

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 (“SBEEA”)**

**AND IN THE MATTER OF THE PUBS CODE ETC. REGULATIONS 2016 (THE
“CODE”)**

BETWEEN

TRACEY PATERSON
(Tied Pub Tenant)

Claimant

-and-

MARSTON’S PLC
(Pub Owning Business)

Respondent

AWARD

[REDACTED]

INTRODUCTION

- 1) The dispute before me is whether or not the Respondent breached both the Small Business Enterprise and Employment Act 2015 (“the SBEEA”) and the Pubs Code, etc Regulations 2016 (“the Code”).
- 2) The Claimant is Tracey Paterson, the Tied Pub Tenant (“TPT”) of the Anchor Inn, 118 Hurley Common, Hurley, Atherstone, Warwickshire CV9 2LR (“the Pub”).
- 3) The Respondent is Marston’s PLC, whose registered address is at Marston’s House, Brewery Road, Wolverhampton WV1 4JT a regulated pub-owning business (“POB”) and who is the landlord of the Pub.
- 4) The Claimant is represented by Chris Wright of the Pubs Advisory Service, Angels View, Heathfield TN21 8UD.
- 5) The Respondent is represented by [REDACTED] of [REDACTED], [REDACTED].
- 6) Parliament has provided for statutory arbitration as the means by which such disputes under the Code are to be resolved.

BACKGROUND

- 7) The Parties are party to a Tied Lease dated 12 November 2007 (Lease), following an assignment to the Claimant pursuant to a Licence to Assign dated 23 March 2016.

- 8) The Respondent sent a Rent Assessment Proposal to the Claimant on 3 January 2017 (2016 RAP) to commence a rent review under the Lease, which was settled in 2017.
- 9) The Respondent sent a Rent Assessment Proposal to the Claimant on 7 January 2022 (2022 RAP) to commence a rent review under the Lease, which remains live.
- 10) The Claimant sent a letter to the Respondent dated 17 May 2022 purporting to be a 21 day notice under S.49(2) of SBEEA.
- 11) The Claimant's Referral to Arbitration was dated and submitted on 10 June 2022.
- 12) There are five issues to be determined in the substantive dispute and these are, briefly:
 - i) Was the 2016 RAP deficient, wrong and in breach of the Code;
 - ii) Did the Respondent "invent" that a meeting took place in connection with the 2016 RAP;
 - iii) Was the 2022 RAP deficient, wrong and in breach of the Code;
 - iv) Did ██████████ fail to deal with the issues stemming from the 2016 RAP; and
 - v) Was ██████████ operating under instruction to press on with his third-party determination knowing that relevant information was missing?
- 13) The parties have agreed a Statement of Agreed Facts and Issues in this dispute. I set this out after the procedural history.

PROCEDURAL HISTORY

- 14) I, [REDACTED], replaced [REDACTED] as arbitrator of this dispute on 19 October 2022.

- 15) Draft Order and Directions No. 1 (undated) was agreed by the Parties. Following my appointment as replacement arbitrator, I adopted the timetable set out within the said Draft Order and Directions No.1. The Order for Directions confined itself to the challenge raised by the Respondent to jurisdiction.

- 16) The Statement of Claim was served on 14 October 2022.

- 17) The Statement of Defence was served on 28 October 2022.

- 18) On 7 November 2022 the Claimant confirmed that no further comment (submission) was to be made. Accordingly, I agreed with the Parties that the 14 day period to provide the list of agreed facts, issues in dispute and relevant documents (Bundle) commenced on 7 November 2022.

- 19) The Respondent served the bundle on 22 November 2022.

- 20) The Award on Jurisdiction was issued on 28 November 2022. In the Award is was agreed and/or decided that the following issues (references are to the issues listed in Annex 1 to the Statement of Defence) were within the jurisdiction of this arbitration to decide:

Arbitration Issues

- 3 2022 RAP deficiency as a result of:
 - 3b No justification for increase in food sales or gross profit;
 - 3c No justification for increase in wine sales;
 - 3d No justification for increase in minerals sales;
 - 3e Proposing radical and different assessments to the premise's typical operations and manipulating rent assessment figures;
 - 3f Benchmarking alleged to be opaque and the raw data behind it unknown; and
 - 3g None of the examples in the published guides match the benchmarking percentage supplied.
 - 4 [REDACTED] failed to deal with the issues stemming from the 2016 RAP; and
 - 5 [REDACTED], operating under instructions, pressed on with his third party determination knowing relevant information was missing.
- 21) By email dated 9 December 2022 the Respondent notified me that they were considering making a challenge to the Commercial Court and requested the arbitration be stayed until 6 January 2023. This was agreed by the Claimant. I gave informal directions on the same day for the parties to attempt to agree directions by 6 January 2023 and to update me either way by that date.
- 22) By email dated 30 December 2022 the Respondent notified me that the parties had agreed to a stay of four weeks up until 27 January 2023 to settle the underlying rent review or, if unsuccessful, to agree directions by 10 February 2023. The Claimant confirmed her agreement by email dated 3 January 2023 and I provide directions also on that day. The directions were as follows:

Amended Directions

- 1 The remaining proceedings be stayed until 27 January 2023 for the parties to negotiate.
- 2 If the parties are unable to settle matters, they will attempt to agree directions by 10 February 2023.
- 3 If no directions can be agreed, a Procedural Meeting will be arranged for the purposes of setting further directions.

