IN THE MATTER OF A PUBS CODE ARBITRATION

BETWEEN

(1) JOHN MARK CALLAND

(2) HANNELIE CALLAND

(Tied Pub Tenants)

Claimants

-and-

PUNCH TAVERNS

(Pub Owning Business)

Respondent

FINAL AWARD INCLUDING COSTS

Introduction

1) The dispute before me is whether or not a proposed MRO tenancy served upon the Claimants by the Respondent is compliant.

2) The Claimants are John Mark Calland and Hannelie Calland, the tied pub tenant ("TPT") of The Old Quay Inn, 32-33 St John's Terrance, Truro, Cornwall TR3 6ND ("the Pub").

3) The Respondent is Punch Taverns Limited, whose registered address is at Jubilee House, Second Avenue, Burton-on-Trent, Staffordshire DE14 2WF a regulated pub-owning business ("POB") and who is the landlord of the Pub.

4) The Claimants are represented by [redacted] of Commercial Business Solutions Limited.

5) The Respondent is represented by [redacted] of [redacted]

6) Parliament has provided for statutory arbitration as the means by which such disputes under the Pubs Code Regulations 2016 are to be resolved.

7) While the issues between the parties have narrowed with the Respondent making certain concessions on disputed terms a significant number of terms remain unresolved.

8) The procedure was agreed between the parties and myself and then issued as Procedural Order No.1 dated 27 September 2019. The parties requested that I determine this matter on the papers.

Background

9) The Claimants hold, by assignment, a fully repairing and insuring lease of the Pub originally granted on 19 August 2005 for a term of 20 years commencing on the same date. Rent reviews are five yearly on 19 August of 2010 2015, 2020 and 2025. The Claimants are fully tied on all drinks for sale on or from the pub with the exception of wines, spirits, minerals and flavoured alcoholic beverages.

10) The lease was originally held by [redacted] and transferred (assigned) to [redacted] on 20 April 2006. By a licence to assign dated 2 July 2009 the Claimants became the tenants under the lease. A deed of variation also dated 2 July 2009 varied the deposit to be paid by way of security and the performance of the Claimants' obligations was guaranteed by [redacted] by a legal guarantee also dated 2 July 2009.

11) The Respondent issued its rent assessment proposal on 30 April 2019.

12) The Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") makes provision for tenants of tied pubs to be offered a MRO option in specified circumstances. As a result of an MRO notice served by the Claimants on the Respondent on 20 May 2019, the Claimants have the right to receive a compliant MRO proposal. On 30 May 2019 the Respondent purported to send to the Claimants a "full response", including within its response a proposed tenancy. The Claimants considers that this proposed tenancy is not "MRO compliant", in that the proposed tenancy requires a surrender and re-grant by way of a new lease, further and/or alternatively it is not a full response and further and/or alternatively that it is on unreasonable terms, and have therefore made a referral to the Adjudicator on 25 June 2019.

13) The Claimants alleged that the individual terms in the proposed tenancy are unreasonable because of the adverse effect they would have, and/or because they differ from the terms of the current lease and/or because they are not common in free of tie agreements. Further, the Claimants allege that insistence of the use of a new lease by the Respondent, as opposed to the use of a deed of variation ("DOV") to the Claimants' current lease, is unreasonable.

Procedural History

14) Following the Claimants request for an MRO on 20 May 2019 the Respondent issued its full response and proposed tenancy on 30 May 2019. The Claimants made their referral to the Pubs Code Adjudicator (PCA) on 25 June 2019.

15) I, [redacted], replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 29 August 2019.

16) The Preliminary Meeting was held on 25 September 2019 by teleconference and attended by [redacted] on behalf of the Claimants and [redacted] and [redacted] on behalf of the Respondent. Procedural Order No.1 was agreed by the parties and issued on 27 September 2019.

17) The law of this arbitration is the law of England and Wales.

18) The seat of the arbitration is Birmingham, England.

19) Statement of Claim was served on 18 October 2019.

20) Statement of Defence was served on 8 November 2019.

21) Paginated bundle was served on 27 November 2019.

22) Witness statements of [redacted] and [redacted] were served on 17 January 2020.

23) Expert witness reports of [redacted] (on behalf of the Claimants) and [redacted] (on behalf of the Respondent) were served on 31 January 2020.

24) Skeleton arguments were exchanged on 7 February 2020.

25) The outstanding list of issues in dispute were served on 21 February 2020.

