IN THE MATTER OF **ARB/103756/HELLIWELL**
THE PUBS CODE ARBITRATION BETWEEN:

GARDEN PUB LIMITED
(Tied-Pub Tenant) Claimant

-and-

RED STAR PUB COMPANY (WRIII) LIMITED
First Respondent

and

STAR PUBS AND BARS LIMITED
(Pub-owning Business) Second Respondent

FINAL AWARD
EXCEPT IN RELATION TO COSTS

Summary of Award

None of the Respondent's stocking requirements served on the Claimant to date have been compliant.

The Respondent must serve a revised MRO proposal which includes the following reasonable stocking requirement:

1. Keg Brands – narrow definition of Landlord Brands – a minimum of three Landlord Brand products shall be stocked and offered for sale from a minimum of four taps.
2. There is no stocking requirement in respect of Cask Brands.

Introduction

1. Somewhat disappointingly, these proceedings have a long and complicated history. They relate to the terms of a stocking requirement, a new concept introduced by the Pubs Code[1]. A stocking requirement is a contractual obligation in a pub tenancy or licence that requires the tenant or licensee to stock beer or cider produced by a brewing pub-owing business regulated under the Pubs Code. A stocking requirement is not a tie.

Parties and Procedure

2. The Claimant is Garden Pub Limited of The Woodman, 414 Archway Road, London N6 5UA ("the Pub") and is the tied pub tenant ("TPT") of the Pub[2] which it occupies under the terms of a lease dated 25 June 2007 granted by the First Respondent under its former name of 'West Register (Public Houses III) Limited'. The First Respondent is a group company of the Second Respondent, which is a pub-owning business ("POB")[3]. In this decision the First Respondent and Second Respondent are together referred to as "the Respondent".

3. The Claimant is represented by Clarke Wilmott LLP of 1 Georges Square, Bath Street, Bristol BS1 6BA. The Respondent is represented by DLA Piper Scotland LLP of Collins House, Rutland Square, Edinburgh EH1 2AA.

4. The procedure applying to this arbitration is set out in Appendix A. Oral hearings took place before me on 26 July 2018 and 7 September 2018, at which [redacted] of counsel appeared for the Claimant and [redacted] of counsel appeared for the Respondent.

Background

5. The Pub is located on Archway Road in the affluent Highgate area of North London and is situated next to the Highgate London Underground station. The Claimant describes Highgate as a 'hot bed of great pubs', and the Respondent describes the Pub as a 'good sized pub in a great location', with two bars and a large outdoor area.

6. The Small Business, Enterprise and Employment Act 2015 ("The 2015 Act") makes provision for tenants of tied pubs to be offered a market rent only ("MRO") option in specified circumstances. As a result of a MRO notice served by the Claimant on the Respondent on 5 December 2016, the Claimant has the right to receive a compliant MRO proposal. This is the third time that I have issued an award in arbitration proceedings between these parties in relation to a MRO proposal served by the Respondent on the Claimant further to that MRO notice.

[1] Included in The Pubs Code etc. Regulations 2016
[2] Within the meaning of section 70(1)(a) of the 2015 Act
[3] Within the meaning of section 69(1) of the 2015 Act

7. In relation to the tenant's referral[4], I issued awards on 26 February and 13 March 2018 in which I found the Respondent's MRO proposal non-compliant. In the later of the two awards (which I shall call my March Award) I considered the proposed stocking requirement. I also considered in the 26 February award and in an additional award dated 17 July 2018 a dispute in relation to the Respondent's rent assessment proposal[5].

8. In my decision in the March Award I found that the proposed terms imposing stocking obligations in relation to keg products did not fall within the statutory definition of a stocking requirement[6] and were non-compliant. I also found that the proposed terms imposing stocking obligations in relation to cask products were unreasonable and therefore non-compliant. None of my previous arbitration awards in relation to this Pub were the subject of any appeal.

9. The Respondent on 3 April 2018 purported to comply with my direction that it must provide the Claimant with a revised response[7] and this contained an amended proposed MRO lease, with a revised proposed stocking requirement which in this decision I shall call "Revised Offer 1" and the terms of which are attached at Appendix B. The Claimant considers that the revised terms of the proposed stocking requirement were again non-compliant and on 17 April 2018 referred the matter back to the PCA for further arbitration. The Respondent then provided the Claimant with a re-revised proposed stocking requirement by email on 29 May 2018 (which I shall refer to as "Revised Offer 2"), and these terms are attached at Appendix C.

10. On 27 July 2018, after the first hearing, the Respondent by letter made a further re-revised offer of a proposed stocking requirement ("Revised Offer 3"), as attached at Appendix D to this award. Then on 20 August 2018 the Respondent made another further re-revised offer of a proposed stocking requirement, ("Revised Offer 4") in the terms set out in Appendix E.

The Proposed Stocking Requirements

11. I have been asked to consider whether the Respondent's proposed stocking requirements are compliant with the legislation. Both parties expressly accepted that I have jurisdiction to consider the revised MRO proposal issued further to my ruling, Revised Offer 1, as well as the subsequent amendments, Revised Offers 2-4. For clarity and ease of comparison, I have set out in a table the principle features of each of the Revised Offers 1-4.

[4] Made under regulation 32(2)(a) of the Pubs Code.

[5] Referred for arbitration under s.48 of the 2015 Act.

[6] In section 68(7) of the 2015 Act.

[7] (Within the meaning of regulation 33(3) of the Pubs Code).

Date	Landlord Keg Brands definition	Keg	Cask
3 April 2018 Revised Offer 1 (see Appendix B)	"Narrow Definition" Manufactured by R (or a group company).	At least 75% of taps shall be Landlord Keg Brands 5 specified Landlord Keg Brands must always be on sale.	At least 1 cask hand-pull a Landlord Cask Brand
29 May 2018 Revised Offer 2 (see Appendix C)	"Extended Definition" Manufactured by R (or a group undertaking), including any trading entity in which R (or a group undertaking) has shares / joint venture / partnership agreement.	At least 75% of taps shall be Landlord Keg Brands 2 specified Landlord Keg Brands must always be on sale - TPT may change these 2 specified brands after 2 years with R's written consent.	At least 1 cask hand-pull to be a Landlord Cask Brand.
27 July 2018 Revised Offer 3 (see Appendix D)	"Extended Definition" Manufactured by R (or a group undertaking), including any trading entity in which R (or a group undertaking) has shares / joint venture / partnership agreement.	At least 70% of taps shall be Landlord Keg Brands No obligation to stock specific Landlord Keg Brands.	At least 1 cask hand-pull to be a Landlord Cask Brand. "Extended Definition" of Landlord Cask Brands Manufactured by R (or a group undertaking), including any trading entity in which R (or a group undertaking) has shares / joint venture / partnership agreement.
20 August 2018 Revised Offer 4 (see Appendix E)	"Extended Definition" Manufactured by R (or a group undertaking), including any trading entity in which R (or a group undertaking) has shares / joint venture / partnership agreement. But If "Wider Definition" made the provision outside statutory definition of stocking requirement, the "Narrow Definition" would apply.	8 of the current 11 taps shall be Landlord Keg Brands. 1st and thereafter alternative odd numbered additional taps – tenant's choice 2nd and thereafter alternate even numbered additional taps must be Landlord Keg Brand.	The offer was silent, and I understand that the 27 July 2018 offer in relation to Landlord Cask Brands is unchanged.

12. Common to Revised Offers 1 and 2 is the requirement that 75% of the taps serving Keg Brands in the Pub must be allocated to Landlord Keg Brands. Common to all of the Revised Offers is the requirement that at least one Cask hand-pull in the Pub must dispense a Landlord Cask Brand at all times. There is an important difference in the way in which a "Landlord Brands"[8] is defined in the successive offers however. In spite of negotiations, the parties were unable to reach a settlement. I heard no submissions from the parties at the hearing of 7 September on the cask stocking requirement, but in the absence of confirmation as to any settlement of that element of the dispute I have reached a determination upon the matter.