23) By email dated 10 February 2023 the Respondent provided some agreed directions which were agreed with the Claimant and I issued Order for Directions No.2 on 10 February 2023. I set out the central directions below:

Order for Directions No.2

5. The Claimant to submit their updated Statement of Claim on the Arbitration Issues only, in writing, within 21 calendar days from the date of this Order.
6. The Respondent to submit their Statement of Defence, within 21 calendar days of receiving the Claimant's Statement of Claim.
7. The Claimant shall within 14 days of receiving the Statement of Defence advise the Arbitrator and Respondent if she wishes to respond to the Statement of Defence.
9. Within 14 calendar days of the date for service of witness statements, the Respondent shall submit to the Arbitrator an agreed indexed bundle of documents.
14. The Arbitrator will reach a decision on the Arbitration Issues on consideration of the documents only and without an oral hearing. Subject to Direction 13, the Arbitrator's intention at the date of this Order is to reach the decision within 14 days of provision of the Documents as provided in Direction 9. If the Arbitrator is

unable to reach the decision in 14 days he will inform the parties, provide a new estimated date for the decision and reason(s) for the delay.

- 24) The Claimant provided her Statement of Claim and supporting documents on 1 March 2023.
- 25) The Respondent provided their Statement of Defence and supporting documents on 21 March 2023.
- 26) By email dated 17 April 2023 I noted that the time for serving a Response to the Statement of Defence had passed and asked whether any witness statements were to be served. The Claimant informed me that the parties were working on the Statement of Agreed facts and the List of Issues in Dispute. Following this the parties informed me that they had agreed to request that the Bundle and Statement of Agreed Facts be served by 9 May 2023. I agreed to the parties' request.
- 27) On 5 May 2023 the Respondent provided the Bundle by electronic means. By email dated 15 May 2023 I notified the parties that due to unforeseen circumstances the award would be delayed until Friday 26 May 2023.
- 28) The law of this arbitration is the law of England and Wales.
- 29) The seat of the arbitration is London, England.

THE AGREED FACTS

Agreed Facts

30) The parties are party to a Tied Lease dated 12 November 2007 (**Lease**), following an assignment to the Claimant pursuant to a Licence to Assign dated 23 March 2016.

RAPs

31) The Respondent sent a rent assessment proposal to the Claimant on 3 January 2017 (**2016 RAP**) to commence a rent review under the Lease, which was settled in 2017.

32) The Respondent sent a rent assessment proposal to the Claimant on 7 January 2022 (**2022 RAP**) to commence a rent review under the Lease, which remains live.

33) The 2022 RAP was prepared by [REDACTED], who was a business development manager of the Respondent under Regulation 41(6) of the Code insofar as he was dealing directly with the Claimant in connection with a rent proposal.

Jurisdiction

34) The Arbitrator has jurisdiction to determine issues 3b to g, 4 and 5 within these proceedings.

35) The Arbitrator has no jurisdiction to determine issues 1, 2 and 3a within these proceedings.

36) The Arbitrator has no jurisdiction to determine the complaints raised in paragraphs 17 to 19 of the Statement of Claim.

Statutory Obligations

37) Section 42(3) of SBEEA provides an obligation on the Secretary of State, not the Respondent. Regulation 41 of the Code provides an obligation on the Respondent to ensure that each of its business development managers deals with tied pub tenants in a manner that is consistent with the principle referred to in Section 42(3)(a) of SBEEA 2015.

38) The obligations applicable to different types of information and content for rent assessment proposals under Schedule 2 of the Code are, insofar as is relevant to the claim, as follows:

Provision	Application	Obligation
Para 1	Information which goes to the methods which must be used under the lease	The summary of methods used must include information used and justification for that information used
Para 8(a)	Figures and information under paras 5 to 7	Sufficiently clear and detailed
Para 8(b)	Assumptions	Justification or supporting evidence
Para 9(a)	Historical data	Accurate
Para 9(b)	Projected data	Reasonable

Rent Review

39) There is no prescribed formula or method in the Lease that must be used to calculate the rent for a rent review.

- 40) The Arbitrator has no jurisdiction to determine the rent review; that jurisdiction is through the RICS scheme as per paragraph 4 of the Second Schedule to the Lease.
- 41) The PCA's Guidance on Fairness for Tied Tenants (para 2.5) provides that upwards only tied rent reviews are not allowed under the Code.
- 42) The rent review commenced by the 2022 RAP is to be agreed or determined (in the correct forum, not within these proceedings) on the basis of the current market rent, regardless of whether that is higher or lower than the current rent (and consequently is not to be agreed or determined as being upwards only).
- 43) The rent review commenced by the 2022 RAP is to be agreed or determined (in the correct forum, not within these proceedings) based on RICS valuation principles relevant to the business in question at the point of the rent review date.

Parties' Representatives

- 44) The Respondent was professionally represented from 29 March 2022 in connection with the rent review commenced by the 2022 RAP by [REDACTED].
- 45) [REDACTED] is a Chartered Surveyor specialising in licensed property matters, having been involved in the sector since the mid-80s.
- 46) The Claimant was professionally represented from 24 February 2022 in connection with the rent review commenced by the 2022 RAP by [REDACTED].

- 47) [REDACTED] is a Chartered Surveyor with over 25 years' post qualification experience in the licensed leisure sector.
- 48) [REDACTED] engaged with [REDACTED] on matters connected to the rent review process and negotiations, rather than with the Claimant directly.
- 49) [REDACTED] requested a copy of the 2016 RAP from [REDACTED] and [REDACTED] (and the Respondent) did not provide a copy.
- 50) The Claimant was a party to the 2016 RAP and provided a copy to [REDACTED].
- 51) The Respondent, through [REDACTED], suggested proceeding to a third party determination of the rent review notwithstanding [REDACTED] complaints that he had not been sent the 2016 RAP by the Respondent.

RAP Contents, Claimants' Business and Complaints

- 52) The Claimant operates the business at the Premises and has access to actual sales and overheads data in respect of that business.
- 53) The data that is the subject of the Claimant's complaints at paragraphs 20 to 24 of the Statement of Claim is projected data.
- 54) The Claimant has not put forward any alternative projected data that she purports to be reasonable, nor any explanation of what she purports to be the correct style of pub, gross profit margin or trade mix.

