ARB/104840/BENSONNYAGAAND

IN THE MATTER OF THE PUBS CODE ARBITRATION BETWEEN:

MR BENSON NYAGA
PAUL KANAI NJOROGE **Claimants**
(Tied Pub Tenants)

-and-

STAR PUBS & BARS LIMITED **Respondent**
(Pub-owning Business)

AWARD

The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.

Background

1. On 15 May 2018, the Claimants made a referral for arbitration to the PCA under regulation 32(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code") that the MRO response which they had received from the Respondent on 3 May 2018 was not a 'full response' for the purposes of regulation 29(6) of the Pubs Code.

2. On 16 May 2018, the Respondent notified the Claimants of its intention to sell the freehold of the Pub.

3. Directions were issued to the parties on 3 July 2018, which (amongst other provisions) provided for the Claimants to submit a Statement of Case by 5pm on 17 July 2018, for the Defendant to then submit a Statement of Defence by 5pm on 31 July 2018.

4. The Claimants duly submitted a Statement of Case on 17 July 2018, but the Respondent requested additional time for the filing of their Statement of Defence (which was granted) and their Statement of Defence was then submitted on 7 August 2018. In that Statement of Defence the Respondent did not fully plead its case because it said at paragraphs 3.3 to 3.5, that,

   > *"both parties are aware that the Premises have been for sale on the open market for some time. The Respondent is currently engaged in advanced negotiations with a potential purchaser of the freehold … which it anticipates will conclude within the next seven days … Should this sale*

conclude then this will likely have an impact on the current proceedings and … on whether this arbitration should conclude in such circumstances. Should the sale not conclude then the Respondent would seek further opportunity to supplement the terms of this defence … [as] it would be unfortunate for parties to spend significant time and costs … if the proceedings are ultimately superfluous"

5. On 9 August 2018, the Respondent contacted the PCA as regulator, and not in relation to these proceedings in particular, to seek clarification of what would happen to an ongoing MRO procedure where a pub owning business sells a pub to a non-pub owning business.

6. On 13 August 2018, I listed an urgent telephone Case Management Conference for the morning of 14 August 2018.

7. At the Case Management Conference on 14 August 2018, the Respondent's representative agreed to take instructions from the Respondent regarding allowing time for the MRO process to end before the sale of the premises completes and update the Arbitrator and the Claimants' representative by 4pm on 15 August 2018. I issued an order on 15 August in the that the Respondent should by that time state "*whether and on what terms it will postpone any such sale until the end of the MRO process (and completion of any free of tie lease on terms agreed or ordered).*"

8. By way of an email of 15:23 on 15 August 2018, the Respondent's representative advised that their prospective purchaser was willing to 'step into the shoes' of the Respondent and continue the MRO process with the Claimants, and also provided a further iteration of its proposed MRO lease.

The application

9. On 15 August 2018 the Claimants' solicitor made an application by email in these proceedings for an order for relief under s.48(5)(a) of the Arbitration Act 1996 ("the 1996 Act"). There are no formalities prescribed for such an application, but the content of this brief and unsupported request appeared to be seriously lacking and I have required the Claimants to submit a full application on grounds, supported by evidence and with a draft of the order sought. That has been done today 16 August at 09:57, when the Claimants' representative made an application to me for exercise powers under s.48(5)(a) of the 1996 Act to grant an injunction against the Respondent preventing them from continuing with the sale of the Pub.

10. I have not received representations from the Respondent and, given the shortness of time, I am treating this application on a without notice basis. However, the application does not seek interim relief. It seeks a final order in these proceedings for injunctive relief which I could only grant on sufficient notice for there to be preparation of representations from both parties. At the present time, and on a without notice application, I could fairly do no more than make an interim injunction.

