

**IN THE MATTER OF
THE PUBS CODE ARBITRATION BETWEEN:**

ARB/105076/NEWINNPUBLIC

**NEW INN PUBLIC HOUSE WALTON LIMITED
(Tied Pub Tenant)**

Claimant

-and-

**EI GROUP PLC
(Pub-owning Business)**

Respondent

PRELIMINARY AWARD

Summary of Award

The Claimant has failed to satisfy me that it served the MRO notice subject to this referral within 21 days of the Respondent's rent assessment proposal of 24 April 2018 as required by regulation 23(2)(b) of the Pubs Code. As such, I do not have jurisdiction to accept this referral.

Introduction

1. This referral was made on 13 June 2018 pursuant to regulation 32(2) of the Pubs Code Regulations 2016. The preliminary matter for my determination is whether I have jurisdiction to consider it, and the issue in dispute is whether the Claimant served a MRO notice on the Respondent in time. The requirement in this case was that the MRO notice was served on the Respondent within 21 days of receipt by the Claimant of a rent assessment proposal¹. I have considered the parties' submissions and evidence produced further to various directions issued in consultation with them.
2. The Claimant has produced with the referral a photograph said to show the handwritten MRO notice apparently (though not clearly) dated 5 May 2018 sent by post on that date. The Respondent denies having received it by post, and says it was not received until 11 June 2018 by email (as it explained in its letter to the Claimant dated 12 June 2018 sent in response).
3. The Claimant is New Inn Public House Walton Limited of Unit 53 Langthwaite Grange, Lidgate Crescent, South Kirkby, West Yorkshire, WF9 3NR and is the tied pub tenant ("TPT") of The New Inn public house, 144 Shay Lane, Walton, Wakefield, West Yorkshire WF2 6LA ("the Pub")². The Claimant occupies the Pub under the terms of a lease granted by the Respondent. The Claimant is represented by Blacks Solicitors of City Point, 29 King Street, Leeds LS1 2HL. The Respondent pub-owning business ("POB")³ is Ei Group Plc of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ and is represented by Gosschalks Solicitors of Queens Gardens, Hull, HU1 3DZ.
4. Neither party has requested an oral hearing and I have considered it appropriate to determine this matter on the papers. The law and procedure applicable to this arbitration appear in the Appendix to this award.

Evidence and Decision

5. In an email of 3 May 2018 to the Respondent the Claimant had stated its intention to serve a MRO notice. The only evidence which the Claimant has that the MRO notice was posted on 5 May 2018 is the witness statement of [REDACTED]. [REDACTED] states that [REDACTED] posted the MRO notice (written in [REDACTED] handwriting) in the post box next to [REDACTED] local village shop. [REDACTED] explains [REDACTED] re-dated the notice by hand from 6 May to 5 May. The Respondent has not produced a mail room log book or other evidence to support its case that it did not receive the letter.
6. I made a direction on 6 September 2018 requiring the Claimant to disclose the meta data showing when its photo of the MRO notice was taken. The Claimant responded on 13 September 2018 to explain:

¹ Regulation 23(2)(b) and 27.

² within the meaning of section 70(1)(a) of the 2015 Act

³ within the meaning of section 69(1) of the 2015 Act

“the original letter was hand written and then copied on a photocopier in our client’s office. The copy was then posted and the original was retained by our clients. The photograph of the original copy was only taken when [the Respondent] informed our client that they had never received it.”

