IN THE MATTER OF **ARB/000177/PRITCHARD**
THE PUBS CODE ARBITRATION BETWEEN:

ABIGAIL PRITCHARD
(Tied Pub Tenant) Claimant

-and-

STAR PUBS AND BARS
(Pub-owning Business) Respondent

AWARD

Summary of Award

In breach of regulation 29(6) the Respondent's full response was served two days' outside of the period of response set out at regulation 29(6) of the Pubs Code. The Respondent's full response was otherwise not MRO compliant, contrary to regulation 29(3) of the Pubs Code, as the Respondent has not shown that its choice of vehicle in the form of a new lease in this case is a reasonable one, MRO being able to be achieved by way of deed of variation, and a number of the terms of the proposed lease are unreasonable and therefore non-compliant. Determination of MRO-compliant terms is to be made by the Arbitrator, and the Respondent is ordered to provide a revised response to the Claimant within 28 days of such determination. Beforehand there will be a period of 28 days during which the parties are directed to discuss agreement on MRO-compliant terms having regard to the findings in this Award. At the end of this period or any agreed extension to it directions will be issued for the determination of MRO-compliant terms at that point in time.

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Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales. I, Mr Paul Newby, 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 2015 Act**").

Procedure

2. 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 2015 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 ("**the CIArb Rules**"). Where a conflict arises between the Pubs Code statutory framework (being the 2015 Act, the Pubs Code and/or the Fees Regulations) and either the CIArb Rules or the 1996 Act, the Pubs Code statutory framework shall prevail.

3. This referral was made on 18 November 2016 under regulation 32(2) of the Pubs Code. It relates to a purported full response given under regulation 29(3) of the Pubs Code, provided by the Respondent to the Claimant on 15 November 2016 including a proposed MRO tenancy, and re-sent by the Respondent on 16 November 2016 as the initial response was found to have contained an error ("the MRO Proposal"). The Claimant asserts in its referral that the MRO Proposal was both submitted out of time and was not MRO-compliant within the meaning of section 43(4) of the 2015 Act, as required by regulation 29(3)(b) of the Pubs Code.

4. Following receipt of the referral, directions were issued for the management of the proceedings and each party has had the opportunity to put forward its statement of case and documentary evidence.

The Parties

5. The Claimant is Abigail Pritchard, who, together with Tamsin Olivier, is the tied pub tenant ("TPT") of the Hampshire Hog public house, 227 King Street, London W6 9JT ("the Pub") within the meaning of section 70(1)(a) of the 2015 Act. The Respondent is Star Pubs and Bars Limited of 3-4 Broadway Park, South Gyle Broadway, Edinburgh EH12 9JZ and is a pub-owning business ("POB") within the meaning of section 69(1) of the 2015 Act. The Claimant together with Tamsin Olivier occupies the Pub under the terms of an original lease dated 24 July 2007 for a term of 25 years granted by West Register (Public Houses II) Limited, now known as Red Star Pub Company (WR II) Limited (a group company of the Respondent) and The London Bar Company Limited ("the Lease"). The Lease was assigned to the Claimant and Tamsin

Olivier pursuant to a licence to assign and deed of variation dated 23 August 2011.

6. The Claimant is represented in this matter by the Pubs Advisory Service of Lake View Farm, Poundfield Road, Hailsham BN27 3TQ. The Respondent is represented by DLA Piper Scotland LLP of Collins House, Rutland Square, Edinburgh EH1 2AA.

Applicable Law and Legal Reasoning

7. For clarity and ease of reference, consideration of the legal issues is set out in the Appendices to this award. Applicable Law is set out at Appendix 1 and legal reasoning in relation to the vehicle for the MRO option, unreasonableness, and stocking requirements are at Appendices 2, 3 and 4 respectively. This legal reasoning represents my own independent view on the PCA's and DPCA's shared understanding of the legislative framework. It is these reasons on which my decision is based.

8. The pleadings in this case were settled and submitted by both parties prior to the publishing of the PCA's Advice Note on MRO-compliant proposals in March 2018 ("the MRO Advice Note"). The parties were therefore not able to have regard to and make submissions on the MRO Advice Note in their pleadings, though no application has been received from the parties to make such representations following its publication. However, having approached this matter with an open mind, I do find that the approach in the MRO Advice Note is of relevance and that is it appropriate to be mindful of the principles set out therein.

The Issues

9. The parties were unable to agree a joint Statement of Agreed Facts and List of Issues in Dispute, and therefore each party submitted separate versions of such documents: the Claimant on 20 March 2018, and the Respondent on 23 March 2018. From an analysis of both documents, it appears that the following are agreed facts between the parties:

    9.1 There has been an event which has activated the Claimant's right to request an MRO proposal from the Respondent.

    9.2 The Claimant made an MRO request which was received by the Respondent on 18 October 2016, within the timescale specified under the Pubs Code.

    9.3 The Respondent sent an MRO response to the Claimant by email on 15 November 2016 but which contained an error, with a corrected MRO response sent by email on 16 November 2016, and the MRO response was therefore served outside the time allowed by the Pubs Code. The Respondent asserts that this the MRO full response was therefore sent 'one day' late.

9.4 The Respondent offered a MRO tenancy to the Claimant by way of a new lease, which purports to include a “stocking requirement”, as defined by section 68 of the 2015 Act.

9.5 The parties have agreed that clause 2.3.3.5 of the proposed MRO lease (relating to drinks monitoring equipment) will be deleted. As such, I no longer need to consider this issue.

10. Furthermore, it appears that the following are agreed issues in dispute:

10.1 Whether the Respondent's MRO proposal is a valid full response in accordance with regulation 29 of the Pubs Code.

10.2 Whether the Claimant suffered any detriment as a result of the Respondent submitting the corrected full response ‘one day’ (as the Respondent’s case refers) outside the 28-day period specified in regulation 29(7) of the Pubs Code.

10.3 Whether the tenancy proposed by the Respondent is MRO compliant in accordance with section 43(4) of the 2015 Act.

10.4 Whether the Respondent is required to provide a revised full response to the Claimant, either in the form of a deed of variation or in another form to be determined by the PCA.

10.5 Whether the existing lease, with the exception of the trading obligations, in itself contains terms that would be common in a commercial lease between a landlord and a free of tie pub tenant.

10.6 Whether offering the MRO tenancy by a new lease as opposed to a variation of an existing lease is designed to make pursuit of an MRO option unviable, and therefore an unfair business practice (contrary to regulation 50 of the Pubs Code) and contrary to the spirit and principles of the 2015 Act.

10.7 Whether offering the MRO tenancy by a new lease inflicts unnecessary detriment on the Claimant due to more onerous lease terms, avoidable expense, and undermining renewal rights under Part II of the Landlord and Tenant Act 1954.

10.8 Whether offering the MRO tenancy by a new lease as opposed to a variation of an existing lease is unreasonable, for the reason that it is uncommon.

10.9 Whether in the current case the MRO tenancy should be offered by way of new lease or variation of existing lease.

10.10 Whether the 2015 Act permits a stocking requirement to be contained in an MRO compliant lease.

10.11 Whether the level of stocking requirement under the proposed MRO lease is unreasonable.

10.12 Whether the terms of the proposed MRO tenancy are unreasonable for the purposes of regulation 31(2)(c) of the Pubs Code because they differ from those contained in the existing lease and extend beyond the variations outlined by the Claimant in paragraph 8 of its Statement of Claim.

10.13 Whether the following terms of the proposed MRO tenancy are unreasonable and/or uncommon terms for the purposes of regulation 31(2)(c) of the Pubs Code:

10.13.1 Clause 3.1.1 (rent by equal quarterly payments)

10.13.2 Clause 3.5 (tenant's obligation to pay proportion of cost of constructing and repairing etc. common property)

10.13.3 Clause 3.6 (tenant's repair and maintenance obligations in relation to plant and apparatus as the property)

10.13.4 Clause 5.6.1.2 (tenant's obligation to pay proper costs of any professional valuation of the property for insurance purposes)

10.13.5 Schedule 3 in general (offer back provision) and in particular the tenant's obligation (should it wish to assign the whole property) to offer to assign to the Landlord for equivalent consideration to that offered by the prospective assignee, if the Landlord requests this by way of LTA Notice.

11. It appears that these issues in dispute are quite specific, and can in fact be grouped into a few more general categories which I set out below for consideration in a logical order:

11.1 Has the Claimant suffered any detriment as a result of the Respondent submitting the corrected full response ‘one day’ outside the 28-day period specified in regulation 29(7) (paragraph 10.2 above)?

11.2 Should MRO be achieved by way of a new lease or a deed of variation (“DOV”) (paragraphs 10.6 to 10.9)?

11.3 Are the terms of the proposed MRO lease uncommon/unreasonable (paragraphs 10.5, 10.12 and 10.13)?

11.4 Is a stocking requirement permitted, and if so are the proposed stocking levels reasonable (paragraphs 10.10 and 10.11)?

11.5 Is the full response valid and compliant, or otherwise should a new full response be issued to the Claimant, and if so in what form (paragraphs 10.1, 10.3 and 10.4 above)?

12. I will now consider these issues in turn.

Detriment suffered by the Claimant due to the delay in the Respondent sending the full response

13. At paragraph 8.2 of the Statement of Defence, the Respondent admits that its full response was sent to the Claimant late on 16 November 2016, but only as a result of the original full response sent on 15 November 2016 having contained an error which required it to be re-served. The Respondent also argues that this, "made no practical difference to the MRO process … and has had a *de minimis* effect on the Claimant".

14. At paragraph 3(13) of the Claimant's Statement in Response to the Statement of Defence, the Claimant asserts that the delays caused by missing this deadline had costs consequences to the Claimant in terms of rescheduling meetings with professional advisors, but provides no particulars of any such costs nor any evidence to support this assertion. The Claimant also more generally asserts that the business is losing money every day it remains bound by the tied lease, but again does not provide evidence to support this claim.

