The outcome of an arbitration is based on its own facts and the evidence produced in the case and is not binding in other cases where the landlord and tenant are not the same. The Pubs Code Adjudicator does expect a regulated pub-owning business to consider its understanding of the law in light of each award that makes a finding on the interpretation of the statutory framework and to adjust its behaviour towards tenants as appropriate. The publication of an arbitration award or an award summary does not mean the Pubs Code Adjudicator endorses the decision and it does not form legal advice about any issue.

**IN THE MATTER OF A DISPUTE UNDER THE PUBS CODE REGULATIONS 2016**
**&**
**THE ARBITRATION ACT 1996**
**BETWEEN**

**(TENANT & CLAIMANT)**
**AND**
**EI GROUP PLC:**
**(PUB OWNING BUSINESS & RESPONDENT)**
**IN RESPECT OF**
**AN MRO COMPLIANT DISPUTE**
**ON**
**PUBLIC HOUSE PROPERTY**
**AT**

# AWARD NO 1 (AMENDED)

**BY**

**PUB CODE ARBITRATOR**

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**APPENDICES**

GFC1: Statement of Agreed Facts – Excluding appendices

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**WHEREAS**

# 1 Recitals

1.1 The Deputy Pubs Code Adjudicator in a letter dated 25th November 2019 appointed me, ████████████████████ to act as the Arbitrator in the above MRO lease dispute on Public House premises known as ██ ████████████████████████████ (The Pub)

1.2 This dispute falls under the provisions of the Small Business, Enterprise and Employment Act 2015 (SBE&EAct15), The Pubs Code etc. Regulations 2016 (PCR16), the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 (PCFR16) and the Arbitration Act 1996 (AA96).

1.3 The PCA has used its power under section 58(2)(b) of the PCR16 to appoint me as the arbitrator.

1.4 ████████ the "Tied Pub Tenants" (TPT) of address, ██████ ████████████████████, hereinafter referred to as the Claimant. The EI Group Plc are the Pub Owning Business (POB) of 3 Monkspath Hall Road, Solihull, West Midlands, BS90 4SJ, hereinafter referred to as the Respondent.

1.5 The Claimant is represented by Mr C. Wright, the Principal of the Pubs Advisory Service of address Angels View, Scotsford Road, Heathfield East Sussex TN21 8UD

1.6 The Respondent is Represented by Mr R, Hastie a solicitor and Partner of Gosschalks, of address Queens Gardens, Kingston Upon Hull HU1 3DZ.

1.7 I understand and have awarded on the basis that both representatives are acting in the capacity of Advocate.

1.8 It is agreed that on 20th August 2016 the Claimants served on the Respondent a valid MRO notice in respect of the subject Pub under the provisions of Regulation 23 of the PCR16.

1.9 This is a statutory arbitration falling under the provisions of section 94 of the AA96 and the framework as set out in Part 4 of the SBE&EAct15 coupled with the requirements of the PCR16 and PCFR16 and with the general procedures to be adopted in managing the dispute being those of the Chartered Institute of

Arbitrators Rules. If any conflict arises under these Acts, Regulations and Rules the provisions of the SBE&EAct15, the PCR16 and PCFR16 are to prevail.

1.10 The Office of the Pubs Code Adjudicator in a letter to me dated 6th November 2019 referred to their earlier letter to the parties in this dispute, dated 22nd October which set out case management matters and enclosed Directions of the Pubs Code Adjudicator, dated 6th November 2019. This Order of the PCA has been superseded by the Order for Directions issued by this Arbitral Tribunal, referred to below.

1.11 I issued my Order for Directions No1 dated 20th December 2019 but by agreement of the parties issued my Order for Directions No1 (Revised) of the same date and which confirmed the issues to be considered by me as follows:

1.11.1 The Claimant alleges that some of the terms contained in the Market Rent Only (MRO) proposal may be regarded as unreasonable under Regulation 31 (2) c. These terms include (but are not limited to):

1.11.1.1 A new agreement gives rise to SDLT, HMLR fees and administrative costs
1.11.1.2 Quarterly rent
1.11.1.3 Rent valuer setting the rent as expert rather than arbitrator.
1.11.1.4 Alienation provisions
1.11.1.5 Statutory compliance clauses widened
1.11.1.6 Dilapidations, credit checks, business plans, and compliance – due before MRO begins

1.11.2 The Claimant proposes that the vehicle for delivering the option should be a Deed of Variation and not a new agreement. The Claimant argues this, would "negate risks and dilapidations etc", be a less expensive option, and could be completed within a day.

1.12 My Order for Directions No1 (Revised) noted the following:

1.12.1 The Claimant's Statement of Claim is set out in a "Scott Schedule" dated 19th November 2019 and the Respondent's Defence is dated 3rd December 2019.

1.12.2 I issued my Directions as instructed without a preliminary meeting but following correspondence with the party's representatives and the receipt of the Claimants Statement of Claim and the Respondent's Defence.

1.12.3 The proceedings are in accordance with the AA96, The PCR16, PCFR16 and the CIArb Rules, other than recorded in this Order for Directions.

1.12.4 The Arbitration shall be on a document only basis by means of written representations with liberty for either party to apply for a hearing or unless I direct to the contrary.

1.13 The Claimant has declined the opportunity to file a Response but did respond to various questions put by my email dated 30th January 2020 to clarify the basis of the statement of claim and on the same date confirmed that there was nothing further to add.

1.14 As a result of these requirements a Statement of Agreed Facts (SOAF) was prepared jointly between the parties and issued to me as recorded below in section 2 of this Award and where I draw attention to a some issues arising as to my instructions and understanding of the dispute before me.