7. Having considered all of the evidence, I find on the balance of probabilities that the Claimant has failed to prove that it sent the MRO notice to the Respondent by post on 5 or 6 May 2018 or at all. There is no provision in the Pubs Code which deems that a document is served even if it is not delivered. Section 7 of the Interpretation Act 1978 provides for deemed service of documents properly sent by post, if that method of service is permitted or required.
8. The Claimant is required to prove what it has done to serve the notice but is unable to provide any convincing evidence to support its case. By sending a MRO notice a tenant seeks to assert a statutory right. It is an important document, and if not using trackable post (or even obtaining proof of posting) and/or email a tenant would knowingly be failing to ensure it had independently verifiable proof of service. This would have been sufficiently clear to the Claimant, who has a history of corresponding with the Respondent by email. Even when a person is sure of their recollection, the possibility of administrative error, mistake or omission cannot be discounted when such proof of service is not obtained, and it would have been readily available to the Claimant. I have considered the evidence and explanation put forward, but applying the test of the balance of probabilities, I am not satisfied as to the Claimant’s case that the MRO notice was committed to the post, whether on the dates stated, or at all. I would go on to add that posting a photocopy and retaining the original seems unusual and providing this explanation when putting forward the photograph for the first time might have been more persuasive.
9. A number of issues as to the validity of the rent assessment proposal and the MRO notice are put before me, and I have determined them on the law and facts. This decision is specific to these facts. I do not bind myself in considering related issues regarding the content, formalities and validity of these documents on different facts and on submissions in any other arbitration proceedings brought by another party in the future.
10. The Claimant argues that the Respondent’s rent assessment letter of 24 April 2018 did not explicitly state that the Claimant had only 21 days to make a referral following the rent assessment, as suggested by the PCA in June 2018 (in the publication ‘What Tied Pub Tenants Should Expect’), and should be deemed to have been served on 12 June 2018 when the deadline was referenced. However, separate email correspondence provided a web link to the necessary information. Whilst the wider point about its accessibility is noted, it is not suggested that the Claimant was unaware of the deadline. Indeed, its primary case that it complied with it is consistent with that. In the circumstances I am not persuaded as to the Claimant’s case on this point.

11. The time limits in the Pubs Code are strict and must be adhered to. There is no power under the Pubs Code statutory framework for an arbitrator to extend any time limits set out in the legislation. The Claimant attempted to persuade me that I have the power to extend such time limits under section 12 of the Arbitration Act 1996. However, this power is expressly reserved to 'the Court' not to an arbitrator, and that in any event, it only explicitly applies to arbitrations conducted pursuant to an arbitration agreement and not to a statutory arbitration. I acknowledge that by virtue of section 94 of the Arbitration Act 1996 that the power *could* also apply to a statutory arbitration, but only if it is not inconsistent with the provisions of the relevant enactment as if it were the arbitration agreement⁴. It would be for a court to consider whether a power to extend the strict Pubs Code time limits would be inconsistent with the Pubs Code, which sets out clear deadlines and makes no provision at all for deadlines to be extended or amended in any way, whether by agreement or otherwise.
12. In view of the above, I find that the MRO notice in this case was not served by the Claimant within 21 days of the relevant event, and that I do not therefore have jurisdiction to accept this referral. I recognise that this is not the outcome that the Claimant wants, but I am satisfied that on a balanced and objective assessment of the evidence before me it is the appropriate conclusion.
13. Having found that the MRO notice was not served in time, issues as to the content of the MRO notice are academic. However, I would have found on the facts that the form of the MRO notice was valid. The Respondent has asserted that the notice was defective as it 'does not specify a trigger event ... as required by Regulation 23(3) of the Pubs Code'. However there were no 'trigger events'⁵ at play in this case. The 'event' which the MRO notice was required to refer to⁶ was a rent assessment⁷. The MRO notice refers to the 'offer dated 24.04.2018' on page 1 and 'YOUR RENT REVIEW OFFER. 24.04.2018' on page 2 and meets the requirements of regulation 23(3)(e) of the Pubs Code.
14. The Respondent takes issue with the fact that the MRO notice is signed by [REDACTED], who is not a director or guarantor of the Claimant company. However, I am satisfied that any MRO notice would have been signed by [REDACTED] on behalf of and with the agreement of Ria Brooks and the Claimant company. There is no express requirement for a TPT to sign a MRO notice. Furthermore, I am satisfied that the [REDACTED] had authority to act as agent for the Claimant, owing to [REDACTED] regular engagement with the Respondent in respect of the Pub, and that the Respondent acquiesced in this. It is not disputed, for example, that [REDACTED] has previously signed minutes of meetings between the parties on the Claimant's behalf and has even previously been sent minutes directly by the Respondent's representatives and area managers

