FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 27
P558/21

Lord President
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the Reclaiming Motion in the petition by

(FIRST) GREENE KING LIMITED; (SECOND) HAWTHORN LEISURE LIMITED; and (THIRD) PUNCH TAVERNS LIMITED

Petitioners

against

THE LORD ADVOCATE

Respondent

for judicial review of the Tied Pubs (Scotland) Act 2021

First and Third Petitioners: O'Neill KC, Welsh; TLT LLP
Respondent: Crawford KC, Scullion; Scottish Government Legal Directorate

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7 July 2023

Introduction

[1] This is a judicial review of the Tied Pubs (Scotland) Act 2021. The petitioners maintain that the Act is outside the legislative competence of the Scottish Parliament because: (a) tied pub contracts are a reserved matter as they involve the regulation of anti-competitive practices or agreements; and (b) the Act infringes the petitioners' property rights under Article 1 of the First Protocol to the European Convention on Human Rights.

The Lord Ordinary held that the Act was within the legislative competence of the Scottish Parliament. The petitioners challenge that determination.

Legislation and the Convention

The Scotland Act 1998

[2] Section 1(1) of the 1998 Act established the Scottish Parliament. Section 28(1) empowered the Parliament to make laws; to be known as Acts of the Scottish Parliament. That power is subject to section 29, by which an Act of the Scottish Parliament, which is outside its legislative competence, is "not law". That occurs, *inter alia*, if the Act "relates to reserved matters" or if it is incompatible with any of the Convention rights. Whether a provision of an Act relates to a reserved matter is to be determined "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".

[3] Although there were amendments to section 29 during the Parliamentary debates, the general devolution scheme followed that set out in the relative White Paper (*Scotland's Parliament* (Cmnd 3658)). The scheme consisted of a list of matters which were reserved to the UK Parliament rather than a definition of what was devolved. Section 30 provides that Schedule 5, which sets out the list, is to have effect. That schedule contains, first, a number of general reservations; notably the constitution, foreign affairs and defence of the realm (Part I). Secondly, it lists under twelve headings a large number of specific reservations ranging from financial and economic to miscellaneous, including outer space (Part II). It is "Head C – Trade and Industry" which is of direct relevance.

[4] Head C commences with Business associations and Insolvency before moving onto paragraph "C3. Competition" and then Intellectual property, Import and export control, Sea

fishing, Consumer protection and nine other areas of greater or lesser generality. C3 itself reads:

> "Regulation of anti-competitive practices and agreements, abuse of dominant position; monopolies and mergers".

It is the interpretation of those words which is at the core of the dispute. For reasons to be explained, their context and purpose require deeper exploration as does their effect. What, in short, did the UK Parliament intend these words to cover?

[5] The White Paper provides some background in narrating that, in the then UK Government's view, there were "many matters which can be more effectively and beneficially handled on a United Kingdom basis" (para 3.2). These would secure "participation in an economic unit which benefits business and provides access to wider markets and investment and increases prosperity for all" (*ibid*, quoted in *Imperial Tobacco* v *Lord Advocate* 2012 SC 297, Lord Reed at para [81]; see also 2013 SC (UKSC) 153, Lord Hope at para [29], cited in *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, Lady Hale at para [28]). The reservation about competition is explained as follows (para 3.3):

> "**Common markets for UK goods and services** at home and abroad including the law on companies and business associations, insurance, corporate insolvency and intellectual property, regulation of financial institutions and financial services, competition policy … consumer protection, regulation of the energy supply industries and international trade policy and Export Credit Guarantee Department matters."

The translation of competition policy into the wording of C3. will require greater analysis, but there is similar wording in C7., "Consumer protection", which becomes "Regulation of – (a) the sale and supply of goods and services to consumers".

[6] The *Notes on Clauses to Schedule 5* (Scottish Office, February 1998)[1] in relation to C3. read:

> "This Section reserves the regulation of anti-competitive practices and agreements; abuse of dominant position, and monopolies and mergers".