1.15 Mr Hastie has provided to me with an undated but signed Report of Mr AP Bell who is an employee of Gosschalks and heads up the Commercial Property Pub Team. Although not stated, I have taken the status of Mr Bell's evidence as that of an advocate and not an expert witness but acknowledge there are areas of his testimony which he puts forward as matters of fact

1.16 Mr Hastie has also submitted the Report of Mr S Gallyot, again undated but signed. Mr Gallyot is the Group Compliance Director of Ei Group who is a chartered surveyor. However, he has not made any declaration as to his status as either an expert witness or advocate as required by the Professional Standards requirements as issued by RICS for chartered surveyors. I have therefore taken his report as reflecting the approach of Ei Group to the MRO process as matters of fact as to how this POB operates in the market.

1.17 The report of [redacted] [redacted] dated 12th June 2019 is a little more difficult to assess. [redacted] is a Member of the Royal Institution of Chartered Surveyors and [redacted] instructions to *"consider what would be the main consistent terms of a free of tie (FOT) lease which would be regarded as common, that would be both attractive to investors and be acceptable to any reasonably efficient tenant, but also protect Ei's value".*

1.18

1.19 report is on the area of which terms are common or uncommon on the issues of repairing and insuring terms; quarterly and monthly rent payments and deposit levels; permitted use of A3/A4; RPI increases and cyclical upward only rent review.

1.20

1.21 report has clearly been prepared on a generic basis and not with this case in mind. Although the letter of instruction was missing , I am satisfied that has not addressed the issues in this case in terms of the arguments promoted by Mr Hastie, although Mr Hastie has relied on the advice of in considering what are common terms and dealing with the specific issues raised in this dispute.

1.22 I therefore find that as an advocate, not that of an independent expert witness does not consider if any terms would be unfair to either party against the facts of this case or given any consideration to the arguments promoted by Mr Wright and the Claimant. I have therefore attached limited weight to this evidence but note advocated about common and uncommon terms.

1.23 I confirm I am in receipt of the following documentation which I regard as either helpful background to assist in my understanding of the case or as relevant to the dispute currently before this arbitral Tribunal:

1. Letter from Ei Group dated 13th September 2019 and signed by Mr N Rowland-Hill the Business Development Manager of Ei Group plc issued as "NOTICE" under regulation 29(3) of the PCR16 confirming it as the "Full Response" to the MRO "NOTICE" served by the Claimant and including:

   i. FOT Valuation Proposal dated 06.09.19

ii. Provisional Completion Statement dated 13.09.19
iii. Market Rent Only Free of Tie Lease for the [redacted]
iv. Benefits of a Tied Pub Partnership prepared by Ei Group
v. Implications of choosing an MRO FOT lease by Ei Group
vi. Credit Check Consent Form prepared by Ei Group
vii. Forecast Maintainable P&L proforma prepared by Ei Group
viii. Statutory Compliance document prepared by Ei Group

2. Lease relating to the [redacted] between [redacted] and [redacted] and [redacted]
3. Deed of Variation relating to the [redacted] between [redacted] and [redacted] and [redacted] and [redacted]
4. Appointment letter from the PCA to the Arbitrator dated 25th November 2019 enclosing:

   i. a lease dated [redacted] but not signed or executed prepared by [redacted] in respect of the [redacted]
   ii. the Claimants case in the form of a Scott schedule signed by Mr C Wright and dated 19th November 2019 (as referred to below)
   iii. Final Directions No1 in respect of the subject property by Mr P Newby the PCA dated 6th November 2019
5. Order For Directions No 1 issued by me as the appointed arbitrator dated 20th December 2019 and subsequently substituted by a "Revised" Order of the same date by agreement of the parties.
6. Statement of Claim submitted by Mr C Wright of the Pubs Advisory Service on behalf of the Claimant in the form of a Scott Schedule, signed and dated 19th November 2019.
7. Statement of Defence submitted by Mr RD Hastie a Partner of Gosschalks solicitors on behalf of the Respondent, signed and dated 3rd December 2019
8. Corrected Award of the Deputy Pubs Code Adjudicator Ms Fiona Dickie dated 9th November 2018
9. Reports in support of the Respondent from the following individuals:
   i. Mr AP Bell of Gosschalks
   ii. Mr S Gallyot of Ei Group
   iii. [redacted]

10. Statement of Agreed Facts document unsigned and undated but agreed between the parties in email correspondence.
11. Various correspondence between Mr Wright & Mr Hastie.

1.24 The issues in dispute were subsequently redefined in the Statement of Agreed Facts as attached at Appendix 1 of this Award and are as follows:

1. Whether the MRO tenancy itself must set out all of the terms or whether terms, such as the rent offered, can be contained in other parts of the full response?
2. Whether the words "subject to contract" should be applied to the full response?
3. Whether the length of term offered (to expiry of existing lease) complies with R.30(2)?
4. Is the Respondent allowed to call the MRO tenancy sent with the full response an MRO lease?
5. Is the sending of a new lease, rather than a clause by clause DOV, unreasonable because of the relative costs of each approach?
6. Does the legislation require the provision of DOV which only changes the terms necessary to remove the tie and any uncommon clauses, or can the landlord include reasonable commercial FOT lease terms?
7. Has the Respondent explained their reasons for sending a new lease sufficiently?

1.25 Points 2 to 4 appear to reflect areas where the parties are agreed. However, point 2 simply refers to the fact that the Claimant is a TPT and the Respondent is a POB under the Code and therefore requires no agreement. It is common ground that a valid request for an MRO tenancy has been made. What is not clear is the extent to which points 4 to 8 is agreed as the Claimant, when invited to complete his response to the Respondent's Defence refused to complete the Claimant's Reply column on the grounds that Mr Wright for the Claimant had nothing further to add.