15. First and foremost, I would note that regulation 29(6) and (7) of the Pubs Code states that the "period of response" within which an MRO full response must be sent is (with emphasis added), "the period of 28 days **which begins with** the day on which the pub-owning business receives an MRO notice". As such, given that it is agreed that the Respondent received the MRO notice in this case on 18 October 2016, it appears that the 28-day period of response did in fact expire on Monday 14 November 2016. The full response that the Respondent relies on is that sent on 16 November 2016. I therefore find that the full response sent on 16 November 2016 was in fact two days outside of the period of response, and in breach of the requirements of regulation 29(6) of the Pubs Code.

16. Notwithstanding the Respondent's arguments about the "*de minimis effect*" of the late sending of its full response, and irrespective of whether the Claimant suffered any direct losses as a result of this delay, I do find the Respondent's delay to be a significant breach of the Pubs Code which, as a point of principle, outweighs the Respondent's "***de minimis"*** arguments. The consequence for tied pub tenants who are one day late with meeting deadlines under the Pubs Code is that they lose their rights under the Pubs Code entirely. As such, it is important that pub-owning businesses also take their Pubs Code timetable requirements seriously and enable swift execution of the MRO procedure.

17. I have not heard what steps the Respondent has taken to ensure the strict time periods in the Pubs Code are respected and I make reference to this in the Operative Provisions later in this award.

Should MRO be achieved by way of a new lease or a DOV

18. As set out above, according to the parties' lists of issues in dispute, there are four limbs to this issue:

    18.1 Whether the Respondent's proposal of a new lease rather than a DOV was intended to make MRO unviable and therefore amounts to an unfair business practice;

    18.2 Whether offering a new lease rather than a DOV inflicts unnecessary detriment on the Claimant;

    18.3 Whether offering a new lease rather than a DOV is in and of itself unreasonable due to being uncommon; and

    18.4 Whether in this case MRO should be achieved by way of a new lease or a DOV.

    Was the Respondent's proposal an unfair business practice?

19. In relation to the first limb, whilst it is stated at paragraph 10 of the Claimant's List of Issues in Dispute that "the tenant's rights to seek the MRO option are being undermined by tactics deployed by the POB that … amount to an unfair business practice", having reviewed the parties' pleadings, I can find no specific reference to the Claimant having claimed that the Respondent's tactics in this case amounted to an unfair business practice. On that basis, I make no finding in relation to this issue, aside from noting that the matters otherwise complained of are matters that fall within the Pubs Code and therefore can be considered in terms of Code compliance rather than Code avoidance.

    Does offering a new lease instead of a DOV inflict unnecessary detriment to the Claimant?

20. Turning to the second limb above, in relation to whether the offering of a new lease rather than a DOV inflicts unnecessary detriment on the Claimant, I note the following passage from paragraphs 5.1 to 5.2 of the Respondent's Statement of Defence:

    > *"The Claimant submits at paragraph 13 to 15 of her Statement of Claim that she will suffer detriment by accepting a tenancy in the form of a new lease rather than a deed of variation. The Claimant asserts that such detriment arises only as a result of it exercising its MRO rights and the Respondent acting in a manner that is in breach of regulation 50. The PCA advised by email dated 15 June 2017 that the Claimant's referral was accepted in relation to an MRO full response under regulation 32 of*

the Pubs Code and that a referral in relation to regulation 50 must be made separately from the existing referral. The PCA provided the Claimant with two options … to submit a revised Statement of Claim removing reference to regulation 50; or … for the existing Statement of Claim to remain and for the Arbitrator to ignore reference made within the Statement of Claim to regulation 50 as part of the Claimant's case … The Claimant's representative confirmed by email dated 15 June 2017 that the Claimant is content for the arbitrator to ignore any reference to regulation 50 in the claim."

21. Having reviewed the correspondence from the Claimant's representative referred to in this passage this position appears to be correct. On this basis, I make no finding in relation to whether offering a new lease rather than a DOV inflicts unnecessary detriment on the Claimant, as that is not an issue which I have the jurisdiction to determine in this referral.

Is offering MRO by way a new lease instead of a DOV unreasonable due to being uncommon?

22. Turning to the third limb, as to whether offering a new lease rather than a DOV is in and of itself unreasonable due to being uncommon, I note that the Claimant's primary reference to this issue is at paragraph 3 of the Particulars of the Claimant's Response to the Statement of Defence, where it is stated that:

"the issue is whether a new agreement is common when severing tied terms."

23. Beyond that broad statement, the Claimant's representative makes no specific submissions as to whether a new agreement is 'common' or not, and indeed acknowledges later in the same paragraph as above, "*that there is no particular way MRO has to be delivered only that it must satisfy the Code regulations*", and then relies instead on alleging that severing the tie by way of a deed of variation is common, and that severing by way of new lease is unreasonable (but not specifically *uncommon*), but these statements are not evidenced beyond bare assertion.

24. The Respondent's submissions on this point are, by and large, that the Pubs Code is predicated upon an MRO offer being in the form of a new lease rather than a DOV, and sets out a range of legal arguments to support this approach, referring to the bespoke nature of tied agreements and to the drafting difficulties with producing DOVs.

25. Whilst I have considered the matter afresh in this case, the contents of the MRO Advice Note set out the position of the PCA as to the interpretation of the legislation including whether a new lease or a DOV can be used to achieve MRO, and I have no reason to take a different view in this case.

26. In accordance with the PCA/DPCA's shared understanding of the law, which is set out at Appendix 2 to this Award, the vehicle to be used to achieve MRO is in the first instance a matter of choice for the POB, however the terms and

conditions of that offer (including the choice of vehicle) must not be unreasonable, including being unreasonable by virtue of being uncommon, and also must be reasonable having regard to the circumstances of the particular tenant, including where relevant the existing contractual relationship between the parties.

27. On the basis of the submissions and evidence before me in this case, I find that the Respondent has not shown that its offer of a new lease was a reasonable choice for delivering MRO in all the circumstances of this case.

In this case should MRO be achieved by way of a new lease or a DOV?

28. Finally, in relation to the fourth limb above, that being whether in this case MRO should be achieved by way of a new lease or a DOV, I note that at paragraph 13 of the Statement of Claim, it is asserted that the Claimant would be negatively affected by accepting a tenancy in the form of a new lease rather than a deed of variation, due to SDLT implications; higher Land Registry registration costs; potentially more onerous terms in the new lease which were not in the existing lease; exposure to an immediate claim for dilapidations, which would not occur if the existing lease was varied; and, the further additional costs that were outlined in the Respondent's full response of 16 November 2016, those being: £575 recharge for the Respondent's legal fees, £86,875 for a deposit of 3 months' rent, and payment of the first quarter's rent in advance. It is asserted in the Claimant's Statement in Response that such terms are designed to be 'toxic' and intended to make the MRO offer unattractive and to deter the Claimant from continuing to seek MRO. On this basis the Claimant asserts that the terms for the grant of a new lease are unreasonable and therefore that the proposed tenancy is not MRO-compliant.

29. The Respondent provides no evidence to show that the new lease proposal in this case is reasonable (or not *un*reasonable), in particular in relation to the specific allegations made by the Claimant regarding the terms and conditions of the offer. The Respondent makes the general point that, as a matter of law, a proposal that contains a lease term that is longer than the existing term can only be achieved by way of a new lease. In this case I note that the proposal made by the Respondent was for 15 years, however the Respondent puts forward no specific argument that this would require the grant of a new lease by operation of law in this case, and on the basis of the submissions and evidence before me this is not an issue that is in dispute between the parties on the facts of the case.

30. As stated at paragraph 26 above, whilst it is the Respondent's choice whether to offer MRO by way of a new lease or a DOV, there must be fair reasons for both their choice of such an MRO vehicle and for the proposed terms and conditions to be contained in that vehicle, both individually and when taken together. The Claimant asserts that the Respondent's proposed tenancy seeks to vary the terms of the existing lease to a greater extent than is necessary in order to comply with the relevant legal requirements. The Claimant further asserts that the necessary variations to the existing lease are few and simple

so as to achieve the commonly adopted approach to severance of the tie by DOV which is compliant with the terms of the legislation, and provides a sample DOV as evidence to support this claim together with a free of tie lease in relation to another POB where it is itself a tie free tenant. However, the Respondent asserts that both of these documents are of little evidential worth.

31. The Claimant considers that DOVs can be used to deliver MRO and refers to the PCA's Bulletin of December 2016 in support of this position. The Claimant asks that the Respondent be directed to provide a revised response in the form of a DOV. There are no further submissions from the Respondent as to whether MRO could or should be achieved by way of a DOV on the facts of this case, having regard to the requirement that the proposed MRO tenancy should not contain any unreasonable terms and conditions including terms which are not common in tie free agreements. Therefore as stated above, I find that the Respondent has not shown that its choice of vehicle for delivering MRO in this case in the form of a new lease is a reasonable one and, further, on the submissions and evidence before me in this case, I find that MRO can be achieved in the form of a DOV.

Are the proposed MRO terms and conditions uncommon/unreasonable?

32. Firstly, the Claimant raises the issue of whether the terms of the proposed MRO tenancy are *prima facie* unreasonable for the purposes of regulation 31(2)(c) of the Pubs Code, because they differ from those contained in the existing lease and extend beyond the variations outlined by the Claimant in paragraph 8 of its Statement of Claim which, it asserts, remove any reference to a product or service tie from the Lease (although these are not claimed to be a full or exhaustive list). The Claimant also provides an example of a free of tie DOV in support of its case.

33. The Respondent asserts that tied leases are fundamentally different to free of tie agreements, reflecting particular long-standing business arrangements and shared commercial interests. The Respondent also considers that the Claimant's example DOV is of no evidential value without the provision of the original lease to which it relates for comparison purposes. As noted in the MRO Advice Note, the Pubs Code does not prescribe the form of vehicle for the delivery of a MRO compliant agreement, whether new lease or DOV, nor does it prescribe that the terms of an MRO compliant agreement have to be the same as the existing tied tenancy, only that they have to be reasonable. It is the content and effect of the agreement that is of primary importance. I consider that the form and content of tied leases and tenancies vary significantly, reflecting the different ways in which this sector has evolved and operates.

