BEFORE [redacted]

UNDER THE PUBS CODE ETC. REGULATIONS

PCA ref: ARB/106050/WOMACK

BETWEEN

STEPHEN WOMACK

(Tied Pub Tenant)

Claimant

-and-

EI GROUP PLC

(Pub Owning Business)

Respondent

RE: The Turnpike, 28-30 High Street, Bawtry, Doncaster, DN10 6JE ("the Property")

PARTIAL FINAL AWARD

(Reserving Jurisdiction in Respect of Issue 4 and Costs)

17 February 2020

Sole Arbitrator

[redacted]

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A. INTRODUCTION

1. This reference to arbitration arises from a Rent Assessment Proposal ("the RAP" or "RAP1") issued to the Claimant by the Respondent in respect of the Property on 8 March 2017 pursuant to Regulation 19(2)(a) of the Pubs Code etc Regulations 2016 ("the Pubs Code") promulgated pursuant to s.42 of the Small Business, Enterprise and Employment Act, 2015 ("the SBEEA"). The principal issues in this arbitration relate to the validity of the RAP and to a monetary claim for £27,732.00 which has been advanced by the Claimant against the Respondent.

2. The Claimant is Mr Stephen Womack, of Turnpike Inn, 28-30 High Street, Bawtry, DN 10 6JE. The Claimant is represented by [redacted]

3. The Respondent is Ei Group PLC, of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. The Respondent is represented by Mr Rob Hastie of Gosschalks, Queens Gardens, Kingston Upon Hull, HU1 3DZ.

4. The Arbitrator is [redacted]

5. This is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996. The statutory framework governing this arbitration, other than the Arbitration Act 1996, is contained in the following enactments:

   5.1 Part 4 of the SBEEA;

   5.2 The Pubs Code; and

   5.3 The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 ("the Fees Regulations").

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

7. The applicable arbitration rules are those of the Chartered Institute of Arbitrators (2019).

8. The relief sought by the Claimant is in the following terms:

   "(1) Rule that the letter of 8th **March 2017** is not a valid RAP that it fails to comply with regulation.

   (2) Direct the Respondent to provide a new compliant RAP to the Claimant with full details i.e. the answer to Schedule 2(5)(c).

   (3) Make an order under Section 48 Arbitration Act powers for a sum of money (to be determined) for the failure by the POB to disclose or calculate sediment into the gross profit, rent and in doing so to alter the shareable profit.

   (4) Further to direct the Respondent to pay the costs of this claim including the PCA referral fee."

B. THE PROCEDURAL BACKGROUND

9. On or about 18 June 2019, the Claimant served a Notice of Dispute under s.48 of the SBEEA.

10. On or about 23 July 2019 the Claimant referred the present dispute for arbitration pursuant to s.48(1) of the SBEEA.

11. On 29 August 2019, the Pubs Code Adjudicator ("the PCA") issued an Order and Directions for the conduct of these proceedings ("Directions Order No 1").

12. On 9 September 2019, the Claimant filed his Statement of Claim.

13. On 12 September 2019 I was appointed as the Arbitrator in this case by the PCA pursuant to ss.48(5)(b) and 50(4)(b) of the SBEEA.

14. On 16 September 2019 and pursuant to the Respondent's application dated 12 September 2019 (to which the Claimant responded on 16 September 2019), I ordered the Claimant to furnish further and better particulars to his money claim. These particulars were served on 20 September 2019.

15. On 20 September 2019 I issued Directions Order No 2 amending certain of the deadlines in Directions Order No 1. I also confirmed (having consulted the parties) that the Arbitration Rules, 2019, of the Chartered Institute of Arbitrators would apply to this reference.

16. On 11 October 2019, the Respondent filed its Statement of Defence, together with a witness statement by [redacted] associated with the Respondent, who had certified that RAP 1 had been prepared in accordance with the RICS Guidance, and was compliant with the Pubs Code.

17. No Response was filed by the Claimant to the Statement of Defence, and no witness evidence has been filed by the Claimant.

18. On 13 November 2019 the parties furnished me with a list of agreed facts and a list of issues.

19. On 18 November 2019 I was furnished with a bundle of documents by the Respondent.

20. The parties are in agreement that there is no need for expert evidence in this case, and that I should reach a decision only on consideration of the documents with which I have been furnished, and without an oral hearing.

21. I am satisfied that each party has had an adequate opportunity to present its case, and to respond to the other party's case.

C. THE FACTS

22. The following factual background appears from the witness statement of [redacted], and the accompanying Exhibits, which was not controverted by any evidence from the Claimant.

The Parties

23. The Respondent and its subsidiaries own approximately 4,000 pubs, of which approximately 3,700 are let on tied tenancy terms. The Respondent is not a brewer, and supplies pubs with drinks (including cask ales) purchased by it from brewers and other sources.

24. Prior to the introduction of the 2016 Pubs Code, the major pub companies, including the Respondent, entered into voluntary Codes of Practice and procedures administered by the British Institute of Innkeepers ("BII").

25. The Respondent's 2010 Code of Practice, which was in force when the Claimant took his assignment of the Lease, referred to the *"high standards of qualification that we regard as essential for running a successful pub business"* and required applicants who had not previously run pubs to complete, inter alia, the BII Pre-Entry Awareness Training Course and 5-day Business Foundation Programme ("BFP") run by the Respondent. The topics covered by the latter included beer and cellar quality, handling cask ale, sediment and cask conditioning (the process whereby secondary fermentation occurs in the cask, causing sediment).

26. The Turnpike is a pub situated at 28-30 High Street, Bawtry, Doncaster DN10 6JE, South Yorkshire, owned by the Respondent ("the Property").

