IN THE MATTER OF A REFERRAL TO THE PUBS CODE ADJUDICATOR

AND IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 ("THE ACT")

AND IN THE MATTER OF THE PUBS CODE ETC REGULATIONS 2016 ("THE CODE")

B E T W E E N

DARREN RAY NIXON

Claimant

-and-

MARSTONS PLC

Respondent

FINAL AWARD EXCEPT IN RELATION TO COSTS

References in [ ] are to pages in the Arbitration Bundle agreed by the parties.

Introduction

1. The Claimant Mr Nixon is the Tied Pub Tenant (TPT) as defined by the Act of the Greyhound, 22 Holt Road, Rhosnesni, Wrexham LL13 8DR ("the Pub"). The Respondent is his landlord and a Pub Owning Business ("POB") as defined by the Act.

2. Mr Nixon occupies the Pub under the terms of a lease ("the Lease") dated 5th September 2005 between the Wolverhampton and Dudley Breweries Plc and [redacted] [098]. The Lease is for a term of 21 years starting on 7th December 2004 and ending on 6th December 2025.

3. On 27th June 2019 the Claimant made an application to the Pubs Code Adjudicator (PCA) [003] to refer a dispute between him and the Respondent to arbitration. The dispute identified was a Market Rent Only (MRO) dispute. The details were set out in Section C of the application [007]

4. The principal issue identified in summary was whether a letter sent by the Respondent to the Claimant dated 17th April 2019 contained a valid rent assessment proposal for the rent review due on 7th December 2019 under the Lease [[123]. The Claimant contended that this document (which I will refer to as the "First Letter") [044] was not a valid rent proposal because it was headed **WITHOUT PREJUDICE.**

5. The Claimant also complained that the conduct of the Respondent was contrary to the principles of the Pubs Code and calculated to prevent him pursuing a MRO claim, by issuing a further letter (the "Second Letter") dated 29th May 2019 in the same terms as the First Letter, including the date of 17th April 2019 but omitting the words **WITHOUT PREJUDICE.** [040]. This, he contended, effectively prevented him making a timeous application for an MRO. Such an application has to be made within 21 days of the relevant trigger event, in this case a rent review notice-See regulation 23(2)(b) of the Pubs Code etc Regulations 2016 (The "Code").

6. On 5th June 2019 the Claimant send a letter to the Respondent enclosing an MRO Notice [039]. The Respondent contended however that this MRO Notice was invalid because it was served more than 21 days after the Claimant's receipt of the First Letter, and thus failed to comply with the Regulations.

7. The PCA appointed an arbitrator, who was subsequently replaced. I was in turn appointed as arbitrator on 9th April 2020.

8. Prior to my_appointment the parties had engaged in correspondence through their solicitors restating their respective positions, and also exchanged statements of case. The Claimant's statement of case with attached Scott Schedule is dated 14th October 2019 [010-016]. The Respondent's which also incorporates replies to the Scott Schedule is dated 1st November 2019 [017-027] The parties have also made further submissions dated 11th February 2020.

9. The parties have very sensibly and helpfully agreed a bundle of documents and a statement of agreed facts and issues in dispute [001]-[002] The issues to be determined as listed in this (the "Agreed Statement") are as follows:

1. *Did the inclusion of the words "without prejudice" prevent the Rent Assessment Proposal sent to the Claimant on 17th April 2019 from acting as a formal notice which triggered the rent review process under the Lease?*
2. *Did the inclusion of the words "without prejudice" prevent the Rent Assessment Proposal sent to the Claimant on 17th April 2019 from triggering the right to serve an MRO Notice under regulation 23(1) of the Code?*

3. *Based on the answer to question 1 above, did the Claimant's right to serve an MRO Notice arise on the Rent Assessment Proposal sent to the Claimant:*

a) *On 17 April 2019, or*

b) *On 29th May 2019*

4. *Does the Code impose an obligation on the Respondent in respect of the principles set out in section 42(3) of the Act?*

5. *If so, has the Respondent breached such obligations?*

10. The parties have confirmed that the proceedings are simply awaiting an award on the basis of the agreed issues to be determined, with an award to be made without the need for a hearing-email [redacted] to me 15th April 17:37.