My Decision

13. In summary form my decisions are as follows:

    a. The Revised Offer 1 is not compliant because:
        i. It is on unreasonable terms.

    b. The Revised Offer 2 is not compliant because:
        i. The restriction on keg products is not a stocking requirement since owing to the extended definition of Landlord Keg Brands it does not relate only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord (in contravention of section 68(7)(a) of the 2015 Act).
        ii. It is in any event on unreasonable terms.

    c. The Revised Offers 3 is not compliant because:
        i. It is not a stocking requirement since owing to the extended definition of both Landlord Keg Brands and Landlord Cask Brands it does not relate only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord (in contravention of section 68(7)(a) of the 2015 Act).
        ii. It is in any event on unreasonable terms.

    d. The Revised Offer 4 is not compliant because:
        i. It is not a stocking requirement since owing to the extended definition of both Landlord Keg Brands and Landlord Cask Brands it does not relate only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord (in contravention of section 68(7)(a) of the 2015 Act). In that case, the Respondent asks me to consider whether the same proposal but applying the narrow definition of "Landlord Keg Brands" would be compliant instead. However, this does not change the meaning given to a "Landlord Cask

[8] By "Landlord Brands" in this award I mean "Landlord Keg Brands" and "Landlord Cask Brands" as defined in Schedule 4 of the lease. Though the parties arguments principally focussed on keg products, the same reasoning applied to "Landlord Cask Brands".

Brand" which is therefore still not within the definition of a stocking requirement.

ii. In any event, whether applying the narrow or extended definition of "Landlord Brands", the proposed requirement is on unreasonable terms.

14. I therefore accept the Claimant's case that none of the proposed stocking obligations are compliant stocking requirements. My reasons are set out below.

Landlord Brands

15. In the Revised Offer 1 *"Landlord Keg Brands"* means:

> *"any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Company of the Landlord (including Heineken UK Limited) from time to time during the Term;"*

16. *By contrast, in the Revised Offers 2, 3 and 4 the definition of "Landlord Keg Brands*" is amended, as follows:

> *"Landlord Keg Brands" means any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Undertaking of the Landlord (including Heineken UK Limited and any company or other trading entity in which either the Landlord or a Group Undertaking has a shareholding interest or has entered into any joint venture or other partnership agreement) from time to time during the Term;*

17. Therefore, it can be seen that in addition to brands which are manufactured by the Respondent or a Group Undertaking of Respondent, the "Landlord Keg Brands" in Revised Offers 2, 3 and 4 also now include companies in which the Respondent or any of its Group Undertakings have any sort of shareholding, or with which they have joint venture or partnership arrangements (none of the terms shareholding, joint venture or partnership arrangement are defined in the proposed lease).

18. Section 68(7) of the 2015 Act defines a contractual obligation to be a stocking requirement if:
    a. *it relates only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord,*
    b. *it does not require the tied pub tenant to procure the beer or cider from any particular supplier, and*
    c. *it does not prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such sales).*

19. [redacted] argued at the hearing on 26 July 2018 that this extended definition of "Landlord Keg Brands" cannot form part of a compliant stocking requirement,

as the definition requires that a stocking requirement must relate, "**only** to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord" (my emphasis). The Respondent did not seek permission to produce further evidence and submissions on the matter before the second hearing day, and I am satisfied the point is in dispute and that it had a fair opportunity to deal with it.

20. A "group undertaking" in section 68(7)(a) has the meaning given to it by section 1161(5) of the Companies Act 2006[9], and is an undertaking which is (a) a parent undertaking or subsidiary undertaking of that undertaking, or (b) a subsidiary undertaking of any parent undertaking of that undertaking. In all of the Revised Offers the following definition is found: "*"Group Undertaking" has the meaning given by s. 1161 of the Companies Act 2006."*

21. I am satisfied that an undertaking in which the Respondent merely has a shareholding, a joint venture or partnership agreement does not come within the statutory definition of "group undertaking" as there is no subsidiary or parent relationship.

22. However, as seen above, by statute a stocking requirement can relate "*only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord.*" As the requirement in question goes further than that and relates to beer or cider (or both) produced by an "*other trading entity in which either the Landlord or a Group Undertaking has a shareholding interest or has entered into any joint venture or other partnership agreement*" it does not come within the definition of a stocking requirement in s.68(7).

23. The Respondent asserted that all of their proposals meet the statutory definition of a 'stocking requirement' and are also reasonable and have been drafted taking into consideration the Pub's local market. In closing submissions, [redacted] accepted that the extended definition of "Landlord Keg Brands" extends beyond the scope of section 68(7)(a) of the 2015 Act, but argued that, even so, this does not mean that the term is not a stocking requirement, as the purpose of extending this lease definition was to offer a broader category of keg products to then be dispensed from the required number or percentage of taps in the Pub. He submitted that the three conditions for a stocking requirement under section 68(7) of the 2015 Act must be looked at together such that one must ask the following questions:

    a. *Does the obligation prevent the Claimant from selling keg beer produced by a person other than the landlord or a landlord group undertaking?* To which the Respondent suggests the answer in respect of their proposed stocking requirement is no.

    b. *Does the obligation restrict sales of keg beer produced by a person other than the landlord or a landlord group undertaking?* The

[9] Section 72 of the 2015 Act defines a "group undertaking" as having the meaning given by section 1161 of the Companies Act 2006.

Respondent suggests the answer to this question for their stocking requirement is yes, though the more complete answer is that it restricts only such products in which the landlord or its group undertaking does not have an interest.

c. *Does the obligation require the Claimant to purchase Landlord Keg Brands from any particular supplier?* The Respondent suggests the answer to this question for their stocking requirement is no.

24. [redacted] argued that the statutory definition of a "stocking requirement" is deliberately broad and allows for all sorts of restrictions to be proposed by POBs in order to preserve their "route to market" and that it is a question of 'reasonableness' to determine whether any particular such restriction is MRO-compliant. He considered [redacted] proposed interpretation that the extended definition of "Landlord Keg Brands" is outside of the scope of section 68(7) of the 2015 Act simply because it does not only relate to beer produced by the landlord or a landlord group undertaking to be perverse.

25. However, I have no difficulty in preferring the Claimant's argument that a stocking requirement should be based on a narrow definition of "Landlord Brands", which is reached by a straightforward reading of the statute. The exception to the definition of a tie is expressed as a contractual obligation that is a stocking requirement. As an exception to a contractual obligation that might otherwise constitute a tie, this ought to be construed narrowly, and in relation to its context. I am satisfied that had Parliament intended that such requirements should have a broad meaning, it would have said so expressly.

26. I therefore find that none of the Respondent's proposed stocking requirements based on the extended definition of Landlord Brands is a stocking requirement as defined by statute. [redacted] argued it is instead a product tie, and for that reason not MRO compliant.

Is the Proposed Stocking Requirement a Tie?

27. The definition of a stocking requirement at section 68(7) of the 2015 Act refers to products 'produced' by a landlord. By contrast the definition of a product tie at section 72(1) of the 2015 Act covers a situation where products are to be 'supplied' only by the landlord, and [redacted] argued that 'supplied' must mean supplied directly or indirectly, and thus that any requirement to buy the landlord's own products would be a product tie, as ultimately their supply would need to be directly or indirectly from the landlord.

28. On the argument put forward, I am not presently persuaded to the interpretation put forward by [redacted]. What he seeks to achieve is to rationalise the carve-out of a stocking requirement from the definition of a product tie. Unless "supply" is interpreted to mean indirectly as well as directly, he proposed, a requirement to stock landlord-brewed products would not be a tie, and the carve-out from the definition of a tie would not be

required at all. However, the rationale for the carve out can be found if indirect supply might (but not necessarily would) be a tie, depending on the facts of the case (such as the degree of control over indirect supply exercised by the landlord). I do not however consider that this issue has been fully argued and determined for the purposes of all aspects of the Code's operation affected by the interpretation of the definition of a tie.

