

[REDACTED]

IN THE MATTER OF A STATUTORY PUBS CODE ARBITRATION AND SECTIONS  
9498 OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF THE PUBS CODE etc REGULATIONS 2016

AND

IN THE MATTER OF THE PUBS CODE (FEES, COSTS AND FINANCIAL PENALTIES)  
REGULATIONS 2016

AND

IN THE MATTER OF THE CIARB RULES 2015

BETWEEN

[REDACTED]

Claimant

and

EI GROUP LIMITED

Respondent

regarding [REDACTED]

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FIRST INTERIM AWARD

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## Introductory matters

- 1 I was appointed to act as arbitrator in this matter by a letter dated 3.8.23 from the Dispute Appointment Service at the Chartered Institute of Arbitrators. The seat of this Arbitration is England and Wales.
- 2 This First Interim Award deals with jurisdictional challenges raised by the Respondent and agreed by the parties to fall under the headings:
  - .1 out of time;
  - .2 not covered by regulation 41(1)(c) of the Pubs Code etc Regulations 2016 ('the Code');
  - .3 no dispute as at 3.5.23;
  - .4 not in s 49 notice ( reference to s.49 Small Business, Enterprise and Employment Act 2015, 'the Act').
- 3 The claim at this stage has been presented as 20 separate claims set out in a Scott schedule, each of which is alleged to have breached one or more Code provision. At the outset of the Arbitration there were 33 heads of claim in the schedule then presented. There has as yet been no general statement of case from the Claimant.
- 4 The Code includes limitation provisions that are relatively short timescales. The parties requested, and I agreed, to address limitation as a preliminary issue. After discussion this grew to encompass other technical challenges to the various claims, under the headings identified above. It is common ground that these amount to jurisdiction challenges.
- 5 Following a case management hearing, I directed by Order 1 of 12.9.23 paragraph 10 that the Claimant was to provide:

*' a statement of case, limited to the issues of scope and limitation, cross referred where necessary to the Chronological Bundle and providing any additional*

*evidence relied upon. The statement of case is to comprise or include a schedule in the form of the draft Scott schedule of heads of claim already provided. In the schedule the Claimant is to:*

- .1 Clearly state the date on which it is said each head of claim arose, and on what grounds;*
- .2 Add a column titled 'breach' stating precisely which Code Provision(s) it is said has been breached in respect of each head of claim;*
- .3 Insofar as possible group the heads of claim so they may be considered as efficiently as possible.'*

I note here that the Respondent contends the Claimant did not fully comply with this direction.

6 The hearing was held virtually on 8.11.23. It was attended by Chris Wright, representative of the Claimant, and Rob Hastie, counsel for the Respondent. I am grateful to the participants for their assistance before and at the hearing.

7 At the hearing we worked through the Scott schedule items. All item numbers refer to the hearing version of the schedule.

8 Following discussion with the parties at the hearing, the following procedure was adopted:

- .1 that following the hearing I would issue this First Interim Award, in which I would decide the matters that I considered capable of decision at this stage;
- .2 thereafter the parties would make submissions, if so instructed, about the future management of the Arbitration;
- .3 that costs would be dealt with at a later date (the Respondent has served a costs schedule and seeks costs relating to this preliminary jurisdiction enquiry).

9 In accordance with that procedure I now publish this First Interim Award.

## Factual background for purposes of this Interim Award

10 It is not contentious that:

- .1 In about autumn 2022 the Claimant agreed to take a lease of the [REDACTED] [REDACTED] ('the pub') from the Respondent.
- .2 The term began on 9.1.23. The formal lease was signed on 24.5.23. The parties are agreed that the effect of the agreement between the parties is that the lease term commenced on 9.1.23 on the terms set out in the 24.5.23 lease.
- .3 On or after taking possession of the pub, the Claimant identified various matters that [REDACTED] considered were not compliant with agreement(s) between the parties.
- .4 On 3.5.23 (which date the parties agree; the relevant emailed letter is in fact dated on its face 5.2.23; 'the May letter') the Claimant wrote to the Respondent setting out a series of matters (which, subject to some modification, now appear in the Scott schedule) as to which [REDACTED] stated:

