BL-2018-000019

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
The Hon. Mr Justice Zacaroli

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN APPLICATION UNDER SECTION 69 OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM
B E T W E E N

(1)EI GROUP PLC
(2)UNIQUE PUB PROPERTIES LIMITED

Claimants

- and -

Defendant

ORDER

ORDER

1. Leave to appeal under section 69 of the Arbitration Act 1996 is refused in respect of the first ground of appeal.
2. Leave to appeal under section 69 of the Arbitration Act 1996 is granted in respect of the second and third grounds of appeal.

REASONS

1. In respect of the first ground of appeal (that the Pubs Code requires that a proposed MRO compliant tenancy should be offered by way of a new tenancy and the Arbitrator erred in law in not so holding), the Arbitrator's decision is neither obviously wrong nor seriously open to question. There is on the contrary force in the Arbitrator's conclusion that nothing in the Pubs Code, or the statutory provisions relied on by the Claimants, suggests that a proposed MRO compliant tenancy can only be offered by way of a new tenancy as opposed to a deed of variation of an existing tenancy.

2. Under the second ground of appeal, it is contended that the choice to offer a new tenancy and the consequences of that choice cannot amount to unreasonable terms contained within the proposed tenancy for the purposes of section 43(4)(a)(iii) of the 2015 Act. The Arbitrator, at [60] to [67] of the Award concluded, in agreement with the Defendant, that the condition that the MRO proposal is provided by way of a new tenancy is unreasonable as: (i) it triggered a substantial liability for the Defendant in respect of SDLT; (ii) it means that the Defendant is required to produce a business plan; and (iii) it means that the repairing obligations in the existing lease are triggered and the dilapidations are crystallised.

3. I consider that it is open to serious doubt whether these consequences fall within the ambit of section 43(4)(a)(iii) on the basis that they do not constitute "unreasonable terms and conditions" contained within the proposed tenancy. Further:
   (1) The determination of this question will substantially affect the rights of the Claimants and the Defendant, because it will determine whether or not a deed of variation must be offered to the Defendant;
   (2) The question is one which the Arbitrator was asked to determine (the Arbitrator having rejected the Claimants' first contention that an MRO compliant lease had to be offered by way of new tenancy);
   (3) The question is one of general public importance given the potentially wide application of the Pubs Code, the Pubs Code has yet to be considered by the courts, and the question whether it is open to a pub owning business to offer an MRO compliant lease by way of new stand-alone agreement is likely to have significant cost consequences within the industry as a whole.
   (4) I am satisfied that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances that the court determine the question.

4. Under the third ground of appeal, it is contended that the Arbitrator applied the wrong test to determine what terms are "not common" for the purposes of regulation 31(2)(c) of the Pubs Code since (a) a term may be common even if it is not "prevalent" and (b) the type of information likely to be available to knowledgeable and prudent parties conducting negotiations is irrelevant to the weight to be attributed to comparable evidence for the purposes of determining whether a term is "not common".

5. While the Arbitrator did not, in determining what was to be taken into account in construing the word "common" at [86] to [88] of the Award, expressly equate "common" with "prevalent", it appears that he did do so in considering whether each of the relevant terms were common (see, for example [92] of the Award). I consider that it is open to serious doubt whether "common" can properly be equated with "prevalent". This is sufficient to mean that the Arbitrator's conclusion as to the meaning of "uncommon" is open to serious doubt. Further:

   (1) The determination of this question will substantially affect the rights of the Claimants and the Defendant because, whilst not being determinative of whether the terms were otherwise unreasonable, a different conclusion on the issue would have required the arbitrator separately to consider the reasonableness of the terms;
   (2) The question is one which the Arbitrator was asked to determine;
   (3) The question is one of general public importance given the potentially wide application of the Pubs Code, and the Pubs Code has yet to be considered by the courts.

(4) I am satisfied that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances that the court determine the question.

Dated 19 January 2018