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**The Pubs Code:**

**“Market Rent Only” and the question of reasonableness**

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**Abstract:** The Pubs Code has now passed its third birthday. This intervention into the arrangements between tied tenants and their powerful pub-owning companies has one core mission: to ensure that tied tenants are no worse off than non-tied tenants. To do so, it provides a right to trigger a “market rent only” offer, but the operation of the code has proven problematic in practice. This article focuses on the “reasonableness” of “market rent only” offers in the underpinning Small Business Enterprise and Employment Act 2015 and the accompanying Pubs Code Regulations 2016, and its interpretation by published decisions of the Pubs Code Adjudicator.

**Introduction**

Having now passed its third birthday, the “Pubs Code” is squarely in its troublesome toddler years. As its core, this statutory intervention into the relationship between pub tenants and pub owners is all about power: large pub-owning companies were liable to abuse their control over tied tenants, with the latter possessing little in the way of negotiating muscle or recourse. The underpinning regulations – contained in the Pubs Code Regulations 2016, enacted under s.42 Small Business Enterprise and Employment Act 2015 ­– were intended to ensure that they were no worse off than if they were not subject to a large Pub company’s tied tenancy.

It is apparent from their first few years of operation that this aim is still far from being realised in the day-to-day operation of the code. Publicans and practitioners have reported a series of problems: pub-owning companies delaying the process and consequently raising costs, notices being issued to pull pubs into “owner management” when tied tenants assert their rights, a lack of clarity in the code, an extremely limited negotiation window, a lack of published decisions – the list goes on-and-on. Noting clear operational issues with the code, the Government undertook a statutory review, with submissions having closed in July of this year. They are yet to report back on the outcome.

Rather than a broader appraisal of the Pubs Code regulations and its various problems, this article focuses on the body of published decisions by the Pubs Code adjudicator. Decisions are only published with the permission of both parties. Pub owning companies have little motivation to consent; they can build up their own file of decisions, whereas tied tenants are only like to engage in one-off referrals. To date, the Pubs Code Adjudicator has published a series of 16 arbitration awards, compared to a total 252 awards since 2017. We can – from this modest base – begin to explore how the adjudicator is approaching the interpretation of key elements of the code.

Following a precis on the core components of the “Pubs Code”, this article focuses on two key issues of interpretation: (i) the reasonableness of proposed “market rent only” tenancy terms, and (ii) the vehicle for delivering such a tenancy, namely, either by grant of a new tenancy or via a deed of variation.

**The Pubs Code mechanism: The “Market Rent Only” tenancy**

The mischief of the “pubs code” is confined to tied-tenants of the largest “pub owning companies” (PubCos), those owning 500 or more pubs. These are: Marston's, Star Pubs & Bars, Greene King, Admiral Taverns, Punch Taverns and Enterprise Inns. As a condition of their tenancy, tied tenants are normally required, *inter alia*, to buy all of their beer (and often other drinks or products) and services from the PubCo, preventing them from buying these at market rates and restricting heavily the range of products available for offer. The code functions by providing these tied tenants a right, in the face of a “trigger event”, to be offered a “market rent only” (MRO) tenancy option for the premises. This breaks them free of the bulk of these tie requirements in return for being charged a “market rent”.

This process is underpinned by s.43 Small Business Enterprise and Employment Act 2015. The “trigger events” are specified in s.43(6) of the 2015 Act, including a renewal of any of the pub arrangements, a rent assessment, or when the price of a tied product(s) or service increases significantly. In practice, tenancy renewals leverage the majority of MRO only requests.

Having had their right triggered, the tied-tenant can make a notice under Reg. 23 of the Pubs Code Regulations 2016 and the PubCo then must offer a MRO-compliant tenancy or license. The MRO offer is only compliant if it (*inter alia*) does not contain any product or service tie (apart from one in respect of insurance provision) or any “unreasonable terms and conditions”. Under s.48 of the 2015 Act, tied pub tenants can refer a matter for dispute to the Pubs Code Adjudicator where they allege that a PubCo has failed to adhere to the code.

