**ROB HASTIE TALKS ABOUT THE SCOTTISH PUBS CODE**

The Scottish Pubs Code (‘SPC’) is going through the consultation process, following the unanimous passing of the Tied Pubs (Scotland) Act 2021 by the Scottish parliament on 23 March 2021.

The SPC will be a significant intervention in the property rights of landlords and tenants of tied pubs in Scotland.

**Summary**

All landlords of tied pubs in Scotland will be subject to regulation under the SPC.

The SPC is to be founded on three principles:

* Fair and lawful dealing by landlords;
* Tied tenants being no worse off than they would be if they were free of tie; and
* A fair sharing of the risks and rewards amongst the parties.

Tenants will be given the option to change their tenancy to remove the tie.

Tenants will also have the option of a guest beer provision.

The Scottish Pubs Code Adjudicator will decide disputes (or appoint someone to do so) and monitor compliance.

**Who**

A person or company is a ‘pub-owning business’ if they are the landlord of a tied pub or are a group company of a landlord of a tied pub.

Even if you are the landlord of just one tied pub, you will be a pub-owning business.

A ‘pub’ is one licensed as such under s.17 of the Licensing (Scotland) Act 2005 and in which the main activity (or one of the main activities) carried on is the sale of alcohol to members of the public for consumption on the premises. The definition in the legislation does not explain how one distinguishes a ‘pub’ from a restaurant, music venue, nightclub or social club.

A ‘tied pub’ is one that has to purchase some or all of its alcohol from the landlord or the landlord’s nominee.

In 2020 there were estimated to be 750 tied pubs in Scotland, around 17% of the total number of pubs.

**Why**

The goals behind the SPC was to:

1. Rebalance the relationship between tied tenants and their landlords, essentially by a transfer of profit from landlords to tenants.
2. Create greater consumer choice and opportunities for brewers, through the guest beer provision.
3. Create a uniformly regulated environment for pub-owning business.

Whilst the SPC will undoubtedly benefit the existing tied tenants, there has been a lack of detailed consideration of its long-term impact on the tied pub sector in Scotland. The effect of making the tied tenanted model much less attractive for landlords will undoubtedly be a decline in the amount of investment in the pubs and a move away from that model to other models (such as direct management or alternative user). There being no protected statutory security of tenure at lease expiry in Scotland (in contrast to the position in England and Wales under the Landlord and Tenant Act 1954) will accelerate any flight from the tied model. The Scottish Government’s Impact Assessment concludes that the number of tied pubs in Scotland may decline as a result of the SPC.

**When and how**

The Pubs Code for England and Wales was rushed through and suffers from a large number of faults as a result. The SPC is sensibly taking a more measured route.

The second consultation on the SPC has recently closed and a further draft SPC is likely to be published shortly.

The Scottish Government is obliged to lay the SPC before parliament by 5 May 2023, but it is expected to be laid in late 2022.

**What**

There are four main parts of the SPC.

Firstly, the provision of a statutory code of practice setting out how the landlord should interact with their tenant before granting a tenancy, at rent review and in relation to repairs. These provisions build on the voluntary codes of practice that have been developed in the industry over the last 30 years.

Secondly, a guest beer provision, which is likely to be comparable to the guest cask ale provisions in the 1989 Beer Orders.

Thirdly, an option to go free of tie at a rent to be set by an independent third party. The most recent draft SPC provides that the option will be exercisable at any point after the first half of the term of the lease has expired. This will be the part of the SPC that produces the largest effects and disputes. Some of those disputes could have been avoided with better drafting. For instance, the definition of a ‘market rent’ to be paid under the free-of-tie lease in Schedule 1 of the 2021 Act does not disregard tenant’s improvements or contain an assumption that the tenant has complied with their obligation to repair.

Fourthly, the establishment of a Scottish Pubs Code Adjudicator (‘SPCA’) to act as regulator of the tied pub sector and manage the dispute resolution process, including acting as arbitrator. There is a tendency for the role of regulator and arbitrator to conflict, for instance in areas where the SPCA issues advice on a matter they subsequently come to arbitrate. For that reason, the SPCA may appoint external arbitrators.

**Conclusion**

Pubs are a favourite topic for legislators, when compared with, say, restaurants or shops. There are few independent authoritative voices in the industry, and legislators tend to prefer the anecdotal evidence of individual tenants over dry facts and figures. As a result, the history of legislation in relation to pubs is littered with well-intended interventions that have led to unintended negative consequences. The number of pubs in the UK has been in decline for the last 50 years and measures such as the SPC are likely to accelerate that decline.

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