- 55) Schedule 2 to the Code contains no obligations in respect of valuation comments.
- 56) The Respondent is under an obligation under paragraph 7 of Schedule 2 to the Code to take account of benchmarking through publicly available data. No part of Schedule 2 to the Code provides obligations in respect of the specific benchmarking to be used.
- 57) The 2022 RAP referred to the BBPA guides explicitly within the RAP itself, the covering letter and the Respondent's Rent Review Protocol.
- 58) The BBPA guides referenced are publicly available documents and familiar to [REDACTED].
- 59) The Claimant has access to the BBPA guides referenced and the figures contained therein.
- 60) In addition to the agreed facts I also note that the Respondent has stated in their agent's letter of 1 June 2022 that errors contained in RAPs used by the Respondent following the Anderson Awards have been addressed after liaising with the PCA and that they are now considered to be compliant. From this I understand that errors were contained in the 2016 RAP but the 2022 RAP no longer contains any such errors. I also note that the errors contained in the 2016 RAP were spotted, acknowledged and addressed during the 2016 rent review.
- 61) Following the 2016 RAP, the rent was agreed between the parties.

THE AGREED ISSUES TO BE DETERMINED

62) Issue 3b

- a. Does the increase in projected food sales and/or gross profit constitute:
 - i. Assumptions under paragraph 8(b) of Schedule 2 to the Code; or ii. Projected data under paragraph 9(b) of Schedule 2 to the Code?
- b. If assumptions, was the increase in projected food sales and/or gross profit unjustified in breach of paragraph 8(b) of Schedule 2 to the Code?
- c. If projected data, was the increase in projected food sales and/or gross profit unreasonable in breach of paragraph 9(b) of Schedule 2 to the Code?

63) Issue 3c

- a. Does the increase in projected wine sales constitute:
 - i. Assumptions under paragraph 8(b) of Schedule 2 to the Code; or ii. Projected data under paragraph 9(b) of Schedule 2 to the Code?
- b. If assumptions, was the increase in projected wine sales and/or gross profit unjustified in breach of paragraph 8(b) of Schedule 2 to the Code?
- c. If projected data, was the increase in projected wine sales unreasonable in breach of paragraph 9(b) of Schedule 2 to the Code?

64) Issue 3d

- a. Does the increase in projected mineral sales constitute:
 - i. Assumptions under paragraph 8(b) of Schedule 2 to the Code; or ii. Projected data under paragraph 9(b) of Schedule 2 to the Code?
- b. If assumptions, was the increase in projected mineral sales and/or gross profit unjustified in breach of paragraph 8(b) of Schedule 2 to the Code?

- c. If projected data, was the increase in projected mineral sales unreasonable in breach of paragraph 9(b) of Schedule 2 to the Code?

65) Issue 3e

- a. Has [REDACTED]:
 - i. Valued a different style of pub?
 - ii. Valued a pub with different gross profit margins?
 - iii. Valued a pub with a different trade mix?
- b. If yes to any of the above, in doing so, has the Respondent failed to ensure that [REDACTED] acted fairly, in breach of Regulation 41(1)(c) of the Code?

66) Issues 3f and g

- a. In respect of [REDACTED] use of BBPA benchmarking data:
 - i. Was the BBPA benchmarking data so opaque as to be unfair?
 - ii. Was use of the BBPA benchmarking data unfair?
 - iii. Should the Respondent have examined and verified the adequacy of the underlying benchmarking data used by the BBPA guides?
- b. If yes to any of the above, in any such instance, has the Respondent failed to ensure that [REDACTED] acted fairly, in breach of Regulation 41(1)(c) of the Code?
- c. Does the Arbitrator have jurisdiction to examine and make directions in respect of the underlying BBPA benchmarking data?
- d. If yes, should the Arbitrator examine that data and/or make directions in respect of such data?

67) Issues 4 and 5

- a. In circumstances where [REDACTED] was a professional representative of the Respondent and did not have any contact or engagement with the Claimant as part of the rent review process, was [REDACTED] a business development manager (as defined under Regulation 41(6) of the Code)?
- b. If yes to the above:
 - i. Has [REDACTED] caused any prejudice to the Claimant by refusing to provide a further copy of the 2016 RAP?
 - ii. Has [REDACTED] caused any prejudice to the Claimant by suggesting proceeding to a third-party determination of the rent review notwithstanding [REDACTED] complaints that he had not been sent the 2016 RAP by the Respondent?
- c. If yes to any of the above, in any such instance, has the Respondent failed to ensure that [REDACTED] acted fairly, in breach of Regulation 41(1)(c) of the Code?

68) Remedies: 2022 RAP compliance:

- a. In the event of any finding that the 2022 RAP was not compliant with paragraph 9(b) of Schedule 2 to the Code in respect of issues 3b, 3c and/or 3d, taking account of all the circumstances, should the Arbitrator intervene and exercise his power to make a declaration under S.48 of the Arbitration Act 1996?
- b. If yes, should that declaration be:
 - i. That the 2022 RAP is ineffective and should be replaced in its entirety;
 - ii. That additional information should be provided to the Claimant to supplement the 2022 RAP; and/or
 - iii. Something else?

69) Remedies: unfair dealings:

- a. In the event of any finding that the Respondent has acted in breach of Regulation 41(1)(c) of the Code in respect of issues 3e, 3f, 3g, 4 and/or 5, taking account of all the circumstances, should the Arbitrator intervene and exercise his power to make a declaration under S.48 of the Arbitration Act 1996?
- b. If yes, what are the appropriate declarations to remedy any unfair dealings?

70) Remedies: other:

- a. Does the Arbitrator have jurisdiction to an order as requested in paragraph 40 of the Statement of Claim?
- b. If yes, should the Arbitrator make such an order and in what terms?

