IN THE MATTER OF AN ARBITRATION UNDER S.48 OF THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

AND IN THE MATTER OF THE ARBITRATION ACT 1996 Ref PAC 46/ ARB 10573 (ArbDB ref 2191)

BETWEEN:

Mr ROB WHITBY	**Claimant**
-and-	
1. STAR PUBS & BARS LIMITED	**First Respondent**
2. PUNCH PARTNERSHIPS (PTL) LIMITED	**Second Respondent**
	(together "the Respondents")

FINAL AWARD SAVE AS TO COSTS

DATED: 22 October 2019

RE: "THE VINE INN", Stourbridge

[redacted] **Sole Arbitrator**

TABLE OF CONTENTS

A. THE NAMES OF THE PARTIES AND THEIR RESPECTIVE REPRESENTATIVES

1. The Claimant in this arbitration is Mr Rob Whitby. The Claimant is represented in this arbitration by Mr Chris Wright of the Pubs Advisory Service Limited.

2. The First Respondent in this arbitration is Star Pubs & Bars Limited, whose registered office is at 3 Monkspath Hall Road, Solihull, West Midlands B590 4SJ. The Second Respondent is Punch Partnerships (PTL) Limited, with registered office at Elsley Court, 20-22 Great Titchfield Street, London W1W 8BE, and which was until 2009 known as Punch Taverns (PTL) Limited. Both Respondents are wholly-owned, directly or indirectly, by Heineken UK Limited. The Respondents are represented in this arbitration by [redacted] I will refer to the Claimant and the Respondents together as "the Parties".

3. A dispute has arisen between the Claimant and the Respondents relating to the Vine Inn, Stourbridge ("the Vine Inn"), of which the First Respondent is the pub-owning business and the Claimant is the tied pub tenant, although the Second Respondent remains the landlord on the lease.

B. THE ARBITRATION AGREEMENT, THE APPOINTMENT OF THE ARBITRATOR, THE PROCEDURAL HISTORY

4. This is a statutory arbitration under the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") and the Arbitration Act 1996 ("the 1996 Act"), Section 94, Application of Part I to Statutory Arbitrations, and Section 95, General Adaptation of Provisions in Relation to Statutory Arbitrations. The 2015 Act received Royal Assent on 26 March 2015.

5. The Claimant filed a completed PCA Referral Form to the Pubs Code Adjudicator ("PCA") and paid the referral fee of £200.00.

6. The PCA had made an application to the Chartered Institute of Arbitrators ("CIArb") for the recommendation of an arbitrator and, pursuant to that request, I was recommended to the PCA by the CIArb Dispute Appointment Service ("DAS") and, having declared my independence and impartiality, I was appointed by a letter from the PCA dated 04 June 2019. I also note that the costs of the PCA to that point were £64.00 plus VAT, being 0.4 hours @ £160.00 per hour.

7. I accepted that appointment and I wrote to the Parties on the same day, by email, stating that it was my privilege to have been appointed as the arbitrator in this matter, having declared my independence and impartiality. I also stated that I would like to organise a preliminary meeting by telephone conference call as soon as possible. I set out the proposed Agenda for the preliminary meeting in an email of 14 June 2019.

8. I was sent the password for the pleadings and evidence bundle for this case on 5 June 2019 by the Office of the PCA, in order to enable me to access the file.

9. The Preliminary Meeting was held by telephone conference call on 9 July 2019. It was attended by Mr Wright of the Pubs Advisory Service Limited on behalf of the Claimant and [redacted] on behalf of the Respondents.

10. The Respondents filed their Statement of Defence on 17 June 2019, including the updated Scott Schedule, which contained the bulk of the Parties' submissions. This was in accordance with the Directions Order of the PCA of 20 May 2019. The Claimant filed his reply on 29 June 2019, together with the full flood report. The Respondent filed its Rebuttal (in accordance with Procedural No 2) on 19 July 2019.

11. In Procedural Order No 2, actually by then dated 23 July 2019, I ordered as follows:

12. The arbitration rules applicable to this arbitration are the ClArb Arbitration Rules, 1 December 2015, except to the extent that they are in conflict with Part 4 of the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") or the Pubs Code etc Regulations 2016 ("the 2016 Regulations"), in which case the latter shall take precedence. I note in passing that, where I refer to "Regulation X", this is a reference to that part of the 2016 Regulations.

13. My appointment as arbitrator by the PCA through the ClArb DAS is valid and I have jurisdiction to resolve the issues between the Parties in this arbitration reference.

14. The issues to be determined by me in this arbitration are:

15. What was the status of [redacted] and, in particular, was he a Business Development Manager (BDM) acting for the Respondents within the meaning of Regulation 41(6) of the 2016 Regulations.

16. If I decide that [redacted] was a BDM acting for the Respondents, (a) did his behaviour towards the Claimant fall short of fair and lawful dealing and (b) did be fail to process any Pubs Independent Rent Review Service (PIRRS) application that may have been filed by the Claimant?