29. Importantly, the issue does not go to the heart of the present case, as the Claimant's argument can in any event only apply to the requirement for "must stock" keg brands which are brewed by Heineken. This requirement is easily severable (but not free-standing) from the proposed term requiring the stocking of Landlord Brands, including applying the extended definition, which is clearly not a tie, as it could be satisfied by not buying any landlord (or group undertaking) brewed products at all.

MRO-Compliance

30. A proposed term will not be MRO-compliant if it is unreasonable[10] and any terms which are not common in free of tie agreements will automatically be unreasonable[11]. An uncommon term is only one example of an unreasonable term[12]. As such, in order to be MRO-compliant, a term which is common must still be reasonable in the more general sense. If I am correct that the proposed stocking requirements including the expanded definition of Landlord Brands are not within the statutory definition of a "stocking requirement", and because such a term is not a tie, it is still necessary for me to consider whether they are in any event MRO-compliant terms.

Are the Proposed Stocking Requirements Common?

31. At paragraphs 6 to 14 of the March Award I set out my approach to applying the test of commonness to a term which meets the statutory definition of a stocking requirement, and there is nothing in the arguments put forward in these proceedings which has persuaded me to alter that approach. That analysis therefore applies in this case.

32. Accordingly, I only need now consider whether the proposed terms which do not meet the statutory definition of a stocking requirement are common (namely the terms including an expanded definition of Landlord Brands). I can deal with this issue briefly. At no stage in these proceedings has the Respondent sought to produce evidence that any of those proposed terms are common in free of tie agreements. In particular, the Respondent could have sought permission to do so after the hearing was adjourned on 7 July but did not.

[10] Section 43(4)(a)(iii) of the 2015 Act.
[11] Regulation 31(2)(c) of the Pubs Code.
[12] As I found in the March Award (see paragraph 34), the requirement at section 43(4)(a)(iii) of the 2015 Act applies to all terms of a proposed tenancy.

33. In any event, the proposed terms have been generated as a result of the definition of a stocking requirement in the Pubs Code (even though it does not meet that definition). Given the relative newness of the Pubs Code and the small number of MRO agreements granted by the Respondent since its introduction, and as it would take time for any emerging term in the market to become common in free of tie agreements, it seems highly unlikely that such a term could be considered common in any event.

Are the Proposed Stocking Requirements Unreasonable?

34. Next I consider if the proposed stocking requirements are unreasonable in the general sense, and it is necessary to do so in light of consideration of the policy intention of the legislation.

The Policy Intention

35. Clearly the extended definitions of Landlord Brands would make it easier for a tenant to comply with the proposed requirement, as they would have a much wider choice of products from which to make a selection to fulfil the minimum stocking obligation imposed. This clarifies, for example, that the Theakston's brands which the Claimant currently stocks would fall within the percentage of Landlord Keg Brands specified and also means brands such as Brixton Brewery and Beavertown, which the Claimant refers to in the Statement of Claim, will be classed as a Landlord Keg Brands for the purposes of the stocking requirement in Revised Offers 2-4, though none are brewed by the Respondent's group undertakings. However, that does not mean that the proposed term is within the statutory definition of a stocking requirement. It is not, and this is clear not only from the words of the provision, but from the policy intention behind it.

36. The Explanatory Note to the 2015 Act illustrates Parliament's intention when, in respect of section 68(7) it states:

> *"Subsection (6) makes clear that a stocking requirement is not a tie. Thus subsection (7) allows pub-owing businesses that are breweries to impose a stocking requirement on tenants and licensee with MRO-compliant tenancies or licences. The stocking requirement applies only to beer and cider produced by the pub owing business, and the tenant must be able to buy the beer or cider from any supplier of their choosing. The stocking requirement also allows the pub-owing business to impose restrictions on sales of competing beer and cider in line with prevailing competition law, so long as the restrictions do not prevent the tenant from selling such products."*

37. As acknowledged by the Respondent in these proceedings and previously[13], and by [redacted] in evidence, the undisputed principle behind the stocking

[13] See paragraph 30 of my March Award.

requirement clause is to protect a brewer POB's route to market. In view of this, it is not necessary for me to define the policy intention further. It is clear that it is only because it is a brewer that the Respondent can impose a stocking requirement, and only as a brewer that it is entitled to require the stocking of products which it brews. An attempt to use a stocking requirement to require or encourage the stocking of products which the POB, though a brewer, does not brew, clearly conflicts with Parliamentary intention.

38. What the Respondent seeks to do in expanding the definition of Landlord Brands is to promote its shareholding interests by virtue of its position as a brewer, in a way that other POBs who are not brewers could not do. In this way the Respondent could obtain a commercial advantage over its competitor non-brewer POBs. Under the tie, the Respondent has the benefit of an obligation on the Claimant to buy from a product list that includes products brewed by the Respondent and its group undertakings, and also those brewed by companies in which it has an interest. The stocking requirement as defined by statute however does not present an opportunity to protect that benefit. The Respondent is not under the tie only protecting its route to market. It is protecting its business model of selling its own brand products and products in which it has a financial interest. It cannot achieve this protection in a stocking requirement.

39. Furthermore, I consider it important to distinguish the opportunity to *protect* the brewer POB's route to market for products it brews (which accords with the policy intent of the legislation) from the opportunity to *increase* the brewer POB's route to market for those products (which does not and which may raise competition issues which are matters for other authorities than the PCA). This is furthermore consistent with the two core principles of the Pubs Code – those of "fair and lawful dealing" and "no worse off"[14], and relevant to considering the test of reasonableness which each proposed MRO term must meet and has not been shown to meet in this case.

40. The Respondent's route to market for its own products as a brewer POB is based on the terms and operation of the tied lease. Whilst the Claimant must purchase all of its beer and cider from the Respondent, it has been under no obligation to stock any produce brewed by the Respondent or its group undertaking. The Respondent offers a product list which is very broad and includes products which are brewed by the Respondent (and its group undertakings) and products which are not. The Respondent does not require the Claimant to purchase any proportion of own-brewed products from that list under the tie. It is currently content to rely on the attractiveness of its own-brewed products to sell themselves to the Claimant, and to obtain its profit both from own-brand and third party brewed products. Looking only at its own-brewed products therefore, the Respondent does not currently have a defined guaranteed route to market under the tie.

41. Furthermore, the product list under the tied lease has the ability to change over time as the Respondent makes available to the Claimant brands which

[14] Section 42(3) of the 2015 Act

meet emerging market trends, including brands which are produced by third-party brewers.

42. It seems to me therefore that there is something of a mismatch between the statutory definition and purpose of a stocking requirement, and the manner in which the Respondent seeks to impose such an obligation on the Claimant in this instance. The proposed stocking requirements introduce a fixed obligation throughout the term of the lease, providing a new guaranteed route to market by way of a new purchasing obligation on the tenant, and (where discussed below), through which the Respondent seeks to increase sales of its own-brewed products at the Pub rather than protect them. Notwithstanding any competition issues which arise, these are all factors I have balanced in considering the test of reasonableness. Other facts of relevance are the nature of trade at the Pub and the local market.

