

# Market dominance or unfair competition?

## Can a restrictive covenant that prevents the residential development of land break the law?

Land transactions are not just governed by property legislation such as the Law of Property Act 1925, the Landlord and Tenant Act 1954 and the Law of Property (Miscellaneous Provisions) Act 1989, to name but a few of the 'classics'.

There are countless other pieces of legislation that also affect land transactions, and not all of them are as obvious as the property legislation detailed above. Take for example, competition law.

### Does legislation that governs trade also apply to land agreements?

Let us consider a simple scenario. A national housebuilder (Developer A) buys a development site, but for commercial reasons (...and nothing to do with Brexit!) decides to only develop part of the site.

The undeveloped part of the site (the land) is packaged up and sold off to Mr and Mrs Parker.

A term of the land transaction between Developer A and Mr and Mrs Parker results in a restrictive covenant being imposed on the land that prevents the future residential development of the land (the Restrictive Covenant).

Nothing too unusual there I hear you say...

However, what happens if another housebuilder (Developer B) buys the land with the intention of building houses on it?

The Restrictive Covenant imposed on the land by Developer A should prevent Developer B from being able to develop the land for residential purposes without first

obtaining a release of the Restrictive Covenant from Developer A, usually in return for a 'reasonable' fee.

The purpose of this article is not to explore restrictive covenants themselves in detail, and therefore this article does not examine the ins and outs of Restrictive Covenants or how one may look to deal with covenants that restrict development opportunities. Instead, this article considers the impact that competition law could have on this scenario.

Competition law was brought in to the UK by the Competition Act 1998 in order to introduce various Articles of European legislation designed to govern trade, to promote fair competition and to outlaw anti-competitive practices by penalising abuse of market dominance and other practices that may prevent, restrict or distort competition.

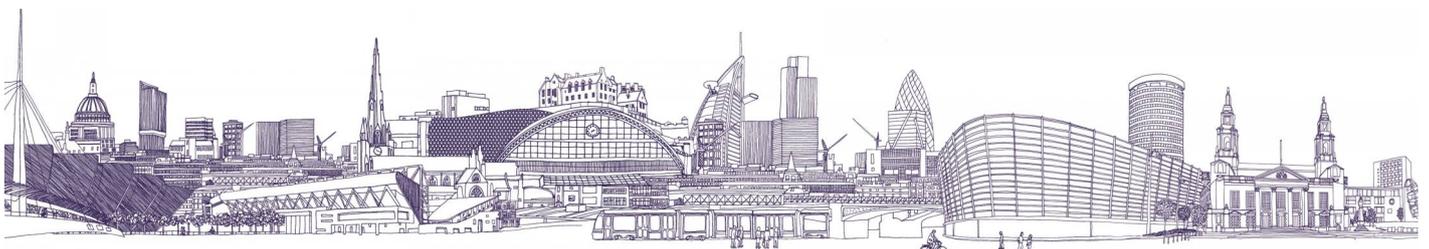
Prior to April 2011, land agreements were excluded from the scope of certain aspects of competition law. Land agreements include contracts, transfers, leases and even easements. However, this exclusion ceased to apply from 6 April 2011 and therefore competition law now applies to all land agreements.

So, does the Restrictive Covenant in our scenario breach competition law? A transfer deed qualifies as a 'land agreement' for the purpose of competition law. Therefore the Restrictive Covenant may well breach competition law if it prevents or restricts Developer B from building in competition with Developer A.

The Restrictive Covenant will be acceptable if:

- i There is a legitimate reason for Developer A to impose the covenant that is unrelated to a desire to restrict competition; and
- i It would be difficult or impossible for Developer A to have completed the sale of the land to Mr and Mrs Parker on reasonable commercial terms without the Restrictive Covenant.

If Developer A had insisted on the covenant for no reason other than to prevent Developer B from developing the



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land in competition with Developer A's adjoining site, the Restrictive Covenant may fall foul of competition law.

Failure to comply with competition law has severe repercussions for companies which can be financial and criminal, and include:

- i Fines of up to 10% of UK turnover.
- i Compensation claims by third parties.
- i Loss of reputation/bad publicity/impact on share price.
- i Agreements can be void, or particular provisions can be severed from an agreement.

For employees who engage in dealings that are contrary to competition law, the penalties include:

- i **Imprisonment for up to five years and / or an unlimited fine!**
- i Disqualification as a director.

And, lack of knowledge is not a defence to a breach of competition law as the legislation requires companies to self-certify themselves to ensure compliance with competition law.

Since 1 April 2014, enforcement of competition law in the UK has been handled by the Competition and Markets Authority (CMA) who replaced the Office of Fair Trading. The CMA is entitled to conduct on the spot investigations of organisations it considers may be operating on the wrong side of the law, which includes being able to question employees and to carry out searches of company premises and to copy documents.

The CMA cannot, however, impose penalties for land agreements that infringe competition law that were entered in to prior to 6 April 2011.

Now that all land agreements are subject to competition law it is important that housebuilders and developers carefully consider covenants that are to be imposed on land in order to restrict the use of the land where the main aim of the covenants is to restrict their competitors in the market from being able to challenge their market share.

As a rule of thumb, 40% is generally considered to be the market share that a company needs to control before competition law can really come in to play.

However, the CMA may in exceptional circumstances treat market share as a lower percentage where land agreements appear to have significant negative effects on competition.

The use of restrictive covenants in land agreements can and should continue. But, housebuilders and developers should have one eye on competition law principles to make sure that any restrictive covenants imposed on land fall on the right side of the law.

If you would like to discuss any of the issues raised in this update, please contact:



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