

IN THE MATTER OF

ARB/000308/ANDERSON4

THE PUBS CODE ARBITRATION BETWEEN:

**EDWARD ANDERSON**

**(Tied-Pub Tenant)**

Claimant

-and-

**MARSTON'S PLC**

**(Pub-owning Business)**

Respondent

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**FINAL AWARD**

**EXCEPT IN RELATION TO REMEDY AND COSTS**

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**Summary of Award:**

The Arbitrator finds, firstly, that the Respondent breached regulation 41(4)(b) of the Pubs Code etc. Regulations 2016 by failing to provide full notes of its meeting with the Claimant of 31 July 2017 to the Claimant within 14 days, and in fact did not provide them until 1 September 2017. Secondly, the Arbitrator does not find that the Respondent breached regulation 50 of the Pubs Code etc. Regulations 2016 in respect of its refusal to undertake external redecorations to the subject pub. In the first instance, the Arbitrator directs as an initial remedy for the breach of regulation 41(4)(b) of the Pubs Code etc. Regulations 2016 that the Respondent is required to report the fact of this breach in its next annual compliance report.



**CONTENTS**

Introduction ..... 4

Procedure ..... 4

Background ..... 5

Applicable Law..... 9

Summary of Agreed Facts and Issues in Dispute ..... 9

Regulation 41(4)(b) referral .....11

Regulation 50 referral .....11

Remedy .....14

Costs .....14

Operative Provisions (Decision) .....15

## **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 regulation 58(2) of the Pubs Code etc. Regulations 2016.
3. The Claimant is Edward Anderson, the tied-pub tenant of The Swan public house, 35-37 High Street, Cheltenham, Gloucestershire, GL50 3QL (“the Pub”), who is unrepresented in this referral.
4. The Respondent and pub owning business is Marston’s plc of Marston’s House, Brewery Road, Wolverhampton, WV1 4JT. The Respondent is represented by [REDACTED].

## **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 Small Business, Enterprise and Employment Act 2015 (the 2015 Act);
  - 5.2 The Pubs Code etc. Regulations 2016 (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 or the Fees Regulations) the Pubs Code statutory framework prevails.
7. The Parties have complied with the agreed order and directions for the management of the case. Each party has had the opportunity to submit their Statement of Case. The following is a brief chronology of the case management.
  - 7.1 The Claimant served the Statement of Claim on 24 November 2017.
  - 7.2 The Respondent served a Reply to the Statement of Claim on 29 November 2017.

- 7.3 The Claimant served a Response to Defendant's Reply on 5 December 2017.
- 7.4 The Respondent served a Reply to the Claimant's Response on 15 December 2017.
- 7.5 The parties were unable to agree a Statement of Agreed Facts and List of Issues in Dispute, and therefore each served separate versions on 25 January 2018.

## **Background**

8. The Claimant occupies the Pub under the terms of a 'Pathway' tenancy agreement from the Respondent dated 2 May 2012. Excerpts from this tenancy are shown at both Appendix 20 of the Statement of Claim and Appendix A to the Respondent's Reply to the Statement of Claim. The relevant terms of the tenancy for the purposes of this dispute is shown at clause 5 on page 27 of the tenancy headed 'Our obligations'. This clause details the obligations on the Respondent: sub-clause c thereof deals with 'repair and services', and sub-sub-clause 2 states, "*We will decorate the outside of the building or buildings (but not any outbuildings) when we think it is reasonable. We will use colours and types of finish we decide.*"
9. In addition to the Pub, the Claimant also leases a second pub from the Respondent, that being The Railway Inn, New Street, Cheltenham, Gloucestershire GL50 3QL ("The Railway"). The Claimant has sought an MRO offer from the Respondents at The Railway.
10. The Claimant sets out a relatively detailed chronology of events in his Statement of Claim and provides copies of relevant emails documenting the events as appendices to that document. From a review of these documents, the following appears to be the salient background to the dispute:
  - 10.1 In December 2016/January 2017, the Claimant discussed with the Respondent's business development manager, [REDACTED] ("the BDM") that the exterior of the Pub needed redecoration and was thus affecting trade, and that works to the bin storage area and back garden lighting were also required.
  - 10.2 In March 2017, the BDM arranged a meeting with the Claimant and one of the Respondent's surveyors to review the exterior of the Pub (Appendix 2 to the Statement of Claim). The surveyor agreed to obtain some quotes for the work; the first quote was deemed too expensive, so a second quote was arranged (Appendix 3 to the Statement of Claim).
  - 10.3 On 3 May 2017, the Claimant met with the BDM to discuss the Pub's trading which was [REDACTED]. It was agreed (amongst other measures) that the parties would, "*press on with getting*

