

Publisher's Note: The outcome of an arbitration is based on its own facts and the evidence produced in the case and is not binding in other cases where the landlord and tenant are not the same. The Pubs Code Adjudicator does expect a regulated pub-owning business to consider its understanding of the law in light of each award that makes a finding on the interpretation of the statutory framework and to adjust its behaviour towards tenants as appropriate. The publication of an arbitration award or an award summary does not mean the Pubs Code Adjudicator endorses the decision and it does not form legal advice about any issue.

**In The Matter of an Arbitration
Under
The Small Business, Enterprise and Employment Act 2015
And
The Pubs Code Regulations 2016**

[REDACTED]

v

EI Group PLC

Concerning

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

First Award of

[REDACTED]

Arbitrator

14 August 2019



1. **The Dispute**

2. This dispute concerns the provision of information required to be provide by a Pub Owinging Business (POB) during a rent assessment under the Pubs Code etc Regulations 2016 (The Code) and the principle of fair and lawful dealing arising under the Small Business, Enterprise and Employment Act 2015 (the 2015 Act).

3. An application for arbitration of the dispute was made to the Pubs Code Adjudicator (PCA) and by letter dated 2 April 2019 I was appointed by the PCA as arbitrator to determine the dispute.

4. The seat of this arbitration is England and Wales.

5. The Claimant is [REDACTED]
[REDACTED] the Respondent is EI Group PLC represented by [REDACTED]
Gosschalks.

6. Following my appointment, I wrote to the parties on 3 April 2019 enclosing draft directions. Order and Directions No 1 were issued on 15 April 2019. I have received a statement of claim, a defence, a reply to the defence and a reply to the claimant's response. I requested further information by email from both parties on 19 June 2019 and have received replies from both parties.

7. The premises are let under a lease dated 7 April 2003 between Unique Pub Properties Ltd as Landlord and [REDACTED] as Tenant. The term is 30 years from and including 7 April 2003 at an initial rent of Nil from 7 April to 7 June 2003 rising to £20,500pa until 6 September 2003 and thereafter £41,000 per year. The lease also contains details of the commercial information relevant to the tie.

8. The lease provides for a rent reviews on the first day of the 6th, 11th, 16th, 21st and 26th years and the penultimate day of the term. There is in addition an annual inflation review related to changes in the All-Items Retail Prices Index.



9. **Background to the dispute**

10. A rent review was initiated to take effect from 7th April 2018. The review was not agreed, and a Deed of Variation to the Lease was entered into permitting referral of the review to an Independent Expert appointed under the Pubs Independent Rent Review Scheme (PIRRS). [REDACTED] was appointed as the Independent Valuer and he issued a determination to the parties on 4 March 2019. The review therefore is no longer live.

11. The application form to the Pubs Code Adjudicator states that the Claimant alleges that the Pub Owning Business (POB) failed to provide a copy of their previous rent assessment at the 2013 rent review. This was required to support a PIRRS rent review. The tenant also requested details of various comparable rates of other EI Group Plc properties within the vicinity in the format required by the RICS for third party determinations. The Claimant alleges no reasons were provided why this information had been omitted save that the tenant should already have this document.

12. **Statement of Claim**

13. The Claimant alleges that during the rent assessment the POB was asked to supply copies of other information including comparable pubs data to support the POB assumptions in the forecasts. The POB said they would supply the other information only if a non-disclosure agreement (NDA) was signed by the Tied Pub Tenant (TPT). The terms of the NDA would clearly prevent the TPT or its advisors from making enquiries or checking if the other information the POB supplied to them was accurate or honest.

14. On behalf of the Claimant it is said the TPT's reasonable request for other information is consistent with page 5 of Fact Sheet 3 published by the PCA as this is "other information which would help a TPT negotiate in an informed manner". There is no pre-condition applied to the supply of this information. Regulation 16.1(d) and



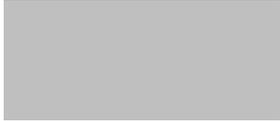
Regulation 20.1(c) both deal with the supply of “other information”. Neither refers to an NDA. Schedule 2 to the regulations also covers the supply of “other information”.