The Pub and Local Market

43. The March Award was made on the papers only and I had cause to comment within it on the inadequacies of the argument and evidence. The Respondent had failed to provide any explanation as to why it considered it reasonable to seek to impose the restrictions then proposed. No evidence was provided to show that it had sought to understand the particular circumstances of the Pub, its trade and its market to determine what a reasonable stocking requirement might be. In the absence of submissions on the point, I gave the parties a non-exhaustive indication of the sort of factors that may be relevant to assessing reasonableness. I said:

> *37. A stocking requirement must be reasonable to be MRO-compliant, and as explained above reasonableness will be determined having regard to all the circumstances of the case. I am determining this dispute only on the basis of the evidence and argument put before me in this individual case. I have considered the legislative intention and the fact that the Respondent offers a particularly broad range of beer and cider products. However, the consideration of reasonableness is not confined to these matters. In particular, the nature and trade of this pub will also be a consideration. What is a reasonable stocking requirement for one pub may not be a reasonable stocking requirement for another pub in another location, operating in a completely different market, with a different offer and clientele. The Respondent's case relies on the range of its own portfolio of products, which is relevant, but what it has not sought to do is to understand the particular market factors affecting this pub, and address whether the requirements are reasonable for its particular circumstances.*
>
> *38. If the test of reasonableness applies to a stocking requirement, the Respondent's position is that the terms of the existing lease are not relevant to that test. However it has not analysed why it should be that the trading arrangement between the parties to the lease of this Pub, in existence for over 10 years, should not be relevant to considering the reasonableness of the new trading arrangements. It seems to me clear that the offer the Pub has made available over the period of the existing*

lease, as a result of its terms and the products made available under the tie, will have had an effect on the trade and goodwill it has built up. To prevent or restrict it from stocking products (or the amount of product) it has been selling under its tied deal could logically present a risk to the business which the Respondent has not demonstrated to be reasonable, or even given reasons for. Clearly, the type of trading arrangement is new, but customer expectations and demand at this Pub during the tied arrangement are not. A brewer POB which seeks to impose a stocking requirement but, in response to a substantive challenge to reasonableness, cannot show that it has considered whether it is reasonable for the particular pub in question will not satisfactorily be able to explain why the term can be reasonable in all of the circumstances.

44. The Respondent has said that it had taken into account these comments in making its Revised Offer 1. In evidence, both parties went to considerable lengths to demonstrate that an understanding of the local market had formed part of their understanding of what a reasonable stocking requirement would be. The effect of this, far from enabling the parties to reach a common negotiated view on the terms of an appropriate stocking requirement, led to entrenched positions upon which each sought to produce evidence of the local market and potential for the trading style of this Pub.

45. I heard evidence for the Claimant from one of its directors, Mr Tom Helliwell, and for the Respondent from its [redacted]

46. It is not necessary or proportionate to set out all of the conflicting evidence and argument, but among the principal areas of disagreement were that Mr Helliwell said that a lack of locally produced keg beers would make the Claimant's business uncompetitive in the local market, which is strongly influenced by local craft beers. [redacted] however denied that the local market was "strongly influenced by local craft beers", that lack of locally produced keg beers would make the Pub uncompetitive in the local market, or that the proposed stocking requirement would materially impact on the Claimant's ability to stock "local craft beers".

47. The Respondent pointed to the Claimant's lack of evidence (including expert evidence) to prove that the factors he relied upon will make the Pub "uncompetitive". The Respondent went so far as to say that increasing the proportion of craft products would constitute a significant risk to the Claimant's business, relying on CGA data (which was not specifically explained and tested in evidence) to show this risk and that well known lager and ales contribute the highest proportion of beer sales in mainstream pubs, such as the Pub (even in pubs which sell four craft beer products). Noting this evidence, it does not persuade me away from looking from the generality to the particular circumstances of this Pub.

48. Mr Helliwell and the Respondent had each carried out surveys of local competitor pubs. Mr Helliwell criticised the Respondent for not having carried

out this survey before issuing the Revised Offer 1, but given the short timescale for doing so the Respondent's steps to understand the local market needed to be proportionate. They drew very different conclusions as to the importance of local and craft beer on the market in Highgate. This was largely because they categorised beers differently (e.g. [redacted] did not categorise Fullers as local because it had a national reach, and he did not categorise Camden Town as local because it was owned by ABInbev). [redacted] approach did not however recognise that it is the customer perception and marketing of some products as local which can affect consumer choice, and that may not be affected by the nature of their ownership.

49. Interestingly, [redacted] expressly acknowledged that the market was becoming more craft focussed, and that part of the Respondent's response to that was to invest in local start-ups. It offers brands with that sort of local craft image which are not products it brews itself (e.g. Brixton Brewery and Beavertown).

50. A Morning Advertiser article from 11 July 2018 was produced in evidence about the Respondent's new scheme allowing tied pubs to rotate craft guest beers produced by third party brewers in addition to Heineken:

> *"Steve Dancer, buying director of Star, said craft beer was an "important growth area" "It is served in more than half of the pubs in the UK. It's not a passing fad, it is here to say. Craft sales are increasing in volume by 25% year on year and the category is predicted to make up 10% of total beer market volumes in the next three years."*

51. Even accepting [redacted] analysis, he considered the split between international/national and local cask brands at premises in Highgate is 48.7% and 51.3% respectively. The Pub's current offering has nowhere near that balance, which does not suggest it sits midstream in the Highgate market. Furthermore, separating the tied from free of tie properties in the surveys shows different pictures. On balance, and speaking in broad terms, I prefer Mr Helliwell's approach.

52. I do not consider that Mr Helliwell was wrong to rely on his substantial experience in trade in the local area in forming his view. [redacted] and Mr Helliwell disagreed about the local demographic and what the Pub's customers want, but having heard from Mr Helliwell I consider he is likely to have a more informed perspective on the customers at his own Pub. Overall, it is unsurprising that I consider by running a pub in the Highgate he a good grasp of trade in the area.

53. Importantly however what I took from this disagreement is that it is possible for rational and experienced trade professionals, such as are [redacted] and Mr Helliwell, to disagree about the best future trading model for a free of tie pub. I do not consider that it is my role to make a finding as to the best trading model for this Pub over the long term, but rather to consider a reasonable stocking requirement taking into account what element of uncertainty I am satisfied to exist. It would be a matter of concern if the route to finding a

reasonable stocking requirement routinely necessitated litigation such as has happened in this case, and the involvement of expert evidence about possible market and trading changes over the duration of a lease.

54. Nobody has a crystal ball, and the tied lease has a term of more than 14 years unexpired. The MRO lease must be for a term at least as long[15]. That is a very significant period over which to try to predict what it would be reasonable to stock in the Pub, and a business should be ready to respond to changes in the market over time. The tied model, by using a broad product list, provides a means of doing that. For example, I heard evidence that the SIBA Flex scheme had recently been made available to the Claimant by the Respondent, whereby it could order craft beers under the tie from smaller independent breweries, and (there having been some administration hiccups in getting access to the scheme) Mr Helliwell had latterly begun to place orders through it.

Current Trade

55. The Pub presently stocks eight keg lines across eleven taps: three products (Heineken, Kronenbourg 1664 and Symonds Cider) use two taps each, with the remaining five taps providing Amstel, Brixton, Theakston IPA, Birra Moretti and Guinness. Mr Helliwell also said that, at most, the Pub could accommodate a total of 14 to 16 taps on the bar, but that as these additional lines would require additional cleaning and maintenance this is not necessarily something he would want to do. In terms of hand-pulled cask products, there are six lines of cask ale, with four main ales (London Pride, Bombardier, Greene King IPA and St Austell Tribute) plus two regularly rotating guest ales. Mr Helliwell said that he could add one or two more hand-pull lines at most.

56. The Claimant had from time to time chosen to stock one cask ale brewed by the Respondent, but had not done so consistently. Mr Helliwell explained that the majority of cask ales available under the tie were not from 'local' breweries and had not proved popular when they had been stocked. [redacted]

57. The fact that there has been a consistent level of beer sales at the Pub was said to support the Respondent's submission that the clientele is satisfied with the current offering. While [redacted] acknowledged that the market as a whole may be becoming more craft focussed, he said the demographic of the Claimant's clientele (generally affluent and middle aged) is not seeking the same craft products as may be sought by a younger demographic.

58. The policy intention being to protect the route to market, it can be seen that protecting a variable and unguaranteed route to market for own-brewed

[15] Regulation 30(2) of the Pubs Code Regulations.

products does not mean guaranteeing a route to market for at least the amount of landlord brewed product currently being stocked in the Pub.

59. In summary, the Respondent's position was that the Revised Offers 2-4 do not oblige the Claimant to stock more Heineken products than the Claimant currently stocks under his tied arrangement. However, in advancing that argument the Respondent based its analysis on applying the extended definition of Landlord Brands.

