IN THE MATTER OF **Ref:** [redacted]

THE PUBS CODE ARBITRATION BETWEEN: -

[redacted] **Claimant**

(Tied Pub Tenant)

-and-

EI GROUP PLC

First Respondent

(Pub-owning Business)

-and-

UNIQUE PUB PROPERTIES LTD

Second Respondent

Award

Summary of Award

The proposed tenancy is not MRO-compliant, and therefore the POB has failed to comply with the duty under regulation 29(3)(b). The POB must give a revised response in the form of a Deed of Variation which is MRO-compliant, the terms of which the arbitrator will determine if not agreed by the parties.

Introduction

1. The law and procedure relating to this arbitration can be found in Appendix 1. The Claimant is [redacted] and is the tied pub tenant (TPT) of the [redacted] ("the Pub"). On [redacted] 2002 the current lease of the Pub was granted for a term of 30 years from [redacted] 2002. On [redacted] this lease was assigned to the Claimant. The Respondent pub-owning business ("POB") is Ei Group Plc of, 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ.

2. The Claimant is represented by Mr Chris Wright of the Pubs Advisory Service. The Respondent is represented by Gosschalks Solicitors.

The First Referral

3. This is the second referral for arbitration in relation to a proposed Market Rent Only ("MRO") lease for the [redacted]. The history of this matter is as set out in my First Award on the previous referral, issued on 23 July 2018 and is not repeated here.

4. It should be noted however that the MRO notice was served[1] on 3 February 2017. My First Award was issued after a 2-day oral hearing on 9 and 10 May 2018 in respect of four consolidated cases including this one, in which all Claimant representatives were linked and active in pub campaigning and / or the representation of large numbers of Claimants in referrals to the PCA for arbitration in relation to MRO issues. The parties sought a determination as to certain core issues of law. There was some expectation from all parties that my awards in these consolidated cases would prove authoritative on the issues of law, at least to them. Therefore, I went into significant detail in my reasoning in relation to a large number of issues, including those of statutory interpretation, such that it would stand legal scrutiny from any source. There was no appeal.

Mischaracterisation of the First Award

5. A material issue in contention in all of those cases was the question – Does the starting point for the MRO option have to be the existing tied lease, which must be varied by deed only to the extent required to achieve compliance with the Pubs Code etc. Regulations 2016 ("the Pubs Code")? I answered that question in the negative, when I found at paragraph 93 of my First Award in the previous referral:

> *"There is nothing in the legislation which requires only the "minimum changes" sought by the Claimant to the existing tied tenancy to release the tenant from the tied trading provisions."*

6. The Respondent has in these proceedings mischaracterised that conclusion. On 13 November 2018 the Respondent said "The PCA has confirmed in the March 2018 advice and in the award in the first referral, that the minimum only DOV approach is wrong." On 10 January 2019 it said:

[1] Under regulation 23 of the Pubs Code

"In your first Award … you confirmed that the existing lease was not the correct starting point for the MRO tenancy and that a "minimum only DOV" was not the appropriate vehicle for delivering the MRO tenancy."

7. The Respondent also wrote to the Claimant on 6 February 2019 as follows:
"Your DOV was clearly not the suitable starting point. It provided for a minimum of changes which the PCA and DPCA has repeatedly confirmed is not the appropriate approach."

8. I reprimanded the Respondent's solicitor for mischaracterising my award in that way. On 26 February 2019 my office wrote to the parties in the following terms:

"[T]he DPCA is concerned to note that on three occasions in this case the Respondent's solicitor has incorrectly or incompletely characterised the findings in her award in respect of the full response.

…

*The DPCA found that the existing lease was not the **necessary** starting point (paragraph 123)… The argument brought by this and other Claimants in the consolidated cases was that, properly interpreting the legislation, the minimum only DOV was the **necessary** starting point for the MRO, and therefore that the full response was non-compliant. The DPCA rejected that argument, but at no point did she find that a "minimum only" DOV (whatever that might in fact be in a particular case, or a DOV of any particular form in contemplation) could not be a compliant MRO tenancy….*

… The suggestion repeated by the Respondent that the DPCA has found that a "minimum only" DOV (whatever that may mean on the facts of an individual case) is not "appropriate" is therefore inconsistent with the reasoning in that award."

9. The Respondent replied on 27 February 2019 that it did not seek to mislead and apologised if it did.

Compliance of the Full Response

10. The POB must provide a full response which includes a proposed MRO tenancy which is compliant. It cannot be compliant if it contains any unreasonable terms or conditions[2]. I found in my previous award that the test of unreasonableness also applies to the choice of vehicle for the MRO tenancy – a new lease or a Deed of Variation ("DOV") of the existing lease[3]. This is consistent with the Advice Note on Compliant MRO Proposals issued by the PCA in March 2018[4].

11. All of the Claimants in the consolidated cases challenged the requirement by the Respondent to enter into a new lease as being unreasonable. In respect of the three consolidated cases other than this one, I went on to find on the

[2] Section 43 of the Small Business, Enterprise and Employment Act 2015.

