

## LAND AGREEMENTS – KNOW YOUR COMPETITION

by

**Katharine Holland QC, Landmark Chambers**

Katharine Holland QC MA BCL (Oxon) DipICarb FCI Arb is a member of Landmark Chambers and was appointed as Queen's Counsel in 2010, after having been awarded Real Estate Junior of the Year in 2006. Since taking Silk, she continues to specialise in all aspects of property litigation. She is a CEDR Accredited mediator, a Fellow of the Chartered Institute of Arbitrators and in 2009 received a Diploma in International Commercial Arbitration.

2011 Chambers and Partners: *"Admired for being "very down to earth" and having "no airs or graces." She continues to be extremely popular and has had a busy year in court... Sources agree that Holland dazzles in court, saying she is "astonishing to watch on her feet - she is razor-sharp and one of the best cross-examiners around." They further affirm that "her ability to devour a lengthy and complex brief and summarise it in a few short paragraphs is mindblowing." ; 2011 Legal 500: "deserved reputation for powerful cross-examinations"; 2010 Chambers & Partners: "New silk Katharine Holland QC is a firm favourite of countless solicitors, who agree that "she is phenomenal and delivers consistently time and again." "A fearsome fighter,".. One solicitor said of her: "Katharine is a hugely committed barrister. When you are up against it and need someone to really knuckle down there is no-one with more commitment or energy"; The Lawyer: "Excellent"; 2008 Legal 500: "retains a first tier ranking with plaudits: can't praise her enough, a team player, extremely knowledgeable, her paperwork is excellent, a barrister you want on your side, especially if you expect to go twelve rounds with the other side" and "a superb fast-thinking trial advocate and ferocious cross-examiner"; 2009 Chambers & Partners: "pulls out all the stops to win your case and is recognised by instructing solicitors and opponents as a superb, fast-thinking trial advocate".*

Reported cases include: SOAS v Persons Unknown (*trespass*); Patel v K&J (*forfeiture*); Hosebay v Lexgorge (*leasehold reform*); Paddington Basin v West End (*service charges*); University of Sussex v Persons Unknown (*trespass*); Lexgorge v Howard de Walden (*leasehold reform*); Redlaw v Cowley (*options*); BNY Trust v Bourne End (*covenants*); Safestore v RSN (*easements*); Windsor Life v Lloyds (*lease renewal*); Paddington Walk v Peabody (*service charges*); Orchard v Reuters (*break notices*); Sunberry v Innovate (*administration*); Chinnock v Hocaoglu (*conveyancing*); Field Common v Elmbridge (*trespass*); BDC v Tyler (*nuisance*); Re Grafton Way (*section 20 notices*); McKay v Renlon (*breach of contract*); City Inn v Ten Trinity (*restrictive covenants*); Eltham v Kenny (*section 20 notices*); Tackaberry v Hollis (*constructive trusts*); Ian Green v Asfari (*estate agents*); Lay v Drexler (*lease renewal*); Wembley National Stadium v Wembley (*service charges*); Howard de Walden v Aggio (*leasehold reform*); A&P Birkenhead v North-western Shiprepairers (*covenants*); EF Clarke v William Sapcote (*land registration*); KUC v Alvingote (*unreasonable consent*); Mount Cook v Media Centre (*forfeiture*); Underhill v Bombardier (*dilapidations*); Graham v Mayrick (*adverse possession*); Seine International v Park Lane (*covenants*); Levin v Beatt (*beneficial ownership*); Sainsburys v Oliveview (*pre-emption*); South Tyneside BC v Wickes (*rent review*); Cadogan v Pockney (*leasehold reform*); Sainsburys v Oliveview (*removal of caution*); Hampshire Waste v Persons Unknown (*injunctions*); Haringey v CSS (*injunctions*); Moreau v Howard de Walden (*leasehold reform*); Famous Army Stores v R&H Properties (*land registration*); Malt Mill v Davies (*service charges*); Press v Chipperfield (*estate agents*); Whale v Viasystems (*land registration*); Robinson Webster v Agombar (*easements*); Law Society v Southall (*transactions defrauding creditors*); Carroll v Manek (*mortgages*); Carl v Grosvenor (*leasehold reform*); Lloyds Bank v Parker Bullen (*solicitors negligence*); Gregory v Shepherds (*solicitors negligence*); Titanor Investments v Macfarlane (*solicitors negligence*); Lloyds Bank v Burd Pearce (*solicitors negligence*); Charville v Unipart (*forfeiture/surrender*); Millman v Ellis (*easements*); Wentworth v Wiltshire (*highways*).