*The following points 1-32 are considered by me the TPT to be a breach of fair and lawful dealing Reg 41(1)(c) and Repairs at Reg 41(4)(a)(iii) and the wider duty to repair at the outset of the agreement under Reg 13, I also consider the business plan you accepted as being in breach of Reg 10.'*

A list of 33 items followed in the letter. The May letter then concluded with the sentence:

*'This is my 21 days' notice of my intention to file a referral with the PCA.'*

- .5 Following further correspondence, on 27.6.23 the Claimant made the Referral on the Pubs Code/CI Arb pro forma Referral form. The dispute details were stated as:  
*'The TPT gave a list of 33 issues to the POB which they replied to on 22 May, the issues were dismissed by the CCO. The TPT seeks to refer the matter as they*

*consider that the actions of the POB are in breach of the code and the principle of the Act to uphold fair and lawful dealing’.*

In describing the dispute by way of the tick boxes on the form, the Claimant ticked sustainable business plan (Regulation 10); premises (Regulation 13); business development managers (Regulation 41, except 41(10)(b) (3) and (5)).

### **Power to decide my own jurisdiction**

- 11 It is common ground that I am able to decide my own jurisdiction because:
- .1 The parties are agreed that I have that power;
  - .2 That power arises under Article 23 of the CI Arb Rules 2015 that the parties agree apply to this Arbitration;
  - .3 That power also arises pursuant to s.30 and s.94 of the Arbitration Act 1996.

### **Overview and general discussion**

#### **(1) The Respondent’s objections**

- 12 The claim as presented in the Scott schedule is 20 individual heads of claim, for example window defects and floor defects. Each individual item is said have breached the Code. I was asked by the parties to consider each item, and consider whether or not I have jurisdiction to deal with it, in the light of the technical objections raised by the Respondent, under the four headings listed at paragraph 3 above.
- 13 By far the largest category of the Respondent’s objections is based on limitation, and it is convenient here to explain the point taken by the Respondent. Section 49 of the Act provides time limits within which the Claimant must act. Sub section (2) provides that the dispute may not be referred until after the expiry of the period of 21 days beginning with the date on which the tenant notifies the pub

owning business of the alleged non compliance. Sub section (4) provides that a dispute may not be referred after the expiry of period of 4 months beginning with the first date on which the dispute could have been referred.

14 The parties agreed that the '*PCA Advice Notice: Timing of referral for arbitration by tied pub tenants (non MRO disputes) 2023*' ('the advice note') is applicable, whilst noting it contains guidance rather than being mandatory. The advice note states that in the view of the PCA:

.1 the first date when the dispute could have been referred would be after 21 days beginning with the date the dispute arose.

.2 The deadline for referring the dispute is therefore 4 months plus 21 days beginning with the date the dispute arose.

.3 The date on which the dispute arises will depend on the circumstances of each case. The PCA would expect the dispute to most usually arise at the time that the alleged breach of the Pubs Code occurred.

In respect of sub paragraph 3 immediately above, the Respondent acknowledged that in some instances the date of knowledge may be relevant to the date on which the dispute arose.

15 Accordingly, and on the basis of the advice note, the agreed position of the parties was that the limitation date was 6.2.23, and that disputes that arose before that date are time barred.

16 A number of the Respondent's limitation objections rely on the proposition that a tenant could or should raise a complaint at the earliest opportunity. This is supported by the advice note. The example in the advice note is a single event – the provision of a rent assessment proposal on 1 July. The advice notes states: '*the TPT **must** tell the POB that they think the RAP is not compliant.*' [emphasis

added.] The advice note concludes that the TPT has until 21 November (which I understand to be 21 days and 4 months after 1 July) to make a referral. I return below (paragraphs 17.2 and 18.1) to the application of this advice in this instance.