The reservation is:

> "designed to ensure the continuation of a common United Kingdom system for the regulation of competition matters. Responsibility for competition policy rests with the President of the Board of Trade".

Reference was made to the existing, and prospective, legislation which governed the investigation of anti-competitive practices and the referral of restrictive practices to the court. The Notes explain, somewhat unhelpfully, that what is reserved is "the regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers". This includes powers of investigation to enforce competition law and the administration of that law through the existing executive institutions.

The Small Business, Enterprise and Employment Act 2015

[7] Part 4 of the 2015 Act does not apply to Scotland (s 163(3)). The reason for that, according to the UK Government's *Pub Companies and Tenants Consultation: A Government Response* (June 2014) (p 14), was that "This matter is devolved in Scotland …".

[8] Part 4 introduced a Pubs Code and an adjudicator for England and Wales. The rationale for doing that was given in the Explanatory Notes, relative to Part 4, as being:

> "longstanding concerns about imbalance, unfairness and lack of transparency in the relationship between tied pub tenants and pub-owing businesses. These concerns have been explored by several Business Select Committees over a period of ten years, with further evidence supplied by responses to a Government Call for Evidence in 2012 and correspondence to Ministers. This led to a public consultation in 2013 and the Government Response to that consultation in June 2014."

[1] not the, albeit very similar, Explanatory Notes from which the Lord Ordinary quotes.

[9] The Code, which places obligations on certain pub-owing businesses, with an adjudicator to enforce it, provides tenants with an option to replace a tied arrangement with a market rent only (MRO) alternative. The objective of Part 4 was stated in the Explanatory Notes as being to ensure that: tied tenants are no worse off than other tenants; there is a fair share of risk and reward; and the relationship is based on the principle of "fair and lawful dealing". This is reflected in sections 42 and 43 of the 2015 Act. An important feature of Part 4 is that it applies only to businesses which own at least 500 pubs in England and Wales (s 69(1)).

The Tied Pubs (Scotland) Act 2021

[10] In August 2014 the Campaign for Real Ale commissioned a survey of tied pubs in Scotland. CAMRA considered that tied pubs involved unfair business practices. These had led to higher prices, lower investment and pub closures (see Policy Memorandum to the relative 2020 Bill, para 47). In May 2015 the Scottish Government commissioned its own research. This did not suggest that there was any disadvantage in the tied pub sector (Memo, para 54). Meantime, in June 2016, the Scottish Beer & Pub Association published a voluntary code of practice.

[11] Neil Bibby, a Labour MSP, was unhappy with the research results and the effectiveness of the voluntary code, which did not include an MRO option. He carried out his own consultation on reform along the lines of the 2015 Act. The object of his proposed reform was to ensure a fairer balance of power by improving tenants' rights. The majority of responders were in favour of reform. Support came not only from individual tenants but also from breweries and "drinks companies", trades unions, the Federation of Small Businesses, the Scottish Licensed Trade Association and CAMRA. The SBPA and a minority

of responders opposed reform (Memo para 89). This was on the basis, *inter alia*, that tied pubs were mutually beneficial.

[12] Mr Bibby introduced his Bill in February 2020. This ultimately gained Scottish Government support and became the 2021 Act. The policy objectives of the Bill were stated in the Policy Memorandum as the improvement of the position of tied pub tenants by introducing a Scottish Pubs Code to govern the landlord and tenant relationship (Memo para 3). They were said to be "broadly similar to those of Part 4" of the 2015 Act and designed to ensure that Scottish tenants had at least the same protections and opportunities as were enjoyed by the equivalent tenants in England and Wales (Memo para 4). The aim was to have a code which was consistent with three principles, two of which were in the 2015 Act, *viz*: fair and lawful dealing by the landlords in relation to the tenants; that the tenant should not be worse off than if they were not subject to the tie; and that the tie offered a fair share of risk and reward. As with the 2015 Act, the code would provide tenants with an MRO option.