1.26 In the circumstances I have drafted this award to respond to the list of issues set out in the SOAF at points a. to g. inclusive (numbered Issues 1 to 7 below) and in the Scott Schedule, attached at appendix GFC2, I have completed my determination on each point as requested by the parties. It has been pointed out to me by Mr Hastie that various issues that were in dispute have been agreed and therefore the Scott Schedule was for my assistance but given the response of Mr Wright that he did not wish to confirm in the Scott Schedule which matters are

agreed and not agreed I have determined that the completed Scott Schedule should be attached to this Award and read as part of it. However, if there is any discrepancy or inconsistency between the wording of this Award and the Scott Schedule attached at Appendix GFC2, the wording of this Award is to prevail.

1.27 I confirm that I have read and considered all the evidence presented to me including the SOAF, the representations of the advocate representatives for both parties to the dispute, the reports as referred to herein for the Respondent and all other documents provided to me, in so far as they are relevant to this Arbitral Tribunal's jurisdiction.

1.28 I am required to provide a Reasoned Award in accordance with the Arbitration Act 1996.

1.29 The language and law of this arbitration is English and the seat of this arbitration is England and Wales.

1.30 Following the issue of this award on 17th February 2020 the Respondent, in a letter addressed to me as the arbitrator dated 26th February identified errors relating to the PCR16 sections appropriate for the referral and the reference to [redacted] which should be [redacted]. I have corrected these clerical errors under the provisions of section 57 of the Arbitration Act 1996 within the required 28-day timescale and this amended award dated 20th March therefore replaces that dated 17th February 2020.

1.31 The Respondent requested me to consider claimed errors in respect of the issue of whether the tenancy should be exercised by a Deed of Variation or New lease. I have reviewed my award and reasoning and do not accept there was any error but that my award correctly reflects my determination on this issue.

1.32 The Respondent also put to me that I had not determined if an express obligation to serve a revised MRO tenancy with in a specified time which is correct but that this was not an issue put to me for determination and that had I made such a decision this would have resulted in me exceeding my jurisdiction/instructions on the issues arising between the parties in this dispute.

## 2 Statement of Agreed Facts

2.1 The Statement of Agreed Facts (SOAF) issued to me is undated and unsigned but the email correspondence between Mr Wright for the Claimant and Mr Hastie for the Respondent confirms that this is an agreed document.

2.2 The SOAF without Appendices, is attached at Appendix GFC1.

2.3 I have relied upon the contents of the SOAF as being accurate and from which I have agreed not to resile. Where there has been a difference relating to matters of fact within the parties' representations, I have taken the information within the SOAF as being the correct position and confirmed the circumstances within the Award.

2.4 I have given a further explanation of the contents of the SOAF above and which I will not repeat here.

## 3 The Issues

3.1 Having considered the issues in this dispute I now find and determine on each one as follows:

**Issue 1:**

**Whether the MRO tenancy itself must set out all of the terms or whether terms, such as the rent offered, can be contained in other parts of the full response?**

**Claimants case**

3.2 Mr Wright's advises that the full response as set out under cover of the Respondents letter dated 13th September 2019 did not satisfy the requirements of Regulation 29(3)(b) of the PCR16 as it was not MRO-compliant within the meaning of S.43(4) of the SBEEA 2015.

**Respondents case**

3.3 Mr Hastie advises that the full response letter dated 13th September 2019 enclosed a draft lease setting out all the purposed terms save for the rent. The rent was identified in the separate P&L calculation which accompanied the full response.

Therefore, the offer of an MRO tenancy as set out in the full response was capable of acceptance or rejection by the claimant.

**Arbitrators Decision**

3.4 Regulation 29(3)(b) of the PCR16 does confirm that the POB must send the tenant a proposed tenancy which is MRO-compliant. Regulation 30(1)(c) identifies where the POB sends a proposed tenancy to the tenant as part of the full response. Simply because the proposed tenancy is not MRO-compliant does not mean that the POB has failed to serve a "full response". A "full response" is not the same as an MRO-compliant tenancy

3.5 The full response letter with enclosures dated 13th September 2019 includes several headings covering the issues of: the draft MRO tenancy; rent; repairs/statutory compliance; next steps; advice and contact. The letter identifies the attachments as follows:

1. MRO tenancy
2. Free of tie rent proposal
3. Provisional completion statement
4. Features of the tie brochure
5. Implication of choosing to exercise MRO
6. A credit check consent form
7. Forecast maintainable P&L
8. Statutory requirement schedule

3.6 I am satisfied that the full response letter dated 13th September 2019 together with the attachments includes all the terms necessary for the tenant to consider. It may be, and indeed it was a fact in this case, that some of the terms were unreasonable or not common and therefore the offer was not MRO-compliant, but it does satisfy the requirements for it to be considered to be a "full response" under Regulations 29(3)(b).

3.7 I cannot see anything within the PCA advice note dated March 2018 on the issue of "Market Rent Only – Compliant proposals" where it considers or determines the precise extent of information necessary for the purposes of identifying a "full response".

3.8 I find for the Respondent that the letter dated 13th September 2019 together with the attachments was a "full response" for the purposes of the legislation and Code.

**Issue 2:**

**Whether the words "subject to contract" should be applied to the full response?**

**Claimants Case**

3.9 Mr Wright refers to the offer letter (the full response letter dated 13th September 2019) as deficient because of the reference to "subject to contract" in the head of the letter with the proposed lease which has no commencement date and includes terms which are not MRO compliant.

**Respondents Case**

3.10 Mr Hastie regards reference to the response letter being "subject to contract" simply confirming that any agreement will be subject to a final and formal signed lease. Further, the respondent accepts that the term of the lease under Regulation 30(2) of the PCR16 must be at least as long as the term of the existing tenancy.