*external redecs done via capex to improve roadside appeal*". Notes from this meeting (Appendix 15 to the Statement of Claim) were provided by the BDM later that same day, with the Claimant given 7 days to respond if he believed any of the notes were incorrect, in compliance with regulation 41(b) of the Pubs Code.

- 10.4 The Claimant continued to chase the Respondent for progress on the external redecoration scheme, and on 22 May 2017 a detailed redecoration scheme (Appendix 17 to the Statement of Claim) was forwarded to the Claimant for comment by the Respondent's surveyor (Appendix 7 to the Statement of Claim). The Claimant provided some comments on the scheme, and a revised version was provided (Appendices 8 and 9 to the Statement of Claim).
- 10.5 The scheme was approved by the Claimant, and the Respondent's surveyor confirmed that it was being referred internally for '*funding approval*' and that planning permission may also be required (Appendix 10 to the Statement of Claim).
- 10.6 The Claimant continued to chase for news through June and July 2017 (Appendices 10 and 11 to the Statement of Claim), which resulted in the BDM visiting the Claimant at the Pub on 31 July 2017.
- 10.7 The Claimant's own notes of that meeting (see the email of 7 September 2017 at Appendix 14 to the Statement of Claim, as well as paragraphs 7 and 8 of the Statement of Claim, and Appendix 12 to the Statement of Claim) are as follows:

*"EA (the Claimant) asked for an update on the proposed capex to redecorate externals at the swan.*

*█ (the BDM) explained that Marstons are considering the railway and the swan together and that the capex is currently shelved because EA is pursuing an MRO option at the railway.*

*EA's reaction was not favourable as he believed he shouldn't be punished at the swan for exploring the MRO option at the railway.*

*EA stated that he believed the pubs should be treated separately and had not considered the MRO option at this stage at the swan and wasn't sure that it was even possible as the lease is different.*

*EA asked █ to look into the lease to see if this was the case.*

*█ and EA agreed that the capex would improve the swan. █ stated he would try to get the decision reviewed and both EA and █ were keen to see if there was any way to get the capex done."*

- 10.8 The Claimant emailed the BDM about these concerns on 4 August 2017, and the BDM replied later that day to say that he had discussed this internally and that there was a *'definite softening of attitude'* (Appendix 12 to the Statement of Claim).
- 10.9 The Claimant also recalled a follow up phone call during which the BDM had confirmed, "*█ has since confirmed that MRO is an option at the swan's next rent review. █ has therefore pressed to get the rent review at the swan moving as this is the way to get the capex back on the agenda*" (email of 7 September 2017 at Appendix 14 to the Statement of Claim).
- 10.10 The Claimant continued to chase progress from the BDM and on 22 August 2017 asked if the BDM was going to provide his notes of the meeting on 31 July 2017, as these had not been received. The BDM then provided some notes on 22 August 2017, but the Claimant replied later that day stating that, "*the notes don't include any mention of the decision by Marstons not to go ahead with the decorations at the swan or the reasons for that decision. To me that was the most important part of the meeting. Could you add these topics to the notes?*" (Appendix 13 to the Statement of Claim).
- 10.11 There was no reply to this email, and the Claimant chased the BDM on 31 August 2017, a month after the meeting, chasing for both the corrected notes and news on the external decorations scheme, adding that, "*I could be forgiven for thinking this delay is designed to put pressure on me and get me out of the pub. I really do not think it is fair that funding for this has been pulled because I'm exploring the MRO option at my other site, it's really not a decent way for Marstons to do business*" (Appendix 13 to the Statement of Claim).
- 10.12 The Claimant chased the BDM again on 1 September 2017 (Appendix 13 to the Statement of Claim), and later that day a further set of notes from the meeting of 31 July 2017 were provided (Appendix 16 to the Statement of Claim) with the explanation for them not being sent earlier being that the BDM "*thought both sets of notes were on the same e mail*" (Appendix 14). These notes record that, "*[the redecoration work] is currently shelved and would be because of the risk of a successful MRO ... [the Claimant] did say that the two businesses (i.e. the Pub and The Railway) ... should not be linked ... and that [the Claimant] thinks that MRO would not be allowed [at the Pub] in any case*".
- 10.13 The Claimant replied to the BDM later that day following receipt of these notes, to say that it was his understanding that the Respondent was "*linking the two pubs and it is because I am looking at a MRO offer at the railway that they have decided not to go ahead with [the redecoration work] at [the Pub], is that right?*". The BDM replied on 7 September 2017 (due to having been on holiday) and said, "*to clarify....any decision to*