[13] The Policy Memorandum outlined the economic background of the pub industry both in Scotland and the wider UK. It explained the advantage of tied pubs in so far as their rents would include a dry (standard) and a wet (relative to the tie) element. The actual rent paid should, at least in theory, be less than the open market figure. The Memorandum detailed the shifting sands of the pub industry in recent years with the imposition and revocation of the Supply of Beer Orders in, respectively, 1989 and 2003. These had restricted the number of tied pubs which a brewer could own. Thereafter, the UK Parliament had carried out several inquiries into tied pubs and had identified "significant concerns and problems with the tied pub model and the relationship between large pub businesses and their tenants" (Memo para 24). These included delays in rent review negotiations, lack of

transparency in these, failures to carry out repairs, ignoring oral agreements, harassment, costs of tied products, increased levels of rent and a lack of compliance with other agreements and obligations (Memo para 25). The problems stemmed from an inequality of bargaining power. The amount of the dry rent paid was becoming insufficiently reduced to negate the impacts of the wet rent. Many tied tenants were struggling to make a living. The Memorandum detailed the case for legislative reform in England and Wales and how the 2015 Act had been applied in practice (para 29 *et seq*). It set out the case for an equivalent statutory code in Scotland, noting the CAMRA survey conclusion on unfair business practices and the low take up and effect of the voluntary code (*supra*). The Memorandum did acknowledge the Scottish Government's own research (*supra*).

[14] The Act applies to all leased pubs which are subject to a contractual obligation which requires that at least some of the alcohol (in practical terms, beer and cider) which is to be sold is supplied by the landlord or a person nominated by the landlord (s 20(1)). Section 1 obliges the Scottish Ministers to introduce a code which places requirements and restrictions on businesses which involve tied pubs. There is to be an adjudicator who has responsibility for enforcing the Code (s 2).

[15] The Code has yet to be introduced to Parliament for approval. On 27 February, the court suspended the provisions of section 4 of the 2021 Act which contains the duty of the Scottish Ministers to introduce the code and an adjudicator. Any Code will have to enshrine the principles: of fair and lawful dealing between landlord and tenant; that the tenants should be no worse off than if they were not subject to a tie; and that any agreement should fairly share the risks and rewards. Schedule 1 provides that the Code should prohibit a term which limits rent assessments which can only be initiated by the landlord and can only increase the rent (para 3). It must require a landlord to offer to enter into a guest beer

agreement, which allows the sale of at least one beer chosen by the tenant (para 4). It must require a landlord to offer an alternative MRO lease (para 5); that is one which fixes the rent at a market value and does not involve a tie.

Article 1 of the First Protocol to the European Convention on Human Rights

[16] The Article states that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law …
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest …".

It is not disputed that any interference must be proportionate; a matter which is assessed by asking: (1) is the objective sufficiently important to justify the limitation; (2) is the limitation rationally connected to the objective; (3) could a less intrusive measure have been used; and (4) balancing these matters with the severity of the consequences, has a fair balance been reached between the rights of the individual and those of the community (*Bank Mellat* v *HM Treasury (No. 2)* [2014] AC 700, Lord Sumption at para 20). The intensity of the review by the court will vary according to the nature of the right and the context in which the interference occurs.

Expert Opinion

[17] Accompanying the petition was a report from Dr Pau Salsas. Dr Salsas is a managing consultant at Europe Economics, a private economic consultancy based in London. He is essentially an economist with an academic background in statistics and econometrics. The petition avers that Dr Salsas' principal findings have been "extrapolated"

into the petition (STAT 24), but the whole report is nevertheless incorporated into the petition by reference. The Lord Ordinary records that the respondent had objected to the use of the report in so far as it purported to express a view on the economic effects of the 2021 Act on the pub sector and on the proportionality of the measures relative to the petitioners' A1P1 rights. The petitioners had stated that their reliance on the report was "as evidence of fact". On that basis the Lord Ordinary was content to have regard to the report, whilst "acknowledging that the proportionality assessment was ultimately a matter for the court" (Opinion para [20]).