15. The TPT believes that the use of the General Data Protection Regulation (GDPR) by the POB as a reason to insist on an NDA is bogus. The Claimant seeks a declaration that: -
 - (i) GDPR does not apply to the provision of “other information” referred to in the Regulations so that the actions of the POB are non-compliant;
 - (ii) That the actions of the POB are non-compliant;
 - (iii) Order the POB to supply RICS compliant comparable information as requested;
 - (iv) The POB to pay the costs of the arbitration.
16. In its response to the Defence, the Claimant notes that there is no power for an independent expert to order disclosure in a PIRRS reference and that the expert has no power to waive requirements of the code.
17. The argument of the Respondent that GDPR trumps the Pubs Code gives rise to an inconsistency under which tenants can never be supplied with sufficient knowledge to make an informed decision. It is simply a contrived and convenient cover for continuation of information asymmetry. A tenant negotiating the rent without considering evidence available to them would not be said to be acting prudently. RICS GN 67:2010 states that the first stage of rental valuation should be to use comparable information before moving onto the profits method.
18. Tenant’s names were not requested and the Claimant would have been happy to receive the suggested POB FMT used at the last rent assessment of comparable sites. What was sought was information on any landlord investment including discounts inducements or concessions as per RICS guidance UKGN 6 which does not identify a tenant.
19. The Respondent is interpreting the legislation to its own advantage and is adopting a policy of not providing ALL relevant information except on their terms. There is no



evidence that signing an NDA would make the situation compliant with GDPR or that the information supplied would be accurate.

20. Expert Witnesses have a duty to disclose information of which they are aware which may be relevant even if it does not support their client's case. It is submitted that this requirement overrides any obligation that a confidentiality agreement may confer.
21. The code places new obligations on the POB and this means industry practices may have to change
22. **Statement of Defence**
23. The Defendant maintains its position is reasonable. Fact Sheet number 3 does not have any statutory status and is merely information given by the Pubs Code Adjudicator.
24. Regulation 16 of the Code applies to rent proposals rather than rent assessments. In any event the information to be given is that which the POB would reasonably be expected to give to the TPT and which is reasonably available. Comparable information is not reasonably available without an NDA and it is subject to confidentiality obligations.
25. Regulation 20 in Schedule 2 relates to information included in or enclosed with a rent assessment proposal (RAP). Comparable data would not use the information supplied with such a RAP because it would not constitute justification or supporting evidence or assumptions in the RAP. It would not necessarily be required information to enable the tenant to negotiate. The Claimant's requests have never directly referred to any figure or assumption in the RAP and it is denied there has been a breach of Regulation 20 or Schedule.
26. In the referral the Claimant relied on a breach of Regulation 21(3) of the Code which deals with reasonable requests for further information following service of RAP which is relevant for negotiations for new rent and which is reasonably available. The



Statement of Claim does not refer to Regulation 21(3) so the Claimant appears to have abandoned this argument.

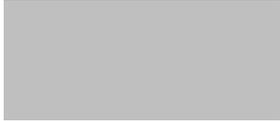
27. Without prejudice to the Respondent's case that the Claimant's Statement of Claim does not plead the correct regulations or raise a prima facie case, the Respondent addresses the reasonableness of its policy.
28. GDPR was introduced from 25th May 2018. The Respondent took advice from its Solicitors as to how this affects the sharing of comparable information.
29. Under GDPR the definition of personal data now includes "*any information relating to an identified or identifiable natural person (data subject) an identifiable natural person is one who can be identified directly or indirectly in particular by reference to an identifier such as a name and identification number, location data, an online identifier or to one or more practice specific to the physical, psychological, genetic, mental, economic cultural or social identity of that natural person*".
30. The Respondent accepts that most of the information provided in comparables is not likely to be classified as personal data but there are concerns regarding the tenant's name and the name of the tenant's agent, the turnover and other financial information relating to a public house may be treated as information relating to an identified or identifiable natural person and refer to their economic identity and finally information regarding the tenant investment or improvement works could relate to the tenant's economic identity.
31. Even if data is public elsewhere it does not stop it being personal data or relax the GDPR requirements as to the handling of that data. Given the wide definition of personal data and the ambiguity of the definition, the Respondent's policy is to treat comparable data as if it were personal data.
32. In addition to GDPR, the Respondent is under a general obligation of confidentiality to their tenants in relation to the data they hold on their behalf. This applies to the Claimant's business data as it does to all the Respondent's other tenants.

