

**IN THE MATTER OF
THE PUBS CODE ARBITRATION BETWEEN: -**

Ref: ARB/000322/ANDERSON5

MR EDWARD ANDERSON

Claimant

(Tied Pub Tenant)

-and-

MARSTONS PLC

Respondent

(Pub-owning Business)

Award

Summary of Award

The purported RAP provided by the Respondent to the Claimant is not compliant with the requirements of the Pubs Code. The Respondent is to provide to the Claimant a RAP which is compliant with the provisions of the Pubs Code, within 21 days of the date of this award.

The Respondent is to undertake a detailed review of its approach to the preparation and service of RAPs and the procedure to be adopted in relation to regulations 20, 21 and Schedule 2 to ensure compliance with the Pubs Code in relation to its future dealings.

Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.
2. 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”).
3. The Claimant is Mr Edward Anderson and is the tied pub tenant (TPT) of The Swan, 35 – 37 High Street, Cheltenham, Gloucestershire GL50 1DX. The Respondent is Marston’s Plc.
4. On 27 October 2017 the Respondent sent to the Claimant a purported Rent Assessment Proposal (RAP) for the purposes of regulation 20 of the Pubs Code in respect of The Swan.
5. The Claimant considered that the RAP did not comply with the requirements of the Pubs Code and made a referral to the PCA for arbitration under s.48(1) of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act) on 24 November 2017. The referral also concerned a dispute referred under regulation 32(2) of the Pubs Code as to compliance with the Pubs Code statutory framework of a proposed Market Rent Only (MRO) tenancy served on the Claimant by the Respondent in relation to The Swan.
6. Case management directions were issued on 25 January 2018 and each party put forward its written case and documentary evidence. They were then unable to agree a list of issues in dispute for the arbitrator’s determination.
7. The Claimant is also the TPT of The Railway, New Street, Cheltenham, Gloucester GL50 3QL. He has made other referrals to the PCA for arbitration in relation to The Railway Inn. These related to disputes regarding a purported RAP served in relation to The Railway Inn and also a MRO dispute with regard to that pub. The issues in each referral relating to the purported RAPs were

substantially the same and it seemed sensible and proportionate that overlapping issues in relation to The Railway Inn and The Swan be dealt with together. Therefore, with the consent of the parties, following a telephone case management conference on 14 September 2018 before the Deputy PCA Ms Fiona Dickie, it was ordered that the two RAP disputes be heard together at an oral hearing before me and the two MRO disputes be heard together before the Deputy PCA. An oral hearing took place on 12 November 2018 to determine the RAP disputes in relation to The Railway Inn and The Swan. I shall issue a separate award in respect of the RAP issues in relation to The Railway Inn. The two MRO disputes were heard together on 10 December 2018 by the Deputy PCA as arbitrator and are the subject of separate awards which have since been issued to the parties.

8. This award determines the dispute in regarding the RAP served in relation to The Swan only.
9. The Claimant is unrepresented and appeared before me in person at the hearing. The Respondent is represented by Flint Bishop LLP. It was represented at the hearing by [REDACTED] of Counsel.

Procedure

10. 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. Where a conflict arises between the Pubs Code statutory framework and these rules or the 1996 Act, the Pubs Code statutory framework (being the Act, the Pubs Code or the Fees Regulations) prevails.

Applicable Law

11. 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:

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.

12. A rent assessment is an assessment of the rent to be paid in accordance with the terms of an existing tenancy. In accordance with regulation 19 of the Pubs Code TPT a POB must conduct a rent assessment in certain circumstances. Regulation 20(1) states that where a POB is required to conduct a rent assessment, it “*must send the tied pub tenant a document [...] containing -*

(a) a proposal for the rent or money payable in lieu of rent which is to be paid under the tenancy or licence at the end of the assessment (the “new rent”);

(b) the information specified in Schedule 2 [to the Pubs Code], if it is reasonably available to the pub-owning business;

(c) such other information as may be required to ensure that the tenant is able to negotiate, in an informed manner, the new rent.”

13. Schedule 2 to the Pubs Code lists the following:

1. *A summary of the methods which must be used under the tenancy or licence to calculate the initial or revised rent or the new rent including—*

(a) the information which will be used to support those calculations;

(b) the justification for the use of such information.