## **(2) The formulation of the Claim**

17 During the hearing both parties identified difficulties with the formulation of the claim as a large number of separate heads of claim:

.1 The Respondent submitted that the claim as put is like a dilapidations claim, which, the Respondent submitted, is not the type of dispute with which the Code is concerned;

.2 The Claimant submitted that strictly applying the advice note guidance (as contended for by the Respondent) to a situation where there are several complaints about individual items is impractical. Using the floor complaint as an example, the Respondent said the Claimant should have complained at the outset, i.e. on the date of handover, or at the latest the date rectification work started on the floor. The Claimant replied it was only apparent how defective the floor was as work on it progressed. The Claimant also submitted that ■■■ ■■■ trying to run a pub, and an obligation to give notice about all these items precisely as and when they arose was unrealistic.

18 I make no finding in this Interim Award as to whether the Code is intended to provide a forum for dilapidation type claims. The point can be the subject of further argument if necessary. However, for the assistance of the parties, I express my provisional view that it is likely that the Respondent is correct that the Code is not intended to deal with multi-headed building defect claims, because, and these are all provisional observations only:

- .1 the difficulties identified by the Claimant in applying the advice note guidance in this instance support this view. It is arguably a counsel of perfection to expect a tenant taking on new premises to identify, and then notify their landlord about, each item they consider to be not in accordance with the contract between the parties, either on the day of handover, or when they first consider something is wrong.
- .2 Section 42 of the Act sets out what may be included in the Code. While not an exclusive list, the focus is clearly on provision of information and assessments, in the context of an overriding principle of fair and lawful dealing.
- .3 Section 48 of the Act provides that a dispute can only be referred to the extent it relates to an alleged failure to comply with a provision of the Code. In the Scott schedule the Claimant has stated in relation to each head of claim which Code provision(s) [REDACTED] have been breached. I have considered all of the Code provisions listed by the Claimant. Consistent with s.42 of the Act, they relate to obligations of fair and lawful dealing, and information type items rather than physical defects. For example: regulation 41(4)(a)(iii) requires the Respondent to ensure its business development manager makes appropriate notes of discussions about repairs to the premises; regulation 13 relates to maintaining an up-to-date schedule of condition.
- .4 I am not aware of anything in the Code that is designed to deal with such building defects claims, for example there is an apparent lack of any remedies in the Code scheme that would relate to claims of this nature.



.5 Further, I have reservations in any event as to whether each of the individual alleged defects taken alone could be sufficient to breach the general obligation of fair and lawful dealing.

19 Notwithstanding the reservations I have expressed, I have, as the parties requested, considered each individual head of claim and reached the conclusions set out below. Having considered the technical points raised by the Respondent, I have found it is clear that a few of the individual Scott schedule heads of claim fall outside the scope of the Referral, and therefore my jurisdiction.

20 In my view it is clear that the Referral contains the overarching allegation of a failure of fair and lawful dealing. The May letter which is incorporated into the Referral states that the list of items ‘... are considered by me the TPT to be a breach of fair and lawful dealing’ and the Referral form states ‘...the actions of the POB are in breach of the code and the principle of the Act to uphold fair and lawful dealing’.

21 I have expressed provisional reservations about whether the claim as currently presented falls within the Code. There is at present no complete statement of case, and it remains a matter for the Claimant how, if the matter proceeds, the overall claim is framed to support the allegation of failure to comply with Code provisions. I consider it is open to the Claimant to pursue the referred claim that ‘the POB is in breach of the code and the principle of the Act to uphold fair and lawful dealing’, including, if [REDACTED] to, by reference to evidence of the defaults alleged in the schedule. This is so even where I have found below that

individual claims fall outside my jurisdiction, because I consider that the individual items remain part of the factual background.

22 I turn now to the individual items in the Scott schedule.

**No dispute as at 3.5.23**

23 For convenience I deal with this category first. These are items 15 and 16 in the Scott schedule. The Respondent conceded at the hearing that these issues could not be dealt with summarily as they were not, on reflection, a jurisdictional issue. However I comment on them here because I consider that the point that arises also applies to some of the other ‘out of time’ points.

24 Item 15 relates to the Claimant’s complaints about the men’s toilets, item 16 relates to electrical installations in the accommodation area. In both instances the Claimant relied on notice having been given on 3.5.23, by the May letter.