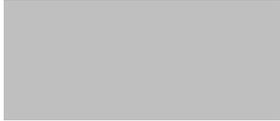
- 
33. The Respondent identifies three possible grounds for allowing processing of personal data: -
- (a) Consent.
 - (b) The processing is necessary for the poor performance of the contract.
 - (c) Processing is necessary for the purpose of legitimate interest pursued by the controller or by a third party except where such interests are overridden by the interest or fundamental rights of freedom of the data subject which require protection of personal data.
34. The Respondent considers the third ground justifies the sharing of comparable data and that it was still obliged to carry out a legitimate interest justification which includes assessing whether the processing is necessary and whether there is no less intrusive way to produce the same result. The Respondent carried out a balancing test and came to the conclusion the individual's interest did not override those legitimate interests.
35. The Respondent considers it is obliged to consider safeguards to reduce the impact of the data processing where possible. The Respondent therefore adopted a policy that they would only disclose information once they had received an NDA. This would have safeguards to ensure the data was not further processed or shared. An NDA is therefore a key part of the GDPR policy process. Without the Claimant providing a signed NDA, the data is not reasonably available to be disclosed by the Respondent. The Respondent takes its obligations seriously and is cognisant of the level of fines which can be imposed for a breach of GDPR.
36. The Respondent is well aware of the tensions between confidentiality and the need for sharing information in rent reviews. I am referred to various passages relating to confidentiality. A PIRRS procedure paper states on page 8 *"it is often not possible to obtain full details of comparable transactions due to confidentiality agreements and data protection issues or a failure of the parties to agree analyses of the transaction"*.
37. The handbook of rent review at paragraph 13.1.1 states *"because a primary method of valuing property is by deduction from values of other comparable property, it follows*



that an agreement or determination of rent on review for property A or information disclosed in arriving at the determination of that rent may be relevant to the determination of a rent review for property B. The rent review in relation to property A may have involved one or both parties of the rent review of property B but is far more likely to have involved parties who have no connection with property B". This raises the question of how confidentiality can be preserved in respect of that information relating to property B which may be commercially sensitive for the tenant or more likely for the landlord of property B.

38. The connection between one rent review and another, the duties respectively owed by the professionals involved in rent reviews and other property transactions to different clients, and the fact that arbitration is a private proceeding can give rise to troublesome conflicts. There is less judicial authority than one might expect on such conflicts but over the past few years decisions on individual problems have slowly accumulated.
39. The UK pub industry framework code which was a predecessor to the pubs code states "*in particular, information which may be used in third party determination of rent should not be unreasonably withheld and should be shared on request subject to appropriate confidentiality agreements*".
40. The RICS paper on Comparable Evidence of Property Valuation First Edition states at page 6 "*questions of commercial confidentiality or statutory data protection may arise when seeking such data. This may mean that sources and figures cannot be expressly confirmed, but would not invalidate the use of such data and arriving at an opinion of value providing that appropriate caution is exercised*".
41. The guide on capital and rental valuation of public houses, bars and restaurants produced by the RICS states on page 9 "*it is often not possible to obtain full details of transactions due to confidentiality agreements or failure of parties to agree analysis*". And at page 14 "*11.1 certain information in respect of trade related property may be confidential. The valuer should strongly endeavour to preserve such confidentiality whether in respect of the property to be valued or comparable properties*"

- 
42. The Respondent therefore maintains its policy is reasonable and in line with industry practice.
 43. The Claimant had the option of approaching the comparable properties directly before signing an NDA and were invited to do so.
 44. If the Claimant had concerns as the viability of comparable data, they could have made those submissions to the Independent Expert and ask him to attach less weight to those comparables.
 45. The Respondent argues this reference is vexatious as the rent review was referred to PIRRS which is a shorter and quicker procedure. The Claimant could have gone down a more formal arbitration route and sort disclosure if the issue was of substance.
 46. The determination of the Independent Expert was made on 4th March 2019 and has not been appealed. Any dissemination of the present referral is hypothetical and will have no real significance to this particular tenant. The numerous references and the literature above make clear that GDPR and confidentiality are clearly a substantial issue and not bogus.
 47. The Claimant fails to make any argument that GDPR does not apply to the data of other publicans. The Claimant does not set out why they believe the information could not be personal data.
 48. It would be pointless to order the Respondent to provide comparable information when the rent review was concluded in March 2019. I am referred to Russell on Arbitration at paragraph 6-110 where the authors confirm that an Arbitrator ought to take a similar approach to a Court in deciding whether to make declarations and should avoid making declarations on hypothetical or academic issues.
 49. This is a vexatious referral and the Respondent wishes to have the opportunity to make further submissions on costs following the Award.