2. *An outline of the procedure to be followed during negotiations of the initial or revised rent or the new rent between the pub-owning business and the tied pub tenant.*
3. *A list of the matters which will be considered to be relevant and irrelevant in such negotiations.*
4. *Information in respect of the cost of service charges relating to the tied pub during the last 3 years.*
5. *A forecast profit and loss statement for the tied pub for the period of 12 months beginning with the day on which the initial or revised rent or the new rent is payable (“the forecast period”) and the figures and other information which have been relied on to formulate that statement, including—*
 - (a) the volume of alcohol, including the number of barrels of alcohol, purchased during the last 3 years from the pub-owning business or its agents;*
 - (b) the percentage of the tied pub’s turnover during the last 3 years which the sale of this volume of alcohol represents;*
 - (c) if different from the figure in (a), the volume of alcohol in respect of which duty was paid during the last 3 years;*
 - (d) a figure for the total estimated sales and gross profit margins of the tied pub for the forecast period, with a breakdown showing separate figures for the estimated sales, gross profit margins, for—*
 - (i) draught ales;*
 - (ii) draught lagers;*
 - (iii) packaged beers;*
 - (iv) draught ciders;*
 - (v) packaged ciders;*
 - (vi) wines;*
 - (vii) spirits;*
 - (viii) flavoured alcoholic beverages; and*
 - (ix) soft drinks;*

(e) the percentage of the pub's turnover for the forecast period which each drink in sub-paragraph (d)(i) to (ix) represents;

(f) an estimate figure for the volume of draught beer and cider which will not be sold during the forecast period (including draught beer and cider wasted, unfit for sale or dispensed in promotions) where that figure has not been accounted for in the gross profit margin;

(g) the estimated operating costs likely to affect the tied pub tenant's profit during the forecast period including, where relevant, the estimated cost of a manager during that year, where the tied pub tenant is not the manager of the tied pub;

(h) an explanation of how estimated income during the forecast period from any gaming machine, in the tied pub has been accounted for in the statement;

(i) a breakdown of any costs during the forecast period which have not been accounted for separately but have been included in the estimated figures for other costs (for example, the cost of cellar gas).

6. *The figures which are provided under paragraph 5 must be provided net of value added tax or machine games duty (within the meaning of Schedule 24 to the Finance Act 2012).*

7. *The profit and loss statement provided under paragraph 5 must refer to relevant and current data available publicly in connection with the typical costs of operating a tied pub in the United Kingdom and explain any variance between the costs referred to and the pub-owning business's costs estimate.*

8. *The statement, figures and other information which the pub-owning business provides to the tied pub tenant under paragraphs 5 to 7 must —*

(a) be sufficiently clear and detailed; and

(b) include justification or supporting evidence for any assumptions,

to allow the tenant to understand the basis on which the estimated figures in the statement have been calculated.

9. *Any information which the pub-owning business provides under paragraph 5, must be—*

(a) accurate, wherever it refers to historical data; and

(b) reasonable, wherever it refers to projected data.

10. *In paragraph 5(c) “duty” means any duty of excise charged on beer by section 36(1) or section 37(1) of the Alcoholic Liquor Duties Act 1979.*

11. *Any information in Schedule 1 which—*

(a) the tied pub tenant has not already received; or

(b) has changed materially since it was provided to the tenant.

12. *A timetable specifying the dates on which any other information will be made available to the tied pub tenant before negotiations begin.”*

14. Regulation 21(3) states that:

“During the rent assessment or assessment or money payable in lieu of rent, the pub-owning business must -

(a) comply with any reasonable request for further information which is relevant for the negotiation of the new rent and which is made by the tied pub tenant or by a person acting for the tied pub tenant; or

(b) provide to the tied pub tenant, as soon as reasonably practicable, a reasonable explanation why the information requested is not provided.”

Issues

15. It is not disputed between the parties that the Respondent was required to send the Claimant a RAP in respect of The Swan.

16. The Claimant argues that the RAP sent by the Respondent does not meet the requirements of the Pubs Code in several respects. He asserts that the documents provided are generally confusing, that they contain very little information, no justification and no context. He also argues that a large amount of the information specified in Schedule 2 was not provided. This includes:

- a. No summary of the methods used to calculate the rent including the information used to support the calculations and the justification for the use of such information (required under paragraph 1 of Schedule 2).

