

IN THE MATTER OF Ref:

THE PUBS CODE ARBITRATION BETWEEN: -

MR CHRIS HANKINS & MRS KELLY HANKINS

Claimants

(Tied Pub Tenant)

-and-

EI GROUP PLC

Respondent

(Pub-owning Business)

Final Award except in relation to costs

The request for a rent assessment made by the Claimant on 6 December 2016 is effective and the Respondent is ordered to conduct a rent assessment and must provide a rent assessment proposal to the Claimant within 28 days of the date of this award.

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Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.
2. The Arbitrator is Mr Paul Newby, Pubs Code Adjudicator, Lower Ground, Victoria Square House, Victoria Square, Birmingham, B2 4AJ. Mr Newby was appointed pursuant to section 48(5) of the Small Business, Enterprise and Employment Act 2015.
3. The Claimants are Mr Chris Hankins and Mrs Kelly Hankins of the Brunswick Arms, 50 Malvern Road, Worcester, WR2 4LQ. The Claimants are unrepresented.
4. The Respondent is Ei Group of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. The Respondent is represented by [REDACTED] of Gosschalks Solicitors of Queens Gardens, Hull, HU1 3DZ.

Procedure

5. This is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996 (the 1996 Act). The statutory framework governing this arbitration, other than the 1996 Act, is contained in the following enactments:
 - 5.1. Part 4 of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act);
 - 5.2. The Pubs Code etc. Regulations 2016 (the Pubs Code); and
 - 5.3. The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 (the Fees Regulations).

6. The applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules. Where a conflict arises between these rules or the 1996 Act and the Pubs Code statutory framework (being the 2015 Act, the Pubs Code or the Fees Regulations) the Pubs Code statutory framework prevails.
7. Each party has had the opportunity to put their case and respond to the case made by the other party. The following is a brief chronology of the case management:
 - 7.1. The Statement of Claim was served on 30 April 2017 on behalf of the Claimants.
 - 7.2. The Statement of Defence was served on 18 May 2017 on behalf of the Respondent.
 - 7.3. The documentary evidence on behalf of the Claimants was served on 28 June 2017.
 - 7.4. The documentary evidence on behalf of the Respondent was served on 29 June 2017.
 - 7.5. The Statement of Agreed Facts and List of Issues in Dispute was submitted on behalf of the parties and confirmed as agreed on 01 November 2017.

Summary of Facts

8. On the [REDACTED] the Respondent granted the Claimants a lease for a term of 10 years from [REDACTED]. There was a deed of variation dated [REDACTED] releasing packaged beer, packaged cider and flavoured alcoholic beverages in return for a fee.
9. On 6 December 2016 the Claimants sent a letter requesting a Rent Assessment Proposal on the basis of regulation 19(1)(b) of the Pubs Code. On 15 December 2016 the Respondent sent a letter rejecting the request for a Rent Assessment Proposal. This letter set out that the Respondent considered it was not obliged to provide a rent assessment under the Pubs Code.

10. On 5 February 2017 the Claimant sent a notification under section 49(2) of the 2015 Act to the Respondent alleging non-compliance with the Pubs Code. On 27 February 2017 the Claimants referred the matter to the Pubs Code Adjudicator (PCA). The referral was accepted for arbitration on 2 March 2017.

Applicable Law

11. This referral to the arbitrator was accepted under section 48 of the 2015 Act which states, as relevant:

Referral for arbitration by tied pub tenants

(1) In accordance with the following provisions of this section and section 49, a tied pub tenant may refer a dispute between the tenant and the pub-owning business concerned to the Adjudicator for arbitration.

...

(4) If the Pubs Code does not specify whether any of its provisions are arbitrable or not arbitrable, a dispute may be referred to the Adjudicator only to the extent that it relates to an allegation by the tenant that the pub-owning business has failed to comply with any provision of the Pubs Code.