2016 RAP AND 2022 RAP

71) Both parties submission have involved the 2016 RAP as well as the 2022 RAP. As found in the Award on Jurisdiction, the 2016 RAP is not part of the dispute in this arbitration. I make no substantive decision is respect of the 2016 RAP.

72) Despite this the Claimant has alleged that the 2016 RAP should have been provided by the Respondent and was necessary in considering the 2022 RAP. This contention is unjustified is so far as the Claimant had a copy of the 2016 RAP in her possession, which is not denied, and indeed she has relied on the contents of the 2016 RAP in pursuing her claim. [REDACTED], the Claimant's surveyor having initially asked [REDACTED], the Respondent's surveyor, for a copy of the 2016 RAP, was then provided with a copy by the Claimant and thus she would have been aware of the estimates contained in that RAP. I can see no prejudice against the Claimant where [REDACTED] did not, as a matter of fact,

provide the 2016 RAP to [REDACTED] when requested. At best this could be seen as an inconvenience.

73) It is of course also the case that the Claimant had actual knowledge of her sales and overheads which were also provided to [REDACTED]. On this basis I can see no disadvantage to the Claimant in her ability to fully participate in the rent review due to not having received from the Respondent or [REDACTED] a copy of the 2016 RAP during the 2022 review.

74) I also note that the Claimant did not provide the actual sales and overheads figures to the Respondent or [REDACTED]. Whilst it is not suggested that the Claimant had an obligation to do so, it did mean that any forecast would have to be made based on assumptions from the information that was available to the Respondent and/or [REDACTED].

ISSUE 3B

75) In dealing with the issues revolving around the 2016 and 2022 RAPs I have taken note of the Respondent's Pubs Code Rent Review Protocol as well as the relevant statutory requirements.

Does the increase in projected food sales and/or gross profit constitute:

- i. Assumptions under paragraph 8(b) of Schedule 2 to the Code; or
- ii. Projected data under paragraph 9(b) of Schedule 2 to the Code?

76) The Claimant submits that the projected food sales and/or gross profit provided by the

Respondent should be reasonable and that they should provide justification for the assumptions that have been made as required by Schedule 2, para 8(b) of the Code. The Claimant does not accept that full and proper justification has been provided by the Respondent.

- 77) The Respondent on the other hand submits that Schedule 2, para 8(b) specifically refers to assumptions and does not go any further. It is said that the complaints in relation to the projected food sales and/or gross profit are not assumptions but rather projections which are covered by Schedule 2, para 9(b) and that there is no obligation to provide justification or good reason in relation to projected data. It is accepted that the projected data should be reasonable.
- 78) Helpfully the parties in their Agreed Facts accept that Schedule 2, para 8(b) applies to assumptions and that the obligation upon the Respondent is to give justification and supporting evidence, whilst Schedule 2, para 9(b) applies to projected data and should be reasonable.
- 79) Looking at the information provided to me it can be seen that the 2022 rent assessment includes a valuation for food sales which is significantly greater than the 2016 assessment with a difference of some £90,000.00 giving a assessed value of £135,000.00. The gross profit from these food sale assessments also increased from 50% to 62%. There is no data provided to explain the reason for such a significant increase over the six year period between the two assessments. Of course neither assessment is based on actual figures which the Claimant has not provided to the Respondent or to me in this arbitration.

80) I accept that on the face of it the increase appears unreasonable but without the actual figures being provided by the Claimant it cannot be known whether the difference is due to an underestimation in 206 or an over estimation in 2022. Based on the submissions made in this arbitration and the information provided it is clear to me that the Respondent has provided its projections based on its own assumptions the basis of which has not been disclosed.

81) Reading the code it is obvious that its intention is to read Schedule 2 as a whole when considering the information specified for the purposes of a rent proposal or a rent assessment proposal. The information provided should be in accordance with paragraphs 8 and 9 which I set out below for ease of reference:

“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.”*

82) As can be seen these paragraphs relate to the same information as is provide in accordance with paragraph 5 of Schedule 2. Paragraph 5 commences by saying:

“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 —“

- 83) The information provided by the Respondent in relation to the projected food sales and/or gross profit are projections used in the forecast of sales and gross profit. Such projections are based on assumptions which are expected to be reasonable. At no point in the process has the Respondent shown that the projections are reasonable or what the basis of those projections are. The projections cannot have been arrived at out of thin air and must have been based on assumptions of the future trade that the Claimant will be expected to attain.
- 84) I accept that projections can be based on historical figures (which would be accurate for the preceding years) but, as the Claimant has not provided these, the Respondent has no choice but to provide projections based on its own assumptions. However the basis for those assumptions should have been provided to the Claimant. Clearly it would have been helpful if the historical figures could have been made available.
- 85) In answer to the question posed by the parties, I find that the increase in projected food sales and/or gross profit constitutes projected data under Paragraph 9(b) of Schedule 2 to the Code but that this projected data must of necessity incorporate assumptions made by the Respondent under Paragraph 8(b) of Schedule 2 to the Code.

If assumptions, was the increase in projected food sales and/or gross profit unjustified in breach of paragraph 8(b) of Schedule 2 to the Code?

- 86) Paragraph 8(b) of Schedule 2 to the Code requires the inclusion of justification or supporting evidence for any assumptions. Accordingly, I find that the necessity for assumptions in the Respondent's projections and their failure to provide such justification or supporting evidence is a breach of Schedule 2, Paragraph 8(b) the Code.

If projected data, was the increase in projected food sales and/or gross profit unreasonable in breach of paragraph 9(b) of Schedule 2 to the Code?