Approaching Reasonableness

60. [redacted] proposed the following approach to assessing the reasonableness of a proposed stocking requirement. The starting point should be the use which the POB is currently making of the pub as a route to market and at most, the stocking requirement should never be more than is required to protect that use. It may and often will be necessary to set the stocking requirement at a lesser requirement than that in order to mitigate a number of factors which would otherwise tend to impact negatively on tenant's business:
    a. The nature of the difference between the tie and a stocking requirement.
    b. The inability of the tenant to achieve any change in the terms of the stocking requirement going forward.
    c. The impact on the tenant's ability currently to compete – the tenant may be taking products now because of the tie that it does not want.
    d. The future which can lead to divergence of the commercial interest and legal obligation.
    e. The following factors are relevant:
        i. Current trading relationship
        ii. Nature of landlord and business
        iii. Nature of tenant and business
        iv. Nature and location of the pub
        v. Nature of local market
        vi. Length of the term of the MRO tenancy
        vii. Any other relevant terms (such as the ability to vary or not).

61. I agree with the general thrust of [redacted] approach, but Parliament provided in the stocking requirement for an exception to the ability of free of tie tenants to do exactly as they please in relation to stocked products. There must therefore be a reasonable balance between the free of tie tenant's commercial freedom and the protection of the brewer POB's route to market.

62. The Claimant raised an argument concerning its ability to obtain bulk buy discounts and branded build projects, which the Respondent dismissed as inconsistent with purchasing from small brewers who will trade directly with pubs in smaller volumes, and would not be likely to offer such sponsorship as is offered by the mainstream brands. The freedom of the tenant to trade under an MRO tenancy is however inevitably to be restricted to a degree by a stocking requirement. What is important is that the stocking requirement is reasonable. I have not reached further conclusion on the suggested

implications for a lack of competition on pricing based on the limited evidence before me.

63. I do not accept the Claimant's argument that a stocking requirement would have an impact on the capital value of the lease. There was no expert evidence how it would affect capital values and rent, which would usually reflect the lease terms. In any event, even if there was such an impact, Parliament has provided for a stocking requirement and so the relevance of this argument is not clear.

64. The Respondent has proposed terms which comply with the definition of a stocking requirement (Revised Offer 1 and the cask stocking requirement in Revised Offer 2), and terms which do not comply with it (all those remaining). I need to consider whether the proposed stocking requirements in Revised Offer 1 and the cask stocking requirement in Revised Offer 2) are reasonable. I also need to consider whether all remaining proposed stocking obligations are reasonable (in case I am wrong that they do not meet the statutory definition of a stocking requirement and are not common).

Conclusions

Revised Offer 1 and the cask stocking requirement in Revised Offer 2

65. Though they meet the definition of a stocking requirement, these proposed terms require the tenant to increase the amount of landlord-brewed products which it is currently selling under the tie. At present, of the eight products dispensed, five (or 62.5%) meet the narrow definition of Landlord Brands, and the Claimant is not required to dispense any of that definition. Counting taps rather than brands, eight dispense products within the narrow definition of Landlord Brands (72.7%), and since there cannot be a percentage of a tap, a requirement for 75% of taps to dispense Landlord Brands requires a minimum of 9 taps to dispense Landlord Brands. This is an increase.

66. As the Claimant has not consistently stocked, or been obliged to stock, one cask product which comes within the narrow definition of a Landlord Brand, the requirement that he now do so is therefore also an increase.

67. I found in my March Award that the Respondent had failed to provide an explanation as to why it was reasonable to impose increased restrictions on products at the Pub bearing in mind the local market in which it operates, and the products which that market demands. The same criticism applies to these proposed increases. The policy aim of the stocking requirement is to *protect* the brewer POB's route to market, not to *increase* it. I have taken into account all of the circumstances of the case as discussed above in this award, and I find these proposed stocking requirements unreasonable.

68. There was insufficient reason put forward by the Respondent for seeking to impose "must stock" brands, and there was sufficient evidence that these were not right for the Pub now or over the duration of the lease.

Revised Offers 3 and 4, and Keg Stocking Requirement in Revised Offer 2 (Extended Definition of Landlord Brands)

69. These I have found are not stocking requirements. I am satisfied in any event that they are also unreasonable terms.

70. It was argued for the Respondent that the extended definition of Landlord Brands allows the Claimant greater flexibility to choose products within the Heineken portfolio to suit the pubs needs, including craft products available within the that portfolio. For example, in Revised Offer 2 the tenant will be permitted to change the two specified brands after the second anniversary of the commencement of the term, on the landlord's prior written consent (not to be unreasonably withheld or delayed). This, says the Respondent, permits flexibility should the demographic of the customer change significantly in the future.

71. Where a term is not within the statutory definition of a stocking requirement, or where it is not a reasonable term, it cannot be rendered compliant and reasonable by extending the definition in a way which manipulates the policy intention of protecting the brewer's route to market and using the term to protect (or increase) the non-brewing elements of the Respondent's business. Whilst it may be easier for the Claimant to comply with the requirement if the extended definition is used, this serves the Respondent's market position in a manner which has nothing to do with the fact that it is a brewer. It then places it at an unfair advantage over its regulated competitors. The extended definition of "Landlord Keg Products" found in the Revised Offers 2-4 (and the extended definition of "Landlord Cask Products" in Revised Offers 3 and 4) does not therefore render these proposed stocking requirements compliant.

72. There was insufficient reason put forward by the Respondent for seeking to impose "must stock" brands, and there was sufficient evidence that those specified were not right for the Pub at this stage.

Revised Offer 4 (alternative narrow definition of Landlord Keg Brands)

73. Eight of the current eleven taps amounts to a fixed requirement to offer for sale just the same amount of products meeting the narrow definition of Landlord Brands throughout the life of the lease that the tenant currently chooses, but is not obliged, to offer for sale under the tie. Thus the significant flexibility the tenant currently enjoys would be lost. Taking into account the evidence concerning the Pub, its trade and the local market, the length of the term and all other relevant circumstances I am satisfied that this is not reasonable, and presents an unacceptable risk to the business. The rationale for seeking to increase the stocking of Landlord Brand products if more taps were placed on the bar was not adequately explained and is rejected. I say more about that later in my conclusions as to the appropriate order.

Proposed Terms not in dispute

74. I would note for the sake of clarity that I have determined only the terms in dispute between the parties and no other matters in relation to stocking more generally. In particular, the dispute did not include matters relating to clause 3.3.2[16], which the Respondent included in their proposed stocking requirements in Schedule 4. This award does not imply that I am of the view that this clause is compliant:

    a. *Landlord Keg Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale.*

Decision and Jurisdiction in Making an Order

75. Ultimately, it is the quality, range and marketing of the Respondent's products which helps to ensure its route to market. Whilst this range can be relevant to the reasonableness of a stocking requirement, I observe that this particular POB has the ability to bring its products to market by other means. The stocking requirement offers reasonable protection for the route to market, balancing the all the circumstances including the business risk it presents, but does not offer an opportunity for artificial support to the brewer POB's trade against market forces by securing an increased or better route to market. It is matter of great concern that the proposal of a stocking requirement has led to this lengthy and costly litigation. The Respondent has served five successive proposals that were all non-compliant by virtue of containing proposed stocking requirements which were all overly commercially aggressive.

76. The Claimant, in the event of its success in these proceedings, seeks a determination from me as to the terms of the compliant stocking requirement to be within the revised response. However, the Respondent says my jurisdiction is only to order it to provide the Claimant with a further revised response. Whilst it would welcome my determination on the stocking requirement, it considers I have no statutory power to determine the precise terms of the MRO proposal, observing that there is no provision within the 2015 Act, the Pubs Code or the CIArb Rules which permits me to impose contractual terms upon the parties to an arbitration.

77. In a MRO dispute referred for arbitration[17] the PCA must "arbitrate the dispute or appoint another person to arbitrate the dispute"[18]. Regulation 33(2) empowers me to rule that the POB must provide a revised response to the TPT. A revised response is a response which includes a proposed tenancy

[16] And similarly worded terms at paragraphs 4.2.2 in relation to cask brands and 5.2.3 in relation to PPB Own Beer Brands and PPB Own Cider Brands

[17] Under regulation 33(2)

[18] Regulation 58 of the Pubs Code

which is MRO compliant[19]. The parties considered whether the extent of my power was to identify the compliance failures and order a revised response, or whether I could be more prescriptive and order the terms in which that revised response must be made.

