient certainty that they will be able to recoup their investment in a development. The appropriate duration of the exclusivity will depend on the specific facts of each case. In a retail context, for example, it may be relevant to take into account the time necessary for a store to reach mature sales (at a point when its sales are projected to grow at a rate at or around inflation) that is, a stable revenue and customer base to provide the required return on investment.

Condition (ii) – Fair share for consumers

5.15 The restrictive agreement must allow consumers a fair share of the benefits identified under the first criterion. This means that it is not sufficient for benefits to accrue to the parties to the agreement - consumers must also benefit.

5.16 The concept of 'fair share' implies that the benefits passed on to consumers must compensate for the negative impact from the restriction of competition. The net effect of the agreement must at least be neutral from the point of view of those consumers that are likely to be affected by the agreement.

5.17 In the illustrative shopping centre example described in paragraph 5.7 above, the agreement restricts competition between retailers within the shopping centre. This restriction impacts on consumers who might otherwise benefit from greater competition between retailers. For example, if the shopping centre contained two department stores instead of one with exclusive rights, the competition between them could improve price, quality, range or service standards for the benefit of consumers.

5.18 In this scenario, other retailers may benefit from the footfall generated by the department store, which may lead to economies of scale which pass through to consumers. Further, there may be evidence that consumers value having this particular retailer in the centre and consumers may benefit from the shopping centre having a greater variety of different types of retailer as a result of the restriction.

> 5.19 The greater the restriction on competition, the greater must be the efficiencies and the pass-on to consumers to justify that restriction. This implies that if the restrictive effects of an agreement are relatively limited and the efficiencies substantial, it is more likely that consumers will receive a 'fair share' of the resulting benefits. If, on the other hand, the restrictive effects of the agreement are substantial and the efficiencies relatively limited, it is unlikely that this criterion will be fulfilled.
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> Condition (iv) – No elimination of competition
>
> 5.20 Finally, in order to benefit from exemption, a restrictive agreement must not allow the parties the possibility of eliminating competition in respect of a substantial part of the products in question.
>
> 5.21 Whether competition is being eliminated for these purposes will depend on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement – that is, the extent of the reduction of competition brought about by the agreement.
>
> 5.22 Where competition within a market is already weak, a relatively small reduction may result in competition being 'eliminated' for the purposes of this criterion. Similarly, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned will be eliminated.
>
> 5.23 Both actual and potential competition must be considered. While sources of actual competition are usually the more important and easier to verify, sources of potential competition must also be taken into account. The assessment of potential competition requires an analysis of barriers to entry facing firms that are not already competing within the relevant market. The OFT would expect any party to a restrictive land agreement seeking to rely on potential competition and the absence of barriers to entry to be able to identify the sources of potential competition and provide evidence that these sources constitute a real competitive constraint."

Submissions

29. The defendant contends that:

(1) the letting scheme gives rise to a greater diversity of small traders and a social hub which amounts to both economic progress and an improvement of the distribution of goods by increasing the range and diversity of such goods across the parade as a whole and providing a destination for the community;

(2) the local community receives a fair share of the benefits resulting from the restriction through an increase in the range of goods available across the parade and the provision of a social hub and the evidence shows that they wish the scheme to continue;

(3) the letting scheme is necessary or "indispensable" if the benefits identified above are to be achieved, and that this necessity is proved by the evidence of Mr Neal and the correspondence from the local traders and shoppers;

(4) the letting scheme does not give the defendant the possibility of eliminating the competition in the relevant market (ie for convenience goods which are the "products in question") which is said to be geographically large enough to include, at least, Tesco Express which is 1000 metres from the parade but more likely 1 to 2 miles from the parade.