[18] The report addresses the question of proportionate interference under specific reference to the four questions in *Bank Mellat* v *HM Treasury (No 2),* albeit quoting the summary in *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, (Lord Mance at para 45) (report Executive Summary p 3). It emphasises, in relation to question 1, the benefits for both parties in a tied pub arrangement and the differences in contractual arrangements in other sections. Dr Salsas criticises the evidential basis for the various complaints by tied pub tenants; there being none to establish any market failure. He expresses a view that there are "no proper reasons for State intervention" (p 4). He goes on, on question 2, to say that the reasons proposed will damage the sector by challenging its traditional dynamics. Ultimately, according to Dr Salsas, landlords will discontinue the arrangement. Questions 3 and 4 did not arise in any significant way, given his previous conclusions.

The Lord Ordinary

[19] The petitioners' contention, that any regulation of tied pub agreements was a reserved matter, was rejected by the Lord Ordinary for seven reasons. First, Article 101(1) of

the Treaty on the Functioning of the European Union concerned itself with agreements which restricted or distorted competition. It provided redress which was distinct from that under the 2021 Act. Secondly, the areas which were covered by C3. were all directed at market failure and not contractual fairness, with which the 2021 Act was concerned. Thirdly, the exemption under Article 101(3), which was based on consumer-oriented fairness, did not preclude regulation in relation to other concerns such as contractual fairness. Fourthly, the petitioners had conflated the relevant market as that between tied pubs and free houses, rather than aspiring entrants into the market for distribution of beer to on-trade premises and incumbents who were already established in that market. Fifthly, the primary focus of the 2021 Act was on the protection of tied pub tenants. It did not address the effect on consumers; nor did it prohibit tied pub leases. Sixthly, the Act's express purpose was to govern the fairness of the relationship between landlords and tenants. It did not follow, from the fact that the Act interfered with parties' freedom of contract, that the Scottish Parliament was regulating competition. Seventhly, while there may be some impact on competition, those effects were incidental to the Act's purpose. The Act did not relate to the reserved matter of competition and was not outside Parliament's legislative competence.

[20] The petitioners' argument on the effect of Article 1 was also rejected. It would be premature to carry out a proportionality assessment. The remedies sought were in respect of the legislation as a whole. That challenge had to fail given that it had not been shown that the Act was incapable of being operated in a manner which was compatible with Convention rights (*Christian Institute* v *Lord Advocate*, at para [28]). The circumstances under which MRO and guest beer offers had to be made were not prescribed by the Act. The petitioners had mischaracterised these rights as automatic. Many of their complaints were based on misconceptions of what the Act requires. Any alleged dangers to the tied pub

sector and the consequences of a broad application of the Act to landlords and tenants could not be assessed until the code had been introduced.

[21] It was clear from the Policy Memorandum that the objectives of the 2021 Act were to improve the position of tied pub tenants and to redress the imbalance of power between them and their landlords. Those objectives were sufficiently important to justify the extent to which there had been any interference with the petitioners' A1P1 rights so far. It did not follow from the evidence of Dr Salsas that, where there was no evidence of market failure, the legislation had no legitimate objective.

Submissions

Petitioners

[22] This was an easy case involving two questions. First, were tied pub agreements anti-competitive? The answer to that was in the affirmative because they restricted competition. Secondly, did the Act seek to regulate these agreements? The answer to that was also in the affirmative. Section 1 could not be clearer. The Scottish Ministers were "by regulations", to "impose requirements and restrictions on pub-owning businesses in connection with tied pubs".