[3] See paragraph 71 of my First Award in the previous referral

[4] https://www.gov.uk/government/publications/pca-advice-note-market-rent-only-mro-compliant-proposals

evidence and submissions that were put before me that it was not unreasonable for the Respondent to propose a new lease.

12. However, I treated this case differently. It was the only one in which the original lease was granted prior to 1 December 2003. That was the date on which the Stamp Duty Land Tax ("SDLT") regime was introduced. In this case, therefore, the tenant would have been liable to pay Stamp Duty (the previous tax which SDLT replaced), and there would be no right to overlap relief of any such sum paid in respect of SDLT liability on the grant of a new MRO lease. Therefore, this tenant could be subject to an element of double taxation if required to enter into a new MRO lease.

13. The role of the POB in the MRO process is not to act as tax consultant. The relevance of SDLT is more nuanced and indirect. It is important to consider what the tenant with negotiating strength would do in this situation. Unlike in the open market, the tenant taking the MRO option at rent review does not have the right to walk away or contract elsewhere, and is not in a position of negotiating strength having made an attractive rent offer to go free of tie. The test of unreasonableness is the counterbalance to the negotiating strength of the POB in the MRO procedure.

14. I did not order the precise terms on which the Respondent should serve the revised response. I considered that the parties had not put before me evidence such that I could determine common terms in the free of tie ("FOT") market to be contained in the revised response, and their principled stances on how the law should be applied had got in the way of negotiating an outcome. I did indicate however, at paragraph 195 of my First Award in the previous referral, that "*a DOV may be required in this case…".*

15. As a result of my award dealing with these points of principle, I hoped that the parties might be in a position to agree the terms of a compliant MRO proposal. That hope was misplaced.

16. The Respondent served its revised response, including a proposed compliant MRO lease, on 28 August 2018. What the Respondent did was something which had not been in the contemplation of the parties, or myself, at the time I issued by first award. The proposed MRO tenancy in the revised response was in the form of a DOV, but in a novel form. Its terms would serve to delete all of the terms of the existing lease (other than the parties, the demise and the duration) and replicate the Respondent's proposed wholly new terms in an annex to the lease. This is referred to in this award as a "DOV by reference".

Case Management

17. On 11 September 2018 the Claimant referred that revised response for arbitration. I offered to hold a telephone case management conference on 5 October 2018, which took place on 15 October 2018 at the Claimant's request. Certain directions were agreed by the parties, including for the agreement of a list of issues in dispute. The Claimant asked for and was granted a little further time for negotiation "owing to an issue arising in relation to the guarantor".

18. Since that Case Management Conference, the procedural progress of this case has been slow and haphazard. Unusually for arbitration proceedings, there have been no statements of case. However, I have sought to understand and be led by the parties what appear to be the issues they wished to explore and the procedure they wished to follow.

Issues in Dispute

19. The parties have never provided a list of issues in dispute in this case. However, as summarised in the following extracts from their exchanges, I deduced that there was a preliminary issue for determination. The Claimant has been directed to set out the issues in dispute, and been reminded of this on several occasions by the Respondent. However, the Claimant's representative has not done so. The Respondent said in an email dated 19 December 2018:

> *"At the present time, it is entirely obscure as to what terms the Claimant does dispute. Identifying terms that the Claimant considers compliant doesn't properly explain, or set out in a form that can be responded to, what is challenged as non-compliant and why.*
>
> *We are unable to prepare evidence or instruct experts to assist with disputes, when we do not know what the disputes are."*

20. Though the Respondent has on other occasions in this dispute challenged the Claimant to identify terms in dispute in its proposed DOV by reference, the principal dispute to have emerged has been whether the use of a DOV by reference is compliant.

21. In an exchange of emails between the parties, the Respondent wrote on 6 February 2019:

> *"The answer on the DOV by reference/SDLT point may then unlock the rest of the case, but we still think your client should set out what terms they object to."*

22. The Respondent wrote again that day reminding the Claimant of a direction to submit a list of issues in dispute, and the Claimant's immediate reply included the following:

> *"First we need to get the vehicle i.e. your new and novel approach to avoid SDLT by cloaking new agreements with a DoV out of the way."*

23. I therefore understood the parties to be seeking a determination first on the compliance of a DOV by reference. My office then wrote to the parties on 27 February 2019 regarding case management as follows:

> *"ISSUES IN DISPUTE*
>
> *The arbitrator notes that the Claimant has not identified a full list of issues in dispute, but from correspondence (including 13 November 2018) he has made it sufficiently clear that the principle issue in dispute is the compliance of a DOV*

by reference as being a novel agreement which is new and untested, and the risk of liability for SDLT arising. Mr Hastie has identified in his email of 6 February 2019 that the DOV by reference/SDLT point may unlock the case, and it is clear from recent correspondence between the parties that they consider (notwithstanding the direction that they agree a list of issues in dispute) that they are now of a mind that the DOV/SDLT issues should be determined first. It is apparent that this relates to (1) the commonality of the deletion of all existing terms and (2) how freely negotiating parties would act in the light of SDLT considerations."