27. On 22 March 2011, the Respondent concluded a Renewal Agreement for a 10-year tenancy of the Property, with the then-tenants, [redacted] on "tied-pub" terms, i.e. the tenants were obliged to purchase from the Respondent all the drinks to be sold on the Property. The rent was £20,000 per annum, increasing annually by the rate of the Retail Price Index, and reviewable on each fifth anniversary (Clauses 13.8 and 13.9).

28. On 14 August 2013, a Licence to Assign the Lease from the [redacted] to the Claimant was concluded. Thereafter the Claimant traded the Property through a management company, Erindore Lincoln Ltd.

29. On 16 November 2013 the Claimant and the Respondent concluded a Deed of Variation to release from the tie Wines, Spirits, Minerals, Packaged Beer, Packaged Cider and Flavoured Alcoholic Beverages in return for a tie release fee of £7,800 per annum.

The March 2016 Sediment Duty Information

30. On or about 4 March 2016, the Respondent released details of sediment duty allowances on main cask ale brands under cover of a press release which reads as follows:

> **"Enterprise Inns has released information about the number of saleable pints in barrels of its leading cask ales following serious concerns from a campaigning licensee.**
>
> [redacted], of [redacted], who heads up campaign group [redacted], launched a campaign early this year arguing information about undrinkable sediment in cask-conditioned beer is not being passed on to licensees—and said many believed firkins contained 72 pints of saleable beer.
>
> Enterprise has now revealed a table detailing the number of saleable litres and saleable pints its licensees can expect to yield from its cask beers.
>
> It said this was designed to act as a guide to help assist with calculating recommend selling prices and gross profit. Enterprise told licencees they should note different sediment allowances when purchasing cask beer.
>
> To view the tables, click **here** and **here**.
>
> A concession from Her Majesty's Revenue and Customs means that duty doesn't need to be paid on the undrinkable sediment in cask conditioned beer—as long as customers of the brewer, including publicans, are made fully aware of the quantity of beer on which duty has been charged."

31. By way of explanation, the concession from HMRC which is referred to in this press release is Excise Notice ("EN") 226, published on 31 October 2014), which provides that duty need not be charged on any undrinkable sediment in a brewer's cask-conditioned beer, provided that the brewer's customer is made fully aware in writing, at or before the time of receipt, of the quantity of beer on which duty has been charged.

32. The tables referred to in the announcement set out the relevant details in respect of approximately 150 cask products under the heading *"when purchasing cask beer, please note that all brewers have different sediment allowances (CAS) which have been factored into ETI wholesale prices. The table below details the relevant sediment allowances, saleable litres and equivalent number of saleable pints for all cask products currently available from ETI wholesale as a guide to assist with RSP and GP calculations."*

33. The above information was made available to the Claimant and the Respondent's other tied pub tenants on the Respondent's Publican channel, an online "dashboard" where a tenant can find out information about its accounts, deliveries, dispense data and other useful information. Access to the channel is logged, and the logs reveal that the Claimant first used the channel on 12 May 2014, and that he has used it as recently as 21 September 2019.

34. The disclosure was the subject of publicity with two articles in the main trade magazine, the Morning Advertiser, on 5 March 2016 and 7 March 2016.

35. The June 2016 edition of the Respondent's magazine "Enterprise deals & ideas", which was issued to all tenants, contained details on how to locate the cask sediment allowances, and included a link to the sediment allowance table and an explanation that *"All Enterprise cask ale wholesale prices factor in sediment allowances agreed between the brewers and HMRC. Visit the Publican Channel for more details."*

The Pubs Code

36. The Pubs Code came into force on 1 July 2016, and constitutes a statutory code for pub-owning businesses which have more than 500 tied pubs.

37. The Pubs Code made provision for Rent Assessment Proposals (i.e. proposals in resect of rent to be paid in accordance with the terms of an existing tenancy), and the material provisions in that regard are the following.

38. In terms of Regulation 19(2)(a) a tied pub tenant may request a rent assessment if, inter alia, such an assessment has not ended within the period of 5 years ending with the date of the request.

39. In terms of Regulation 20(1) the rent proposal must contain:

> "(a) a proposal for the rent or money payable in lieu of rent which is to be paid under the tenancy or licence at the end of the assessment (the "new rent");
> (b) the information specified in Schedule 2, if it is reasonably available to the pub-owning business;
> (c) such other information as may be required to ensure that the tenant is able to negotiate, in an informed manner, the new rent."

40. Regulation 21 relates to the conduct of the rent assessment, and requires inter alia, that the assessment must be conducted in accordance with the RICS Guidance and must be so certified by a member or fellow of the RICS (Regulation 21(2) and 21(9)); during the rent assessment the pub-owning business must comply with any reasonable request by the tied pub tenant for further information which is relevant for the negotiation of the new rent, or provide to the tied pub tenant, as soon as reasonably practicable, a reasonable explanation why the information required is not provided (Regulation 21(3)); the pub-owning business must advise the tied pub tenant to obtain independent professional advice in connection with the new rent before the tenant agrees that rent (Regulation 21(5)); and the tied pub's tenant agreement to the new rent must be given in writing (Regulation 21(8)).

41. Schedule 2 specifies the following information for the purposes of a rent assessment proposal:

> "**1.** A summary of the methods which must be used under the tenancy or licence to calculate the initial or revised rent or the new rent including—

(a) the information which will be used to support those calculations;

(b) the justification for the use of such information.

2. An outline of the procedure to be followed during negotiations of the initial or revised rent or the new rent between the pub-owning business and the tied pub tenant.

