IN THE MATTER OF

THE PUBS CODE ARBITRATION BETWEEN: -

ALAN PETER CLATWORTHY

Claimant

(Tied Pub Tenant)

-and-

EI GROUP PLC

Respondent

(Pub-owning Business)

Final Award except in relation to costs

The Rent Assessment Proposal made by the Respondent is invalid and the Respondent is ordered to provide a new Rent Assessment Proposal to the Claimant within 28 days of the date of this award.

Contents

1. **Introduction**

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

3. The Arbitrator was appointed pursuant to section 48(5)(b) and 50(4)(b) of the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") by the Pubs Code Adjudicator ("the PCA") as Arbitrator in the case of ARB/105270/CLATWORTHY as of 30 April 2019.

4. The Claimant is Mr Alan Peter Clatworthy of The Bell Inn, 3 Broyle Road, Chichester, West Sussex, PO19 6AT. The Claimant is represented by Mr Chris Wright of the Pubs Advisory Service (PAS)

5. The Respondent is Ei Group of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. The Respondent is represented by Gosschalks Solicitors of Queens Gardens, Hull, HU1 3DZ.

6. **Procedure**

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

8. Part 4 of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act);

9. The Pubs Code etc. Regulations 2016 (the Pubs Code); and

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

11. The applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules. Where a conflict arises between these rules or the 1996 Act and the Pubs Code statutory framework (being the 2015 Act, the Pubs Code or the Fees Regulations) the Pubs Code statutory framework prevails.

12. Each party has had the opportunity to put their case and respond to the case made by the other party. The following is a brief chronology of the case management:

13. The Amended Statement of Claim (superseding original Statement of Claim) was served on 30 October 2018 on behalf of the Claimants.

14. The Amended Statement of Defence (superseding original Statement of Defence) was served on 20 November 2018 on behalf of the Respondent.

15. The Respondent supplied the Witness Statement of [redacted] dated 17 January 2019.

16. The parties were unable to agree a Statement of Agreed Facts and List of Issues in Dispute and each side has provided their own version.

17. The Respondent served a Submission regarding Guidance Issued by The Pubs Code Adjudicator being the PCA "Guidance: Accounting in Pubs Code Schedule 2 etc." on 10th April 2019.

18. The Claimant provided a further Statement of New Evidence dated 15 May 2019.

19. The Claimant served a Submission regarding Guidance Issued by The Pubs Code Adjudicator being the PCA "Guidance: Accounting in Pubs Code Schedule 2 etc." on 21st June 2019.

20. **Summary of Facts**

21. On 9 August 2013 a renewal lease was entered into between the Respondent and the Claimant for a term of 20 years commencing on 18 January 2013.

22. On 18 May 2018 a Rent Assessment Proposal (RAP) was served which is the subject of this case.

23. On 19 June 2018 a Market Rent Only (MRO) request was made by the Tied Pub Tenant (TPT).

24. On 20 June 2018 a full response to the MRO request by the Pub Owning Business (POB) rejected the same for being out of time as it was served more than 21 days after receipt of the Rent Assessment Proposal.

25. On 20 July 2018 the Claimant sent a notice which challenged the contents of the RAP.

26. On 23 July 2018 a letter of response was sent by the POB.

27. On 28 August 2018 the matter was referred to the Pubs Code Adjudicator (PCA), Mr Paul Newby.

28. The referral was accepted for arbitration on 4 September 2018.

29. **Applicable Law**

30. This referral to the arbitrator was accepted under section 48 of the 2015 Act which states, as is relevant:

> **Referral for arbitration by tied pub tenants**
>
> (1) In accordance with the following provisions of this section and section 49, a tied pub tenant may refer a dispute between the tenant and the pub-owning business concerned to the Adjudicator for arbitration.
>
> …
>
> (4) If the Pubs Code does not specify whether any of its provisions are arbitrable or not arbitrable, a dispute may be referred to the Adjudicator only to the extent that it relates to an allegation by the tenant that the pub-owning business has failed to comply with any provision of the Pubs Code.
>
> (5) Where a dispute is referred for arbitration under this section, the Adjudicator must either—
>
> (a) arbitrate the dispute, or
>
> (b) appoint another person to arbitrate the dispute

31. Section 49 of the 2015 Act then states –

Timing of referral for arbitration by tied pub tenants

(1) This section makes provision as to the period within which a tied pub tenant may refer a dispute to the Adjudicator in accordance with section 48.