In practice, there are a number of aspects of the code that have proven problematic for tied tenants or that have suffered from a lack of clarity. One of these is the “reasonableness” of an MRO-compliant proposal by the PubCo. What does reasonableness mean in this context? Does the assessment of reasonableness extend beyond the individual terms contained within the proposed tenancy? Early decisions released by the Pubs Code Adjudicator have begun to shed some light on these questions. The two sections below focus on a series of appendices in one such award by the Deputy Pubs Code Adjudicator, *Elizabeth Doyle v Punch Partnerships Limited and Star Pubs & Bars Limited* [2018] ARB/17/DOYLE. Here, clarification was provided on a number of important elements of code and its underpinning regulations’ interpretation. I will deal with two issues in turn: the assessment of the reasonableness of terms in an MRO offer, and whether a specific vehicle (i.e. a deed of variation or new tenancy) is required for such an offer.

1. **Reasonableness of terms**

The animating concern of the Pubs Code, enshrined in s.42 of the 2015 Act, is that: “tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.” True to this ethos, the key litmus test for a compliant MRO tenancy offer by the PubCo is whether the terms are “common terms in agreements between landlords and pub tenants who are not subject to product or service ties” (reg.31(2)(c) Pubs Code Regulations 2016). If they are not, they are to be regarded as “unreasonable”, and therefore render the MRO-only offer non-compliant.

The published adjudicator decisions provide an insight into how the “unreasonableness” of terms will be interpreted. The Deputy Pubs Code Adjudicator Fiona Dickie, in a published arbitration dating back to November 2018 (*Elizabeth Doyle v Punch Partnerships Limited and Star Pubs & Bars Limited* [2018] ARB/17/DOYLE), sought to provide a greater indication of how this key term would be interpreted in subsequent referrals through an Appendix outlining the position of the law. I suggest that the appendix reveals four key elements to this assessment of “reasonableness”.

First, the assessment of the reasonableness of a term is not confined to mere questions of commonality. If a term is not common in free-of-tie agreements, this will indicate unreasonableness, but it is not the *only* indication of reasonableness. A term has to also be reasonable in the wider sense. Although the Pubs Code Regulations 2016 refer only to a lack of commonality (reg.31(2)(c)), the underpinning 2015 Act refers more broadly to a lack of “any unreasonable terms or conditions” (see s.43(4)(iii)).

Second, this assessment of reasonableness applies to the tenancy as a whole and not just to the appraisal of individual terms. Whether a particular term is reasonable may depend on what other terms are contained alongside it. This is both to recognise the overall impact on a tied tenant (for instance, when charges imposed by multiple terms may have an acute compound effect), and to better reflect the output of negotiations on the open market, where agreements are reached as a composite whole, not in a piecemeal fashion.

Third – and perhaps most fundamentally – the assessment of “reasonableness” is a relative standard, not an objective one. In the words of the deputy adjudicator, “what is reasonable in one case for one particular pub may not be reasonable for another” (see, *Elizabeth Doyle* [2018] ARB/17/DOYLE, Appendix 2, para. 10). As the aim of the pubs code is to counterbalance the relative negotiating strength of the PubCo, the nature of what constitutes unfair dealing is inevitably context-specific. The Deputy Arbitrator offers a formulation to apply: reasonableness in practice requires that the MRO offer is “not on worse terms and conditions than that which would be made available to a free of tie tenant after negotiations on the open market” (see, *Elizabeth Doyle* [2018] ARB/17/DOYLE, Appendix 2, para. 17).

Finally, PubCos should be able to provide “good reasons” for the inclusion of contested terms in the proposed MRO tenancy. An absence of good reasons indicates that the terms are likely to be unreasonable. Adequate communication of these reasons to the tied tenant at the point of presenting the proposed tenancy would help – in the adjudicator’s view at least – to reduce the volume of disputes being referred.