**Arbitrators Decision**

3.11 The reference to subject to contact does not adversely affect the basis on which the full response has been put forward by the POB with any agreement only concluded once the lease has been executed. The advice note by the PCA of March 2018 makes it clear that the parties should negotiate in good faith, that negotiations should be the norm and that such negotiations should continue with a view to reaching an agreement outside the arbitration process, with arbitration only required under exceptional circumstance. Such negotiations will be conducted on the basis that they are confidential and subject to an agreement being reached if possible. The inclusion of the "subject to contact" in the full response letter dated 13th September 2019 neither dilutes nor lessens the proposals.

3.12 The inclusion of "subject to contact" and the lack of a date on the lease or confirmation of the lease commencement date does not impact adversely on the "full response". I agree with the Respondent that until such time as the new lease or contract is concluded, the commencement date cannot be identified. The "full response" letter of the Ei Group accepts that the existing tenancy will continue until the new MRO agreement is completed whether it is by way of a New Lease (NL) or a Deed Of Variation (DOV).

3.13 I find for the Respondent on this issue that the inclusion of "subject to contact" and the lack of a commencement date of a NL neither offends the requirements of the "full response" or an MRO-compliant tenancy, during the period up to the final agreement.

**Issue 3:**

**Whether the length of term offered (to expiry of existing lease) complies with R.30(2)?**

**Claimants Case**

3.14 Mr Wright advises that the full response is deficient as the proposed lease is not dated and does not have a commencement date. Further, under Regulation 30(2) of the PCR16 *"the proposed MRO tenancy is only MRO compliant if it contains provisions, the effect of which is that the term is for a period that is at least as long as the remaining term of the existing tenancy".* Further, Mr Wright argues that the term of the lease is shortening by the day and will never equal the remaining term of the existing tenancy which was from the rent review date as a trigger date.

**Respondents Case**

3.15 Mr Hastie's advises that the term to be considered is that of the point of delivery of the "full response" and that if Regulations 24 and 25 lead to the MRO notice, then there will be no rent review date and that there is nothing in the Code which states that the rent review date is the start of the term. Importantly, as the proposed MRO tenancy in the full response specifies the same termination date as the existing tenancy, the remaining term will always be as long as the remaining term as the existing tenancy.

**Arbitrators Decision**

3.16 I find for the Respondent and the assessment by Mr Hastie that the key under Regulations 25 (trigger events) or Regulations 27 (RAP) is that the term set out in the proposed MRO tenancy is MRO-compliant in respect of the length of the tenancy if it is for a period at least as long as the remaining term of the existing lease.

**Issue 4:**

**Is the Respondent allowed to call the MRO tenancy sent with the full response an MRO lease?**

**Claimants Case**

3.17 Mr Wright claims that the "full response" of the Respondent enclosing the proposed MRO lease and other terms is not MRO-compliant and therefore the Respondent is unable to refer to the proposed lease as an MRO lease.

**Respondent's Case**

3.18 Mr Hastie advises that the proposed MRO tenancy is compliant and consequently the proposed MRO lease is appropriately named.

**Arbitrators Decision**

3.19 I find that in issuing the "full response", the Respondent is entitled to refer to their proposal as MRO compliant and the draft lease an MRO lease as this simply reflects their position. Such referencing does not however mean that the proposed tenancy and lease as set out in the full response is MRO-compliant.

3.20 An MRO-compliant lease will depend on the details of the terms proposed and if they satisfy the provisions of the SBEEA 2015 at clause 42 (3) in that such terms are fair and reasonable and follow the general principle that tied pub tenant (TPT) should not be worse of than they would be if they were not subject to any product or service tie. The PCA advise note on MRO–compliant proposals dated March 2018 identifies the test as to reasonableness and what are unreasonable terms. This confirms that a term being uncommon is only one way in which a term or condition may be unreasonable. There will be other circumstances which will have to be considered to ensure that any MRO proposal is consistence with the core principles of the Code in accordance with clause 42(3)(a) and (b) of the SBEEA 2015.

3.21 I therefore find that although the Respondent can refer to the lease as an MRO lease for the purposes of providing a "full response" under Regulation 29 (3) of the PCR16, it does not mean that it is as a matter of fact MRO-compliant. Consequently, the Respondent had not breached either the SBEEA 2015 or the PCR16 by using the terminology of MRO lease.

**Issue 5:**

**Is the sending of a new lease, rather than a clause by clause DOV, unreasonable because of the relative costs of each approach?**

**Claimants Case**

3.22 Mr Wright advises that a NL will be a much more costly option than a DOV given that in this case, the number of amendments in the lease are limited. Therefore the DOV will be a much more cost effective option coupled with no SDLT payable if the DOV is adopted whereas an SDLT as an additional cost is required for an NL. The tenant should not be put to additional costs simply because the POB prefers a NL to create greater homogeneity in their estate as this is unfair on a tenant to be subject to such costs to achieve the POBs objective.

**Respondent's Case**

3.23 Mr Hastie draws my attention to the report of MR A P Bell and where the costs of a DOV on a clause by clause basis will be in excess of £5,000 for both sides. By contrast the NL drawn up with common terms and in a standard format could be agreed at a far lower cost. Mr Hastie further advises that the SDLT payment will be a maximum of £1,414 but is likely to be substantially less depending on the level of rent set.

3.24 Mr Hastie draws attention to the PCA website and an Award published under the title Quarter-4-18-12 which found that in the circumstances of that case the costs of a DOV by reference to line by line changes makes the choice of a new tenancy not unreasonable even taking into account the additional SDLT costs

3.25 The Respondent exercises caution on the likely problems that arise from a clause by clause DOV where errors are more likely to occur and the increased costs of ensuring such errors which do not occur when compared to a DOV by reference. The reference form of DOV follows the terms of the new MRO in any event, is less costly to produce than a clause by clause DOV and avoids SDLT.

3.26 However, a DOV by reference cannot be offered in a "full response" as the DCPA has found that such forms of agreement are not sufficiently common in the FOT market to be compliant.