(2) Except in the case mentioned in subsection (3), 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 noncompliance.

(3) Where the Pubs Code requires a pub-owning business to provide a parallel rent assessment within a period of time specified by the Adjudicator, a dispute which relates to an allegation that the pub-owning business has failed to comply with that requirement may not be referred until the day after the day on which the specified period ends.

(4) In all cases, a dispute may not be referred after the expiry of the period of 4 months beginning with the first date on which the dispute could have been referred.

32. This referral concerns Regulation 20(1)(b) and Schedule 2 paragraph 5(c) of the Code.

33. Regulation 20 relates to **The Rent Assessment Proposal** and Regulation 20(1) states:

1) Where a pub-owning business is required to conduct a rent assessment or an assessment of money payable in lieu of rent under regulation 19(1), the pub-owning business must send the tied pub tenant a document ("the rent assessment proposal") containing—

(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.

34. Schedule 2 relates to **Information specified for the purposes of a rent proposal or a rent assessment proposal**; and,

35. Paragraph 5 of the Code relates to **A forecast profit and loss statement for the tied pub** and states:

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).

36. **Issues**

37. In the two draft Statements of Agreed Facts and List of Issues in Dispute provided by each of the parties the differences were only over the issues in dispute. I have considered these and the specific differences and hereby determine that the issues I am requested to determine are:

38. **Whether the volume of alcohol in respect of which duty was paid is or should be available to the Respondent under paragraph 5(c) of Schedule 2?**

39. **Whether any failure to provide information specified in schedule 2 paragraph 5 would invalidate the Rent Assessment Proposal?**

40. **Whether any failure to provide a reason to a Tied Pub Tenant (TPT) as to why the Pub Owning Business (POB) is not supplying information specified in schedule 2 would invalidate the Rent Assessment Proposal?**

41. The POB respondent has included an issue which is not agreed by the Claimant:

42. **Would a second Rent Assessment Proposal provided by the Respondent constitute an MRO event under Regulation 27?**

43. This point does not appear to have been the subject of proper submission by the parties except that the respondent in item 14 of the amended statement of defence discusses a lack of clarity on the point.

44. As such I have concluded that it is not for me to decide on this point. I would refer the parties to the PCA for clarification.

45. **Arguments and discussion**

46. The Claimant is seeking an award to the effect that the 18 May 2018 letter is not a compliant Rent Assessment Proposal because it does not comply with Regulation 20(1)(b) in that it does not provide information required by Schedule 2.

47. In particular he (TPT) claims that it does not provide the information required by Schedule 2 Paragraph 5(c) “if different from the figure in (a), the volume of alcohol in respect of which duty was paid during the last 3 years;”

48. In failing to do so the POB did not give reasons upon which the TPT could have responded. He (TPT) says the reason given after "raising a written complaint" was not acceptable or reasonable.

49. He (TPT) says that "knowing the saleable content and the price is fundamental".

50. He (TPT) contends this would "allow the TPT to take into account the information used to set pricing and gross profit. Not providing it undermines the creation of a credible and sustainable business plan".

51. He (TPT) contends that it is "obvious that the information is available to the POB" and hence he (TPT) says the failure to disclose is a breach of fair and lawful dealing and the transparency are expected under the SBEE Act 2015 Section 42 (3) (a).

52. In support the tenant’s representative has written to a number of suppliers trying to establish the extent of the availability of the information. He (TPT) also found relevant information on the Star Pub's website which they provided printouts of as evidence.

53. The claimant asks the arbitrator to provide relief by way of ruling that the letter of 18 May 2018 is not a valid RAP;

54. and, directing the respondent to provide a new and compliant RAP;

55. and, ordering that the Respondent pay the costs of the claim in the sum of £200.

56. The Respondent accepts that this information has not been provided; Statement of Defence 7(g).

57. They (POB) say and at least within the defence maintain that “the information is not reasonably available to them “for the purposes of providing a RAP”.

