

IN THE MATTER OF Ref:

ARB/105152/EDENNATELTD

THE PUBS CODE ARBITRATION BETWEEN: -

EDENNATE LIMITED

Claimant

(Tied Pub Tenant)

-and-

EI GROUP PLC

First Respondent

(Pub-owning Business)

UNIQUE PUB PROPERTIES (ALPHA) LIMITED

Second Respondent

Final Award except in relation to costs

The request for a rent assessment made by the Claimant on 4th June 2018 is effective and the Respondents are ordered to provide a compliant rent assessment proposal to the Claimant within 28 days of the date of this award.

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Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.
2. The Arbitrator is Mr Paul Newby, Pubs Code Adjudicator, Lower Ground, Victoria Square House, Victoria Square, Birmingham, B2 4AJ. Mr Newby was appointed pursuant to section 48(5) of the Small Business, Enterprise and Employment Act 2015.
3. The Claimant and tied pub tenant ("TPT") is Edennate Limited of The Pheasant, 355 Reading Road, Winnersh, Wokingham, Berkshire RG41 5LR. ("the Pub"). The Claimant is represented by Mr Michael Erridge of MDE Pub Consultants of Suite 105, 39b Howardsgate, Welwyn Garden City, Hertfordshire AL8 6AP.
4. The First Respondent and pub-owning business ("POB") is Ei Group Plc of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. The Second Respondent is Unique Pub Properties (Alpha) Limited also of 3 Monkspath Hall Road, Solihull, West Midlands, B09 4SJ. The First and Second Respondents are represented in this matter by Mr Robert Hastie of Gosschalks Solicitors of Queens Gardens, Hull, HU1 3DZ, and are hereafter referred to as the Respondents.
5. As was set out in correspondence to the parties from the PCA's Office dated 1 August 2018, as the Second Respondent is a group undertaking of the First Respondent, the effect of section 69(1) and (2) of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act) is that although the Second Respondent is the immediate landlord, the Pub is to be treated as a tied pub of which the First Respondent is the landlord for the purposes of calculating the number of tied pubs of the First Respondent.
6. The First Respondent is therefore the POB for these purposes and the award is addressed to the First Respondent.

7. As it is assumed that the Second Respondent, being the landlord of the Pub, would be able to assist with the resolution of the dispute I was content for the parties to agree for the Second Respondent to be joined as a party. However, it was considered necessary for the Second Respondent to enter into a formal agreement with the parties that it would comply with all case management directions set down in the matter and that it would honour any award made. The Second Respondent confirmed that they would comply in correspondence dated 1st August 2018.
8. I am disappointed to have to be determining the issue between the parties as to when a valid rent assessment proposal can be made, bearing in mind that the earliest date a valid rent assessment proposal could have been made was 29th May 2018 and the latest date that a valid rent assessment proposal could be made is 24th March 2019. The difference between the parties on timing therefore now amounts to just 3 months and it appears to my mind that the Respondents here are pursuing a point of principle at the expense of the Claimant.
9. The Respondents have raised a number of technical points which can only have the effect of seeking to avoid issuing the rent assessment proposal some time sooner than their contended date of 24th March 2019, being 5 years from the execution of the lease. I would have expected a more pragmatic approach from the Respondents in the light of the ongoing business relationship between the parties. I would hope the Respondents will do all it can to avoid such issues coming for arbitration in future.

Procedure

10. 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:

- 10.1 Part 4 of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act);

- 10.2 The Pubs Code etc. Regulations 2016 (the Pubs Code); and
 - 10.3 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 (“the CI Arb Rules”). Where a conflict arises between the Pubs Code statutory framework (being the 2015 Act, the Pubs Code and/or the Fees Regulations) and the CI Arb Rules or the 1996 Act, 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:
- 12.1. The Statement of Claim was served on 19th October 2018 on behalf of the Claimant in the form of a Scott Schedule.
 - 12.2. The Statement of Defence was served on 26th October 2018 on behalf of the Respondents.
 - 12.3. The Claimant and the Respondents made submissions on 27th and 23rd November 2018 respectively pursuant to an order of further directions made on the 20th November 2018.

Summary of Facts

13. Both parties acknowledge that the Second Respondent granted the Claimant a lease for a term of 10 years commencing on 29th May 2013 (“the Lease”). The Lease was executed on the 24th March 2014.
14. On 4th June 2018 the Claimant sent a letter requesting a rent assessment proposal in reliance on regulation 19(2)(a) of the Pubs Code. On 7th June 2018 the Respondents replied rejecting the request for a rent assessment proposal. The Respondents stated that it considered it was not obliged to provide a rent assessment under the Pubs Code.