17. Costs of the previous rent review arbitrations.

18. Costs of this arbitration reference.

19. The Respondent may by Friday 19 July 2019 file a Rebuttal limited to 5 pages of A4 and also amend the Scott Schedule, either by adding an additional column or amending the column relating to the Respondents' Statement of Defence. The Rebuttal shall not be accompanied by any additional documents or materials. Submissions are closed at that point.

20. This arbitration reference shall proceed on documents only, although either Party may apply for a Hearing to be held.

21. Thereafter, I will produce and hand down a written and reasoned award as a Final Award save as to Costs and invite submissions on Costs and then hand down a Final Award on Costs.

22. No provision for expert evidence.

23. The law of the arbitration is the law of England & Wales and, in particular, the 1996 Act.

24. The language of the arbitration shall be English.

25. The Seat (Legal Place) of the arbitration is London, England.

26. Any negotiated settlement shall be notified to me and made the subject of a consent award and I will be entitled to my fees incurred up to the date of such consent award.

27. My terms for this arbitration are £375.00 per hour plus VAT and any reasonable and agreed expenses. As an advance on my fees, the Respondent shall send £8,000.00 plus VAT, that is a total of £9,600.00, to the bank account of my Chambers, [redacted]. The advance shall be topped up from time to time as ordered by or requested by me. Cancellation fees shall be payable if any Hearing is cancelled within one month of the due date.

28. All communications shall be copied to the other Parties and to me.

29. Costs of the Preliminary Meeting and this Procedural Order No. 2 shall be Costs in the Arbitration.

30. Either Party may apply to vary this Procedural Order No. 2.

31. I declared that submissions were closed in an email to the Parties of 22 July 2019, although I did email the Parties on 27 September 2019, stating that I would appreciate brief submissions from them by 4 October 2019, specifically on whether I had jurisdiction to decide what I am calling Issue 3, the costs of the previous rent review arbitration. I received a response from Mr Wright acting for the Claimant in an email of 30 September 2019. I also received a further submission from the Respondents, with an email of 4 October 2019. I sent a further email to the Parties on 5 October 2019, confirming that all submissions were now closed.

C. THE FACTS AND BACKGROUND TO THE DISPUTE

32. The Claimant is the tied pub tenant of the Vine Inn, Clent, Stourbridge. The First Respondent is the pub-owning business of the Vine Inn, although the Second Respondent remains the landlord on the lease. The Vine Inn is situated in the Clent Hills, south west of Birmingham. The Vine Inn was first registered as "the Clatterback Water Mill" and what was once a water mill pond now forms part of the garden, with a decking area built near to where the water wheel was situated.

33. The Claimant's lease of the Vine Inn is dated 12 October 2006 made between the Second Respondent and the Claimant for a 15 year period ("the Lease"). The Lease provides for an initial rent of £42,000.00 per annum and for the rent payable to be reviewed every 5 years, including therefore in October 2016, although the rent that was actually being paid was £36,000.00 per annum immediately before the review that gave rise to this dispute. The Lease also provides for an independent determination of the rent, in the absence of agreement, including by arbitration.

34. Agreement was not reached on the October 2016 rent review and the Second Respondent accordingly notified the Claimant that it would be referring the matter to arbitration. The Second Respondent then appointed [redacted] to advise it on the rent review, deal with the application for an arbitrator to be appointed and to make submissions to the arbitrator in that regard. Of course, as we will see, the Claimant's position is that [redacted] did rather more than that, to the extent that he was acting as a BDM.

35. [redacted] provided his advice to the Second Respondent and, following the rejection of a without prejudice save as to costs offer put to the Claimant by [redacted] the Second Respondent instructed [redacted] to seek the appointment of an arbitrator by the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS) to determine the rent review.

36. [redacted] was appointed to arbitrate on 3 August 2017. He handed down his first award on 11 June 2018 ("the First Award"). In that First Award, [redacted] noted that "the Landlord is represented by [redacted] He decided that the rent payable from the date of the rent review should be £39,500.00. This rent was higher than that contained in the Second Respondent's without prejudice save as to costs offer.

37. [redacted] handed down his award on costs on 16 September 2018 ("the Second Award"), which ordered that the Claimant was to pay the Second Respondent's costs of the RICS's application fee, half [redacted] fee and [redacted] reasonable fee, with either party being able to make an application for [redacted] to determine that fee. In the absence of agreement, [redacted] made a Final Award (on Costs) on 3 January 2019, ordering that the Claimant pay the Respondent(s) £14,010.00 plus VAT and interest in respect of [redacted] fee. I should note that the Second Respondent was the respondent in the rent review arbitration, variously under the name of Punch Taverns Limited and later Punch Taverns (PTL) Limited, its current name.

