



St John's
CHAMBERS

The Competition Appeal Tribunal: a new venue for challenging restrictive covenants?

Matthew O'Regan, St John's Chambers

Matthew O'Regan considers how competition law may be used as a means of challenging the validity of restrictive covenants contained in land transfer agreements, leases and business sale agreements.



Published on 13th June 2016

Restrictive covenants are a common feature of business sale and property transfer agreements. In many cases, these will not restrict competition. However, in some circumstances, they may do so and be at risk of challenge by the party bound by the covenant.

A recent case brought in the Competition Appeal Tribunal ("**CAT**"), *Shahid Latif and Mohammed Abdul Waheed v Tesco Stores*,¹ which settled at an early stage, demonstrates that the CAT (and not the High Court) may be an appropriate venue for challenging anti-competitive covenants contained in business sale or property transfer agreements that infringe the Competition Act 1998 ("**the Act**").

The claimants in *Shahid Latif* availed of a new procedure, known as the 'fast track' procedure, which enables claims brought under the Act to be brought quickly and at low cost, in particular by individuals, micro-businesses and small and medium-sized enterprises ("**SMEs**").

Restrictive covenants in business sale and land agreements

¹ Case No 1247/5/7/16. A summary of the Claim is available at: http://www.catribunal.org.uk/files/1247_Latif_Summary_180216.pdf.

When a business is sold or ownership of property is transferred, it is common for the vendor to be subject to a restrictive covenant.

A business vendor may be restricted from competing with the purchaser for a particular period, whilst the vendor or transferor of land may be restricted from using any retained property for specific purposes. Such covenants are intended to protect the value of the goodwill acquired by the purchaser. It is equally possible, although less common, that the purchaser may agree not to compete with the vendor's retained business.

Similarly, covenants in commercial property leases may restrict either the landlord (in respect of retained premises) or the tenant (in respect of the demised premises) in the use to which the relevant premises may be put. The landlord may be prevented from using or leasing retained premises (for example, other units in a shopping centre) to companies that compete with the tenant. Alternatively, the tenant may be restricted in the goods or services it can sell from the demised premises.

The Act prohibits anti-competitive agreements and concerted practices (the 'Chapter I prohibition': s.2) and the abuse of a dominant position (the 'Chapter II prohibition': s.18). A restrictive covenant is an agreement for the purposes of s.2 of the Act. Where a dominant undertaking imposes a covenant upon another undertaking, this may potentially constitute abusive behaviour for the purposes of s.18.

Many such covenants will not restrict competition, although in some circumstances they may do so. Much will turn on the facts of the individual case. However, in terms of general principles:

- in business sale agreements, a covenant accepted by the vendor that is in excess of three years' duration (or which is broader in product and/or geographic scope than that of the business being sold) will generally be considered not be 'ancillary' to the transaction and will likely restrict competition. Covenants accepted by purchasers are generally considered to restrict competition, as they do not have any objective justification and are likely be regarded as a 'hard core' illegal market-sharing agreement.
- covenants in property transfers and leases may have anti-competitive effects if they have, actually or potentially, appreciable negative effects on competition by excluding ('foreclosing') competitors from the relevant market (for example grocery retailing in a town) and do not have

countervailing benefits for consumers (and thus does not benefit from an exemption).²

The CAT's jurisdiction and the 'fast track' procedure

The CAT is a specialist competition law tribunal that hears and decides a range of competition and regulatory cases, including claims for damages for losses caused by infringements of ss.2 and/or 18 of the Act and equivalent provisions of EU Competition Law, pursuant to s.47A of the Act.

In 2015, the Consumer Rights Act extended the CMA's jurisdiction in a number of respects, including to hear both 'follow-on' claims for damages (i.e. after the Competition and Markets Authority ("CMA") or European Commission has adopted a decision that UK or EU competition law has been infringed) and 'standalone' actions (where no such decision has been adopted and the claimant must thus prove that an infringement has been committed).³

A new procedure, the 'fast track' procedure, was also introduced. This is intended to make it easier for individuals, micro-businesses and SMEs to obtain redress for harm suffered by anti-competitive behaviour, although its use is not restricted to such claimants. Under the 'fast track' procedure, a final hearing must be fixed within six months of proceedings being commenced. Generally, the trial should for less no more than three days. Recoverable costs are capped, so reducing claimants' costs exposure, should they be unsuccessful. Disclosure tightly managed by the CAT is limited to specific disclosure. This procedure is therefore suitable for claims that are not legally or factually complex claims, with more limited evidence and limited claims for damages that will not require interlocutory hearings on points of principle.⁴ The CAT's Guidance to Proceedings indicates that it may be well suited to claims where injunctive relief is sought. As well as damages, claimants may apply for both interim and final injunctions.