15. On 20th June 2018 the Claimant sent a notification under section 49(2) of the 2015 Act to the Respondents alleging non-compliance with the Pubs Code. On 20th July 2018 the Claimant referred the matter to the Pubs Code Adjudicator (PCA). The referral was accepted for arbitration on 23rd July 2018.

Applicable Law

16. This referral to the arbitrator was accepted under section 48 of the 2015 Act.
17. This referral concerns regulations 19 and 66 of the Pubs Code. Regulation 19 of the Pubs Code states (as far as is relevant to this arbitration) –

Duty to conduct a rent assessment or an assessment of money payable in lieu of rent

Reg - 19(1) A pub-owning business—

- (a) must conduct a rent assessment or an assessment of money payable in lieu of rent in connection with a rent review which is required under the terms of a tenancy or licence of a tied pub of which it is the landlord; and*
- (b) must conduct a rent assessment or an assessment of money payable in lieu of rent where a tied pub tenant of such a pub requests it under paragraph (2).*

(2) A tied pub tenant may request a rent assessment or an assessment of money payable in lieu of rent if —

- (a) such an assessment has not ended within the period of 5 years ending with the date of the request.*

...

(3) A request under paragraph (2) must be made in writing

...

- (4) The following are not rent reviews for the purposes of paragraph (1)(a)—*
- (a) an annual or other periodic indexation of rent;*
- (b) a change in rent in connection with the receipt of a corresponding benefit from the pub owning business:*

(c) a change in rent in connection with the freeing of the tied pub tenant from a product or service tie:

(d) any discussions in respect of changes in rent which are carried out within a review of the business provided for under the terms of the tenancy or licence.

18. Regulation 66 of the Pubs Code states (as far as is relevant) -

Rent assessments

66.—(1) The reference in regulation 19(1)(a) to a rent review which is required under the terms of a tenancy or licence does not include—

(a) a rent review where the rent review date falls before the commencement date; or

(b) a rent review which is concluded before the commencement date.

(2) A tied pub tenant may request, on or before the 5-year anniversary date, a rent assessment or an assessment of money payable in lieu of rent under regulation 19(2)(a) if, and only if—

(a) no rent assessment or assessment of money payable in lieu of rent has been concluded before the date of the request; and

(b) no rent review has been concluded within the period of 5 years ending with the date of the request.

...

(8) For the purposes of this regulation—

(a) a rent review is concluded when the rent, or money payable in lieu of rent, is agreed in writing between the pub-owning business and the tied pub tenant;

(b) a rent assessment is concluded when it ends ...

(9) In this regulation, the “5-year anniversary date” means the date which is 5 years after the commencement date.

Issues

19. Regulation 19(1) of the Pubs Code provides that a POB must conduct a rent assessment either when a rent review is due under the terms of the tenancy (regulation 19(1)(a)), or when requested by a tied pub tenant (TPT) where one of the circumstances set out in regulation 19(2) applies (regulation 19(1)(b)). For the purposes of this referral, the relevant circumstance in regulation 19(2) is that

“such an assessment has not ended within the period of 5 years ending with the date of the request” (regulation 19(2)(a)). Regulation 66(2) makes it clear that a TPT may request a rent assessment under regulation 19(2)(a), *“if, and only if, no rent assessment has been concluded before the date of the request and no rent review has been concluded within the period of five years ending with the date of the request.”* Regulation 66(8) provides that *“a rent review is concluded when the rent, or money payable in lieu of rent is agreed in writing [between the POB and TPT]”,* and *“a rent assessment is concluded when it ends (under regulation 22).”*

20. The issues before me are:

20.1 Whether the Claimant has had a rent assessment concluded under regulation 66(2)(a) in the five years ending with the date of the request; and

20.2 Whether the Claimant has had a rent review concluded under regulation 66(2)(b) within the period of five years ending with the date of the request.

21. The Claimant’s submissions are:

21.1 The term under the Lease commenced on the 29th May 2013 and the Tenant also went into occupation on 29th May 2013; and

21.2 The Rent fell due under the Lease from 29th May 2013 and was paid as of that date;

21.3 The Claimant submits that the agreement of the rent (with effect from 29th May 2013) in relation to the Lease constituted a “rent assessment” and was therefore more than 5 years ago.