58. I presume that this is meant to say that it is not "reasonably available to them" for any purpose.

59. They (POB) contend that the obligation of Regulation 20(1)(b) is not absolute and is subject to the qualification that the information has to be “reasonably available”.

60. They (POB) say that ale is purchased from a large number of brewers and suppliers; the cask ale is sold to the respondent "duty-paid"; and, they do not pay duty directly to HMRC.

61. They (POB) say that for them it is not reasonably practicable to identify the precise quantities of each brand of cask ale delivered to the Property at different times; and, calculate the cask sediment allowance relevant to that delivery; and, deduct any costs returned or credited.

62. They (POB) say that would be an overly bureaucratic process.

63. I find this somewhat surprising.

64. It would seem to me that the precise quantities of each brand of cask ale delivered to the property is a fundamental record necessary for the bookkeeping, accounts, operation and profitability of their business.

65. The provision of this information has been a requirement of the Pubs code since July 2016.

66. Whilst in the immediate aftermath of the introduction of this legislation the information may not for a variety of reasons have been “reasonably available”, some two years later for the argument of not being "reasonably available" to prevail, there would need to be justification as to the steps taken to comply with the Act and the difficulties encountered that would make it reasonable for this information to still not be available. This has not been provided to me in the submissions.

67. They (POB) cite the witness statement of [redacted] who takes the view that the important figure is the wastage allowance rather than the percentage of volume subject to beer duty.

68. They (POB) also take the view that the TPT has its own records and is in at least as good a position as the POB to understand the number of saleable pints from each cask delivered.

69. I do not accept or find as a fact that the limited bookkeeping and analysis resources of an independent pub can in any way match the sophistication and depth of access to modern technology of those of a major operator covered by the Pubs Code in the 21st century.

70. The PCA has now issued Beer Duty Guidance in the document "*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.*" on 10th April 2019 and this came into effect on 1st July 2019.

71. The respondent cites paragraph 1.6 which they say states "*that where a POB has taken reasonable steps to obtain the information required regarding sediment duty allowance from brewers and that information is not made available, then the profit and loss forecast will not be "non-compliant" with the Guidance.*"

72. They (POB) contend that Mr Wright acknowledges he attempted to obtain information directly from brewers but had limited success in obtaining the same.

73. I note that is so.

74. However, what Mr Wright specifically says in his submission is that "Some of the brewers we contacted refused to supply the information to us as they cited commercial confidentiality with the respondent.".

75. He is in fact saying that the information was refused to him because of business agreements between the supplier and the respondent.

76. Mr Wright says that "every brewer is required by law to provide necessary sediment information to their customer". If a brewer does not provide that information then they are failing to comply with HMRC regulation EN 226. Were that the case the purchaser should

suspect that they are being sold beer as duty paid when duty has not been paid on an element of it. There would then be a requirement to report the suspicion/failure to HMRC. He says this has been a legal requirement since the 1990s and there is no evidence submitted that such a complaint has been made.

77. He points to the respondent producing lists of sediment which he says indicates they (POB) have had the information but withheld it contrary to the requirements of the Pubs Code.

78. I note that the respondent has not provided the "reasonable" steps they have taken to obtain the information required regarding settlement duty allowance or evidence that it is not available.

79. The respondent acknowledges that in accordance with the new guidance that from 1 July 2019 they will be expected to provide the duty-paid volume data as far as they are able to in relation to sediment duty allowance for the previous 3 years.

80. They (POB) say the guidance is not retrospective and was introduced on the 10th April 2019 but will only be effective from the 1 July 2019 providing a lead in period. They say this is because the PCA anticipated that there will need to be procedures set up and information gathered in order to comply.

81. They (POB) contend there is no indication in the guidance that a failure to comply with the provisions of the guidance before 1 July 2019 makes a RAP non-compliant.

82. The Respondent maintains that it is not reasonable to judge the RAP sent in May 2018 against standards published in April 2019 as that would be an application of the Guidance “ex post facto”. The focus should be on compliance going forward rather than a historic rent assessment proposal.

83. The Claimant notes that the draft guidance was published in November 2018 as a consultation document and was not varied significantly, hence, they (POB) had more than enough notice to change non-compliant practices.