*undertake [re-decoration work at] ... [the Pub] will be based on the circumstances at [the Pub] alone and will not be based on any other premises you hold agreements on. We have deferred any potential [re-decoration works] until the forthcoming rent review at [the Pub] is completed”.*

10.14 As per paragraph 10.7 above, the Claimant then sent a further email to the BDM on 7 September 2017 providing his own notes from the meeting on 31 July 2017, but the BDM replied later that same day to confirm that he did not accept these to be an accurate record of what was discussed.

10.15 The Claimant then ultimately referred this matter to the PCA for arbitration on 29 September 2017.

11. When submitting this referral, the Claimant ticked the box on page 3 of the referral form to indicate that the issue being referred for arbitration related to the duty of the POB not to subject a TPT to any detriment on grounds that the TPT exercises, or attempts to exercise, rights under the Code. On page 4 of the form, in the box titled ‘Details of non-MRO complaint’ in Section B, the Claimant detailed the referral as follows:

*“[The Respondent is] contractually obliged to decorate the exterior of the Swan when it needs doing. In January we agreed on the need to decorate the exterior of the Swan and plans to complete the necessary exterior decoration were drawn up. The agreed plans went to the board to approve costings and then I was informed that the scheme had been cancelled because I was exploring the MRO option at my other tenanted site, the Railway.*

*The meeting to inform me of this took place on the date on the 31st of July 2017 and I wasn’t given the notes on the meeting until the 1st of September 2017.*

*I would like to refer this case under regulation 50 [of the Pubs Code] on the basis that I have suffered detriment because I have attempted to exercise my rights under the code.*

*I would also like to refer this case under [regulation] 41(4) of the [Pubs Code] on the basis that appropriate notes from the meeting were not given to me within the time period set out in the code.”*

12. In the Respondent’s Reply to the Statement of Claim document, and in relation to the alleged breach of regulation 41(4) of the Pubs Code, the Respondent accepts that the BDM did not send the notes of the meeting on 31 July 2017 to the Claimant within 14 days, and that this was a breach of regulation 41(4)(b) of the Pubs Code.

13. However, the Respondent further asserted that the notes of this meeting were sent to the Claimant on 22 August 2017, and that this error was due to a genuine mistake as “[the BDM had] *typed his meeting notes the following day and inadvertently sent the notes to himself and failed to copy the tenant into the e-mail*”. However, it is noted that the Respondent did not provide any evidence in support of this assertion, such as the inadvertent email sent by the BDM to himself, and that the BDM never put forward such an explanation in any of his correspondence with the Claimant. It is also noted that this explanation fails to correlate with the BDM’s comments in his email of 1 September 2017 that there were two sets of notes of this meeting and that he had (in error) only attached one of them to his email of 22 August 2017.

### **Applicable Law**

14. Regulation 41 of the Pubs Code states (as far as is relevant to this arbitration)–

#### **Business development managers**

41.—

...