21.4 That the extract from Woodfall: Landlord and Tenant, Volume 1, Part 1. Chapter 5 Section 7, paragraph 5.069 (provided by the Respondents) is clear as to the commencement of the term of the Lease by the words *“But the duration of the term is to be computed from the date mentioned in the lease for that purpose”*, and further that in particular the second paragraph of the extract from Woodfall: Landlord and Tenant, Volume 1,

Part 1. Chapter 5 Section 7, paragraph 5.069 provides that *“Thus where the lease provides for rent review, the period until the first review will normally be calculated from the date on which the lease is expressed to begin, and not from the date on which the instrument itself was executed.”*

22. The Respondents' submissions are:

22.1 The Respondents contend that it is more technically correct to describe the agreement of the initial rent in relation to the Lease as being a rent review as opposed to a rent assessment.

22.2 That in accordance with regulation 66(8)(a) a rent review is concluded *“when the rent, or money payable in lieu of rent, is agreed in writing between the pub-owning business and the tied pub tenant”*.

22.3 The Respondents go on to contend therefore that the date of execution of the Lease, being the 24th March 2014 is the date on which the rent is agreed in writing and therefore only satisfies regulation 66(8)(a) from this date. The Respondents submit that as this date falls within the period of five years prior to the Claimants' request on 4th June 2018, the Claimant is not entitled to a rent assessment arising from that request.

22.4 The Respondents also seek to rely on Woodfall: Landlord and Tenant, Volume 1, Part 1. Chapter 5 Section 7, paragraph 5.069 which states that *“a lease operates as a grant only from the time of its execution....”* And *“where the length of the lease is of relevance for the purpose of a statute, its length will normally be reckoned from the date of its execution”* And *“the term created will be a term which commences on the date when the lease is executed, and not the earlier date”*

23. The purpose of regulation 66 when read with regulation 19 is to ensure that where there has been neither a rent assessment nor a rent review concluded in the previous five years from the date of the request, a TPT is entitled to one.

Findings

24. On the facts presented in this referral, and on the basis of the evidence submitted and with reference to Woodfall: Landlord and Tenant, Volume 1, Part 1, Chapter 5, Section 7, paragraph 5.069 and the case of *Trane UK v Provident Mutual Life Assurance* [1995] 1E.G.L.R. 33 I find that in this case the effective date of a rent assessment or rent review is 29th May 2013. i.e. the term/rent review period commencement date. This is the date from which both the term of the Lease commenced, and the rent was due and was paid.
25. From this it follows that there has been no rent assessment within the period of 5 years ending on 4 June 2018, this being the date of the Claimant's request for a rent assessment proposal.
26. As to whether there has been a rent review concluded within the period of 5 years, I am not convinced that agreement to an initial rent is a rent review within the meaning of the Pubs Code, as a rent review is ordinarily understood to occur within the term of the lease and not at the beginning of the lease.
27. In any event, having regard to the case of *Trane UK v Provident Mutual Life Assurance* [1995] 1E.G L.R. 33 I find that it is the time since the rent was last fixed and not the length of the lease and/or the date of execution that is the relevant point. Therefore, on this basis I find there can have been no rent review within the period of 5 years ending with the date of the request, and as a result it is not necessary for me to consider whether or not the agreement of the initial rent, effective from 29th May 2013 is to be regarded as rent review for these purposes.
28. I consider that these findings are consistent with, rather than to be distinguished from, the commentary in Woodfall: Landlord and Tenant, Volume 1, Part 1. Chapter 5 Section 7, paragraph 5.069 based on the findings in the case of *Trane (UK) v Provident Mutual Life Assurance* [1995] 1 E.G.L.R. 33, and in particular with the wording "*Thus where the lease provides for rent review, the period until the first review will normally be calculated from the*

date on which the lease is expressed to begin, and not from the date on which the instrument itself was executed”.

29. As there has been neither a rent review nor a rent assessment within the 5 year period ending on 4 June 2018, the Claimant was entitled to request a rent assessment pursuant to regulation 19(2)(a) of the Pubs Code. The Claimant therefore succeeds with its claim that the rent assessment proposal request is valid.
30. No remedy is sought by the Claimant and the Claimant’s referral form and Scott Schedule does not refer to a remedy. In the circumstances I find that the appropriate remedy is for the Respondents to provide the Claimant with a compliant rent assessment proposal.

Costs

31. Issues as to costs of the arbitration are reserved pending the parties’ opportunity to make submissions as to costs.

Operative Provisions (Decision)

32. In light of the above I make the following award:
- 32.1 The request for a rent assessment made by the Claimant on 4th June 2018 is valid;
- 32.2 The Respondents are ordered to provide a compliant rent assessment proposal to the Claimant within 28 days of the date of this award;
- 32.3 Costs are reserved.

Arbitrator’s Signature



Date Award made 21 December 2018

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