84. They (TPT) contend that whilst the PCA guidance creates no new regulation it makes it very clear that practices that were common but contrary to existing regulation must now be complied with by the parties.

85. The claimant says that the guidance clarifies what is needed to be compliant under Schedule 2 of the code. They accept that the POB may provide the information in different formats but say it is not open to the POB to fail to give the information required under schedule two of the code. This is the case under the new guidance but is in fact no different from the position under the requirements of Schedule 2 from when the Act came into being in July 2016. The guidance does not change any of these requirements.

86. Therefore, any RAP that is non-compliant after the publication of this guidance and its introduction on the 1 July 2019 would have in any event been non-compliant before that under the main legislation.

87. I note that Regulations 16 and 20 in conjunction with paragraph 5(c) of Schedule 2 to the Code require, so far as reasonably available, that the forecast profit and loss statement to be provided by the POBs as part of a rent proposal or rent assessment proposal is to 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.

88. The PCA states in the guidance paragraph 1.2 that "*This provision 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***"

89. The POB in this case says that they buy in cask ales.

90. Furthermore, paragraph 1.3 states "*The PCA considers that compliance with Schedule 2 requires, on a business as usual basis, POBs to provide their TPTs with full details of the volume on which duty has been paid on cask ales and keg beers available under the tie in a readily*

available full and up to date product price list. This should be published on the POB's tenant-accessible website; and should also be provided to TPTs on at least an annual basis. This price list should be updated to reflect changes in the products it contains; and should be reviewed annually."

91. I note that this is guidance as to what schedule 2 of the Act requires.

92. It clarifies the requirements; it does not change the requirements.

93. The respondent by its own admission has accepted that it did not provide analysis of the volume of alcohol delivered in the previous three years on which the cask sediment amount has been claimed.

94. They (POB) claim that the information is not reasonably available to them, but I find as a fact that they have not provided any evidence to support this claim. They simply say it is not reasonably practicable for them to do so.

95. Thereafter, in paragraph 6 of their submission on the guidance, they (POB) acknowledge that they "will be expected to provide the duty-paid volume data as far as they are able to, in relation sediment duty allowance for the previous three years" from the 1 July 2019.

96. This together with their (POB) following assertion that the guidance is not retrospective I find is suggestive of an acknowledgement that rather more data can be provided than they have provided in the past and that they could have provided more in the past.

97. In any event, the PCA is clear that this information should have been and should be available in all but the most exceptional of circumstances. I find that no evidence has been provided of circumstances that I can find to be in the nature of "most exceptional circumstances".

98. I find that the volume of alcohol in respect of which duty was paid is likely to have been available and should be available to the respondent for provision under paragraph 5 (c) of Schedule 2.

99. The respondent contends that by service of a purported MRO notice on the 19 June 2018 the claimant acknowledged that a valid RAP under the code had been served and waived any rights to and/or was estopped from challenging the validity of the RAP.

100. They (POB) do not however provide any supporting argument evidence precedent or case law on which they would rely in support of their contention for the proposition of waiver.

101. The act of waiver is a voluntary relinquishment of legal rights that a person would normally have if the waiver did not exist.

102. The action of service of an MRO is to initiate a process of negotiation. It would be bizarre to consider that the mistake of serving such a notice after the expiry of the time limit for doing so would be a voluntary waiver of the legal right to challenge the validity of the RAP.

103. This argument might have more logic if the service of the MRO was in time and the negotiating process had commenced. The positive act of entering into negotiations by the POB following the MRO might be seen as a voluntary waiver by the POB of the right to challenge the validity of the RAP. I do not however make any determination as to whether that would be the case as this is not in question in this matter and arguments have not been put to me on this.

104. I find that the service of the MRO in this case is not a waiver of the right to challenge the validity of the RAP.

105. The doctrine of estoppel is an equitable intervention to prevent a party from resiling from an assurance where it would be unconscionable for it to do so. To be unconscionable usually requires that there needs to be some detriment to the other party.

106. In effect it appears the respondent is saying that the service of the MRO was an assurance that they relied on to their detriment, notwithstanding their rejection of it as being out of time, and hence as a result of that reliance it would be unconscionable for the claimants to be allowed to challenge the validity of the RAP.