**Arbitrators Decision**

3.27 I find that the relative costs of adopting either a NL or DOV will be an important factor to consider as to which option is adopted, but I also find that it is not the only consideration.

3.28 It is helpful that the Respondent, in considering the DPCA's conclusion on an earlier award that depending on the circumstances, a DOV may be straightforward and therefore a relevant vehicle. I also accept it is not unreasonable for the Respondent to seek in general a system which can be adopted at a high-level on which the MRO process for a new tenancy can rely on. However, such an overriding objective of a POB does not entitle it to state that a NL is the only option simply because it is cheaper as the overriding principle.

3.29 The DCPA advises that each case must be judged on it merits and the choice of MRO vehicle must not be unreasonable for either party. The test of reasonableness is not restricted to costs alone but if firstly, it is fair and secondly, the tenant is "no worse off" as prescribed by paragraph 42(3)(a) & (b) of the SBEEA2015.

3.30 On the subject property, a DOV was entered into on the 28th May 2012 between Enterprise Inns PLC as POB and as the tenant at the time. This demonstrates that quite significant changes to a lease can easily be incorporated into a relatively simple and straight forward DOV.

3.31 On the other hand, I am sympathetic to the Respondent's argument that there comes a point where extensive amendments and changes to lease terms will increase costs to a point where there may be little difference between an NL and DOV and in some circumstance, the costs of a DOV may exceed the costs of an NL. The problem which the Respondent cannot ignore is that with an NL a SDLT charge arises where in a DOV, SDLT does not normally arise.

3.32 In the SOAF, the parties have suggested they are agreed to 5 variations to the terms of the NL relating to insurance valuations, repairing obligations, cycle rent review provisions, the periodic payments of rents and the financial security relating to alienation. On this basis, I cannot see why a DOV cannot be adopted to accommodate these amendments at a lessor costs to a NL and without the burden or SDLT when entering into a DOV.

3.33 I find for the Claimant that it is likely a DOV will be a cheaper option in this case and that it is not unreasonable to have regard to the lower cost of the DOV option

when compared to the NL option. When the cost estimate was considered and opined upon by Mr A P Bell, it appears that the differences between the parties in respect of the lease term amendments were far greater than those that have been presented to me and as set out in the SOAF. Consequently, the costs of the DOV will be less than those projected by Mr A P Bell and adopted by Mr Hastie in his defence.

**Issue 6:**

**Does the legislation require the provision of a DOV which only changes the terms necessary to remove the tie and any uncommon clauses, or can the landlord include reasonable commercial FOT lease terms?**

**Claimants Case**

3.34 The Claimant argues that the FOT tenancy can easily be achieved by a DOV and will result in only the necessary changes being made to the existing lease in accordance with the legislation which neither requires a NL nor wholesale changes to an existing lease on a FOT MRO-compliant lease arrangement.

3.35 To change the terms of the existing lease would result in unfairness to the tenant as it is unreasonable to have other terms imposed on the tenant other than those which are included in the current lease, subject to the changes necessary for it to become a FOT tenancy. The terms now sought by the POB in the grant of a NL are contrary to the first principles as set out in the SBEEA 15 at clause 42(3)(a) relating to fairness and reasonableness

3.36 The Claimant advises that the PCA states that it is reasonable for a POB to issue a DOV and that the SofS, PCA and BEIS have considered this issue when drafting the PCR16 and have made no positive statement that a FOT lease should be a NL rather than a DOV or vice versa. The correct vehicle to adopt must reflect the individual circumstances of each case.

3.37 In this case the multiple changes proposed by the Respondent to the existing lease covenants would result in a very different tenancy to the existing terms (excluding the changes necessary for to create a FOT leases and the costs of a NL will be much higher for a NL when compared to a DOV).

3.38 Mr Wright includes a draft DOV which he advises took 90 minutes to produce and although it requires the details to be concluded demonstrates that the DOV option can be undertaken quickly, effectively and at a lower cost.

3.39 Mr Wright is of the opinion that the Respondent has deliberately complicated the DOV option so as to enable its standard format FOT or a NL which is similar to its standard template being adopted even though this will incorporate very different terms to the existing lease and which will place a greater and unfair burden on the tenant. The promotion and pressure to adopt a standard template lease on an "industrial scale" is inappropriate as it takes away the ability of the tenant to negotiate fair and reasonable terms and reflects the power of the POBs to exploit the weaker position of the independent tenant.

**Respondent's Case**

3.40 The Respondent acknowledges that whilst each case must be determined on the specific facts that arise, it is reasonable for the landlord to provide a new MRO tenancy (NL) rather than a Deed of Variation (DOV). The Respondent argues that there are a number of reasons why an NL is preferable to a DOV which can be summarised as follows:

1. Good estate management through standardisation of covenants allowing the POB to rationalise activity and provide homogeneity of services to the tenants
2. Improvement to Capital Values of the individual properties and estate through standard clauses and resulting efficiencies of understanding, application of standards and consequent performance improvements
3. Commonality of tenancy terms within the industry providing a yardstick for the test of which are reasonable to ensure that TPTs are *"no worse off than they would be if they were not subject to any product or service tie".* Mr Hastie advises that without this yardstick, the test of reasonableness "would be impossible to apply".
4. The Capital Value of a pub investment is derived from the income secured, known as rent. The expectations of the investment market drive the terms that are common in FOT agreements and consequently reflect what the terms in an MRO-compliant tenancy should be.
5. Where an estate of FOT Pub leases has substantial deviations from common commercial FOT lease terms this will adversely affect the Capital Value of the estate.
6. Where terms of leases differ, it is harder to establish comparability and value the estate accurately or make analysis of the comparables consistent.