(4) A pub-owning business must ensure that the business development manager—

(a) makes appropriate notes of any discussions with tied pub tenants in connection with—

- (i) rent proposals;
- (ii) rent assessments or assessments of money payable in lieu of rent;
- (iii) repairs to the tied pub premises;
- (iv) matters relating to the tied pub tenants’ current or future business plans;

(b) provides tied pub tenants with a record of any such discussions within the period of 14 days beginning with the day on which the discussion occurred; and

(c) requests that the tenant respond to the business development manager if the tenant does not agree with any aspect of the record within the period of 7 days beginning with the day on which the record was received.

15. Regulation 50 of the Pubs Code states–

#### **Tied pub tenant not to suffer detriment**

50. A pub-owning business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.

### **Summary of Agreed Facts and Issues in Dispute**

16. As set out at paragraph 7.5 above, the parties were unable to agree a Statement of Agreed Facts and Issues in Dispute, and therefore each served separate versions of such documents.

17. The Claimant states in his version that the agreed facts are that,

17.1 “*The Respondent and the Claimant agree on the need to redecorate the exterior of [the Pub]*”,

and that the issues in dispute are,

- 17.2 *“The respondent believes it is acceptable to cause the claimant detriment because they are exploring MRO options”, and*
- 17.3 *“The notes from the Business Development Review meeting between the parties held on 31<sup>st</sup> July 2017 were sent to the Claimant by the respondent on 1st September 2017.”*
18. In the Respondent’s version, it states that the agreed facts are,
- 18.1 *“The notes from the Business Development Review meeting between the parties held on 31st July 2017 were sent to the Claimant by the respondent on 22nd August 2017.”*
- and that the issue in dispute is whether,
- 18.2 *“There is a contractual obligation on the Respondent to undertake external decorations at any specific date.”*
19. Distilling these points down, it appears that the following are the issues in dispute between the parties:
- 19.1 On the regulation 41(4)(b) of the Pubs Code issue, were the notes of the meeting on 31 July 2017 sent to the Claimant on 22 August 2017 or 1 September 2017? However, the question that I consider I need to ask myself is: *were the notes sent to the Claimant within 14 days in accordance with the Pubs Code requirements?*
- 19.2 On the regulation 50 of the Pubs Code issue:
- (a) Does clause 5(c)(2) of the tenancy operate as a contractual obligation on the Respondent to redecorate the Pub?
  - (b) Do the parties accept that the exterior of the Pub needs to be redecorated?
  - (c) Was the Respondent’s decision not to undertake the external redecorations to the Pub because the Claimant has sought MRO at The Railway, and the Respondent does not want to invest in the Pub if the Claimant will then seek MRO there as well?
20. However on the second of the above points, as it would appear that the issues set out at paragraph 19.2 are not entirely relevant to the question which I need to consider as the Arbitrator in this case, namely whether the Respondent has in fact breached regulation 50, I have instead considered these issues together by asking myself: *Did the Respondent breach regulation 50 of the Pubs Code by refusing to undertake external redecorations to the Pub?*

### Regulation 41(4)(b) referral

#### **Were the notes of the meeting on 31 July 2017 sent to the Claimant within 14 days?**

21. With reference to the evidence submitted by the parties, summarised at paragraph 10 above, and the parties' submissions on this point, I find that the Respondent was required to comply with its obligations under regulations 41(4)(a) and (b) of the Pubs Code within 14 days, with this beginning on 31 July. The Respondent did not do so and has admitted as much. As such, I find that there has been breach of the Pubs Code report requirements in this respect.
22. With a view to the potential remedies for this breach which could be imposed, I also find that:
  - 22.1 Incomplete notes were provided by the Respondent 9 days late. These notes did not satisfy the need to record "*any*" discussions, as per regulation 41(4)(a) of the Pubs Code.
  - 22.2 Full notes were provided 18 days late when, on the evidence before me, the reporting process was completed out of time.
  - 22.3 The explanations provided by the BDM and the Respondent for the breach are inconsistent. The BDM asserts that a second set of notes were initially omitted. The Respondent asserts that the BDM prepared the notes the day after the meeting but then sent them to himself rather than to the Claimant, although no evidence is provided to prove this.
  - 22.4 The inconsistency in the Respondent's position is a matter for concern and raises questions about its approach to the relevant Pubs Code obligations.