107. I fail to see what reliance the POB has put on the MRO, given they rejected it, and hence what detriment there would be to the POB such that it would be unconscionable for the claimants

be allowed to challenge the validity of the RAP because they had previously tried to serve the MRO.

108. I cannot therefore find that the claimant is estopped from challenging the validity of the RAP.

109. The respondent further contends that failure to provide any or all of the information specified in Schedule 2 would not invalidate the RAP.

110. In support of this they (POB) contend that the question is one of statutory interpretation. They refer to the decision of the Court of Appeal in Osman v Natt [2015] 1 WLR 1536.

111. In this case the consequence of failure to comply with a process or procedure in a statute where the statute does not itself expressly state what is the consequence of failure to comply with that process or procedure was considered.

112. The consequence used to be said to depend on whether the requirement was mandatory or directory.

113. If on proper interpretation it was held to be mandatory the failure to comply was said to invalidate everything which followed.

114. If it was held on the proper interpretation to be directory failing to comply would not necessarily have invalidated everything.

115. In the decision in Osman v Natt the Chancellor said that the above approach was now regarded as unsatisfactory. He said the “modern approach was 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 requirements in the context of the statutory scheme as a whole.".

116. The respondent thereafter contends that Regulation 20 does not provide that a RAP is invalid if such information is not contained in the document sent to the TPT.

117. I concur to the extent that Regulation 20 (b) limits the information required to that "reasonably available to the pub-owning business" that if the information was not "reasonably available" then the RAP would not be invalid were that information not provided.

118. I do not accept that because the Regulation does not specifically provide for invalidity of a RAP it necessarily follows that failure to provide the information where reasonably available would not invalidate the RAP.

119. They (POB) say that certainty is required to the provision of a RAP because first, under regulation 21 (1), this triggers the commencement of a rent assessment and secondly, under regulation 27 the service of a RAP is an MRO event.

120. I concur that these are both important matters, but it seems to me they are equally supportive as grounds for the RAP being invalid if the requirements have not been met. The tenant has only 21 days within which to decide upon and serve a Market Rent Only (MRO) notice. It is hence important that the RAP is both valid and Schedule 2 information is provided as fully as possible so as to inform that decision. It is important that if the RAP is not valid that the TPT is not bound to make such important decisions as serving an MRO notice without the full information he is entitled to under the Act. The only protection there can be to this is that where the information is not provided that the RAP is invalid.

121. The POB states that 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. They (POB) say if the omission of any information required under regulation 20 (1) invalidated the RAP, this procedure would be otiose.

122. The POB says that Regulation 21 (3) supports the contention that the RAP is intended to be the trigger of a process, which involves communication 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.

123. The argument is hence that 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 because it lacks information required by Schedule 2.

124. It is denied by the POB that if any or all the alleged deficiencies under Schedule 2 of the code are established by the claimant such deficiencies are capable of invalidating the RAP served by the claimant. Rather, they (POB) say, the code provides by regulation 21 (3), a process for the parties to discuss any further information which might be required.

125. Schedule 2 specifies the information required for the purposes of a rent proposal.

126. Regulation 20 states "the POB **must** send the tied pub tenant a document ("the rent assessment proposal") containing …….. (b) the information specified in Schedule 2, if it is reasonably available to the pub owning business".

127. Section 21 (3) states:

> "During the rent assessment or assessment of money payable in lieu of rent, the pub-owning business must—
>
> (a)comply with any reasonable request for further information which is relevant for the negotiation of the new rent and which is made by the tied pub tenant or by a person acting on behalf of the tied pub tenant; or
>
> (b)provide to the tied pub tenant, as soon as reasonably practicable, a reasonable explanation why the information requested is not provided."

128. I note that this relates to information which is "relevant for the negotiation of the new rent".

129. The section is therefore intended to assist throughout the Rent Assessment period before and after the 21 days within an MRO notice can be served.

130. The information required by Schedule 2 is quite comprehensive. It would follow therefore that different POB's and different TPT's would have different interpretations and needs for the extent and depth of that information's provision.

