**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

**Kevin Heaney** 

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Star Pubs and Bars Ltd

The Market Inn Lemon Quay Truro TR1 2LQ

First Award of

Arbitrator

14 August 2019

### 1. The Dispute

- This dispute concerns the duties of a pub owning business (POB) under the Pubs
  Code etc Regulations 2016 (The Code) between Kevin Heaney (Claimant) and Star
  Pubs and Bars Ltd (Respondent).
- An application for arbitration of the dispute was made to the Pubs Code Adjudicator and by letter dated 12 April 2019 I was appointed by the Pubs Code Adjudicator as arbitrator to determine the dispute.
- 4. The seat of this arbitration is England and Wales.
- The Claimant is Mr Kevin Heaney
   and the Respondent is Star Pubs and Bars Ltd represented by DLA
   Piper.
- 6. Following my appointment, I wrote to the parties on 16 April 2019 and received a letter dated 29 April 2019 from the Respondent questioning the jurisdiction of an arbitrator as the application did not meet the requirements of The Code. I issued Order and Directions No 1 dated 1 May 2019 for submissions on the issue. I have received argument and replies from both parties. On 26 June I asked the parties to address me on the application of section 82 (2) of the Arbitration Act 1996 to the case. I also invited them to address me on whether a party can be joined to the arbitration, substituted, a case assigned or novated. Finally, I asked the parties to address me on the consequence if I upheld the jurisdictional challenge.
- 7. The premises are let under a lease dated 21 April 2015 between Red Star Pub Company (WR III) Ltd as Landlord and Zekla Limited as Tenant. The term is 20 years from and including 1 March 2015 at an initial rent of £20,750 per year. The lease also contains details of the commercial information relevant to the tie.

8. The lease provides for a rent review on 1 March 2020 and five yearly thereafter. There is in addition an annual inflation review related to changes in the All-Items Retail Prices Index.

# 9. Jurisdictional Challenge

- 10. The letter from DLA Piper dated 29 April 2019 on behalf of the Respondent informed me that preliminary submissions had already been made to the Deputy Pubs Code Adjudicator and states that the DPCA did not make any determination prior to my appointment. There are two grounds of challenge:
  - (i) the standing of the Claimant to pursue the referral as the Claimant is not the Tied Pub Tenant (TPT);
  - (ii) the basis of referral in that the Respondent considers that a rent review has been concluded within the period of five years prior to the date of the request and that the Claimant may not rely upon regulation 19(2)(a).

# 11. Standing of the Claimant

# 12. The Respondent's case

- 13. The Respondent's case on this point is that Mr Heaney, the Claimant, is not the tenant of the Market Inn and that he has not been at any time the tenant. Between 7 November 2013 and 28 February 2015, the property was occupied under a Temporary Management Agreement by Incus AV Ltd. Under the tied lease the premises were let to Zekla Ltd for a period of 20 years commencing on 1 March 2015.
- 14. Under a licence to assign dated 21 November 2017 the lease was assigned to Gelma Ltd with the Claimant as guarantor.

- 15. While the Claimant may be a director and shareholder of Gelma Limited, as a matter of legal persona the Claimant and the company are treated as separate entities. The Claimant's role as guarantor in respect of the licence does not alter the position.
- 16. The Respondent submits the referral should not proceed any further in its present form given the lack of standing on the part of the Claimant.
- 17. In further submissions and in response to questions raised by me the Respondent argues that s82(2) of the Arbitration Act does not apply as the Claimant is not a party to the arbitration agreement. Mr Heaney is not claiming under or through the part, Gelma Ltd.
- 18. It is also argued that a party cannot be joined or substituted under the Pubs Code and 2015 Act as they do not provide for it. Similarly, there can be no assignment or novation.
- 19. Finally, the consequence of my finding in favour of the Respondent is that the claim cannot proceed in its present form but this does not impact on the right of a tenant or licensee of the Tied Premises to make a further referral.

# 20. The Claimants Case

21. The Claimant's case is based on the history of the Claimants dealing with the Respondent through its various employees.

22.	quotes from an email from	of the Respondent "as regards
	payments received, we have previously set out we a	are aware there are a number of
	company names involved with Kevin Heaney howe	ver it was the belief of our credit
	department Mr Heaney and his wife were paying us	from the company name that we
	were invoicing namely AV Incus Ltd and we accepte	ed those payments in good faith"
	this states this demonstrates the Respon	dent was taking payment from Mr
	Heaney as part of his agreement under AV Incus Lt	d.