78. I take the view that the reference to my powers in regulation 33(2) is not exhaustive. Its language is permissive, in that it does not restrict me in the scope of any ruling I may make as to the terms of the revised proposal. I must arbitrate the dispute, and that means that I should ensure that the Claimant obtains a compliant MRO proposal without the need to refer for further arbitration on the terms of the MRO lease. History indicates to me that the parties are unable to negotiate to an effective agreement, and therefore in this case I have determined that I should order the compliant terms on which the revised proposal must be made.

79. The Respondent has already made five non-compliant offers of a stocking requirement, in relation to which the Claimant has been successful in two arbitration awards on stocking requirements. The prospect of permitting the Respondent to try again and again, locking the Claimant into a cycle of litigation until the Respondent finally identifies a stocking requirement which is compliant is unconscionable. The Claimant's route to achieving a compliant MRO proposal should not be delayed by the Respondent's experimentation with the stocking requirement.

80. The delay in concluding compliant terms of an MRO agreement is potentially to the Respondent's advantage. It is a huge international brand with deep pockets. The financial burden of repeated litigation impacts on the tenant in a way it does not on the landlord. I am satisfied that I have the power, and indeed I ought, to bring this dispute to an end with an order which cannot result in further dispute between the parties as to what terms would be compliant in the revised proposal to be made pursuant to regulation 33(2). The parties have had more than sufficient opportunity to produce evidence to enable me to do so.

Conclusion as to Order

81. The Respondent is entitled to reasonable protection for its route to market, and current sales show a demand for Heineken products. Overall, I found more merit in the Claimant's evidence as to the need to respond to its customer base's interest in craft and local products than the Respondent's case on the point. [redacted] sought to persuade me that in the circumstances and on the facts of the case I should order the terms of a stocking requirement specifying a minimum number of products and not taps, as the rationale is to guarantee a route to market for products, and not to guarantee a volume of sale. Given that five products are currently sold, in order to accommodate future risks [redacted] submitted that the stocking requirement should be set at three products. [redacted] argued that the extent of exposure in offering a product for sale was part and parcel of the route to

[19] See regulation 33(3) and 29(3)(a) to (c)

market to be protected. He did not suggest to me what order I should make if I found all of the proposed stocking requirements to be non-compliant.

82. The Respondent has consistently proposed stocking requirements expressed as fixed minimum percentages of taps or number of taps / hand-pulls over the remaining term of the lease (reference in one draft of a proposed stocking requirement referring to numbers of products was said by the Respondent to be an error). I do not consider that it would be appropriate for me to stray into the unknown and consider any much more creative approaches to drafting which have not been the subject of evidence and submission from the parties.

83. Overall the evidential dispute persuaded me that it was necessary to exercise significant restraint in stipulating such fixed obligations on the Claimant over the term of this lease to ensure that any stocking requirement is (and remains) reasonable. I do not consider it reasonable, given the circumstances I have discussed above, simply to undercut slightly the current trade in landlord-brewed products. I observed after the March Award (in a case management conference with the parties) that the Respondent had not considered "future-proofing" the lease to take account of what would happen if it sold the Pub to another pub-owing business. The present discussion suggests further need for the Respondent to consider "future-proofing" the stocking requirement which it has not addressed. However, for the reasons given I do not consider it is appropriate to give it a further chance to do so in respect of this Pub.

84. Taking into account the particular facts of this case and all of the considerations above touching on the issue of reasonableness, including the need for restraint given the length of the lease, I find that I accept the submission of [redacted] that a reasonable stocking requirement would oblige the Claimant to stock and offer for sale three of the Respondent's own-brewed keg products. This provides a reasonable degree of flex given the number of such products currently selling. However, it is reasonable to order also that these products are dispensed from a minimum of four taps to control minimum exposure of the Respondent's products. A specified number of taps provides more clarity than a percentage.

85. The clear message the Respondent advanced in its case concerning the trading future of this Pub was that it had reached its expected potential and that there should be no change to its offer. The Respondent observed that around 500 brewers' barrels of beer per year are sold at the premises and that not many pubs sell this volume of beer in the current climate. The logic that it should enjoy the benefit of an increased stocking requirement proportionate to the increase in taps or hand-pulls was not well supported, and the Respondent has not shown why it would be reasonable, on an alternate tap basis or at all, for it to enjoy a share of any improved success for the business as a result of the changes Mr Helliwell explained. I consider it reasonable therefore not to order any ratcheting up of the stocking requirement in the event that further taps area added to the bar.

86. Furthermore, the Respondent did not provide sufficient justification for specifying any "must stock" products, or for its choice of those specified

products within the lease (which Mr Helliwell said were some of his worst sellers). Accordingly, on the available evidence I find it is reasonable not to specify any "must stock" products.

87. On the evidence I find it is reasonable not to impose a stocking requirement in relation to cask products.

Costs

88. Issues as to costs of the arbitration are reserved pending the parties' opportunity to make submissions as to costs.

Operative Provisions

89. In light of the above findings:
    a. The Second Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant;
    b. Any stocking requirement in respect of keg products in that revised response must specify no greater restriction on the Claimant than that it must stock and offer for sale not less than three keg products brewed by the Respondent or its group undertakings from not less than four keg taps;
    c. There is to be no stocking requirement in respect of cask products;
    d. The narrow definition of Landlord Brands must be used in any stocking requirement;
    e. The revised response must be provided to the Claimant within 21 days of the date of this Award;
    f. Jurisdiction is reserved to the DPCA to determine any dispute that may arise in connection with the full response;
    g. Costs are reserved.

Arbitrator's Signature…… …

Fiona Dickie, Deputy Pubs Code Adjudicator

Date Award made 3 December 2018

Claimant's Ref: ARB/103756/HELLIWELL

Respondent's Ref: ARB/103756/HELLIWELL

Appendix A - Procedure

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 and paragraph 5 of Schedule 1, Part 1 of the Small Business, Enterprise and Employment Act 2015.

2. This is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996. The statutory framework governing this arbitration, other than the 1996 Act, is contained in Part 4 of the 2015 Act; the Pubs Code; and, The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016**.** The applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules. Where a conflict arises between the Pubs Code statutory framework (being the 2015 Act, the Pubs Code and/or the Fees Regulations) and either the CIArb Rules or the 1996 Act, the Pubs Code statutory framework shall prevail.

Appendix B – 3 April 2018 Stocking Requirement REVISED OFFER 1

SCHEDULE 4: STOCKING REQUIREMENTS

1. Preamble

This schedule 4 sets out the obligations of the parties in relation to products to be stocked and offered for sale at the Property taking into account existing applicable legislation (as amended and updated from time to time) which governs your pub owning and operating arrangements. This schedule does not create or imply any obligation to purchase Landlord brands from the Landlord alone, Landlord products will include any products which are produced by the Landlord or any of its group companies. The Landlord may waive or vary the stocking requirement provisions at any time to the effect that they will then be less onerous from a Tenant viewpoint and the Tenant will co-operate in executing and entering into any documentation to give effect to such variations or waivers.