Legislation

11. Section 49 of the Pubs Code reads as follows–

> ***Sale of freehold or long leasehold***
> *49.—(1) Where the pub-owning business is aware that the holder of the freehold, or the superior landlord, of the premises to which the tenancy or licence relates has—*
>
> *(a) taken any steps to advertise the sale of the freehold or the leasehold;*
> *(b) placed the freehold or the leasehold on the market;*
> *(c) employed an agent to sell the freehold or the leasehold; or*
> *(d) entered into an agreement to sell the freehold or the leasehold,*
> *the pub-owning business must comply with paragraph (2) as soon as reasonably practicable.*
>
> *(2) The pub-owning business must provide to the tied pub tenant—*
>
> *(a)details of any arrangements which have been made of the kind mentioned in paragraph (1)(a) to (c); and*
> *(b) where an agreement of the kind mentioned in paragraph (1)(d) has been entered into, the name and address of the buyers.*
>
> *(3) The pub-owning business is not required to provide the information under paragraph (2)(a)—*
>
> *(a) if the sale is part of a sale and leaseback transaction; or*
> *(b) if a disclosure under that paragraph would breach any obligation under or by virtue of any Act.*

The Respondent's Position

12. At the case management conference that took place on 14 August, [redacted] for the Respondent made clear that construing the legislation such that the right to the MRO, and this referral, would fall away on the sale of the pub to a non-regulated purchaser was consistent with its interpretation of the law.

13. However, the Respondent in correspondence dated 15 August the Respondent said:

> "*I am now aware from discussion with those involved in documenting the intended sale within Heineken and who are instructing colleagues within this firm in this regard that the buyer of the property, who is represented by a firm of solicitors experienced in Pubs Code matters, has received advice to indicate that the ongoing MRO process and arbitration will continue post-sale. This is irrespective of the buyer not meeting the criteria for a "pub owning business" under the 2015 Act and Pubs Code.*
>
> *I understand that the buyer accepts this proposal in principle and has indicated that it would be willing to have the ongoing arbitration transferred to it and therefore would step into the shoes of the existing Respondent to*

the arbitral proceedings. In such circumstances, an application would be made to the PCA to have the existing Respondent replaced by the buyer at the completion stage. If that application was successful, the Claimant would continue to negotiate and arbitrate with that entity. At the present time I do not have instructions to disclose the identity of the purchaser.

I attach the latest iteration of the relevant wording to be contained within the sale agreement in this regard for the DPCA's reference. This wording is being communicated to the buyer today: while the Respondent cannot rule out that the buyer may have comments thereon, this is being exhibited to the PCA now in the interests of expediency and to show that the Respondent is taking active steps to have the buyer introduced to the proceedings, as per the buyer's request. The anticipation is that contracts will be exchanged by the end of this week, with completion 28 days from the date of exchange.

I should therefore be grateful if the DPCA could advise whether she is content to proceed on the basis of the existing Respondent being substituted with the buyer of the Thatched House in this manner. If this was to be permitted then other than a short delay while completion is effected, the Claimant would be in the same position that it would be but for the sale."

14. The Respondent took no steps in this correspondence to explain why as a matter of law it could be that extended protection could apply. The copy of the proposed wording of the sale agreement which was provided with that correspondence required the Respondent to make application to the Adjudicator to be joined as a party to these proceedings in substitution for this Respondent. This document was apparently drafted by the Respondent's solicitors (I am not aware whether this is the same firm or a different firm to the one which acts for them in these proceedings).

15. An extraordinary position therefore appears to arise, in that the Respondent through its legal advisers is acting in this sale on the basis that it will not bring to an end the MRO process, but acting in these proceedings as if it will (or at least, given that no substantive submissions have been made on the point, as if it is likely to).

CIArb Rules 2015

16. These proceedings are conducted according to the Rules of the Chartered Institute of Arbitrators, which provide:

Article 26 — Emergency relief and interim measures

…

2. The arbitral tribunal may, at the request of a party, grant interim measures.

3. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
a) maintain or restore the status quo pending the determination of the dispute;
b) take action that would prevent, or refrain from taking action that is likely to cause (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
d) preserve evidence that may be relevant and material to the resolution of the dispute.

4. The party requesting an interim measure under paragraphs 3 (a) to (c) shall satisfy the arbitral tribunal that:
a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

5. With regard to a request for an interim measure under paragraph 3 (d), the requirements in paragraphs 4 (a) and (b) shall apply only to the extent that the arbitral tribunal considers appropriate.

6. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

7. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

9. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure

should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

10. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

Discussion

17. An injunction is a remedy of last resort. With regard to the matters in Article 26(4)(a) above, the Claimants have not satisfied me that damages would not be an adequate remedy. Mr Phillips in fact refers to a remedy for damages being available under a Regulation 50 referral. Any such referral can only be made by a tied pub tenant as defined. As for Article 26(4)(b), I have not been addressed on the merits of the referral in light of the concessions made by the landlord, but I note that the legislation gives the Claimants the right to accept the MRO proposal even if unsuccessful in these proceedings in establishing it is non-compliant.