26) On 6 March 2020 I issued my Award in relation to the substantive issues finding that:
- The MRO proposal may be provided by way of either a deed of variation or by the provision of a new lease. If the non-compliant terms are amended to be MRO compliant the provision of a new FOT lease would be acceptable.
- The MRO proposal is not compliant because:
    - The proposed new lease fails to take account of the financial effects upon the Claimants and whether the proposal makes it unviable for the Claimants to enter into a free of tie lease with the Respondents.

- The terms set out in paragraph 80 of my Award dated 6 March 2020 are either not common and/or are unreasonable.
- That should the parties be unable to negotiate mutually acceptable terms within 28 days of my Award I would provide directions for further submissions.

27) By email dated 24 March 2020 the Respondent requested an extension of two working days to provide a revised Response to the Claimants. This was agreed on 25 March 2020.

28) The Respondent provide a revised Response which contained a revised MRO Proposal to the Claimants.

29) By email on 10 April 2020 the Claimants accepted that the revised MRO Proposal had removed the unreasonable terms making the MRO terms themselves acceptable. The Claimants then noted that the revised MRO Proposal was in the form of a new lease rather than Deed of Variation and that this would cause undue cost to the Claimants due to the legal and stamp duty costs that would be incurred.

30) By email dated 23 April 2020 the Respondent set out their understanding of the stamp duty issues, which are not part of this arbitration, and that the Claimant would not incur any stamp duty due to overlap relief. By email of the same date I noted that the tax implications of a new lease would be a matter for the Claimants and suggested that they take independent tax advice.

31) By email dated 27 April 2020 the Claimants' accepted the approach of using a revised MRO lease with the agreed terms in lieu of a Deed of Variation.

32) I issued directions for directions as to costs by email dated 277 April 2020 directing that submission as to costs were to be provided by 4:00pm Friday 8 May 2020. The Respondent requested that the date for submissions be put back to Wednesday 13 May 2020. I agreed to this short extension by email dated 28 April 2020.

33) Both parties provided their submissions as to costs on Wednesday 13 May 2020.

Revised MRO Proposal

34) The parties have agreed the terms of a new lease as set out in the Respondent's revised MRO Proposal. By consent of the parties the terms of the revised MRO Proposal forming the new MRO compliant lease are incorporated into this Final Award as Appendix 'A'.

Costs – Liability

35) Both parties made submissions in writing in relation to the party costs by email (including attachments) on 13 May 2020.

Claimants

36) The costs claimed by the Claimants fall under two categories: i) Costs incurred whilst continuing to trade as a tied tenant and ii) Costs incurred for support used to facilitate the MRO process and support during the PCA referral/adjudication process.

Costs incurred whilst continuing to trade as a tied tenant

37) The Claimants have not provided any submissions as to why these costs are claimable in this arbitration. These submissions are in relation to the additional cost to the Claimants of continuing to trade as a tied tenant over the costs to them of trading as a MRO tenant.

38) The additional cost of continuing to trade as a tied tenant is not a party cost in the arbitration. They are in reality a potential claim for damages that are not part of this arbitration.

39) I dismiss the Claimants claim for costs incurred whilst continuing to trade as tied tenant.

Costs incurred for support used to facilitate the MRO process and support during the PCA referral/adjudication process

40) The Claimants submit that the costs of representation including negotiations with the Respondent are payable. In particular it is submitted that:

'*We would like to comment that it would perhaps not be reasonable to determine the claimants as litigants in person, given they have been represented by us throughout the process of arbitration. However, we also recognise that Commercial Business Solutions are not lawyers and therefore it would not be appropriate to determine the cost of our input as an appropriate fee earner either. We suggest that if an award for*

costs is to be made that the cost of representing the claimants needs to be reasonably determined by the arbitrator.

We would kindly request that the claimant's choice of representation should not bias the determination of any award in relation to costs and that in the alternative any award is given reasonable consideration as would be expected in the circumstances.'

41) The Respondent submits that that the Claimants were not legally represented by solicitors and were, in essence, litigants in person and any claim for [redacted] fees should be treated in light of the principles set out in *Agassi v Robinson* [2005] EWCA Civ 1507.

42) The *Agassi* case is in relation to the costs that can be recovered in litigation where specific rules apply to representation. The rules as to representation in litigation do not apply to other forms of dispute resolution including arbitration. It is my view that the costs of representation are not restricted to lawyers as would be the case in litigation.