- 87) Paragraph 9(b) of Schedule 2 to the Code does not in itself require the inclusion of justification or supporting evidence for any projection. The information provided to me does not allow any conclusion as to whether the projections used are reasonable or not. On this basis I do not find that the Claimant has shown that the projections are unreasonable or that there has been a breach of Schedule 2, Paragraph 9(b) the Code.
- 88) The question of reasonableness of the projected data is not a matter for this arbitration and should more correctly be dealt with by third party determination under the appropriate rent review process.

ISSUE 3C

Does the increase in projected wine sales constitute:

- i. Assumptions under paragraph 8(b) of Schedule 2 to the Code;
- or ii. Projected data under paragraph 9(b) of Schedule 2 to the Code?

- 89) The submissions and information produced are on the same basis as for Issue 3(b), which is dealt with in paragraphs 76 to 85 above.

90) After considering whether the information provided created any difference with my finding in Issue 3(b) I find that there is no substantive difference. I find that the increase in projected wine sales constitutes projected data under Paragraph 9(b) of Schedule 2 to the Code but that this projected data must of necessity incorporate assumptions made by the Respondent under Paragraph 8(b) of Schedule 2 to the Code.

If assumptions, was the increase in projected wine sales unjustified in breach of paragraph 8(b) of Schedule 2 to the Code?

91) Paragraph 8(b) of Schedule 2 to the Code requires the inclusion of justification or supporting evidence for any assumptions. Accordingly, I find that the necessity for assumptions in the Respondent's projections and their failure to provide such justification or supporting evidence is a breach of Schedule 2, Paragraph 8(b) the Code.

If projected data, was the increase in projected wine sales unreasonable in breach of paragraph 9(b) of Schedule 2 to the Code?

92) Paragraph 9(b) of Schedule 2 to the Code does not in itself require the inclusion of justification or supporting evidence for any projection. The information provided to me does not allow any conclusion as to whether the projections used are reasonable or not. On this basis I do not find that the Claimant has shown that the projections are unreasonable or that there has been a breach of Schedule 2, Paragraph 9(b) the Code.

93) The question of reasonableness of the projected data is not a matter for this arbitration and should more correctly be dealt with by third party determination under the appropriate rent review process.

ISSUE 3D

Does the increase in projected mineral sales constitute:

- i. Assumptions under paragraph 8(b) of Schedule 2 to the Code; or
- ii. Projected data under paragraph 9(b) of Schedule 2 to the Code?

94) The submissions and information produced are on the same basis as for issue 3(b), which is dealt with in paragraphs 76 to 85 above.

95) After considering whether the information provided created any difference with my finding in issue 3(b) I find that there is no substantive difference. I find that the increase in projected mineral sales constitutes projected data under Paragraph 9(b) of Schedule 2 to the Code but that this projected data must of necessity incorporate assumptions made by the Respondent under Paragraph 8(b) of Schedule 2 to the Code.

If assumptions, was the increase in projected mineral sales unjustified in breach of paragraph 8(b) of Schedule 2 to the Code?

96) Paragraph 8(b) of Schedule 2 to the Code requires the inclusion of justification or supporting evidence for any assumptions. Accordingly, I find that the necessity for assumptions in the Respondent's projections and their failure to provide such justification or supporting evidence is a breach of Schedule 2, Paragraph 8(b) the Code.

If projected data, was the increase in projected mineral sales unreasonable in breach of paragraph 9(b) of Schedule 2 to the Code?

97) Paragraph 9(b) of Schedule 2 to the Code does not in itself require the inclusion of justification or supporting evidence for any projection. The information provided to me

does not allow any conclusion as to whether the projections used are reasonable or not.

On this basis I do not find that the Claimant has shown that the projections are unreasonable or that there has been a breach of Schedule 2, Paragraph 9(b) the Code.

- 98) The question of reasonableness of the projected data is not a matter for this arbitration and should more correctly be dealt with by third party determination under the appropriate rent review process.

ISSUE 3E [REDACTED]

[REDACTED]

- i. Valued a different style of pub?
 - ii. Valued a pub with different gross profit margins?
 - iii. Valued a pub with a different trade mix?
- 99) It is the case that the Respondent (through [REDACTED]) did not use the 2026 RAP when undertaking the 2022 RAP and the assessments used therein.
- 100) [REDACTED] was the business development manager of the Respondent in accordance with Regulation 41(6) of the Code. He was responsible for the 2022 RAP and was the person who signed the letter dated 7 January 2022 enclosing the 2022 RAP. The valuation used was dated 5 January 2022.
- 101) Within the 2022 RAP [REDACTED] has valued the pub based on it being a traditional pub, as noted in the comments. The full description shown within the comments is:
- “The profit generated is in line with the market and trading potential of the site. Personal factors in relation to the specific operator have been disregarded.”*

“The Anchor Inn is a traditional community pub operating from two bars with a good food offer. The property benefits from a private car park, beer garden and pool room. During my meeting with the tenant it was confirmed that the wet/dry split is 40/60. The area is price sensitive but has recently started to attract people moving out from Birmingham to this semi rural location. Other income is nuts, snacks and crisps. I have used BBPA benchmarking categories for benchmarking running costs. FMV is in line with pre Covid levels. Costs are within the expected range given the size and style of operation.

The running costs show expenditure as total sum for the following areas of business expenditure:- consumables, waste disposal/cleaning/hygiene, professional and equipment hire”

102) A demographic report was provided as part of the 2022 RAP. This showed the demographics in a one mile radius and a two mile radius.

103) Whilst it is the case that the 2016 RAP is not in dispute in this arbitration it is useful in understanding the difference, if any, of the style of pub being assessed. [REDACTED] was responsible for both the 2016 and 2022 RAPs. Within the 2106 RAP [REDACTED] states in the comment section:

“The profit generated is in line with the market and trading potential of the site.”