- b. No outline of the procedure to be followed during negotiations (required under paragraph 2 of Schedule 2).
- c. No list of matters which will be considered to be relevant and irrelevant in such negotiations (required under paragraph 3 of Schedule 2).
- d. No information labelled “forecast profit and loss statement” (required under paragraph 5 of Schedule 2).
- e. No figures showing the volume of alcohol, including the number of barrels of alcohol, purchased during the last 3 years from the pub-owning business (required under paragraph 5(a) of Schedule 2).
- f. No figures showing the percentage of the tied pub’s turnover during the last 3 years that the sale of this volume of alcohol represents (required under paragraph 5(b) of Schedule 2).
- g. No figures with regard to the volume of alcohol in respect of which duty was paid during the last 3 years (required under paragraph 5(c) of Schedule 2).
- h. The estimated operating costs likely to affect the tied pub tenant’s profit (as required under paragraph 5(g) of Schedule 2) assumed the Claimant is a live-in tenant and therefore does not need a manager but he in fact operates multiple pubs and therefore will incur the cost of a manager.
- i. No adequate explanation of the variance between the costs referred to and the cost estimated (as required under paragraph 7 of Schedule 2).
- j. No justification or supporting evidence given for any assumptions (as required under paragraph 8 of Schedule 2).

17. In relation to regulation 20(1)(c) the Claimant asserts that the Respondent failed to provide other information as may be required to negotiate to ensure that the tenant is able to negotiate the proposed rent in an informed manner. In particular he alleges the Respondent failed to provide previous profit and loss forecasts when he requested them to aid his understanding.

18. The Claimant argues that the Pubs Code clearly sets out what is required in a RAP and that the obligation is on the POB to provide the information listed. He

also contends that the RAP did not enable him to properly negotiate from an informed position.

19. The Respondent asserts firstly that the RAP complied with the requirements of the Pubs Code in the information provided in the first instance. It was submitted by [REDACTED] that if I consider that is not the case and I find that information should have been provided with the RAPs which was not, that this has subsequently been remedied by information provided in response to requests under regulation 21(3).

20. [REDACTED] made further submissions on the effect of a failure to comply with statutory requirements and asserted that if I do find that the requirements of regulation 20 were not met, I am not obliged to find the RAP served invalid and to order that the Respondent serve an entirely new RAP in order to remedy this, and should instead order that the Respondent provide any outstanding information to the Claimant under regulation 21(3). This submission is founded in statutory interpretation of the relevant provisions and also in proportionality. The Respondent contends that if any non-compliance always resulted in an entirely new RAP this could lead to a circle of arbitration referrals and is disproportionate if it is the case that any defects can be remedied simply by providing further information.

Witness Evidence

21. Prior to the hearing witness statements were submitted by the Claimant and by [REDACTED], the Respondent's [REDACTED]. Both the Claimant and [REDACTED] gave oral evidence and each party had the opportunity to cross-examine the others' witness. I also put questions to the witnesses.

Discussion – RAP Requirements

22. I consider that the overarching principle from which flows consideration of all the legal issues in this case is the principle of fair and lawful dealing by pub-

owning businesses in relation to their tied pub tenants. All of the issues in the case should be considered in the light of the overriding principles found in section 42 of the 2015 Act because they are the starting point to understanding the Pubs Code and the statute which enabled it. Parliament's instruction to the Secretary of State in making the Pubs Code is that she/he must seek to ensure that it is consistent with those principles. The core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act. 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. The Code principles are therefore an aid to interpretation of the Pubs Code where required.

23. The requirement that dealings by a POB towards a TPT 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. The requirement for fair and lawful dealing is supported by the POB acting in a transparent manner in providing the information required by the Pubs Code, acting reasonably in relation to the stated limitations, i.e. the provision of information set out in Schedule 2 that is reasonably available and such other information as may be required to enable the tenant to negotiate in an informed manner.
24. [REDACTED] submitted that the purpose of a RAP is to support fair and lawful dealings between a POB and a TPT and is designed to ensure that the tenant is able to negotiate a rent review in an informed manner. He argued that the requirement to provide information should be interpreted in light of the purpose of the provision; that the TPT should be put in a position to be able to negotiate a new rent. [REDACTED] submitted that regulation 20(1)(c) is not an entirely separate test or obligation to the requirement to provide information under regulation 20(1)(b). He argued that the reason for having a requirement in the Pubs Code to provide the documents at regulation 20(1)(b) can be seen set out at 20(1)(c), i.e. that the TPT be put in a position to be able to negotiate. He submitted that putting the TPT in a position to be able to negotiate is the fulfilment of the fair and lawful dealing principle.

