

Publisher's Note: The outcome of an arbitration is based on its own facts and the evidence produced in the case and is not binding in other cases where the landlord and tenant are not the same. The Pubs Code Adjudicator does expect a regulated pub-owning business to consider its understanding of the law in light of each award that makes a finding on the interpretation of the statutory framework and to adjust its behaviour towards tenants as appropriate. The publication of an arbitration award or an award summary does not mean the Pubs Code Adjudicator endorses the decision and it does not form legal advice about any issue.

**In The Matter of an Arbitration
Under
The Small Business, Enterprise and Employment Act 2015
And
The Pubs Code Regulations 2016**

Gelma Ltd

v

Star Pubs and Bars Ltd

**Concerning
The Market Inn
Lemon Quay
Truro
TR1 2LQ**

Third Award of

Arbitrator

5 November 2019





1. The Dispute


2. This dispute concerns the duties of a pub owning business (POB) under the Pubs Code etc Regulations 2016 (The Code) between Gelma Ltd (Claimant) and Star Pubs and Bars Ltd (Respondent).
3. An application for arbitration of the dispute was made to the Pubs Code Adjudicator and by letter dated 12 April 2019 I was appointed by the Pubs Code Adjudicator as arbitrator to determine the dispute.
4. The seat of this arbitration is England and Wales.
5. Following my appointment, the Respondent raised points of jurisdiction. I made my First Award on jurisdiction dated 14 August 2019. My award substituted Gelma Ltd as Claimant and found that the index linked reviews in previous years did not constitute a rent review within the last five years.
6. I issued Order for Directions No 2 providing for submission on the costs of the First Award. I made Award No 2 on the costs of the jurisdiction issue on 1 October 2019.
7. I issued Order for Directions No 3 on 4 September 2019 providing for submissions on the substantive part of the claim
8. I have received submissions on behalf of the Claimant and Respondent and further replies from the Claimant and respondent.

9. The Claim

10. The claim is a brief one but raises a significant point. The Claimant says that the Tied Pub Tenant (TPT) has been in place since 13 November 2013 as leaseholder/tied tenant.

- 
11. On 8 November 2018 the TPT asked for a rent assessment proposal (RAP) under Regulation 19(2) and Regulation 66(2) of the Pubs Code “whereby such an assessment has not ended within a period of 5 years ending on the date of the request”. The landlord Pub Owning Business (POB) refused.
 12. The TPT requested the production of the RAP and the POB declined so the matter was referred to arbitration.
 13. Following the making of the First Award there is no reason why a RAP should not be provided.
 14. The Claimant seeks an award that the refusal to supply a RAP pursuant to the 8 November 2018 request is unlawful and to direct the POB provides a new compliant RAP.
 15. **Statement of Defence**
 16. The defence statement is similarly brief. It starts by setting out the chain of leases from 2013 to date.
 17. From 7 November 2013 to 28 February 2015 the property was occupied under a Temporary Management Agreement (tenancy at will) at a rent of [REDACTED] per month. The Tenant under the temporary lease was Incus AV guaranteed by [REDACTED].
 18. From 1 March 2015 the premises were let to Zekla Ltd guaranteed by [REDACTED] at an agreed rent of £20,750 pa. Both leases contain information about product prices and other commercial matters but in slightly different terms.
 19. By a Licence to Assign dated 21 December 2017 the tenant’s interest was assigned to Gelma Ltd guaranteed by Kevin Heaney.

- 
20. The claimant alleges it is entitled to a RAP under Regulation 19(2)(a) and Regulation 66(2) as such an assessment has not ended within a period of 5 years ending on the date of the request.
 21. S70 of the 2015 Act defines a TPT as a person who is (a) the tenant or licensee of a tied pub or (b) a party to negotiations relating to the prospective tenancy of, or a licence to occupy premises which are, or on completion are expected to be, a tied pub.
 22. The Respondent accepts that occupation under the terms of a Temporary Management Agreement would constitute a licence to occupy bringing the party within the definition of a TPT.
 23. However, the identity of the TPT has changed 3 times since occupation of the premises commenced. The Claimant was not a party to the Temporary Management Agreement and had no connection with the occupant under that arrangement. The Claimant has not been “in situ in the premises since 13 November 2013 as leaseholder/tied tenant”. The existing arrangement started on 1 March 2015 and provided for open market reviews every 5 years.
 24. The claim that the combined effect of Regulations 19(2)(a) and 66(2) entitles the Claimant to a RAP is resisted on the basis it is perfectly reasonable that a RAP within the Pubs Code was not completed in the 5 years from November 2013 as a new lease was granted on 1 March 2015. Under the Code the TPT has a right to request a RAP every 5 years on the contractual review dates.
 25. The Respondent submits the intention underpinning Regulation 19(1)(b) and 19(2) on which the TPT seeks to rely is to protect TPT’s who are either not subject to rent review provisions as part of their occupation arrangements or where the POB is in breach of its obligations to provide a RAP. Neither applies here.