25 In my view the Referral on 27.6.23 was within the time period of 21 days plus 4 months after the notice in the May letter on 3.5.23. It was also more than 21 days after the May letter. I consider that the only technical objection could be that the notice was not given promptly upon the occurrence of breach. This is consistent with the Respondent’s statement in the Scott schedule; *‘No detail given of the date of the incident, the extent of the alleged damage or whether it was reported before 3.5.23’*.

26 I refer to paragraph 18.1 above, and in the present circumstances I am not prepared to dismiss claims on the basis of late notice at this stage.

27 For the avoidance of doubt, items 15 and 16 are not dismissed due to the Respondent’s concession.

28 Where I consider that the same contention, namely that notice was not given promptly, applies under the 'out of time' items, I have identified this as the 'late notice point'.

**Issues argued by the Respondent to be out of time**

29 I have set out above (paragraphs 13-15) the basis on which the parties agreed that the latest date on which an alleged non compliance could be raised and be open for decision in this Arbitration was 6.2.23.

30 **Item 1, window repairs to accommodation.** The Claimant's stated position was this this issue was raised in January 2023, although no document identifying notification was relied on by the Claimant. The Respondent, accepting this date of notice, submitted the claim is out of time.

31 I note that an email of 7.10.22 from [REDACTED] to the Claimant stated '*Take pub on 9<sup>th</sup> Jan.... Windows x 2 upstairs should have been renewed by then*' [bundle page 33]. As an agreed matter of fact, the windows were repaired in May 2023. The Respondent's secondary position was that this was a reasonable period.

32 I find that, on the basis of the date of notice in January 2023 relied on by the Claimant, the Referral was made too late and this head of claim is dismissed.

33 I note that the Claimant's position at the hearing was that the windows point had evolved into a Schedule of Condition point, namely that the Schedule of Condition should be updated. I refer to paragraphs 61-63 below with respect to complaints about the Schedule of Condition.

34 **Item 2, fire doors.** The Claimant's stated position was that this issue was raised in January 2023, although no document identifying notification was relied on. It

was agreed that the work is now done, although there was disagreement about when.

35 The Respondent submitted there had been two tranches of work to the doors. The Respondent's position was the January date of notice would make the claim out of time. I find that is correct.

36 The Respondent fairly pointed out there was then a notice by the Claimant on 21.3.23 in respect of the need to replace the fire doors. The Respondent accepts, and I find, that this claim can be dealt with in this Arbitration, notice having been given after 6.2.23.

37 The Claimant argued that it was artificial to divide the door issues into 2 periods, but that the door was simply not fit for purpose. This argument does not assist the Claimant as it requires reliance on the January notice which I have found is out of time.

38 I find that the complaint about the need to replace the fire doors is within the scope of this Arbitration, and the January notice relating to repair is out of time.

39 **Item 3, gas and electric contracts.** The Claimant's position is that no information was provided in respect of existing services contracts, that the Respondent should have provided this, and as a result the Claimant was charged 'out of contract rates'. The Claimant says this was raised on 18.2.23, but no document was referred to substantiate this date.

40 The Respondent's position was this issue was known at the date of handover (9.1.23) and should have been raised then, and thus the complaint is time barred.

41 I find that the Respondent's objection amounts to reliance on the late notice point (see paragraphs 26 and 28) and accordingly this head of claim is not dismissed.

42 **Item 4, floors.** The Claimant's position is that ■ raised this issue on 18.2.23, but no document was relied upon. The original Scott schedule indicates that the floors were cleaned from 11.1.23 to 18.2.23. The Respondent's position was that the alleged non compliance should therefore have been raised by at least 11.1.23, if not at handover. The Claimant argued that the extent of the problem was not apparent until the cleaning had been carried out.

43 I find that the Respondent's objection amounts to reliance on the late notice point (see paragraphs 26 and 28) and accordingly this head of claim is not dismissed.