⁴ see s 95(1)(a) of the Arbitration Act 1996

⁵ as defined by regulation 25 of the Pubs Code and section 43(9) of the 2015 Act

⁶ as required by regulation 23(3)(e) of the Pubs Code

⁷ as per regulation 27 of the Pubs Code

on several occasions. My conclusion is supported by the fact that the Respondent, which raised arguments as to the validity of the notice in its letter of 12 June 2018, did not challenge it on this ground. I would not expect future MRO notices to be rejected by the POB on such a technicality, especially when this matter could easily be verified with the TPT.

Costs

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

Operative Provisions

- 16. The MRO notice subject to this referral was not served by the Claimant within 21 days of the Respondent's rent assessment proposal of 24 April 2018 as required by regulation 23(2)(b) of the Pubs Code and is out of time, and I therefore do not have jurisdiction to accept this referral.

Arbitrator's Signature 

Date Award made09/01/2019.....

Claimant's Ref: SB/NEW942/1

Respondent's Ref: ARB/105076/NEWINNPUBLIC

Appendix

Procedure

The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 (“**the Pubs Code**”) and paragraph 5 of Schedule 1, Part 1 of the Small Business, Enterprise and Employment Act 2015 (“**the 2015 Act**”).

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 Part 4 of the 2015 Act; the Pubs Code; and The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 (“**the Fees Regulations**”). The applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules (“**the CI Arb Rules**”). Where a conflict arises between the Pubs Code statutory framework (being the 2015 Act, the Pubs Code and/or the Fees Regulations) and either the CI Arb Rules or the 1996 Act, the Pubs Code statutory framework shall prevail.

Applicable Law

1. Regulation 23 of the Pubs Code sets out the requirements for an MRO notice as follows:

23.—(1) A tied pub tenant may give a notice (an “MRO notice”) to the pub-owning business where—

(a) the event specified in regulation 24 or 25 occurs; or

(b) the event specified in regulation 26 or 27 occurs and the investment exception does not apply (see regulation 56).

(2) The MRO notice must be—

(a) in writing; and

(b) received by the pub-owning business within the period of 21 days beginning with the day on which the event mentioned in paragraph (1) occurred.

(3) The MRO notice must include—

(a) the tenant’s name, postal address, email address (if any) and telephone number;

(b) the date on which the notice is being sent;

(c) the name of the tied pub in relation to which the request for an offer of a market rent only option is being made and its address;

(d) the date on which the event mentioned in paragraph (1) occurred; and

(e) a description of that event which, in the tenant's opinion, demonstrates that it is an event specified in regulation 24, 25, 26 or 27.

(4) A tied pub tenant may not give an MRO notice to the pub-owning business where—

(a) the tenant has already given an MRO notice under paragraph (1); and

(b) the MRO procedure(a) which relates to that notice has not ended.

2. Regulation 25 of the Pubs Code describes a 'trigger event' as follows:

25.—(1) The event specified in this regulation is that the tied pub tenant sends the pub-owning business, during the relevant period, a relevant analysis which demonstrates that a trigger event has occurred.

(2) In paragraph (1)—

(a) "the relevant period" means the period of 56 days beginning with the day after that on which the trigger event occurred;

(b) "a relevant analysis" means a written analysis of the level of trading which is forecast for a period beginning with the day on which the trigger event occurred and ending at least 12 months later.

3. Regulation 27 provides a TPT with the right to serve an MRO notice in the event of the following:

27. The event specified in this regulation is that the tied pub tenant receives a rent assessment proposal sent by the pub-owning business under regulation 20(1) in respect of the tenancy or licence.