“The subject property benefits from a good size beer garden and car park. The food offer has recently changed from an Indian offer to a more Western style menu and the kitchen

is open all day. The area is price sensitive with the main wet competition coming from the Holly Bush, a free house and Wood End Working Men's Cub. Costs are within the expected range for this type of pub, style and location of the operation. The running costs show expenditure as a total sum for the following business expenditure:- consumables, waste disposal,/cleaning/hygiene, professional fees and equipment hire. Other income is nuts, crisps and snacks.”

- 104) As with the 2022 RAP a demographic report is enclosed showing demographics in a one mile, two mile and three mile radius.
- 105) It is apparent that the two reports show the pub to have changed very little in the intervening 5 years. The demographics also show that the population has remained the same with the Key Mosaic Groups within one mile being shown as Family basics – 34%, Country Living – 23% and Transient Renters – 21% in both reports.
- 106) From the description provided by [REDACTED] in the comments section of his reports it is apparent that there has been no real change in the pub and the demographic shows that the pub is in an area which is price sensitive. There is nothing in the 2022 RAP that shows that this has changed. Whilst the 2022 RAP indicates that there may have been some city dwellers moving into the area the demographic report does not confirm this and is exactly the same as the demographic report included within the 2016 RAP.
- 107) From a comparison of the 2016 and 2022 RAPs it is apparent from the Rent Assessment Statement that different volumes of sales for each type of product have been used. These are minor in some cases but large in others. Examples using the sales mix difference: Minerals 2.5%, Spirits 23.50%, Wine 9.10%, Cask & Keg Larger 9.50%. Of course the

Rent Assessment Statement for 2022 was not based on the Sales Assessment Statement for 2016, as explained by the Respondent, but the comparison does show that a different percentage of sales mix has been used in those RAPs.

108) I also note that the 2022 BBPA figures (Benchmark) are similar to the 2022 RAP but will show variations and are unlikely to match the breakdown used in the 2016 RAP.

109) A comparison of the gross profit margins shown in each RAP indicates some variation throughout and a total gross profit margin differing by 10.41% with the overall higher gross profit margin shown in the 2016 RAP.

Valued a different style of pub?

110) From this information and it can be seen that [REDACTED] has used the same style of pub in his valuation in both the 2016 and 2022 RAPs. The indication of some possible gentrification in the 2022 RAP does not change the style of the pub set out in both RAPs. The gross margins and trade mix used in the 2022 RAP are different to those used in the 2016 RAP. However, this of itself cannot be said to have resulted in [REDACTED] valuing a different style of pub.

Valued a pub with different gross profit margins?

111) From the RAPs it is apparent that [REDACTED] has used different gross profit margins throughout due to the change in sales mix but as far as individual products are concerned these do not vary by a significant amount save for spirits and alcopops.

112) I do not consider the overall reduction in overall gross profit margins used in the 2022 RAP to be significant.

Valued a pub with a different trade mix?

113) Based on my finding above, I do consider that the trade mix used in the 2022 RAP is not in line with the type of pub indicated in the 2016 RAP. On this basis it is fair to say that [REDACTED] valued a pub with a different trade mix in 2022 to that which he valued in 2016.

ISSUES 3F AND G

In respect of [REDACTED] use of BBPA benchmarking data:

- i. Was the BBPA benchmarking data so opaque as to be unfair?
- ii. Was use of the BBPA benchmarking data unfair?
- iii. Should the Respondent have examined and verified the adequacy of the underlying benchmarking data used by the BBPA guides?

114) Both parties accept that the Respondent is under an obligation under Paragraph 7 of Schedule 2 to the Code to take account of benchmarking through publically available data. No part of Schedule 2 to the Code provides obligations in respect of the specific benchmarking to be used. Furthermore it is accepted by both parties that that the 2022 RAP referred to the BBPA guidelines which are publically available documents and are familiar to [REDACTED], the Claimant's surveyor, and that the Claimant had access to the BBPA Guidelines as referred to in the 2022 RAP and the figures contained therein.

115) The BBPA Guidelines are a reputable source for benchmarking and the Claimant has not shown otherwise.

116) On consideration of the BBPA Guidelines for 2022 it is apparent that the guide should be used with caution, as noted in the introductory page:

“The guide shows both the average and the range of costs in running a pub over a variety of pub models based on turnover and business types, including food and wet-led models.

The report takes account of the significant variations that exist in the cost base - even within those pubs that are broadly in the same category. Such costs are based on the size and location of the pub, the age and state of repair, the operating style and the experience of those in charge. Costs will also vary dependent on tenure type (for example repair and insurance obligations).

As well as providing average costs, the guide also includes the minimum and maximum typical costs providing a range of scenarios across different types of business.

However, we would point out that as input data and sources change each year, the information should not be used to determine trends from year to year. The data should also be used in conjunction with sources such as the UKHospitality benchmarking report1 and other pub trade data.”

117) Additionally the guidelines says in the Background and Explanatory notes:

“The BBPA guide has been compiled from data supplied by BBPA members in relation to short term tenancies (usually 3-5 years) and longer-term leases (the latter tend to be fully repairing and insuring).

The tables represent a composite of accounts presented to tenants by companies based on their experience across their entire estate, or a representative sample of their estate, and individual pub accounts that have been made available to their pub companies.

The information is supplied in summary form across nine different pub models. While not inclusive of all business models, they are representative of the vast majority of pubs run as either tenancies or leases.

Weekly costs are shown on the basis that the pub business is directly operated by the tenant or leaseholder and that their income is derived from the profit remaining after operating expenses and rent payable is deducted.

The examples and figures supplied in the survey give an indication of the weekly costs that are likely to be incurred in the types of pub businesses described in this guide.