44 **Item 5, fire alarm.** It is not clear to me what this complaint is about. The Claimant says it was raised on 3.5.23. In both the 3.5.23 letter and the Scott schedule the Claimant states '*No one knew what was going on with this not even the engineer who came out to service it*'. No date of breach is alleged. In the premises it is not possible to form a view about this item.

45 The Respondent invites me to strike out this head of claim given the Claimant's failure to comply with my order directing particularisation. I am not prepared to do that, particularly as this is a fire alarm issue that is apparently still unresolved. I note that the Respondent's concerns about non compliance with the order can potentially be dealt with as a matter of costs.

46 **Item 6, no fixtures and fittings report.** The substance of the Claimant's complaint is the fixtures and fittings are allegedly mostly not fit for purpose. But the Claimant also complains that ■ waiting for fixtures and fittings valuation. The Claimant's position is that this issue (it is not clear whether this refers to the items or the report) was raised on 20.3.23, but no document was relied upon.

47 The Respondent's position is that the fixtures and fittings were capable of inspection at handover 9.1.23 and this item should have been raised then.

- 48 It is apparent from the bundle (including pages 29, 32, 33, 85) that there were written exchanges between the parties about the fixtures and fittings and the position is unclear to me. In any event I find that the Respondent's objection amounts to reliance on the late notice point (see paragraphs 26 and 28) and accordingly this head of claim is not dismissed.
- 49 **Item 7, complaint against [REDACTED]**. The Claimant states this was raised on 1.3.23. There is reference to a formal complaint raised by the Claimant in an email 1.3.23 to [REDACTED] (bundle p.122). The substance of the complaint has not been particularised. I share the Respondent's expressed concern that a complaint against a named individual remains unparticularised for this extended period. However I find this claim is not out of time and it is not dismissed.
- 50 While not forming part of this Interim Award, I note that I am not clear why a complaint of this nature in respect of an employee of the Respondent's does not fall to be dealt with in accordance with an internal grievance procedure.
- 51 **Item 8, minuted meetings.** The Claimant complains about a lack of minutes. The Respondent refers to two sets of minutes (19.1.23 and 25.1.23) and submits that any complaint over these is out of time.
- 52 In circumstances where there has been no disclosure, and the Claimant is complaining about the absence of minutes, I find it is not appropriate to dismiss this claim.
- 53 **Item 9, grill.** The Claimant says this issue was raised on 2.3.23, but no document was relied on. The Claimant's case is that the grill had to be removed as it was not fit for purpose. I note the Schedule of Condition stated the grill was disconnected and needs a new hose.

54 The Respondent's position is that the grill was inspectable at handover on 9.1.23 and the claim should have been raised then. I find that the Respondent's objection amounts to reliance on the late notice point (see paragraphs 26 and 28) and accordingly this head of claim is not dismissed.

55 **Item 10, fridge.** The Claimant relies on this having been raised in the 3.5.23 letter. The Respondent submits this item should have been raised at handover. I find that the Respondent's objection amounts to reliance on the late notice point (see paragraphs 26 and 28) and accordingly this head of claim is not dismissed.

56 **Item 11, Garden furniture.** The Claimant relies on this having been raised in the 3.5.23 letter. The Respondent says it should have been raised at handover. I find that the Respondent's objection amounts to reliance on the late notice point (see paragraphs 26 and 28) and accordingly this head of claim is not dismissed.

57 **Item 12, not credited for fixing glass washer.** The Claimant relies on this having been raised in the 3.5.23 letter. The Respondent says the problem with the glass washer was identified at handover, and so this item is out of time.

58 The Claimant's complaint does not appear to relate to the glass washer, but to an alleged arrangement as to who was paying for it to be mended. I have no evidence about that alleged agreement or the dates relevant to it. I find this head of claim is not dismissed.

**Not covered by Reg.41(1)(c).**

59 Following discussion at the hearing these items, 13, which relates to a letter dated 5.4.23 from the Respondent, and 14, which is described as 'trying to meet operations director', were conceded by the Claimant. My understanding is that the provision that was sought to be relied on by the Claimant relates to the conduct

of Business Development Managers. The Respondent's point, which I understand that the Claimant conceded, was that in respect of these items the

Respondent was not acting as a Business Development Manager such that the Code provision relied on applies. The Respondent styled these communications as the Respondent seeking to negotiate the dispute that had arisen.