3. A list of the matters which will be considered to be relevant and irrelevant in such negotiations.

4. Information in respect of the cost of service charges relating to the tied pub during the last 3 years.

5. A forecast profit and loss statement for the tied pub for the period of 12 months beginning with the day on which the initial or revised rent or the new rent is payable ("the forecast period") and the figures and other information which have been relied on to formulate that statement, including—

(a) the volume of alcohol, including the number of barrels of alcohol, purchased during the last 3 years from the pub-owning business or its agents;

(b) the percentage of the tied pub's turnover during the last 3 years which the sale of this volume of alcohol represents;

(c) if different from the figure in (a), the volume of alcohol in respect of which duty was paid during the last 3 years;

(d) a figure for the total estimated sales and gross profit margins of the tied pub for the forecast period, with a breakdown showing separate figures for the estimated sales, gross profit margins, for—

(i) draught ales;

(ii) draught lagers;

(iii) packaged beers;

(iv) draught ciders;

(v) packaged ciders;

(vi) wines;

(vii) spirits;

(viii) flavoured alcoholic beverages; and

(ix) soft drinks;

(e) the percentage of the pub's turnover for the forecast period which each drink in sub-paragraph (d)(i) to (ix) represents;

(f) an estimate figure for the volume of draught beer and cider which will not be sold during the forecast period (including draught beer and cider wasted, unfit for sale or dispensed in promotions) where that figure has not been accounted for in the gross profit margin;

(g) the estimated operating costs likely to affect the tied pub tenant's profit during the forecast period including, where relevant, the estimated cost of a manager during that year, where the tied pub tenant is not the manager of the tied pub;

(h) an explanation of how estimated income during the forecast period from any gaming machine, in the tied pub has been accounted for in the statement;

(i) a breakdown of any costs during the forecast period which have not been accounted for separately but have been included in the estimated figures for other costs (for example, the cost of cellar gas).

6. The figures which are provided under paragraph 5 must be provided net of value added tax or machine games duty (within the meaning of Schedule 24 to the Finance Act 2012.

7. The profit and loss statement provided under paragraph 5 must refer to relevant and current data available publicly in connection with the typical costs of operating a tied pub in the United Kingdom and explain any variance between the costs referred to and the pub-owning business's costs estimate.

8. The statement, figures and other information which the pub-owning business provides to the tied pub tenant under paragraphs 5 to 7 must —

(a) be sufficiently clear and detailed; and

(b) include justification or supporting evidence for any assumptions,

to allow the tenant to understand the basis on which the estimated figures in the statement have been calculated.

9. Any information which the pub-owing business provides under paragraph 5, must be—

(a) accurate, wherever it refers to historical data; and

(b) reasonable, wherever it refers to projected data.

10. In paragraph 5(c) "duty" means any duty of excise charged on beer by section 36(1) or section 37(1) of the Alcoholic Liquor Duties Act 1979.

11. Any information in Schedule 1 which—

(a) the tied pub tenant has not already received; or

(b) has changed materially since it was provided to the tenant.

12. A timetable specifying the dates on which any other information will be made available to the tied pub tenant before negotiations begin.

42. The Pubs Code also introduced a right to go free of tie (the "Market Rent Only" or "MRO" option). In terms of Regulation 23 as read with Regulation 27, the service of a Rent Assessment Proposal by the pub-owning business entitles the tied pub tenant to serve an MRO notice, in which event the pub-owning business is obliged to offer the tenant a "full response" in the form of a free of tie lease (Regulation 29(3)(b)). Once the terms of this lease have been agreed or determined, the free of tie rent is set by an Independent Assessor, following the parties' submissions, under Part 7 of the Pubs Code. The tied pub tenant then has a choice whether to accept the MRO tenancy or to stay with their tied tenancy.

The Rent Assessment Proposal

43. On 10 October 2016, the Respondent received a request for a Rent Assessment Proposal under Regulation 19(2)(a) of the Code from a representative of the Claimant.

44. The Respondent sent the RAP to the Claimant under cover of a letter dated 8 March 2017.

45. In the covering letter, the Respondent proposed that the Claimant's rent be amended from £24,349.93 to £38,000 per annum with effect from 21 March 2016, on the basis that *"this assessment accurately reflects the appropriate open market rent for the premises taking due account of the terms of your lease, tied supply and the prevailing market conditions."*

46. The enclosed Rent Assessment contained an Income section with separate figures (in terms of turnover, percentage of turnover, gross margin and gross profit percentages) for various types of draught and packaged beers, cider and FABs, wines, spirits, minerals and food. The total estimated annual turnover was £513,500, after deduction of £5,000 for Wastage, and the gross margin was estimated at £274,000. The Rent Assessment also contained an Overheads section, which listed the various categories of overheads, which totalled £194,000. This left a divisible balance of £80,000. The Respondent's rent proposal was £38,000 which would result in an estimated total publican profit of £42,000.

47. The wastage figure of £5,000, being 1% of turnover, was a combination of [redacted] estimate of operational waste and sediment waste. As its name implies, operational waste is waste which occurs in the normal course of operations, and depends how long the beer lines are from the cellar, how often they are cleaned, and the publican's practices, and the relevant volume changes from pub to pub. Sediment waste only applies to cask ale, which continues to ferment in the cask and therefore has sediment. In that regard [redacted] comments (para 15) that *"Everyone involved in the pub industry is or should be aware of that fact. It is a reason that casks need to be allowed to settle after delivery and be tilted. At the end of each cask there will be dregs which will be indispensable."*

48. The RAP did not provide information as to sediment duty allowance, as required by item 5(c) of Schedule 2. The reason for this was explained by [redacted] as follows (para 73):

    "a. The Respondent is not a brewer and therefore does not pay the duty. Some POB's are brewers.

    b. The Respondent buys all its alcoholic drinks "duty paid".

c. The Respondent supply over 1,000 different cask ale products.

d. The Respondent does not always receive information regarding sediment allowances and changes thereto.

e. There is no easy way for the Respondent to collect exact information for the last 3 years.

f. It would be an unreasonable bureaucratic burden.

g. An estimate of the sediment wastage is already accounted for in the wastage line in the RAP1 profit and loss account."

