IN THE MATTER OF **ARB/100022/MILLSYSCAFEBAR**
THE PUBS CODE ARBITRATION BETWEEN:

MILLSY'S CAFÉ BAR BISTRO LIMITED
(Tied-Pub Tenant) Claimant

-and-

PUNCH PARTNERSHIPS (PTL) LTD
First Respondent

and

STAR PUBS AND BARS LIMITED
(Pub-owning Business) Second Respondent

AWARD

Summary of Award

The Respondent's full response was not compliant.

Introduction

1. This dispute relates to the terms of a proposed stocking requirement, a new concept introduced by the Pubs Code[1]. Other issues that were in dispute between the parties have been settled. A stocking requirement is a contractual obligation in a pub tenancy or licence that requires the tenant or licensee to stock beer or cider produced by a brewing pub-owing business regulated under the Pubs Code. A stocking requirement is not a tie.

Parties and Procedure

2. The Claimant is Millsy's Café Bar Bistro Limited of the Royal Oak, 22 Earlsdon Street, Coventry, CV5 6EJ ("the Pub") and is the tied pub tenant ("TPT")[2] of the Pub which it occupies under the terms of a lease granted on 15 July 2013 for a term of ten years commencing on 29 June 2013.

3. The First Respondent is the landlord of the Pub, Punch Partnership (PTL) Limited, and was purchased by Heineken UK Limited on 29 August 2017 from Punch Taverns plc. The First Respondent has since that date been a group company of the Second Respondent, which is a pub-owning business ("POB")[3] and which operates Heineken's pub portfolio. In this award, the First and Second Respondent are referred to together as the Respondent.

4. The Claimant is represented by Mr Michael Erridge of MDE Pub Consultants. The Respondent is represented by DLA Piper Scotland LLP. The procedure applying to this arbitration is set out in Appendix A.

Background

5. The Small Business, Enterprise and Employment Act 2015 ("The 2015 Act") makes provision for tenants of tied pubs to be offered a market rent only ("MRO") option in specified circumstances. As a result of a MRO notice[4] served by the Claimant on 15 December 2017 on the Respondent, the Claimant has the right to receive a compliant MRO proposal.

6. The Respondent on 9 January 2018 purported to serve on the Claimant a full response[5] and this contained a draft MRO lease including a proposed stocking requirement.

7. The Claimant made a referral to the PCA on 22 January 2018[6]. The TPT disputes that the Respondent has complied with the duty[7] to send the tenant a proposed tenancy which is MRO-compliant.

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[1] In The Pubs Code etc. Regulations 2016
[2] Within the meaning of section 70(1)(a) of the 2015 Act
[3] Within the meaning of section 69(1) of the 2015 Act
[4] Regulation 29(3), on a notice served in accordsance with regulation 23
[5] Within the meaning of regulation 33(3) of the Pubs Code
[6] Under regulation 32(2)(b)
[7] Under regulation 29(3)

8. Directions were issued on 8 March and 28 March, and the Claimant then filed a Statement of Claim. On 11 April I held a telephone case management conference with the parties and issued amended directions on 17 April.

9. Between April and September the proceedings were stayed on several sequential joint requests of both parties, in order that they could have time to negotiate. Various offers were exchanged between them, but no settlement was reached. Ultimately, on 25 October I rejected a further joint request for another stay and required the Respondent to file its Statement of Defence, which it did on 29 October. The parties filed an agreed list of issues in dispute on 14 December and on 18 December I held a case management conference. Certain missing information was provided by the parties at my request on 14 January 2019.

10. The parties have both requested that this matter is determined on the papers without an oral hearing, and I have proceeded to determine it on that basis.

The Proposed Stocking Requirement

11. The proposed stocking requirement is set out at Appendix B to this award. My jurisdiction arises in respect of the referral of the Respondent's full response for arbitration. It is therefore for me to determine whether the proposed MRO lease in that full response is compliant. The agreed issues for my determination are:

    a. Whether the proposed keg stocking requirement is a compliant stocking requirement by the definition of Section 68(7)(c) of the 2015 Act.
    b. Whether the keg stocking requirement is reasonable.
    c. Whether the cask stocking requirement is reasonable.

The Law

12. Section 68(7) of the 2015 Act defines a contractual obligation to be 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).