[23] The substance of competition law had remained largely unchanged after the United Kingdom had left the European Union. The EU legislation had been adopted into domestic law. Beer supply agreements were anti-competitive (Case T-231/99 *Joynson* v *Commission* [2002] 5 CMLR 4 at para 57; Case C-453/99 *Courage* v *Crehan* [2002] QB 507). The whole point was that, pre "Brexit", tied pubs had been subject to a block exemption as they were a form of vertical agreement; ie between persons not in competition with each other but the one retailing the other's goods (Commission Regulation (EU) No 330/2010 … on the application

of Article 101(3) [TFEU] …; Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, Art 10(5)). That exemption would not apply were there to be an MRO. The reservation in C3. was not the regulation of competition law or policy but of anti-competitive agreements. The 2021 Act purported to modify the block exemption of tied pubs. Adjusting bargaining strengths just meant changing the contractual conditions.

[24] The Lord Ordinary erroneously focused on whether the changes introduced by the 2021 Act were compliant with EU competition law. That was of no consequence on whether its provisions related to a reserved matter (*UK Withdrawal from The European Union (Legal Continuity) (Scotland) Bill* 2019 SC (UKSC) 13, at para 25). The focus on consumer protection confused the reservation under C3. with that in C7. The sole question was whether the Act's provisions related to the regulation of anti-competitive practices. The test was a broad one which encompassed both direct and indirect effects (*Reference by the Lord Advocate of devolution issues* 2022 SLT 1325, at paras 71-72 and 74). The Lord Ordinary accepted that there would be some impact on competition in the beer supply market. Whether those effects were incidental to the Act's purpose was irrelevant; they were direct and real.

[25] There was a lack of evidence supporting legislative intervention. The UK competition law regime classified tied pub leases as anti-competitive. It followed that the Scottish Parliament was imposing a new level of regulation on what were classified under UK and EU law as anti-competitive. The intention of the 2021 Act was to interfere with the current conditions of competition. It introduced a new concept of fairness. This could not be described as having no more than a loose or consequential connection to how tied-pubs were currently regulated.

[26] The Act's provisions engaged the petitioners' A1P1 rights. It was accepted in the Policy Memorandum that A1P1 was engaged (para 93, under reference to the code for

England and Wales). It was not necessary for the final code to be introduced before a proportionality assessment could be carried out. Schedule 1 prescribed mandatory provisions for the code. Those provisions were sufficient to engage A1P1. That being so, the burden passed to the respondent to provide sufficient cogent and reliable evidence to satisfy the court that any interference was proportionate. It was not for the court to substitute itself for the respondent and to provide those justifications. There was nothing premature about the argument. *Christian Institute* v *Lord Advocate* considered whether legislation, which had not yet come into force, was beyond competence.

[27] The Lord Ordinary inverted the manner in which proportionality fell to be assessed. The legitimacy of an objective was not to be determined from the extent of the interference. A proportionality assessment presupposed that a legitimate objective had been identified. The respondent had failed to substantiate any legitimate aim. No economic evidence had been produced that suggested that there was inherent unfairness in the bargaining power between landlords and tied pub tenants. The size of any Parliamentary majority was irrelevant (*UNCRC (Incorporation) (S) Bill* 2022 SC (UKSC) 1, at para 31). The onus was on the respondent (Case C-333/14 *Scotch Whisky Association* v *Lord Advocate* [2016] 1 WLR 2283 at para 53 (p 2323); *Sporting Odds* [2018] 3 CMLR 18 at paras 53-54).

[28] The remedies were sought only insofar as the provisions were outside competence. Just satisfaction was sought to ensure full and proper reparation for damage caused. The petitioners were not yet able to quantify the damage and the court should remit this issue to the Lord Ordinary.

Respondent

[29] The petitioners had not identified any specific provision which related to the

reserved matter of competition law. Rather, the challenge was to the legislation as a whole. It was first necessary to determine the scope of the reservation (*Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153, at para 26). This was to prevent the Scottish Parliament from legislating to provide what is or is not an anti-competitive agreement; what is exempt which would otherwise be prohibited or to remove an exemption. It did not extend to regulating the terms and conditions of an anti-competitive agreement so long as they did not seek to prescribe whether the agreement was or was not anti-competitive.