38. During the initial phase of the arbitration before [redacted] the Claimant raised more than once his desire that the matter should be referred to the Pubs Independent Rent Review Scheme ("PIRSS"). [redacted] explained to the Parties that this was a matter between them and that, if the Parties so wished and agreed, he would step down. In the result, the Claimant did not make a PIRSS application. It would be for the Claimant, as the tenant of the Vine Inn, to make this application and no such application was made. [redacted] in his first award, also set out that the Claimant had sent him a memory stick containing a video and sound recording of a meeting between the Claimant and [redacted] at the Vine Inn. [redacted] also sets out he informally inspected those local competing establishments and comparables identified by the Claimant and [redacted] [redacted] notes that [redacted] set out in what [redacted] describes as [redacted] "report" his opinion of the Market Rental Value of £46,000.00. [redacted] also notes that he agreed with [redacted] that the present standard of repair and decoration was below that which he was to assume for the purpose of the rent review. Finally, [redacted] notes he was not aware that [redacted] has acted in any way improperly". [redacted] was the sole representative of the Respondent(s) in the arbitration before [redacted] [redacted] sets out at paragraph 25 of his first award that [redacted] "has set out his report in a style normally expected of an experienced chartered rent review surveyor".

39. Whilst, in an email of 27 April 2017 to [redacted] of the Second Respondent, [redacted] stated that he had not attempted negotiating with the Claimant, this was in response to an email from [redacted] asking " where have you got with the negotiations?".

40. It would be fair to say that a considerable degree of distrust has built up between the Claimant and [redacted] during the arbitration process, as set out at page 3 of [redacted] first award. Indeed, there is evidence that there was a poor relationship between the Claimant and the Respondents. [redacted] alludes to this in an email of 27 July 2017 to [redacted] of the Second Respondent.

D. THE SEAT (LEGAL PLACE) OF THE ARBITRATION

41. The Parties have accepted that the Seat (legal Place) of the arbitration is London, England and I so ordered in Procedural Order No. 2. This is also the jurisdiction which coincides with the location of the pub concerned, the Vine Inn, and most closely connected with the dispute at hand.

E. THE ISSUES IN THE ARBITRATION

42. The issues in this arbitration are:

43. What was the status of [redacted] and, in particular, was he a Business Development Manager (BDM) acting for the Respondents within the meaning of Regulation 41(6) (Issue 1.).

44. If I decide that [redacted] was a BDM acting for the Respondents, (a) did his behaviour towards the Claimant fall short of fair and lawful dealing and (b) did be fail to process any Pubs Independent Rent Review Service application that may have been filed by the Claimant? (Issue 2.)

45. Costs of the previous rent review arbitration (Issue 3).

46. Costs of this arbitration reference.

F. THE SUBMISSIONS OF THE PARTIES ON THE ISSUES

47. **What was the status of [redacted] and, in particular, was he a Business Development Manager (BDM) acting for the Respondents within the meaning of Regulation 41(6) of the 2016 Regulations.**

The Claimant

48. The Claimant states that the First Respondent contracted the rent review assessment work to [redacted] and that, in accordance with Regulation 41(6), [redacted] undertook to arrange to meet with the Claimant at the Vine Inn to discuss numerous issues in connection with the rent assessment and the money payable in lieu of rent.

49. The Claimant notes that, in the email of 27 April 2017 (at p133 of the documents accompanying the Points of Defence), it is set out that [redacted] was fully expected and/or instructed to "negotiate" with the Claimant. The Claimant submits that this is clearly an instruction accepted by [redacted] to act as a BDM in matters relating to the duties and dealings under Regulation 41(4). The Claimant continues that, despite letters laying out [redacted] official instructions, the email of 27 April 2017 shows other instructions were being given to [redacted] whereby he was taking instructions to do things other than the valuation work, which things were part of a BDM's duties. The Claimant also notes that [redacted] made notes of repairs previously undertaken by the Claimant and the plans of the Claimant to continue trading, despite the known risk of flooding, and refers to Regulation 41 (4)(i)-(iv) in that regard.

50. The Claimant submits that there is a line between those acting for the landlord and those representing a landlord under a lease or, in this case, the 2016 Regulations. The Claimant submits that [redacted] was there to negotiate with him (the Claimant) and to act as the BDM. He Claimant also states that [redacted] redefined the risk of flooding as low and dismissed the detailed findings of the flooding report. The Claimant notes that he supplied [redacted] with a detailed flooding report and that [redacted] was not just acting as a valuer.

The Respondents

51. The Respondents set out Regulation 41(6) in their long form Statement of Defence. I will not set it out here but I have set it out in the Discussion and Findings section of this Final Award save as to Costs.