The MRO application

49. The Claimant served an MRO notice (relying on RAP1 as an MRO event) on 27 March 2017, to which the Respondent served a full response on 11 April 2017. The Claimant did not challenge the MRO tenancy and the FOT rent was set on 22 June 2018 at £51,000.

The 2019 PCA Guidance

50. On 10 April 2019, the PCA published his *"Guidance: Accounting in Pubs Code Schedule 2 forecast profit and loss statements as part of a rent proposal under Part 3 of the Code or a rent assessment proposal under Part 4 of the Code for (a) the volume of alcohol on which duty has been paid; and (b) the volume of draught product waste which is unsaleable, Including the provision of associated training and support."* ("The PCA Guidance").

51. The PCA Guidance came into effect on 1 July 2019, and provides inter alia as follows:

51.1 ***Accounting for Duty Paid.*** The requirement of Regulations 16 and 20 in conjunction with paragraph 5(c) of Schedule 2 to the Code that, so far as reasonably available, the forecast profit and loss statement to be provided by the POBs as part of a rent proposal or rent assessment proposal must include the volume of alcohol in respect of which duty was paid during the last three

years if this figure is different from the actual volume of alcohol purchased by the TPT during the same period *"will always be relevant in respect of cask ale and the PCA considers that this information is likely to be reasonably available in all but the most exceptional of circumstances. POBs who are also brewers will have information on the volume on which duty has been paid on their cask ales from their own submissions to HMRC in accordance with Excise Notice 226. POBs who buy in cask ales are required by paragraph 11.3.5 of Excise Notice 226 to be informed by the brewer of this information".* (Paras 1.1 and 1.2)

51.2 ***Accounting for Waste.*** The Guidance refers to paragraphs 5(f) and 8 of Schedule 2 to the Code and comments that *"the PCA therefore believes that best practice requires POBs to account for the amount of unsaleable draught beer and cider separately in the forecast profit and loss account, and not only as part of the gross profit calculation."* (paras 2.1-2.3).

51.3 The Guidance also alludes to the difference between sediment waste and operational waste and states that *"to ensure maximum transparency, consistent with the requirements of paragraphs 8 and 9 of Schedule 2, POBs should include as separate entries in their forecast profit and loss statements (a) the estimated saleable volume of the cask ales supplied after an allowance for sediment; and (b) the estimated saleable volume for all draught products supplied—including cask ales, keg beers and ciders—after an allowance for operational waste."* (paras 2.5-2.6).

51.4 ***Sediment Waste.*** The PCA considers that POBs will meet the requirement to account for the estimated saleable volume of cask ales after an allowance for sediment either by providing a separate figure for saleable ale in respect of each cask product supplied or by including a consolidated allowance covering the range of cask products supplied under the tied agreement. (para 2.7)

51.5 ***Operational Waste.*** The PCA considers that compliance with paragraph 5(d) of Schedule 2 requires forecast profit and loss statements to include separate

entries for the saleable volumes for all categories of draught products supplied after an allowance for operational waste. In the case of draught cask ales, this should be an allowance separate from (and in addition to) the allowance for sediment waste (para 2.12).

51.6 ***The PCA's Consultation Summary of Responses.*** In this document the PCA commented that *"There is no statutory authority that permits the guidance to be applied retrospectively. The guidance does not, however, create any new statutory duties—the Schedule 2 requirement for POBs to provide their tenants with transparent information about duty and wastage have existed since the Code came into force in July 2016. TPTs have had the right since then to refer any concerns about compliance with the Schedule 2 requirements to the PCA for arbitration."*

The Respondent's Response to the Guidance

52. This is dealt with in [redacted] statement as follows.

53. According to [redacted], the problem for the Respondent was that until the Guidance was issued, it was not clear that it had to obtain and record the sediment duty information on the over 1,000 brands it supplies, which change from time to time. Therefore, it would not have been possible in 2017 to have provided 3 years history of sediment duty on the over 1000 brands of cask ale delivered. The only reasonably available information would have been an estimate, which is what RAP 1 contains.

54. In the light of the Guidance, the Respondent has started to collect more detailed information, and [redacted] has produced an analysis of the sediment duty on the brands supplied to the Turnpike, which [redacted] has explained as follows:

54.1 [redacted] has included the figures to 2016 to show the changes since the introduction of the Code. To go back to 2014 would require a substantial amount of further time and effort. It will be difficult to ascertain the historic information for over 1,000 products.

54.2 The Turnpike had 148 different products in a 4 year period.

54.3 It took over 10 hours to identify the data for these products, find specific product information that was not part of the pricelist sediment data, input the relevant delivery information and check the data.

54.4 To automate the process would require a huge amount of time, cost and resources, as the data sets are vast and would need cross-referencing across multiple systems. The system would need to be constantly updated with new and seasonal products coming onto the market.

55. The Respondent does not believe it is reasonable to carry out this exercise with every RAP and instead provides an estimated figure based on the valuer's knowledge of the actual brands dispensed by the TPT and the publicly available evidence on sediment duty allowance. POB's that brew will have a much narrower range of products and will be the payer of beer duty. Therefore, we believe it is more reasonable for them to provide the detail that the Claimant seeks in this case.

56. The outcome of the one-off process is a figure for the tenant's actual sediment allowance, which is then not directly relevant to the hypothetical sediment wastage figure for the REO.

57. [redacted] attached a further document reflecting what the RAP would look like in the light of [redacted] exercise ("RAP2"), which (according to [redacted] the Claimant can request to be formally served if they wish under regulation 19(2).