43) Section 59(1) of the Arbitration Act 1996 states that costs in arbitration proceedings fall into three categories:
- The arbitrators' fees and expenses,
- The fees and expenses of any arbitral institution concerned, and
- The legal or other costs of the parties.

44) The third point is in relation to legal or other costs of the parties. The question will be whether the costs incurred related to and for the purpose of the arbitration. If the costs had not been incurred in order to bring or defend a claim, they would fall outside the scope of "other costs" and would not be recoverable. This allows the arbitrator to award the costs of representation even though such representation is by a non-lawyer.

45) I am of the view that the Claimants' cost of representation may be awarded even though such representation is not by a legally qualified person. Accordingly, the reasonable costs of [redacted] may be awarded should I decide that that such costs should be awarded.

Respondent

46) The Respondent has submitted that '*…that it was justified in producing a new lease, as opposed to a DOV, and that the majority of all submissions in this referral (including the award itself) related to this issue. Therefore, the main area of dispute related to whether a new lease could be the basis for the MRO vehicle (which by its very nature contained new, more modern clauses), or whether the MRO vehicle had to be by way of a narrow DOV, simply removing the tie. It was held in the original award, dated 06 March 2020, that the Claimants' case was not made out in this regard*.'

47) In making this submission the Respondent is saying that the majority of the time expended in this arbitration was in relation to the question of whether an MRO lease should be by way of a new lease or a deed of variation. Whilst this may be the case the decision was that the MRO lease could be by way of either vehicle, and that the Claimants' position that it should be by way of a Deed of Variation was incorrect. Once the specific terms, which were not complaint in the original MRO Response, had been addressed by the Respondent and incorporated into the revised Response the Claimants, following their consideration of the tax position, accepted that revised proposal which was in the form of a new lease.

48) This was a legitimate position to be taken by the Claimants and in other circumstances it may have been that the better way forward would have been a Deed of Variation which would have been also acceptable under the Pubs Code etc. Regulations 2016. On consideration of the submission made in relation to this issue I am unconvinced that the Claimants were taking an issue that should not in reality have been taken.

49) Further to this the Respondent has submitted that this arbitration could have been compromised though negotiation and that despite the concessions made by the Respondent the Claimants position hardened such that any compromise became impossible. It is this conduct that is said to be unreasonable when set against the eventual award and the acceptance by the Claimants of the revised MRO Response which continued to be by way of a new lease.

50) The Respondent sets out the chronology of the negotiations between the parties within their cost submission. Relevant correspondence has also been provided in support of the views expressed in that chronology.

51) Of particular relevance is the offer of a Deed of Variation on 24 September 2019 from the Respondent albeit that some of the terms were unacceptable to the Claimants, terms were further revised by the Respondent on 19 October 2019 but again this was rejected by the Claimants who said on 5 December 2019 that the MRO should be agreed on mirror terms to the original lease by way of Deed of Variation.

52) Further discussions were held and the Claimants' position became one that the Deed of Variation should simply be by way of a severing of the tied terms. This was not acceptable to the Respondents. The discussions continued into January 2020 but failed to make any further progress.

53) The negotiations could have been successful as is evident from the agreement to the revised MRO proposal containing the terms of a new lease. This of course could be argued in many cases that are fought in arbitration or litigation. Only in exceptional cases can it be said that a party should not have embarked on its course of action or that they were so obviously wrong that the claim has no chance of success. I do not accept that the Claimants were so obviously wrong that they should have not embarked on this arbitration. The Claimants did not lose the case but rather obtained a new lease with terms that they could finally accept rather than a new lease, or Deed of Variation, that contained terms that were unacceptable to them.

54) The Respondent notes '*In summary, the Respondent observes that of these 18 clauses, 11 were original clauses that were upheld by the Arbitrator in his award and a further 5 clauses were conceded by* [redacted] *in his witness statement dated 17 January 2020, leaving only the 2 clauses relating to the deposit level (the new level of deposit and the deposit level for any assignee) that were not upheld, or conceded by the Respondent*.'

55) The Respondent is correct in their observation, however, this left disputed terms that in turn led to a decision which upheld the Claimants position.

56) On balance, it is clear to me that as both parties have been partially successful in this arbitration and that I have found that the Claimants did not act unreasonably that the liability for party costs should be proportionate as to the relative success of each party.

Costs – Quantum

57) Under the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 No. 802 the following provisions in relation to costs are set out:

MRO disputes: fees, costs etc.