1. **The vehicle for the MRO tenancy**

A key problem that can arise for tied tenants in practice is the vehicle for an MRO offer. When PubCos discharge their duty to create a MRO compliant tenancy by offering a fresh tenancy – as opposed to a deed of variation to the existing one – this can have significant financial implications for the sitting tenant. In many circumstances, terminating a lease to take advantage of a new MRO tenancy will carry with it a liability to pay terminal dilapidations, possibly running to tens of thousands of pounds. Such problems do not persist when the PubCo instead offers a deed of variation to the existing tenancy.

The following question therefore arises for the Pubs Code adjudicator: should an MRO compliant tenancy be offered through a deed of variation or a new lease? In a separate Appendix to the *Doyle* decision (see, *Elizabeth Doyle* [2018] ARB/17/DOYLE, Appendix 2, para. 10), the Deputy Pubs Code Adjudicator undertakes an extended exercise in statutory interpretation, looking to the 2015 Act, the 2016 code and – for the sake of completeness – the Government’s first statutory review into the operation of the Pubs Code.

Although the Code is littered with references to a “new tenancy” (19 times in total), the actual definition of an MRO-compliant tenancy is contained within the 2015 Act, not the accompanying Pubs Code regulations. The delegated authority for the Pubs Code regulations is only with respect to the “terms and conditions” of the MRO offer, not the vehicle for the agreement. The Pubs Code has to, inevitably, distinguish between the extant tenancy and the new offer: hence references to a “new tenancy”.

Within the 2015 Act, there is no language to limit an MRO-offer to a new tenancy or a deed of variation. The only express prohibition is at 43(4)(b), preventing a tenancy-at-will. The drafters could have also detailed easily any prohibition on the use of deed of variations, and the failure to do so indicates that no such restrictions apply. This does, however, work the other way too. The lack of specificity also indicates that a new tenancy also has the capacity to be MRO-compliant. The space for a new tenancy can be read into the grey areas of the legislation. For instance, as tenancy-at-wills are prohibited, a current tenant at will would only receive an MRO-complaint offer by virtue of a new tenancy. So what emerges, therefore, is the position summarised by the Deputy Pubs Code Adjudicator: “what is obviously lacking is any direct and decisive comment on the permissible vehicle” (see, *Elizabeth Doyle* [2018] ARB/17/DOYLE, Appendix 3, para. 20).

So, having considered that the underpinning regulations are silent on requirements on whether to adopt a new tenancy or a deed of variation, when will the adjudicator intervene on the choice of MRO vehicle? Here, the determination turns again to a question of “reasonableness”. The 2015 Act specifies that an MRO-compliant tenancy should not “contain any unreasonable terms and conditions” (s. 43(4)), and – on the Deputy Pubs Code Adjudicator’s interpretation – the word “contain” is not limited to just the terms within any such agreement. Instead, it allows for an assessment of the reasonableness of adopting a requirement to enter into a new tenancy. Indeed, if – as above – the terms cannot collectively be unreasonable, then it follows that the vehicle for the agreement is the aggregate of the proposed terms.

Here, the reasonableness standard is the same as above: namely whether the MRO offer is “not on worse terms and conditions than that which would be made available to a free of tie tenant after negotiations on the open market” (see, *Elizabeth Doyle* [2018] ARB/17/DOYLE, Appendix 2, para. 17). The PubCo should be prepared to provide good reasons to support their decision to offer a new tenancy as opposed to a deed of variation, and – if no such reasons are forthcoming – are likely to be making an unreasonable, and therefore non-compliant, MRO-offer.

**Conclusion**

What emerges from these early publicly available awards is the Pubs Code adjudicator’s emphasis on a flexible interpretation of “reasonableness”. Under both the underpinning regulations in the 2015 Act and the Pubs Code itself, they adopt a wide discretion to consider both the reasonableness of individual terms in any proposed agreement. However, they have made clear that this extents to the wider format of the agreement as a whole and other contextual factors. As the Deputy Adjudicator put it, “what is reasonable in one case for one particular pub may not be reasonable for another” (see, *Elizabeth Doyle* [2018] ARB/17/DOYLE, Appendix 2, para. 10). This broader interpretation of their remit is in line with the Pubs Code’s overarching ethos to ensure that “tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie” (s.42(2) of the 2015 Act).

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