(5) Where a dispute is referred for arbitration under this section, the Adjudicator must either—

(a) arbitrate the dispute, or

(b) appoint another person to arbitrate the dispute

12. Section 49 of the 2015 Act then states –

Timing of referral for arbitration by tied pub tenants

(1) This section makes provision as to the period within which a tied pub tenant may refer a dispute to the Adjudicator in accordance with section 48.

(2) Except in the case mentioned in subsection (3), the dispute may not be referred until after the expiry of the period of 21 days beginning with the date

on which the tenant notifies the pub-owning business of the alleged non-compliance.

(3) Where the Pubs Code requires a pub-owning business to provide a parallel rent assessment within a period of time specified by the Adjudicator, a dispute which relates to an allegation that the pub-owning business has failed to comply with that requirement may not be referred until the day after the day on which the specified period ends.

(4) In all cases, a dispute may not be referred after the expiry of the period of 4 months beginning with the first date on which the dispute could have been referred.

13. The Claimants initially referred the Respondents' alleged non-compliance with regulation 19 of the Pubs Code to the PCA on 17 January 2017. However, the referral was not initially accepted, as a non-compliance notice under section 49(2) of the 2015 Act had seemingly not been given to the Respondents. The Claimants then duly gave the Respondents the required non-compliance notice in accordance with section 49(2) on 5 February 2017 and re-referred the matter to the PCA on 27 February 2017.

14. This referral concerns regulations 19 and 66 of the Pubs Code. Regulation 19 of the Pubs Code states (as far as is relevant to this arbitration) –

Duty to conduct a rent assessment or an assessment of money payable in lieu of rent

(1) A pub-owning business—

(a) must conduct a rent assessment or an assessment of money payable in lieu of rent in connection with a rent review which is required under the terms of a tenancy or licence of a tied pub of which it is the landlord; and

(b) must conduct a rent assessment or an assessment of money payable in lieu of rent where a tied pub tenant of such a pub requests it under paragraph (2).

(2) A tied pub tenant may request a rent assessment or an assessment of money payable in lieu of rent if —

(a) such an assessment has not ended within the period of 5 years ending with the date of the request.

...

(3) A request under paragraph (2) must be made in writing

...

(4) The following are not rent reviews for the purposes of paragraph (1)(a)—

(a) an annual or other periodic indexation of rent;

(b) a change in rent in connection with the receipt of a corresponding benefit from the pub owning business;

(c) a change in rent in connection with the freeing of the tied pub tenant from a product or service tie;

(d) any discussions in respect of changes in rent which are carried out within a review of the business provided for under the terms of the tenancy or licence.

15. Regulation 66 of the Pubs Code states (as far as is relevant) -

Rent assessments

66.—*(1) The reference in regulation 19(1)(a) to a rent review which is required under the terms of a tenancy or licence does not include—*

(a) a rent review where the rent review date falls before the commencement date; or

(b) a rent review which is concluded before the commencement date.

(2) A tied pub tenant may request, on or before the 5-year anniversary date, a rent assessment or an assessment of money payable in lieu of rent under regulation 19(2)(a) if, and only if—

(a) no rent assessment or assessment of money payable in lieu of rent has been concluded before the date of the request; and

(b) no rent review has been concluded within the period of 5 years ending with the date of the request.

...

(8) For the purposes of this regulation—

(a) a rent review is concluded when the rent, or money payable in lieu of rent, is agreed in writing between the pub-owning business and the tied pub tenant;

(b) a rent assessment is concluded when it ends ...

(9) In this regulation, the “5-year anniversary date” means the date which is 5 years after the commencement date.