30. The claimant submits that:

(1) the defendant, on whom the burden lies, has adduced no evidence to prove the positive requirements of either of the alternative conditions set out in subsection 9(1)(a) ie that the Proposed User Clause "contributes to (i) improving production or distribution, or (ii) promoting technical or economic progress" and that therefore

(2) the defendant cannot prove that the local community would benefit from the restriction contained in the Proposed User Clause;

(3) in any event there are other ways of restricting the use of the Premises or the types of goods sold there; and

(4) as a matter of fact the restriction would create a means of eliminating competition in respect of the goods which are or might be permitted to be sold from the Premises and elsewhere on the parade.

Discussion

31. I am satisfied that the leases of the various retail units on the parade form part of a letting scheme within the meaning attributed to that expression and according to the principles explained by the Court of Appeal in *Williams v Kiley* above. The starting point in considering the validity of the Proposed User Clause as part of such a scheme is that, as rightly conceded in my view, it would amount to a breach of the Chapter 1 prohibition because the effect of such a clause, in the context of the letting scheme, would be to restrict competition in the sale of convenience goods on the parade. Therefore the clause would be void unless the defendant can satisfy the conditions of subsection 9(1) and show that the agreement would fall within an exemption. There is a dispute about how a party shows that an agreement falls within an exemption. The OFT guidance does not comment on how the issue should be approached. In my view the answer lies within subsection 9(2) which places on the party seeking to claim the benefit of the exemption "the burden of proving that the conditions of [subsection 1] are satisfied". The opening words of that subsection provide the relevant context, namely "[i]n any proceedings in which it is alleged that the Chapter 1 prohibition is being…infringed". Thus the proof of the right to the exemption is to be established in

proceedings, in this case in a court, where, as a matter of law and practice, proof of disputed factual matters is provided by adducing admissible evidence. A disputed fact or matter is proved by showing that the fact or matter is more likely than not to be true. Thus in my judgment, giving the words of subsection (2) their ordinary meaning in the context of civil litigation in the courts, the burden is on the defendant, to show on the balance of probabilities that the agreement falls within the exemption and it does that by proving by admissible evidence the relevant factual conditions set out in subsection (1).

32. It seems to me that written and oral evidence of Mr Davenport and Mr Neal was useful but to a material extent was an expression of subjective opinion by them rather than evidence of primary fact. Insofar as it was opinion evidence I bear in mind that each of them is an employee of one of the parties in this litigation and does not express his views from an independent perspective. They also seek to base their opinions on factual evidence derived from local residents and traders, supported by the correspondence and petitions which I refer to above. None of these written assertions was supported by live oral evidence and could not therefore be tested by cross-examination. I also have concerns, in respect of the hearsay material relied on by each of the parties before me, as to the reliability of such views given the way in which such views were obtained and the potential partiality of the persons whose views I was told of and/or read about. I am afraid that I do not therefore attach much, if any, weight to the views expressed in those documents. The defendant submitted that it would be disproportionate to call members of the local community to give evidence. I disagree. In the absence of first hand evidence of the facts which the defendant wishes to rely on it cannot, in my judgment, prove its case on the issues to which such evidence goes.

33. While the OFT document is guidance, and without formal legislative effect, it seems to me that it provides a practical and sensible approach to analysing the conditions contained in subsection 9(1) and I will consider the question of whether an exemption has been established by reference to the four criteria which the guidance identifies in paragraph 5.3.

34. Efficiency gains is the description used by the guidance for the criteria contained in subsection 9(1)(a)(i) and (ii). The burden is on the defendant to prove that the Proposed User Clause would contribute to (1) improving production or (2) improving distribution or (3) promoting technical progress or (4) promoting economic progress. Those four expressions are undefined by the Competition Act but it is plain that they are capable of encompassing a wide range of potential benefits. In considering the Proposed User Clause against these criteria it seems to me that one has to have regard to the whole of the parade and the letting scheme which applies to it because the Proposed User Clause is an integral part of that scheme as it relates to the parade. The essence of the defendant's case on this point is that a number of different retailers is better than a single supermarket because it affords a choice between different sources of goods, from independent sustainable smaller businesses and enables new traders to enter the market when otherwise they might not.