58. RAP 2 reflects a figure of £3,200 or 0.6% of turnover for operational wastage and £1,700 or 0.03% for cask sediment allowance. This allowance is 1.9 x 36 gallon barrels, which is equivalent to £1,700 turnover on sales of cask ale of £39,800. This is based on the brands which the Respondent believes the REO would stock (including Greene King's Ruddles, which is at the higher end of sediment duty allowances).

59. Therefore, following the guidance, there is a greater level of information in the RAP2, but it has made no substantive difference in wastage figure. The wastage, as a percentage of turnover, has decreased from RAP1 to RAP2.

60. [redacted] does not think it is fair to judge the RAP1 by reference to the 2019 guidance, but he believes that the estimated figure for wastage, which includes sediment waste, stands up. In particular a difference of +/- 0.5% on the sediment wastage allowance (i.e. 4.7% or 3.8%) on the cask ale sales of £39,800 in RAP2 would mean that:-

60.1 The gross margin would be +/- £199.

60.2 The divisible balance would be +/- £199.

60.3 The rent offer would be +/- £96.71 which is of no valuation significance given the fact that rents are rounded up or down by more than that amount.

D. THE AGREED FACTS AND LIST OF ISSUES

61. On 13 November 2019, I was furnished with a statement of agreed facts and list of issues by the parties. The agreed facts were as follows:

1. The renewal lease was entered into on 22 March 2011. The term was 10 years from 22 March 2011 at a rent of £20,000 per annum.

2. In late 2012 there was an application for licence to assign the Lease from the [redacted] to the Claimant.

3. On 14 August 2013 Licence to Assign was granted. As part of the assignment process the Claimant was offered but did not attend the Respondent's Business Foundation Programme.

4. The Claimant trades the Property through Erindore Lincoln Ltd.

5. The Claimant is protected by the Pubs Code.

6. The Respondent sent the Claimant a document on 8 March 2017 ('RAP1') which the Respondent asserts was a valid RAP.

7. The Code states that information in Schedule 2 should be provided in a RAP if it is reasonably available.

8. Schedule 2 specifies, amongst many other matters, that the RAP should include the volume of alcohol in respect of which duty was paid during the last 3 years (clause 5(c)).

9. RAP1 did not provide information as to sediment duty allowance.

10. The Claimant served an MRO notice (relying on RAP1 as an MRO event) on 27 March 2017.

11. The Respondent served a full response on 11 April 2017.

12. The Claimant did not challenge the MRO tenancy and the FOT rent was set on 22 June 2018 at £51,000.

13. The Claimant can, at any time, request a further RAP be sent under r.19(2).

62. The issues in dispute were as follows:

1. Did the Respondent knowingly conceal cask sediment information from the Claimant?

2. Was the 3 years cask sediment duty information reasonably available in March 2017?

3. If it was, then does the omission of such information render RAP1 invalid?

4. Do the MRO notice and proceedings, estop the Claimant from disputing the validity of RAP1?

5. Does the Claimant have a cause of action for compensation?

6. If so, did any breach of the Code cause the Claimant to suffer loss?

7. If so, what is the quantum of that loss?

8. Is the referral vexatious?

E. DISCUSSION OF THE ISSUES AND FINDINGS

Issue 1: Did the Respondent knowingly conceal cask sediment information from the Claimant?

63. The Claimant contends that *"In Breach of regulation 20(1)(b) the proposal sent by the POB failed to comply with Schedule 2 of the pubs code, important data was knowingly concealed despite the it being available to the POB and outlined in a document published by the respondent dated 2016 (Cask-Ale-Sediment-Allowances)."*

64. The Respondent contends that it is contradictory for the Claimant to allege *"knowing concealment"* of information that it refers to as having been published by the Respondent in 2016. The Respondent also relies on the facts set out in [redacted] witness statement to rebut the Claimant's contention.

65. In my view, the Claimant has failed to establish that the Respondent knowingly concealed cask information from the Claimant. This is a serious allegation, in respect of which the Claimant bears the burden of proof. Notwithstanding this, the Claimant failed to lead any witness evidence which might support its case in this regard. In particular, there is no witness statement from the Claimant as to the extent of his knowledge of cask sediment information.

66. Furthermore, when regard is had to the available facts set out in [redacted] witness statement, which have not been rebutted by any contradictory evidence form the Claimant, and must therefore be accepted, it is my view clear that the Claimant's contention that the Respondent deliberately concealed cask sediment information from the Claimant is wholly unsustainable.

67. In particular:

    67.1 The Respondent required the Claimant to attend, free of charge, a training course on cellar maintenance, which included handling of cask ales and sediment, prior to the Claimant taking the assignment of the lease in 2013. The Claimant repeatedly failed to attend the course.

    67.2 The Respondent published details of sediment duty of cash also on its main pricelist, and provided press and magazine articles relating to the same.

    67.3 The Respondent made the information regarding sediment duty available through the Publican Channel.

67.4 The Respondent provided details of wastage in RAP1.

67.5 The facts set out in paras 30-35 above indicate that the Claimant was aware of the phenomenon of cask sediment, and was able to access cask sediment details in respect of 150 cask products, for a substantial time before the service of RAP1.

68. The answer to Issue 1 is therefore No.

Issue 2: Was the 3 years cask sediment duty information reasonably available in March 2017?

69. The Claimant contends that the answer is Yes, and relies in particular on HMRC's EN 226.

70. The Respondent contends that the answer is No, because:

70.1 The Respondent supplies over 1,000 brands of cask ales.

70.2 As RAP1 was provided in March 2017, the Respondent would have had to provide information dating back to March 2014, over two years before the Code. There was no lead-in period to the Code. The regulations were changing up until the last minute before its introduction. Therefore, the Respondent could not have prepared beforehand for the provision of information dating back to March 2014.