# LANDMARK CHAMBERS

**180 Fleet Street**  
**London EC4A 2HG**

Tel: 020 7421 1328

Fax: 020 7421 6060

Email: [kholland@landmarkchambers.co.uk](mailto:kholland@landmarkchambers.co.uk)

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## **Introduction**

- 1.1 All 'land agreements' are now the subject of competition law. A new competition law mindset therefore needs to be adopted by those involved in advising, negotiating or litigating on such agreements.
- 1.2 In a nutshell, that mindset requires property lawyers to understand that competition law is all about creating greater customer choice and preventing the formation of monopolies. This paper is intended as a brief introduction to some of the applicable principles.

## **Why do competition law principles now play an essential part in the expertise to be expected from a property lawyer?**

- 2.1 The importance of familiarisation with the new principles is demonstrated by considering the consequences if a 'land agreement' is incompatible with the new rules:-
  - 2.1.1 A prohibited provision is void and unenforceable. Under competition law it is only the offending provision that is void<sup>1</sup>. However, as a matter of contract law, if the provisions cannot be severed from the remainder of the agreement, then the entire 'land agreement' will be rendered void.
  - 2.1.2 Certain third parties whose interests have been harmed by the operation of an anti-competitive provision may sue the parties to the agreement for damages and/or for injunctive relief.
  - 2.1.3 The OFT may impose penalties and may order a restrictive agreement to be brought to an end.
- 2.2 The types of agreement most likely to be affected are:-
  - 2.2.1 Covenants imposed by tenants on landlords, especially those imposed by anchor tenants;

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<sup>1</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235

- 2.2.2 Covenants restricting the type of commercial activity that a tenant may undertake;
  - 2.2.3 Restrictions placed upon vendors not to sell adjacent property to a competitor of the purchaser;
  - 2.2.4 'Solus' agreements requiring purchases to be from a particular source;
  - 2.2.5 'Lock out' agreements which are for more than a few months.
- 2.3 With respect to particular types of client:-
- 2.3.1 Retailers and other undertakings may wish to consider whether the protection they have from competition is in fact enforceable;
  - 2.3.2 Investors may be concerned as to the potential unenforceability of anti-competitive restrictions and any wish to secure warranties against any such liabilities;
  - 2.3.3 Lenders may need to consider whether the value of their security is affected where the property has the benefit of restrictions which are potentially anti-competitive.
- 2.4 The importance of the role of the solicitor advising a client on these matters is heightened by the fact that the rules are the subject of a 'self-assessment' process. It is for businesses themselves to determine whether or not their agreements and/or conduct comply with competition law.
- 2.5 Nevertheless, the OFT and the European Commission have both published guidance to assist businesses in this respect. In March 2011, the OFT helpfully published guidance on the new changes in relation to 'land agreements' in a document entitled "*Land Agreements – The application of competition law following the revocation of the Land Agreements Exclusion Order*". This provides a detailed explanation of the new rules, together with 'worked examples' of how these new rules will be applied to land agreements and further helpful annexures, copies of which are provided with this paper. Perhaps most helpfully of all, the OFT has given the reassurance that they

consider that only a minority of restrictions in land agreements will infringe the new rules.

### **Competition Law – The Statutory Background**

3.1 There are two main forms of statutory prohibition set out in the Competition Act 1998:-

3.1.1 The “Chapter I” prohibition, which is set out in section 2 of the 1998 Act and which provides that agreements and other kinds of ‘joint’ behaviour will be illegal and void if they have as their object the effect of restricting competition, save where there is a specific exemption.

3.1.2 The “Chapter II” prohibition, which is set out in section 18 of the 1998 Act and which is principally concerned with controlling single undertakings whose position in the market is such that they can be regarded as ‘dominant’ and who are to be prevented from abusing this dominant position (whether by the exploitation of customers or by the taking of steps to cut out competitors).

3.2 The prohibitions in the UK reflect similar statutory rules which apply to Europe and which are contained in Articles 101 and 102 of the Treaty for the Functioning of the European Union.