24. In determining this preliminary issue I have sought expert evidence under s.37 of the Arbitration Act 1996 from SDLT expert in the form of a report dated 22 May 2019 and a supplementary report dated 26 June 2019 on which both parties have had the opportunity to make submissions.

25. In order to ensure justice to both parties, and bearing in mind that the Claimant is not professionally represented, I have sought to summarise from his various communications what he asks me to determine. By letter from my office to the parties dated 6 August 2019 I set out the following issues and asked the parties to confirm that they accurately represent the issues which were in dispute between the parties and in respect of which they seek determination at this stage.

> *"Whether the DOV by reference is not compliant because in breach of Section 43(4)(a)(iii) it contains unreasonable terms and conditions in that:*
>
> *a. A freely negotiating tenant properly advised would have a preference for a DOV which effects any changes to the terms of the existing lease by a direct line by line amendment, above a DOV by reference, due to SDLT considerations.*
>
> *b. The Respondent has not put forward reasons for the use of a DOV by reference instead of a "minimum changes" DOV (which does no more than vary the lease to the minimum required to achieve compliance), though the arbitrator has already determined between these parties that the existing lease is not the necessary starting point for the MRO compliant lease.*
>
> *c. Pursuant to regulation 30(2)(c), its terms and conditions are to be regarded as unreasonable because they are not common terms in agreements between landlords and pub tenants who are not subject to product and service ties, including (as referenced by the arbitrator on 27 February 2019 in identifying the issues in dispute) because the terms of the DOV (Clause 2) delete all existing terms of the tied lease (other than parties, demise and duration) and replace them with new terms."*

26. By letter from my office dated 14 August 2019, I further invited the parties to confirm if they were content for me to proceed to issue an award on these issues. The Respondent indicated that prior to the issue of such an award, it wished to make further submissions in light of the expert report of . On 22 August 2019 the Claimant stated that he wished to have the opportunity to reply to any such submission. I noted that the Respondent had

already been in possession of the report of [redacted] for some time (since 26 June 2019), however having taken into account its delay in seeking permission to do so and the fact that the Claimant did not object, I nevertheless considered it appropriate to grant permission for the Respondent to make a short submission, and for the Claimant to respond. Now that both parties have had the opportunity to make those further submissions, and both have done so, my understanding now is that they wish for me to make a determination of the above issues. I wrote to them on 8 October 2019 to advise them that I would do so.

Determination

27. In relation to the issues set out in paragraph 25, my determination in summary is that the revised MRO proposal is not compliant. My reasoned consideration of the evidence in reaching this conclusion is now set out below. I address points a, b and c below.

Issue a - *Whether the DOV by reference is not compliant because in breach of Section 43(4)(a)(iii) it contains unreasonable terms and conditions in that:*

a. A freely negotiating tenant properly advised would have a preference for a DOV which effects any changes to the terms of the existing lease by a direct line by line amendment, above a DOV by reference, due to SDLT considerations.

28. In correspondence from the Claimant's representative, he has expressed concern about liability for SDLT arising from the DOV by reference. I understand that he considers this agreement structure is a new and novel route which could be considered a new agreement in all but name. I understand that he contends that he is being asked to take the risk of SDLT liability which could arise on an untested method of agreement when there is a simpler route which carries no risk for him.

29. The directions agreed by the parties on 12 November 2018 included for an order for the disclosure by the Respondent of its advice on SDLT liability, or alternatively for the agreement by the parties of an appropriate expert to be appointed by the arbitrator under s.37 of the Arbitration Act 1996 to advise.

30. On 13 November 2018 the Respondent declined to disclose its own advice on SDLT liability in respect of the DOV by reference and advanced the names of certain proposed tax experts to provide me with advice. The Claimant did not engage in respect of these proposals. The process of obtaining evidence in relation to the SDLT issues has been tortuously slow.

31. The Respondent has also refused to provide to the Claimant an indemnity in respect of all such SDLT liability and penalties that may arise.

32. The Claimant on 4 January 2019 provided a draft DOV of the existing lease, but it was not produced by an expert and the Respondent dismissed it as effectively useless as it contained numerous errors and is so poor that it should not form the basis of any consideration.

