

IN THE MATTER OF

ARB/PB/17/SHROPSHIRE ARMS

THE PUBS CODE ARBITRATION BETWEEN:

**MR THOMAS EDWARD JOHN HUGHES**

(Tied Pub Tenant)

Claimant

-and-

**EI GROUP PLC**

(Pub-owning Business)

Respondent

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**AWARD ON PRELIMINARY ISSUE**

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**SUMMARY:** I find in favour of the Claimant on the Preliminary Issue. The November 2014 rent review concluded on 8 October 2015, prior to the commencement of the relevant provisions of the 2015 Act and of the Pubs Code, does not constitute an assessment of the kind referred to in Section 43(6)(b) of the 2015 Act.

## **Introduction**

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.
2. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator am the arbitrator. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 (“the Pubs Code”) and paragraph 5 of Schedule 1 Part 1 of the Small Business, Enterprise and Employment Act 2015 (“the 2015 Act”).
3. The Claimant and tied pub tenant is Mr Thomas Edward John Hughes of The Shropshire Arms, 45 Northgate St, Chester, CH1 2HQ (“the Pub”). The Claimant is represented by Joliffe & Co Solicitors, 6 St. John Street, Chester, CH1 1DA.
4. The Respondent and pub-owning business is Ei Group Plc of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. The Respondent is represented by Gosschalk’s Solicitors, Queens Gardens, Hull, HU1 3DZ.

## **Procedure**

5. 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:
  - 5.1 Part 4 of the 2015 Act;
  - 5.2 The Pubs Code; and
  - 5.3 The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 (the Fees Regulations).
6. The applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules. Where a conflict arises between these rules, the 1996 Act or the Pubs Code statutory framework (being the 2015 Act, the Pubs Code and the Fees Regulations) the Pubs Code statutory framework prevails.
7. After a telephone case management hearing of this matter on 10 April 2018, I issued agreed directions for the determination as a preliminary issue the meaning of ‘reasonably foreseeable’ as set out at section 43(9)(b) of the 2015 Act, as pleaded at paragraph 23(2) of the Statement of Claim, and paragraph 27 of the Statement of Defence.
8. The hearing of the preliminary issue took place on 27 June 2018. Mr Andrew Thomas QC appeared for the Claimant and Mr Jamal Damachkie of counsel for the Respondent.

## **Background**

9. The preliminary issue concerns whether or not a trigger event has occurred for the purposes of Section 43(2) of the 2015 Act.
10. The related issue of law which falls to be determined is whether a November 2014 rent review concluded on 8 October 2015, prior to the commencement of the relevant provisions of the 2015 Act and of the Pubs Code, constitutes an assessment of the kind referred to in Section 43(6)(b) of the 2015 Act, namely:

*“a rent assessment or assessment of money payable by the tenant in lieu of rent.”*

The Claimant’s case is that only a statutory assessment of that kind will suffice. The Respondent’s case is that it is sufficient that there is a process which is the same as or similar to an assessment in s.43(6)(b) of the 2015 Act, and that therefore a rent review under the old law suffices.

11. It was agreed that the preliminary dispute had two elements:
  - 11.1 Whether the reference in s.43(9)(b) of the 2015 Act to an event that is ‘reasonably foreseeable’ applies only to an event in connection with a significant increase in price; and
  - 11.2 Whether facts known at a rent review prior to the Pubs Code coming into force count as ‘reasonably foreseeable’ for the purposes of s.43(9)(b) of the 2015 Act.
12. The following is a relevant chronology for the purposes of this Award:

20 November 2009	Date on which the Lease took effect.
8 June 2010	Date of execution of Lease.
<i>22 April 2013</i>	<i>Publication by BIS of the original Pub Companies and Tenants consultation.</i>
19 May 2014	Proposal for new rent. Proposed increase from £29,505 pa to £47,000 pa.
<i>25 June 2014</i>	<i>First reading of the Small Business, Enterprise and Employment Bill.</i>
1 September 2014	Claimant’s response to rent proposal.
19 November 2014	Rent review date.

26 March 2015	<i>Enactment of the 2015 Act.</i>
8 October 2015	Date of agreement for new rent. Fixed at £37,000.
20 July 2016	Commencement date for Section 43 of the 2015 Act and the Pubs Code.
15 June 2017	Claimant serves MRO Notice on the Respondent.
30 June 2017	Letter from Respondent's Solicitors denying that a trigger event has occurred. Contends that the redevelopment was reasonably foreseeable as at 8th October 2015.
13 July 2017	Date of referral to the PCA.