### **What is a ‘land agreement’?**

4.1 Under the new law, there is now introduced into this statutory arena, the creature of the ‘land agreement’, which is defined as:-

*‘an agreement between undertakings which creates, alters, transfers or terminates an interest in land, or an agreement to enter into such an agreement, together with any obligation and restriction to which Article 5 applies’*

(see Article 3 of the Land Agreements Exclusion Order 2004/1260 (“the Exclusion Order”))

4.2 Land agreements were previously exempt from Chapter 1 of the Competition Act 1998 by the Exclusion Order. However, the Competition Act (Land Agreements Exclusion Revocation) Order 2010 (“the Revocation Order”) revoked the Exclusion Order as of 6 April 2011. From this date, all land agreements have been subject to Chapter 1 of the

Competition Act 1998. This applies to all existing land agreements as well as those made on or after that date.

- 4.3 The driver behind the revocation of the Exclusion Order was an investigation by the Competition Commission<sup>2</sup> into anti-competitive and restrictive practices within the grocery retail sector. The Competition Commission held that certain land agreements between large grocery retailers had an appreciable effect on competition and should not benefit from the Exclusion Order. The Competition Commission produced their final report 'The Supply of Groceries in the UK Market Investigation' on 30<sup>th</sup> April 2008<sup>3</sup>. Of particular relevance are chapter 7 'barriers to entry and expansion' and chapter 10 'findings and features'. It was felt that the most straightforward option was to revoke the Exclusion Order in its entirety rather than risk encouraging litigation as to the meaning of grocery retail agreements.
- 4.4 A further practical reason behind the change was that since 2004 applications on individual agreements are no longer made to the OFT but there is instead a system of self assessment. Previously, there had been a concern that the OFT would be overwhelmed with requests relating to land agreements and this was one of the reasons that 'land agreements' were the subject of exemption from the full rigour of competition law. However, following the introduction of the system of self assessment, this practical reason for the Exemption Order was removed. Hence, it is as a result of the previous practices of the supermarket giants and the removal of a procedural obstacle that many covenants in the property sector are now subject to a whole new range of challenges.

### **The relevant provisions of the Competition Act 1998**

- 5.1 The principal section which may now bite upon a 'land agreement' is section 2 of the 1998 Act which provides as follows:-

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<sup>2</sup> Following a referral by the OFT under s.131 Enterprise Act on 9 May 2006

<sup>3</sup> See [http://www.competition-commission.org.uk/rep\\_pub/reports/2008/538grocery.htm](http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm)

**2 Agreements etc. preventing, restricting or distorting competition.**

- (1) *Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—*
- (a) *may affect trade within the United Kingdom, and*
  - (b) *have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,*
- are prohibited unless they are exempt in accordance with the provisions of this Part.*
- (2) *Subsection (1) applies, in particular, to agreements, decisions or practices which—*
- (a) *directly or indirectly fix purchase or selling prices or any other trading conditions;*
  - (b) *limit or control production, markets, technical development or investment;*
  - (c) *share markets or sources of supply;*
  - (d) *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
  - (e) *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
- (3) *Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.*
- (4) *Any agreement or decision which is prohibited by subsection (1) is void.*
- (5) *A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).*
- (6) *Subsection (5) does not apply where the context otherwise requires.*
- (7) *In this section “the United Kingdom” means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.*
- (8) *The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter I prohibition”.*

## **Some Key points**

- 6.1 The key points to note in relation to section 2 are as follows:-
- 6.1.1 There must be an 'agreement'. This may take the form of a 'horizontal agreement' (eg. between two competing businesses) or a 'vertical agreement' (eg. between a shopping centre landlord and the shop lessees).
  - 6.1.2 The Chapter 1 prohibition only applies to agreements between undertakings or businesses and does not apply to individuals. Therefore agreements concerning residential property made between or with an individual are not affected.
  - 6.1.3 The agreement concerned must have as its "object" or "effect" the restriction etc of competition, in one of the ways described in more detail below.
  - 6.1.4 Exemptions may be applicable and are an important part of the legislative scheme.

## **When will an agreement have as its object or effect the prevention, restriction or distortion of competition?**

- 7.1 An agreement will not fall within the scope of competition law unless its impact upon competition is "appreciable". When determining whether the impact of an agreement is appreciable the OFT will have regard to the approach set out in the European Commission's Notice on Agreements of Minor Importance. This sets out various thresholds by reference to market share but even when those thresholds are exceeded, this does not mean that the effect of an agreement on competition is appreciable and other factors will also be considered.
- 7.2 The appreciability test usually requires definition of a relevant market and demonstration that the agreement would have an appreciable effect on competition within that market.

