Campaign for Pubs

Promote, Support and Protect Pubs

Rt. Hon Kwasi Kwarteng MP
Secretary of State
Department for Business, Energy & Industrial Strategy
3 Whitehall Place
London
SW1A 2AW

8th February 2021

Dear Kwasi,

Discrimination against tenants who have exercised their legal right to the Market Rent Only option

We are writing from the Campaign for Pubs to raise an extremely serious matter which is threatening the future of some pubs and pushing some publicans towards bankruptcy. We refer to the scandalous matter of publicans being singled out and charged full rent by their pub-owning company, ***simply for having exercised their legal rights under the Pubs Code***.

This is clearly profoundly discriminatory, and also somewhat sinister, as it is a clear attempt to circumvent the intent of legislation and the will of Parliament. The tenants involved have often reported a feeling that, despite being good-quality tenants in every sense, they are now being "punished" by their pub-owning companies for exercising their legal rights under the Pubs Code, ***but even worse than that, many report a strong believe that they are being subjected to an opportunistic attempt to force them out of their pubs so that their pub-owning company can regain the sites for their own use.***

These tenants are being treated in a clearly detrimental manner, something that was expressly mentioned in the legislation as being unacceptable. As Secretary of State for BEIS, the responsibility is upon you to ensure adherence to the intent of that legislation.

As you will be aware, the Covid crisis has taken a universally enormous toll on hospitality businesses of every type, with all pubs being particularly hard-hit as a result of enforced closure during the three periods of lockdown, as well suffering greatly reduced trade where they were able open under the restrictions imposed by the Tier system.

Given that pubs everywhere have been similarly affected it would seem reasonable that pubs, especially those owned by the large, regulated pub companies, should receive equal levels of support and understanding from their pub-owning company, but this has absolutely not been the case.

Initially, under the first few weeks of the first lockdown, rental support of any type was hard to come by. This led to a high profile social media campaign under the banner #nopubnorent which was backed by many industry campaigning bodies including Campaign for Pubs. Eventually this campaign bore fruit as, one by one, the major regulated pub companies, and also many of the smaller pub-owning companies and regional brewers, responded to the significant adverse publicity generated by their reluctance to provide fair and reasonable help to tenants whose pubs were closed and unable to generate any revenue with which to pay rent.

The majority of companies eventually agreed to give rent concessions to most of their tenants, often linking their rent relief package to the amount of Covid relief grant that had been received by a given pub (which in turn depended on the rateable value of that pub). Commonly this led to a situation whereby a higher level of rent relief was extended to pubs that had received a lower level (or indeed nothing at all) in grant funding.

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One type of pub tenant however was systematically excluded from any such support at all, and has been billed in full for all rent since the very beginning of the crisis. We refer here to “free-of-tie” (FOT) tenants. These are tenants who have what is known as a Market Rent Only (MRO) or Commercial agreement, meaning that they are not subject to a product supply “tie”, and are therefore not obliged to buy their products from their pub-owning company.

Often these tenants will have had to endure an onerous and protracted battle with their pub company to exercise their right to extract themselves from this tied supply arrangement, sometimes under the statutory provisions of the Pubs Code (2016), and sometimes in a private legal battle where their access to the Pubs Code provisions was thwarted by their pub-owning company. Either way these tenants will have had to overcome many obstacles to achieve their FOT status, and will have invariably incurred the disfavour of their pub owning company in the process. We believe that this disfavour is now being manifested in the open discrimination of pub-owning companies against these tenants in terms of the withholding of rent relief during this crisis.

The Government put in place a Code of Practice for commercial rents during the first lockdown, which was supposed to provide a framework whereby commercial tenants could negotiate reasonable rent concessions with their landlords. However, the Government chose not to make the Code mandatory, despite passionate warnings from tenants everywhere that many commercial landlords would openly ignore a Code that was merely voluntary. Indeed some of the most impassioned warnings came from pub tenants themselves, because they have long had to endure operating in a sector where their commercial landlords have long treated voluntary Codes with open contempt and where self-regulation has consistently failed. Their behaviour has indeed been so consistently poor (as recognised by no fewer than four business Select Committee hearings) that it resulted in the largest pub-owning companies being made subject to statutory regulation under the Pubs Code itself.

The provisions and intentions of the Government’s current voluntary Code of Practice are very clearly universal, meaning that the principles it lays out are clearly supposed be applied equally fairly to all tenants depending upon their circumstances. Therefore, if one pub is closed and unable to trade then that pub should expect equal treatment to another similar pub owned by the same commercial landlord that is also closed and unable to trade.

