

Do your land contracts breach the Competition Act 1998?

The Competition Act 1998 (Competition Act), came into force on 1 March 2000 and as from 6 April 2011, all existing and new agreements altering, creating, terminating or transferring an interest in land now fall within Chapter I of that Act.

Most residential contracts will not be covered by Chapter I.

In a nutshell, Chapter I prohibits agreements that restrict, prevent or distort competition within the UK, and which have an effect on trade within the UK.

Agreements that are now caught include sale contracts, transfers of land, leases and development agreements but not planning agreements for example S.106 or other planning gain agreements.

The Office of Fair Trading recently published a 70 page guidance note to help the property sector assess whether a particular agreement is caught by Chapter I.

Examples of areas that may be affected by Chapter I include:



- Restrictive covenants that are imposed on the sale of a property that affects its use, for example a typical pub user restriction imposed when a public house is sold by a major pub company.
- Tenant exclusivity provisions, for example where a tenant in an agreement, side letter or otherwise, has the benefit of a provision prohibiting or restricting the landlord from letting adjoining units to a competitor.

Any land agreements that contain provisions which restrict the way that land can be used or how rights relating to land can be exercised are affected but does that mean that all are caught?

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Restrictive covenants

Restrictive covenants that prevent uses that interfere with the existing use of any land retained by the relevant party are unlikely to offend Chapter I. An example given is whether the owner of a theatre sells adjacent land with a restriction not to use that land for industrial processes as these may create noise which affects the theatre.

However, where for example an owner of a petrol station operating at two sites in a town decides to sell one of them and impose a prohibition on petrol station use, unless there are lots of other potential sites in the town for such use, the OFT are likely to see the provision as restricting competition.

Anchor tenants

Shopping centre developments frequently have some form of restriction relating to lettings in the centre that compete with the anchor tenant. Whether the restrictions fall foul of Chapter I will depend on the circumstances. The OFT guidance indicate that if the anchor tenant would not have taken a lease at the development without such a restriction, the provisions of Chapter I may not be infringed.

Other exclusivity

Where the exclusivity benefits a smaller tenant in the shopping centre for example a shoe shop, it is unlikely that the landlord would be able to justify the exclusivity provisions. The smaller tenant is

very unlikely to be a major reason for people to visit the centre.

Tenant mix

Shopping centre owners rely on tenant mix in their management strategy but will such provisions fall foul of Chapter I? If a restrictive or permitted user clause restricts a tenant's activity where it is in competition with its landlord or a particular tenant is granted exclusivity, this is likely to offend Chapter I. The Landlord needs to prove that any permitted/restricted user clauses have come about as a result of objective criteria and not so as to limit competition or to give a particular tenant exclusivity.

Provisions entered into prior to 6 April 2011

The OFT has indicated that for agreements entered into before April, provided that the party can show them that they have used best endeavours to amend or remove the offending provision from the agreement and not tried to enforce it, they may consider this as a mitigating factor when

deciding on any fines.

Why do you care?

There are a number of consequences to non-compliance and these include:

- Injunctions obtained by aggrieved third parties who have suffered loss as a result of the restrictions.
- An OFT investigation which could result in fines of up to 10% of the company's turnover worldwide;
- That the offending provision in the agreement may not be enforceable and ultimately, the entire agreement may fail.

The OFT expects that only a minority of restrictions will infringe Chapter I however you should take the provisions into account when negotiating land agreements and consider carefully whether you need to think about agreements that were entered into before 6 April 2011.



Is the plaster on the walls and ceiling of a leasehold flat part of the structure of a property?

In an interesting decision by the Court of Appeal (*Grand v Gill* [2011] EWCA Civ 554), it appears that the plaster finishes on the walls and ceiling of a flat form part of the structure of the flat, which means that the landlord is therefore responsible for repairing damage to the plaster under the statutory repairing liability imposed by section 11 of the Landlord and Tenant Act 1985.

A landlord of a residential lease granted for a term of less than seven years has certain repairing obligations which are implied by statute, which include an obligation to keep in repair the structure and exterior of the property. When making its decision, the court

considered *Irvine v Moran* (1992) 24 HLR 1, in which the High Court held that the structure of a dwellinghouse "consists of those elements of the overall dwellinghouse which give it its essential appearance, stability and shape". The structure is not limited to those parts of the property that are load-bearing and to be part of the structure, "a particular element must be a material or significant element in the overall construction". The High Court held that the internal wall plaster was "more in the nature of a decorative finish" rather than being part of the essential materials that make up the structure of the dwellinghouse and the internal plaster was considered not therefore to be part of the structure of the dwellinghouse.

Whilst the Court of Appeal accepted the High Court's definition of the structure of a dwellinghouse, it disagreed that the plaster finish to a wall was not part of the structure. The court found that plaster was "in the nature of a smooth constructional finish to walls and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself" and the Court of Appeal therefore held that the plaster did form part of the structure and was within the landlord's repairing covenant.

Landlords should therefore be aware that they will be responsible for repairs to damaged plaster as part of the structure of the property, although the landlord will only be liable to repair plasterwork if there is actual damage to it.

SDLT relief for multiple residential purchases

The first version of the Finance Bill 2011, includes the provisions for relief from Stamp Duty Land Tax (SDLT) for multiple residence purchases. The new relief will fix the rate of SDLT by reference to the average consideration for multiple purchases of dwellings rather than the aggregate consideration. This measure is intended to boost the residential property market but it will not be available until the Bill receives Royal Assent (likely to be in July 2011). As a result, buyers may consider delaying purchases until then.

Tenancy deposit schemes: no power to make a penalty order once tenancy has ended

In *Gladehurst Properties Ltd v Hashemi and another* [2011] EWCA Civ 604, the Court of Appeal held that an application cannot be made for a landlord to pay a penalty of three times the deposit once a tenancy has expired. The court has the power to make an order under section 214(3) and (4) of the Housing Act 2004 requiring the landlord to pay the penalty, however this is no longer exercisable once the tenancy has come to an end. This decision now forces a tenant to bring any such claim before the end of the tenancy or it will lose the ability to apply for a section 214 order altogether.

Property

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