16. Regulation 2 of the Pubs Code (‘General Interpretation’) defines

“commencement date” as –

the date on which these Regulations come into force;

Issues

17. Regulation 19(1) of the Pubs Code provides that a POB must conduct a rent assessment either when a rent review is due under the terms of the tenancy (regulation 19(1)(a)), or when requested by a TPT where one of the circumstances set out in regulation 19(2) applies (regulation 19(1)(b)). For the purposes of this referral, the relevant circumstance in regulation 19(2) is that “*such an assessment has not ended within the period of 5 years ending with the date of the request*” (regulation 2(a)). Regulation 66 (2) makes it clear that a TPT may request a rent assessment under regulation 19(2)(a), “*if, and only if*”, no rent assessment has been concluded before the date of the request and no rent review has been concluded within the period of 5 years ending with the date of the request. Regulation 66(8) 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 TPT]*”, and a rent assessment is concluded when it ends (under regulation 22).

18. In summary, the Respondent accepts that there has been no rent assessment conducted in relation to this pub, but contends that a rent review was conducted in the 5 years preceding the request, and so it was not obliged to provide a rent assessment to the Claimants in response to their request. The Respondent initially argued on the grounds that there had been two events which constituted the conclusion of a rent review. However, it has now conceded one of these, and is not pursuing the argument that annual increases by reference to the Retail Price index constitute rent reviews for the purpose of the Pubs Code. The Respondent contends therefore on the remaining ground that the Deed of

Variation (DOV) entered into by the parties on [REDACTED] was a rent review for the purposes of the Code. It is submitted that as this was concluded in the 5 years prior to the Claimants' request, that they are therefore not entitled to a rent assessment arising from that request.

19. The Claimants' submissions are very brief, and they did not elect to submit a Response to the Respondent's Statement of Defence in which it argued that the DOV dated [REDACTED] constitutes a rent review. However, I understand from the Statement of Claim that the Claimants consider that there was no rent review concluded and that they were entitled to request a rent assessment on 6 December 2016.

20. The only issue for me to determine for the purposes of this award is whether the DOV dated [REDACTED] constituted a concluded rent review for the purposes of regulation 66(2).

Arguments and discussion

21. The DOV dated [REDACTED] provides that the Claimants shall be released from the obligation under the lease to purchase packaged beer, packaged cider and flavoured alcoholic beverages from the Respondent, in return for an annual fee for each category of product (defined as a "Tie Release Fee" under the DOV and lease). The Tie Release Fee is reviewed annually in accordance with the terms of the lease. The Respondent argues that entering into the DOV operated as a rent review for the purposes of regulation 66(2).

22. The Respondent contends in the Statement of Defence that the 2015 Act and the Pubs Code refer to a rent assessment or "*an assessment of money in lieu of rent.*" It avers that the Tie Release Fee is a "*payment in lieu of an increase in the annual rent that would be obtained if the annual rent were valued on the released terms*". It further argues that the Tie Release Fee is part of the "Rents" payable under the lease, as the lease (at clause 1.51) defines "Rents" as "*any sum payable to Us under the terms of this lease.*"

23. The Respondent further points to regulation 19(4) which provides that “*The following are not rent reviews for the purposes of paragraph 1(a)* [referring to regulation 19(1)(a)]”. This includes “*a change in rent in connection with the freeing of the tied pub tenant from a product or service tie*” (regulation 19(4)(c)). It argues that this exclusion is explicitly only in relation to regulation 19(1)(a), i.e where there is a rent review required under the terms of the tenancy and therefore is not excluded from the definition of “rent review” for the purposes of regulation 19(1)(b), 19(2) and therefore regulation 66(2)(b). It further argues that the fact that regulation 19(4) refers to exclusions which are “*not rent reviews for the purposes of paragraph 1(a)*” indicate that for events other than a rent review required under the terms of the tenancy, a “rent review” for any other purpose should be taken to include such events, otherwise there would be no need to exclude them for the purposes of regulation 19(1)(a).
24. I agree that the Pubs Code provides two ways in which a TPT is entitled to a Rent Assessment Proposal. The first is under regulation 19(1)(a) and is an automatic requirement for the POB to provide one in connection with a contractual rent review. The second way is triggered by a request being made by the TPT in certain circumstances, one of which is that there has been no rent review within the last 5 years.
25. In my view it would be inconsistent to provide for two different definitions of “rent review” within the same provision of the Pubs Code. It is clear on its face that a change in rent in connection with the freeing of the TPT from a product or service tie is not a “rent review” in respect of regulation 19(1)(a). It would be nonsensical if a different type of rent review were to be considered in regulation 19(1)(b), such that a TPT was excluded from requesting a Rent Assessment Proposal, because the DOV agreeing payment of the Tie Release Fee was considered to be a rent review under regulation 19(1)(b), but would not amount to contractual rent review for the purpose of regulation 19(1)(a). This would be inconsistent with the purpose of the Pubs Code as a whole.
26. The purpose of regulation 66 when read with regulation 19 is to ensure that whenever a rent review has not been concluded in the previous 5 years, a TPT