This has absolutely not been the case in the tenanted pub sector, where pub-owning companies have openly refused to give any concessions, or indeed to negotiate at all, with the vast majority of FOT tenants who have attempted to achieve parity with tied tenants in comparable situations. Furthermore, we would point out that the withholding of this support impacts disproportionately heavily on the FOT tenants affected, because very often they have had to settle for a higher fixed rent as part of the process of extracting themselves from a former tied arrangement.

This is a clear case of open discrimination against tenants who, along with the rest of their publican colleagues nationwide, are suffering real hardship. We believe this discrimination was completely foreseeable and that the active withholding of rent relief from these tenants amounts to opportunistic and predatory treatment by pub-owning companies who, by their actions, are openly revealing that they have no interest in these particular tenants surviving in business. This is because the whole point of the MRO option in the Pubs Code was to enable a much needed redistribution of the excessive profit share being taken by pub-owning companies from each pub under the tied model. The failure of a FOT pub business would allow that pub-owning company to regain vacant possession of the premises for their own use, giving them various opportunities to claw back their former excessive profit share.

In such a situation they would have free rein to reinstate tied supply terms with a new tenant which would yield more profit to themselves and, in the case of the brewing pub companies, would secure a guaranteed new route to market and increase their market share. Alternatively, the pub-owning company would have the chance to cherry pick the best performing sites for their own direct management, meaning the permanent loss of a locally-run small business. In the worst case scenario, the building may be subject to disposal for redevelopment into alternative use, which would yield a short term windfall gain to the pub-owning company at the cost of the permanent loss of a precious community facility.

Sadly, due to bad and compromised law-making, the FOT tenants affected are not covered by the Pubs Code. The Fair Deal for Your Local campaign argued strongly that the Pubs Code should apply to all tenants of all the large pub-owning companies, but alas some other organisations, with different interests, argued that it should only apply to tied tenants. What this has done is to effectively allow precisely the kind of discrimination that your department agreed to prevent.

The Fair Deal for Your Local Campaign, the British Pub confederation and our own Campaign Director, Greg Mulholland, specifically warned against restricting the Pubs Code to tied tenants, because it would leave free-of-tie tenants of the same regulated companies vulnerable to discrimination, exploitation and bullying. They warned that the Government would create the absurd position in law that any tenant exercising their right to go free-of-tie (MRO) under the Pubs Code would, in so doing, immediately put themselves outside the same Pubs Code with no protection against exploitation and discrimination from the same, ongoing, pub-owning company. It is clearly a farcical situation that tenants exercising the very rights given to them by Government and Parliament should simultaneously have to deprive themselves of their own ongoing right to not be discriminated against.

So, we ask that the Government recognises this discriminatory behaviour as a matter of urgency, and acts swiftly and decisively to protect the rights of tenants who have exercised their statutory right (usually at great effort and expense) to extricate their small business from the restrictive shackles of a tied supply agreement.

In particular, we ask that the Government revisits the failed voluntary Code of Practice and retrospectively gives it statutory weight, so that all commercial landlords are mandated by law to treat all their tenants fairly and consistently, and to offer fair rental discounts that can be backdated to the start of the crisis.

We also ask that all pub tenants be given the statutory right to a special Covid rent review, with recourse to a binding independent assessment of their ongoing rent, so that they can take their business safely through the remainder of this crisis and beyond.

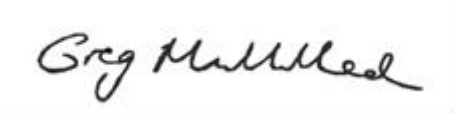
In connection to this we make an important specific request, which is that “upward only” rent review clauses in existing leases be ruled unenforceable in all cases to allow a sensible resetting of the commercial rental market in the post-Covid age.

Publicans have had to deal with enormous pressures throughout this crisis. They have worked so hard and invested so much of their own limited resources in order to keep their customers and staff safe, and have risen admirably to every challenge in the overwhelming majority of cases.

It is outrageous and totally unjust that any publican should be expected to continue in such circumstances whilst also having to endure the ever-present additional stress of mounting rent arrears imposed by uncaring, often openly predatory, commercial landlords who would quite happily see the publican rented not only out of business, but in many cases also out of their home.

We look forward to hearing from you and hope you will engage with this issue and stamp out this clear discrimination.

Yours sincerely,



Greg Mulholland
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Paul Crossman
Chair

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