70.3 The information that the Respondent had related to cask brands on the main pricelist, which form a fraction of the total brands delivered.

70.4 The figures for sediment duty on each brand can change from year to year.

70.5 The Respondent does not always purchase directly from brewers.

70.6 It is not easy to ascertain the data, particularly for historic periods.

70.7 The task of collating the data would have been a disproportionate bureaucratic burden.

70.8 The information on sediment duty volumes was just one of over 100 separate pieces of information required to be included in the RAP (which includes the updating of information on schedule 1, as well as providing information in schedule 2).

70.9 Many other new procedures and information were required by the Code in 2016 with no lead in period.

70.10 Given the above issues, it was reasonable to estimate sediment wastage on the first page of RAP1 in March 2017.

71. In my view, the difficulties to which the Respondent alludes show that it might have been time-consuming, and will have required a financial outlay, for the Respondent to collate the information on sediment wastage before 2019, but does not detract from the fact that the Respondent had the means of obtaining the information from its brewer suppliers by reason of the statutory obligations of the latter under EN 226. In addition, the March 2016 sediment duty information shows that the Respondent had the relevant sediment data for at least some of the cask ales sold by it at that time. Furthermore, the analysis conducted by [redacted] after the 2019 Guidance was issued shows that it was perfectly possible to collate the data and to produce an RAP which contained separate data in respect of sediment wastage and thereby comply with item 5(c) of Schedule 2 as at 2019, and no satisfactory explanation has been given why the Respondent could not have accessed this information at an earlier stage by using its statutory rights under EN 226.

72. The 2019 Guidance itself states that *"this information is likely to be reasonably available in all but the most exceptional of circumstances"* and although the Guidance itself came into force in July 2019, it seems to me that the availability of the information by reason of EN 226 makes it likely that this statement would apply equally to the period before 2019.

73. In my view, therefore, the answer to Issue 2 is Yes.

Issue 3: If it was, then does the omission of such information render RAP1 invalid?

74. The Claimant's central contention is that RAP1 is invalid because it does not comply with Regulation 20 and Schedule 2 and fails to show the volume of alcohol delivered and the volume which was subject to duty for a 3 year period as required by paras 2(5)(a) and (c) of Schedule 2.

75. The Claimant also contends that in breach of para 2(8) of Schedule 2, the Respondent *"failed to acknowledge or indicate there was any difference as required in answering Schedule 2(5)(c). This answer would allow a TPT to take into account the information and use it to set pricing and gross profit. Not providing it undermines the creation of a credible and sustainable business plan and fails to help a TPT populate a blank template profit and loss with which a TPT can base any agreement or argument over the proposed rent. There was no justification or attention drawn to the failure to provide any calculation Schedule 2 (5) (c)."*

76. The Claimant also contends that Respondent fails to establish the gross profit margins as required under Schedule 2(5)(d) and as recently reiterated under point 2.9 in the 2019 Guidance.

77. The Respondent contends, firstly, that the question of whether a failure to comply with a requirement in the Code has the effect of invalidating RAP 1 is one of statutory interpretation. It relies on *Osman v Natt* [2015] 1 WLR 1536, where the Court of

Appeal said that the test is no longer whether the statutory provision is mandatory or directory, and that *"The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole."*

78. Secondly, the Respondent contends that the failure to provide specific information under schedule 2 does not invalidate a RAP because:

78.1 Regulation 20 does not provide that a RAP is invalid if any such information is not contained in the document sent to the TPT.

78.2 Certainty is required as to the provision of a valid RAP because (i) under regulation 21(1), this triggers the commencement of a rent assessment and (ii) under regulation 27, the service of a RAP is an MRO event.

78.3 Regulation 20, schedule 2 (and schedule 1), require potentially hundreds of pieces of information. Dispute could be raised as to the inclusion or omission of any one piece of information, for up to 6 years after the RAP is served. A strict approach would therefore be a cause of great uncertainty and confusion. It would give rise to the risk that the substantial amounts spent on MRO procedures based on the RAPs (as has been the case at the Turnpike) would be wasted.

78.4 By regulation 21(3), provision is made for further information to be requested during the rent assessment at the reasonable request of the TPT or person acting on behalf of the TPT. If the omission of any information required under regulation 20(1) invalidated the RAP, this procedure would be otiose. Rather, regulation 21(3) supports the contention that the RAP is intended to be the trigger of a process, which involves communication and discussion between

the TPT and the POB such that if the TPT or his adviser considers that further information is required, the TPT can request it and, unless there is a reasonable explanation for not providing it, such request must be complied with by the POB. Accordingly, the Code provides a mechanism to secure compliance with regulation 20(1) and therefore the Code should not be construed in a way which renders a RAP invalid and therefore a nullity merely because it lacks information required by schedule 2.

78.5 In the alternative, if, which is denied, any or all of the alleged deficiencies under regulation schedule 2 to the Code are established by the Claimant, it is denied that such deficiencies are capable of invalidating the RAP served by the Respondent. Rather, the Code provides, by regulation 21(3), a process for the parties to discuss any further information which might be required.

79. In my view this is a simple issue of construction and application of the Code. Regulation 20(1)(b) is mandatory, and provides that the pub-owning business "*must send to the tied pub tenant (a RAP) containing the information specified in Schedule 2 if it is reasonably available to the pub-owning business.*" Schedule 2 in turn lists 12 items which the RAP must contain, one of which is the profit and loss forecast referred to in item 5. That profit and loss forecast must include "*the figures and other information which have been relied on to formulate that statement*", and those figures must include the nine categories of information set out in sub-paras (a) to (i). In particular, sub-paras (a) and (c) explicitly require the volume of alcohol purchased in the last 3 years and, if different from that figure, the volume on which duty was paid in that period. The difference is the sediment, and it follows that it is one of the explicit and central requirements of Schedule 2 that the profit and loss statement must be formulated with reference to a figure for sediment wastage, which must be disclosed in the statement itself.

