

Case news

■ DAMAGE LIMITATION

THE MESSAGE: AN OBLIGATION NOT TO COMPETE WITH ANOTHER'S BUSINESS IS LIKELY TO CONTINUE TO APPLY EVEN THOUGH, AT THE TIME, THERE MAY BE NO SUCH BUSINESS TO COMPETE WITH

THE CASE IN *CHIPSAWAY INTERNATIONAL V KERR* (11.03.09), the Court of Appeal considered the extent of a restrictive covenant in a franchise agreement restricting a competing use, and the court's comments may be of relevance to restrictive covenants in a property context.

Chipsaway had the rights to a system, known as 'ChipsAway', for filling and restoring damage such as dents and scratches to the bodywork and bumpers of cars and other vehicles. Chipsaway did not itself provide the service but was a franchising company that authorised franchisees to use the ChipsAway name and products and provided them with instruction and advice.

In 2002, Chipsaway and Mr Kerr entered into a franchise agreement relating to a car care centre franchise. The franchise was for an initial term of five years and contained a restrictive covenant. This stated that, for 12 months following the end of the agreement, the franchisee would not, without Chipsaway's prior written consent, engage in any business,

THE COVENANT DID NOT DEPEND ON THERE BEING A SUCCESSOR FRANCHISEE TRADING

within a specified area, that competed with the provision by a franchisee of a service to customers repairing damage to vehicle paintwork using the ChipsAway system.

At about the same time, Kerr took a five-year lease on a property in Banbury, Oxfordshire, which was to be his car care centre during the period of the franchise.

The franchise agreement required Kerr's letter headings, invoices and advertising material and signs at the property to feature the name 'ChipsAway', which they did.

Kerr's lease ended in December 2007 and shortly afterwards he renewed the lease for a further five years.

While he carried on his business at the property, Kerr did not renew the franchise. He continued to provide the car care service but he did not use any ChipsAway products, nor their name or manuals.

Chipsaway brought proceedings against Kerr, alleging that by continuing with his business in the Banbury area and repairing damage to paintwork on vehicles he was in breach of the restrictive covenant in the franchise agreement. Chipsaway applied for an injunction to stop Kerr's business.

The court heard that the purpose of the restrictive covenant was to allow Chipsaway a period of 12 months in which to establish a replacement franchisee and to protect

its goodwill, free from competition from a franchisee that had previously operated within the relevant franchise territory. Even though Chipsaway had not tried to find a replacement franchisee for Kerr in the months following the end of the agreement, the covenant still applied. The covenant did not depend on there being a successor franchisee trading.

The authorities make clear that an important purpose served by covenants such as the one in this case is to protect the franchisor's goodwill and its ability to find a replacement franchisee.

The court, therefore, held that Kerr had acted in breach of the covenant. The court would, at a later stage, decide the remedy to which Chipsaway would be entitled.

Warren Gordon is head of real estate know-how at Olswang

■ SUMMING UP: CHIPSAWAY INTERNATIONAL V KERR

■ Car care centre franchisor Chipsaway International signed a deal with franchisee Kerr in 2002. This deal included a restrictive covenant.

■ This covenant said Kerr could not carry out similar business for the year after the end of the contract. This would let Chipsaway find a new franchisee.

■ Kerr renewed his lease in December 2007 but not the franchise arrangement. Chipsaway said this breached the restrictive covenant, even though it was not seeking a new franchisee. Even so, the Court of Appeal agreed with Chipsaway.

Professional advice

I INTEND TO OBTAIN PLANNING PERMISSION FOR A SITE AND THEN SELL IT BEFORE WORKS START. I SERVED A NOTICE TO QUIT ON MY TENANT BUT HE HAS CLAIMED A NEW TENANCY. WHAT IS THE SAFEST WAY TO PROCEED?

To protect your position you should serve a counter notice on your tenant within two months of his claim, opposing his application for a new tenancy under section 30(1)(f) of the Landlord and Tenant Act 1954, in addition to any applicable non-compensation ground.

Ground (f) states 'that on the termination



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of the current tenancy the landlord intends to demolish or reconstruct the premises ... or to carry out substantial work of construction'. The issue of intention is therefore important.

Although you cannot rely on ground (f) if you simply intend to sell the premises on to a purchaser that will develop the property, serving the counter-notice gives you some options.

First, the landlord needs to demonstrate an intention to carry out the works, at the time

of the court case, to determine whether a new lease should be granted. This means that any purchaser that is landlord at the time of the

hearing and has the necessary intention could rely on your counter notice.

Second, you could structure the sale around an agreement for a building lease with the proposed purchaser. This is because it is not necessary for the landlord to intend to do the works itself or by its own contractors.

Ground (f) can apply where the landlord intends to carry out the works through a building lessee. The grant of a building lease is considered a means of paying for the work – the lessee being 'paid' by the grant of a period of years of occupation.

This logic may also extend to circumstances where you enter into a joint venture with the purchaser. Here you would both jointly fund the works. On completion of the works you would sell or lease the property to the purchaser.