26. The Respondent sent a RAP on 15 July 2019 including all the information required under Regulation 20(1) of the Code and with the timetable under Regulation 20(2). The tenant is not entitled to a further proposal.

27. Claimants Response

28. The chain of tenancies set out above is agreed.

29. The First Award determined that Mr Heaney fitted the definition of a TPT and that during the Tenancy at Will Mr Heaney was a tied tenant.

30. The intention of the Code was to make sure that a tenant could not be placed in a perpetual short term or temporary agreement thereby avoiding the 5-year trigger and this is demonstrated by the different wording in Regulations 19(1)(a) and (b). The Respondents interpretation has no merit and they confirm no rent assessment took place from November 2013. The tied tenant was in position for longer than 5 years which is the trigger under Regulation 19(1)(b).


31. The Claimant disagrees that a compliant RAP has been made in 2019. It is irrelevant as a request was made in November 2018 and the Code does not allow two MRO proposals so if the TPT accepted the July 2019 RAP this would not allow the trigger event to lead to an MRO and it had to be ignored. It is not the Claimants fault the arbitration was extended by the jurisdiction issues.

32. It is denied that the Respondent has already served the Claimant with a compliant proposal and cannot serve another as the rent proposal provided on 15 July 2019 has not ended as per Regulation 19(1)(b) "*such an assessment has not ended within the period of 5 years ending with the date of the request*"



33. Respondent's reply

34. The Respondent disputes that Mr Heaney is the TPT. The First Award held that Gelma Ltd is the tenant.
35. Mr Heaney has never been the TPT. The Claimant has produced no evidence Mr Heaney was a party to the Temporary Management Agreement, or any of the subsequent lease documents.
36. Regarding the Claimants arguments, Regulation 66(2)(b) provides that "*a rent review is concluded when the rent or money payable in lieu of rent is agreed in writing between the POB and the TPT.*"
37. The rent was agreed between Red Star and Zekla Ltd when the tied lease came into effect in April 2015 and superseded the temporary agreement. The rent was assessed at that time and can be stated to have concluded at that point in terms of Regulation 66(2)(b). The first contractual date under the lease is 1 March 2020. The rights and obligations of the lease apply to the Claimant following the assignment of the lease.
38. Given a rent assessment concluded in April 2015 and the next rent assessment is not due until 1 March 2020, the Claimant was not entitled to make a request on 8 November 2018.
39. The Claimant argues the 15 July 2019 RAP does not comply with the Code but has provided no reasons why it believes that to be the case.
40. The Respondent disagrees that the 15 July 2019 RAP would not have allowed the Claimant to make an MRO request. Under Regulation 23(1)(b) receipt of a RAP entitles the TPT to request an MRO by notice within 21 days of the RAP.
41. The Respondent is concerned by the suggestion the Claimant would consider refusing or delaying to agree the RAP dated 15 July 2019 for the tactical reason of seeking an





MRO, an opportunity the Claimant failed to use. There are means to resolve rents payable using the PIRRS to ensure no dispute runs indefinitely.


42. If I find the Claimant is entitled to a review following its 2018 request as the new lease does not constitute a rent assessment then this results in the illogical position where a TPT could possibly request a rent review as early as day one of a new lease thus triggering the right to seek an MRO. This appears to be a departure from the regulations where the TPT can request a review if there has not been one for 5 years.

43. Discussion

44. The basis of the claim is that no rent assessment has been made since the Tenancy at Will started in 2013. If that argument is correct, where does this leave the grant of the new lease in 2015? Is that a rent assessment?
45. The tied lease was granted before the Small Business Enterprise and Employment Act 2015 came into force and a year before the Code. The lease contains 5-year rent reviews. Regulation 19(1)(a) will apply at the review date.
46. It is not clear to me that the Code is intended to give the tenant effectively 2 bites of the cherry in the circumstances of this lease.
47. The Code allows a TPT to compel the POB to review the rent, even if it chooses not to, on contractual review dates for such reasons as they are upwards only and have not been implemented as the market has fallen. A review under the Code is to market rent and not upwards only.
48. The Code also allows the TPT to compel the landlord to review the rent if the lease does not contain contractual reviews or there has not been some form of rent assessment within a period of 5 years ending with the date of the request. There may be other circumstances where this arises and I do not need to provide an exhaustive list.