- 
50. In its reply to the claimant's response the Respondent notes that the Claimant appears to accept there is an issue with confidentiality and providing comparable information. The Respondent does not believe the claimant has set out a coherent argument that the principles of GDPR and commercial confidentiality are overridden by the obligations of the code.
51. In these proceedings the Claimant has not sought disclosure of any previous rent assessment which in any event is the opinion of the landlord of the rent at that time and not evidence for the purposes of an arbitration of a subsequent rent review.
52. The Respondent's case is that the pubs Code and GDPR have to work together and documents are only reasonably available for disclosure if the requirements of GDPR can be satisfied. It is denied tenants cannot obtain sufficient knowledge to make an informed decision. They are able to speak to tenants of comparable properties before signing the NDA.
53. Giving details of comparables without details of the tenant personally is dangerous as, when seeking confirmation, the claimant is likely to speak to an employee rather than the tenant personally.
54. The Claimant appears to admit that concern is to confidentiality and GDPR are legitimate and that this is an industrywide issue.
55. The Claimant's assertion that tenants of comparable property will not talk to them because they "fear repercussions" from their POB appears to be pure speculation. The fact that tenants were unwilling to disclose confidential commercial information highlights that such information does require safeguards.
56. **Arbitrators Further Questions**
57. In an email of 24 June 2019, I asked the parties to address me on several issues. Firstly, whether the obligation within the code to provide information falls within article



6(1)(c) of GDPR (processing is necessary for compliance with the legal obligation to which the control is subject).

58. The Claimant considers that this is the case and my attention is drawn to a notice on the Respondents website. The Claimant does not believe the data requested is personal data.
59. The Respondent does not consider the provision of information is an obligation under any of regulations 16, 20 or schedule two of the code. The obligation is to provide information which is reasonably available, and it is not clear whether the requirements of the code fit within article 6(1)(c). In any event the respondent considers the processing of information as possible on the GDP are six using the legitimate interest exception.
60. I then asked the parties to consider the tenant's lawful basis of processing personal data assuming it is released by the POB.
61. The Claimant considers this is a moot question as no personal data has been requested all the data requested is of a commercial/corporate nature. The use of the information is to enable greater transparency in the commercial market where one party has a knowledge advantage over the other and that party has chosen when and what information will be released to its commercial advantage in contravention of the principle of fair and lawful dealing
62. The Respondent considers that the same justification applies to the claimant as for the respondent.
63. The next question posed asked what data which has been requested or refused without an NDA is personal data.
64. The Claimant considers that the information requested does not contain fields which are categorised as personal data. The Respondent draws my attention to paragraph 12 of its statement of defence which deals with this issue

- 
65. In response to the question by what route does an NDA made lawful processing data under GDP are when a lawful basis has not otherwise been identified, the Respondent states that whichever route is used to disclose data, the data provider is still obliged to take steps to safeguard that data. I am provided with two extracts from ICO guidance on data sharing which encourages parties to take steps to make sure the recipient of data entered into an agreement to ensure it remains confidential.
66. Finally, I asked the parties to address me on what obligations of confidentiality applied to arbitrations and expert determinations.
67. The Claimant considers that under English law there is an implied obligation on the parties and any arbitration tribunal to maintain the confidentiality of the arbitration hearing itself, the documents generated and disclose during the proceedings and the award. There are some exceptions and confidentiality can be overridden by other factors such as in the interests of justice or public interest. While it is unlikely that information provided in rent review cases will be made public, it is believed that the PCA is looking to greater transparency with regard to awards and as such this complaint may fall under the public interest scenario but with personal data redacted to comply with GDPR.
68. The Respondent stated that it clearly has obligations of confidentiality towards other tenants. My attention is drawn to a consideration of the issue in the Handbook of Rent Review at chapter 13.1

“Because a primary method of valuing property is by deduction from values of other comparable property, it follows that an agreement or determination of rent on review for property A, or information disclosed in arriving at the determination of that rent, may be relevant to the determination of a rent on review for property B. The rent review in relation to property A may have involved one or both of the parties to the rent review of property B, but is far more likely to have involved parties who have no connection with property B.”