34. On the evidence before me in this case, I am not persuaded by the Claimant that its proposed terms for a DOV are MRO compliant, requiring only the removal of the relevant tied terms, having regard to the provisions of section 43(4) and (5) of the 2015 Act and reg 31(2) of the Pubs Code.

35. I can find nothing in the legislation which states that the MRO proposal has to be in ostensibly the same terms as the tied tenancy, just that the terms of the MRO proposal have to be reasonable, including in relation to commonness. On this basis, I consider that adopting the same tied terms is not the necessary starting point, however this does not mean that consideration of the existing terms is irrelevant in any particular case. I therefore find in general terms that the proposed terms are not automatically unreasonable because they differ from those contained in the existing Lease or extend beyond the minimal variations to the existing Lease that the Claimant considers are required to produce an MRO-compliant agreement. The Claimant considers that the existing Lease contains terms that are common in free of tie agreements and this is a matter for consideration based upon the evidence presented. The MRO proposal should be consistent with the core principles of fair and lawful dealing and no worse off under section 42(3) of the 2015 Act, and it is likely to be unreasonable for the Respondent to offer unattractive MRO terms and conditions if the intention is to persuade the Claimant to stay tied. The Respondent should therefore demonstrate that there are fair reasons for the proposed terms and conditions in this case.

36. On this basis, with regard to the requirement for a three month's rent deposit of £86,875, the Respondent has not demonstrated that there is a fair reason for this particular term.

37. The Claimant also raises the linked issue that the existing Lease, with the exception of the tie/trading obligations, in itself contains terms that would be common in a commercial lease between a landlord and a free of tie pub tenant and that any such terms or conditions in the proposed tenancy that differ from those in the existing lease are unreasonable.

38. The Respondent again submits that the relevant comparator relating to commonness and reasonableness of the terms of the MRO proposal (and, I would note, that these words are at times used interchangeably by the parties) is not the terms of the existing Lease but those of a "standard lease". However, the Respondent also refers to the changing market and the difficulty in identifying standard clauses at the present time. Nonetheless, the Respondent contends at paragraph 6.2 of its Statement of Defence that the terms within the proposed MRO tenancy are "not uncommon or unreasonable in comparable and relevant pub … leases".

39. I find that the test to be applied in this respect is that compliant terms must not be unreasonable including being unreasonable by virtue of being uncommon. This means that there must be fair reasons for those terms by reference to the terms of existing tenancies in the relevant market sector, albeit that regard will also need to be had to the existing contractual relationship between the parties. This is something that must be done on a case-by-case basis, having regard at all times to the Pubs Code core principles to ensure that there is an effective choice between going tie free and remaining tied. The Respondent does not provide any detailed evidence (despite being specifically invited by the Claimant to do so at paragraph 7 of the Claimant's Statement in Response, and in fact responds at paragraph 4.1 on this point that the terms

of tenancies it holds “are irrelevant”, and describing information relating to another POB’s tie free leases as “not helpful” as they are not a “brewer landlord”) to support its assertion that the proposed terms in this case are not unreasonable/uncommon.

40. On the basis of the evidence before me, I find it likely that the Respondent has simply adopted a standardised response to the matter and has not shown that it has applied its mind to the circumstances and existing tenancy of the Claimant in this case, in its choice of MRO terms. On this basis, I find that the Respondent has not managed to effectively counter the Claimant’s contention that the terms of the MRO proposal are unreasonable because they differ from those contained in the existing lease (save for the necessary variations) and show that this is incorrect, and I find as such.

41. In addition to these two general points of approach, and as set out at paragraph 10.13 above, the Claimant also takes issue with certain specific clauses within the proposed MRO lease, asserting that they are specifically uncommon and/or unreasonable.

Clause 3.1.1 – rent by equal quarterly payments

42. Dealing firstly with clause 3.1.1 of the proposed MRO lease which, under the heading ‘Basic Rent’, reads as follows:

> *“The Tenant will pay the Landlord the Basic Rent by equal quarterly payments in advance on the Rent Days, whether formally demanded or not and any interim rent or rents at any time agreed or ordered.”*

43. At paragraph 11(1) of the Statement of Claim, the Claimant sets out that payment of rent quarterly in advance (as compared to monthly in advance in the existing lease) generally is not a common term in tie free agreements and that this requirement will adversely affect working capital and is therefore unreasonable.

44. At paragraph 6.3 of the Statement of Defence, the Respondent submits that any clause cannot be considered to be uncommon simply because it is different to a term contained in the existing lease, and asserts that payment of rent in quarterly instalments is a common clause in leases between landlords and pub tenants which are not subject to product or service ties, but provides no detailed evidence to support this claim. It is also notable that the Respondent makes no submissions as to whether the clause is reasonable or not.

45. I find therefore on the evidence before me that the Respondent has neither proved the commonness of this term nor has it shown that it has applied its mind to the circumstances of this case such that the choice of this term is reasonable. On this basis, I find that this clause is non-compliant.

Clause 3.5 – Tenant's obligation to pay towards constructing and repairing common property

46. Turning secondly to clause 3.5 of the proposed MRO lease, which, under the heading 'Common facilities', reads as follows:

> "*To pay to the Landlord on demand such proportion as the Landlord may from time to time determine of the cost of constructing, repairing, rebuilding, renewing, lighting, cleansing and maintaining all things used in common by the Property and other premises.*"

47. At paragraph 11(2) of the Statement of Claim, the Claimant describes this clause as "*onerous*" and says that it amounts to a "*Jervis v Harris*" clause (providing a landlord with rights to carry out works not properly undertaken by a tenant) and is therefore unreasonable, and also asserts generally that such a clause is not common.

48. At paragraph 6.5 of the Statement of Defence, the Respondent makes the bare assertion that such a term *is* common in tie free agreements but again provides no specific evidence as to commonness or more generally as to the reasonableness of this clause in this case.

49. On this basis, and similar to my findings on the quarterly rent payment proposal, I find that this clause is also non-compliant.

Clause 3.6 – Tenant's repair and maintenance obligations in relation to plant and apparatus at the property

50. Thirdly, in relation to clause 3.6 of the proposed MRO lease, which, under the heading of 'Maintenance', reads as follows:

> *"3.6.1 To procure the maintenance, inspection, care and servicing of lifts, boilers, beer engines, beer dispensing equipment, Amusement Machines, cellar flaps, cesspools, septic tanks and any other plant or apparatus at the Property including entry at the cost of the Tenant into any contracts with appropriate and reputable third parties as may be necessary for procurement of the relevant services.*
>
> *3.6.2 To pay to the Landlord on demand the cost to the Landlord of any periodic inspections and repairs and/or improvements which the Landlord may from time to time carry out to the gas and other utility installations and any other plant and equipment at the Property (provided that the presence of this clause will not imply any obligation on the Landlord to do any of these things)." and the Tenant will afford the Landlord and its representatives all necessary access and facilities for these purposes."*

51. The Claimant's arguments in relation to this clause, again at paragraph 11(2) of the Statement of Claim, are essentially the same as the arguments in relation to clause 3.5 discussed above, that the requirements are onerous, go far beyond the requirements of statute, and therefore amount to a *"Jervis v*

Harris" clause and are therefore similarly unreasonable, and not common in free of tie leases.

52. In response, the Respondent asserts at paragraph 6.6 of the Statement of Defence that such a clause will only give rise to an obligation where any such items exist on site, but again fails to explain why this clause is reasonable in all the circumstances of this case.

53. As such, and similar to my findings on both quarterly rent payments and paying towards constructing and repairing common property, I find that this clause is also non-compliant.

Clause 5.6.1.2 – Tenant's obligation to pay proper costs of any professional valuation of the property for insurance purposes

54. Fourthly, in relation to clause 5.6.1.2 of the proposed MRO lease which, under the heading of 'Tenant's obligations', reads as follows:-

> *"The Tenant will:*
> *5.6.1 pay the Landlord the Insurance Rent and cost of:*
> *…*
> *5.6.1.2 the proper costs of any professional valuation of the Property for insurance purposes prepared no later than three years from today and again at intervals of no less than every three years;"*

55. At paragraph 11(3) of the Statement of Claim, the Claimant states that, "*No such onerous and unreasonable provision exist* (sic) *in the Lease*", and also more generally at paragraph 11 that the clause is not a 'common term' in agreements between landlords and pub tenants who are not subject to product or service ties.

56. The Respondent states at paragraph 6.7 of the Statement of Defence that this clause "*cannot be considered to be uncommon simply by virtue of the fact it is not contained in the [existing] lease*". The Respondent further asserts that periodic calculations are common in free of tie leases, but does not provide any detailed evidence to prove this. It is also noted that the Respondent does not make any submissions as to the reasonableness of this clause either.

57. On the basis of the evidence before me in this case, I therefore find that this clause is non-compliant.

Schedule 3 – Offer back provision

58. Finally, in relation to the offer back provisions contained in Schedule 3 to the proposed MRO agreement (which I do not intend to set out in full here). The Claimant's submissions on this point at paragraph 11(6) of the Statement of Claim are not clearly formulated, although its submissions at paragraph 11(7) are slightly clearer. Here, the Claimant asserts that the provisions in Schedule 3 which require the tenant to first offer to surrender the lease to the

Respondent if it wishes to assign the lease to a third party are unreasonable, not contained within the existing lease, and effectively constitute a break clause for the purposes of regulation 31(2)(a) of the Pubs Code.

59. In response, at paragraph 6.8 of the Statement of Defence, the Respondent rejects any suggestion that the offer back provision is an uncommon term in an MRO lease, and submits (again) that such a clause "*cannot be considered to be uncommon simply by virtue of the fact it is not contained in the [existing] lease*". At paragraphs 6.9 and 6.10 of the Statement of Defence, the Respondent sets out that the obligation for the tenant to offer to surrender the lease to the landlord for equivalent consideration to a prospective third party purchaser is common, but this is again a bare assertion without further evidence. In addition, there is again no submission made as to whether this term is otherwise reasonable. As such, and for the same reasons as set out above, I find that this clause is non-compliant.