11. I will deal with the Issues in the order set out above.

12. The seat of this arbitration is London.

Discussion

Issues 1-3

13. The first 3 issues identified by the parties raise common questions and are conveniently dealt with together.

14. Before considering the arguments of the parties it is helpful briefly to examine the notice provisions of the Lease in relation to triggering a rent review and how they are impacted by the Code.

15. The review dates are specified on page 3 [102]. On page 3 of the Lease [102] it is stated that *Every year we will increase the rent by the percentage increase in the index since the previous year or 5%,*

whichever is less. We will also review the rent on a review date in the way set out in the second schedule.

16. The general provisions relating to notices are contained in section 8a of the Lease [118]. These provide that the Landlord may serve notices by first class recorded delivery or by leaving the notice at the Property.

17. The provisions for calculating the rent on review are set out in the second schedule [123]. The revised rent after the first review is to be *the best open-market rent you have agreed with us or decided upon by the valuer under paragraph 3 of this schedule.*

18. If the rent is not agreed within one month of the review date paragraph 3 the landlord can refer the matter to a valuer with specified qualifications and experience who is to act as arbitrator and who is to determine an open market rent.

19. A notice triggering a rent review is not under the Lease required to be in any particular form, or to contain particular wording or even to specify the figure for which the Landlord contends, or to be given by a particular date. It seems sufficient for the notice simply to give notice triggering a review on the relevant review date.

20. However, this position is drastically modified by the Code. Regulation 20 of the Code lays down detailed requirements for rent assessment proposals (RAP's), including that they should contain information as set out in Schedule 2 to the Code. The information in this Schedule is broadly intended to show how a landlord has calculated the revised rent it seeks so as to enable the tenant to negotiate in an informed manner, to use the wording of Regulation 20.

21. A helpful explanation and summary of the requirements of a RAP is contained in the PCA's Technical Guide Number 2, at paragraph 3. It is not necessary for me to set all of these matters out in detail as it is not in dispute between the parties that the First Letter with its memory stick complied with these requirements.

22. In order to deal with these requirements, the First Letter was accompanied by a memory stick with extensive documentation including a rent assessment statement, a direction to a copy of the Code, a copy of the Lease, details of the operation of Regulation 23, and a copy of the PCA leaflet on TPTs' rights. It also contained a "Rent Review Protocol" which provided the following:

- *We will send a trigger letter to the tenant confirming the date the rent review in their agreement falls due, not more than 12 months prior to the review date.*

- *An inspection will take place of the premises ...to collect information in connection with carrying out an assessment of rent...*

- *No later than 3 months after that inspection and no less than 6 months before the rent review date, we will provide the tenant with a rent assessment proposal.*

23. It is as has been noted already not in issue between the parties that leaving aside the use of the words **WITHOUT PREJUDICE** the First Letter was:

23.1. properly served under the Lease, and

23.2. a RAP within part 4 of the Regulations, so that it gave rise to a right to serve an MRO notice under regulation 23.

24. The point made at paragraph 23.2 must also apply logically to the Second Letter, which contained the same supporting material as the First Letter, assuming that the First Letter was not a valid RAP. If it was, the Second Letter cannot in my finding be relied on by the Claimant, and indeed the Claimant does not seek to argue that it can. In the Agreed Statement paragraph 10 it is said that *One (but not both) of the Rent Assessment Proposals sent to the Claimant on 17 April and 29 May 2019 commenced the rent review under the Lease and triggered the Claimant's right under regulation 23(1) of the Code to serve an MRO Notice.*

25. It is also convenient to deal at this point with the effect of the backdating the Second Letter. In my finding, this cannot have the effect of requiring the RAP it contained (If indeed it did contain a valid RAP) to be considered as having been served on 17th April 2019 or shortly thereafter. This is plain from the Regulations. The right to serve an MRO notice arises under Regulation 23 when the TPT receives a RAP-See Regulation 27. It is not therefore possible to backdate a RAP so as to prejudice the rights of the TPT.

26. I turn to consider the effect of the words WITHOUT PREJUDICE in the First Letter.

27. For the Claimant it is argued that the inclusion of these words has the effect that they produce a situation where a reasonable recipient could not tell whether the document was a RAP or merely a step in negotiations.