*Where these figures are to be used in preparing business plans or for other purposes it should be borne in mind that **all pubs are unique and that the actual costs incurred will be dependent on the different aims and styles of the business according to the location, the market and the skills of the tenant/lessee.***

Costs do vary across the country and the size of the business, as well as its focus, will have a significant impact on costs. For further information on taking on a pub, please refer to the links section at the end of this guidance.

*Utilities and inflation: As the costs in this report relate primarily to 2021, they will not reflect the full extent of the 2022 energy crisis where pubs are frequently seeing price increases of over 100% on their energy bills. Such large increases, on what is usually the second biggest cost line, will have a significant impact on a pub's overall cost and operating margins. High inflation generally in 2022 will also impact other elements of the model and, therefore, **particular caution is required when reviewing the data this year.**"*

118) The Claimant says that the BBPA benchmarking used does not match the percentages applied in the 2022 RAP. In particular the benchmarking for Community/Wet led pubs 90:10 split turnover £5,000/week is highlighted as not reflective within the 2022 RAP. The projected turnover in the 2022 RAP is £6,331.50 per week. On checking the 2022 RAP it can be seen that the benchmarked gross profit margin is 56.41% whilst the gross profit margin in the BBPA guideline for 2022 is 53.6%, a difference of 2.81%. The Respondent notes that the difference between the 2022 RAP and the 2022 BBPA figures is 0.6%.

119) The BBPA guidelines do not break down the actual sales mix used but simply provide overall gross figures for wet sales and food. As the guideline says the figures provided are a snapshot and do not represent minimum or maximum figures but rather an average taken from the data provided to them by the pubs in their survey as provided by the BBPA member companies (which accounts for 90% of beer produced in Britain and 20,000 pubs across the UK, according to the BBPA's website).

Was the BBPA benchmarking data so opaque as to be unfair?

- 120) The benchmarking data used by the Respondent is not broken down into types of wet sales and percentages that the average pub in the specified categories may have. This makes the comparison of the 2022 RAP to the benchmarking difficult if the intention is to go deeper than the overall gross figures. Paragraph 7 of Schedule 2 to the Code states: *“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.”*
- 121) This does not give any indication of the type of data that is to be referred to save that it should be relevant. Clearly the BBPA guidelines are relevant, current and publically available. The Claimant does not indicate what other types of data should be used or whether any other publically available data would provide any greater detail.
- 122) In my view the use of benchmarking information can be used as an indication of figures for types of pub and which can be used to show that the overall gross figures set out within the 2022 RAP are within the average expected range for that type of pub.
- 123) In the context of the Claimant’s submission I do not find that the Respondent’s provision on the BBPA guidelines is unfair dealing by the Respondent especially when the BBPA information has been notified to the Claimant for information only and has not been used to calculate the rent set out in the 2022 RAP.

Was use of the BBPA benchmarking data unfair?

- 124) No.

Should the Respondent have examined and verified the adequacy of the underlying benchmarking data used by the BBPA guides?

125) No. I do not find any obligation put upon the Respondent under the Code to examine and verify the adequacy of the data used by BBPA in compiling its guidelines.

126) The Claimant does not suggest or show that the BBPA is not a reputable source for benchmarking or that their overall figures set out within the guidelines are in any way unreliable. Furthermore as noted in the BBPA guidelines, as set out above in paragraphs 118 and 119, the figures should be treated with caution due to the variables found within any pub as well as the problems caused by inflation in that particular year (2022).

If yes to any of the above, in any such instance, has the Respondent failed to ensure that [REDACTED] acted fairly, in breach of Regulation 41(1)(c) of the Code?

127) I have found that the answer to the questions in issues 3f and g are negative and thus this question does not arise.

Does the Arbitrator have jurisdiction to examine and make directions in respect of the underlying BBPA benchmarking data?

128) Neither party has made submission in relation to this question, however, from my understanding of the Code and the use of benchmarking data I do not consider that I have the jurisdiction to examine and make directions in respect of the underlying BBPA benchmarking data.

If yes, should the Arbitrator examine that data and/or make directions in respect of such data?

129) I have not found that I have the jurisdiction to examine the benchmarking data and accordingly this question does not arise.

ISSUES 4 AND 5

In circumstances where [REDACTED] was a professional representative of the Respondent and did not have any contact or engagement with the Claimant as part of the rent review process, was [REDACTED] a business development manager (as defined under Regulation 41(6) of the Code)?

130) Part 9 of the Code sets out the provisions for Business Development Managers and Compliance officers. The Claimant specifically refers me to Regulation 41(6) which states:

A “business development manager” means—

- (a) a person who is employed as such by a pub-owning business; or*
- (b) any other person who represents the pub-owning business in negotiations with tied pub tenants in connection with the matters listed in paragraph (4)(a).*

131) Paragraph 4 states:

(4) A pub-owning business must ensure that the business development manager—

- (a) makes appropriate notes of any discussions with tied pub tenants in connection with—*
 - (i) rent proposals;*
 - (ii) rent assessments or assessments of money payable in lieu of rent;*
 - (iii) repairs to the tied pub premises;*

- (iv) matters relating to the tied pub tenants' current or future business plans;*
- (b) provides tied pub tenants with a record of any such discussions within the period of 14 days beginning with the day on which the discussion occurred; and*
- (c) requests that the tenant respond to the business development manager if the tenant does not agree with any aspect of the record within the period of 7 days beginning with the day on which the record was received.*

132) The parties agree that [REDACTED] did not directly engage with the Claimant but rather engaged with [REDACTED] on matters connected with the rent review process and negotiations. [REDACTED] was acting as the Claimant's representative in the rent review process and negotiations with [REDACTED] in the same way that [REDACTED] was acting as the Respondent's representative.

133) The matter of rent review and negotiations clearly falls under the matters listed in paragraph 4(a) as set out above. Whilst the words 'rent review' are not used in paragraph 4(a) the wording 'rent proposals' is and 'rent assessment' encompass 'rent review'. I am satisfied that [REDACTED] was acting on behalf of the Respondent and carrying out matters as listed in paragraph 4(a).