The Claimant's Case

13. The Claimant's case is that the proposed stocking term relating to keg brands does not come within the definition of a stocking requirement because it is a complete prohibition on the stocking of competitor keg brands.

14. The Pub has recently been transferred from Punch Taverns Plc. and the Claimant also argues that the proposed keg brand stocking term is unreasonable as the Claimant currently stocks no Heineken keg brands, and this change would represent a risk to its business.

15. The Claimant considers the proposed stocking term in relation to cask ale is unreasonable, pointing to the fact that none of the regular or rotating guest cask brands stocked within the last 12 months was a Heineken brand. The Pub is a wet led business.

The Respondent's Case

16. In spite of a direction to file a Statement of Defence, the document filed by the Respondent does not contain a substantive defence of the stocking term in the proposed MRO lease. It contains only a simple denial that the full response was not a full response in accordance with regulation 29(3)(b), but it says no more in support of that denial. The Respondent puts forward no attempt at justification on the facts or law for the disputed MRO proposal and no evidence. It is of significant concern that the Respondent puts the arbitrator to the task of considering and drafting an award, and the Claimant to the expense and delay of arbitration proceedings, rather than openly conceding a term it does not seek to defend. This is not an appropriate approach to Pubs Code arbitrations.

My Decision in respect of the Full Response

17. The stocking requirement in the MRO proposal is not compliant for the following reasons:

Keg Brands

18. The Keg Brand stocking term at paragraph 3 does not fall within the definition of a stocking requirement as it imposes an absolute prohibition on the sale of competitor brands. I set out my full legal reasoning for reaching this conclusion in the attached Appendix C. The Keg Brand restriction is in any event unreasonable for the reasons I set out there.

19. I also make the following observations, in respect of which I have not heard submissions. The lease definition of "Landlord Keg Brands" means "*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*". "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 definition 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 representations as to whether the use

of that definition of Group Company, and not group undertaking as provided for in s.67, brings the Keg Brand stocking term outside of the statutory definition of a stocking requirement.

20. 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.

Cask Brands

21. I find that the Cask Brand restriction is unreasonable as no evidence has been put forward to show that it is reasonable and I accept the Claimant's case that it is not.

22. Whilst not a matter in dispute, I will make a further observation about the stocking term in respect of Cask Brands, though I have not heard submissions about it in this particular case. 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.*" A 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 s.68(7).

23. A "group undertaking" in section 68(7)(a) has the meaning given to it by section 1161(5) of the Companies Act 2006[8], and 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.

24. By reason of the definition of "Control" in 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, but extends beyond the definition of group undertaking in s.1161 of the Companies Act 2006 used in the statutory definition of a stocking requirement.

25. The observation made 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.

Other Offers

26. The parties have not expressly agreed that I have jurisdiction to determine whether a number of further offers made by the Respondent during negotiations are compliant. The parties have not filed pleadings to set out their cases in respect of these further offers and I do not have before me full argument in relation to them. Accordingly, I have not set them out in this

[8] S.72 of the 2015 Act defines a "group undertaking" as having the meaning given by s. 1161 of the Companies Act 2006

award (though they have not been made without prejudice and they have all been disclosed to me). The Respondent does not put them forward as compliant, but instead in its Statement of Defence it states that they ”represent a meaningful negotiation in an attempt to reach resolution of this dispute.” It holds open an offer in respect of keg and cask lines “in the spirit of seeking a negotiated settlement”.

27. These further offers are not part of the full response, and they are not part of any revised response[9]. I have considered whether I should order that any of those offers must form part of the revised response under regulation 33(2), but in order to do this I would have to be satisfied that they were MRO-compliant. However, there is no evidence before me upon which I could conclude that any of these other offers is compliant, and I make the following observations for the benefit of the parties:

    a. A stocking requirement must be reasonable for the particular pub in question. A requirement to stock a particular percentage of Cask Brand or Keg Brand, or particular named brands, could not be found to be reasonable unless reasons are put forward for that proposed term for that particular pub.
    b. For the purposes of the Pubs Code, the definition of “group undertaking” is, as I have discussed above, a statutory one and is found in s.1161 of the Companies Act 2006. An undertaking in which the Respondent merely has a shareholding, a joint venture or brewing partnership agreement also does not come within the statutory definition of “group undertaking” as there is no subsidiary or parent relationship. A requirement to stock beer or cider not produced by the landlord or its group undertaking does not come within the definition of a stocking requirement in s.68(7).
    c. The definition of a stocking requirement does not make provision for the term to influence the re-selling price of products covered by it and this award does not imply that I am of the view that such a term is compliant.