- 
49. As an ordinary matter of impression, I am more inclined to the view that the last rent assessment was in 2015 at the start of the current lease and another is therefore not due until the contractual review date in March 2020. The Code uses “rent assessment” and “rent review” interchangeably as distinct from the defined term “rent assessment proposal”. There is nothing to indicate that a new lease cannot operate as a rent assessment or rent review for the purposes of the Code. The transitional provisions of Regulations 65 and 66 support this view. Events occurring before the commencement date of the Code are not affected by it but the Code does not say such events are ignored for the purpose of deciding when a rent review can be carried out. The previous Tenancy at Will was not at a market rent, merely a relatively nominal payment. The arrangements between the landlord and tenant were completely reviewed with a 20-year lease replacing a Tenancy at Will and revision of the commercial arrangements relating to rent and products. As an ordinary use of words this was a rent assessment. The Code provisions did not apply to the process as the lease predates the Code.
50. I accept the point made by Respondent that the Code is intended to protect tied tenants who do not have rent reviews in their leases or where the POB is in breach of requirements to provide a RAP. I do not consider this is inconsistent with the Claimants argument that the Code is intended to ensure tenants are not placed in a perpetual short term or temporary arrangement. None of those circumstances arise in this case.
51. If the Claimant is right that a new lease does not constitute a rent assessment then any tenant who has occupied for 5 years can demand a rent review at any point in a new lease up to five years from grant unless the old lease had a late rent review under the code. I do not think this can be right.
52. I am not persuaded that the chain of tenancies is decisive in determining which date is to be used. It is a question of fact when the rent was last assessed.

- 
53. Regulation 15 sets out what is to happen when notices are served under the Landlord and Tenant Act 1954 leading to the grant of a new lease. I can see nothing in the code which would entitle a tenant to serve notice under Regulation 19(2)(b) requesting a rent assessment in the succeeding 5 years. Similarly, I can see nothing which entitles the tenant to serve a notice in the first 5 years of a new lease which predates the Code.
54. I therefore hold that the grant of a new lease in 2015 was a rent assessment for the purposes of calculating dates under the Code.
55. I have not received any argument as to whether any timetable started by the 15 July 2019 rent assessment proposal is suspended while the validity 2018 request is decided by arbitration. There will need to be further submissions on the point if parties cannot agree. However, I make the following observations.
56. In the summer of 2019 both parties had a dilemma and had risks of losing rights, caused by delay in the arbitration process due firstly, to the delay from the application to the PCA up to my appointment and secondly, to the Respondent raising jurisdiction issues. If the 2018 claim is valid then a 2019 RAP would not be required but by not serving a RAP in 2019 the landlord possibly runs a risk of losing its review or at least getting into an argument about the validity of a late notice if it succeeds. If, however the 2018 request is invalid then what? Once the landlord served the July 2019 RAP, I do not consider it necessarily unreasonable for TPT not to act on that assessment while the 2018 reference is running as the TPT could be argued to have abandoned the 2018 claim. The TPT could have responded on a “without prejudice” basis but would this be valid?
57. Applying the principle of “fair dealing” set down in the 2015 Act I incline to the view that the POB should now restart the 2020 rent review in the light of the awards. Time is not generally of the essence of the rent review process and I would need argument as to whether the presumption is displaced by a “contra-indication” in the Code. It seems unlikely that if I had found that the 2018 review is to be actioned the POB can



be required to serve a RAP retrospectively but that a RAP cannot be given for the 2020 review if the award finds that is the operative date but after the notice period has expired. The more significant effect is on the time limits for response and request for an MRO (21 days) and I would need argument as to whether the time limits are strict in the circumstances arising in this case. Having said that I am aware of the DPCA's award No11 of Quarter 1 2019 in which it was held time limits are strict and must be adhered to. It would however be preferable for the parties to agree the way forward without further proceedings.

58. Award

59. I therefore award that the grant of the lease dated 21 April 2015 between Red Star Pub Company (WR III) Ltd and Zekla Ltd constituted a rent assessment for the purposes of the Pubs Code and that the Respondents refusal to provide a Rent Assessment Proposal in response to the Claimants request dated 8 November 2018 was not unlawful.
60. This award is final as to all matters to which it refers other than the issue of costs. I reserve my award as to the applicable costs of this award including liability for my fees and expenses as between the parties and the fees of the Pubs Code Adjudicator. In all other respects this is my final award.
- 

5 November 2019