52. The Respondents deny that [redacted] was a BDM under Regulation 41(6). The First Respondent further denies that it contracted any rent assessment work to [redacted] The Respondents submit that [redacted] was appointed by them to inspect the Vine Inn

and to make submissions to the rent review arbitrator, The Respondents deny that, in accordance with Regulation 41(6), [redacted] undertook to meet the Claimant at the Vine Inn to discuss numerous issues in connection with the rent assessment and the money payable in lieu of rent. The Respondents rely on the fact that [redacted] was not a BDM under Regulation 41(6). They also note that [redacted] was not involved in the first phase of the rent review negotiations, as [redacted] was not appointed until the Second Respondent had notified the Claimant that it would be referring the matter to arbitration, in accordance with the Lease.

53. The Respondents admit that the Claimant supplied a detailed flooding report to [redacted] but deny that [redacted] was a BDM. They also deny that [redacted] "redefined" the risk of flooding as low and also deny that he dismissed the risk of flooding as low.

54. In the Respondents' Rebuttal, the Respondents deny that [redacted] was a BDM and submit that [redacted] instructions were set out in an email to him of 7 October 2016 (p91) and [redacted] own letters of 3 and 6 January 2017 (p 93-94). They also refer to the representations made by [redacted] made to [redacted] in October and November 2017, wherein he sets out that that he is appointed to act as an "Expert Witness". The Respondents submit that this was not an instruction accepted by [redacted] to act as a BDM. They also draw my attention to an email of [redacted] of 27 April 2017, in which he states "*.....haven't attempted negotiating with the tenant*".

55. The Claimant had suggested that the Respondents had used [redacted] as a proxy BDM, thinking that he would be free from following the 2016 Regulations. The Respondents submit that there is no evidence to support this contention.

56. They also submit that the Claimant was aware that the Second Respondent employed a BDM directly, [redacted] who was the BDM for the Vine Inn, and that [redacted] had regular meetings with the Claimant as part of her role. The Claimant states that [redacted] was not party to the rent review negotiations and the Claimant dealt solely with the Second Respondent's Estates Managers. [redacted] remained the BDM for the Vine Inn until replaced by [redacted] in March 2018.

57. The Respondents also submit that, in order to be classed as a BDM, [redacted] would have had to be employed by either of the Respondents, which he was not at any time, or engaged to represent either of the Respondents in negotiations with the Claimant in respect of any of the matters listed in Regulation 41(6)b, which he was not. They liken [redacted] to a specialist third party, for example, a lawyer.

58. The Respondents have also set out in paragraphs 4.4 to 4.7 of the Statement of Defence the "without prejudice save as to costs" offers that were made by [redacted] to the Claimant on the instructions of the Respondents. The first was before the rent review arbitration and the second was in relation to Costs. Both offers were rejected by the Claimant. A third "without prejudice save as to costs" offer in relation to [redacted] fees was also rejected by the Claimant.

59. In their Rebuttal, the Respondents submit that [redacted] role was further evidenced by his representations made to [redacted] the Rent Review Arbitrator, regarding the proposed new rent, wherein [redacted] states that he is appointed to act as an Expert Witness.

60. The Claimants also state in their Rebuttal that [redacted] never understood or believed his role was that of a BDM and they reiterate that the BDM for the Vine Inn was [redacted]

61. The Respondents conclude that they do not accept that the Claimant could have formed a justifiable view that [redacted] was the BDM.

62. **If I decide that [redacted] was a BDM acting for the Respondents, (a) did his behaviour towards the Claimant fall short of fair and lawful dealing and (b) did he fail to process any Pubs Independent Rent Review Service application that may have been filed by the Claimant?**

The Claimant

63. The Claimant states that [redacted] undertook to meet with him at the Vine Inn to discuss numerous issues in connection with the rent assessment and the money payable in lieu of rent. The Claimant goes on to state that [redacted] made notes of repairs previously made by the Claimant and the Claimant's plans to continue trading with a known risk of flooding. The Claimant also stated that he supplied [redacted] with a detailed flooding report, which outlined the future costs of ensuring the Vine Inn could operate efficiently and negate the effects of what the Claimant characterises as a clearly foreseeable risk of flooding.

64. The Claimant submits that [redacted] who was not an expert the Claimant says, redefined the risk of flooding as low and dismissed the risk of flooding as low and dismissed the detailed findings of the flooding report. The Claimant also states that no equivalent expert to the author of the flooding report was commissioned by the Respondents and that that report was not rebutted line by line. The Claimant submits that the flooding report was treated as "inconvenient" to [redacted] despite the huge effect that it outlined in the future of the Vine Inn and this was inconsistent with the duties of [redacted] as the BDM, and was a breach of fair and lawful dealing.

65. The Claimant submits that [redacted] used an inflated calculation for rent and ignored the style and configuration of the Vine Inn. He also states that [redacted] also failed to take into account the level of wastage and the flooding report and failed to take appropriate notes related to these matters: The Claimant concludes that the failure to take these matters into account is not in accordance with fair or lawful dealing. In his Reply, the Claimant also notes that [redacted] had wrongly placed the flooding risk in the low risk category, whereas this should, the Claimant says, been categorised as a higher risk, with a consequent higher cost.