Decision and Next Steps

28. In a MRO dispute referred for arbitration[10] the PCA must “arbitrate the dispute or appoint another person to arbitrate the dispute”[11]. Regulation 33(2) empowers me to rule that the POB must provide a revised response to the TPT. A revised response is a response which includes a proposed tenancy which is MRO compliant[12].

29. As I find that the Respondent’s full response was not MRO-compliant, my powers under regulation 33(2) are engaged, and I may order the Respondent to serve a revised full response.

[9] Under regulation 33(2) and (3)

[10] Under regulation 33(2)

[11] Regulation 58 of the Pubs Code

[12] See regulation 33(3) and 29(3)(a) to (c)

30. The parties have not made submissions on the law as to my powers under regulation 33(2) in deciding what order I should make. I take the view that the reference to those powers is not exhaustive. Its language is permissive, in that it does not provide for a restriction in the scope of any ruling I may make as to the terms of the revised proposal.

31. There have been lengthy unsuccessful negotiations in this case and a series of offers and counter-offers. Unless the parties, in light of the findings and observations in this award, can reach a prompt agreement, I will make an appropriate order to ensure that the Claimant obtains a compliant MRO proposal within the revised response without the likelihood of further dispute.

32. I am sure that the Claimant would wish me to make an order now as to the terms of a compliant stocking requirement to be included in the MRO lease, and thus bring finality to these proceedings. I will explain why I am not in possession of sufficient facts to enable me to do so.

33. A revised response must include a compliant MRO tenancy. I could only therefore consider making an order as to the terms of a revised response which are MRO-compliant, its terms being reasonable for both the Claimant and the Respondent. The Respondent has not put forward any evidence at all as to reasonableness, and I would be entitled to make an order on the basis that I consider only the evidence of reasonableness that has been put forward by the Claimant. However, there is a problem with approach, in that the evidence of the Claimant is inconsistent and requires further explanation.

34. The Claimant has made two offers disclosed to me which are starkly different. In a letter dated 13 July 2018 the Claimant offered to stock one Heineken brand keg product at all times, with no restriction as to the individual product, and one Heineken cask product, with no restriction as to the individual product. That offer was marked “without prejudice”, but privilege in respect of that offer has now been waived by the Claimant.

35. On 7 October 2018 the Claimant made a further counter offer “of a 60% stocking requirement and a 10 year term.” The full terms of this offer are not explained, but I understand it to relates to Keg Brands, and it is this percentage of keg taps/lines which is included as a requirement in some of open offers made by the Respondent in respect of Keg Brands which were rejected. This offer (though it does not reference Cask Brands) does not appear to be consistent with the Claimant’s case that any imposition of a stocking requirement for this pub is unreasonable given that it is from the Punch estate and has not previously sold any Heineken products. It suggests a contradiction in the Claimant’s position. Having considered the matter, in my view the path to the fairest outcome is for me to seek further explanation from the parties as to the factors relevant to this Pub and these parties which should be considered in determining a compliant stocking requirement.

36. To ensure compliance with the principle of fair dealing within any MRO negotiation that might take place as a result of this award, Star should make

known to the Claimant any policy it applies in respect of lease length to enable fair negotiations in the round.

Costs

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

Operative Provisions

38. In light of the above findings:
    a. The Second Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant on the terms to be determined by the arbitrator;
    b. Jurisdiction is reserved to the DPCA to determine any dispute that may arise in connection with the full response;
    c. Costs are reserved.

Arbitrator's Signature

Fiona Dickie, Deputy Pubs Code Adjudicator

Date Award made 08 February 2019

Claimant's Ref: ARB/100022/MILLSYSCAFEBAR
Respondent's Ref: ARB/100022/MILLSYSCAFEBAR

Appendix A - Procedure

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 and paragraph 5 of Schedule 1, Part 1 of the Small Business, Enterprise and Employment Act 2015.

2. This is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996. 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 applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules. Where a conflict arises between the Pubs Code statutory framework (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.