- 7.3 The first stage in assessing the impact of a land agreement will generally involve the consideration of two relevant markets. The first relevant market is the downstream or 'related market'. This is the market involving the economic activity where the land affected by the agreement is used. That will depend upon both the product and the geographic scope of the market. For example, in the case of a coffee shop, the product market will be defined by reference to the number of other coffee shops or similar businesses that compete with the coffee shop and the geographical market will be defined by the relevant geographic area over which the product in question competes. So, the competitive effect of a 'land agreement' pertaining to a coffee shop in Harrow will not be looked at by reference to hairdresser businesses in Harrow and it will not be looked at by reference to coffee shops in Dulwich. It will be considered by reference to coffee shops or similar businesses in Harrow.
- 7.4 The second relevant market is the upstream 'market for land' that is suitable for use in the related market. The scope of the market for land is defined as all land that is suitable for use in the related market where the land is being used. In the example of the coffee shop, this will include all the land that is suitable for use by a coffee shop or similar operation within the relevant geographic scope of that market.
- 7.5 When assessing whether a restriction may restrict competition, it is essential to compare the actual or future situation of the relevant market with the land agreement in place, with the situation that would prevail in the absence of the agreement ('the counterfactual'). A restriction will fall within the scope of the prohibition only if it has a negative impact on actual or potential competition when compared with the counterfactual.
- 7.6 In undertaking this comparison, the factors which are relevant to determining whether the agreement appreciably restricts competition are as follows:-

7.6.1 *Nature of the restriction*

Where the parties to a land agreement are competitors and the object of a restriction regarding the use of land is for the parties to share markets by territory, type or size of customer, the agreement will almost invariably infringe the Chapter I prohibition. A restriction which guarantees one party exclusivity or

protection from competition is the restriction most likely to have an appreciable effect on competition. Potentially anti-competitive restrictions may apply to both freehold and leasehold land. For example, the following restrictions would be susceptible to being struck down:-

7.6.1.1A landlord of a shopping centre might guarantee to one tenant the exclusive right to operate a certain type of shop in that centre. By definition, such an agreement could protect that tenant from competition with other potential competitors and this therefore has the potential to restrict competition in the related market.

7.6.1.2A landlord who operates convenience stores in an area might impose a restriction upon a lessee to the effect that he may not use the site as a convenience store. Again, this would have the effect of restricting competition.

7.6.1.3A vendor of a property who happens to own betting shops in a particular area may impose a restrictive covenant upon the sale to the effect that the property cannot be used as a betting shop.

#### 7.6.2 *Market power*

The greater the parties' market power, the more likely the restriction is to be anti-competitive. Market power arises where an undertaking does not face effective competitive pressure. The existence of barriers to entry (eg. the availability of suitable land for use in the related market) is also relevant to assessment of market power on the related market.

#### 7.6.3 *Cumulative impact of multiple agreements*

Where an agreement forms part of a series or group of similar agreements in a given market and access to the relevant market or competition on that market is significantly restricted by the cumulative effect of these agreements, an individual agreement may fall within the Chapter I prohibition if the agreement makes an appreciable contribution to the cumulative effect.

## When will an exemption apply?

8.1 An agreement which falls within the scope of the Chapter 1 prohibition may nevertheless be exempt from the prohibition if certain criteria are satisfied, with no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in section 9(1) of the 1998 Act are satisfied and it continues to enjoy the benefit of the exemption for as long as these criteria are satisfied. For an agreement to be exempt four cumulative criteria must be satisfied<sup>4</sup>:-

8.1.1 *The agreement must contribute to improving production or distribution, or to promoting technical or economic progress*

The benefits of the agreement must outweigh or at least match the negative impact on competition. So, for example, a department store might be granted an exclusive right to operate in a shopping centre. This agreement may give rise to efficiency gains by reason of the fact that the department store will attract many new shoppers to the centre, thereby benefitting other retailers from an increased footfall.

8.1.2 *It must allow consumers a fair share of the benefits*

In other words, the net effect of the agreement must be at least neutral for those consumers affected by the agreement. So, in the shopping centre example, this test might be satisfied by showing that the increase in footfall brought about by the presence of the department store benefits other retailers to such an extent that the benefits can be passed on to consumers through, for example, costs savings.