25. The Respondent therefore contended that regulation 20(1) should be read as a whole, as a provision the purpose of which is to ensure that the aim of enabling a TPT to negotiate is achieved, with 20(1)(b) and 20(1)(c) to be read sequentially rather than separately. It was argued that the holistic test of whether a POB has complied with regulation 20(1) is whether the TPT is put in a position to negotiate in an informed manner. In aid of this argument the Respondent notes that (at least where a RAP is requested under regulation 19(1)(b)), the POB must provide that RAP within a relatively short period of time (21 days) and it argues that the Pubs Code envisages that any failure to provide information in the initial RAP can be remedied by a request for further information (under regulation 21(3)).
26. The Claimant's position in relation to this issue was that regulation 20(1) and Schedule 2 of the Pubs Code set out clearly what documents and information a POB must send to a TPT as part of a RAP, and he contends that this was not sent to him.
27. I agree with [REDACTED] to the extent that I consider that regulation 20(1) can be interpreted sequentially such as to reasonably conclude that the purpose of a RAP as a whole is to enable the tenant to negotiate in an informed manner. However, the test as to whether regulation 20(1) has been complied with is not whether or not the TPT has been put in a position to negotiate. The regulations explicitly set out how that outcome is to be achieved, and that is fundamentally through provision of the information specified in regulation 20(1) and Schedule 2. The duty on the POB is to provide that Schedule 2 information, if it is reasonably available. In other words, if the information is missing, it is for the POB to show that the information was not reasonably available, where challenged. This duty is separate to, and in addition to, the requirement in regulation 20(1)(c) for such *other* information as may be required to ensure the TPT is able to negotiate, in an informed manner, the new rent. The use of the word 'other' indicates that this is in addition to that already specified in Schedule 2.

28. During the hearing there was discussion from [REDACTED] about whether or not the Claimant as matter of fact was in a position to be able to sensibly enter into a negotiation with the Respondent. This included the Claimant's understanding of the information provided to him, the fact that he is an educated man and an experienced business owner who has been involved in negotiations previously. Proving compliance with regulation 20(1) is not a case of proving that a particular tenant in that particular tenant's circumstances is or is not as a matter of fact able to enter into a negotiation and the test is not whether the POB is satisfied that that TPT is able to negotiate based on the information it has provided to them.

29. Regulation 20(1) is clear as to the obligations on a POB. Under 20(1)(b) the POB must send to the TPT a RAP containing the information specified in Schedule 2 of the Pubs Code, if it is reasonably available to the POB. If there is prescribed information under Schedule 2 which is not reasonably available then I consider it would be prudent for a POB to explain why that is the case as the burden will fall on the POB to show why the information is not so reasonably available if a challenge is brought. The information specified in Schedule 2 (where reasonably available) is required notwithstanding the requirement in regulation 20(1)(c) which recognises that there may be *other* information on a case by case basis, further to the information specified in Schedule 2, which is required in addition to enable the TPT to negotiate in an informed manner.

RICS Guidance

30. Regulation 20(3) provides that the RAP must be prepared in accordance with RICS guidance and must be accompanied by written confirmation from a member or fellow of the RICS that the RAP has been so prepared. The relevant guidance is RICS GN 67/2010 1st edition, guidance note "The capital and rental valuation of public houses, bars, restaurants and nightclubs in England and Wales".

31. This guidance note requires the valuer to consider the type of pub, appropriate mode of operator/operation, physical and trading characteristics including analysis of actual trade and the effect of any tie, scope for development, an

assessment of trading potential, market demand and relevant comparable evidence (of both rental and trading information). The valuation methodology known as “the profits method of valuation” requires a market based assessment adopting the concept of a “Reasonably Efficient Operator” (REO) who will achieve a particular level of “Fair Maintainable Turnover” (FMT) and “Fair Maintainable Operating Profit” (FMOP) in the pub being assessed (which may be different from the actual trade being achieved). Assessment of rental value is based upon a division of the available profit split between a return for the tenant and rent for the landlord, the latter typically within the range of 35% to 65% of the profit assessed for these purposes – known as the Divisible Balance (DB). Comparable evidence where available is relevant to the assessment of FMT, FMOP and the split of the DB. In relation to a tied pub the valuer should consider the effect on profit and market demand of supply terms and support services provided by pubco landlords. The guidance note recognises the difficulties in making comparisons between the tied and non-tied sectors, but considers there is nothing in the guidance that should set one at any advantage or disadvantage to the other, and that the efficiency of the market relies upon transparent market evidence. The Schedule 2 information which is required is supported by the approach to valuation undertaken in accordance with RICS guidance.