131. It therefore appears to me to be eminently reasonable that clause 21 (3) allows for further information to be requested and that information be provided be provided or an explanation

for not providing it to be given. This can be both before and after the 21 days allowed for service of an MRO notice.

132. The clause is not in my view meant to be a way of extracting information from the POB that must be provided in the first instance and is needed to decide on serving a notice in a limited time period; but, is a useful means for the parties to communicate, and for information that is needed for the continuing process to be exchanged, where the information needed and its extent is likely to vary from one party to another.

133. Where information is required by Schedule 2 it must be provided unless it is not reasonably available.

134. I therefore do not accept the argument of the respondent that the RAP cannot be invalidated by missing information.

135. Where information is required under Schedule 2 that has an impact on the decision of serving an MRO notice then failure to provide it will invalidate the MRO.

136. I find that the RAP is invalidated by the failure to provide the information.

137. Where the information is not reasonably available whilst the Act does not say the reasons must be provided with the RAP doing so might well support argument that the RAP is nonetheless valid.

138. In this case the information was not provided and nor were reasons until they were requested after the 21-day period.

139. In their letter of the 23 July 2018 the POB give reason for failing to provide the information specified in Schedule 2 paragraph 5(c). They say:

140. “All tied supplies from EI Group are duty paid at the appropriate level, and all our wholesale prices are duty-inclusive, so there is no difference from the figures disclosed under 5(a). Therefore section 5(c) does not apply.”.

141. This statement clearly does not correlate with the HMRC requirements and the PCA guidance paragraph 1.2 and 1.3.

142. The TPT contend that it is "obvious that the information is available to the POB" and hence they (TPT) say the failure to disclose and/or give proper reasons is a breach of fair and lawful dealing and the transparency are expected under the SBEE Act 2015 Section 42 (3) (a).

143. The contention that section 5 (c) does not apply is incorrect.

144. The POB therefore did not provide a valid reason as to why they were not supplying the information.

145. It is argued by the TPT that the failure to disclose is a breach of fair and lawful dealing and the transparency expected under the SBEE Act 2015 Section 42 (3) (a).

146. I concur.

147. Whether this would invalidate the RAP is in my view a question of whether the failure is so fundamental that it effects the decision to serve an MRO or not. If it were not, then the matter can be sent to arbitration for the relief of an order that the information be provided. It is where the opportunity of losing the option to serve an MRO notice is lost that the RAP is invalidated because otherwise the option to serve the notice is lost.

148. The issues I need to determine as derived from the draft Statements of Agreed Facts and Issues to be Determined and considered here above are:

149. **Whether the volume of alcohol in respect of which duty was paid is or should be available to the Respondent under paragraph 5(c) of Schedule 2?**

150. I find as a fact that the volume of alcohol in respect of which duty was paid is likely to have been available and should be available to the respondent for provision under paragraph 5 (c) of Schedule 2.

151. **Whether any failure to provide information specified in schedule 2 paragraph 5 would invalidate the Rent Assessment Proposal?**

152. I find that a failure to sufficiently provide the information specified in Schedule 2 paragraph 5 invalidates the Rent Assessment Proposal.

153. **Whether any failure to provide a reason to a Tied Pub Tenant (TPT) as to why the Pub Owning Business (POB) is not supplying information specified in schedule 2 would invalidate the Rent Assessment Proposal?**

154. I find as a fact that the reasons provided were incorrect and as the information was required to develop a business plan and hence affected the ability to decide on the serving of an MRO notice and that this invalidates the Rent Assessment Proposal.

155. **Costs**

156. The claimant has requested that the respondent be ordered to pay costs in the claim of £200.

157. Submissions on this have not been made by either party.

158. There have been no requests to date for the award of party costs.

159. Issues as to costs of the arbitration are reserved pending the parties' opportunity to make submissions as to costs.

160. **Operative Provisions**

161. Considering the above I make the following award:

162. The failure to sufficiently provide the information specified in Schedule 2 paragraph 5 and proper reasons why this was not reasonably available invalidates the Rent Assessment Proposal.

163. The Respondent is ordered to provide a new Rent Assessment Proposal to the Claimant within 28 days of the date of this award;

164. Costs are reserved.

Date Award made ……..……12 August 2019