7. Guidance for future lease terms and how staff in the POB should undertake their duties in compliance with a lease, is made much harder where there is a lack of consistency in the terms of the many leases held in a single estate.
8. Administration in terms of time and costs is higher where there is inconsistency in individual lease terms.
9. DOVs require customisation of a specific agreement which is more expensive to the POB when compared to a standard template lease.
10. Lease renewals for different lease formats involve more time and expense.
11. Because of the incidence of Head leases in POB estates there is often greater expense in securing consents from the landlord required by such head leases for non-standard leases.

3.41 Mr Hastie carefully considers the concept of "no worse off" and the test of reasonableness by advising that the comparison to apply must be between a TPT in the real world and an FOT tenant in the real world. If the FOT terms are watered down against those which are common in the FOT market, then the result is that the TPT must be no worse off than an FOT on favourable terms or that the TPT must be better off than a FOT tenant in the real world. That approach is not what the Act and Code sets out to achieve in respect of the concept and test of "no worse off".

3.42 The benefit of common terms in FOT leases in the market is that they have been freely negotiated and therefore must represent what the market regards as reasonable.

3.43 The terms of an existing tenancy are therefore not relevant in determining whether the terms of the proposed MRO tenancy are "common" for the purposes Regulation 31(2)(c) of the PCR16 as the requirement is to establish an MRO-compliant tenancy as those *"terms in agreements between landlords and pub tenants who are not subject to product or service ties".* As the existing tenancy is a tied tenancy, the existing terms are therefore not a benchmark for commonality and the test of reasonableness for the terms of the new FOT tenancy.

3.44 Terms of FOT tenancies continue to evolve and change and therefore time is an important consideration. Consequently, the more historic a market based FOT agreement, the less relevant it is.

3.45 In the subject case the reasons why a NL should be preferred to that of a DOV are summarised as follows:

1. In the open market whether dealing with an open market tenant or an existing tenant, the vast majority of FOT agreements are granted by way of a new lease in the Ei Company's standard format.
2. It is not the purpose of either the SBEEA15 or PCR16 to transfer the favourable tied terms into an FOT lease and that to do so would be an unreasonable approach.
3. The onerous terms of the subject lease would lead to the MRO rent being reduced which is unreasonable for the POB. The proposed MRO tenancy offered in this case is substantially more favourable than the Ei's standard FOT tenancy
4. In the period July 2014 to November 2019, Ei created 444 FOT agreements and whilst there are some minor negotiated variations of the terms, there is generally no issue taken with the substantive standard terms and where Mr Bell analyses the transactions as follows:

   a) 178 were new leases to new tenants where the tenants were nearly all legally represented and where most were agreed on an Ei' standard FOT tenancy with 10 including turnover rent arrangements.
   b) 218 were new lease to existing tied tenants where the tenants were nearly all legally represented and where most were agreed on Ei' standard FOT tenancy with 12 including turnover rent arrangements and 29 were following MRO requests.
   c) 22 were UTRs.
   d) 13 were clause by clause DOV's where 5 related to a single transaction with a multiple tenant including a complex trading agreement and DOV with the remainder one offs mostly involving food led properties and with no two DOVs being the same.
   e) 4 were DOVs by reference where the existing terms other than demise and term are deleted and replaced by FOT terms in a schedule but not offered in a full response as such an approach is not common enough to qualify as MRO-compliant
   f) 9 were 1954 Act renewals reflecting the terms of the preceding lease and where the costs of replacing the original lease terms are a barrier to pursing such change. The landlord & Tenant 1954 Act Part II creates new leases reflecting lease terms from 20 years ago rather than modern commercial lease terms.
   g) Mr Bell produces a schedule of the 444 FOT agreements to demonstrate how the terms of lease length, quarterly rent payments,

RPI increases, upward only rent reviews and the extent of deposits have been finalised on each transaction.

3.46 FOT and tied leases are different and as the existing lease terms are not the necessary starting point *"it makes no sense from a drafting point of view to base the new agreement on the existing terms".* The existing leases have been created over time from the involvement of many other POBs and tied leases include a raft of provisions and documents which are not relevant to FOT leases. Consequently, DOVs are not appropriate and a NL should be the appropriate vehicle to adopt.

**Arbitrators Decision**

3.47 On this issue I determine that the legislation does not stipulate what vehicle is to be adopted for an FOT tenancy. The FOT tenancy may be by the provision of a DOV which only changes the terms necessary to remove the tie and any uncommon clauses, or in the alternative that the landlord may include reasonable commercial FOT lease terms either through a DOV or NL.

3.48 The legislation and Code confirm that what must be satisfied are the provisions of Section 43(4)(a)(iii) of the SBEEEA 15 that the proposal, to be MRO-compliant must not contain any unreasonable terms or conditions. In achieving this objective, I am also drawn to the two principles as set down in clause 42(3)(a)&(b) of the Act which requires firstly, that the Pubs Code is consistent with the principle of fair and lawful dealings by pub owning businesses in relation to their tied pub tenants and secondly, pub tied tenants should not be worse off than they would be if they were not subject to any product or service tie.

3.49 In terms of whether a DOV or NL is to be preferred against the other, I find in general terms as follows:

i. A compliant MRO proposal is permissible in the form of either a NL or DOV. The legislation and code had every opportunity to determine if either was preferable and chose not to be prescriptive to ensure fairness and reasonableness is assessed in each case and on the specific merits of each case.

ii. That whatever vehicle is adopted it must be a reasonable option given the specific circumstances of the case.

iii. The terms of any FOT tenancy offered do not have to be the same or substantially the same as the terms of the existing lease, and should only be subject to such variations as are necessary to render the tenancy MRO-compliant.

iv. It is permissible to offer wholly new terms, subject only to the requirements of section 43 of the Act but only if reasonable. However, it is not a requirement of the Act to offer wholly new terms.

v. A term can be unreasonable for the purpose of Section 43(4)(a)(iii) of the Act if it is not deemed reasonable by virtue of regulation 31 of the Code.

vi. The test of reasonableness in section 43(4)(a)(iii) is to be interpreted in accordance with the core Code principles

3.50 Therefore, the FOT tenancy can be in a NL or DOV format provided the core Code principles of *"fair and lawful dealing"* and the tenant is *"no worse off"* to a service tie lease, are adopted to ensure the test of reasonableness is applied in each specific case.