<u>Is a stocking requirement permitted, and if so are the proposed stocking levels reasonable?</u>

60. There are two limbs to the dispute on this issue. Firstly, are stocking requirements permitted? Secondly, if so, is the stocking requirement proposed in this case unreasonable? I will deal with each of these in turn.

61. The PCA published a stocking requirements advice note in March 2017 ("the Stocking Advice Note") prior to the party's pleadings in this case, which, whilst also retaining an open mind and keeping in mind the particular facts of this case, I have had reference to in relation to this issue.

62. The Claimant's initial submissions on the stocking requirement are found at paragraph 11(4) of the Statement of Claim, where it is asserted that such a requirement is, 'uncommon and unfair and doesn't … feature in a genuine free trade situation'.

63. The Respondent responds to these submissions at paragraph 7.3 of the Statement of Defence, stating that, "*upon the true construction of section 43(4) of the 2015 Act it is plain that Parliament intended that "stocking requirements" were properly to be included within MRO-compliant lease terms*", and then goes on to quote the various statutory definitions from sections 43(4) and 72(1) of the 2015 Act, as well as paragraph 353 of the Explanatory Note to the 2015 Act, which states,

> *"Subsections (6)-(8) [of section 68] define a 'stocking requirement'. This is relevant for when a tied pub chooses the Market Rent Only option (see sections 43-45). Section 43(4)(a)(ii) stipulates that a MRO-compliant tenancy or licence must not include any product or service tie (other than one relating to insurance of the pub). Subsection (6) makes clear that a stocking requirement is not a tie. Thus subsection (7) allows pub-owning businesses that are breweries to impose a stocking requirement on tenants and licensees with MRO-compliant tenancies or licences. The stocking requirement applies only to beer and cider*

produced by the pub-owning business, and the tenant must be able to buy the beer or cider from any supplier of their choosing. The stocking requirement also allows the pub-owning business to impose restrictions on sales of competing beer and cider in line with prevailing competition law, so long as the restrictions do not prevent the tenant from selling such products."

64. The Claimant makes no further submissions as to the whether stocking requirements are permitted in its Statement of Response.

65. As stated in the Stocking Advice Note, section 68(6) of the 2015 Act expressly excludes stocking requirements from the definition of a 'tied pub' under that section. As such, I find that stocking requirements are *prima facie* permitted by the Pubs Code statutory framework. That said the term must fall within the statutory definition of a stocking requirement, and must be reasonable in any given case, which takes us on to the second limb of this issue: whether the proposed stocking levels in this case are reasonable.

66. The stocking requirements in this case are set out at clause 3.24 and Schedule 5 of the proposed MRO lease, and can be summarised as follows:

    66.1 The Claimant must only stock and make available for sale 'Landlord Keg Brands' (defined as any brands of beer or cider sold from a keg which are manufactured by the Respondent or a group company of the Respondent);

    66.2 At least 60% of the cask beer stocked and made available for sale by the Claimant at any given time must be 'Landlord Cask Brands' of beer (defined as any brands of beer dispensed in draught from a cask which are manufactured by the Respondent, a group company of the Respondent, or by a third-party brewery in which the Respondent or one of its group companies has control meaning that it holds the majority of the voting rights or has the right to exercise a dominant influence);

    66.3 The Claimant must stock and make available for sale 2 or more 'PPB Own Beer Brands' (defined as brands of premium packaged beer owned or exclusively licensed by the Respondent or a group undertaking of the Respondent);

    66.4 The Claimant must stock and make available for sale 2 or more 'PPB Own Cider Brands' (defined as brands of premium packaged cider owned or exclusively licensed by the Respondent or a group undertaking of the Respondent); and

    66.5 In complying with the stocking requirements at 66.3 and 66.4 above, the Claimant must give the PPB Own Beer Brands and PPB Own Cider Brands at least 50% of any available, visible display space on shelves or in fridges in the Pub used for displaying or storing premium packaged beer and cider, and must offer them for sale at reasonable

market prices commensurate with the pricing of such products offered for sale.

67. The Claimant argues that the stocking requirements will deprive it of the "*payments, retrospective credits or other tangible support in exchange for holding stock of products or brands"* that are available to the free trade, and adds that, "*typically and quite normally for the free trade these stocking inducements are in the tens of thousands* [of pounds] *for pubs who exclusively stock supplier's products to a higher percentage".* The Claimant states that this would make them, as an MRO tenant, worse off than other tie free tenants in arm's length relationships with the Respondent. However, the Claimant produces no evidence to support these assertions.

68. The Claimant also asserts that high percentage (in excess of 50%) stocking requirements will represent a *decrease* on its current level of choice, as the Claimant is already tie free on some categories of product, and does not want to lose this freedom due to moving to MRO terms. As referenced above, the Claimant suggests that such terms are designed by the Respondent "*to be as toxic as possible … to put off or punish the Claimant for exercising their rights".* The Claimant also questions what happens if the Pub is sold to another POB with a more limited product choice which may then affect the value of their lease, and have other consequences that would be better avoided by having no stocking requirements. The Claimant argues that this would result in "partially tied pubs" which could ultimately be left worst off out of all scenarios, which was not the intention of the legislation, and is therefore unreasonable. I consider that the Claimant makes a good point here, particularly given that the proposed term of the MRO lease is 15 years in this case. This is a substantial period and one in which there may be significant changes in the trading characteristics of the Pub. With this in mind the Respondent has not shown that it has considered what element of "future proofing" may be required in proposing an MRO-compliant stocking requirement that will endure effectively for the duration of the MRO lease.

69. The Respondent states that the stocking requirement applies only to beer and cider, also that the Claimant is free to purchase their beer and cider from any supplier of its choosing, and that they as a 'brewer POB' may impose restrictions on sales of competing beer and cider provided the restrictions do not prevent a tenant from selling any such products.

70. The Respondent also states that the Government's policy intention of allowing stocking requirements to operate within MRO arrangements was to protect brewer POBs' route to market through their own pubs. The Respondent suggests that it is important to understand the breadth and quality of its beer and cider portfolio as part of one of the world's largest brewers (Heineken), which means that it has a leading beer and cider to offer in all categories which it says puts it in a "*unique position*" in the market place. This, the Respondent argues, means that its proposed stocking requirement is in keeping with the statutory intention.

71. The Respondent also states that it is not its intention to "*punish"* the Claimant and asserts that the Claimant has misunderstood the purpose of the stocking requirement and that the Claimant is, "*free to enter into an arm's length transaction with a supplier of its choosing to purchase both the Respondent's brands and competitor brands".* The Respondent asserts that the stocking requirement, together with all other terms of the proposed MRO lease, are taken into account when assessing the level of the MRO rent, and that there is no obligation on it to provide financial reward or compensation in relation to the stocking requirements.

72. In this regard, the Respondent notes that the Pub does not sell a high volume of beer and cider, which only represents 15% of total sales. However, the Claimant states that the lack of wet sales is a consequence of the tied pub model where low profits lead to a lack of incentive to promote wet sales.

73. Whilst not specifically raised by the Claimant, having regard to the PCA/DPCA's shared understanding of the legal requirements as set out in Appendix 4, it appears to me that the Landlord Keg Brand stocking term does in fact not fall within the definition of a stocking requirement at section 68(7) of the 2015 Act, as it places an absolute prohibition on the selling of keg beer produced by any of the Respondent's competitors. As such I find that this stocking term is non-compliant.

74. As to the remaining elements of the stocking requirements proposed in this case, I find that there has been insufficient evidence put before me to determine what does constitute a reasonable stocking requirement in this instance. In particular, in seemingly seeking to adopt a standard approach to stocking requirements across its estate, there is no evidence to show that the Respondent has given any consideration as to what requirements would be reasonable for this particular tenant at this particular pub.

75. On this basis, and in the absence of any evidence that the Respondent has given these matters such consideration, I find the proposed stocking requirement terms are not shown to be MRO compliant.

76. In addition, I also make the following observations on the wording of the stocking requirement, notwithstanding that I have not heard submissions from the parties on these points. The lease definition of "Landlord Keg Brands" is (with emphasis added),

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

77. "Group Company" is defined in clause 1 of the lease to mean "*a company which is a member of the same group of companies as the Tenant (as defined in section 42(1) of the 1954 Act)",* which is,

"*two bodies corporate shall be taken to be members of a group if and only if one is a subsidiary of the other or both are subsidiaries of a third body corporate or the same person has a controlling interest in both*".

I have not considered whether the use of that definition of Group Company, and not group undertaking as provided for in section 68(7)(a) of the 2015 Act (that being the meaning given at section 1161(5) of the Companies Act 2006, which is an undertaking which is (a) a parent undertaking or subsidiary undertaking of that undertaking, or (b) a subsidiary undertaking of any parent undertaking of that undertaking), brings the Keg Brand stocking term outside of the statutory definition of a stocking requirement.

78. Without further understanding, it appears possible that "manufactured" in the definition of Landlord Keg Brands could have a different meaning beyond capturing the production of a particular beer or cider such that the stocking term would fall outside of the statutory definition of a stocking requirement.

79. In addition, whilst also not a matter in dispute, nor something upon which I have heard submissions, I also make a further observation about the stocking requirement terms in respect of Cask Brands. A stocking requirement can relate "*only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord.*" As such, a stocking requirement which extends to beer or cider *not* produced by the landlord or its group undertaking does not come within the definition of a stocking requirement in section 68(7) of the 2015 Act.

80. Furthermore, and with reference to the definition of "group undertaking" referred to in paragraph 77 above, and by reason of the definition of "Control" in relation to the definition of "Landlord Cask Brewery" in the proposed MRO lease, such a brewery may be a brewery in which the Respondent or its Group Undertaking "holds a majority of the voting rights or has the right to exercise a dominant influence". This does not restrict the lease definition of Group Undertaking to those entities in which there is a subsidiary or parent relationship with the Respondent, and therefore extends beyond the definition of group undertaking in section 1161 of the Companies Act 2006 used in the statutory definition of a stocking requirement.