Appendix B - Stocking Requirement in the MRO Lease

Clause 3.24 of the proposed MRO lease provides:

> *3.24.1 The Tenant shall observe and perform the obligations set out in schedule 6 for as long as the Landlord is a Brewer, and*
>
> *3.24.2 It is hereby agreed and declared that the Landlord shall be permitted to waive or vary all or any of the provisions of the said schedule 6 to the effect that the provisions contained therein shall be less onerous to the Tenant and the parties shall give effect to any such waiver or variation by entering into such collateral or supplemental deeds as the Landlord may reasonably require.*

SCHEDULE 6: STOCKING REQUIREMENT

1. Preamble

This schedule 6 sets out the obligations of the parties in relation to products to be stocked and offered for sale at the Property taking into account existing applicable legislation (as amended and updated from time to time) which governs your pub owning and operating arrangements. This schedule does not create or imply any obligation to purchase Landlord brands from the Landlord alone. Landlord products will include any products which are produced by the Landlord or any of its group companies. The Landlord may waive or vary the stocking requirement provisions at any time to the effect that they will then be less onerous from a Tenant viewpoint and the Tenant will co-operate in executing and entering into any documentation to give effect to such variations or waivers.

2. Defintions

In this schedule:

…

"Control" means in relation to a Landlord Cask Brewery either where the Landlord or a Group Undertaking of the Landlord holds a majority of the voting rights or has the right to exercise a dominant influence;

"Group Undertaking" has the meaning given by s.1161 of the Companies Act 2006;

…

'Landlord Cask Brands" means any brands or denominations of Cask Brands (or variants thereof) which are manufactured by a Landlord Cask Brewery;

"Landlord Cask Brewery" means any brewery which is either owned by the Landlord or a Group Undertaking of the Landlord or in which the Landlord or a Group Undertaking of the Landlord has Control;

"Landlord Keg Brands" means 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;

…

3. Keg Brands

3.1 Subject to clause 3.2 below, the Tenant will stock and make available for sale only Landlord Keg Brands.

3.2 The Tenant may exercise discretion as to the Landlord Keg Brands which it wishes to offer for sale from time to time and may request the consent of the Landlord to stock and offer for sale the Keg Brands and the Landlord shall consider any such request on its individual merits and in its absolute discretion.

4. Cask Brands

4.1 Subject to clauses 4.2 and 4.3 below, the Tenant shall stock and offer for sale only the Landlord Cask Brands.

4.2 The Tenant may in its absolute discretion stock and offer for sale any Cask Brands which it deems appropriate from time to time throughout the Term provided that at least sixty percent (60%) of the total volume of the Cask Brands which are made available for sale from time to time shall be comprised of Landlord Cask Brands.

4.3 The Tenant may at any time throughout the term install such further Cask dispensing facilities as it requires without the consent of the Landlord and at its own cost provided that this shall not have the effect of giving rise to a breach of clause 4.2 of this schedule 6.

…

6.2 provides that each provision of Schedule 6 shall, unless the context otherwise requires, be read and construed independently of every other provision of that schedule.

Appendix C – My Reasoning

Is the Stocking Requirement Granular?

1. 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 competitor Keg Brands which are prohibited. Competitor Cask Brands and PPB are not. Therefore, does Schedule 6 comply with s.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 does not require the 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 a MRO compliant tenancy.

Interpretation of the statutory provisions

3. The parties' arguments provide no reference to the statutory language, but I have sought to analyse the provisions without their assistance. However, I would remark that they are overlapping and technical, and I have restricted my consideration only so as to address the issues before me in this case.

4. 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 s.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.

5. Furthermore, in considering subsection (7)(c) I am satisfied that in this negative statement the "or" is disjunctive in its context – in 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).

6. 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).

7. The drafting of s.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.

8. 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.

9. The Explanatory Note to the 2015 Act states that “The stocking requirement also allows the pub-owing 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.

10. 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. I therefore turn to consider Paragraphs 3 and 4 of Schedule 6 individually.

Keg Brands - Is Paragraph 3 of Schedule 6 a stocking requirement?

11. I am satisfied for the reasons that follow that the Claimant correctly argues that Paragraph 3 of Schedule 6 is not a stocking requirement, as it does not fall within the definition in section 68(7)(c), in that it prevents the sale of competitor keg brands.