66. The Claimant concludes that, [redacted] as a BDM, was not dealing with him in a fair and lawful manner, consistent with the principles of Regulation 41(1)(c).

67. The Claimant then deals with issue of the PIRRS, Issue 2(b). The Claimant submits that [redacted] as BDM, refused to process any application for PIRRS or report the Claimant's position to the Respondents.

The Respondents

68. The Respondents deny that in accordance with Regulation 41(6) [redacted] undertook to arrange to meet with the Claimant at the Vine Inn to discuss the numerous issues set out by the Claimant. The Respondents rely on the fact that [redacted] was not a BDM in that connection and that Regulation 41(6) is therefore not relevant. They deny that he failed to make appropriate notes, as this was not required in any event, as [redacted] was not discussing the relevant matters with the Claimant. They deny any breaches of Regulation 41(1)(c), drawing my attention in particular to the statement of the rent review arbitrator, [redacted] that, so far as he was aware, [redacted] had not acted in any way improperly.

69. The Respondents deny that [redacted] redefined the risk of flooding as low. They submit that it can be seen from his report to the Second Respondent which is at Appendix B PP 95-98 that he did not dismiss the findings on flooding of the flooding report and that this clearly demonstrates that there was no breach on [redacted] part of fair and lawful dealing and that, in any event, he was not acting as a BDM. The Respondents make the same submission in relation to the Claimant's submission that [redacted] used an inflated calculation for rent ignoring the style and configuration of the Vine Inn.

70. In this connection, the Respondents conclude by asking me to rule that [redacted] dealt with the Claimant in a fair and lawful manner in accordance with the Code.

71. On the PIRRS point, Issue 2(b), the Respondents deny that [redacted] refused to process any application for PIRRS and submit that this would have been an impossibility, as the Claimant never made such an application. They state that, at no time did the Respondents or [redacted] refuse the Claimant the opportunity to use PIRRS and that it was open to the Claimant to make an application for PIRRS at any time, which he chose not to do.

72. Costs of the previous rent review arbitration.

The Claimant

73. The Claimant requests that I rule that the Respondent cannot charge the Claimant for the costs of the previous rent review arbitration, as it was opposed and built on a false premise.

The Respondents

74. The Respondents submit that I should rule that the previous rent review arbitration was not opposed or built on a false premise and that, as a result, the Claimant should pay the costs of the previous rent review arbitration as awarded against him.

75. The Respondents also note that the rent review arbitrator [redacted] made two awards as to Costs, which they refer to as the Second Award (on Costs), dated 16 September 2018, and the Final Award (on Costs) dated 3 January 2019, pursuant to which the Claimant was ordered to pay the Costs incurred by the Second Respondent, as follows:

76. The Second Respondent's application fee to the RICS for the appointment of the rent review arbitrator- £425.00;

77. Half of the rent review arbitrator's fee, paid by the Second Respondent- £4,080.00;

78. [redacted] reasonable fees, as assessed by the rent review arbitrator- £14,010.00 (plus VAT); and

79. Interest at 5% per annum on due sums. I note in passing that [redacted] had ordered that interest should be simple interest and should be payable from dates that he specified.

80. The Respondents go on to point out that the Claimant could not claim to be under any illusion that the arbitration process would be binding on him, given the clear terms of reference. The Respondents also state that the Claimant was given a full opportunity to make submissions on the responsibility and assessment of Costs prior to both awards on Costs and yet chose not to make any comment.

81. The Respondents conclude their submissions on this point by drawing attention to the "without prejudice save as to costs" offer to settle the rent review arbitration that they

made prior to the commencement of the arbitration, which the Claimant chose not to accept, and which was "beaten" by the rent review arbitrator's decision. They submit that the Claimant should pay their Costs of the rent review arbitration.

82. The Respondents reiterate in their final submission on 4 October 2019 that I have no jurisdiction to rule that the Respondents cannot charge the Claimant for the Costs of the rent review arbitration and that, if I do have jurisdiction, there is no justification for setting aside or overturning the costs awards in the previous rent review arbitration.

83. **The Costs of this arbitration reference.**

The Claimant

84. The Claimant submits that the Respondents should pay the Costs of this arbitration reference.

The Respondents

85. The Respondents reserve their position as to whether this arbitration reference was vexatious or not (and thereby the Respondents' right to seek a ruling pursuant to Regulation 4(3) of the Pubs Code Fees Regulations, having acknowledged that, in accordance with Section 51(6) of the 2015 Act, the pub owning business is normally required to pay the reasonable fees and expenses of the arbitrator.