3. *(1) This regulation applies where—*

*(a) a tied pub tenant(**c**) or a pub-owning business(**d**) refers an MRO dispute to the Adjudicator(**e**) ("the referral") under the Pubs Code etc. Regulations 2016(**f**); or*

(b) a tied pub tenant gives notice ("the notice") under regulation 60(2) of those Regulations that the tenant wishes the Adjudicator to be appointed to arbitrate an MRO dispute.

(2) The person who makes the referral or gives the notice must pay a fee of £200 to the Adjudicator at the time the referral is made or the notice is given.

(3) The pub-owning business must pay the reasonable fees and expenses of the Adjudicator (or of the person appointed by the Adjudicator under regulation 58(2)(b) or 60(4)(b) of the Pubs Code etc. Regulations 2016) in respect of the arbitration, except where—

(a) the tenant made the referral or gave the notice; and

(b) the Adjudicator (or the person appointed by the Adjudicator under regulation 58(2)(b) or 60(4)(b) of the Pubs Code etc. Regulations 2016) concludes that the referral or notice was vexatious.

(4) The Adjudicator (or a person appointed by the Adjudicator under regulation 58(2)(b) or 60(4)(b) of the Pubs Code etc. Regulations 2016) may order the tied pub tenant to pay an amount in respect of the pub-owning business's costs relating to the arbitration.

(5) The maximum amount the tied pub tenant may be ordered to pay is—

(a) where paragraph (6) applies, the pub-owning business's full costs of the arbitration;

(b) otherwise, £2,000.

(6) This paragraph applies where the Adjudicator (or a person appointed by the Adjudicator under regulation 58(2)(b) or 60(4)(b) of the Pubs Code etc. Regulations 2016) considers that—

(a) the referral or the notice was vexatious; or

(b) the tied pub tenant's conduct in connection with the arbitration has resulted in an unreasonable increase in the costs of the arbitration.

58) There is no cap on the costs that can be awarded to the Claimants whilst a cap of £2,000.00 applies to the Respondent's costs save where paragraph 6 applies.

59) In this arbitration both parties have been partially successful in their submissions with a number of proposed terms being found to be unreasonable and the MRO compliant lease capable of being either a Deed of Variation or a New Lease.

60) I have considered the costs provided by both parties. In relation to the Claimants' cost of [redacted] these are based on an agreement for [redacted] per calendar month. No breakdown of the work that has been carried out has been provided and there is no indication as to what an appropriate hourly rate might be. When compared to the Respondent's costs of [redacted] it can be seen that a description of the work that has been carried out has been provided along with the number of hours and rate to be applied. It is also noticeable that the Respondent's total cost are much lower than those claimed by the Claimant.

61) I am unable to assess whether the costs incurred by the Claimants are reasonable or whether they have been reasonably incurred. It is the case that time has been expended on the Claimants' representation in these proceedings but I am unable to accept the costs as have been submitted. I accept that an award of costs should be allowed in respect of the elements of the claim that were successful. I have decided that [redacted] of the Claimants' costs should be allowed in relation to the elements where they succeeded, this equals [redacted]. This sum is reduced by [redacted] due to the total lack of information as to the hours expended and the appropriate hourly rate that should be applied. The Claimants' total allowable cost of this arbitration are [redacted]

62) The Respondent's cost are limited by the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 No. 802 at paragraphs 3(5). I have not found that the exception set out at paragraph 3(6) applies and therefore can only allow [redacted] for the Respondent's costs in this arbitration.

Arbitrator Costs

63) Paragraph 3(3) of The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016, states that the pub-owning business is required to pay the Arbitrator's reasonable fees and expenses, except where the tenant makes the referral and the Arbitrator concludes that the referral or notice was vexatious.

64) I have concluded that the Claimants' referral to arbitration was not vexatious and I am therefore obliged to order the Respondent to pay the Arbitrator's costs including the cost incurred by DPCA as arbitrator of [redacted]

65) My cost in this arbitration are [redacted].

66) The DPCA's cost will be invoiced separately to the Respondent.

IT IS NOW ORDERED THAT:

a) By consent the parties have agreed to enter into a new MRO compliant lease as set out in the Appendix to this Arbitration Award;
b) The Claimant is to pay the Respondent's Costs in the sum of
c) The Respondent is to pay the Claimant's Costs in the sum of
d) The Respondent is to pay the DPCA Arbitrator's Costs in the sum of and
e) The Respondent is to pay the Arbitrator's Costs in the sum of .

Arbitrator

Date Award made 20 May 2020

Ref: ARB/105948/CALLAND