[30] An anti-competitive practice was one which may affect trade within the UK and have as its object or effect the prevention, restriction or distortion of competition (Competition Act 1998, s 2, adopted from TFEU Art 101). Nothing in the 2021 Act prevented landlords from continuing to enter into tied pub agreements where the terms of the block exemption were met. The purpose of the 2021 Act, ie what it was "really about" (Reference by the *Lord Advocate's Reference of devolution issues* at para 77), was the regulation of unfair contract terms and improving contractual fairness between private parties. The petitioners' interpretation of C3. would preclude the Scottish Parliament from legislating in any way which may impact upon tied pub agreements, no matter how remote. C3. was designed to regulate competition in the sense of legislating for situations which might require UK governmental intervention. It was significant that the Advocate General had not sought to intervene.

[31] The Lord Ordinary was correct to consider it premature to assess proportionality. The Code had not yet been adopted. The petitioners' attack on the 2021 Act was confined to the terms of schedule 1. The Policy Memorandum made it clear that these provisions pursued the legitimate aims of: (i) improving the position of the tenants; and (ii) redressing the balance of power. The purpose of the Bill was to confer on Scottish tenants similar statutory rights to those enjoyed by their English and Welsh counterparts. The Scottish

Parliament had been entitled to conclude that the evidence placed before it supported the general principles of the Bill.

[32] The Policy Memorandum considered alternative approaches and addressed the striking of a fair balance between the competing interests (*Bank Mellat* v *HM Treasury (No. 2)*, at para 20). It was impossible to weigh all the relevant interests without first seeing the terms of the Code. The provisions as enacted provided a framework. The Code would provide the detail of how the competing interests were to be balanced. The parameters of the MRO and guest beer offer requirements remained to be determined. The proportionality of the mandatory provisions could not be assessed. They had to be set against the terms of the Code as a whole. The provisions which were enacted to create the framework were proportionate to the legitimate aim pursued. The petitioners had not established either that the provisions or the legislation as a whole would always, or almost always, unjustifiably interfere with their rights (*Christian Institute* v *Lord Advocate* at para [88]). It followed that their challenge must fail.

Decision

Reserved Matter

[33] An interesting, if not unique, feature of the central issue, of whether the Tied Pubs (Scotland) Act 2021 encompasses a reserved matter in terms of heading "C3. Competition" in Part II of Schedule 5 of the Scotland Act 1998, is that neither the Scottish nor the UK Parliaments nor the relative Governments appear to think that it does. From a practical point of view, it could indeed be, as the petitioners put it, an "easy case" if that were determinative. However, in legal terms, it is not so simple. The intention of the UK Parliament, in using the words in C3., must be ascertained from those words in their context

within the particular section, group of sections and the statute as a whole. Thereafter, the court will require to apply section 29(3) of the 1998 Act to determine whether the intended subject "relates to a reserved matter … by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".

[34] The petitioners' case closely mirrors that in *Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153. There, the Scottish Parliament had passed an Act which, in broad terms, prohibited the advertisement of tobacco products and the use of cigarette vending machines. The appellants in that case argued that these were reserved matters. Paragraph C7. ("Consumer protection") of Schedule 5 reserved the "Regulation of – (a) the sale and supply of goods and services to consumers". As in the present case, this was, superficially, an attractive argument in so far as it is said to give the words their ordinary and natural meaning, if no regard is paid to their context. Taken in isolation, the words are not ambiguous; or so the argument ran.

[35] Lord Hope rejected that approach as follows:

> "[28] It would be surprising if the words used in section C7(a) had such a wide reach. Responsibility for Scots private law, including the law of obligations arising from contract, belongs to the Scottish Parliament. This is made clear by section 29(4) which deals with modifications to Scots private law as it applies to reserved matters but leaves Scots private law otherwise untouched, and by the definition of what references to Scots private law are to be taken to mean in section 126(4). The sale and supply of goods is part of the law of obligations and, as such, is the responsibility of the Scottish Parliament. The appellants' argument as to the reach of section C7(a) does not sit easily with this conclusion or with the way Scots private law is dealt with elsewhere in the 1998 Act. This makes it necessary to look more closely at the context in which the words of that section appear."