23.	then quotes from an email dated 2 October 2017 from of
	the Respondent regarding the assignment of the 2015 agreement stating he attaches
	the inventory from 2014. makes the point that if the TPT was not Mr
	Heaney why was this information being given to him?
24.	exhibits a further email dated 21 September 2017 from
	which he says demonstrates a clear timeline back to October 2013 showing that the
	Respondent considered Mr Heaney was the TPT from October 2013.
25.	Appendix 5 to submission is an Assignee Checklist dated 2 October
	2017 signed by the Respondent's Business Development Manager. The signature
	appears to be that of As points out the form clearly states
	the assignment is because the lease is being transferred from one company owned by
	K Heaney to another.
26.	These documents clearly show that the criteria of the Pubs Code definition of a tied
	operator that (a) the tenant or licensee of the tied premises or (b) a party to
	negotiations relating to the prospective tenancy of or licences to occupy premises
	which are or on completion of the negotiations are expected to be a tied pub.
	which are or on completion or the negotiations are expected to be a fied pub.
27.	The Respondent is using semantics as to the true status of the TPT alluding to the fact
	the referrals in the name of Mr Heaney personally. This would appear to be supported
	by the statement in the Claimant's case "on this basis the Respondent submits that
	this referral should not proceed any further in its present form given the lack of
	standing on the part of the Claimant" (emphasis added). The Respondent seems to
	accept that if the referral had been worded slightly different than it would have been
	successful supporting the argument the Respondent is being purely technical in
	avoiding the impact of the legislation.
28.	In his further submissions, argues that it is illogical for the Respondent
	to claim that Gelma Ltd has the right to make a referral but that the person with
	significant control does not have the right. It is plain to see that the sole director of
	Gelma Ltd has initiated the referral.

29. The arguments that the Code does not mention joining a party or substitution are technically correct but irrelevant as arguments such as this were not considered when the legislation was drafted and the principle of fair and lawful dealing needs to be taken into account

#### 30. Discussion

- 31. In a standard commercial arbitration, the points made by DLA Piper for the Respondent would carry significant force. However, this is a statutory arbitration under the provisions of the Pubs Code and the provisions of the Small Business Enterprise and Employment Act 2015 which lay down the principle of fair and lawful dealing of Pub Owning Businesses in relation to their Tied Pub Tenants given the disparity of resources available to each. In a case with a single pub landlord, whether in his own name or that of a company the POB should be slow to take technical points. Different considerations apply where there are multiple directors or the company is larger. The POB is entitled to know with whom it is dealing.
- 32. On the specific facts of this case this is a point which should not have been taken. It is clear from the documentary evidence that Mr Heaney is the natural person who runs the Market Inn and the Respondent company is well aware of that. It is not unusual for individuals in small businesses to operate through a solely owned and operated limited company and while for many purposes there should be a separation between the two legal persons i.e. the natural person and the company, in this particular case taking the point serves no purpose other than to delay matters by making Mr Heaney fill out a fresh form substituting the company name for his own.
- 33. I therefore hold that the claim is validly made but should continue in the name of Gelma Ltd by correction of the claim form and /or substitution of a party and/or joining Gelma Ltd.

#### 34. Basis of Referral

- 35. The Respondent argues that a rent review has concluded within the period of 5 years prior to the request for a rent assessment and therefore the Claimant may not rely on Regulation 19(2)(a) as a basis of referral to the PCA.
- 36. The background to the claim is that on 8th November 2018 the TPT asked for a rent assessment proposal (RAP) under Regulation 19(2)(a) and Regulation 66(2). The POB has refused, stating that a RAP was provided in March 2015. This fact is denied by the Claimant. The TPT has requested sight of that RAP and this has been refused.
- 37. Under Regulation 19(2)(a) a pub tenant may only request a rent assessment if one has not been made within the period of 5 years ending with the date of request and this is supplemented by Regulation 66(2). The Respondent considers that a rent review has concluded in the period of 5 years prior to the date of request and therefore the Claimant cannot rely upon Regulation 19(2)(a).
- 38. In reaching this conclusion the Respondent relies on chapter 9 of the tied lease which provides for 5 yearly open market reviews and also for rent increases in line with the RPI. The Respondent submits that a rent review has therefore been concluded on each occasion of a rise in line with the RPI.
- 39. Under Regulation 66(8)(a) the review is concluded when the rent is agreed in writing between the parties. In this case the tied lease requires the landlord to calculate the fixed increase and give notice to the tenant and the tenant has agreed in writing to this mechanism at the time the lease was completed.
- 40. It is also argued that further weight is given to this argument that an index linked rent increase is a rent review for the purposes of Regulation 19(2)(a) as Regulation 19(4)(a) states that "an annual or periodic indexation of rent is not a rent review for the purpose of Regulation 19(1)(a)". It is argued this Regulation does not apply to Regulation 19(2) and the Respondent submits that the indexation increase is pursuant

to clause 2 of chapter 9 to the lease are rent reviews for the purposes of Regulation 66(2)(b).