### Regulation 50 referral

#### **Did the Respondent breach regulation 50 of the Pubs Code by refusing to undertake external redecorations to the Pub?**

23. My starting point here is the wording of regulation 50 of the Pubs Code, as set out at paragraph 15 above, and I note that the wording of regulation 50 does not expressly state that the pub in respect of which a TPT is being subjected to detriment at by a POB, must be the same pub in respect of which the TPT previously exercised a right under the Pubs Code.
24. Furthermore, I also note that regulation 50 uses the words '*exercises, or attempts to exercise*' any right under [the Pubs Code], and does not say, '*exercises ... attempts to exercise or because the pub-owning business*

**believes the tied pub tenant may exercise**’ any right under [the Pubs Code].

25. As such, I find that I should not to take into consideration whether the Respondent anticipated that the Claimant was likely to pursue MRO at the Pub as a reason for refusing the works, but that I may take into consideration the Claimant’s previous pursuit of MRO at The Railway as being a possible reason for the refusal.
26. In this regard, and again with reference to the evidence submitted by the parties, summarised at paragraph 10 above, the wording of clause 5(c)(2) of the tenancy as set out at paragraph 8 above, and the parties’ submissions on this point, I make the following findings.
27. With regards to external decorations it is clear that the Respondent’s obligation is to carry them out “*when we think it is reasonable*”. It appears therefore that the judgement as to what is “*reasonable*” rests entirely with the Respondent.
28. Nevertheless, I consider that the Respondent’s statements and actions during the material period (as evidenced by the relevant email exchanges) gave the Claimant significant expectations that the decorations would be carried out. The Claimant and the BDM agreed on the need for the decorations. Significant preparatory work was undertaken and the Respondent’s project manager at one point stated in relation to the works, “*....realistically I would say end of the summer to be on site*”.
29. It is clear however that other approvals, both internal to the Respondent and external, would be required before the works could commence. The Respondent referred more generally to typical redecoration periods for commercial premises and to its approach to undertaking such works from May to November in any given year. The Respondent also stated that the matter would “*be reviewed next year*” and that “*The capital investment was delayed due to the impending rent review*” at the Pub, noting that a rent review was due on 28 April 2018, in respect of which the Claimant has since issued an MRO Notice. Whilst frustration on the part of the Claimant that the works did not proceed is understandable, I find that the Respondent did not fail in its obligations on a contractual basis.
30. I do consider though that the issue is not a matter just of contractual obligations, but also of whether the Respondent decided not to proceed with the works because the Claimant sought to exercise MRO rights, and if so on what basis.
31. Here, on the evidence before me, there is an important difference in the positions advanced in the parties’ evidence. In essence, the Claimant asserts there is a link between the decision not to proceed with the decorations and the MRO process on The Railway, which he also leases from the

Respondent. By contrast, as stated in the Respondent's minutes of the meeting on 31 July 2017, as provided on 1 September 2017, and as per the email from the BDM dated 7 September 2017 discussed at paragraph 10.13 above, the Respondent does not agree that this link exists and states that its decision was based solely on matters relating to the Pub and was not related to the MRO procedure at The Railway.