3.51 The evidence of the Respondent promotes as a virtue, in support of the legislation and Code, the creation of a homogenous and standard lease template as a simple form of tenure for the creation of a FOT lease. The evidence of Mr Bell and Mr Gallyot commends the standardisation and homogeneity of NLs in favour of the POBs to support the business efficiency and maximisation of capital values of the POBs pub estates

3.52 Yet I find to the contrary that the test of unreasonableness is in part required as a necessity to counterbalance the negotiating strength of the POB with its inherent potential for unfair dealing towards a TPT in the MRO procedure. Therefore, rather than a virtue as promoted by the Respondent, a standard template lease to be applied by the POB is potentially a burdensome position for the tenant with limited strength and negotiating support and consequently could result in unfairness to the tenant.

3.53 The creation of a standard lease by a dominant POB which is designed to maximise the position of the POB may well contain terms which are a threat to the reasonableness of such a lease when considering the position of the FOT tenant. Therefore, as a principle, standardisation as a virtue as put by the Respondent as

a virtue is arguably contrary to the requirements of the legislation and Code when put in the way it has been by the Respondent in this case.

3.54 The interests of one party cannot be considered in isolation. The consideration must be balanced and the terms and choice of vehicle, not unreasonable when viewed from either party's perspective. The Respondents case including the arguments put forward by Mr Hastie and the position as put by Mr Bell, Mr Gallyot and ████ are geared towards the POB and the Respondent in this case and do not give a balanced position in considering the position of the tenant as required under the legislation and Code

3.55 I accept the approach of the Respondent that there must be realism in any proposal of the impact of any term on both parties. In offering terms of the MRO option, I find it may be appropriate and helpful to have regard to the existing contractual relationship to the parties, even though the existing lease terms may not be the necessary starting point. The definition of an MRO-compliant tenancy (in section 43 (4) and (5) makes no reference to the terms of the existing tied tenancy.

3.56 On the other hand, one reason for considering the terms of the existing lease is to establish fairness and reasonableness in any new terms that are being promoted by either side. Each case must be looked at on its merits, but to suggest the existing lease terms are always irrelevant is not an approach I find acceptable and this is a shared approach and supported in appendix 4 at paragraph 8 of the DPCA Award dated 9th November 2018.

3.57 Having regard to all the above the suggestion that a standard FOT lease is appropriate and should be adopted just because it creates a homogenous product which the investment market prefers and improves the efficiency and reversionary value of the POB estate is to be rejected when put in isolation without considering the position of the tenant.

3.58 I am satisfied that a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a NL. Therefore, rejecting the DOV option because it does not create a single clean document as promoted by the Respondent, does not carry any weight where the DOV option is a reasonable one to adopt in all the circumstances of the case. Both a DOV and NL can create a similar outcome and are both capable of bringing about an MRO-compliant tenancy.

3.59 The definition of an MRO-compliant tenancy is set out within the SBEEA 15 and not the PCR, other than as delegated under section 43(5) where terms are either

required to be contained within an MRO-compliant tenancy or which are to be regarded as reasonable or unreasonable for the purposes of subsection (4). I therefore return to the applicable law and section 42 of the SBEEA 15 where subsection (3) provides:

(a) The principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;

(b) The principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.

3.60 Although there is much agreement between the parties on these terms which require amendment to make it an MRO-compliant tenancy, there are terms which are not agreed.

3.61 I find that in considering the new terms that are not agreed the Respondent in their case and evidence has not given sufficient attention to the existing term that is to be changed and establishing if the new arrangement will be fair and reasonable. This is underpinned by the concessions the Respondent has now agreed with the Claimant in the SOAF and the Scott Schedule.

3.62 In this case the term of the lease is to remain the same and the key objective is to remove the business tie to create a FOT tenancy, at the same time making such changes to other terms which will make the tenancy MRO-compliant.

3.63 Having considered the evidence before me I am persuaded by the Claimant that a NL is not appropriate in this case and that a DOV scheduling the lease term changes is the fairest and most appropriate option to adopt.

3.64 By contrast I am not persuaded by the Respondent that there is anything in this case that indicates that to be MRO-compliant the tenancy to be offered should be by way of a NL as I do not find the arguments on costs supported by the facts and cognisant of the of changes to the lease that are now required. I find that the changes now required following some agreement on certain issues by the parties, are not of such a magnitude that they would warrant the costs being promoted by the Respondent.

3.65 For completeness I acknowledge there is nothing to suggest that the existing and proposed tenancies must be different tenancies. I am satisfied that the legislation

and Code allows for either a DOV or a NL (subject to terms and conditions) both of which are capable of bringing about an MRO-compliant tenancy."

3.66 Based on the NL as promoted by the Respondent, there are too many areas where even minor word changes between the existing terms and the new terms by transfer to a new lease document may prove unreasonable. A DOV with a disciplined approach to amending the terms as necessary both as now agreed between the parties in the SOAF and as determined in this award is the basis on which the MRO compliant tenancy should proceed.

3.67 The marketplace accepts leases which are subject to DOVs both in terms of the occupier and owner/investor without detriment to either side. No evidence has been put to me by the Respondent that demonstrates a DOV solution would adversely impact the market value of the property subject to the lease and DOV and I am of the opinion that this is because there is no evidence to justify such a claim. I am not persuaded that a lease with a DOV will be regarded any less desirable than a NL on the same terms including lease length and rent with the existing lease already subject to a DOV with no evidence put by the Respondent that this has not been accepted by the market.