81. Again, the observation made at paragraph 78 above in respect of the use of the word "manufactured" rather than "produced" in the definition of a Landlord Keg Brand is repeated here in respect of the lease definition of Landlord Cask Brands.

<u>Is the full response valid and compliant, or otherwise should a new full response be issued to the Claimant, and if so in what form?</u>

82. Given my findings on the other four issues in dispute above, this question does appear somewhat redundant. However, and as a form of conclusion, the Claimant accuses the Respondent of a lack of adherence to the Pubs Code and a failure to take its obligations under the Pubs Code and 2015 Act

seriously. This is denied by the Respondent, but the Respondent does not provide a detailed rebuttal of the Claimant's position.

83. Accordingly, I find, as set out above, that the terms and conditions of the proposed MRO tenancy in this case are not MRO-compliant.

Decision and Next steps

84. In view of my findings above that a) the Respondent's choice of vehicle for delivering MRO in this case in the form of a new lease has not been shown to be a reasonable one and that MRO can be achieved in the form of a DOV and, b) that the terms and conditions of the proposed MRO tenancy in this case are not MRO compliant, it is therefore necessary for me to consider what order I should make in respect of this referral in exercise of my powers in this particular case.

85. Accepting again that the Respondent could not have been aware of the MRO Advice Note at the time of providing the MRO proposal, I am concerned that since the publication of the MRO Advice Note the Respondent has not seemingly made any attempt to issue revised terms to the Claimant or to seek a resolution of the matter by further negotiation, being subsequently aware (as it should be) of their obligations as a POB in the MRO process.

86. POBs generally should be demonstrating compliance with the Pubs Code and its application in particular cases in order to avoid (or at least minimise) disputes, and to prevent the same issues from being referred to arbitration repeatedly. I am concerned at the prospect of continued delay in this matter if there is further dispute over MRO terms and the adverse consequences this could have for the Claimant.

87. In the last 12 months, a number of Pubs Code arbitration awards have been issued in respect of referrals to the PCA under regulation 32(2)(a) of the Pubs Code. Regulation 33(2) empowers an Arbitrator to rule on such a referral that the POB must provide a revised response to the tied tenant. A "revised response" is defined in regulation 33(3) as a response which includes the information mentioned in regulation 29(3)(a) to (c) (which includes a proposed tenancy which is MRO-compliant).

88. The power in regulation 33(2) is not prescriptive. It does not restrict the nature of the ruling which I may make as Arbitrator in this case.

89. I am of the view that following this Award the revised response should be such that further disputes as to the compliance of that revised proposal do not arise. There remains, as ever, a hope and expectation that parties will seek to negotiate mutually acceptable MRO terms in this case. However, based upon my experience where an MRO proposal is found to be non-compliant and a direction is made to provide a revised response without specifying its precise form, there is a significant risk of continuing disagreement between the parties about the interpretation of an award, therefore risking further delay to the MRO process.

90. As such, failing such agreement in this case, I consider that the appropriate course of action is for me to proceed to determine the complete terms of a compliant MRO proposal such that my ruling under regulation 33(2) can be for the Respondent to provide a revised response in the precise terms that I shall order. I will need expert advice as to what terms would be uncommon, and I may need legal assistance in respect of drafting of the MRO lease terms. I propose to appoint such experts as required under article 29 of the CIArb Rules and section 37 of the Arbitration Act 1996.

91. Notwithstanding the above, I am of the view that the parties should at this stage, and in view of my findings in this Award, seek to agree MRO-compliant terms between themselves. As such, I therefore direct that there should be a period of 28 days from the date of this award for such purpose, prior to the issue directions for the determination of compliant MRO terms. If these discussions on MRO compliant terms between the parties are productive (and I sincerely hope that they will be), but the parties agree that they require extra time to finalise terms, then they may approach me before the end of this 28 day period to request a short extension to this period in order to complete negotiations.

Costs

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

Operative Provisions (Order)

93. In light of my findings at paragraphs 16 and 17 above:

93.1 The Respondent breached regulation 29(6) of the Pubs Code by failing to send a full response within the period of response.

93.2 The Respondent is to include reference to this breach in its next compliance report and is to provide evidence to both the PCA and DPCA as Regulator of the steps it has taken to ensure that similar breaches do not occur again, within 28 days from the date of this Award.

93.3 I am minded to consider the exercise of my powers under section 48(4) of the Arbitration Act 1996 in respect of the full response served out of time, subject to the Claimant providing full evidence and submissions of any direct losses suffered between 14 and 16 November 2016 and as a result of this breach.

93.4 The Claimant is therefore directed to provide all submissions and evidence in relation to any such losses suffered between 14 and 16 November 2016 and caused as a direct result of the delay in receipt of

the full response to both the Respondent and the Arbitrator within 14 days of the date of this Award. The Respondent may make submissions to both the Claimant and the Arbitrator in response within 14 days following receipt of the Claimants submissions and evidence.

94. In light of all other findings above:

94.1 The Respondent's choice of vehicle for delivering MRO in this case in the form of a new lease has not been shown to be a reasonable one and is therefore non-compliant;

94.2 MRO can be achieved in the form of a DOV;

94.3 The Respondent's MRO offer contains terms in relation to one quarter's rent deposit; quarterly rent in advance; payments towards the cost of constructing, repairing or maintaining common property, plant and apparatus; payments towards the costs of valuations for insurance purposes; the lease of the Pub to be first offered back to the Respondent if the Claimant seeks to assign its interest; and, a requirement that the Claimant must exclusively stock and offer for sale keg products produced by the Respondent or its group companies at the Pub, which are unreasonable and therefore non-compliant;

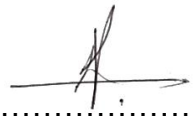
94.4 Determination of MRO-compliant terms is to be made by the Arbitrator;

94.5 The Respondent is ordered to provide a revised response to the Claimant within 28 days of the Arbitrator's determination of its terms;

94.6 Prior to this determination by the Arbitrator, there will be a 28 day period during which time the parties are directed to discuss agreement on MRO-compliant terms having regard to my findings in this Award ;

94.7 Following the expiration of this period (and/or any subsequent or extended period) directions are to be issued for the purpose of determination by the Arbitrator of compliant MRO terms;

94.8 Costs are reserved.



Arbitrator's Signature ……..

Date Award made ……26/02/2019……..

Appendix 1 – Applicable Law

1. Section 42 of the 2015 Act makes provision for the Secretary of State to make regulations about practice and procedures to be followed by POBs in their dealings with TPTs, to be referred to as "the Pubs Code", and subsection (3) provides:

> *(3) The Secretary of State must seek to ensure that the Pubs Code is consistent with –*
>
> > *(a) the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;*
> >
> > *(b) the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.*

2. Section 43 of the 2015 Act outlines the specified circumstances when a pub-owning business must offer a market rent only option to a tied pub tenant, and what is required in a compliant market rent only tenancy/licence, and sub-sections (4) and (5) provide that:

> *(4) A tenancy or licence is MRO-compliant if—*
>
> > *(a) taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence it—*
> >
> > > *(i) contains such terms and conditions as may be required by virtue of subsection (5)(a),*
> > >
> > > *(ii) does not contain any product or service tie other than one in respect of insurance in connection with the tied pub, and*
> > >
> > > *(iii) does not contain any unreasonable terms or conditions, and*
> >
> > *(b) it is not a tenancy at will.*

3. Section 68 of the 2015 Act outlines the definition of a "Tied Pub", and that any pub must meet 4 conditions to be classified as such. Condition D is particularly relevant to the facts of this case as it is where the concept of a stocking requirement is introduced, as follows:

> *(5) Condition D is that the tenant or licensee of the premises is subject to a contractual obligation that some or all of the alcohol to be sold at the premises is supplied by—*

(a) the landlord or a person who is a group undertaking in relation to the landlord, or

(b) a person nominated by the landlord or by a person who is a group undertaking in relation to the landlord.

(6) But condition D is not met if the contractual obligation is a stocking requirement.

(7) The contractual obligation is a stocking requirement if

(a) it relates only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord,

(b) it does not require the tied pub tenant to procure the beer or cider from any particular supplier, and

(c) it does not prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such sales).

(8) In subsection (7), "beer" and "cider" have the same meanings as in the Alcoholic Liquor Duties Act 1979 (see section 1 of that Act).

4. Regulation 23 of the Code provides for the TPT to give the POB an MRO notice where a specified event occurs. Where the POB agrees that the TPT's description in the notice demonstrates that a relevant event has taken place, pursuant to regulation 29(3) the POB must send the TPT a statement confirming its agreement and, where the MRO notice relates to a tenancy or licence, a proposed tenancy or licence respectively which is MRO-compliant.

5. Regulation 29 of the Pubs Code outlines the consequences of a TPT serving an MRO notice on a POB. Paragraph (3) sets out that where a POB accepts that a TPT was entitled to serve an MRO notice, that it must send the tenant a statement confirming such agreement, and '*a proposed tenancy which is MRO-compliant*', which is defined by paragraph (5) as a *"full response"*. Paragraphs (6) then sets out that a POB must send the full response within the period of response, which (in the circumstances of this case) is defined at paragraph (7) as:

"the period of 28 days which begins with the day on which the pub-owning business receives an MRO notice."