80. In my view it follows that if the sediment wastage figure is reasonably available (as I have found that it was), a RAP which does not disclose that figure and include it in

the profit and loss calculation, does not comply with Regulation 20(1)(b) and is therefore invalid. I think that the Respondent's contentions which are set out in paras 83-85 above may well have force when it comes to the level of detail and peripheral information contained in a RAP, which the Respondent refers to as "potentially hundreds of pieces of information" but I do not agree that this reasoning can apply to the core information which is explicitly required by Schedule 2. By the same token, the fact that a compliant RAP may not have differed materially from RAP1 (see paras above) does not detract from the fact that the Claimant was entitled to receive the information required by sub-paras (a) and (c) in order to conduct his own assessment.

81. The answer to Issue 3 is therefore Yes.

Issue 4: Do the MRO notice and proceedings, estop the Claimant from disputing the validity of RAP1?

82. Having reviewed the parties' pleadings, I have concluded that neither party has articulated its case on this issue with sufficient clarity to enable me to make a ruling on it.

83. I have therefore decided to reserve jurisdiction on this issue and to deal with it in a Final Award (together with the costs issues) after calling for further short submissions from the parties on this issue (limited to 2 pages each) which must please be filed as follows:

    83.1 Main submissions to be filed by 5 pm London time on Monday 24 February 2020.

    83.2 Responsive submissions to be filed by 5 pm London time on Thursday 27 February 2020.

Issue 5: Does the Claimant have a cause of action for compensation?

Issue 6: If so, did any breach of the Code cause the Claimant to suffer loss?

84. It is convenient to deal with these issues together.

85. The Claimant's monetary claim is for payment of £27,732.00, representing an alleged loss of £4,622 *"for each of the six years the rent has been assessed incorrectly and unfairly during the occupation of the Claimant"*. The figure of £4,622 is in turn made up as to £3,133.00 in the form of a shortfall in turnover, and £1,488 in the form of a rental differential. The reduction in turnover is said to have come about because, using the pricing in the RAP dated 8 March 2017, and assuming that there were 66 saleable pints per firkin, by reason of sediment wastage, instead of the theoretical 72 pints, a total of 1080 pints were unsaleable, and this would have achieved a turnover of £34,467, instead of the stated turnover of £37,600 in respect of cask ale, hence a shortfall in turnover of £3,133.00. This shortfall in turn *"reduces the £80,000 divisible balance by that amount to £76,867 and at 47.5% the rent should be £36,512 and not £38,000 which is a £1,488 difference. Because the rent is fixed the tenant must pay this £1,488 rent from a turnover already reduced by the £3,133 shortfall in sales, so the residual "Total publican profit" is reduced by the sum total of both these amounts."*

86. The Claimant has articulated the legal basis of his claim as follows:

> *"The legal basis of the money claim is that the Respondent has breached the Pubs Code at Schedule 2 Para 5 & 8 and as underlined by the Beer Duty Wastage Statutory Guidance July 2019…There is a clear requirement to inform the tenant of the contents of cask ale, a large pack product the POB include in their regular assessment of shareable profit and the rent they receive. This breach should be viewed against the duties under HMRC EN226 11.3.5 whereby the brewer informs the customer of the contents of large pack beer in this case EI Group. That EI then misguides a tenant as to the agreed amount of duty being paid and declared is manifestly unfair as this amount is clearly the maximum consumable and therefore saleable quantity in the containers as agreed between HMRC and the brewer after a comprehensive validation exercise."*

"The legal basis for the claim is supported by action to mitigate and compensate for loss under s.48 Arbitration Act, Pubs Code Regulation 20, Schedule 2 para 5 & 8 of the same, the PCA statutory guidance July 2019, SBEE Act s42(3)."

87. The Respondent resists this claim, and contends, in summary, as follows:

87.1 The Claimant has produced no evidence to support the assertion that RAP1 was used by the Claimant in setting its prices or its gross profit.

87.2 The Claimant has produced no evidence of when he became aware of cask sediment or sediment duty allowance and whether he changed his prices in any way.

87.3 The Act and the Code provide specific remedies, which do not include any provision for compensation to be paid to tied pub tenants. There was no mention of claims to compensation in any consultation which led to the creation of the legislation

87.4 Under section 48 a matter may only be referred to arbitration to the extent that *"it relates to an allegation by the tenant that the POB has failed to comply with any provisions of the Pubs Code"*. There is no indication in the legislation that was intended to cover money claims.

87.5 The Claimant sets out no legal cause of action to support his claim.

87.6 As to causation, the Claimant has produced no witness evidence and the Statement of Claim is not signed by the Claimant. The Claimant would have been aware of sediment had he attended the course that he was offered for free. It is improbable that the Claimant was unaware of sediment in cask ale having traded the Turnpike for 3 years and traded two other properties before that.

87.7 The Claimant has produced no evidence of any loss. The Claimant's gross profit percentages are consistently higher than those estimated in the Respondent's RAPs. The price of the Claimant's beer is higher than the average in the North according to the Craft Report for 2017/18.

87.8 The Claimant is and was entitled at any stage, to request a further RAP, which would comply with the terms of the PCA's July 2019 guidance.