#### 41. The Claimant's Case

- 42. The Claimant does not agree with the above. The Respondent appears to have confused the Regulations. Regulation 19(2)(a) provides a tied tenant may request a rent assessment if such an assessment has not ended within the period of 5 years prior to the reference. There is no dispute this is supplemented by Regulation 66(2). These provide that a tied pub tenant may request on or before the 5-year anniversary date 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 review has concluded within the period of 5 years ending with the date of the request.
- 43. The Respondent has highlighted Regulation 66(2)(b) and goes on to assert they consider an RPI increase amounts to rent reviews despite also pointing out that Regulation 19(4)(a) states it is not.
- 44. The Respondents argue they have conducted a rent review in accordance with Regulation 19(1)(a) by undertaking annually inflationary increases despite the code which expressly states that an annual increase is not considered as a rent review.
- 45. It is clear that Sections 19(1) and 19(2) are to be considered in conjunction with each other.
- 46. Furthermore, the code is clear on what is required in order for a rent assessment to take place at Regulation 20. The Respondent would have needed to send to the Claimant a rent assessment proposal satisfying Regulation 20 including the schedule to information which will be superfluous for a forced increase and sufficient information for the tenant to negotiate in an informed manner which they cannot as an index linked increase is not negotiable.

# 47. Respondent's Reply

- 48. The Respondent submits that the Claimant is reading Regulations 19(1)(a) and 19(1)(b) together which is not the intention given that Regulation 19(4) draws a distinction between what is a rent review for the purposes of each limb of Regulation 19(1). This provides for two routes by which a tenant can obtain a rent assessment which are where the terms of the tenants require it or where the tenant requests one as one has not been made within 5 years before the request.
- 49. The Respondent argues that the Claimant is proceeding under Regulation 19(2)(a) i.e. that a rent assessment has not ended within the period of 5 years ending with the date of the request. Accordingly, where the Claimant is using grounds under Regulation 19(2), Regulation 19(1)(a) is not relevant as the Claimant is not seeking to rely on it.
- 50. There has been no previous rent assessment and so no rent assessment has concluded before the date of the request meaning the criteria has been satisfied. Finally, the Respondent argues that in order for a rent review to have concluded for the purposes of Regulation 66(2) it needs to have commenced. There are two possible interpretations when determining whether index rent reviews under the tied lease are rent reviews for the purpose of Regulation 19(1)(b) either:
  - (a) reliant on Regulation 19(4)(a) which draws the distinction that if annual rent reviews are carried out, they will be deemed to have commenced on the relevant review date and concluded when the notice of increase was given in writing; or
  - (b) if annual rent reviews are not rent reviews when read with Regulation 66(2) then no rent review has commenced so there is no rent review to be concluded under the contractual provisions of the tied lease. On either interpretation the right to seek a rent assessment under Regulation 19(1)(b) would not arise.

#### 51. Discussion

- 52. I prefer the arguments on behalf of the Claimant.
- 53. On a plain reading of the words, Regulation 19 of the Pubs Code Regulations contains a coherent scheme for conducting rent assessments, or of money payable in lieu of rent. It does not need detailed legal argument to make sense of it. It states that a POB must conduct a rent assessment if one is required under the terms of the tenancy and an index linked rent increase is not a rent review for these purposes by virtue of regulation 19(4)(a). Alternatively, a POB must conduct a rent assessment if a tenant of a tied pub requests it under Regulation 19(2)(a) and one has not been carried out in the previous 5 years.
- 54. The first part of each clause is identical "must conduct a rent assessment or assessment of money payable in lieu of rent". It would seem to me to be perverse that for a contractual review an index linked rent increase is not a rent assessment but for a requested rent assessment it is. It would require clear words to give that meaning which are not present. The case argued by the Respondent would have the effect that if a contractual review had not been carried out in the last 5 years, say before the Code came into force but indexation applied then the tenant would not be able to use regulation 19(2)(b) to request a rent assessment despite its clear terms.
- 55. I am reinforced in this view by Regulation 20(1) which does not distinguish between 19(1)(a) and (b) other than in timing for steps to be taken under Regulation 20(2)
- 56. Regulation 22(1) refers to 19(1) without distinguishing between (a) and (b). It also means that rent assessments are not "upwards only" and the only distinction between regulation 19(1)(a) and (b) is of timing for different steps.
- 57. This interpretation makes perfect commercial sense in that history tells us that indexation almost always goes upwards whereas market rents fluctuate. The purpose of a regular rent assessment is to ensure that indexation clauses do not take the rent out of line with market values.

58.	I therefore prefer the arguments of the Claimant and hold that there has not been a
	rent assessment which has ended within the period of 5 years ending with the date of
	the request by operation of the index linked rent increases.

# 59. Award

- 60. I hereby award and determine that the arbitration has been validly commenced and that Gelma Ltd will be the claimant going forward in place of Mr Heaney.
- 61. I hereby award and determine that the annual index linked rent increases do not constitute a rent assessment which has ended within the period of 5 years ending with the date of the request.
- 62. 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