This raises the question of how confidentiality can be preserved in respect of the information relating to property B, which may be commercially sensitive for the tenant or, more likely, for the landlord of property B.

The connection between one rent review and another, the duties respectively owed by the professionals involved in rent reviews and other property transactions to different clients, and the fact that arbitration is a private proceeding, can give rise to troublesome conflicts. There is less judicial authority than one might expect on such conflicts but, over the past few years, decisions on individual problems have slowly accumulated.

The Arbitration Act 1996 (the 1996 Act) does not deal with the question of a duty of confidentiality, for the reasons discussed in paragraph 13.1.3, below.”

69. Discussion

70. The essential problem which this case raises is one of confidentiality relating to information on comparable properties which is not in the possession of both parties. It is accepted that provision of comparable information is an important part of the operation of the market.
71. I will take first the Respondents argument that I should follow the practice of the court and avoid making declarations on hypothetical or academic issues. I have considered this argument which would carry weight in a contractual arbitration but consider it is appropriate to continue to an award as this is a statutory arbitration, in a scheme where there is publication of awards and the issue is of general importance to the industry. Furthermore, in this case there is no live data involved to confuse the issues of principle. I do however recognise that an award is not binding in any other case. This is not a review of the expert’s proceedings or decision but focusses on the actions of the parties.
72. The dispute has arisen out of the requirements of the Pubs Code for the POB to provide information under s20 and Schedule 2 of the Code and the principle of “fair



and lawful dealing” under s43(3)(a) of the 2015 Act. I set out below the relevant extracts from the 2015 Act and the Pubs Code

Small Business, Enterprise and Employment Act 2015

42. Pubs Code

(1) The Secretary of State must, before the end of the period of one year beginning with the day on which this section comes into force, make regulations about practices and procedures to be followed by pub-owning businesses in their dealings with their tied pub tenants.

(2) In this Part the regulations are referred to as “the Pubs Code”.

(3) The Secretary of State must seek to ensure that the Pubs Code is consistent with—

(a) the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;

Pubs Code etc Regulations 2016

S20 states: -

20.—(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.

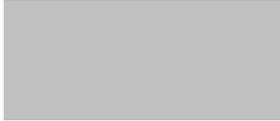
(2) The rent assessment proposal must be provided to the tied pub tenant—

- 
- (a) in the case of an assessment conducted under regulation 19(1)(a), at least 6 months before the rent review date;*
- (b) in the case of an assessment conducted under regulation 19(1)(b), within the period of 21 days beginning with the day on which the tied pub tenant requests the assessment.*
- (3) The pub-owning business must prepare the rent assessment proposal in accordance with the RICS guidance and the rent assessment proposal, when provided, must be accompanied by written confirmation from a member or fellow of the RICS that the rent assessment proposal has been so prepared (emphasis added)*

SCHEDULE 2

Information specified for the purposes of a rent proposal or a rent assessment proposal

- 1. A summary of the methods which must be used under the tenancy or licence to calculate the initial or revised rent or the new rent including—
 - (a) the information which will be used to support those calculations;*
 - (b) the justification for the use of such information.**
 - 2. An outline of the procedure to be followed during negotiations of the initial or revised rent or the new rent between the pub-owning business and the tied pub tenant.*
 - 3. A list of the matters which will be considered to be relevant and irrelevant in such negotiations.*
73. As this Award arises under a reference to arbitration and the rent under review was set by an independent expert under the PIRRS scheme I consider it appropriate to look at some of the differences between arbitration and expert determination and how evidence is obtained and treated.
74. An arbitrator decides a case on the basis of the arguments and evidence presented which must be proved in accordance with the directions. Arbitrators do not normally seek out or investigate evidence on their own account but if aware of something



relevant must disclose it to the parties and invite comment. An arbitrator has powers to order disclosure and the parties can seek witness summonses from third parties who may have relevant evidence. An arbitrator must make a reasoned award unless the parties contract out of it.

75. An expert makes a determination on the basis of his own knowledge and experience and can take into account evidence supplied by the parties but is not bound by it in the same way as an arbitrator. The expert has a duty to investigate relevant evidence and has no powers to order disclosure and witness summonses are not available to the parties. An expert does not have to provide reasons unless the contract requires it.

