Knowing MƎES, knowing you

Charlotte Ross discusses breaches of competition law by local authorities, energy efficiency regulations for commercial properties as well as leases and assignment

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In the case of *Martins Retail Group Ltd v Crawley Borough Council* [2014], the court considered whether the landlord's proposal for a user clause in a lease renewal contravened the Competition Act 1998.

The case concerned a retail unit on a parade of shops in Crawley, occupied by the tenant operating as a newsagent. The parade had been run by the council under a letting scheme since 1947.

The council's objective was to have a range of different traders available to local residents, and it sought to achieve this tenant mix by restricting the user of each unit to a particular trade or business.

On renewal of its lease, the tenant sought a user clause which permitted the sale of items including alcohol and convenience goods. The landlord resisted this, and proposed a clause which expressly excluded the sale of these items. The court was asked to determine whether the landlord's proposal was unlawful on the grounds that it was prohibited by competition legislation.

The court determined the proposed user clause would amount to a breach of the chapter one prohibition contained in the Act because the effect would be to restrict competition in the sale of convenience goods on the parade. The clause would therefore be void unless the council could demonstrate that the agreement would fall within an exemption, by proving four specific criteria:

- 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; and
- it must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The court held that the council had failed to satisfy any of these criteria. The council had not adduced evidence to show that the distribution of goods was improved or economic progress promoted through the existence of a number of different retailers rather than via a larger retailer. It had also failed to show that the restrictions were necessary to achieve the desired tenant mix.

Many of the court's conclusions were reached as a result of the landlord's failure to adduce evidence on the relevant points in question. It remains to be seen whether a similar case with more robust evidence would yield a different result.

The name oF the Game

Over the summer, the Department of Energy and Climate Change (DECC) held a six-week consultation on the Minimum Energy Efficiency Scheme (MEES) for commercial (or non-domestic) properties. The intention behind MEES is to improve the energy efficiency of rented buildings in England and Wales.

With the consultation now closed, DECC can start to add meat to the bones of the enabling provisions of the Energy Act 2011. The government has made it clear they want the detailed regulations in place before the next general election.

In short, with effect from 1 April 2018, it will become unlawful to let non-domestic properties with an energy performance certificate (EPC) rating of F or G. It is clear the regulations will only affect tenanted properties, and moreover, only those for which an EPC is required. However, owner-occupiers should also take heed as a low energy rating could affect the capital value of their property or, should they subsequently decide to sublet, this could bring them within the ambit of the scheme.

Somewhat contentiously, the intention is that MEES will apply both to new lettings and to pre-existing lettings (subject to limited exemptions as referred to below). MEES will only apply to new lettings on or after 1 April 2018 with compliance required for all tenanted properties by 1 April 2023.

Money, money, money

The government has stated it is committed to ensuring that landlords do not face upfront costs for any works required.

The intention is that landlords will be able to use government-backed finance under a Green Deal initiative similar to those packages available for residential properties. Landlords can borrow from Green Deal lenders to pay for the improvement >>

>> works, with repayments collected via tenants' energy bills. However, there are currently no such Green Deal packages available for non-domestic properties.

GimmE! GimmE! GimmE!

The government expects that around 18 per cent of non-domestic properties are below the E rating. Once landlords have carried out all possible improvements, the property can be let even if the EPC rating is still below E.

Other proposed exemptions include where a landlord cannot obtain required third-party consent to carry out any improvements, such as an existing tenant refusing access for works to be carried out. There may be a further exemption where the works would materially adversely affect the value of the property.

A *de minimis* tenancy term of six months has also been proposed, albeit with anti-avoidance provisions to prevent repeat short-term lettings designed to circumvent MEES.

Landlord and tenant SOS

Statutory responsibility for compliance rests with the landlord. The tenant is not caught by the rules unless they take on obligations to comply in their lease. Landlords should consider the need for appropriate indemnities or a requirement for incoming tenants to carry out relevant improvements as part of their fitout. Importantly, tenants will not be required to vacate a non-compliant property.

The Trading Standards Office is tasked with issuing penalty notices based on the ratable value of the premises.

Thank you for the MEESic

Landlords and tenants have at least three years until the regulations will bite and may be able to claim exemptions to extend this deadline. However, savvy landlords will want to consider the implications now in terms of the potential impact on marketability for letting and on capital value.

In terms of new leases, landlords may want to include specific rights of access to carry out necessary improvement works with recovery of the cost via the service charge.

Lenders' requirements will also have an impact. If a pre-condition to lending is for works to be carried out now to ensure a minimum E rating for the asset against which the loan is secured, then the borrower will have to ensure they are done.

Intra-group assignments

In the recent case of *Tindall Cobham 1 Limited v Adda Hotels and Ors* [2014], the Court of Appeal decided how a lease should be construed where one of its terms fell foul of the anti-avoidance provisions of the Landlord and Tenant (Covenants) Act 1995.

The lease prohibited intra-group assignments without the prior consent of the landlord, with the ability for the landlord to impose either or both of two specific conditions on any assignment pursuant to section 19(1A) of the Landlord and Tenant Act 1927.

The first condition compelled notification of the assignment. The second required the current guarantor to guarantee the assignee's obligations under the lease. This second condition was held to be contrary to the provisions of section 24(2) of the 1995 Act. Therefore, in accordance with section 25, the lease was void to the extent that its terms would otherwise frustrate the operation of the 1995 Act.

The court considered the consequential effect on the lease's assignment provisions. The landlord argued that the offending clause should be removed in its entirety, which would leave intra-group assignments to be dealt with under the more onerous provisions of the general alienation clause. The tenant argued that only the second condition should be removed, meaning that all it would be required to do was notify the landlord of the assignment, without any need for the prior consent of the landlord.

The general principle is that one should choose the construction which makes the instrument legally effective as opposed to ineffective. The court made clear, however, that this principle was not devised as a means of avoiding the consequences of legislation being applied to the contract which the parties had made. A court will not sever the terms of a contract unless:

- the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording that remains;
- the remaining terms are supported by adequate consideration; and
- the removal of the unenforceable provision does not alter the character of the contract.

The court had difficulty accepting the tenant's argument that the two conditions to an intra-group assignment were intended to be independent and self-sufficient, and instead held that the two conditions were intended to be parts of a composite interdependent proviso under which the landlord should consent if the conditions were fulfilled. As such, the proviso formed a complete term of the contract, which should be severed in its entirety. This left a simple qualified covenant against intra-group assignments, which could be operated without reference to the severed conditions.

As far as landlords are concerned, the court has reached a common-sense conclusion. The decision turned on the specific facts of the case and so should not be viewed as creating a general rule the courts will adopt in severing invalid conditions to assignment. **SJ**

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