Pubs Code Statutory Review

The key issues around the pubs code

Introduction

For the purposes of this introduction lease, tenancy and agreement are all the same thing.

First, one has to remember there are two bits of legislation to consider, primary (the Act) and secondary (the Code).

The Act wording is not too clear and therefore its unhelpful, changing the Act would be a monumental task and I assume government would not like to resort to changes of primary legislation. So, we have to work with the Code, which is up for review and 'easier' to change.

At no point in the Act does it require the POB to offer a 'new agreement' which is a relief, (equally it doesn't say they cannot) and at s43(5) the Act offers the Code the opportunity to further expand upon the "MRO tenancy". The latter may enable us to see if we can nail down MRO using the Code.

At s43(4) of the Act it actually defines a tenancy as MRO compliant if -

"(a) taken together <u>with any other contractual agreement</u> entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence it—
(i) contains such terms and conditions as may be required by virtue of subsection (5)(a),
(ii) does not contain any product or service tie other than one in respect of insurance in connection with the tied pub, and
(iii) does not contain any unreasonable terms or conditions, and
(b) it is not a tenancy at will."

Put simply that says to us, that the existing lease with an *"other contractual agreement"* (i.e. a deed or side letter) could be an MRO tenancy for the purposes of the Act. It also opens the door for the POB's to say a new agreement could do the same. These are essentially the findings to date of the PCA - it could be either a new agreement or a deed, but it is at the POB's discretion provided the new agreement satisfies s43(4) (like no unreasonable terms). This allows them to deliver a new agreement or a deed with any amount of changes as they like provided the revised terms are "reasonable". As a result the POB's are offering a wholly different agreement and whilst they resisted a deed, tooth and nail, now the PCA has found against that argument they simply include all the changes they would have put in a new agreement into a deed, so either way we get the same outcome - a highly complex and lengthy document fraught with pitfalls and traps.

The POBs argument is that the MRO agreement is a unique, stand-alone agreement unlike either a normal lease/ tenancy or a Commercial free of tie agreement.

The tenant's argument is that the MRO agreement is the existing agreement, minus the tied terms.

So, if we assume the Act is not where we work then we need clarification from the Code.

The lack of clarification from the code is where many of the existing issues originated.

The Code repeatedly refers to regulations surrounding a "new agreement" which the POB's took to mean they had to offer MRO by new agreement. Our advisors understanding, when they participated in the Code drafting, was that they had to cover the eventuality of new agreements, i.e. new lettings to new tenants. This did not encompass, in their opinions, MRO agreements to existing tenants. If you read the Code and do a search for "new agreement" you will see it popping up everywhere but most references would be inappropriate to an MRO agreement for an existing tenant (e.g. Reg 10, why provide a business plan if the POB cannot deny you MRO on the basis they are not happy with it ?). Schedule 1 of the Code outlines the information a POB must supply to the tenant before entering into a new agreement, if you read through this it becomes obvious it is not relating to an MRO agreement, all be it that would be a new agreement of sorts, e.g. Reg 25 actually states that the information provided to a tenant before entering into a new agreement needs to include "The events, the occurrence of which, entitle the tied pub tenant, under Reg 23 to give an MRO notice." clearly this would not apply to an agreement that is already MRO.

A SIMPLE SOLUTION

What we need is a clarification that "new agreement" in the Code relates to a new TIED agreement not an MRO agreement.

The reason the Act remained open/vague was at the time of drafting an argument was put forward that the Government did not want to overly interfere with commercial practices and if the parties wanted to agree MRO by new agreement, rather than side letter, they should not be restrained from doing so. We agree BUT there should be a default position, MRO by the swiftest simplest and cheapest means possible, alternatively, if the POB want to deliver by new agreement they offer terms to the tenant and the tenant considers and negotiates/agrees or, in the absence of agreement it all reverts back to a side letter like the one the POB can initiate in the lease. This makes sure the POB has to "sell" a new agreement on its benefits rather than force it upon tenants as the only alternative to being tied (so it's a choice between two negatives, death or pain!)

WHAT WE CURRENTLY HAVE

The POB's can rewrite the agreement in its entirety to suit their own purposes, as long as the new terms are reasonable and common. In our view [Redacted] have gone to a great deal of trouble to grant a raft of Free of Tie lettings to create an artificial data base of common terms, [Redacted].

In the same way, many of the POBs, [Redacted] being a good example, set up new “retail” agreements and then fought hard during the drafting of the legislation to make sure that these types of agreements fell outside of the Code.