Individual allegations

32. I will now consider the Claimant’s specific allegations about the RAPs. With one exception all these allegations relate to the information requirements under regulation 20(1)(b) and Schedule 2. In relation to the Claimant’s allegations concerning Schedule 2 information the Claimant also refers to the requirements of regulation 20(1)(c).

No summary of the methods used to calculate the rent including the information used to support the calculations and the justification for the use of such information (required under paragraph 1 of Schedule 2).

33. The Claimant alleges that the RAP does not contain a summary of the methods used to calculate the rent, including no summary of the information used in the calculations and no justifications of any information.

34. The Respondent argued in its Statement of Defence that the RAP provided the information used to calculate the rental figure and that comments were provided throughout in terms of justification and assumptions made. In [REDACTED] witness evidence [REDACTED] states that Paragraph 1 of Schedule 2 requires a summary of the methods which must be used under the tenancy or licence to calculate the initial or revised rent or the new rent and that this requirement refers to methods expressly prescribed by the rent review provisions under the lease. [REDACTED] further states that the Respondent understands that “methods” refers to a method of calculation of valuation based on certain parameters or details and there are no such prescribed methods in the lease. Therefore there are no methods which must be used and so paragraph 1 of Schedule 2 does not apply.
35. [REDACTED] submitted that the lease defines the revised rent as the best open market rent, but that there is no prescribed formula to calculate that rent, which is a matter of valuation expertise; on the facts of this case there is no method which must be used. He further referred to the “ultimate method” that should be used which is briefly described as finding the fair maintainable turnover and the net profit and using that to ascertain the rent, which he submits is all the RAP can do and is “enough” for the Claimant to be informed about the approach being adopted in relation to negotiations.
36. It is clear that regulation 20 requires a POB to send the tenant a RAP document that includes the Schedule 2 information if it is reasonably available and such other information as may be required to ensure that the tenant is able to undertake informed negotiations and this must be done in accordance with RICS guidance. Paragraph 1 of Schedule 2 requires the RAP to include “A summary of the methods which must be used under the tenancy” to calculate the new rent, including the information that supports those calculations and the justification for using that information.
37. The Claimant acknowledged that the purported RAP contains “figures” but contends there is no summary of the method and no explanation of most of the

figures. The Respondent's defence is that the RAP as served includes the information used to calculate the rent with supporting comment. As to the method the Respondent relies upon a narrow interpretation of the Schedule 2 wording as being what is recited in the lease regarding open market rent as the basis of review, although even this limited approach is not clearly expressed in the RAP to aid the tenant's understanding. The body of the RAP includes the statement "The above valuation has been constructed with reference to the Royal Institution of Chartered Surveyors guidelines on the rental valuation of licensed premises", and the valuation notes include terminology arising from that guidance. The Respondent's Counsel does in fact recognise that there are further references to method in the contents of the RAP that go beyond the lease contents. I find this representation contradicts the previously narrower interpretation of Paragraph 1 of Schedule 2 based on the rent review provisions in the lease which the Respondent put forward, with which I do not agree. Even if I am wrong in this respect it is evident that the Respondent accepts there is a method for assessing the rent upon which it relies. Therefore having regard to its own approach the Respondent has not provided a summary of this method in accordance with the Schedule 2 requirement.

38. I further find in relation to the requirement to provide a summary of the method, that the Respondent has therefore not provided as part of such a summary the information (or at least categories of information) relevant to the method that underlies the rent calculation e.g. trading information and comparable evidence and why it was used. I therefore find that I agree with the Claimant that the Respondent has failed to comply with this specific Code requirement.

No outline of the procedure to be followed during negotiations (required under paragraph 2 of Schedule 2).

39. I find that the RAP does not contain anything that can be described as complying with the requirement under Paragraph 2 of Schedule 2 to provide an outline of the procedure to be followed during negotiations between the POB and the TPT.