32. Emails from the Claimant dated 4 and 31 August (referred to at paragraphs 10.8 and 10.11 above) suggest that the Claimant believed the link to The Railway was made at the BDM meeting on 31 July 2017. In addition, in his original referral the Claimant stated, "...I was informed that the scheme had been cancelled because I was exploring the MRO option at my other tenanted site, The Railway"; this was also repeated in his email of 7 September 2017, where he recalls the BDM meeting thus: "█ explained that Marstons' are considering the railway and swan together and that capex is currently shelved because EA is pursuing an MRO option at the railway".
33. The BDM responded to the Claimant on this point later that same day with, "...I do not recall saying The Railway and the Swan are linked in this case and my previous email confirms the Marston's view. For this reason, I believe my notes (attached) to be an accurate summary of our meeting". The relevant section of the meeting notes provided by the BDM on 1 September 2017 record, "█ explained that this (external redecorations) is currently shelved and would be because the risk of a successful MRO would be tangible". This note also refers to the Claimant thus: "Ed's reaction was not favourable and stated that if this had anything to do with the pending MRO at the Railway he would feel punished. He did say that the two businesses (although owned by him) should not be linked and should be treated as separate entities".
34. In this regard, I also observe that in the first paragraph of his email to the BDM of 7 September 2017 the Claimant says, "Thank you for sending the notes about the swan. I only disagree with the word 'if (sic) in the first paragraph".
35. Whilst I note that, as detailed at paragraph 10.7 above, that the Claimant goes on to assert later in his email of 7 September 2017 that his notes of the meeting recorded the BDM as having said, "that Marstons are considering the railway and the swan together and that the [external redecorations are] currently shelved because [the Claimant] is pursuing an MRO option at the railway", I do not find these assertions are proved.
36. Whilst there may be legitimate reasons to draw such an inference, I find from the evidence of the dialogue between the parties there is nothing that proves a clear link between the Claimant's MRO claim at The Railway and the Respondent's decision not proceed with external decorations at the Pub. Notwithstanding what may be the sincere belief of the Claimant as to what was said at the meeting on 31 July 2017, there is no record that shows that

the BDM explicitly made such a link, and the BDM advised the Claimant that he did not. Further I consider that in the circumstances of this case the reference to “*the risk of a successful MRO would be tangible*” could legitimately be referring to an anticipated MRO notice in respect of the Pub (which did in fact subsequently materialise) rather than the MRO notice and response in respect of The Railway. As stated above, in the Respondent’s evidence it states that its decision was based only on matters relating to the Pub.

37. I consider that the burden of proof to show a clear link to the MRO claim on The Railway lies with the Claimant, and the Claimant has not succeeded in discharging this burden and providing adequate proof in this respect. I am therefore unable to make a finding that any detriment in breach of regulation 50 of the Pubs Code has occurred, from what is otherwise the Respondent’s lawful contractual position with regard to having an absolute discretion as to whether it should carry out the external redecorations or not.
38. I would add that if there had there been clear proof of such a link, then in the circumstances of this case it is likely that I would have found that a breach had occurred. The parties may wish to take note of this in relation to their future dealings more generally.

### **Remedy**

39. In relation to the acknowledged breach of Regulation 41(4)(b) of the Pubs Code and noting that the Respondent states that it has implemented a review of their internal processes, this must be referenced in its next annual compliance report required under regulation 43 of the Pubs Code.
40. I am also minded to direct the Respondent to issue guidance to, and undertake training of, all its business development managers regarding all of their obligations under the Pubs Code, including their obligation to provide notes of their meetings with TPTs within the specified period of time, and to provide evidence to the PCA (as regulator) of their compliance with such a direction within a reasonable period of time, and am minded to make such an award.
41. However, as such a remedy was not proposed by the Claimant, I have not heard submissions from either party on the point or what a reasonable compliance period might be.

### **Costs**

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

**Operative Provisions (Decision)**

43. In the light of the above I make the following Award:

- 43.1 The alleged failure in respect of the BDM's failure to provide full notes of its meeting with the Claimant within 14 days contrary to Regulation 41(4)(b) of the Pubs Code has occurred.
- 43.2 The Respondent must therefore make specific reference to this breach and my finding in its next annual compliance report required under regulation 43 of the Pubs Code
- 43.3 The Claimant's allegation that the Respondent breached regulation 50 of the Pubs Code in respect of its refusal to undertake external redecorations to the Pub is not upheld.
- 43.4 Costs are reserved.



**Arbitrator's Signature:** .....

**Date Award made:** .....24/09/2018.....

**Claimant's Ref: ARB//000308/ANDERSON4**

**Respondent's Ref: ARB//000308/ANDERSON4**