12. For the reasons set out above, the permissions under the Preamble and Paragraph 3.2 cannot bring the whole of Schedule 6 within the definition of a stocking requirement. Paragraph 3.2 states that the Claimant must seek the Respondent’s consent before stocking and offering for sale keg brands other than Heineken brands. The restriction is therefore only one of prior consent, and only in relation to kegs. The preamble to Schedule 6 makes it clear that the Respondent may waive any restrictions to make these less onerous on the tenant. However, the interests of the TPT and the POB will not necessarily be aligned in such circumstances. The POB may have an interest in allowing the sale of a one brand produced by another person over any other if it has an investment in that brand. The TPT will not be in that position, however, and will be seeking to respond directly to the market.

13. 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 Paragraph 3 of Schedule 6 is that it prevents such sales unless the landlord dictates otherwise. This is nothing other than a prohibition.

14. I find that a contractual obligation which prevents the TPT from selling at the premises beer or cider produced by another person unless the landlord in its absolute discretion permits it offends the principle in section 68(7)(c) and is not a stocking requirement (though I remark that in such circumstances I am not presently satisfied that the proposed tenancy is necessarily thereby subject to a tie). The position in reality is little different to there being an unqualified prohibition on such sales, when the landlord could in law waive any breach at its absolute discretion. Since the release of the contractual obligation in Paragraph 3 is solely in the gift of the landlord, it cannot be said that there is no such contractual obligation on the tenant.

15. I do not consider that the legislation is ambiguous. The policy intent behind s.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.

Is the Proposed Stocking Term a Tie?

16. The definition of a stocking requirement at section 68(7) of the 2015 Act refers to products 'produced' by a landlord. By contrast the definition of a product tie at section 72(1) of the 2015 Act covers a situation where products are to be 'supplied' only by the landlord. I am not presently satisfied that 'supplied' must mean supplied directly or indirectly, and thus that any requirement to buy the landlord's own products would necessarily be a product tie, as ultimately their supply would need to be directly or indirectly from the landlord.

17. The stocking of Landlord Cask Brands, including applying the extended definition which results from applying a definition of "group undertaking" other than the statutory one, is clearly not a tie as it could be satisfied by not buying any landlord (or group undertaking) brewed products at all.

MRO-Compliance

18. A proposed term will not be MRO-compliant if it is unreasonable[13] and any terms which are not common in free of tie agreements will automatically be unreasonable[14]. An uncommon term is only one example of an unreasonable term[15]. As such, in order to be MRO-compliant, a term which is common must still be reasonable in the more general sense. If I am correct that the proposed stocking terms (the 100% Keg Brand requirement and a restriction on the sale of Landlord Cask Brands applying a definition of a "group undertaking" which extends beyond the statutory one) do not fall within the statutory definition of a "stocking requirement", and because I am not satisfied that such a term is a tie, it is still necessary for me to consider whether they are in any event MRO-compliant terms.

19. However, I can deal with the matter very shortly, in light of the Respondent's lack of engagement with the issues in this case. I will not address the question of how the

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

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

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

test of commonality must be applied to a stocking requirement (though I have considered it in other awards). It is a matter of some legal intricacy and not raised by the parties here. However, in summary I will say that I am satisfied that the uncommonness of a proposed stocking requirement (which meets the statutory definition) does not render that stocking requirement non-compliant. A proposed stocking term (which does not meet the statutory definition of a stocking requirement) is not common in free of tie leases, and will not therefore be compliant.

Reasonableness

20. 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.

21. Unreasonableness must be understood in light of the Pubs Code core principles and all the circumstances of the case. Due to the absence of submissions from the Respondent on the question of what would be reasonable in this case, it is not necessary for me to analyse in detail how I consider the test of reasonableness should be approached (though I have addressed it in other Pubs Code arbitration awards already published with party consent).

22. No reasons have been put forward why a 100% keg restriction or a 60% cask restriction (with or without the lease definitions which would bring it within the statutory definition of a stocking requirement) would be reasonable and it is accordingly unnecessary for me to consider the point further. Given that Parliament provided that a stocking requirement cannot prohibit the sale of competing products, for any stocking term to seek to do so would in my view clearly be unreasonable. The statutory duty lies on the Respondent to serve a compliant MRO proposal. It must therefore have, when serving that proposal, grounds for considering that it is compliant, but it has not indicated that it had any such grounds in the present case in all of the circumstances in respect of this Pub, including given its recent trading history when the First Respondent was owned by Punch Taverns plc. The Claimant's succinctly put case is persuasive on this point.

23. 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.

- end -