40. In the RAP covering letter the Claimant is advised to consult the reports and information provided on a separate memory stick, which in turn refers the Claimant to the Respondent's MyMarstons website. The Claimant objects to the provision of the required information in this way. Whilst there may be other options, I consider there is nothing fundamentally objectionable in this method of presentation providing the information is reasonably accessible and written in a way that is easily understood by a tenant.
41. The presentation should be clear as to how the provision of this information aligns with the Code requirements. In this case the Claimant is further referred to a document titled "Rent Review Protocol" (RRP), although it is not at all clear that the Respondent intends that this is the document that is considered to satisfy this Code requirement. In the spirit of fair and lawful dealing, these documents should be easily accessible and understood by tenants.
42. An examination of the RAP reveals that it provides a description of events up to the provision of the RAP and new rent figure, as well as what happens if the rent is agreed or not agreed and the information that will be provided in the RAP, but does not in fact provide any information regarding the "procedure to be followed during negotiations" and what is expected of the TPT and the POB during this phase of the process. Whilst this may be something that is entirely familiar to Chartered Surveyors and others regularly engaged in such matters, this is nonetheless a technical issue, which at least some tenants may not understand or about which they do not feel well briefed or confident. A rent negotiation procedure is something that the POB should provide in a manner which is Code compliant.
43. On the basis of the evidence before me in this case I find that I agree with the Claimant that the Respondent has not complied with this requirement.

No list of matters which will be considered to be relevant and irrelevant in such negotiations (required under paragraph 3 of Schedule 2).

44. The Claimant argues that no list of matters which will be considered to be relevant and irrelevant in negotiations is included in the RAP.
45. In [redacted] witness evidence [redacted] stated that comments within the RAP contain details of “relevant and irrelevant aspects” and refers as an example amongst other points to the comment “the trading potential of a reasonably efficient operator is relevant, whereas personal goodwill is irrelevant”. [redacted] [redacted] further considered in [redacted] witness statement that the requirements do not prescribe the make up or format of the list of matters considered to be relevant and irrelevant. [redacted] submitted that the Respondent has set out in the RAP what is relevant and irrelevant, and it cannot do more than that. He further submitted that if the Respondent was wrong on what was relevant/irrelevant then that is a matter for negotiation or ultimately submission in rent review, rather than being a matter for the RAP.
46. I find that this Code requirement is very clear. A list of matters that are relevant and irrelevant should be provided as part of the RAP. The regulations specify the word “list”. On a plain reading of the requirement, which I consider to be for a number of items set out in an ordered and connected way, for example one after the other, there exists no list for this purpose in the RAP as served by the Respondent.
47. The Respondent asserts that the RAP contains details of relevant/irrelevant aspects, but such comments as part of the notes do not constitute a “list”. In any event there is no indication that the Respondent has set out all the matters it considers relevant/irrelevant, which the provision of an appropriate list would do. The Respondent’s observation that there is no prescribed form of list does not absolve it from the requirement to provide a list in a form it considers reasonable and compliant with Code requirements.
48. Recognising that there are issues of proportionality, I consider that the Respondent is not required to go beyond a reasonable approach to the list on a case by case basis to identify such matters. Therefore if the Respondent considers that there are no further relevant/irrelevant matters beyond those it

has reasonably listed then a simple statement to this effect would provide appropriate clarity in relation to compliance with this requirement. In this case however with regard to Counsel's submissions I find that I disagree that the Respondent cannot do more than it has done, and further as the provision of such a list is a clear requirement of the Code I am not persuaded that anything beyond what is provided in this case is a matter for negotiation or submission in a tied rent dispute. I find that the Respondent's approach to this requirement is not compliant with the Code.

No "forecast profit and loss statement" (as required under paragraph 5 of Schedule 2).

49. In relation to the information required by paragraph 5 of Schedule 2, the Claimant refers to the specific information requirements under sub-paragraphs (a), (b), (c) and (g) and also to the paragraph 5 obligation to provide a "profit and loss statement for the tied pub for the period of 12 months beginning with the day on which the initial or revised rent or the new rent is payable and the figures and other information which have been relied on to formulate that statement".

50. The Claimant asserts in the Statement of Claim that "There is no information labelled "forecast profit and loss statement". There are figures but no reference to the period they cover and no explanation of terms. There is no reference to the start or finish of the forecast period or any reference to forecast period at all." He contends that there is no proper labelling or explanation of figures, and that they are confusing. The Respondent disputes this. In [REDACTED] witness evidence [REDACTED] considers that there is a full profit and loss forecast in the RAP, with every relevant figure and detail set out.

51. Firstly I note that the RAP is the entire content of the information provided, including covering letter. I am of the view that there is a lack of clear headings and the use of different and varying terminology does lack clarity and is unhelpful to a TPT seeking to interpret the document.