[36] The court agrees. The UK Parliament could not have intended C3. to mean that any legislation which touched (however tangentially) upon the regulation of an anti-competitive agreement, such as provisions in relation to the form in which the agreement should be expressed or its mode of execution, is "not law" because it relates to a reserved matter.

Equally, specifically in relation to tied pubs, regulation of the licensing conditions, such as opening or closing times, cannot have been intended to be reserved. To understand what the UK Parliament had intended, regard must be had to the context.

[37] The context in which the words "Regulation of anti-competitive practices and agreements" appear in paragraph C3. is under the heading "Competition". That is important as is the setting of the words alongside "abuse of dominant position; monopolies and mergers". The heading may be looked at as an aid to construction once, as here, ambiguity is detected (*Imperial Tobacco* v *Lord Advocate*, Lord Hope at para [17]). It is part of the wider context within which the paragraph sits. The wider context of the statute as a whole is that of defining matters which have pan-United Kingdom effect and are thus more appropriately regulated on a UK, ie by the UK Parliament, basis. When seen in these contexts, the regulation of anti-competitive agreements is to be understood as applying to measures which will affect the anti-competitive regimes already in place across the UK, and previously the European Union; notably those which fall under the prohibition in section 2 of the Competition Act 1998. This applies to a range of "[a]greements etc" which may, *inter alia*, affect trade within the UK or have as their object or effect the prevention, restriction or distortion of competition within the UK.

[38] That is the objective or intention of the wording of C3 set in its proper context. It is not designed to prevent the Scottish Parliament from introducing measures which have as their object the rectification of inequalities in the relationship between landlord and tenant in particular leases. It is to stop the Parliament from legislating in a manner which will affect UK anti-competitive measures. The position becomes even more apparent when it is realised that the UK Parliament has, in Part 4 of the Small Business, Enterprise and Employment Act 2015, already introduced similar provisions in large part to England and

Wales. It presumably does not regard this as distorting the competition regime. The Scottish Act brings the two jurisdictions more into line with each other than hitherto, rather than increasing any perceived divide.

[39] It was accepted that tied pub leases were anti-competitive but that they were exempt from challenge on that ground. The 2021 Act does not alter that. Its purposes do not include preventing a landlord from entering into a tied pub lease with a tenant; nor do they terminate such leases. The introduction of a Code which will grant the tenant certain rights in relation to altering the lease into a market rent only one or to permit the sale of a guest beer are not *per se* anti-competitive measures; rather the opposite. If the Act does have some effect on such measures, it is no more than a "loose or consequential connection" (*Imperial Tobacco* v *Lord Advocate*, Lord Hope at para [16]). The challenge, in so far as it is based on reserved matters falls to be rejected.

A1P1

[40] The objective of the 2021 Act is a legitimate one. This was, as expressed in the Policy Memorandum, the improvement of the position of tied pub tenants by introducing a Code to govern their relationships with the landlords. Although there are differences between the provisions in England and Wales and those in the 2021 Act, the Scottish legislation is, as the Memorandum states, "broadly similar" to that south of the border. The stated intention is to afford Scottish tenants similar protections to those acquired by tenants under the 2015 Act. It is anticipated that the provisions of the Scottish Code will mirror those in England and Wales concerning fair dealing, and equivalence with the non-tied tenant, as well as introducing a fair share of risk and reward. Dr Salsas may disagree on the legitimacy of the objective, but there was adequate, albeit in part contradicted, material before the Scottish

Parliament to demonstrate a systematic imbalance in bargaining positions between landlords and tenants which led to unfair business practices. That being so, an objective which is designed to cure that perceived social injustice is legitimate. The proposal to introduce a tied pub Code which attempted to redress the balance, was rationally connected to the objective.