3.68 I find for the Claimant that the MRO-compliant tenancy is most fairly and appropriately achieved by a DOV and not by a NL. This is a common methodology of effecting necessary lease changes and ensures there is less chance of an unfair or unreasonable term arising than in the drafting of a NL. I am satisfied that the DOV will comply with the provisions of sections 43(4)(iii) and 43(5)(b) of the SBEEA 15.

**Issue 7:**

**Has the Respondent explained their reasons for sending a new lease sufficiently?**

**Claimants Case**

3.69 Mr Wright argues that a DOV is the appropriate vehicle to adopt and not a NL on the grounds of costs and unnecessary changes to the terms of the existing lease which will make him worse off as a FOT tenant as apposed to a TPT on the same lease terms. Therefore, the unreasonable nature of the new terms of the NL demonstrates that the Respondent in sending an NL was not sufficiently explained.

**Respondent's Case**

3.70 Mr Hastie argues that MRO terms have been sufficiently explained and are both reasonable and common for the following reasons:

a. Ei's standard FOT tenancy has been a common tenancy in the marketplace since 2011.

b. The terms of Ei' MRO tenancy are now more favourable than Ei's standard FOT tenancy as supported by the Witness Statement of Mr A P Bell.

c. The terms have been accepted by other FOT tenants of other landlords, such as ██████ which Mr A P Bell confirms is the most common form of FOT agreement.

d. The terms of the existing lease reflect the fact that the lease is tied and as Mr A P Bell confirms are more favourable than those found in FOT agreements

e. The MRO terms offered take account of the requirements of the Claimant.

f. Mr A P Bell confirms that to substantially redraft the MRO tenancy with each MRO request and then to identify the commonality of individual terms in FOT agreements would be onerous and unreasonable.

g. It is unlikely that any combination of terms other than commercial lease terms would be common in FOT agreements.

h. Offering the Claimant terms which are better than those negotiated elsewhere in the open market for FOT tenants demonstrates that TPT's are no worse off.

i. In this case, the Claimant has been offered better terms than the open market FOT tenant and therefore the TPT is better off.

j. The witness statement of ████████ ██████ demonstrates that it is reasonable for the FOT to start with a common form of FOT tenancy; the investment market responds well to standardized terms and therefore the capital value of the Respondent is supported by such an approach; common terms in an FOT estate makes it easier to administer and manage and the Respondent has been negotiating the terms of MRO tenancy to the same

extent as when they are granting a non-MRO FOT agreement. Consequently, the terms offered in this MRO tenancy are reasonable for the reasons given in the Scott Schedule.

**Arbitrators Decision**

3.71 I find that the Respondent has explained their reasons for putting forward a NL but I do not find that such reasons have persuaded me to award that a NL should be adopted as opposed to a DOV

# 4 Award

4.1 I have determined the issues in this dispute and make my award on the issues arising between the parties as follows:

1. As to Issue 1, I find for the Respondent that the letter dated 13th September 2019 together with the attachments is a "full response".

2. As to Issue 2, I find for the Respondent that the inclusion of the words "subject to contact" and the lack of a commencement date of the new lease neither offends the requirements of the "full response" nor an MRO-compliant tenancy, during the period up to the final agreement.

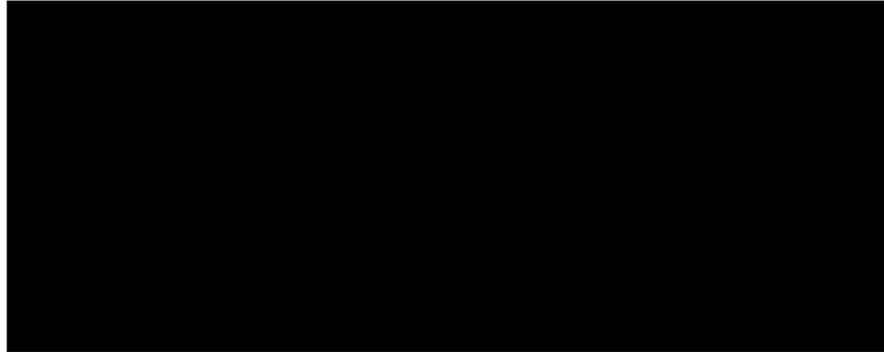
3. As to issue 3, I find for the Respondent that the term set out in the proposed MRO tenancy is MRO-compliant if it is for a period at least as long as the remaining term of the existing lease.

4. As to issue 4, I find for the Respondent who has not breached either the SBEEA 2015 or the PCR16 by using the terminology of MRO lease.

5. As to issue 5, I find for the Claimant that it is likely a DOV will be a cheaper option in this case and that it is not unreasonable to have regard to the lower cost of the DOV option when compared to the NL option.

6. As to Issue 6, I find for the Claimant that the MRO-compliant tenancy is most fairly and appropriately achieved by a DOV and not by a NL and satisfied that the DOV will comply with the provisions of sections 43(4)(iii) and 43(5)(b) of the SBE&EAct15.

7. As to issue 7, I find for the Respondent who has explained their reasons for putting forward a NL but has not persuaded me to award that a NL should be adopted as opposed to a DOV.



**Dated the Twentieth day of March 2020**

**In the seat of England and Wales**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ii) Neither the whole nor any part of this Award or any references thereto may be included within any publicised documents, circulars or statements and neither may it be published, reproduced, nor referred to in any correspondence or communications without the written approval of both parties to the dispute.

iii) If approval is granted for the disclosure of this Award, it must be reproduced in full and not in part or as an extract.

# Appendix GFC1
# Statement of Agreed Facts
# (Without Appendices)

# Appendix GFC2
# Scott Schedule completed by the Arbitrator