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SMTA – advice concerning the Coronavirus Business Support grant scheme ("the grant scheme") and the stance adopted by Scottish Local Authorities.

I am providing this short note following receipt of material on 5 August 2020 which comprises of various responses by Local Authorities from throughout Scotland to the SMTA's objections to the way in which some members' grant applications, made under the grant scheme, have been refused.

The common theme throughout the Local Authority responses that I have seen is that applications have been rejected because applicants have failure to demonstrate retail use.

Is the stance taken by Local Authorities open to challenge?

I will not rehearse the pronouncements from the Scottish Government at the time of the introduction of the grant scheme. Many are referenced in the attached Court of Session decision of Sharp v The Scottish Ministers [2020] CSOH 74 that was issued on 23 July 2020. That case involved a challenge to the application of the grant scheme and to the best of my knowledge is the only case which has sought to judicially review an aspect of the grant scheme. A copy of the decision accompanies this Note.

Although the application failed, Lord Fairley's judgment offers helpful commentary on how the grant scheme came into operation. I should emphasise that whilst this provides background information, the judgment does not address the circumstances in which certain SMTA members find themselves. The issue for SMTA members is more straightforward; is there a legitimate basis for the refusal of their grant applications?

To answer this question the correct place to start is with a consideration of the Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020 ("the Regulations") The Regulations underpin the grant scheme. A copy of the Regulations accompanies this Note.

Below I quote from the Regulations:

> **Relief for lands and heritages used for retail, hospitality or leisure purposes, or as or at an airport**
> **4.**—(1) This regulation grants relief to a person who is liable to pay rates in respect of lands and heritages on a day in the 2020-21 financial year where—
> (a) the grant of relief complies with paragraphs (4) and (5), and
> (b) the lands and heritages are wholly or mainly used on that day for a purpose, or purposes, specified in the classes in schedule 1.
> *(emphasis added)*

Schedule 1 of the Regulations includes a range of classes that will enjoy relief, the intention being that these classes fall within the scope of the retail, hospitality and leisure sectors.

For present purposes the only relevant class is class 12, it states:

> **Class 12 Retail shop**
> Use as a shop, being a building or part of a building that is used for the retail sale of goods to members of the public who visit the building to buy goods for consumption or use elsewhere, whether or not by the buyer, for purposes unconnected with a trade or business.

Although the description in class 12 might be criticised as somewhat 'woolly', the wording is no so unclear as to lack meaning. To gain an understanding of its meaning a breakdown of the clause assists:

'Use as a shop' – although 'shop' is not defined, one can by inference know what that means

'*is used for the retail sale of goods'*

'to members of the public who visit the building to buy goods for consumption or use elsewhere'

'whether or not by the buyer'

'for purposes unconnected with a trade or business'

What this comes to is that there is a statutory definition of 'retail shop'. It may be that in certain particular circumstances there is a blurred line as to whether a premises does or does not fall within this definition, nevertheless there is a criteria against which a local authority can apply its judgment when determining whether the premises is a 'retail shop' or not.

Read on its own I think it would still be possible to argue that a garage or automotive service business could fit into the description of a 'retail shop'. However, this definition must also be considered within the context of clause 4(1) (quoted above), in that such a 'retail shop' must be '*wholly or mainly used'* in the manner set out in the class.

When referring to how the criteria was being applied one local authority stated:

"Under this definition retail premises must be wholly or mainly used for the selling of items for use or consumption elsewhere. It is not considered that garages or automotive services businesses meet this definition as the goods sold are more likely to be purchased to be used in the servicing or repair of a vehicle on the same premises."

Whilst I think this explanation is slightly misdirected, it is not reasoning which is irrational or unreasonable in judicial review terms. If one considers what goes on in garage or automotive repair shops it is difficult to refute the assertion that such goods that are sold are likely to be used in actual serving or repair of vehicles, and, importantly, it is difficult to avoid the conclusion that even if there is retail activity, it is not activity for which the premises are 'wholly or mainly used'. The local authority's position is therefore, on the face

of it, justified in such a situation because it is making a judgment against the wording of the Regulations. In my opinion, provided such an assessment is proceeding on this rational basis there is no scope for challenge.

In the information provided, another Local Authority explained that its decision-making process included an assessment based upon the percentage of floor space given over to a particular activity. Applying the wording of the Regulations and the reasoning above, using a criteria like that would also seem to be a defensible position, provided always that there is a mechanism for an applicant to seek review or an appeal of any initial decision.

Since Class 12 has been created to ensure that 'retail shop' is included in the grant scheme, if an applicant cannot demonstrate that it falls within the class, or any other class within Schedule 1 of the Regulations, then it will not have met the criteria necessary to secure a grant.

Policy Notice

Although the Policy Notice that accompanies the Regulations does not enjoy the weight of law it is useful to be mindful of what that says. A copy accompanies this note.

Under the heading 'Policy Objectives' it is stated:

> The 100% RHL(*retail, hospitality & leisure)* relief will be available for properties in the retail, hospitality and leisure sectors, where they are wholly or mainly used on a day for a purpose specified in the classes in schedule 1 of the Regulations.
> (*emphasis added)*

This comment supports what I have observed about the Regulations and what they are setting out to achieve. The Regulations set out a mechanism for determining which premises fall within the criteria for a grant. To that end the Regulations achieve that purpose and cannot be regarded as arbitrary or capricious.

Local Government Financial Circular No 8/2020 (updated 4 May 2020) ("the circular")

For completeness a copy of the circular accompanies this Note.

The circular is intended to be a guide to Local Authorities, it does not carry the weight of law. Read on its own it is a confusing document for it does not reference the classes set out in Schedule 1 of the Regulations. Thus, if read in isolation, one can be left to question why a car wash, or a laundrette falls within the grant scheme, but a automotive service business does not. On the face of it these operations seem similar. An explanation for the demarcation only comes when one reads the different classes set out in the Schedule.

The circular is at best a guide. That said, having reviewed it I do not find that in contains anything which is inconsistent with the Regulations or for which use could be made in any challenge.

Summary

The Regulations appear to achieve the purpose for which they were drafted. I do not see scope for judicial review.

Applicants who seek to challenge a Local Authority's refusal of a grant need to focus on arguments which would highlight how it is that their premises fall within the criteria of class 12. The focus of any argument would need to be on demonstrating that the premises 'wholly or mainly' falls within the definition of a 'retail shop'. Individual cases can turn on the specific facts but in my opinion there is no scope for a 'root and branch' challenge to the general line that has been taken by Local Authorities in the material that has been provided to me.

BH.