33. The identity of a tax expert was agreed between the parties on 22 January 2019 – . On 8 February 2019 the Respondent produced a draft letter of instruction to , which was agreed by the Claimant. The letter from my office dated 27 February 2019 explained that I was not content with the draft instructions as they did not request opinion as to:

> *a. The comparative approaches of a freely negotiating tenant in relation to:*
>
> > *i. a DOV which amends the existing lease line-by-line, with expert instructions which reference that the Fourth Schedule "Terms of Trading" provides for a tie in respect of beers and ciders, the tenant being required to sell only those supplied by the landlord and where paragraph 7 of the Sixth Schedule entitles the landlord to release, suspend or vary the tenant's obligations in the Fourth Schedule (and other tenant obligations) by notice. That the DOV would not exercise the existing landlord's right to serve notice but would by deed vary the lease to release the tie and vary other such terms as are not common in free of tie leases and to vary the terms so that they are reasonable to both parties in a free of tie lease (such amendments not yet being agreed between the parties)*
> > *ii. A DOV by reference - which deletes all of the terms of the existing lease and replaces them.*
>
> *b. Whether the expert in his professional career has seen the wholesale variation of a lease by DOV which deletes all terms and replaces them in an annex?*
> *c. What effect on SDLT, if any, does the expert consider deleting and remaking all relevant terms of a lease in an annex has compared to a direct amendment of the existing terms?*
> *d. If faced with a choice between direct variation of the existing terms, and the wholesale deletion and replacement of terms in an annex, what is the most likely option a tenant acting knowledgeably, prudently and willingly would choose and why?*

34. Instructions to drafted by the Respondent were agreed by the parties on 4 March 2019 which did not fully reflect the advice as arbitrator I had indicated that I needed. I therefore wrote to the parties on 17 April 2019 in the following terms:

> *"The arbitrator is seeking to ensure fair instructions to the expert, which in the light of drafting from only one party is causing further delay whilst the arbitrator considers an approach which is objectively fair and which will provide evidence that will support the arbitrator in being able to make an effective decision."*

35. I provided amended instructions to the expert. There was unnecessary delay in the confirmation of instructions, in correspondence instigated by

the Claimant on 30 April 2019 insisting that the PCA agree his fee, together with associated exchanges thereafter. However, as the fee would be an arbitrator's expense, for which the Respondent would be liable in the absence of the referral having been vexatious, unless the Respondent itself challenged the fee as unreasonable or refused to meet it in the first instance, there was no need for such an enquiry to be made of the arbitrator. By 14 May 2019 had finally been instructed.

36. report was received on 22 May 2019 and on 17 June 2019 I issued further instructions to him to obtain further details and clarity on his conclusions. produced his supplementary report on 26 June 2019.

37. The Respondent has now made submissions in relation to SDLT, in the form of the witness statement of dated 2 September 2019. The Claimant filed a response to this on 9 September 2019.

38. My role in this matter is not one of tax advisor and nor am I tasked with making a determination as to one party's potential tax liability in order to reach a concrete conclusion on this. I have no such jurisdiction. I am considering the issue the parties put before me, from the perspective of the well-informed tenant operating in the market and considering amongst other things what parties negotiating in the market would do where the tenant had negotiating power.

39. was in summary instructed to provide his expert view on any tax risk arising from the use of a DOV by reference and whether there are any differences in the level of risk for the parties in a MRO option delivered by a DOV by reference when compared to a DOV which effects any changes to the terms of the existing lease by a direct line by line amendment.

40. In brief, view was that the use of a DOV by reference does not create any additional tax or SDLT risks. He considers that the law on tax in relation to lease variations focuses on substance rather than form and the crucial question is whether changes are so fundamental as to mean that a variation takes effect in law as a surrender and re-grant of a new lease, rather than the form of the DOV itself. view is that that where the parties, the demise and the term remain the same, there would be no relevant difference in the substance of the changes when comparing a DOV by reference with a line-by-line variation. He does consider that a freely negotiating tenant would ask that one of the parties send the draft DOV by reference to HMRC to ask them to confirm whether any SDLT liability would arise, although acknowledges that HMRC will often refuse to express an opinion and that the parties would then have to take their own view as to SDLT risk. He acknowledges that there would be nothing preventing a tenant from seeking to negotiate that a POB provide an indemnity in case SDLT did arise, however he considers that this is a matter for commercial negotiation between the parties.

41. [redacted] states that in his opinion a properly advised tenant with negotiating strength would consider that there were no SDLT implications in a MRO-option delivered via a DOV by reference compared with a line-by-line variation. His view is that a strongly positioned and properly advised tenant, from a SDLT standpoint, would have no preference between either vehicle.

42. As stated above, I am not acting as a tax advisor to the parties, nor do I have jurisdiction to do so. My decision is made based on the consideration of, amongst other matters, what the parties negotiating in the market would do where the tenant had negotiating power. My determination in relation to this is based on the documents before me in this case, and is not a comment on any general position or determinative in any way as to future decisions on this issue.

43. I am not entirely clear as to why [redacted] indicated that a well-advised tenant would expect the parties to attempt to obtain clarification from HMRC as to SDLT liability in relation to a DOV by reference, but that in the absence of such clarification the tenant would conclude in any event that there was no such liability. It is not clear to me why such a tenant would seek confirmation from HMRC in the first place. The Respondent having early on in these proceedings stated that HMRC does not give such confirmation, I have not considered it appropriate to enquire further with the parties in that direction. In any event, [redacted] expert report is firm in its reasoning and overall conclusion.