G. THE REMEDIES REQUESTED BY THE CLAIMANT

86. The Claimant requests that:

87. (1) I order and declare that [redacted] was a BDM;

88. (2) That [redacted] as a BDM, was not dealing with the Claimant in a fair and lawful manner consistent with the principles of the Code- Reg 41(1);

89. (3) That the Respondent cannot charge the Claimant for the costs of the previous rent arbitration, as it was opposed and built of a false premise. The Respondents submit that the Claimant should pay the Second Respondent's costs of the rent review arbitration, as awarded by the rent review arbitrator; and

90. (4) Order that the Respondent pay for the costs of this arbitration reference.

H. THE REMEDIES REQUESTED BY THE RESPONDENTS

91. The Respondents request that I order, direct and declare as follows:

92. (1) Rule that [redacted] was not a BDM under the Pubs Code;

93. (2) Rule that Regulation 41(1)(c) is not applicable to this arbitration referral, given that [redacted] was not a BDM or, in the alternative, rule that [redacted] dealt with the Claimant is a fair and lawful manner, consistent with the Pubs Code;

94. (3) Rule that the rent review arbitration was not opposed or built on a false premise and that, as a result, the Claimant should pay the costs of the rent review arbitration, as awarded against him; and

95. (4) The Respondents reserve their position as to whether the referral is vexatious or not (and thereby their right to seek a ruling on Costs pursuant to Regulation 4(3)).

I. DISCUSSIONS AND FINDINGS ON THE ISSUES- JURISDICTION

96. My power to decide on my own jurisdiction arises out of S.30 of the 1996 Act "Competence of tribunal to rule on its own jurisdiction", which enshrines into English law the principle of *"Kompetenz Kompetenz"* and states as follows:

" (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction , that is, as to-

(a) Whether there is a valid arbitration agreement,

(b) Whether the tribunal is properly constituted, and

(c) What matters have been submitted to arbitration in accordance with the arbitration agreement."

97. There has been no agreement to the contrary between the Parties and no submissions to me to limit or remove my jurisdiction to rule on my own jurisdiction. There has also been no challenge to my appointment or jurisdiction.

98. It follows that I was validly appointed as Sole Arbitrator and have jurisdiction to arbitrate this dispute, apart from Issue 3, which I will address later in this Final Award save as to Costs.

J. DISCUSSION AND FINDINGS ON THE ISSUES- THE ISSUES IN THE ARBITRATION

99. What was the status of [redacted] and, in particular, was he a Business Development Manager (BDM) acting for the Respondents within the meaning of Regulation 41(6) of the 2016 Regulations.

100. The burden of proof to establish that [redacted] was a BDM is on the Claimant and the standard of proof to be met is that of the balance of probabilities.

101. I accept the Respondents' submission that [redacted] was not employed by them or either of them and therefore find as a fact that [redacted] was not a BDM under Regulation 41(6)(a). In fact, as shown by the letter at P95 of Appendix B to the Statement of Defence, [redacted] s or was at the time a director of and probably employed by [redacted], a company of Chartered Surveyors and Licensed Leisure Specialists.

102. However, that is not the end of the story and I also have to take into account Regulation 41 (6)(b) and decide whether [redacted] was: "any other person who represents the pub-owning business in negotiations with tied pub tenants in connection with:

(i) Rent proposals;

(ii) Rent assessments or assessments of money payable in lieu of rent;

(iii) Repairs to the tied premises;

(iv) Matters relating to the tied pub tenants current or future business plans."

103. The Respondents admit that [redacted] was representing them or specifically the Second Respondent. The Claimant was a all material times a tied pub tenant.

104. I accept the Claimant's submissions that [redacted] was acting as a BDM. I do accept that [redacted] and [redacted] were appointed by the Respondents at various times as the BDM for the Vine Inn but that does not prevent me finding that [redacted] was a BDM.

105. When characterising himself as "an Expert", [redacted] may have been confused. No doubt, he will have acted as a party-appointed or even Court-appointed expert in other proceedings but that was not what he was doing here. He may also, at times, acted as an independent valuer or independent expert determiner but, again, that was not what he was doing here. In fact, as the Respondents set out, he was a professional and was appointed by the Respondents to represent them. The Respondents liken the role of [redacted] to that of a lawyer and I consider that is a fair characterisation. Lawyers very often negotiate with their clients' counterparties and that is what [redacted] was doing here. There is no suggestion that he was not authorised to do what he did nor that he was on "a frolic of his own".

106. Perhaps the clearest indication of the relevant part of his role arises from the three without prejudice save as to costs offers. These were put to the Claimant directly as part of negotiations. As it happens, all three offers were rejected but that is not the point. The offers were all related to proposals for the rent at the Vine Inn and/or the assessment of the rent that was to be payable from the relevant time under the lease on the Vine Inn. The first offer was directly on the point and the other two arguably likewise, although more indirectly on the point. [redacted] also wrote direct to the Claimant on 27 July 2017 by email, talking about the relevant "without prejudice save as to costs offer". The appointment of the rent review arbitrator and the representation of the Respondents before [redacted] did not render [redacted] a BDM; the negotiations with the Claimant via the three without prejudice offers did. I accept the Claimant's submission that [redacted] role crossed the line at that point. I am fortified in that conclusion by the fact that, at no point, did [redacted] explain to the Claimant that he was not acting as a BDM and also, as found by [redacted] he had meetings with the Claimant.