[41] The issue of a less intrusive measure was addressed in Mr Bibby's research on the effectiveness of the voluntary code. No realistic alternative to cure the perceived ills of the tied pub systems was advanced. The achievement of a fair balance between the rights of the individual (in this case the landlord) and the community as a whole is something which, as the Lord Ordinary found, cannot be assessed until at least the promulgation of a Code and probably not until it is seen in operation in relation to a particular tied pub or lease.

[42] This is a root and branch challenge to the whole 2021 Act; not to a specific provision or provisions. In order to succeed in such a wide-ranging attack on the prospective effect of legislation, the petitioners require to demonstrate the Act, as a whole, cannot be operated in a manner which is consistent with the petitioners' A1P1 rights in "all or almost all cases" (*Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, Lady Hale at para 88). This is far from being demonstrated here. This ground of challenge also fails.

Conclusion

[43] The reclaiming motion will be refused and the court will essentially adhere to the interlocutor of the Lord Ordinary dated 9 December 2022. That interlocutor correctly sustained certain of the respondent's pleas-in-law. The effect of that is not a refusal of the petition, which has been accepted and adjudicated upon, but a refusal to grant the remedies sought in statement 6. The interlocutor will be corrected accordingly.

[44] Had the court found that there had been a breach of the petitioners' A1P1 rights, it would have declined to remit the case to the Lord Ordinary to assess any award of damages by way of just satisfaction. This is a reclaiming motion to a Division of the Court from a final decision of a Lord Ordinary on a petition for judicial review. The court is not accustomed to remitting matters, which it is dealing with on a motion for review, to the Outer House for further procedure. All relevant issues ought to have been dealt with by the Lord Ordinary before the case reached the Inner House. If they were not, this court might, in certain circumstances, deal with any issues left unresolved. In this litigation, if any substantial damages were to be sought, that ought to have been specified in the written and oral pleadings in the Outer House. The absence of such pleadings means that there is no basis for this court to make any award by way of damages.

Postscript

[45] The Practice Note (No. 3 of 2011): *Causes in the Inner House*, was designed *inter alia* to complement new rules of court which were intended to enhance case management and to focus the true issues for determination on appeal. Paragraph 86 outlines certain general principles which apply to written notes of argument. One of these is that, where an authority (meaning a judicial precedent) is cited, it should be accompanied by the proposition of law which the case ostensibly vouches. More than one authority should not normally be cited in support of one proposition. Paragraph 91 provides that bundles of authorities should not include those which vouch propositions which are not in dispute. No more than 10 authorities should normally be cited. It has, for some years, been the practice of the court to require parties to enrol a motion where they seek to cite more than 10 cases. This ought to be done some time before the Summar Roll hearing and preferably at the stage

of the Procedural Hearing, by which time the written notes of argument should have been lodged (RCS 38.13) and thus the scope of the precedent to be cited ought to be identifiable.

[46] Neither party's note of argument complied with what are now well-known rules or practices. Both cited multiple cases in support of a single proposition and in some cases for propositions which were not in dispute. When the joint list was lodged, it contained 18 cases. A motion to refer to another case was made on the eve of the Summar Roll hearing. The petitioners' application for these to be cited in oral argument proceeded on the basis that the terms of the Practice Note were not conducive to the proper development of the law; the inference being that they or their counsel did not agree with the object of the PN. They should therefore be entitled to cite whatever case, and however many, they deemed fit. Reference was made to the practice in a particular tribunal, before which the petitioners' counsel had recently appeared, to allow the citation of many volumes of authorities.

[47] The court refused the petitioners' application. The terms of the Practice Note have been devised for sound reasons, after consultation with the profession. As part of the duty of counsel to assist the court, Practice Notes ought to be complied with, in the absence of good reason to the contrary. No attempt had been made to prioritise a core number of cases or to justify citation of the others. After a short adjournment, the parties were able to confine the list to 10 authorities; and the petitioners' counsel graciously accepted that they probably did not require to cite the disregarded cases. The court agrees.