18. With regard to Article 26(9), there is nothing in the application which suggests that the Claimants understand that they may be liable for any costs and damages caused by an interim injunction (such as the loss of the sale), should it later be determined that it should not have been granted. It would be entirely inappropriate for me to make an order for an interim injunction in these circumstances. By comparison with an application for an interim injunction in the court, an undertaking as to damages is almost always required. An undertaking may not expressly be required in arbitration pursuant to the CIArb Rules, but the absence of a clear expression of understanding from a claimant as to the potential liability can be a very material factor weighing against the grant of an order.

19. Other than directing me to section 48(5)(a) of the 1996 Act, the Claimants have not addressed me on the law relevant to the existence of my power to grant an injunction in a Pubs Code arbitration, and have not addressed me on the principles of law which I should apply in the exercise of any such power.

20. As for the merits of the application, the Pubs Code at regulation 49 only requires the Respondent to notify the Claimants of an intention to sell a tied pub and of any agreement to sell. Nowhere in the statutory framework does it say that a pub owning business cannot sell the freehold of a pub whilst an MRO process is ongoing. In addition, Parliament's clear intention is that where the freehold to a tied pub is sold by a pub owning business, the tied pub tenant should not get extended protection rights in relation to MRO. It achieved this by specifically by excluding the MRO provisions from extended protection at section 69(7) of the Small Business and Enterprise Act 2015 "the 2015 Act". The Claimants do not address this issue in their application.

21. In spite of this, it does appear to me that a pub owning business has a duty to act in good faith in respect of any such sale during an MRO process (and the Respondent's representative [redacted] expressed agreement with that proposal in the case management conference on 14 August). This is consistent

with the core principle that the pub owning business must act fairly and lawfully (section 42(3) of the 2015 Act). It may not therefore be proper for it to select a pub for sale because an MRO notice has been served in order to frustrate that process, nor unreasonably delay the MRO process until the sale can take place so as to frustrate the tenant's exercise of the right. My mind remains open however as to the circumstances which could amount to a breach of regulation 50 (or other actionable remedy under the Code). Nevertheless, for the reasons given I cannot grant final relief and the basis for making an order for interim relief is not disclosed.

22. Mr Phillips puts his case very high. He makes a number of factual allegations as to the Respondent's motives in selling this property and for taking the steps it has taken to date. I could not reach any such conclusion without full consideration of the evidence. That is why Mr Phillips is precipitous in making an application other than for interim relief.

23. The Claimants knew as long ago as 16 May 2018 that the property was being marketed for sale. However, until the case management conference called by me on 14 August they do not appear to have appreciated the potential effect of a sale of the property to a non-regulated POB, and have proceeded on the understanding (as summarised by Mr Phillips in the case management conference on 14 August), that on such a sale the purchaser would merely step into the shoes of the Respondent, and I understand from this that he considered extended protection would apply.

24. It appears also that the Respondent may not have appreciated the effect of such a sale on the MRO process. It was certainly however aware of the potential implications on 9 August 2018, when the Respondent wrote to the PCA as regulator to ask for his opinion on the point of law which arises in the present case. It wrote:

> "*A query has arisen as to the status of any Pubs Code arbitration under raised by a tied pub tenant under section 48 of the 2015 Act in circumstances where during the currency of such arbitral proceedings the premises to which the tenancy relates are sold by Star to a business which does not meet the definition of a pub-owning business on the basis that it is not the landlord of 500 or more tied pubs and therefore does not meet the requirements of section 69(1) 2015 (hereinafter referred to as the "**Buyer**").*
>
> *Star is aware that section 69 goes on to provide as follows:*
>
> *(3) A person not falling within subsection (1) and who is the landlord of a tied pub occupied by a tied pub tenant who has extended protection in relation to that tied pub is also a pub-owning business for the purposes of this Part in relation to that occupation.*
> *(4) A tied pub tenant has "extended protection in relation to a tied pub" if—*
> *(a) the tenant occupies the tied pub under a tenancy or licence at a time when the landlord is a person who is a pub-owning business by virtue of subsection (1), and*

(b) before the end of that tenancy or licence the landlord is no longer such a person (whether because of a transfer of title or because the landlord ceases to fall within subsection (1)).
(5) But a tied pub tenant ceases to have "extended protection in relation to a tied pub" on the earlier
of—
(a) the end of the tenancy or licence concerned, and
(b) the conclusion of the first rent assessment or assessment of money payable in lieu of rent to be provided after the landlord is no longer a person who is a pub-owning business by virtue of subsection (1).