107. I therefore decide as a matter fact, on the balance of probabilities, [redacted] was a BDM engaged to represent the Second Respondent in negotiations with a tied pub tenant in connection with a rent proposal and a rent assessment. I am fortified in this conclusion by the exchange of emails of 27 April 2017 between the Second Respondent and [redacted] to which I have already referred.

108. Having found that [redacted] was acting as a BDM, I now have to go on and deal with Issues 2(a) and 2(b).

109. If I decide that [redacted] was a BDM acting for the Respondents, (a) did his behaviour towards the Claimant fall short of fair and lawful dealing and (b) did he fail to process any Pubs Independent Rent Review Service application that may have been filed by the Claimant?

110. The first matter that I should deal with is to agree with [redacted] in accepting that [redacted] did not behave in any way improperly. In deciding whether [redacted] behaviour fell short of fair and lawful dealing, I do not need to find that [redacted] behaved in any way improperly, as the word "improperly" carries with it a whiff of dishonesty and that was not the case here.

111. In order for this part of the claim to succeed, the Claimant must show that [redacted] conduct fell short of "fair and lawful dealing". I have taken it that the Claimant must establish on the balance of probabilities that [redacted] conduct fell short on both counts, that is that it was effectively both unfair and unlawful.

112. In support of his contentions, the Claimant complains of [redacted] treatment of the flooding report and that [redacted] failed to take into account the level of wastage and used and inflated calculation for rent. In fact, [redacted] opinion of the

market rental value of £46,000.00 per annum for the Vine Inn has to be seen in the context of, first, the initial rent in the Lease some 10 years before of £42,000.00 and the actual rent that was being paid in 2016 of £36,000.00 and the rent payable as decided by [redacted] of £39,500.00. The Claimant had a full opportunity to put his case to [redacted] in the previous rent review arbitration and the outcome was in the same bracket as all the rent numbers that I have just quoted. The first "without prejudice save as to costs" offer, no doubt crafted by [redacted] and rejected by the Claimant, was, in fact, less than the rent awarded by [redacted]

113. There is a conflict on the submissions of the Parties on the flooding report. [redacted] as a professional, was entitled to give his opinion. On the flooding risk, which opinion was no doubt influenced by the fact that the Vine Inn is a long way from the sea or any river. I do not find that any of [redacted] conduct was either unfair or unlawful and certainly did not "fall short of fair and lawful dealing". The flooding report itself at Section 5, Flood Risk Assessment, describes the river and sea flooding risk as low risk, groundwater flooding risk as "low" and tidal flooding risk as "low".

114. This leaves pluvial or rainfall flooding risk, which was also described in the flooding report as "low risk". The flooding report did recommend some improvements but these were made in the context of the risks assessed as I have set out. This is not consistent with [redacted] dismissing the detailed findings of the flooding report. [redacted] at paragraph 30 of his first award, also states that the Claimant had provided very little critique of [redacted] report.

115. On the balance of probabilities, I am not satisfied that any of this conduct was unfair and unlawful and I so find as a fact and therefore this part of the claim must fail. I am fortified in this conclusion by the findings of [redacted] who found that [redacted] did not behave in any way improperly, having been able to observe [redacted] much more closely than I.

116. I should also deal at this stage with the claim that [redacted] failed to process any PIRRS application that may have been filed by the Claimant. I have referred to this as Issue 2(b). Issue 2(a) and Issue 2(b) are in fact separate sub-issues. The Claimant stated on a number of occasions that he was going to file an application under PIRRS but there is no evidence he actually did so. [redacted] is clear that, if such an application had been made, as the rent review arbitrator, he would have stayed the rent review arbitration or, more likely, stepped aside. This part of the claim therefore fails also, as there was no PIRRS application which [redacted] failed to process. I should mention that this issue is not raised specifically in the Claimant's case document and his sections of the Scott Schedule that contains most of the Parties' submissions but it is clearly in issue in this arbitration and that is why I have to decide it, not least as it is set as one of the issues set as to be determined by me in Procedural Order No. 2.

117. Costs of the previous rent review arbitration.

118. I have set out the submissions of the Parties on this issue. Both Parties have proceeded on the basis that I have jurisdiction to deal with Issue 3, the Costs of the previous rent review arbitration.

119. This issue has to do with the enforcement of [redacted] Second Award of 16 September 2018 and his Final Award on Costs of 3 January 2019. These awards have long since passed the 28 day period for challenge set out in S. 67-69 of the 1996 Act and are therefore final and binding on the Claimant and the Second Respondent. The Claimant in this arbitration, who was the Respondent in the rent review arbitration, should have complied

with the Final Award on Costs and the Second Award of 16 September 2018 and the award of 3 January 2019 in accordance with their respective terms, that is within 28 days.