134) The only question remaining is whether [REDACTED] was representing the Respondent (pub-owning business) in negotiations with the Claimant (tied pub tenant). I am of the view that engaging with a party's representative in respect of negotiations is akin to negotiating with that party directly. On this basis I find that [REDACTED] was acting as 'Business Development Manager' as defined in Regulation 41(6).

If yes to the above:

Has [REDACTED] caused any prejudice to the Claimant by refusing to provide a further copy of the 2016 RAP?

- 135) No. The Claimant was already in possession of the 2016 RAP which, she provided to [REDACTED] after he had requested the same from [REDACTED] and that request was refused. The Claimant has not suggested that the period between [REDACTED] refusal and her provision of the 2016 RAP to [REDACTED] caused any prejudice or created any difficulty. I also note that there is no evidence provided by either party that shows prejudice or difficulty caused by [REDACTED] refusal.

Has [REDACTED] caused any prejudice to the Claimant by suggesting proceeding to a thirdparty determination of the rent review notwithstanding [REDACTED] complaints that he had not been sent the 2016 RAP by the Respondent?

- 136) No. The 2016 RAP was in the possession of the Claimant and a copy was provided to [REDACTED].

If yes to any of the above, in any such instance, has the Respondent failed to ensure that [REDACTED] acted fairly, in breach of Regulation 41(1)(c) of the Code

- 137) The only issue is whether [REDACTED] acted fairly in not providing a copy of the 2016 RAP to [REDACTED] when requested and then suggesting third party rent review. As I have already found, there was no prejudice as the Claimant had a copy of the 2016 RAP in her possession and provided a copy to [REDACTED]. Neither did this cause any prejudice to the Claimant when [REDACTED] suggested a third party rent review as the 2016 RAP was in her possession and could be used by the Claimant in the suggested third party

rent review. It is, of course, the Respondent's position that the 2016 RAP was not used in making the assessments set out in the 2022 RAP.

138) ██████ refusal to provide a copy of the 2016 RAP on the basis that it had not been used in the preparation of the 2022 RAP is not a good reason not to supply that document upon request. There is no cogent reason why this request could not have been complied with whilst informing the Claimant and/or ██████ that it had not been used in the preparation of the 2022 RAP.

139) I find that in this instance the Respondent has failed to ensure that ██████ acted fairly and was in breach of Regulation 41(1)(c) of the Code.

CONCLUSIONS

140) The failure to provide a copy of the 2016 RAP report by the Respondent has not caused any prejudice to the Claimant.

Issues 3b, 3c and 3d

141) The increase in projected food sales, wine sales and mineral sales and/or gross profit constitutes projected data under Paragraph 9(b) of Schedule 2 to the Code but this

projected data must of necessity incorporate assumptions made by the Respondent under Paragraph 8(b) of Schedule 2 to the Code.

- 142) The Respondent's failure to provide justification and/or supporting evidence for their assumptions is a breach Schedule 2, Paragraph 8(b) the Code.

Issue 3e

- 143) [REDACTED] has not valued a different style of pub.
- 144) [REDACTED] use of different gross profit margins is not a significant difference and is within acceptable parameters.
- 145) [REDACTED] has valued a pub with a different sales mix.

Issues 3f and g

- 146) The benchmarking is not so opaque as to be unfair.
- 147) The use of BBPA benchmarking was not unfair.
- 148) The Respondent was under no obligation to examine and verify the adequacy of the underlying benchmarking data used by BBPA guides.
- 149) I find that I do not have the jurisdiction to examine and make directions in respect of the underlying BBPA benchmarking data.

Issues 4 and 5

- 150) ██████ was acting as a Business Development Manager as described by Regulation 41(6) of the Code.
- 151) ██████ has not caused any prejudice to the Claimant by refusing to provide a further copy of the 2016 RAP.
- 152) ██████ has not caused any prejudice to the Claimant by suggesting Third Party Determination of the Rent Review despite his refusal to provide a further copy of the 2016 RAP to the Claimant a/or ██████.
- 153) The Respondent has failed to ensure that ██████ acted fairly and is in breach of Regulation 41(1)(c) of the Code.

REMEDIES

The 2022 RAP

- 154) In accordance with S.48 of the Arbitration Act 1998 I declare that additional information should be provided to the Claimant to supplement the 2022 RAP. Such information should allow the Claimant to understand the assumptions made in relation to the projections contained within the 2022 RAP.

Unfair Dealings

- 155) I do not find that a declaration is required in accordance S.48 of the Arbitration Act 1998 despite the Respondent's breach of Regulation 41(1)(c) of the Code as I have found that no prejudice has resulted from this breach to the Claimant.

Other

156) I find that I do not have jurisdiction to an order that the BBPA benchmarking not be used until such time as it is capable of being verified, as requested in paragraph 40 of the Statement of Claim.

157) The Claimant has requested that I contact the PCA with a request that they investigate further the Respondent using statutory powers under Section 53 of the SBEE Act 2015 to ensure there are no further repeats of this behaviour. I do not consider that I should make any such request to the PCA who will be provided with a copy of this Award and that any further investigation will be solely a matter for the PCA.

COSTS

158) Costs of the arbitration are reserved.

IT IS NOW DECLARED AND DIRECTED THAT:

- a) Additional information should be provided to the Claimant by the Respondent to supplement the 2022 RAP within 28 days of the date of this Award.
- b) Costs are reserved.
- c) The Parties are to provide submissions on costs no later than 4:00pm on 9 June 2023.

A black rectangular box redacting a signature.

Arbitrator's Signature

Date Award made 26 May 2023

London

Ref: DAS-01330-G1T6F-PCA149