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*Practice Group(s):*

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## Property Developer attacks Restrictive Covenant before the Competition Appeal Tribunal

*By Neil A. Baylis and Jennifer P. M. Marsh*

A property developer, High Peak Developments, is alleging that a restrictive covenant affecting the land surrounding a Tesco superstore is anti-competitive. High Peak has brought a damages claim under the new fast-track procedure in the Competition Appeal Tribunal (“CAT”).

### Facts

Tesco bought the land for its superstore site in Whaley Bridge, south of Manchester from High Peak Developments in 1997. A restrictive covenant was agreed providing that the surroundings could not be used for the sale of food, convenience goods or pharmacy products. According to reports, High Peak last year agreed a lease with variety retailer B&M Bargains for a store on High Peak’s nearby land on the condition that the covenant with Tesco was released.

The developer is asking the CAT to declare the restrictive covenant unenforceable and to order Tesco to cease enforcing it. High Peak is also claiming damages for lost rent, on the basis that the developer could have been renting the land to other retailers while it has been abiding by the covenant.

### Legal Background

Restrictive covenants in land agreements have been subject to the UK prohibition on anti-competitive agreements since 6 April 2011<sup>1</sup>. Prior to that date all land agreements were exempt from the prohibition. Many restrictive covenants which were agreed prior to 2011 remain in place and have not yet been re-assessed under UK competition law. Furthermore, market practice has not fully adjusted to the change in the law so that some anti-competitive restrictive covenants continue to be agreed.

Although such clauses are increasingly challenged in the course of negotiations between landlords and tenants, challenges in court have to date been limited, in part due to concerns over the cost.

In October 2015, the Consumer Rights Act 2015 introduced a fast-track procedure for seeking compensation alleged to have arisen as a result of competition law infringements. It is designed to allow smaller businesses or less complex claims to be litigated quickly with limited risk as to costs. This is the second time that this procedure has been used since its introduction. Under this mechanism, a final hearing should take place within six months unless the parties agree a settlement, which Tesco may be keen to do to avoid negative publicity.

### Supermarkets

It emerged during the Competition Commission’s groceries market investigation (which concluded back in 2009) that several major supermarkets had a number of restrictive

<sup>1</sup> By virtue of the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010.

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covenants in place, which were considered likely to reduce the competition faced by supermarkets in some local areas. By virtue of the Groceries Market Investigation (Controlled Land) Order 2010 (the “**Order**”), Tesco and several other major supermarkets were required to release a number of restrictive covenants and a process was established for competition authorities to assess other covenants as they were notified.

As an alternative to issuing proceedings in the CAT, High Peak could therefore have notified the Competition and Markets Authority (“**CMA**”) of the clause and requested an assessment under the Order. Although the CMA process is likely to have been even quicker and cheaper than the CAT’s fast-track procedure, the Order provides for the application of a relatively formulaic test and some covenants which would be regarded as anti-competitive under general competition law will not fall within the confines of the Order. Consequently, High Peak may benefit from a more rigorous court assessment. Furthermore, High Peak would not have been able to seek damages before the CMA, only the release of the covenant.

### Impact

This case illustrates that land agreements are increasingly vulnerable to competition law challenges. Not only are they subject to competition laws in theory but the variety of cost-efficient processes available to parties wishing to challenge such agreements means that the scope for such challenges has increased in practice.

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