28. The Claimant relies on **Maurice Investments Ltd v Lincoln Insurance Services Ltd [2007] 1 P & CR 14.** In that case a rent review clause provided for notice by the lessor proposing a rent, with a right for the lessee to have the amount of rent fixed by arbitration provided it gave notice within 3 months of the lessor's notice. The notification from the lessor was headed "subject to contract" and "without prejudice". The court held that the question was how a reasonable recipient would have understood the document, but that only if the reasonable recipient was left in no reasonable doubt could the notice be valid.

29. The Respondent on the other hand relies on **Royal Life Insurance v Philips [1990] 2 EGLR 135,** where the court upheld a notice on similar facts to the **Maurice Investments** case. The Respondent points out in its Defence paragraphs 18 and 19 a number of factors in the wording of the First Letter and the documents on the stick which show, as it contends, that a reasonable recipient of the First Letter would have interpreted it as commencing a rent review procedure and so triggering the right to serve a MRO notice. It is not necessary to set them out again in this award.

30. The Respondent also relies on the fact that when the Claimant's solicitors responded to the First Letter on 3rd May 2019 [043] they clearly understood it was intended to operate the review procedure but mistakenly took the line that because the Letter was headed WITHOUT PREJUDICE it was not a valid notice under the Lease.

31. In his further submissions the Claimant draws attention to the guidance from the PCA published in November 2019 that RAP's should not be marked *without prejudice*. RAP's are statutory documents which must be provided by law.

32. In its further submissions, the Respondent refers to 2 PCA arbitration decisions. The second of these is to the effect that the statutory time limit for serving an MRO Notice cannot be extended. I accept this to be correct, at least generally. (There may be a possibility of reading the time limit down to comply with Article 6 of the Convention, but this could only arise in exceptional circumstances).

33. The first decision relied on by the Respondent is to the effect that in the particular case the RAP was admitted despite being "without prejudice" and "subject to contract". However, it appears that the TPT did not ultimately pursue his objection to the documents being put in evidence, and hence the decision appears of little assistance. In any event, each case must depend on its facts.

34. The starting point is in my view to consider the purpose of the heading "without prejudice". This is to encourage settlement of disputes, by preventing documents so headed from being put in evidence in the proceedings, or indeed subsequent proceedings between the same parties relating to the same matter-See **Unilever plc v The Procter and Gamble Company [2000] 1 WLR 2436.** The rule is subject to a number of exceptions, discussed by Robert Walker LJ.

35. It is also established firstly that the communication must be a genuine attempt at settlement-See **Cutts v Head [1984] Ch 290.** Secondly, a letter constituting the opening shot in an attempt to negotiate may attract the privilege: See on Evidence (18th Edition) para 24.13. Thirdly, the privilege is for the benefit of both parties, and neither can waive it without the concurrence of the other-See Phipson para 24.10.

36. The cases of **Maurice Investments** and **Royal Life v Philips** both proceed on the basis that the notices in question were not subject to without prejudice privilege. The question in each case was regarded as

whether the inclusion of the words "without prejudice" was such as to deprive them of certainty. However, this may be to oversimplify the issues, bypassing the evidential issue.

37. However, that may be, I consider the law is as stated in the **Maurice Investments** case. This view is supported by Woodfall on Landlord and Tenant at para 8.009.

38. Having considered the matter, although the point is not easy, I prefer the arguments of the Claimant. Although the First Letter was accompanied by a welter of documentation, which the Respondent has emphasised, it seems to me that it is not unfair to describe this, apart from the specific figures in the Rent Assessment Statement, as standard form material drafted to satisfy Schedule 2 to the Regulations. A reasonable recipient could well form the view that the Letter was no more than an opening shot in negotiations.

39. Furthermore, an important matter from the Claimant's point of view, as recipient of the Letter, would be whether it was a formal RAP or not. Given that the use of the heading **WITHOUT PREJUDICE** was in capitals and in bold type and so was clearly intended to be highly significant, the recipient of the letter would assume it was not intended to be a trigger for a rent review or a RAP. This emphatic wording was, he might well conclude, intended to make it clear that the document was indeed nothing more than a step in negotiations. Further, a point later emphasised by the PCA in guidance, the use of this heading might well deprive the document of all statutory force.