44. By email dated 29 July 2019, the Claimant's representative stated that "[redacted] *stated that (in negotiations) the POB would be expected to cover the tenants liability for SDLT and the POB has refused to do so*." This is not a correct representation of what of contained in [redacted] report. On this point, [redacted] stated that ordinarily, it would be for the tenant to bear any SDLT arising on a lease variation that it had sought from the landlord. However, that this would not prevent the tenant in a case such as this seeking to negotiate with the landlord, that the landlord either fund the SDLT fully or partially or provide an indemnity in the event that HMRC did determine it was payable.

45. Further, in his submissions dated 9 September 2019, the Claimant stated that there "was no good reason why they should take a gamble" and "the expert report also highlighted the risk." I do not however recognise this as being an accurate description of [redacted] findings. Beyond this, the Claimant's representative has stated (by email dated 26 July 2019) that he considers "*there is sufficient information in the experts report for the arbitrator to make a swift decision / award on the SDLT issue in favour of the claimant*."

46. On the basis of the documents before me I do not consider that the Claimant has successfully demonstrated in this case that a freely negotiating tenant properly advised would have a preference for a DOV which effects any changes to the terms of the existing lease by a direct line by line amendment, above a DOV by reference, due to SDLT considerations. I must express some

reservations in reaching this conclusion however, such that my decision rests on the submissions and evidence before me in this case only, and does not preclude a different conclusion on other submissions or evidence. These reservations are on two bases not effectively put forward by this Claimant:

a. [redacted] refers to an indemnity being a matter of commercial negotiation. In the MRO procedure there is no negotiation in the open market and the tenant has reduced negotiating strength compared to a tenant in the market dealing with a landlord who for commercial reasons wants to convert the tied tenancy to FOT terms. The POB has the choice of what MRO proposal to make, and the tenant who challenges its compliance has the burden of establishing in formal arbitration proceedings that its terms are unreasonable. This factor deserves to be weighed when considering whether it would be reasonable for the POB to refuse to provide an indemnity for the DOV by reference.

b. The Respondent's submissions make clear that a DOV by reference has not come into existence in the market. It has been created as a response to the MRO procedure. The fact that in reality freely negotiating parties in the market do not agree to vary a tied lease to FOT terms by DOV by reference is suggestive that such parties would not do so, and this is a matter which is not reconciled in [redacted] advice.

47. In all of the circumstances, however, given my conclusion below in relation to the compliance of the DOV by reference, it is not necessary for me to say more in respect of these reservations in these proceedings. They in any event relate to factors considered in relation to applying the overall test of reasonableness to the proposed terms, which I discuss below.

Point b - *"Whether the DOV by reference is not compliant because in breach of Section 43(4)(a)(iii) it contains unreasonable terms and conditions in that:*

b. The Respondent has not put forward reasons for the use of a DOV by reference instead of a "minimum changes" DOV (which does no more than vary the lease to the minimum required to achieve compliance), though the arbitrator has already determined between these parties that the existing lease is not the necessary starting point for the MRO compliant lease.

48. I have been asked by the Claimant to determine whether the DOV by reference is not compliant because the Respondent has failed to provide reasons for the use of this rather than using a "minimum changes" DOV. I made it clear in my First Award (see paragraph 123) that "The existing lease is not the necessary starting point in this statutory procedure." A "minimum changes" DOV is not the default method of effecting a MRO-tenancy. The Respondent must indeed act reasonably in proposing its terms, and that includes being able to provide reasons for doing so. A fully engaged POB may well answer questions about

why it has not adopted particular approach. The PCA Advice Note on MRO Compliant Proposals, published in March 2018, says:

> "*It is not possible to set out all of the matters which might be relevant in deciding whether terms are unreasonable as they depend on the circumstances of each case, but they may include:*
>
> *Whether there are fair reasons for the POB's choice of MRO vehicle, and fair reasons for proposing any new terms and conditions. The PCA expects the POB to communicate these reasons to the TPT to reduce the likelihood of disputes.*"

49. The Claimant overlooks that the Respondent has produced substantial evidence and submissions, in particular in the first proceedings, including in relation to its wish to homogenise its FOT estate, and the reduced cost and risk of error in using a standardised approach. So it cannot be said that the Respondent has not put forward any reasons for its changes. What had the potential for exploration on the evidence in the present case is how the Respondent would behave in the market, but the Claimant has been ineffective in doing this. The Advice Note also said:

> *"The commercial relationship between the TPT and the POB on service of a MRO Notice is different to negotiations on the open market, and the core Code principles mean that the POB must act in good faith and cannot take advantage of any limitations on the TPT's power to negotiate effectively."*