2. Definitions

In this schedule:

"Beer" means beer of all types, denominations or descriptions (including but not limited to ales, lagers porters and stouts) whether packaged or in bulk, including for the avoidance of doubt any low or 0% ABV products which are branded as beer;

"Cider" means apple ciders pear cider, perry or other fruit cider of all types, denominations or descriptions whether packaged or in bulk;

"Cask" means cask conditioned Beer or a container of the same;

"Cask Brands" means all Beers which are sold and dispensed in draught from a Cask;

"Control" means in relation to a Landlord Cask Brewery either where the Landlord or a Group Undertaking of the Landlord holds a majority of the voting rights or has the right to exercise a dominant influence;

"Group Undertaking" has the meaning given by s. 1161 of the Companies Act 2006;

"Keg" means a brewery conditioned Beer or Cider or a container of the same;

"Keg Brands" means all Beers or Ciders which are sold and dispensed from a Keg;

"Landlord Cask Brands" means any brands or denominations of Cask Brands (or variants thereof) which are manufactured by a Landlord Cask Brewery;

"Landlord Cask Brewery" means any brewery which is either owned by the Landlord or a Group Undertaking of the Landlord or in which the Landlord or a Group Undertaking of the Landlord has Control;

"Landlord Keg Brands" means any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Company of the Landlord (including Heineken UK Limited) from time to time during the Term;

“PPB Own Beer Brands" means packaged Beer brands owned or exclusively licensed by the Landlord or a Group Undertaking of the Landlord;

"PPB Own Cider Brands" means packaged Cider brands owned or exclusively licensed by the Landlord or a Group Undertaking of the Landlord;

"Premium Packaged Beers” means all and any premium packaged beers which are not PPB Own Beer Brands;

"Premium Packaged Ciders" means all and any premium packaged ciders which are not PPB Own Cider Brands;

"Products" means together:

(a) Keg Brands;

(b) Cask Brands;

(c) PPB Own Beer Brands;

(d) PPB own Cider Brands;

(e) Premium Packaged Beers; and

(f) Premium Packaged Ciders.

"Shelf Space" means the area measured in square centimetres of any fridge or other sale display facility situated at the Property which is used to display and make available for sale any PPB Own Beer Brands, PPB Own Cider Brands or Premium Packaged Beers;

3. Keg Brands

The Tenant may in its absolute discretion stock and offer for sale any Keg Brands which it deems appropriate from time to time throughout the Term provided that

3.1 at least seventy five percent (75%) of the Keg taps or other items of equipment from which Keg Brands are dispensed from time to time shall dispense Landlord Keg Brands at all times throughout the Term; and

3.2 each of the following Landlord Keg Brands shall be included in the Landlord Keg Brands which are made available for sale at all times throughout the Term:

3.2.1 Birra Moretti;

3.2.2 Kronenbourg 1664;

3.2.3 Heineken;

3.2.4 Amstel; and

3.2.5 Symonds Founders Reserve.

3.3 In effecting compliance with its obligations in this clause 3, the Tenant shall ensure

3.3.1 equal prominence with other Keg Brands is provided to Landlord Keg Brands on display for sale to customers at all times throughout the Term;

3.3.2 Landlord Keg Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale.

4. Cask Brands

4.1 The Tenant may in its absolute discretion stock and offer for sale any Cask Brands which it deems appropriate provided that at least one Cask handpull or other item of equipment from which Cask Brands are dispensed from time to time shall dispense a Landlord Cask Brand at all times throughout the Term;

4.2 In effecting compliance with its obligations in this clause 4, the Tenant shall ensure

4.2.1 equal prominence with other Cask Brands is provided to the handpull dispensing the Landlord Cask Brand on display for sale to customers at all times throughout the Term;

4.2.2 Landlord Cask Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale.

5. PPB Brands

5.1 The Tenant shall stock and offer for sale each of the following at all times during the Term:

5.1.1 two or more PPB Own Beer Brands; and

5.1.2 two or more PPB Own Cider Brands.

5.2 In effecting compliance with its obligations in clause 5.1, the Tenant shall

5.2.1 procure that not less than fifty percent of the Shelf Space is used to make available for sale either PPB Own Beer Brands or PPB Own Cider Brands;

5.2.2 equal prominence is provided to PPB Own Beer Brands and PPB Own Cider Brands such that at least fifty percent of the Shelf Space immediately on display to customers at any time gives visibility to such brands;

5.2.3 PPB Own Beer Brands and PPB Own Cider Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale

5.3 Subject to clauses 5.1 and 5.2, the Tenant may stock and offer for sale any Premium Packaged Beers or Premium Packaged Ciders which it deems appropriate at its own discretion.

6. Miscellaneous

6.1 Nothing in this schedule 4 shall impose any obligation on the Tenant to purchase any Products which are displayed and offered for sale at the Property from the Landlord or any of its Group Companies.

6.2 Each provision of this schedule 4 shall, unless the context otherwise requires, be read and construed independently of every other provision

of this schedule 4. If any provision is held to be invalid or unenforceable for any reason then the remaining provisions of this schedule 4 shall, to the extent that they are not held to be invalid, remain in full force and effect. If any provision of this schedule 4 is held to be void or unenforceable but would, if some pall thereof was deleted or amended, be valid and enforceable, then such provision shall apply with such deletion or amendment as may be necessary to make it valid and enforceable.

Appendix C – 29 May 2018 Stocking Requirement – REVISED OFFER 2

SCHEDULE 4: STOCKING REQUIREMENTS

1. Preamble

1.1 This schedule 4 sets out the obligations of the parties in relation to products to be stocked and offered for sale at the Property taking into account existing applicable legislation (as amended and updated from time to time) which governs your pub owning and operating arrangements. This schedule does not create or imply any obligation to purchase Landlord brands from the Landlord alone. Landlord products will include any products which ate produced by the Landlord or any of its group companies. The Landlord may waive or vary the stocking requirement provisions at any time to the effect that they will then be less onerous from a Tenant viewpoint and the Tenant will co-operate in executing and entering into any documentation to give effect to such variations or waivers.

1.2 The provisions of this schedule 4 shall apply only for as long as Red Star Pub Company (WRIII) Limited (CRN04089947) or a company which is a Group Undertaking of that entity is the Landlord and shall cease to apply on any Disposal of the Property.

2. Definitions

In this schedule:

"Beer" means beer of all types, denominations or descriptions (including but not limited to ales, lagers porters and stouts) whether packaged or in bulk, including for the avoidance of doubt any low or 0% ABV products which are branded as beer;

"Cider" means apple ciders pear cider, perry or other fruit cider of all types, denominations or descriptions whether packaged or in bulk;

"Cask" means cask conditioned Beer or a container of the same;

"Cask Brands" means all Beers which are sold and dispensed in draught from a Cask;

"Control" means in relation to a Landlord Cask Brewery either where the Landlord or a Group Undertaking of the Landlord holds a majority of the voting rights or has the right to exercise a dominant influence;

"Disposal" means the sale of the reversionary interest in the Lease or the grant of a lease for term of more than twenty one years by the Landlord to an entity other than a Group Undertaking;

"Group Undertaking" has the meaning given by s. 1161 of the Companies Act 2006;

"Keg" means a brewery conditioned Beer or Cider or a container of the same;

"Keg Brands" means all Beers or Ciders which are sold and dispensed from a Keg;

"Landlord Cask Brands" means any brands or denominations of Cask Brands (or variants thereof) which are manufactured by a Landlord Cask Brewery;

"Landlord Cask Brewery" means any brewery which is either owned by the Landlord or a Group Undertaking of the Landlord or in which the Landlord or a Group Undertaking of the Landlord has Control;

"Landlord Keg Brands" means any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Undertaking of the Landlord (including Heineken UK Limited and any company or other trading entity in which either the Landlord or a Group Undertaking has a shareholding interest or has entered into any joint venture or other partnership agreement) from time to time during the Term;

"PPB Own Beer Brands" means packaged Beer brands owned or exclusively licensed by the Landlord or a Group Undertaking of the Landlord;

"PPB Own Cider Brands" means packaged Cider brands owned or exclusively licensed by the Landlord or a Group Undertaking of the Landlord;

"Premium Packaged Beers" means all and any premium packaged beers which are not PPB Own Beer Brands;

"Premium Packaged Ciders" means all and any premium packaged ciders which are not PPB Own Cider Brands;

"Products" means together:

(a) Keg Brands;

(b) Cask Brands;

(c) PPB Own Beer Brands;

(d) PPB own Cider Brands;

(e) Premium Packaged Beers; and

(f) Premium Packaged Ciders.