is entitled to one. It is not logical to take a different approach to the definition of rent review under each part of the provision. I find therefore that a change in rent in connection with the freeing of the TPT from a product or service tie is not a rent review under regulation 19(1)(a) or (b).

27. On the basis of the above, even if, as the Respondent argues, the Tie Release Fee constitutes “rent”, the DOV is still excluded from the meaning of “rent review”.
28. Having regard to the relevant provisions of the lease relating to review of rent, it is not contended that there has been a Tie Review, nor can there have been an End of Term Review (clause 14 of the lease). I note that the first Index Review Date (under clause 13 of the lease) is described as taking place on 1 October 2012 and then annually thereafter, however the Respondent is no longer contending that this constitutes a “rent review” for the purposes of regulation 19(1)(2). If the Respondent is not pursuing its argument that RPI increases are rent reviews for the purposes of the Pubs Code, I am unclear on what basis it differentiates any change in the rent in connection with the freeing of the TPT from a product or service tie, as the same considerations would seem to apply to both, as both are listed in regulation 19(4) as exclusions.
29. It is of note that there is no definition of “rent review” in the Pubs Code (only, in regulation 19(4), what a “rent review” is not). The parties have not directed me to any relevant law or legal precedent which may assist with such a definition. It does seem to appear in interpreting regulation 19, that Parliament intended to distinguish between periodic changes in the principal market rent, and other types of changes in rent as listed at regulation 19(4).
30. I find that on the facts of this case, that no rent review has been concluded by virtue of the DOV dated [REDACTED] and on the evidence before me no rent review was otherwise concluded within 5 years preceding 6 December 2016.
31. I do also note that the Respondent’s letter to the Claimants dated 15 December 2016 refers to the Claimants “*requesting a rent assessment in respect of the*

tyed cyclical rent review overdue from 8 July 2016 which has not yet been concluded". This does not appear to correspond with the terms of the lease and no such cyclical rent review was relied upon subsequently. The Respondent also made nothing at that stage of its subsequent argument that there was no entitlement to a rent assessment because of the DOV dated [REDACTED]. It appears therefore that this letter to the Claimant included incorrect information which would have been potentially unhelpful or misleading. I would direct the Respondent to the principle of "fair dealing" in connection with Pubs Code matters, and it should take note as to recognising the importance of ensuring the accuracy of such Code related communications to TPTs.

Costs

32. Issues as to costs of the arbitration are reserved pending the parties' opportunity to make submissions as to costs.

Operative Provisions

33. In light of the above I make the following award:

- 33.1. The request for a rent assessment made by the Claimant on 6 December 2016 is effective;
- 33.2. The Respondent is ordered to conduct a rent assessment and must provide a rent assessment proposal to the Claimant within 28 days of the date of this award;
- 33.3. Costs are reserved.



Arbitrator's Signature

Date Award made25 September 2018.....

Claimant's Ref: [REDACTED]

Respondent's Ref: [REDACTED]