50. Not all regulated POBs will have within its own estate tenancies which have moved from tied to FOT arrangements, but this Respondent does. In the present case the assessment of how the POB's increased negotiating strength is exercised in the MRO process does not have to be a solely abstract one. It produced in evidence in the first proceedings a list of its new FOT tenancies granted since July 2014. Some of these were to existing tenants. Relevant evidence in relation to FOT arrangements other than a new lease entered into with existing tenants has been produced by the Respondent in the present proceedings. On 17 December 2018 I put proposed further directions to the parties:

> *"- The Respondent to produce evidence whether it has ever proposed or agreed such a DOV by reference outside of the MRO process during the period from July 2014.*
>
> *- All documents created since July 2014, including deeds of variation, collateral contracts, trading agreements, supplemental trading agreements and releases, recording the transition of pre-existing tied tenancies into tenancies which are not subject to product or service ties (including, for the avoidance of doubt, pre-existing tied tenancies where the product and services ties are suspended).*
>
> *..."*

51. The Respondent in correspondence of 19 December 2018 said that it was unclear whether I had given formal or suggested directions, but it nevertheless confirmed that further directions would be required and on 10 January 2019 produced its evidence as identified by me on 17 December 2018 without a formal direction, in the form of a schedule of 42 pub leases which since July 2014 have transitioned from pre-existing tied tenancies into tenancies which are not subject to product or service ties, together with copies of the relevant leases and the associated unilateral tie release notices or DOVs.

52. The only response from the Claimant to that evidence disclosed was by return email from his representative on 10 January 2019 when he simply said: "*We can see Mr Hastie has made our case for us. We look forward to hearing from the arbitrator by return*." The Claimant's representative did not unpack what he meant by that.

53. The Claimant's representative has not gone to the trouble of analysing for me the documents presented by the Respondent. I do consider it is appropriate that where a party wishes the arbitrator to draw a certain conclusion from evidence that they provide at least some analysis and/or submissions as to why this is and why they consider the evidence supports their case. It appears that Mr Wright has left it to me to do this, but I am not the representative for the Claimant. I have therefore only taken a high-level view of the evidence provided, and of what might be drawn from it. There has been no independent verification of the contextual information provided by the Respondent, but I have taken it at face value. I observe that:

    a. In a number of cases the Respondent served a unilateral tie release under the terms of the lease (which of course does not have any effect on the lease terms other than removing the tie, though these have usually been associated with a rent review). However, in the great majority these appear to have been very individual types of licenced properties – including Chinese or Indian restaurants, very low volume beer sale pubs, or a strategy in relation to a distressed or abandoned business.
    b. I have looked at the cases in which the Respondent has entered into a DOV. I note in particular the example at row "C" of the schedule. This (like the lease of the subject premises) is a standard "Voyager" lease executed in 2002 (before the introduction of SDLT). This DOV was executed in April 2016, when the Respondent was well aware of the forthcoming introduction of the right to request the MRO[5]. While I expressed reservations in my previous award about comparing the Respondent's behaviour in the market before the MRO[6], this case seems to provide a good indicator of the Respondent's approach when

[5] the 2015 Act having received Royal Assent in March 2015

[6] see paragraph 95 of that award

induced by a tenant into a FOT agreement, and I observed that the DOV inserted commercial terms relating to payment of quarterly rent, added a rent deposit equivalent to a quarter's rent and changed the permitted use of the premises. The schedule provides that the tenant in that instance made a "compelling" offer to the Respondent.

c. I also note reference to five pubs operated by the same tenant, who provided a global deposit deed in relation to all of the pubs. Again, FOT arrangements were effected by DOV in May 2015 when the Respondent was aware that the right to request MRO would be introduced.
d. There is also at row "U" a lease of a gastropub in an affluent London area amended by DOV which it is explained "amended the rent review basis to upward-only, added annual RPI and set a new first cyclical RR date, then also added an R&M fund and then reference a Supplemental trading deed which released the lessees from all trading ties in exchange for a tie release fee".

54. The sample of cases is of limited size, but overall the evidence (including that not referenced above) gives the impression that, where the circumstances or the commercial advantages to the Respondent favour it, it may take a bespoke approach to release of the tie by DOV, amended as necessary to incorporate commercial terms. The Claimant's case, such as it is, does not persuade me that the Respondent in the present case would adopt a "minimum changes" approach – that is, by simply removing the tie only. There is some evidence before me however that the Respondent would have in mind whether the tied lease already contained core commercial terms, and if it did not then agree to release the tie by a DOV which ensured the inclusion of such terms.

55. However, the Claimant has not asked me to consider whether the MRO proposal is unreasonable because it has not adopted this approach in the present case. This is not the question the parties have asked me to determine, nor have they put forward specific submission on the point. The Claimant has instead focused on the Respondent not providing a "minimum changes" DOV and I do not uphold its argument on this point. There is no requirement under the Pubs Code that a POB provide a "minimum changes" DOV. It is a requirement on the POB that it produce a MRO-compliant tenancy in accordance with s.43 of the 2015 Act. In accordance with s.43 (4), the terms and conditions of such a MRO-compliant tenancy must be reasonable.