13. The Pub is let pursuant to a lease dated the 8 of June 2010 for a term of 15 years commencing on 20 November 2009 ("the Lease"). The initial rent was £25,300 but subject to annual RPI increases.
14. The Summary and Schedule 3 of the Lease provide for Open Market Rent Reviews at five-year intervals. The first such review date was 19 November 2014.
15. The Lease pre-dates the 2015 Act and it consequently made no reference to a 'rent assessment' within the meaning of that Act. Furthermore, it made no reference to any non-statutory rent assessment, whether pursuant to a voluntary code of practice or otherwise.
16. On 19 May 2014, the Respondent wrote to the Claimant, marked "without prejudice", proposing an increase in rent from £29,505.61 to £47,000 per annum (an increase of 59.3% on top of the RPI increases already applied). This was accompanied by a proposed reduction in volume targets from 350 to 332 per annum (a decrease of 5.1%).
17. Negotiations over the new rent extended beyond the rent review date. On 8 October 2015 the new rent was agreed at £37,000 (an increase of 25.4%).
18. The Claimant's case is that since the date of agreement for the new rent the business has been affected by a sudden adverse change in trading conditions, namely the relocation of the adjacent Chester Bus Interchange and the commencement of the Northgate Development. For the avoidance of doubt, the Claimant's position was that these are, in reality, a single event, and for convenience I refer to these matters simply as 'the Redevelopment'. It is the Claimant's case that the Redevelopment constitutes a 'trigger event' for the purposes of Section 43(9) of the 2015 Act which entitles the Claimant to serve an MRO notice.

## **Applicable Law**

19. Section 43(1) of the 2015 Act provides that the Pubs Code must require pub-owning businesses to offer their tied pub tenants a market rent only option in specified circumstances and subsection (3) requires that that must include provision requiring a pub-owning business to offer a tied pub tenant a market rent only option:

- (a) *in connection with the renewal of any of the pub arrangements;*
- (b) *in connection with a rent assessment or assessment of money payable by the tenant in lieu of rent;*
- (c) *in connection with a significant increase in the price at which any product or serve which is subject to a product or service tie is supplied to the tied pub tenant where the increase was not reasonably foreseeable-*
  - (i) *when the tenancy or licence was granted, or*
  - (ii) *if there has been an assessment of a kind mentioned in paragraph (b), when the last assessment was concluded;*
- (d) *after a trigger event has occurred.*

20. Section 43(9) of the 2015 Act provides –

*(9) In this Part a “trigger event”, in relation to a tied pub tenant, means an event which—*

- (a) is beyond the control of the tied pub tenant,*
- (b) was not reasonably foreseeable as mentioned in subsection (6)(c),*
- (c) has a significant impact on the level of trade that could reasonably be expected to be achieved at the tied pub, and*
- (d) is of a description specified in the Pubs Code.*

## **Discussion**

21. Firstly, I reject the Claimant’s contention that references to reasonably foreseeable as mentioned in section 43(6)(c) in the 2015 Act must only relate to events which relate to a significant increase in price, as I find that this argument has no merit. On a plain reading of the 2015 Act, the reference to ‘reasonably foreseeable’ events in section 43(9)(b) is not limited to events referenced in section 43(6)(c). The words ‘*as mentioned in subsection (6)(c)*’ evidently relate to the wording within section 43(6)(c) which comes after the words ‘reasonably foreseeable’ and which define the dates on which the ‘reasonable foreseeability’ is assessed.