60 In the premises I find that these heads of claim shall not proceed in this Arbitration.

#### **Not raised in s.49 notice**

61 Upon an agreed bundle being prepared for the hearing, the Claimant stated ■ had not previously seen the Schedule of Condition included in it by the Respondent. This was contested. The Claimant sought to add issues relating to the Schedule of Condition to the Scott schedule ('the new complaints'), items numbered 16, 17, and 18.

62 Section 48 of the Act provides that a tenant may refer a dispute for arbitration in accordance with the s.49 time limits. The Respondent contended that the new complaints could not be included in the Referral as the Claimant's position is that ■ date of knowledge of the Schedule of Condition was after both the May letter and the Referral. In the light of this argument, with which I agree, at the hearing the Claimant did not pursue these items further.

63 For the avoidance of doubt, I find that the new complaints cannot be in the Referral for the reason outlined above. However the Schedule of Condition remains a document that has been put in evidence in this Arbitration.



## General dispute

64 **Item 20, heating system.** There appears to be an ongoing issue with the heating system. The Claimant says this was raised on 13.4.23. It is apparent from the agreed bundle that there have been numerous notifications by the Claimant of problems with the boiler and heating, and on going repairs, and there appears to be no consensus whether the problem is now resolved. In the circumstances I find this item is not dismissed.

## Summary of findings

65 I have explained (paragraph 18 above) my provisional view that it is unlikely that building defects claims should be being made under the Code. This question remains susceptible to further argument if necessary.

66 It is clear (paragraph 20 above) that the Claimant has referred a claim alleging that *'the POB is in breach of the code and the principle of the Act to uphold fair and lawful dealing'*. Such a claim has not yet been properly particularised and related to the Code. The facts (if proved) of all the individual defect claims are part of the factual background.

67 I have nevertheless considered each head of claim on the basis of the technical objections advanced by the Respondent. I have recorded in the table below my findings as to the individual claims that could potentially be pursued in this Reference by the Claimant. I have also included in the table below concessions made by the parties.

Scott schedule item		Remains in issue in this Arbitration
1	Window repairs to accommodation	No
2 (1)	Fire doors – repair said to be notified Jan 23	No
2 (2)	Fire doors - replacement notified 21.3.23	Yes
3	Gas and electric contracts	Yes

4	Floors	Yes
5	Fire alarm	Yes
6	Fixtures and fittings report	Yes
7	Complaint against [REDACTED]	Yes
8	Minuted meetings	Yes
9	Grill	Yes
10	Fridge	Yes
11	Garden furniture	Yes
12	Glasswasher repair	Yes
13	Letter 5.4.23	No
14	Trying to meet operations director	No
15	Gents toilet	Yes
16	Accommodation electrics	Yes
17	Schedule of condition	No
18	Schedule of condition (2)	No
19	Schedule of condition (3)	No
20	Heating system	Yes

### **Costs**

68 The Respondent served a costs schedule in advance of the hearing and has indicated an intention to seek costs of this preliminary jurisdiction exercise insofar as I am in a position to award them. I did not hear arguments on costs; this will be dealt with in due course.

### **Award**

69 I hereby award and determine that:

- .1 the following heads of claim (identified by their number in the Scott schedule and summarised in the table at paragraph 67 above) are capable of being pursued in this Arbitration: 2(2), 3,4,5,6,7,8,9,10,11,12,15,16, and 20.

- .2 The remaining heads of claim listed in the Scott schedule, for the reasons set out herein above, cannot be pursued as separate claims in this Arbitration.
- .3 The facts related to all the claims in the Scott schedule remain part of the factual background.
- .4 The question of costs of these preliminary issues and this interim award are reserved, as are all other issues in the Arbitration.

**This First Interim Award is made in London on 29 November 2023**



Arbitrator  
Crown Office Chambers