Shahid Latif v Tesco: facts and outcome

² This is considered in more detail in my recent article, [European Court of Justice provides guidance on when provisions of property leases may be anti-competitive](#), which considers the CJEU's judgment in *SIA 'Maxima Latvija'*, EU:C:2015:784 and an earlier County Court judgment in *Martin Retail v Crawley Borough Council* (24 December 2013, unreported).

³ These changes are considered in detail in my article, [United Kingdom: Consumer Rights Act 2015 introduces new procedures for competition litigation, including collective follow-on damages actions](#).

⁴ This does not, however, mean that more complex cases cannot be brought using the 'fast track' procedure. In *Socrates Training v The Law Society*, Case No. 1249/5/7/16 (a claim alleging that The Law Society has abused a dominant position by refusing to accredit the Claimant's training courses), the CAT has ordered a split trial, with liability to be determined first and the quantification of damages to be heard after judgment on liability.

In 1997, the Claimants sold land in the small Derbyshire town of Whaley Bridge to Tesco. It would appear that Tesco built a supermarket on the land. The Claimants retained adjacent land and covenanted with Tesco that they would not “use or permit the Retained Land to be used for the sale of food convenience goods or pharmacy products”.

In 2015, the Claimants intended to sell the retained land to a discount retailer, but they first needed to be released from the covenant by Tesco. Perhaps not unsurprisingly, Tesco refused to do so.

On 5 February 2016, the Claimants brought ‘fast-track’ proceedings in the CAT, alleging that the covenant restricted competition (presumably in the sale of grocery and/or pharmacy products) in the relevant geographic area (presumably the Whaley Bridge area), thereby infringing the Chapter I and/or II prohibitions. It was further alleged that the covenant was an unlawful restraint of trade contrary to the common law doctrine of restraint of trade. The claimants sought declaratory and injunctive relief as well as damages, including exemplary damages.⁵

On 17 March 2016, four days before the first case management conference, it was announced that Tesco had released the Claimants from the covenant. Accordingly, the claim was withdrawn, without Tesco having served its defence and with no costs order being made.⁶

Conclusion

By using the CAT’s ‘fast-track’ procedure, the Claimants in *Shadid Latif v Tesco* were able to achieve through litigation,⁷ their commercial objectives quickly and (presumably) at low cost. An early settlement was also achieved in one of the three other ‘fast track’ cases brought so far, *NCQR v Institution for Occupational Safety and Health* (in which an infringement of the Chapter II prohibition was alleged), in which the defendant settled a claim alleging a breach of the Chapter II prohibition by granting accreditation for the claimant’s diploma qualification.⁸

Whether a restrictive covenant is anti-competitive will depend on the facts of the individual case, in particular the extent to which it does or may restrict competition in the relevant product and geographic markets. In the case of a property covenant, this is likely to be a local market.

⁵ It should be observed that the CAT does not have jurisdiction to grant declaratory relief and, as a statutory tribunal also does not have jurisdiction to hear claims based upon the common law doctrine of restraint of trade: to pursue such relief and claims, the case would need to be transferred to the High Court.

⁶ CAT Order, available at: http://www.catribunal.org.uk/files/1247_Latif_Order_170316.pdf.

⁷ Commercial negotiations having been unsuccessful.

⁸ Case Nos. 1242/5/7/15(IN) and 1242/5/7/15. The CAT Order is available at: http://www.catribunal.org.uk/files/1242-1243_NCRQ_Order_120116.pdf.

The CMA is unlikely, as a matter of administrative priority, to investigate complaints concerning a single covenant. High Court proceedings may be lengthy and expensive. As an alternative, the CAT's 'fast track' procedure is well suited to challenging the validity of restrictive covenants: it is a quick and relatively cheap means, particularly for individuals and SMEs, of dealing with such cases, which do not generally raise complex questions of law, fact or evidence.

Individuals and companies that are subject to restrictive covenants, whether given in the context of a business sale or a property sale or lease, may therefore wish to consider if there are grounds to challenge them before the CAT.

Matthew O'Regan
matthew.oregan@stjohnschambers.co.uk

13th June 2016
St John's Chambers

This article is provided free of charge for information purposes only; it does not constitute legal advice and should not be relied on as such. No responsibility for the accuracy and/or correctness of the information and commentary set out in the article, or for any consequences of relying on it, is assumed or accepted by any member of Chambers or by Chambers as a whole.