87.9 The assessment of the claim is denied, inter alia because there is no evidence that the Claimant's prices were set by reference to any information in RAP1; the 2016 tied rent has not been settled at present and the passing rent is £24,349.93 per annum; therefore, it is misconceived to try to claim that the Claimant has suffered a loss by reference to the £38,000 per annum rent quoted, when that is not the level at which rent has been paid; a RAP is based on the beers that a REO would purchase, not necessarily those of the Claimant; and the factual premises of the Claimant's calculation are questionable for a number of reasons, including the fact that the Claimant's figure takes no account of the wastage figure in RAP1 which includes sediment wastage and has already been deducted from the gross profit.

87.10 The Claimant seeks damages from 2013. Matters before the introduction of the Code are out of the jurisdiction of this arbitration.

88. Having given the parties' submissions careful consideration, I have concluded that the Claimant's money claim must fail, for each of the three main reasons.

89. First, I do not have jurisdiction in respect of the Claimant's money claim, for two reasons:

89.1 I agree with the Respondent that under s.48 of the SBEEA, under section 48 a matter may only be referred to statutory arbitration to the extent that *"it relates to an allegation by the tenant that the POB has failed to comply with any provisions of the Pubs Code"*. There is no indication in the legislation that was intended to cover a money claim.

89.2 In any event the legislation and in particular the 2016 Pubs Code cannot cover claims pre-dating its introduction, as the Claimant's claim (which seeks damages from 2013) does in part.

90. Second, the Claimant has failed to articulate a cause of action which is legally sound for the relief which he seeks:

90.1 As I pointed out in my ruling on 16 September 2019, s.48(4) of the Arbitration Act, 1996 empowers an arbitrator to order payment of a sum of money, but cannot in itself constitute the legal basis of the claim, which must be sought in a legal cause of action such as a contractual right or a breach of contract or other duty.

90.2 From the passages cited in para 86 above, it appears that the Claimant is seeking to derive a right to compensation from the SBEEA, the Pubs Code and the 2019 Guidance. In my view there is no basis for this contention. The Act and the Code provide specific remedies, which do not include any provision for compensation to be paid to tied pub tenants. In particular, I cannot discern in these provisions any intention on the part of the legislature that a failure by a pub-owning company to provide a RAP which complied with regulation 20 and Schedule 2 should be visited with a liability in damages.

90.3 In my view, the 2019 Guidance is equally irrelevant in the present context.

91. Third, the Claimant has not put forward a coherent factual basis for his claim:

91.1 The Claimant has not explained how the Respondent's provision of a non-compliant RAP, which the Claimant has not accepted, could have caused him any loss.

91.2 It is not clear whether the claim is for a shortfall between the beer quantities contracted for and the beer quantities delivered by the Respondent to the Claimant in the period 2011-2017, or for misrepresentation or non-disclosure of the sediment content of the cask ales sold to the Claimant in that period.

91.3 In either event, there is no proper quantification of the claim. It is clear from the summary in para 85 above that the claim is based on an assumption that, by reason of the sediment content of the cask ale sold to the Claimant in the 6-year period between March 2011 and March 2017, the Claimant has suffered a loss which is calculated on the basis of the profit and loss statement in RAP 1, which relate to the 12-month forecast period required by item 5 of Schedule 2. In my view this is not an appropriate method of quantification, in particular having regard to the fact that in this period the tied rent was considerably less than the £38,000 proposed in RAP1.

91.4 No witness evidence was produced by the Claimant to establish the Claimant's own state of knowledge of the sediment content of cask ale in the period 2011-2017, his beer prices and profits during this period, the allowance that was made for sediment in setting his prices, and the alleged loss in relation to trading data in the aforesaid period.

92. I have therefore concluded that the answers to Issues 5 and 6 are No.

Issue 7: If so, what is the quantum of that loss?

93. Given my conclusions on Issues 5 and 6, this issue does not arise.

Issue 8: Is the referral vexatious?

94. The Respondent avers that the Claimant's claim is motivated by campaigning issues rather than practical issues, in particular in that the Claimant has not been misled and has not suffered any loss; the Claimant may at any time to request a further RAP prepared in accordance with the latest guidance; the Claimant's pleading is generic and deliberately exaggerated; the Claimant has provided no evidence in support of his allegations; the Claimant has failed to demonstrate any substantive prejudice.

95. The Respondent therefore avers that this referral is vexatious under regulation 4(5)(a) of the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 and seeks an award that the Claimant pay the PCA's and the Arbitrator's costs, and the Respondent's reasonable costs, not limited to £2,000.

96. I am not persuaded that the referral is vexatious. Although the Claimant has failed on Issues 1, 5 and 6, he has succeeded on Issues 2 and 3, and this is enough to defeat any suggestion that the motive behind this claim is to vex or harass the Respondent.

F. CONCLUSIONS

97. For the above reasons, I have concluded that it is appropriate to make an Order in the terms set out in Section G below.

98. In view of the fact that each party has been successful in respect of different issues, I propose to reserve jurisdiction in respect of costs, and to deal with costs in a Final Award after inviting further submissions from the parties as follows:

    98.1 Each party may file any further submissions regarding costs (including costs schedules, if appropriate, by 5 pm London time on Monday 24 February 2020.

    98.2 Responsive submissions to be filed by 5 pm London time on Thursday 27 February 2020.

G. THE OPERATIVE PART OF THIS AWARD

99. For the reasons set out above, I make the following Orders:

99.1 A declaration is issued that the Rent Assessment Proposal issued to the Claimant by the Respondent in respect of the Property on 8 March 2017 does not comply with the Pubs Code.

99.2 The Respondent is directed to issue a new and compliant Rent Assessment Proposal to the Claimant within 21 days of the date of this Award.

99.3 The Claimant's claim for financial compensation fails and is dismissed.

100. Jurisdiction is reserved to a Final Award in respect of:

100.1 Issue 4; and

100.2 Costs.

This Award is made and signed in London on 17 February 2020

Sole Arbitrator