6. Regulation 31 of the Pubs Code then outlines some terms which are to be regarded as unreasonable in relation to proposed MRO tenancies, and paragraphs (1) and (2) provide:

> *(1) Paragraph (2) applies where—*
>
> > *(a) a tied pub tenant is subject to a tenancy ("the existing tenancy") granted by the pub-owning business;*
> >
> > *(b) the tied pub tenant gives an MRO notice to the pub-owning business; and*
> >
> > *(c) the pub-owning business sends a proposed tenancy ("the proposed MRO tenancy") to the tied pub tenant as part of a full response under regulation 29(3) or a revised response under regulation 33(2) or otherwise during the negotiation period.*
>
> *(2) The terms and conditions of the proposed MRO tenancy, taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy, are to be regarded as unreasonable for the purposes of section 43(4) of SBEEA 2015 if they—*
>
> *…*
>
> > *(c) are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.*
>
> *(3) Paragraph (4) applies where—*
>
> > *(a) the conditions in paragraph (1)(a) to (c) are met, and*
> >
> > *(b) the existing tenancy is a protected 1954 Act tenancy.*
>
> *(4) The terms and conditions of the proposed MRO tenancy, taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy, are to be regarded as unreasonable for the purposes of section 43(4) of SBEEA 2015 if they exclude the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to the proposed MRO tenancy.*

Appendix 2 – Vehicle for the MRO Option

1. There has been much debate as to whether the MRO should be delivered by way of a new lease, or by way of a variation by deed of the terms of the existing lease (DOV). There is no express provision in either the 2015 Act or the Pubs Code which states that an MRO-compliant tenancy must be provided either by way of a new lease or by way of a DOV. Indeed, there is no express provision as to its form at all, only as to its terms.

Interpreting the Legislation

2. In interpreting legislation, it is necessary to ascertain objectively, by reference to the language used in it, what Parliament intended. That language should be given its natural meaning rather than a strained one, and background material must not take precedence over the clear meaning of the words used. Legislation should be construed according to the intention expressed in the language.

3. The word “tenancy” (in and of itself) does not gives any particular guidance; a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a new lease. The statutory language does not suggest that a new and separate agreement must be entered into. There are no clear words which would indicate this - such as the “grant” of a tenancy or its "commencement", or the “termination”, “surrender” or “end” of the existing tenancy. The language used, for example “accept” and “enter into” in regulation 39, is consistent with a new tenancy or a varied one.

4. When interpreting the Code, it is proper to have regard to the extent of the rule-making power conferred by the primary legislation. The 2015 Act requires the Code to confer on the TPT a "*market rent only option*" - Section 43(1) of the 2015 Act provides that the Pubs Code must "*require the pub-owning business to offer their tied pub tenants falling within s.70(1)(a) a market rent only option in specified circumstances*". Section 43(2)(a) provides that the "*market rent only option*" means the option for the TPT to occupy the tied pub under a tenancy or licence which is MRO-compliant. Subsection (4) specifies the circumstances in which a tenancy or licence is "*MRO-compliant*". Therefore, the definition of an MRO-compliant tenancy is set out within the 2015 Act, not the Code, other than as delegated under section 43(5), which provides for the matters in respect of the content of the proposed tenancy which are delegated by the Act to the Code as follows:

   The Pubs Code may specify descriptions of terms and conditions—

   (a)which are required to be contained in a tenancy or licence for it to be MRO-compliant;

   (b)which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).

5. It is under this section 43(5) power that regulations 30 (regarding lease terms) and 31 (as to terms and conditions regarded as unreasonable) are made, and these are the only regulations in the Code that provide for the form and content of the MRO-compliant tenancy. Neither provision relates to the form or content of the proposed MRO tenancy as being the terms of a new lease or the terms of the

existing tied lease varied by deed. It was open to Parliament to make further provision as empowered by section 43(5), but it conspicuously did not.

6. Section 44(1)(a) of the 2015 Act provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option (referred to in this Part as "the MRO procedure") …*". This delegates to the Code the procedure in connection with an offer of an MRO option, and not the form or content of the proposal, which is the subject of the separate delegation in section 43(5).

7. Considering the language of the Pubs Code and looking at the way in which the term "tenancy" is used in context within the legislation does not indicate that Parliament intended the MRO option was to be implemented by the grant of a new tenancy only and not a DOV. The provisions referring to a "tenancy" include:

    1. Regulation 29(3) requires the POB to send to the TPT "*a proposed tenancy which is MRO-compliant*"

    2. Regulation 30(1)(a) and (c) refer to the "*existing tenancy*" and a "*proposed MRO tenancy*"

    3. Regulation 30(2) refers to the term of the existing tenancy and the term of the proposed MRO tenancy, which must be "*at least as long as the remaining term of the existing tenancy*". Regulations 34(2) and 37(1) refer to the *"proposed tenancy or licence".*

    4. Regulation 39(2) and (4) (dealing with the end of the MRO procedure) refer to the POB and TPT *"entering into"* the tenancy or licence.

    There is nothing in the language of these provisions that is not appropriate for the execution of a DOV.

8. Considering the following language also provides no grounds to undermine the proposition that the MRO can be the existing tenancy amended by deed:

    1. The definition of "market rent" in section 43(10) of the 2015 Act, which provides for an estimated rent based on certain assumptions, including that the lease is entered into on the date the determination of the estimated rent is made, in an arm's length transaction.

    2. Section 43(4)(a) sets out the circumstances in which a tenancy or licence is "MRO-compliant" and in doing so refers to the "t*enancy or licence" "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence*".

    3. Section 44(2)(b) of the 2015 Act sets out provision for a negotiation period for parties to agree rent *"in respect of the tied pub tenant's occupation of the premises concerned under the proposed MRO-compliant tenancy or licence."*

9. There is nothing in the way that the term tenancy is used in context that indicates that the MRO could only be offered by way of a new lease. There is nothing in the use of the phrases "existing tenancy" and "proposed tenancy" in regulations 30 and 31 to suggest that the existing and proposed tenancy must be different tenancies – i.e. that the latter must bring an end to the former, or that the proposed tenancy must be completely contained within a new document from that of the existing

tenancy. Parliament chose not to make provision that a compliant MRO proposal must contain a new tenancy to be granted upon the surrender of the existing one, though it might easily have done so. The provisions relating to the market rent (in section 43(10) of the 2015 Act) relate to the rent under the MRO-compliant lease, but do not inform what those lease terms and conditions are.

10. Furthermore, the draftsperson was alive to the need to specify a “new” MRO tenancy to distinguish it from an existing tenancy, if such need existed. This is clear from the expression "new tenancy" which appeared in the Code no less than 19 times (within the definition of "new agreement", which refers only to a new tied tenancy). It would have been simple for the draftsperson to have made clear any restriction against the use of a DOV, and the complete and consistent failure to do so in the language of the Code demonstrates plainly that no such restriction was intended.

11. That the legislation does not by implication require an MRO-compliant option to be given only by way of a DOV seems to be clear however. Regulation 30(2) provides that an MRO tenancy will only be MRO-compliant if its term is at least as long as the remaining term of the existing tenancy, and its term can therefore expire after the date of expiry of the original lease. As a matter of law, where the term of a lease is extended by way of a DOV, it operates as a surrender of the existing lease and a grant of a new lease. Furthermore, if the proposed tenancy was intended to be achieved by variation of the existing tenancy only, there would be no need for the provisions in regulation 31(3) and (4) preserving rights under the Landlord and Tenant Act 1954 where they apply to existing leases, as such protection would be unaffected. Lastly, where the existing TPT is a tenant at will (as per section 70(2) of the 2015 Act) because pursuant to section 43(4)(b) an MRO tenancy cannot be a tenancy at will, the MRO must therefore be a new tenancy.

Background Material

12. Correspondence to the then Secretary of State Vince Cable MP dated 25 October 2013, from CAMRA and others advocating the MRO option, referred expressly to the expectation that the POB would issue a DOV. This serves to illustrate that, having been specifically asked to contemplate a DOV, the Secretary of State did not make regulations which expressly prohibited it.

13. The fact that open language has been used in the Government Consultation on the new Pubs Code (October 2015) does not mean that its meaning is unclear. In fact, it is not. On the contrary, the ordinary meaning of the language is permissive of either a new lease or a lease varied by deed, and this is not a reason to look at other material to seek to interpret the ordinary meaning in a more restrictive way.

14. Such background material must not be allowed to take precedence over the clear meaning of the words used. In *Milton v DPP* [2007] EWHC 532 (Admin), Smith LJ stated at [24] (as cited with approval in *Christian UYI Limited v HMRC* [2018] UKUT 0010) that:

> *"If the meaning is clear, there is no need to delve into the policy background. If the court is uncertain as to the meaning, it may well be helpful to consider background material in order to discover the "mischief" at which the change in the new law was aimed."*

15. Section 9 of this consultation considers the powers to be delegated under section 43(5) in respect of the compliant MRO tenancies, including:

> *9.4 The Government does not propose to prescribe a model form of MRO-compliant agreement in the Code. Rather we expect MRO agreements to be modelled on the standard types of commercial agreements that are already common for free-of-tie tenants.*

16. It is clear that there was no intention to prescribe a form. An expectation as to the form is referenced which is a precursor to the commonness test in regulation 31(2)(c), the meaning of which does not require clarification by reference to this paragraph of the consultation. Notwithstanding the inclusion of the word "commercial" (which does not appear in the legislation) it is not clear that Parliament is intending to exclude a lease varied by DOV, rather than leaving the matter to the market. Given paragraph 9.4, it would be hard to rely on other parts of the consultation to show that the Government did indeed intend to prescribe that the MRO-compliant agreement could not be in the form of a tied lease with a tie release by DOV, rather than to leave it to the market to decide.

17. The expression "new tenancy" is not found in other paragraphs of the consultation which refer to a new (MRO) agreement, not even in paragraphs 9.6 and 9.8 where a tenancy has already been referred to earlier in the sentences. Furthermore, the expression "new agreement", which is not consistently used in the consultation, is not an unequivocal marker of intention. In 6.13 a "new agreement" which will end a rent assessment does not need to be a new tied tenancy after surrender of the old. There should not be too much read into selected words of the consultation or into the Government's response to the consultation dated April 2016, where the expression "new agreement" does not occur in the context of MRO at all.