76. The PIRRS Scheme at section 18 states:

*The calculation in an ideal world would involve the use of comparable transactions concerning comparable properties in comparable locations at every stage **and the parties usually do their best to set relevant comparables before the Independent Expert as part of their case.** Often ideal direct comparables will not be available and the parties and in turn **the Independent Expert will need to research a wider geographical area to obtain adequate comparable evidence.** Adjustments to reflect negative trading factors, such as surplus space secondary location or an unusual style of property can be very subjective. **It is often not possible to obtain full details of comparable transactions due to confidentiality agreements, data protection issues or a failure of the parties to agree analyses of transactions.***
(Emphasis added)

77. At section 24, the PIRRS Scheme states: -

78. The statements of case and responses placed by each party before the independent expert are to be regarded as confidential between the two parties and the independent expert so as to allow each to supply potentially sensitive information without fear of it being used to their detriment...

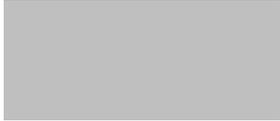
- 
79. The essential point is that the provision of comparable information and investigation of it is a fundamental part of the rent review process under whichever section it arises. The question is whether the proposed NDA put forward by the POB interferes with that process or is unfair given the express duty of the POB to act fairly. It reads: -

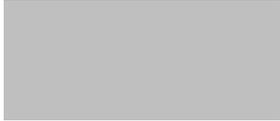
We undertake to treat all information concerning comparable properties, disclose to us by EI group plc in these rent negotiations, as being strictly private and confidential and disclosed for the purposes of this rent negotiation only.

We shall take all steps necessary to prevent this information being disclosed or made public to any third party excepting only my appointed representatives and the appointed independent expert or arbitrator.

We shall not inform or question the lessees, occupiers or managers of those comparable properties about these disclosures.

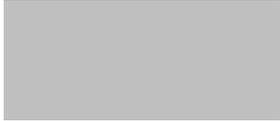
80. Against the background of the expert's duties to investigate I consider that the final paragraph of the Respondent's proposed NDA is fundamentally unfair. I recognise the contractual confidentiality clause under the PIRRS rules but this does not apply to data supplied before a reference to PIRRS. The obligation under Regulation 20(c) is to provide such other information as may be required to ensure that the tenant is able to negotiate, in an informed manner, the new rent. Under the draft NDA, information is to be given to the TPT which it cannot question or verify and which may then be placed before the independent expert who has a duty to consider it and investigate for himself. The expert is not obliged to give reasons unless the conditions set out in the agreement are satisfied. This raises the possibility that the Independent Expert may consider information based on the POB evidence which he in turn has clarified but which the TPT has no opportunity to see or comment upon. To some extent this is a risk of the expert determination process but not when it is deliberately engineered. The reference in the PIRRS scheme to confidentiality agreements is to an agreement between the parties to a transaction and not an NDA imposed in circumstances such as the present case. I therefore consider that final paragraph of the draft NDA breaches the Pub Code requirement of fair dealing.

- 
81. Turning to wider issues of confidentiality there are two categories of data: firstly, personal data which is covered by GDPR and secondly business or corporate data which is not. I accept it can be difficult to provide details of business or corporate data without including personal data such as the name and contact details of an individual who can verify it which may be personal data. In either event I accept that data is provided for the purposes of a specific rent review and should not be used more generally by either party if the data is not their own.
82. There is a body of case law on the use of tenants trading accounts in rent reviews but as this has not been argued in this case, I will not consider it further. I accept there is a legitimate interest in protecting trading data and in principle I do not consider it objectionable for an NDA to be sought, but the terms of it must be fair and compliant with the Pubs Code. There is a difference between the availability of tenants trading information in the pub sector and letting information in the wider market where there are databases available of lettings and public sources such as the rating list and land registry which make research easier.
83. Support is provided for this view by Section 11 of RICS Guidance Note GN67/2010 entitled The Capital and rental valuation of public houses, bars, restaurants and nightclubs in England and Wales which is headed Confidentiality. At 11.1 "*certain information in respect of trade related property may be confidential. The valuer should strongly endeavour to preserve such confidentiality whether in respect of the property or comparable properties*".
84. An RICS Guidance Note is advice and recommendations and not mandatory for RICS members. Regulation 21(2) says the assessment MUST be conducted in accordance with RICS Guidance. Therefore, it follows there must be some confidentiality obligations on both parties regardless of whether they are RICS members.
85. I hold that the information required by regulation 20 and schedule 2 is provided solely for the purposes of the rent assessment in question and that there are obligations of



confidentiality on both parties such that commercial information cannot be used for any other purpose or disclosed to parties outside the review in question.