The Explanatory Notes to section 69 state as follows (emphasis added):

355. Subsections (3)-(7) cover circumstances a) in which a tied pub is sold by a pub-owning business to a new owner who does not own 500 or more tied pubs or b) when a tied pub is protected by the
Pubs Code and Adjudicator by virtue of being owned by a pub-owning business but then the business no longer qualifies as a pub-owning business – for example, through selling sufficient pubs to drop
below the 500 tied pub threshold. In both these circumstances the tied pub would have "extended protection" and its owner would be considered a "pub-owning business" under this legislation, in
respect of that pub until the pub's next rent review or until the end of the tenancy/licence, whichever is sooner. ***A business that is a pub-owning business solely because of these circumstances would not be covered by sections 43-45 (Market Rent Only option)*** *or sections 53-59 (Investigations) but would be covered by all the remaining sections of this Part of the Act, including those relating to parallel rent assessments and arbitrations.*

On the basis of the above, we appreciate that the Buyer "would not be covered by sections 43-45 (Market Rent Only option)", however the legislation is silent on the position whereby an arbitration in relation to an MRO proposal remains extant, and whether it would expect the Buyer to step into the shoes of Star in terms of defending such proceedings and negotiating a free-of-tie lease.

We would be grateful for the PCA's view on this point which we anticipate may not just be an issue for Star could well arise for other pub-owning businesses and their tenants in regular course. If the PCA was able to give a preliminary view in the course of this week that would be very helpful."

25. Both parties have apparently failed to appreciate the impact of the forthcoming sale, but it is the Claimants who seek relief, and I do not consider they can properly rely on the Respondent's failure to advise them that the sale would terminate the MRO process. The party seeking such urgent relief must show that the granting of relief is just, convenient and proportionate on the facts presented, and that there is no other suitable remedy to avoid injustice. The Claimants have failed to meet that test in the present case.

26. Thus the application has insufficient merit and is dismissed. I cannot say if it is still open to the Claimants to make urgent without notice application to the High Court (as, pursuant to section 44(2)(e) of the 1996 Act, the Court has the power to grant an interim injunction), with the appropriate undertakings.

27. As for the Respondent's position, as I stated during the telephone case management conference on 14 August, I have concerns about the history of this matter, but the relevant facts are not available to me at the present time. The only matters made clear to me are that the MRO proposal was a legacy version which did not take account of changes reflecting previous arbitration awards involving the Respondent pub owning business. Much time has therefore passed between its service and the concessions recently made by the Respondent. It may be that the Claimants' opportunity to negotiate a compliant lease before the sale completes has therefore been impacted, though I have not yet formed a view on that in the absence of evidence. Nevertheless, it may well be that the Respondent would therefore wish to do all it can to ensure that negotiations for an MRO compliant lease are successfully concluded before the completion of any sale takes place. Whilst I have not considered the most recent concessions made by the Respondent, I would expect the Respondent to compare them against other arbitration awards it has been party to in order to identify whether or not the most recent terms may be compliant.

28. The fact that the Respondent may have been proceeding with both the sale of the property and these proceedings without ensuring it had a clear view on the impact which the sale would have on the Claimants, and possibly on conflicting legal advice as to the interpretation of the statutory provisions is a matter for concern. If it has decided to proceed with the sale based on a mistaken understanding of the law it may well wish to consider very carefully what its next step should be. The circumstances in this case are unique and unusual and I have an open mind as to the Respondent's conduct overall. I rightly reminded the Respondent in the case management conference on 14 August of the statutory powers of the PCA as regulator, including the power to conduct an investigation under s.53 of the 2015 Act if the PCA has reasonable grounds to suspect that a pub owning business has failed to comply with the Pubs Code. However, this should in no way be perceived as anything more than a reminder to the Respondent of the requirements of the Pubs Code.

29. I will separately give directions to the parties on the progress of the arbitration, which should be agreed if possible.

Arbitrator's Signature: …… **……**

Date Order Made: 16 August 2018

Claimant's Ref: ARB/104840/BENSONNYAGAAND

Respondent's Ref: ARB/104840/BENSONNYAGAAND