18. Powers to make provision in relation to the MRO procedure, delegated under section 44(1), are considered in section 10 of the same Consultation:

> *10.11 However, where the tenant requests an MRO agreement, their intention is to move to a completely new form of contractual relationship with the pub-owning business. Changes to the old tied terms that occur during the MRO procedure will have no equivalent terms in the MRO agreement. It is therefore neither appropriate nor practical to alter the MRO offer to take account of the increased prices paid by the tenant during the MRO procedure.*

19. All that this means is that the "form of contractual relationship" (i.e. tie free) is new, not necessarily that the contractual documentation itself is a wholly new entity. The remainder of this paragraph deals with changes in tied terms during the MRO procedure (and not as a result of it), and the rent.

20. Looking at these passages, they are far from conclusive that only a new lease can be compliant. There is no silver bullet within them. These extracts cannot be viewed too selectively to be understood to point towards a prohibition of DOV. These are a few of many references in the consultation documents to the MRO agreement. Read as a whole what is obviously lacking is any direct and decisive comment on the permissible vehicle for the MRO, which is consistent with an intention not to make unjustified intervention in commercial dealings between the parties.

21. There is nothing in the legislation which precludes or requires the grant of a new tenancy, and if this had been the intention of Parliament or the Secretary of State, there would be express provision to one effect or the other. Accordingly, either a DOV or a new lease (subject to its terms and conditions) is capable of bringing about an MRO-compliant tenancy.

22. It should also be observed that the legislation, however, in not prescribing the contents of the MRO-compliant tenancy except as set out in section 43(4) and regulation 31, has not expressly required that the terms of the MRO-compliant tenancy remain the same as the terms of the original tenancy, with variation only of the rent and severance of the tie. This is consistent with the MRO vehicle not being restricted to a DOV and is another matter for which there could easily have been provision if that was the legislator's intention.

Appendix 3 – Unreasonableness

The terms and conditions must not be unreasonable overall. Uncommonness is merely one way in which terms can be unreasonable.

1. Pursuant to section 43(4) an MRO-compliant tenancy cannot contain any unreasonable terms or conditions. Regulation 31 of the Code makes provision for certain terms and conditions which will automatically be unreasonable, amongst them (under paragraphs (2)(c)) terms which are uncommon in tie free leases.

2. It is necessary first to consider whether the terms set out in that regulation are an exhaustive list of all unreasonable terms and conditions, but it is clear from a straightforward reading of the legislation that they are not and are merely particular examples of unreasonable terms. Section 43(5)(b) is a power not a duty, and section 43(4) renders a tenancy non-compliant for any unreasonable terms or conditions in any event, notwithstanding that the Secretary of State might not have chosen to exercise that power to specify descriptions of terms and conditions to be regarded as reasonable or unreasonable. It is still necessary for all terms and conditions in the proposed tenancy to be reasonable in a broader sense.

3. Therefore, determining MRO-compliance is not simply a question of looking at each individual term to decide whether it is uncommon for the purposes of regulation 31, but whether the proposed MRO tenancy contains terms or conditions which are unreasonable. The terms or conditions of a lease may be unreasonable by virtue of words which are not included, and not just those that are.

The terms and conditions must not individually and collectively be unreasonable

4. Furthermore, it is not the case that the language of the 2015 Act and Pubs Code requires consideration of each proposed term or condition in isolation. A judgement as to whether an individual term or condition is unreasonable may be affected by the other terms and conditions of the proposed tenancy. Two or more terms and conditions together may render the proposed tenancy unreasonable, for example, where they are inconsistent with each other, or where their combined effect is too onerous for the tenant. Indeed, this is reflected in the normal course of negotiations between parties in the market, in which a tenant may not look at each term or condition in isolation to decide if it is reasonable. A tenant may consider that a number of terms together in a lease may make the proposed terms unreasonable. There may be some particular terms which are make or break, but often some terms objected to may be rendered acceptable by virtue of concessions elsewhere in the negotiation. It is necessary therefore to consider not just whether the individual terms are unreasonable, but also whether that test applies to the proposed lease as a whole.

5. Thus, for example, the payment of an increased deposit, rent in advance and payment of insurance annually in advance would constitute additional costs to the tenant. Other cost considerations at entry may be legal fees and the payment of

dilapidations. Where costs, including entry costs, are excessive in total, but negotiated to a reasonable level overall, it may not be correct to focus on an individual term or condition in isolation and to decide if that cost is or is not reasonable – it may depend on the context.

6. A tenancy will not be compliant if its terms and conditions, individually or collectively, are unreasonable. That this is the correct approach to considering whether proposed lease terms are uncommon is furthermore clear from the wording of regulation 31(2), which refers to terms and conditions only in the plural. Therefore, this regulation requires consideration of whether the agreement as a whole is one which is not common in tie free agreements.

The choice of vehicle for delivering MRO cannot be unreasonable

7. Section 43(4) refers to a tenancy being MRO-compliant if "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence" it does not contain any unreasonable terms and conditions pursuant to subsection (iii). There is no necessity to restrict the interpretation of "contained" to the express terms of the proposed tenancy document alone. This is broad enough to encompass the requirement to enter into a new tenancy. Therefore, the choice of vehicle is subject to a test of unreasonableness.

8. The question of whether the choice of MRO vehicle is unreasonable can correctly be analysed in both of the following two ways. Firstly, the lease terms individually and collectively cannot be unreasonable, and if they are in the form of a new lease which unreasonably imposes an excessive burden on the TPT, then those terms can be unreasonable and non-compliant. Secondly, the fact that the POB offers the proposed MRO tenancy only by way of new lease can amount to an implied condition (precedent) in the lease, in that the MRO option can only be exercised if the TPT agrees to a new lease. The method of delivery would on that analysis be a term or condition which, if challenged by the TPT, falls for consideration under section 43(4) of the 2015 Act and may be unreasonable if there is no good reason for any resulting disadvantage imposed on the TPT (while noting that it is only uncommon terms, not uncommon conditions that fall foul of the wording of regulation 31(2)).

Unreasonableness - meaning

9. The legislation imposes on the POB a statutory duty to serve on the TPT a proposed tenancy which is compliant. Accordingly, it is for the POB to make the choice of terms and vehicle, and that choice must not be unreasonable in the particular case. Communicating those reasons will help to avoid disputes and is consistent with the fair dealing principle.

10. In determining what is unreasonable, it is apparent that there is nothing in the statutory language which requires the meaning of that term to be determined only in light of open market considerations which would affect two unconnected parties entering into a new FOT lease. A term will be judged to be unreasonable or not based on all of the circumstances, as they are known (or ought to be

known) to the parties, and each case will turn on its own facts. While a POB might achieve some certainty that particular lease terms are common in the tie free market, what is reasonable in one case for one particular pub may not be reasonable for another.

11. It is necessary to consider whether there is statutory guidance which assists in applying the test of unreasonableness. The starting point to understanding the Pubs Code and the statute which enabled it is the core principles, found in section 42 of the 2015 Act. Parliament's instruction to the Secretary of State in making the Pubs Code (which includes particular examples of unreasonable terms and conditions made pursuant to a power in the 2015 Act) is that she/he must seek to ensure that it is consistent with those principles.

12. The core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the Pubs Code (including any regulations made under the power delegated in section 43(5)) are to be interpreted as consistent with the two core principles, if the provisions in the 2015 Act (in this case, as to reasonableness in section 43(4)(a)(iii)) are not, there would be a fundamental incompatibility between these instruments. Were the language in the 2015 Act and Pubs Code not consistent with these principles, the Secretary of State would not have enacted the Pubs Code in its current form.

13. It is proper to conclude therefore that the Pubs Code and section 43(4)(a)(iii) of the 2015 Act, read together, can be interpreted in a manner consistent with the principles of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants and that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie. If it is necessary to call statutory interpretation principles in aid, this is a purposive approach. Thus, these principles are relevant to my understanding of what terms and conditions may be "unreasonable", and some consideration is appropriate as to what they might mean in practice.

The Pubs Code Principles

Fair and lawful dealing

14. Its long title states that the 2015 Act is "to make provision for the creation of a Pubs Code and Adjudicator for the regulation of dealings by pub-owning businesses with their tied pub tenants" and the Code regulations, pursuant to section 42, are "about practices and procedures to be followed by pub-owning businesses in their dealings with their tied pub tenants." The term "dealings" is not defined in the 2015 Act. I note there is some inconsistency between the Pubs Code provisions at regulations 54 and 55 (which imply that "dealings" with a TPT may take place in relation to the MRO provisions by virtue of certain exclusions provided for) and the Explanatory Note (which does not form part of the regulations).

15. Overall, there is nothing in the statutory language which excludes the POB's conduct in the MRO procedure from being "dealings" with the TPT. The meaning of the term is broad, and it is fit to encompass any of the activities in the business relationship between the TPT and POB regulated by the Pubs Code. The term references the existing commercial relationship between them and includes interactions pursuant to the current lease as well as their business practices with each other in relation to a proposed lease and more generally. The requirement that such dealings are fair means that Parliament intended that, in addition to complying with legislation and private law principles, they should be in good faith, equitable and without unjust advantage.

No Worse Off

16. The second core Pubs Code principle requires a comparison of the position of TPTs with tenants who are tie free, and the former are intended to be no worse off than the latter. It would seem to me to be a judgement of fact and degree in each case whether a TPT is worse off. That judgement would include financial matters, particularly profit, but could it seems also include considerations not directly expressed in financial terms – for example a difference in bargaining power and the reduced risk in having a tied deal, or the business support available to a TPT from a POB may be something of value for the TPT. By pursuing the MRO option, the TPT should be in the position of being able to compare, and make an informed choice between, the two options.

The Application of Pubs Code Principles

17. It is consistent with the Pubs Code principles that the proposed tenancy which is made available to the TPT through the MRO procedure is not on worse terms and conditions than that which would be made available to a free of tie ("FOT") tenant after negotiations on the open market. This is for two reasons. Firstly, if the POB was able to get more favourable terms from the TPT using the MRO procedure than it would on the open market, or than it would offer to a TPT it was motivated for business reasons, not required, to release from the tie, this would not be fair dealing. Secondly, the TPT would be worse off in having a choice to accept terms which were worse than would be available to a FOT tenant, including for example an existing FOT tenant renegotiating terms on lease renewal. In any event, these principles follow from the general concept of reasonableness, taking into account the relative negotiating positions of the parties within this statutory scheme.