8.1.3 *It must not impose restrictions beyond those indispensable to achieving those objectives*

The test is not whether without the restriction the agreement would not have been concluded but whether the benefits could have been achieved by a less restrictive agreement. So, for example, in the department store example, the

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<sup>4</sup> Regard should also be had to the European Commission's Guidelines on the Application of Article 81(3) (OJ C101, 27.4.2004)

department store may need to invest considerably in order to establish a new store within a shopping centre and it may only be prepared to make this investment if it has a guarantee that it will be the only department store in the shopping venue. However, in order to recover its investment to an appropriate level, it is only appropriate that it should enjoy the protection of the relevant covenant for a certain period of time – and not forever.

8.1.4 *It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the product in question*

Whether the competition is being eliminated for these purposes depends upon the degree of competition existing prior to the agreement and on the impact of the restrictive agreement – ie. the extent of the reduction of competition brought about by the agreement. Hence, where competition is weak, a very limited reduction may result in competition being ‘eliminated’ for these purposes.

### **Abuse of Dominant Position**

9.1 As explained, Chapter II of the 1998 prohibits a business which holds a dominant position in a market from abusing that position. Section 18 provides as follows:-

#### ***18 Abuse of dominant position***

- (1) *Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.*
- (2) *Conduct may, in particular, constitute such an abuse if it consists in—*
  - (a) *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
  - (b) *limiting production, markets or technical development to the prejudice of consumers;*
  - (c) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

(d) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.*

(3) *In this section—*

*“dominant position” means a dominant position within the United Kingdom; and*

*“the United Kingdom” means the United Kingdom or any part of it.*

(4) *The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter II prohibition”.*

9.2 These provisions apply equally to conduct relating to land as they do to any other business. Generally parties are free to decide to whom they sell or lease land and upon the price at which they choose to do so. It is only in limited circumstances that conduct regarding land will be prohibited by Chapter II of the 1998 Act.

9.3 A dominant position in a market essentially means that a business is generally able to behave independently of competitive pressures, such as other competitors, in that market. So, it is necessary to consider the definition of the relevant market in which the business operates and whether the business holds a dominant position within that market. Generally speaking, a market share above 50 per cent gives rise to a presumption of dominance, in the absence of evidence to the contrary<sup>5</sup>. This involves a two stage process; firstly, consideration is given to whether a firm is dominant and secondly, whether it has abused its dominance. It is worth noting that there are no exemptions from Chapter II. However, the OFT considers that a position of dominance is unlikely where the market share is below 40 per cent.

9.4 Conduct which may be considered an abuse by a business in a dominant position includes:

9.4.1 charging excessively high prices;

9.4.2 limiting production;

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<sup>5</sup> The European Court has stated that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a market share persistently above 50%: *Case C62/86 AKZO Chemie BV v Commission* [1993] 5 CMLR 215

- 9.4.3 refusing to supply an existing long standing customer without good reason;
  - 9.4.4 charging different prices to different customers where there is no difference in what is being supplied;
  - 9.4.5 making a contract conditional on factors that have nothing to do with the subject of the contract.
- 9.5 In the context of land agreements, the OFT Guidance mentions the situation where a dominant business seeks to use restrictions in land agreements as part of a strategic campaign to exclude competitors from a market, particularly where regulatory constraints, such as planning or licensing, limit the supply of suitable land for the competing activity. A business might also abuse a dominant position through 'exploitative conduct' such as the charging of excessive prices for land that are significantly above the competitive level.
- 9.6 In *Humber Oil Terminals Trustee Limited v Associated British Ports* [2011] EWHC 352, competition law issues were raised in the context of a lease renewal case for the oil terminal at the Port of Immingham. The landlord, Associated British Ports, opposed the grant of a new tenancy on the grounds that they required the terminal for their own use. This was following years of unsuccessful negotiations, during which the landlord had been seeking a high rent for the new lease. The issue which arose was whether the landlord could abuse its dominant position by relying on its statutory right to oppose the grant of a new lease or by requesting a high rent in the lease negotiations. The Chancellor, Sir Andrew Morritt, struck out the competition law claims. The Chancellor disagreed that a proposal by a monopoly supplier in the course of negotiations to charge excessive, unfair or discriminatory prices is, without more, abusive conduct. Relying in part on the earlier UK Court of Appeal ruling in *Attheraces Ltd v BHB Ltd* [2007] EWCA Civ 38 the Chancellor held that the requirement under Article 102 and section 18 of the Competition Act 1998 for prices to have been imposed was not met on the facts. The landlord had merely advanced figures as a basis for further negotiations. Furthermore, the fact that section 34 of the 1954 Act provided for the rent to be determined at the level which the property might reasonably be expected to be let in the open market by a willing lessor, excluded the possibility of an abusive price being set. The Chancellor also held that the exercise of the landlord's property rights under