40. I consider the Claimant could therefore entertain reasonable doubt as to the effect of the Letter. I find that a reasonable recipient could not be sure that it was intended to initiate a rent review or amount to a RAP.

41. I am not persuaded by the argument that by responding through his solicitors as he did on 3rd May 2019 [043] the Claimant was implicitly recognising that the First Letter was a valid RAP. Indeed, this letter specifically raises the issue of uncertainty and shows genuine perplexity as to the way forward and the status of the First Letter.

42. A further important matter is that the Respondent subsequently reissued the First Letter with the same supporting documentation but omitting the words **WITHOUT PREJUDICE**. [040] This was in response to a letter dated 22nd May 2019 from the Claimant's solicitors [041] in which they said:

> *Accordingly, if you intend to conduct a rent review, please provide our client with a rent assessment on an open basis.*

43. In my finding it is clear that at that point the Respondent abandoned reliance on the First Letter and is precluded from now asserting that it was a valid RAP.

44. Accordingly, my answers to the first 3 issues in the Agreed Statement is as follows:

Issue 1

Yes.

Issue 2

Yes

Issue 3

The Claimant's right to serve an MRO Notice arose on the Rent Assessment Proposal served on 29th May 2019.

Issues 4 and 5

45. Issue 4 raises a potentially wide issue on the applicability of the Act. However, it seems to me clear on the wording of the Act that the obligations of the POB are as defined in the Code. Section 42(3) of the Act contains no wording directly imposing obligations on the POB. Further, the Act makes no provision allowing a TPT to enforce the terms of the section against the POB or indeed the Secretary of State.

46. Any challenge to the terms of the Code as not protecting TPT's sufficiently would therefore have to be by way of judicial review.

47. The arbitration decision in the Anderson case referred to by the Respondent in its further submissions contains some discussion of the relevant principles at paragraphs 24 and following. As I read the decision of the PCA, he takes the view that in interpreting the Code it is proper to have regard to the wording of section 42, on the basis that the intention of the draftsman of the Code is to be consistent with the Act. This is plainly correct. However, the decision provides no support for the argument that a TPT can maintain a direct claim for breach of the Act. What the decision does do is confirm that the TPT can make a direct claim against the POB for breach of the Code.

48. This being my finding on Issue 4, strictly Issue 5 does not arise. I have however considered briefly whether there has been a breach or breaches of the Code. Whilst one can fully understand the frustration and uncertainty for the Claimant as a result of the First Letter, the Claimant could have protected himself by serving an MRO Notice without prejudice to his argument that the First Letter was invalid. I agree with the submission for the Respondent at paragraphs 27 and following of its Defence [022] that there are no provisions of the Code which justify the idea of "lawful and fair dealing" and "no worse off". I find that the Respondent was not in breach of its obligations.

Decision on Issues 4 and 5

49. On Issue 4 I find the Code does not have the effect of imposing an obligation on the Respondent in respect of the principles set out in section 42(3) of the Act.

50. Issue 5 does not arise. I further find that the Respondent was not in breach of the Code.

Overall Decision

51. The effect of my decisions on the above issues is that:
    51.1. the only valid RAP was that made in the letter sent by the Respondent on 29th May 2019
    51.2. The Claimant's MRO Notice sent on 5th June 2019 is valid.
    51.3. The Respondent is not in breach of the Code.

Costs

52. I invite the parties to make submissions on costs. These should include their views as to which party if either should pay costs to the other and if so, what the appropriate amount of any costs awarded should be.

53. If either party requests me to award costs in their favour against the other, the request should comply with PCA Technical Note Number 15 paragraphs 9-17 as far as practicable.

54. Since the Claimant has substantially succeeded there does not seem to me at present there is any basis to order him to pay any part of the Respondent's costs under the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016. See also paragraph 45 of PCA Technical Guide Number 14. However, I invite any comments from the parties on this point also.

55. In accordance with paragraph 3 (3) of the above Regulations, the normal rule would be that the Respondent should pay my fees. Once again, I invite any views of the parties on this.

56. I direct that submissions on costs be sent to me with copy to the other party by 5pm on 14th August 2020.

[redacted]

Arbitrator

[redacted]

29th July 2020

Signed

[redacted]

ARB/105960

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AWARD

[redacted] **Chartered Arbitrator**

[redacted]