18. Furthermore, the proposed new lease would be unreasonable and inconsistent with Pubs Code principles if it represented an unreasonable barrier to the TPT taking an MRO option, and thus frustrated Parliamentary intention. If the POB, in a new letting on the open market made a lease offer, the prospective new tenant would have various options available – including accepting the offer, negotiating different terms, negotiating better terms in respect of a different pub with one of the POB's competitors, or walking away.

19. The commercial relationship between the TPT and the POB on service of an MRO notice is different. The TPT (except at renewal) does not have the right to

walk away or contract elsewhere. It only has the right to keep its current tied deal or to accept the offer. Even at renewal, any goodwill earned will be a relevant consideration for the tenant, as will the availability of the County Court's jurisdiction to determine reasonable terms of the new tenancy. The TPT in the MRO procedure is not in an open market position.

20. The test of unreasonableness is the counterbalance to the negotiating strength of the POB, with its inherent potential for unfair dealing towards a TPT in the MRO procedure (or any step to make the tenant worse off than if they were FOT). In addition, an attempt to thwart the MRO process by making the MRO proposed tenancy too unattractive would not be lawful dealing.

21. It must be emphasised that the existing tied deal is one to which the TPT contractually agreed. However, the occurrence of a specified event giving rise to the right to serve an MRO notice in each case is by its nature something which has affected the commercial balance of that deal as between the parties, and Parliament intended that this should give rise to a meaningful right to go tie free. The test of reasonableness requires that the POB, in offering the terms of the purported MRO tenancy, cannot take advantage of any absence of commercial bargaining power on the part of the existing TPT pursuing the MRO procedure.

22. It is in this particular context that a POB must be able to show that its choice of MRO vehicle is not unreasonable. This may be the case if there is a significant negative impact on the TPT arising from that choice, including one which operates as an unreasonable disincentive to taking the MRO option. Furthermore, the POB must be able to show that its choice of terms of the MRO tenancy are not unreasonable, and they may be if they have an impact of that nature. The choice of vehicle and proposed terms and conditions cannot be used to create an obstacle to the TPT exercising the right to an MRO option. There must be an effective choice available to the TPT.

23. Showing that the landlord's choices are not unreasonable naturally includes being able to articulate good reasons for them. This is necessary if the POB is to show it is not taking advantage of its negotiating strength. Communicating those reasons would reduce the chance of disputes (and it would support the fair dealing principle for the POB to provide those reasons alongside the MRO proposal, to aid negotiation). There must be fair reasons for the POB's choice of MRO vehicle, and fair reasons for proposing the particular terms. Where fair reasons cannot be shown to exist, the terms and conditions of the MRO proposal may be considered unreasonable and not compliant.

24. Whether the terms of the MRO proposal are reasonable will depend on the impact they have on both parties. The interests of one party cannot be considered in isolation. The consideration must be balanced and the terms, and choice of vehicle, not unreasonable when viewed from either party's perspective.

Appendix 4 – Stocking Requirement

1. Although not raised by the Claimant or the Respondent in their pleadings, it is relevant to consider whether the principle that competitor products may be restricted, though not prevented, must be applied to the stocking requirement taken as a whole, or whether it must be applied to each type or category of beer and cider (that is, whether the stocking requirement is granular). In the present case, it is only non-Landlord Keg Brands which are subject to an absolute prohibition. Competitor Cask Brands and PPB are not. Therefore, does the stocking requirement comply with section 68(7) in that it does allow a range of competitor products to be sold in both beer and cider categories? It is necessary to consider the wording of the statute.

2. A stocking requirement should not require a TPT to procure the beer or cider from any particular supplier. A stocking requirement is not a tie and POBs which are also breweries may, pursuant to subsection (7), impose a stocking requirement on tenants and licensees within an MRO compliant tenancy.

Interpretation of the statutory provisions

3. Firstly, by virtue of section 6(c) of the Interpretation Act 1978, unless the contrary intention appears, the singular in an Act includes the plural. Therefore a stocking requirement under section 68(7)(c) cannot prevent the sale of “beers or ciders” produced by another person. Accordingly, any interpretation of the legislation which would permit a term preventing the sale of all but one beer (or cider) to be a stocking requirement cannot be correct.

4. Furthermore, in considering subsection (7)(c) I am satisfied that in this negative statement the “or” is disjunctive in its context – in that there can be no prevention of the sale of either beer or cider (not just no prevention of the sale of both beer and cider). Therefore, as a positive statement, the sale of both beers and ciders produced by another person must be permitted. This is the more logical interpretation in context, given the reference to “beer or cider (or both)” in subsection (a) and by implication subsection (b) as the products referenced in (c) should be understood as referable to those covered by (a) and (b).

5. Next, the beer or cider referred to in (a) should be understood as comparable to the beer or cider produced by another person referred to in (c). In (a) and (b) beer and cider is broad enough to encompass all of the types of beer and cider produced by the landlord (or its group undertaking), and in trade terms this can encompass beer and cider of various types or product – be it keg, cask or bottle. The beer or cider referred to in (c) must, I consider, be understood in the same equally broad way. Therefore, for example, if the term relates to keg beers in (a), then (c) must be read as excluding from the definition of a stocking requirement a term which prevents the sale of keg beers produced by another person. Comparison is therefore not on an exact product like for like basis (the same product with same packaging) but rather a similar product (e.g. another type of the same beer or cider).

6. The drafting of section 68(7) is therefore broad – no beer or cider produced by another person may be prohibited for sale. There is no reason to restrict the meaning of this provision. In any particular case the simple and correct way to approach the matter is to ask “is this product beer or cider produced by another person?”. If the answer is yes, and if the lease term prevents its sale, then the term does not fall within the definition of a stocking requirement.

7. In addition, by virtue of section 68(8), “beer” and “cider” have the meaning ascribed to them in section 1 of the Alcoholic Liquor Duties Act 1979, pursuant to which “beer” “includes ale, porter, stout and any other description of beer, and any liquor which is made or sold as a description of beer or as a substitute for beer…”. Section 68(7)(c) can therefore be interpreted as prohibiting through a stocking requirement the prevention of the sale of “ale, porter, stout and any other description of beer” produced by another person. This serves to weigh heavily in favour of the interpretation that I adopt.

8. The Explanatory Note to the 2015 Act states that “The stocking requirement also allows the pub-owning business to impose restrictions on sales of **competing** beer and cider in line with prevailing competition law, so long as the restrictions do not prevent the tenant from selling such products.” (my emphasis). It is competing beer which must be permitted to be sold. If the landlord prohibits wholesale the stocking of types of beer and cider produced by another, then it is in effect prohibiting the sale of beer and cider products which compete with its own. A PPB lager cannot, for example, be accurately described in my view as a competitor to cask ale.

9. Taking the alternative interpretation to its extreme, that the stocking requirement should be looked at as a whole to determine if it prohibits the stocking of competitor products, it could, for example, prevent the sale of any draught beer and any draught cider at all from another producer, and permit only PBB sales from other producers (even though these might be products which do not sell well in the particular pub in question). If restrictions which could have such wide effect were intended, I would expect there to be express words in the 2015 Act to make such provision. I find that to fall within the definition of a stocking requirement the sale of any type of competitor beer or cider product must be permitted. Therefore, a stocking requirement is granular, and each provision restricting the sale of a type of competitor beer or cider must comply with the definition of a stocking requirement.

10. By virtue of section 68(7)(c) a stocking requirement is a contractual obligation which cannot “prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such sales)”. The effect of restriction on non-Landlord Keg Brands in a stocking requirement is that it prevents such sales and is nothing other than a prohibition.

11. I do not consider that the legislation is ambiguous. The policy intent behind section 68(7) and its language was to permit the Respondent to protect its route to market. A brewer POB’s route to market can indeed be protected, and this can

lawfully be achieved by restricting sales of competitor products, but not by prohibiting them.

12. A proposed term will not be MRO-compliant if it is unreasonable[1] and any terms which are not common in free of tie agreements will automatically be unreasonable[2]. An uncommon term is only one example of an unreasonable term[3]. As such, in order to be MRO-compliant, a term which is common must still be reasonable in the more general sense.

13. If proposed stocking terms are found not to fall within the statutory definition of a "stocking requirement", but do not amount to a tie, it would then be necessary to consider whether such terms are in any event MRO-compliant.

14. A proposed term (be it a stocking requirement within the statutory definition or other stocking term which is not) will not be compliant if it is unreasonable. On a plain reading of section 43(4)(a) of the 2015 Act, all of the three conditions in (i)-(iii) must be satisfied in order for the proposed tenancy to be MRO-compliant, as the conjunction "and" appears at the end of the second. The exclusion of a stocking requirement from the definition of a product tie in (ii) is therefore irrelevant to the application of the reasonableness test in (iii), which applies to all terms of the proposed tenancy.

15. Unreasonableness must be understood in light of the Pubs Code core principles and all the circumstances of the case. I would remark however that in considering reasonableness, matters which may be relevant include the existing pub offer; the nature of the landlord and its business; the nature of the tenant and its business; the nature and location of the pub and its local market; any other relevant matters (such as any ability to vary over the length of the term of the lease). Parliament provided in the stocking requirement for an exception to the ability of free of tie tenants to do exactly as they please in relation to stocked products. There must therefore be a reasonable balance between the free of tie tenant's commercial freedom and the protection of the brewer POB's route to market. Good and fair reasons would be required to justify as reasonable a restriction on the stocking of a proportion of products actually demanded and consumed by the local market, as demonstrated by recent sales during the term of the existing lease.

[1] Section 43(4)(a)(iii) of the 2015 Act

[2] Regulation 31(2)(c) of the Pubs Code

[3] The requirement at section 43(4)(a)(iii) of the 2015 Act applies to all terms of a proposed tenancy