section 30(1)(g) of the 1954 Act, without more, could not constitute an abuse of a dominant position for the purposes of either section 18 of the 1998 Act or Article 102.

### **The Consequences of breaching Chapter 1 of the 1998 Act**

10.1 As stated earlier in this paper, parties to an agreement which falls within the prohibition or persons abusing a dominant position are liable to enforcement action by the OFT, the European Commission or a sectoral regulator, who may decide to impose financial penalties and give directions to bring the infringement to an end. If a provision is found to be anti-competitive the OFT may impose fines of up to 10% of the world turnover of the offending undertaking. Guidance as to the assessment of fines to which the OFT must have regard is provided by the OFT's *'Guidance as to appropriate amount of a penalty'*<sup>6</sup>. Sections 39 and 40 of the 1998 Act provide limited immunity from financial penalties for small agreements in relation to infringements of the Chapter I prohibition and for conduct of minor significance in relation to infringements of the Chapter II prohibition. The OFT and sectoral regulators cannot make a finding of infringement of the Chapter I prohibition or impose penalties for land agreements in respect of the period prior to 6 April 2011.

10.3 A provision which is found to be anti-competitive is void and unenforceable. Under competition law it is only the offending provision that is void<sup>7</sup>. However, as a matter of contract law, the presence of the offending provision may affect the whole agreement. A court may consider it possible to sever provisions which infringe the Chapter 1 prohibition from the rest of the agreement. The leading case on severance remains the Court of Appeal decision in *Chemidus Wavin v Société pour la Transformation* [1978] 3 CMLR 514 where Buckley LJ framed the relevant question to consider as follows:

*'[whether] the contract could be said to fail for lack of consideration or on any other ground, or whether the contract would be so changed in its character as not to be the sort of contract that the parties intended to enter into at all.'*<sup>8</sup>

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<sup>6</sup> OFT 423

<sup>7</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235

<sup>8</sup> For more detail see *Courage Limited v Crehan* [1999] E.C.C. 455 paragraphs 157-179 and *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 at paragraphs 51-52.

10.4 Although anti-competitive provisions are void, the Court of Appeal in *Passmore v Morland* [1999] 1 CMLR 1129<sup>9</sup> held that this may be transient only. In other words, if market or economic conditions change such that a restriction is no longer anti-competitive, it may cease to be void. Although the *Passmore* case concerned what was Article 82, it is probably right that the somewhat perplexing concept of transitory ‘voidness’ also applies to Chapter 1 of the 1998 Act.<sup>10</sup>

10.5 It is now clear that third parties to an agreement may seek damages from the parties to a restriction that is found to be anti-competitive. Competition law damages may now be sought either in the Competition Appeal Tribunal (s.47A CA 1998)<sup>11</sup> or in the usual courts. Injunctive relief could also be sought in court proceedings.

10.6 It may also be possible for the weaker party to an unenforceable anti-competitive contract to claim restitution and/or damages under the contract against the stronger party. This is however a complicated and uncertain area of the law, detailed consideration of which lies outside the scope of this paper.

**KATHARINE HOLLAND QC**

**Landmark Chambers**

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<sup>9</sup> *Passmore* was applied by Park J in *Barrett v Innpreneur PUB Company* [2000] E.C.C 106

<sup>10</sup> S.60 CA 1998 requires the CA 1998 to be as consistent as possible with European competition law.

<sup>11</sup> The first competition damages case to come to trial in the CAT was *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Limited* [2009] CAT 36. The decision in *Enron* was issued on 21<sup>st</sup> December 2009 and permission to appeal to the Court of Appeal was refused on 9<sup>th</sup> February 2010. *Enron* is useful as an indication of the difficulties particularly relating to quantum and causation that face claimants claiming competition law damages.