Point c - *"Whether the DOV by reference is not compliant because in breach of Section 43(4)(a)(iii) it contains unreasonable terms and conditions in that:*

c. Pursuant to regulation 30(2)(c), its terms and conditions are to be regarded as unreasonable because they are not common terms in agreements between landlords and pub tenants who are not subject to product and service ties, including (as referenced by the arbitrator on 27 February 2019 in identifying the issues in dispute) because the terms of the DOV (Clause 2)

delete all existing terms of the tied lease (other than parties, demise and duration) and replace them with new terms."

56. The Respondent has made written submissions dated 13 March 2019 on this point, in response to my direction that it "show cause why the revised response should not be found non-compliant on the ground that the proposed lease is on terms which are not common in free of tie leases".

57. I had said in my letter of 27 February 2019, in seeking to identify the issues in dispute, that "the principal issue in dispute is the compliance of a DOV by reference as being a novel agreement which is new and untested, and the risk of liability for SDLT arising".

58. The Respondent made its written representations of 13 March 2019, on commonality interpreting the question for submissions as "apparently" being in respect of the mode of delivery of the MRO option, rather than the terms contained in the proposed MRO tenancy. I do not consider that the Respondent's interpretation of the issue in dispute was justified. In setting out to the parties clearly in the issues for this preliminary determination, issue (c) is:

> *"Pursuant to regulation 30(2)(c), its terms and conditions are to be regarded as unreasonable because they are not common terms in agreements between landlords and pub tenants who are not subject to product and service ties, including (as referenced by the arbitrator on 27 February 2019 in identifying the issues in dispute) because the terms of the DOV (Clause 2) delete all existing terms of the tied lease (other than parties, demise and duration) and replace them with new terms."*

59. The Respondent has had ample opportunity to address this issue fully. In the letter to the parties dated 6 August 2019 I set out this issue again, but it has relied on its submissions on commonality largely limited to the question of the mode of delivery. Its submissions on that point are in summary:

    a. The Respondent has acknowledged that it is not aware of any previous DOV by reference in which a tied pub tenant had substituted a FOT tenancy for his tied tenancy. Accordingly, the Respondent acknowledges that "if the commonality test were to apply, it cannot be said that a DOV by reference is 'common in agreements between landlords and pub tenants who are not subject to product or service ties.'"
    b. However, the Respondent submits that regulation 31(2)(c) does not apply to the machinery by which the terms of the MRO tenancy are to be delivered, and accordingly the proposed MRO tenancy cannot be rendered unreasonable by virtue of the fact that the "DOV by reference" is "uncommon".
    c. Firstly, it submits that as a matter of language, the mode of delivery is not a "term", and thus cannot be an uncommon term. The Respondent

refers me to one of my published awards and argues that the tenancy, the terms of which have to be common, refers to the tenancy that exists once the DOV has been incorporated into the existing lease. The focus, the Respondent states, is on the terms of the tenancy, and not the machinery to deliver them.

d. Thus, the Respondent says that the requirement to enter into a particular form of agreement is a "condition" rather than a "term" of the MRO tenancy.

60. What the Respondent's argument does not address is the more simple fact that the proposed MRO tenancy contains the following term at Clause 2 (which I set out in my direction of 27 February 2019):

> *VARIATION*
> *The Company the Tenant and the Guarantor hereby agree that the Lease shall henceforth be read as if:-*
>
> *(A) From the date hereof save for definition within the Lease to the:-*
> *i) original parties to the Lease,*
> *ii) the demise,*
> *iii) the "Property" or "Premises" (or howsoever defined) (and for the avoidance of doubt reference to the "Premises" or any other similar term within the Lease shall now be deemed to be reference to "Property")*
> *iv) the "Term" or "Contractual Term" (or howsoever described and as may have been previously extended)*
> *the Lease shall be deleted in its entirety and shall be deemed to be replaced by that form of Lease in the form annexed at Schedule 3.*
> *(B) All and any supplemental agreements and/or other documents and/or side letters that may have been subsisting prior to the date hereof (and ancillary to the Lease) shall be deemed (save for any antecedent breach by either party) to have ceased as of the date hereof and shall be of no further effect.*

61. The conclusion that Clause 2 is a term of the proposed MRO tenancy seems to me to be clear. When offering a new lease as the MRO proposal, there is nothing express in its terms requiring the tenant to enter a new lease – that comes as an implied condition, or an express one in the covering letter. When proposing a DOV by reference as the proposed MRO tenancy, the situation is different. There are express terms in it which delete all of the terms of the existing lease. The Respondent contends that the Claimant is bound by my having noted in the First Award that it is only uncommon terms, not uncommon conditions, that fall foul of regulation 31(2)). If anything turns on this, it is not applicable given that here we are indeed dealing with an express term in the form of Clause 2.

62. Contrary to the Respondent's submission, the question is not whether the mode of delivery is a "term" of the MRO proposal, but whether Clause 2 is a term, which it clearly is.