What we have is MRO by the most complex means possible a new agreement changing every lease term for the worse, including, 3 month deposit rather than one month, quarterly rent in advance rather than monthly, guarantee and rent deposit rather than one or the other, up only rent reviews and annual RPI increases, the list goes on. POB's are seeking to demonstrate their new terms are 'the most common' therefore they should prevail, this should be irrelevant. If the 'non tie related' existing tied lease terms exist in other FOT agreements, they should not be altered without parties agreement. POB's will argue that this creates a hybrid agreement, two distinctions: -

1. They wrote the option into their lease,

2. This assumes that all other FOT agreements are exactly the same, they are not, there are a plethora of alternative terms in FOT commercial agreements.

Lease terms can be considered and reflected in the rental valuation so arguably, if the existing terms on deposit, security rent payment intervals etc, are recognised as beneficial to the comparables then the rent should be higher as a result.

THE AIM

As previously mentioned, the only reason MRO was to be available at certain events, rent review, lease renewal, trigger points, was because we were told, by the POB's [Redacted], there would be a flood gate of tenants wanting to go MRO. They are now arguing that MRO up take has been low because tenants have realised the tied model is so great. This being the case surely, we can do away with MRO opportunity events and adopt MRO at will. At the same time, if the legislation is to deliver the underlying principle of 'fairness' surely the tenant should have the same rights as the landlord as regards tie release under the terms of the lease.

What we need is MRO by the simplest means possible a side letter or deed that makes the absolute minimum changes to deliver a tie free agreement.

A POTENTIAL ISSUE WE NEED TO CONSIDER

One problem with the above is that if purchasing obligations are removed from a lease it leaves other terms that are tie related but not necessarily purchasing obligations, flow monitoring, product sampling, insurance, service and cellar maintenance contracts, restraints on assignment to a brewer etc. They tried to cover this at drafting stage and so ended up with a more complex process. MRO by side letter, as the POB can achieve under the terms of the lease, does not deliver MRO in accordance with the Code as uncommon and unreasonable terms remain in the lease. All that said one of our consultants drafted a deed which took a couple of hours (bearing in mind he is not a lawyer and had never done it before) which even [Redacted] had to concede would have delivered MRO in

accordance with the Code. Our point being that if one of our consultants can do it, then it should be a simple process for a competent lawyer to produce the document.

A CLOSER LOOK AT THE CODE

If you accept the arguments set out above then the code needs so redrafting in order for it and the act to work effectively, this is obviously the job of government and civil servants but the Forum would suggest that the following areas of the code are the ones that need to be focussed on, evolved and improved, we have also attached the link to the code for reference.

http://www.legislation.gov.uk/ukdsi/2016/9780111146330/contents

Just for information and clarity, Part 3 is a Rent Proposal and Part 4 is a Rent Assessment.

The two are different in that Part 3 relates to a Rent Proposal that is issued as a result of a new agreement through the issuing of a Section 25 (landlord) or Section 26 (Tenant).

Part 4 relates to a Rent Assessment which is delivered as part of a rent review in the middle of an ongoing agreement or if the rent review has not been concluded within 5 years.

The bits we need to focus on are part 5 and part 6

Part 5

Regulation 23 – The MRO Notice is far too detailed and needs simplifying

Regulation 24 – Needs to be more specific as this relates to a "significant increase" in prices – how do you define "significant"?

Regulation 25 – Really doesn't make sense, it talks about a trigger event and yet it would appear that you have to produce a "forecast" explaining why you think it's a trigger – the POB will just say – "it's not" and that causes disagreement and dispute. Trigger events should be more clearly defined (for example a Managed operation opens next door selling beer cheaper than you)

Part 6

Regulation 28 – This is the section that seems to imply MRO can't be backdated and encourages delay

Regulation 29 - This details what the POB should do if they: agree/ disagree with the MRO request

Regulation 30 – Terms and conditions of the MRO tenancy – this requires simplifying and turning into the original MRO intention, a cheap and simple choice for the tenant.

Regulation 31 – Does not define what's reasonable and not reasonable, which is the main concern, that said we have enough evidence to clearly define and make this work now.

Regulation 32 – This should be simplified so that if the response is not provided the tenant has speedy resolution.

Regulation 33 – This needs to have a timeline so that the PCA are forced to do something in the required time – currently any dispute can drag out forever.

Regulation 34 – Is to do with the negotiation period which doesn't work as there is no intent on the part of the POB to negotiate

[Redacted]