35. In my judgment the defendant fails at this first hurdle. I am not satisfied that, as a matter of fact, the distribution of goods is improved or economic progress promoted through the existence of a number of different retailers rather than via a supermarket or a number of similar retailers. The defendant has not adduced evidence to prove

what the particular improvement or progress is. Nor do I have the benefit of a written policy document relating to the letting scheme nor, as I have mentioned above, any data or analysis of the effects of the scheme. I would be doing little more than speculating if I accepted the defendant's proposition. In any event it seems to me that there is great force in the claimant's submission that the Proposed User Clause and the other restrictions in the units on the parade contribute to a particular model of distribution determined by the defendant local authority rather than by the market itself. 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 I might have come to a different conclusion on this issue.

36. As to the second criterion, a "fair share of the resulting benefit", the claimant rightly submits this depends on the benefit identified on consideration of the first criterion. Further, the share has to be "fair", which again seems to me to depend on the nature and extent of the benefit identified. An increase in the range of goods available and provision of a social hub might be a fair share of the benefits, if the evidence were to show such benefits arising from the restriction on competition. However, as the defendant acknowledges, there is unlikely to be a price benefit from the existence of the restrictions in this case and that must be a matter of considerable concern to the community. I agree with the OFT guidance that in considering this question the court has to balance the benefits against the negative impact of the restriction on competition and that the greater the restriction the larger the benefit for the consumer there has to be for the share to be considered fair. I do not accept, on the evidence in this case, that the community would benefit from the restrictions contained in the Proposed User Clause and letting scheme.

37. As to the third criterion, the indispensability of the proposed restrictions, the defendant submits that the restrictions are necessary to the letting scheme and without them the scheme would be swept away and small traders would not come to the parade. Again, it seems to me that this is something which the defendant has to prove, notwithstanding the inference which Buxton LJ felt able to draw in paragraph 45 of *Williams v Kiley*. The defendant's hearsay evidence shows that the current traders and certain local shoppers fear a "free for all", but that is not evidence that new traders would be discouraged from setting up business on the parade. Further, it seems to me that a mix of retailers can be achieved at a shopping centre by the use of less restrictive covenants which fall short of conferring the monopoly which is created by the defendant's letting scheme as applied to this parade. The third criterion is not, in my judgment, satisfied.

38. The fourth criterion is whether the restriction would allow the "undertakings concerned", namely the parties to the agreement (ie the claimant and defendant), the possibility of eliminating competition in respect of a substantial part of the products in question. In my judgment the products in question must mean the products which the agreement requires the claimant to sell and/or those which it prohibits it from selling. In considering whether competition may be eliminated it seems to me that one has to take into account the relevant market and the existing and potential competition in respect of the particular products in that market.

39. The defendant gave 8 reasons why the proper market is much greater than that contended for by the claimant. It seems to me that having regard to the type of goods

that the claimant wishes to sell, which I have referred to as convenience goods, the market which is relevant to my considerations is that identified by Mr Davenport as within a relatively short walking distance from the parade. It seems to me highly likely that potential customers would be reluctant to walk further for a pint of milk, box of eggs or packet of washing powder and I agree that if it was intended to undertake a weekly shop of a variety of household goods the Premises and indeed the parade would not be a likely destination and customers would be prepared to travel a greater distance by private vehicle or public transport if available. The Proposed User Clause, as part of the letting scheme, clearly provides a means of eliminating competition in convenience goods on the parade and within a relatively short walking distance. If the relevant market is geographically bigger so that the other convenience stores which I have mentioned above fall within its catchment area then there would be no such possibility of elimination.

Conclusion

40. For the reasons which I have given above I have come to the conclusion that the Proposed User Clause, within the context of the current letting scheme, would contravene section 2 of the Competition Act 1998 and the defendant has not satisfied me that it would be an exempt agreement within section 9(1) of that Act.