"Shelf Space" means the area measured in square centimetres of any fridge or other sale display facility situated at the Property which is used to display and make available for sale any PPB Own Beer Brands, PPB Own Cider Brands or Premium Packaged Beers;

3. Keg Brands

The Tenant may in its absolute discretion stock and offer for sale any Keg Brands which it deems appropriate from time to time throughout the Term provided that

3.1 at least seventy five percent (75%) of the Keg taps or other items of equipment from which Keg Brands are dispensed from time to time shall dispense Landlord Keg Brands at all times throughout the Term; and

3.2 each of the following Landlord Keg Brands shall be included in the Landlord Keg Brands which are made available for sale at all times throughout the Term:

3.2.1 Birra Moretti;

3.2.2 Amstel.

3.3 the Tenant shall be permitted to change the Landlord Keg Brands specified in clause 3.2 at any time after the second anniversary of the Term Commencement Date subject to obtaining the prior written consent of the Landlord (not to be unreasonably withheld or delayed). The Tenant may apply for consent under this Clause 3.2 prior to the second anniversary of the Term Commencement Date but any consent granted shall not be effective until that date.

3.4 In effecting compliance with its obligations in this clause 3, the Tenant shall ensure

3.4.1 equal prominence with other Keg Brands is provided to Landlord Keg Brands on display for sale to customers at all times throughout the Term;

3.4.2 Landlord Keg Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the

Property and being reasonably commensurate with the pricing of other Products offered for sale.

4. Cask Brands

4.1 The Tenant may in its absolute discretion stock and offer for sale any Cask Brands which it deems appropriate provided that at least one Cask handpull or other item of equipment from which Cask Brands are dispensed from time to time shall dispense a Landlord Cask Brand at all times throughout the Term;

4.2 In effecting compliance with its obligations in this clause 4, the Tenant shall ensure

4.2.1 equal prominence with other Cask Brands is provided to the handpull dispensing the Landlord Cask Brand on display for sale to customers at all times throughout the Term;

4.2.2 Landlord Cask Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale.

5. PPB Brands

5.1 The Tenant shall stock and offer for sale each of the following at all times during the Term:

5.1.1 two or more PPB Own Beer Brands; and

5.1.2 two or more PPB Own Cider Brands.

5.2 In effecting compliance with its obligations in clause 5.1, the Tenant shall

5.2.1 procure that not less than fifty percent of the Shelf Space is used to make available for sale either PPB Own Beer Brands or PPB Own Cider Brands;

5.2.2 equal prominence is provided to PPB Own Beer Brands and PPB Own Cider Brands such that at least fifty percent of the Shelf Space immediately on display to customers at any time gives visibility to such brands;

5.2.3 PPB Own Beer Brands and PPB Own Cider Brands are offered for sale at a reasonable market price taking into account the location

and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale

5.3 Subject to clauses Error! Reference source not found. (sic) and Error! Reference source not found. (sic), the Tenant may stock and offer for sale any Premium Packaged Beers or Premium Packaged Ciders which it deems appropriate at its own discretion.

6. Miscellaneous

6.1 Nothing in this schedule 4 shall impose any obligation on the Tenant to purchase any Products which are displayed and offered for sale at the Property from the Landlord or any of its Group Companies.

6.2 Each provision of this schedule 4 shall, unless the context otherwise requires, be read and construed independently of every other provision of this schedule 4. If any provision is held to be invalid or unenforceable for any reason then the remaining provisions of this schedule 4 shall, to the extent that they are not held to be invalid, remain in full force and effect. If any provision of this schedule 4 is held to be void or unenforceable but would, if some pall thereof was deleted or amended, be valid and enforceable, then such provision shall apply with such deletion or amendment as may be necessary to make it valid and enforceable."

Appendix D – Further re-revised Stocking Requirement of 27 July 2018 – REVISED OFFER 3

From: [redacted]@dlapiper.com>
Sent: 27 July 2018 16:12
To: Laura Robbetts <Laura.Robbetts@clarkewillmott.com>
Cc: Referrals <referrals@pubscodeadjudicator.gov.uk>; [redacted]@dlapiper.com>; [redacted]@dlapiper.com>
Subject: ARB/WH/17/HELLIWELL - The Woodman [redacted]

Dear Laura

Further to our conversation following the hearing yesterday, the Respondents are willing to make a further offer to bring these matters to a conclusion.

The proposal is as follows:

- To amend paragraph 3.1 of Schedule 4 to provide that at least **seventy per cent (70%)** of the Keg taps or other items of equipment from which Keg Brands are dispensed from time to time shall dispense Landlord Keg Brands at all times throughout the term;
- The extended definition of Landlord Keg Brands as set out in the Further Amended Stocking Requirement which was sent to you on 29 May 2018 is to be maintained;
- To delete paragraph 3.2 of schedule 4 relating to the obligation to stock Amstel and Birra Moretti. As a result paragraph 3.3 of schedule 4 would also be deleted as this relates to the ability to change the Landlord Keg Brands named at paragraph 3.2.
- To similarly extend the definition of Landlord Cask Brands to include any brands or denominations of Cask Brands which are manufactured by any company or other trading entity in which either the Landlord or a Group Undertaking has a shareholding interest or has entered into any joint venture or other partnership agreement from time to time during the Term.

This offer remains open until 5 pm on Tuesday 31 July. You will note that this is an open offer and has been copied to the PCA.

Kind regards,

[redacted]

[redacted]

[redacted]

Appendix E – Further re-revised Stocking Requirement of 20 August 2018 – REVISED OFFER 4

20 August 2018

Dear Sirs

MR TOM HELLIWELL AND STAR PUBS AND BARS THE WOODMAN, 414 ARCHWAY ROAD, LONDON N6 SUA STOCKING REQUIREMENT SETTLEMENT OFFER

Further to the hearing that took place on Thursday 26 July, our client has instructed us to make the following counter-offer to settle in relation to paragraph 3 (Keg Brands) of Schedule 4:

1. The wider definition of "Landlord Keg Brands" continues to apply, as set out in our e-mail of 29 May 2018 timed at 11:34;

2. From the evidence heard on 26 July, we understand that the Woodman bar currently hosts I l taps. Our client would accept a minimum of 8 of the I l existing taps on the bar to be unnamed Landlord Keg Brands, such that your client has the right to choose, and change if required and without Landlord consent, which Landlord Keg Brands are offered;

3. From the evidence heard on 26 July, we understand that the Woodman bar can host a maximum of 16 taps. Our client would be willing to offer a proposal whereby in terms of future taps installed to facilitate your client's growth of the business, the following allocation would be adopted:

    - Tap 12: Your client would be entitled to offer a non-Landlord Keg Brand of his choosing;

    - Tap 13: Your client would be obliged to offer a Landlord Keg Brand of his choosing;

    - Tap 14: Your client would be entitled to offer a non-Landlord Keg Brand of his choosing;

    - Tap 15: Your client would be obliged to offer a Landlord Keg Brand of his choosing; and

    - Tap 16: Your client would be entitled to offer a non-Landlord Keg Brand of his choosing.

    In this scenario, if your client was to install the maximum sixteen taps then ten (effectively 62.5% of the total) of the taps would require to be Landlord Keg Brands.

4. Although the present stated maximum number of taps for which the bar has capacity is 16, should this capacity increase in the future, any additional taps

shall follow the same pattern as above: so that if a 17th tap were added, your client would be obliged to offer a Landlord Keg Brand of its choosing, and if an 18th tap were added, your client would be entitled to offer a non-Landlord Keg Brand of its choosing, and so on.

For the avoidance of any doubt we remain of the view that this iteration of our clients' stocking requirement, inclusive of the wider definition of "Landlord Keg Brands", is within the statutory definition of a stocking requirement, If for any reason the DPCA does not accept this position, our client would offer the same proposal set out above on the narrower definition of Landlord Keg Brands offered prior to 29 May 2018.

We hope that your client appreciates that this offer is a genuine offer made in an attempt to negotiate and which appreciates your client's willingness in principle to place more Landlord Keg Brands within the inventory of the bar.

We should be grateful if you would indicate whether your client is prepared to accept this offer. This offer is copied to the office of the Pubs Code Adjudicator.

Yours faithfully

DLA PIPER UK LLP