22. I do however accept the Claimant's case that section 43(9)(b) of the 2015 Act applies only to a rent assessment which has been carried out pursuant to the provisions of that Act. It cannot be taken to refer to a non-statutory rent assessment carried out under previous voluntary codes or otherwise. There was no legal definition for what constituted a rent assessment prior to the commencement of the 2015 Act.
23. The Respondent characterises the Claimant's submission on this point as a "narrow" interpretation of section 43(6)(b) of the 2015 Act. However, the Claimant submits that the paragraph is written in plain English and means what it says, namely that it applies to an assessment which qualifies within section 43(6)(b) (i.e. a statutory rent assessment compliant pursuant to the Pubs Code).
24. The Respondent's case depends upon reading the words '*assessment of the kind mentioned*' as meaning an assessment **similar** to the categories referred to in section 43(6)(b) of the 2015 Act.
25. I consider that the Respondent is misreading the plain language of the statute, and that the word 'kind' is used here as a noun in the simple sense described by the Oxford English dictionary as meaning a 'class, sort, or type of people or things'.
26. The Respondent argues that the statute does not limit the application of section 43(6)(c) of the 2015 Act to exclude the kinds of rent assessment which pre-date its commencement, and that if Parliament had intended that to be the case, with the interpretation favoured by the Claimant, it would have just needed to repeat the wording of section 43(6)(b), instead of adding the words '*of a kind*'.
27. I cannot except the Respondent's submission. The meaning of the statutory provision is quite clear; the wording of section 43(6)(c) of the 2015 Act relates to the closed list mentioned in section 43(6)(b).
28. I do not consider that the point needs greater elaboration or justification. However, if it does, then I agree with the Claimant that the phrase, '*of a kind mentioned in...*' is a draftsman's tool used in other legislation as well. Mr Thomas QC for the Claimant referred me to a number of examples of the same or similar expression being used within statutes, and in all such instances it was consistently used by the draftsman by default to describe a defined and/or closed class of cases.

29. Prior to the enactment of the 2015 Act, there was no specific statutory scheme controlling the determination of rents for pubs; the concept of a rent assessment was not known to the law. It is acknowledged that there were voluntary codes of practice within the industry, culminating in the UK Pub Industry Framework Code which made provision for '*rent assessments*'. There was also reference within RICS guidance. However, none of this had any specific legal definition or statutory force.
30. The 2015 Act and the Pubs Code are a wholly new framework making provision for, amongst other things, the determination of rent in respect of the tenants of pub-owning businesses. It adopted (in broad terms) the concept of a rent assessment, but for the first time gave it a legal definition.
31. It cannot be that the legislature intended that the application of Section 43(9)(b) would be determined by a pre-commencement rent assessment. There was no legal definition of what did or not qualify as a rent assessment for those purposes. There was no legal test for whether or not any such assessment was compliant.
32. The Respondent's case is therefore inimical to the principle of legal certainty and would require me to decide how like or unlike a Pubs Code 'rent assessment' any particular contractual rent review that had been carried out in fact was.
33. The transitional provisions in Regulation 66 of the Pubs Code make it clear that the legislation did not apply to rent reviews or assessments which predated the Pubs Code's commencement.
34. I do not consider it is necessary to consider whether legislative preparatory materials are admissible, applying the principles of *Pepper v Hart* [1992] UKHL 3. I find that the legislation of the statute is plain and is not ambiguous.
35. The Respondent argued that the Claimant's interpretation would strike a curious distinction between the grant of the lease/licence and the undertaking of a rent review/assessment, asserting that under the Claimant's construction it would be permissible to exclude events which were reasonably foreseeable at the time of the grant of a lease, but not exclude events which were reasonably foreseeable before the date on which a rent review was carried out. For example, under a new lease granted in October 2015, before the Pubs Code came in to force, there would be no obligation on the pub owning business to provide information as to foreseeable material changes on the grant of the lease.

36. I see nothing curious in this distinction. There is nothing striking in Parliament having treated these two events differently. The bargaining position of a tenant entering into a new lease, as Mr Thomas QC for the Claimant observed, is different to that of a tenant on a rent review. The law places a high level of responsibility on the purchaser to satisfy itself as to relevant factors which affect its decision to contract. As the legal maxim goes: the buyer must beware.

**Decision**

37. In view of all of the above, I find that the concept of ‘reasonable foreseeability’ of a trigger event as referred to in section 43(9)(b) of the 2015 Act (which cross refers to both section 43(6)(c) and then section 43(6)(b) of the 2015 Act) requires consideration only of whether the relevant trigger event was reasonably foreseeable at the time that the lease/licence was entered into or at the time of any Pubs Code rent assessment, and not at the time of any pre-Pubs Code contractual rent review.

38. Costs reserved.

**Directions**

Within 14 days of the date of this Award, the parties shall file:

- a) An agreed list of:
  - a. any remaining issues of law, and
  - b. any remaining facts in dispute,which are relevant to the final determination.
- b) The names of witnesses who may be required to provide.
- c) Proposals for the appointment of an external arbitrator and terms of appointment.



**Arbitrator’s Signature:** ..... ..

**Date Award made:** .....16 July 2018.....

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**Respondent's Ref: ARB/PB/17/SHROPSHIRE ARMS**