

## Brooker v Unique Pub Properties

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## **IS THE WHITE HORSE UNIQUE?**

A recent judgment in the Chancery Division of the High Court (*Charles Brooker and Leslie Brooker v Unique Pub Properties Limited*, handed down 7 September 2009), has caused much excitement in licensed property spheres.

The subject-matter of the action was a pub near Bristol, the White Horse at Hambrook. The freehold owners are Unique Pub Properties Limited, a 'pubco', owning a large estate of public houses mostly let on long leases. The tenants are the Brookers, whose lease had expired and they had applied for a new tenancy. All the terms had been agreed except the rent to be reserved. The parties' respective advisers had disagreed on this and so the case went to the Court for the level of rent to be fixed, a statutory renewal not being an occasion when "upwards only" valuations are applied. The decision of the judge came down nearer to the tenants' claimed figure than that of the landlords. In technical terms, the rent was set at 35% of the 'divisible balance' – the pub's notional profit – whilst the landlords had claimed 50%.

Champions of pubco tenants claim that the case has set a precedent and that the landlords of public house estates have suffered a major defeat over their method of setting rents, which, the opponents say, are too high and threaten the viability of the tenants' businesses. Some commentators say the case marks the beginning of the end for the large pubcos.

Unique Pub Properties is a division of Enterprise Inns plc, which is reported to be struggling to keep its bankers and shareholders happy. Any diminution of the company's national rental income would seriously affect its profitability. Enterprise are therefore responding to the publicity caused by the case to deny that any precedent has been set, that the case turned on its own facts and that, in any event, only eight of the public houses in their estate are let on the type of lease which was the subject of this case.

Where then does the truth lie? As is often the case, it is somewhere in the middle, but Enterprise are, in terms of the principle, nearer the mark than their critics, although the eventual outcome in practice may not be to their liking.

First, there are some background matters to explain:-

1. 'Fair Maintainable Trade': Unlike offices, which are valued according to their floor area, licensed properties are commonly valued on what can be shown as the fair maintainable trade of the premises in question – the turnover reasonably achievable in that location by a reasonably competent operator.

2. The hypothetical tenant: In any rental assessment, an objective assessment has to be made of the rent which a hypothetical tenant would be prepared to offer. Matters which would affect his bid must therefore be taken into account.
  
3. The divisible balance or notional profit: The hypothetical tenant will first calculate the anticipated turnover from all sources of income and then his gross profit on that turnover and then deduct his anticipated expenses. That is his notional profit and the argument will revolve around how much of that should be paid as rent to the landlord and how much should be kept by the tenant. Surprisingly, the rent is normally fixed at between 40% and 60%.

In considering the effect of the case, the general point to be made is that a 'precedent' is a ruling on a legal issue, which binds lower Courts, rather than a decision on the particular facts of a case, which does not.

There is no issue of strictly legal importance in the judge's decision. He reached a decision on the level of rent based on the circumstances argued before him. What is significant is that he disagreed with the arguments of the tenants' accountant, but supported the method of calculation set out in the Royal Institution of Chartered Surveyors valuation paper (used by Unique's adviser) as being 'the present usual practice amongst professional valuers'. Even on that basis he still reduced the rent. He did not say, as a point of principle, that the RICS method produces rents which are too high. He used that method, but applied to it 'the factors affecting risk and confidence in the market' which a hypothetical tenant would take into account when making a rental bid.

He also said 'I have only taken account of the agreed long-term decline in beer sales' and referred to 'the highly unusual circumstances', meaning the current economic climate.

What the case amounts to is not 'a precedent', but guidance as to the way rental valuations should be conducted or pitched at the present time. The professional valuation method, whatever one's opinion of that might be (and there are plenty of people who would say it is too biased in favour of landlords), has not in itself been discredited. It might produce a different result in different times. Valuers of public houses should however take note of the case when assessing rents.

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**Ask us. Joelson Wilson has considerable experience of the licensed property world and its experienced team of lawyers undertake both real estate and licensing work for tenants and landlords.**

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