86. Assuming that I am correct then an NDA is not essential but draws attention of the parties to the requirement of confidentiality and puts the issue beyond doubt subject to its terms. GDPR cannot be used as a reason not to provide data but processing by anyone involved must be in accordance with its provisions.
87. There is no authoritative decision on duties of confidentiality in expert determinations or indeed in arbitrations as set out in the passage from the Handbook of Rent Review quoted above at paragraph 68. The chapter is primarily concerned with Arbitration rather than expert determination.
88. Paragraph 9.6 of the RICS practice statement and guidance note: Surveyors acting as expert witnesses states...*"it is considered best practice for chartered surveyors and all expert witnesses to ensure that both the client and the other side see all evidence and relevant material supporting their case prior to the exchange of expert witness reports. The withholding of evidence as a tactical approach so as to deliberately mislead or ambush the other side is regarded as unprofessional...it may lead to a charge of misconduct..."*
89. Section 42(3)(a) of the Small Business, Enterprise and Employment Act 2015 imposes a principle of fair and lawful dealing by POB's in relation to their tied pub tenants. Sections 16 and 20 and schedule 2 of the Pubs Code set out the information which MUST be provided by the POB if it is reasonably available to it in support of its proposals and calculations. There is also an obligation to provide such other information as may be required to ensure the tenant is able to negotiate in an informed manner new rent. I do not consider that the proposed terms of the NDA in this case satisfy these requirements as they seek to prevent the tenant speaking to anyone involved with comparable information to verify what is stated or seek any further clarification which may be relevant to the weight placed on such information. An NDA is not required in order to make information "reasonably available".

- 
90. To the extent that any information supplied contains personal data within the scope of GDPR, a lawful basis for processing such data must be identified and the requirements of GDPR followed. I do not consider the Code requirements override those of GDPR.
91. A refusal to provide full data at negotiating stage is likely to force tenants down the arbitration route where disclosure and witness summonses are available at increased costs as opposed to using expert determination under PIRRS or otherwise.
92. Comparable data is needed for the proper operation of the market but only for these purposes. The POB is obliged to provide data for rent assessment or rent proposal purposes but not for any other.
93. The industry needs to resolve how to deal with potentially confidential information if it wants to use expert determination rather than arbitration for all cases. It works for both parties if valuations are to be made on an informed basis. The expert will otherwise rely on his/her own knowledge and experience and such information as he/she has or can verify. The PIRRS Scheme could be amended to strengthen the obligations relating to confidential data but this would not assist with data required to be provided before a reference occurs.
94. It would be helpful if any revision of the Code dealt with confidentiality explicitly.
95. **Award**
96. I hereby award and determine that:
- (1) Compliance by both parties with the provisions of GDPR where data which is to be supplied under ss16 and 20 and Schedule 2 of the Pubs Code falls within its scope is not incompatible with, or overridden by, the Pubs Code;
 - (2) An NDA is not required to make information “reasonably available” to a POB for disclosure to the TPT under ss16 and 20 of the Code.

- 
- (3) There is a duty of confidentiality on both parties and their advisers to use comparable data or trading data relating to the subject property only for the purpose of the rent proposal or rent assessment in question and the provision of NDA's applicable to either party to protect any of that data is not incompatible with that duty;
 - (4) The terms of any NDA must be fair and consistent with the duties and obligations of both parties under the Pubs Code and must not interfere with any dispute resolution process or obstruct or prevent the proper investigation, consideration and presentation of evidence;
 - (5) The actions of the POB are non-compliant in this case in that the third paragraph of the draft NDA is unfair as it does not allow the TPT to investigate evidence presented by the POB for use in the negotiation process in an informed manner or subsequently in any dispute resolution process;
 - (6) There is no purpose in ordering the POB to supply RICS compliant comparable information in this case as the review has been concluded;
 - (7) Costs are reserved to a further award

97. This award is final as to all matters to which it refers other than the issue of costs. I reserve my award as to the applicable costs of this reference to date including liability for my fees and expenses as between the parties and the fees of the Pubs Code Adjudicator. In all other respects this is my final award.



14 August 2019