63. It is not disputed by the Respondent that it is not common in a FOT agreement to find the existing lease varied by deed, such variation to include a term deleting all of the existing terms and inserting wholly new ones. That Clause 2 is therefore not a term which is common in free of tie tenancies in the market is clearly conceded by virtue of the Respondent's submissions in this case.

64. The question for me then is how the test of uncommonness in regulation 31(2)(c) is to be applied, and whether it applies to Clause 2. There is a danger in applying the test in regulation 31(2)(c) with excessive zeal. If analysis must be made of the commonness of each variant wording or difference in content of terms of a certain type, or of the commonness of the entire lease terms as they appear in a single FOT lease, it may be impossible ever to make a sensible and workable assessment of what terms are common in the FOT market. It seems to me that the test of commonality must be a sensible and proportionate one which can be useful to and practically applicable by both parties. The great variation of FOT leases and the drafting approaches of types of terms within them should be sensibly accommodated in applying the test of reasonableness.

65. However, it seems to me that what the Secretary of State sought to ensure in regulation 31(2)(c) is that the MRO tenancy should not be at the vanguard of changes in the FOT market. It should follow them. Any new innovation in commercial approaches should be tested in the market first – where, importantly, market forces are at play. Only if a term is acceptable in the market should it be offered to the MRO tenant (who has more limited negotiating strength within the MRO process). Clause 2 has not been shown to be acceptable in the FOT market (either with a negotiated indemnity from the landlord in respect of any SDLT liability or without). I find that Clause 2 is not a common term in agreements between landlords and pub tenants who are not subject to product or service ties and accordingly the test in regulation 31(2)(c) is not met and the MRO proposal is not compliant.

66. What is clear is that Clause 2, by which all of the terms of the existing lease (other than term, demise and parties) are deleted and new terms inserted, is a new invention by the Respondent in response to the MRO process. Its aim is to continue to achieve the homogeny of standard terms that the Respondent wants for its MRO leases. It is reasonable for the Respondent to weigh up the advantages of homogeny in the leases in its estate - there is value in that, and it makes management easier, for example. However, it is only one consideration in determining reasonableness, and cannot be an overriding one in all cases. It was apparently not an overriding consideration in the cases disclosed in evidence by the Respondent in which it has used a DOV to vary a tied lease to commercial FOT terms.

67. In the second witness statement of [redacted] at Gosschalks solicitors who act for the Respondent, he states that following my First Award in the previous arbitration, the Respondent developed the idea of the DOV by reference. He accepts that this is a new creation in response to the provisions of the Pubs Code. The test of commonality was devised to ensure that tenants seeking the MRO did not find themselves in the position of being at the vanguard of new practices before they have been tested in the market.

68. [redacted] also details that in having to prepare a "bespoke" DOV recently, his experience was that preparation of such a document was time-consuming and complex, with a greater risk of errors. However, a bespoke DOV is not objectionable to the Respondent in all cases, as its evidence shows, and its wish to avoid that approach does not overreach all other interests and considerations in determining reasonableness. I also emphasise to the Claimant that merely removing the tie is not, or may not always be, sufficient to ensure the lease is MRO-compliant. However, even if a number of changes need to be made then I do not accept that the drafting of a "bespoke" DOV is unduly complicated, onerous or time consuming. The Respondent has not demonstrated in the cases disclosed in evidence in which it used a DOV that this was so.

Next Steps

69. I have not considered in these proceedings what any evidence the parties may wish to rely on as to common terms. I urge the parties to consider most carefully whether it is appropriate to elongate this dispute still further, or whether in light of the findings in this award there is a path to agreement which involves the amendment of the existing lease by deed to include key common commercial terms as may be appropriate such as would ensure an accessible and reasonable proposed MRO tenancy in this case. I require them to confirm to me within 14 days whether they have reached agreement and if they do not I shall order the terms of the DOV to be executed.

Jurisdiction

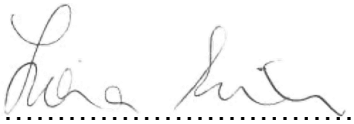
70. The Respondent has made it clear that it accepts that I have jurisdiction in the current proceedings. It takes no point on there being any right to arbitration in respect of the revised response.

71. The obtaining of expert evidence as to the existence or otherwise of a liability for SDLT occasioned by the use of a DOV by reference has provided some clarification, though it is not for me to provide a determination as to tax liability.

Operative provisions

In the light of the above:

- The Respondent must provide a revised response in the form of a Deed of Variation which is MRO-compliant (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant within 28 days of determination of those terms by the arbitrator, and must provide a copy to the PCA;
- The Deed of Variation may not be in the form of a "Deed of Variation by reference";
- Costs are reserved.

Arbitrator's Signature  ……..

Date Award made: 29 October 2019

Appendix 1

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.

2. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code") and paragraph 5 of Schedule 1 Part 1 of the Small Business, Enterprise and Employment Act 2015 ("the Act").

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