

Unique Pub Properties Limited, Enterprise Inns Plc -v- Onifas Limited

Summary

- **Fair Pint campaigner takes on pub company to prove flow monitoring equipment is inaccurate and illegal.**
- **The Judge who hears the case is experienced in dealing with cases involving flow monitoring equipment.**
- **The Judge finds that previous methods for investigating breaches of the tie were unreliable, unsatisfactory and intrusive, and that flow monitors provided pub companies with a useful management tool.**

Unique and Enterprise Inns Plc ('the Landlords') let premises known as The Bedford Public House, 77 Bedford Hill, Balham, SW12 9HD to Onifas Limited. The Director of Onifas Limited was Karl Harrison who is a co-founder of Fair Pint and has campaigned against pub companies, the tie and beer flow monitoring equipment.

The Landlords had installed Brulines DMS system in the public house. It appeared to be working properly. For instance:-

- In the period 2 March 2009 to 4 October 2009 for keg products, the Bedford's till records and the flow monitoring data disagreed by only 1.1%.
- In the period 8 March 2010 to 6 March 2011 for cask ales the Bedford stocktaking report and the flow monitors disagreed by only 0.06%.
- In the period 8 March 2010 to 6 March 2011 for keg products, the Bedford's till records and the flow monitors disagreed by only 0.71%.

The Landlords did not suspect Onifas Limited of breaching the tie and there had been no dispute with Onifas Limited in connection with the flow monitoring equipment.

Onifas Limited and its director Mr Harrison, appeared to wish to create litigation with the Landlords over its contractual right to install the flow monitoring equipment.

On 4 March 2010 Mr Harrison posted a comment on the Morning Advertiser Website encouraging tenants to remove their Brulines equipment and stating *'The Court is not going to interfere with that through injunction. There is no possibility of contempt, you are wrong'*.

On 10 March 2010 Mr Harrison emailed the Landlords stating that he considered the flow monitoring equipment to be illegal under a host of criminal offences, including those under the Theft Act, Proceeds of Crime Act, Fraud Act and a series of health and safety statutes. He gave the Landlords 10 days notice to disconnect and remove the flow monitoring equipment or he would.

On 23 March 2010 the Landlord's solicitors sought an undertaking from Onifas Limited that the threat to remove the equipment would not be carried out. They informed Onifas that if they failed to provide those undertakings then the Landlords would apply to Court for an injunction to restrain the removal of the equipment.

Mr Harrison's response was to state *'I will be content for you to seek an injunction - it will offer me the opportunity to ventilate the matter fully in Court.... I see that Government has this week again reconfirmed its own concerns about the Bruline system and I will certainly be drawing the Government's attention to these proceedings as they develop'*.

Injunction proceedings were issued by the Landlord and by a Consent Order Onifas Limited agreed not to remove the equipment during the course of the proceedings without first providing notice.

Onifas Limited's challenge to the equipment was based on an assertion that the right to install was subject to an implied term that the Landlords could not install equipment that was unlawful and inaccurate. They asserted that the Brulines' flow monitors were not accurate and put the Landlords to proof as to their lawfulness.

In relation to accuracy, Onifas Limited sought to rely on expert evidence from a Dr Graham of Sud Tuv Nel. That expert evidence was served late and was only served some three weeks before the trial.

The expert report was based on testing Dr Graham had carried out at the Bedford. The results of that testing were fundamentally undermined because, as she admitted in a letter dated 28 October 2011, Dr Graham did not know the details of how the EDIS box processed information or how the system carried over data.

The point that Dr Graham did not understand was that Brulines' DMS system records all dispense, but only adds a half pint to the report once a full half pint is reached. Therefore at the start of an hour's testing the system had up to ½ a pint of dispense data stored. This is why it is necessary for Trading Standards, when they carry out tests, to be in contact with Vianet so that the system can be set to zero for the period of testing.

As an example, Dr Graham poured 1.79 pints of San Miguel in a particular hour. The flow monitoring equipment could have registered 1.5 pints or 2 pints depending on how many pulses were stored from the previous hour. In fact, the flow monitors recorded 2 pints, which caused Dr Graham to assert that the system had wrongly over recorded by 11.6%.

Because Dr Graham poured a small amount and in quantities that were short of ½ pint, there were seven of her tests where the system could not possibly have recorded a result within 10% of the measured volume. Dr Graham's standard was plus or minus 5% on a measured dispense of 1 pint. There were 18 out of 32 tests she carried out where it was impossible for the DMS figure to be within 5% of the value measured. These and other errors in Dr Graham's testing could have been avoided had Onifas accepted the Landlords' offer of assistance from Vianet in carrying out the testing.

The matter went before His Honour Judge Behrens in the High Court in London in mid-November 2011 for a two day trial. His Honour Judge Behrens had had experience with Brulines flow monitoring because he sat in the High Court Leeds where Punch Taverns issue the majority of their injunction cases. He was therefore familiar with the operation of the system and the information it produced.

The obvious faults in Dr Graham's evidence were such that the Landlords were prepared to waive the lateness of service of Dr Graham's report and go ahead with the trial without their own expert, provided that Onifas did not challenge the admissibility of evidence in response from a Director of Vianet. Onifas turned down that offer and objected to the evidence from Vianet. Therefore the case proceeded on the preliminary issue of whether there was an implied term of accuracy and lawfulness in the lease.

His Honour Judge Behrens concluded in his judgment:-

- The main (but not the only) purpose of flow monitoring equipment is to enable the landlord to identify breaches of the tie. The other methods of monitoring compliance with the tie (ie rights of entry, access to tenant's books, cover surveillance) had proved unreliable and unsatisfactory. The barrister for Onifas did not attempt to challenge that evidence.
- It is, of course, open to a tenant to challenge readings from flow monitors that are said to be inaccurate. VAT returns and other records may prove the tenant has not been buying out of the tie.
- There was no contravention of Weights & Measures Act 1985.
- There is no necessity for the implied term as to lawfulness and accuracy asserted by Onifas Limited.

Following the judgment being handed down, the Barrister for Onifas attempted to argue that the case should continue on public interest grounds for the benefit of other tenants. His Honour Judge Behrens stated that he had reservations as to whether the testing carried by Dr Graham was relevant to other pubs as there were points that were fact sensitive. His Honour Judge Behrens stated that Mr Harrison and Onifas, if they wished the point to be resolved through the Courts, could always support with funding a challenge to the system on behalf of another tenant who was accused of breaching the tie.