120. In the absence of compliance with these awards by the Claimant in this arbitration, the Second Respondent should have taken steps to enforce the awards in the usual way through the Courts. I see no reason why it should not now do so, so it would not be without a remedy.

121. Accordingly, it does not fall to me in this arbitration to order enforcement of awards already made by another arbitrator in another arbitration, the previous rent review arbitration, and I decide that I do not have jurisdiction so to do and I accept the Respondents' submission in that regard. This part of the remedy requested by the Second Respondent therefore fails and is dismissed for want of jurisdiction. It follows that I do not have to rule whether the rent review arbitration was not opposed or based on a false premise and whether I should overturn or set aside the Costs orders in the previous rent review arbitration.

K. DISCUSSION AND FINDINGS- COSTS AND THE ASSESSMENT OF COSTS IN THIS ARBITRATION REFERENCE

122. My power to award costs arises out of Section 61 of the Arbitration Act. Section 61(2) states that the general principle should be that costs should follow the event (unless the parties otherwise agree). Section 63 - The Recoverable Costs of the Arbitration gives me the power to determine what costs are recoverable on such basis as I think fit.

123. As it was agreed that this should be a Final Award save as to Costs, I am reserving all questions as to Costs for further submissions following this Award. For the sake of good order, I am setting out that I was advised of the PCA's Costs when I was appointed and these Costs will be invoiced separately in due course. These Costs amounted to 0.4 hours @ £160.00- £64.00- and will be included in any Costs award that I make and will order that these Costs should be paid to the PCA directly, following the issuing of the corresponding invoice by the PCA. I also note that the Claimant would have paid the £200.00 Referral Fee to the PCA, although the appropriate box was not ticked on the PCA Referral Form. I will also deal with the question of interest on Costs at the same time.

L. HOLDINGS OF THIS FINAL AWARD SAVE AS TO COSTS

NOW, I, [redacted] ARBITRATOR, having carefully considered the submissions of the Parties and all the materials before me and in final resolution of all issues before me, apart from those relating Costs, **HEREBY ORDER, DECLARE, AWARD AND DIRECT** as follows:

HOLDINGS OF THIS FINAL AWARD SAVE AS TO COSTS - THE SEAT (LEGAL PLACE) OF THE ARBITRATION

124. The Seat (Legal Place) of the arbitration is London, England.

HOLDINGS OF THE FINAL AWARD SAVE AS TO COSTS- JURISDICTION

125. I have jurisdiction to determine the disputes between the Parties, save in relation to Issue 3, the Costs of the previous rent review arbitration.

HOLDINGS OF THIS FINAL AWARD SAVE AS TO COSTS - THE INSTITUTIONAL RULES TO BE USED

126. The institutional rules governing this arbitration are the Chartered Institute of Arbitrators Arbitration Rules 2015 and the procedural law of the arbitration is English law.

HOLDINGS OF THIS PARTIAL FINAL AWARD SAVE AS TO COSTS – THE ISSUES IN THIS ARBITRATION

127. What was the status of [redacted] and, in particular, was he a Business Development Manager (BDM) acting for the Respondents within the meaning of Regulation 41(6) of the 2016 Regulations.

128. [redacted] was a BDM within the meaning of Regulation 41(6) and this part of the claim therefore succeeds.

129. If I decide that [redacted] was a BDM acting for the Respondents, (a) did his behaviour towards the Claimant fall short of fair and lawful dealing and (b) did be fail to process any Pubs Independent Rent Review Service (PIRSS) application that may have been filed by the Claimant?

130. The first part of issue 2, Issue 2(a), in the claim fails.

131. The second part of the claim, relating to the alleged failure by [redacted] to process any PIRRS application, in Issue 2(b) fails.

132. Costs of the previous rent review arbitration.

133. This part of the Claim fails, as I do not have jurisdiction to deal with the issue of the Costs of the previous rent review arbitration.

HOLDINGS OF THIS PARTIAL FINAL AWARD SAVE AS TO COSTS- COSTS AND THE ASSESSMENT OF COSTS IN THIS ARBITRATION REFERENCE

127. All questions as to Costs are reserved for further submissions of the Parties and a Final Award on Costs.

HOLDINGS OF THIS FINAL AWARD SAVE AS TO COSTS- REJECTION OF ALL OTHER REQUESTS AND CLAIMS

128. All other requests and claims are rejected, save those which relate to Costs and the assessment of Costs in this arbitration reference, which are reserved as set out above.

MADE AND PUBLISHED UNDER MY HAND at the Seat (Legal Place) of the arbitration in London on 22 October 2019 by [redacted] at [redacted]

Signed. [redacted]

Dated 22 October 2019

[redacted] **Arbitrator**

Witness:...

Address of Witness...

Signature of Witness:.....