52. I agree that within the RAP document there is nothing that is labelled as a “Forecast Profit and Loss Statement” for a defined 12 month period, albeit this is what the “Rent Assessment Statement” appears to be. There is reference to a “valuation date” but this does not appear to be a date referenced by the Code, which requires the forecast to be for a 12 month period beginning with the day on which the new rent is payable, defined as the forecast period. There is no clear or comprehensive explanation of the terminology used, such as a glossary would provide, which would also provide appropriate cross reference to RICS guidance. I do not agree with the Respondent that the “Rent Assessment Statement” as presented is clear and unambiguous.

53. On the basis set out above, I find that the Respondent has not complied with the Pubs Code requirements under Paragraph 5 of Schedule 2. Consistency with the principle of fair and lawful dealing between a POB and a TPT in my view requires that obligations be complied with in a transparent and accessible manner, that enables a TPT to access their rights under the Code. The Pubs Code places specific obligations on a POB in respect of the information to be provided. It is therefore incumbent on a POB to ensure that it complies, taking any necessary steps in relation to its policies and documents to do so. The provision of a RAP which is clearly labelled, formatted and incorporating terminology that reflects the requirements and language of the Pubs Code would be consistent with this principle.

No figures showing the volume of alcohol, including the number of barrels of alcohol, purchased during the last 3 years from the pub-owning business (required under paragraph 5(a) of Schedule 2).

54. The Claimant acknowledges that this information has been provided for a 5 year period and I understand that this ground is therefore not pursued.

55. There are some observations which I make about the presentation of the information, which I hope will be of assistance to the Respondent in preparing RAP documents in the future. As set out above in this award, I consider it to be a Code compliant approach and consistent with the core principles of the Pubs Code that a RAP is prepared with transparency and TPT accessibility in mind.

On that basis I consider that the information required by Paragraph 5(a) of Schedule 2 should be more clearly set out and in particular I make the following comments.

- a. The information which is headed "Sales history and gaming income" should be more clearly labelled to reflect Code terminology at paragraph 5(a) of Schedule 2, whether for the minimum 3 year period or longer.
- b. The column headings should be more clearly labelled so that it is clear which annual periods are referred to and how these relate to the Code requirement that the forecast profit and loss statement is for the period of 12 months beginning with the day on which the new rent is payable.
- c. The second page of the volume figures has a heading "Gaming Machine Income" with no other information provided. The valuation notes set out earlier in the "Rent Assessment Statement" say "Gaming machine income is not reflected in this valuation. We have made no regard to any income or profit that a tenant can earn from gaming machines". There is no explanation of this assumption, however given that is the basis of valuation in this respect, it would be clearer if the reference to gaming machine income in the volume figures made clear that this is not applicable, where this is the case.

No figures showing the percentage of the tied pub's turnover during the last 3 years that the sale of this volume of alcohol represents (required under paragraph 5(b) of Schedule 2).

56. The Respondent argues that it has not had sight of the Claimant's accounts and does not know the actual turnover. The Respondent claims as a result that it is not able nor is it reasonable to provide such information. The Respondent says the rent assessment is based on the reasonably efficient operator.

57. The Claimant argues that the Respondent knows what products he has bought and what prices he has sold them for, information he provided to the Respondent.
58. In [REDACTED] witness evidence, [REDACTED] stated that “it is only possible to work out this as a percentage of the overall turnover with full access to the accounts and records of the business. Marstons therefore has only part of the information necessary to provide any percentage on this basis”. The Respondent contends that this is information that is not reasonably available to it.
59. It is clear to me that the forecast profit and loss account required by Paragraph 5 of Schedule 2 must incorporate the figures and other information relied upon including in 5(a) the actual volume of alcohol and 5(b) the percentage of turnover derived from this actual volume if this information is reasonably available. In the case of a tied pub the volume information will ordinarily be reasonably available to a POB, although there maybe exceptions e.g. where there is a partial tie. In relation to the percentage of turnover a logical reading of the requirements is that the actual volume would be expressed as a proportion of the actual turnover. This is information that may not be reasonably available to a POB if it does not have knowledge of the actual turnover for instance by sight of the business accounts. If on the other hand a POB does have actual turnover information then the required percentage figures could be provided.
60. In this case there is no evidence that the Respondent has actual turnover figures nor that the Claimant is obliged to provide them. The Respondent refers to the adopted REO/FMT approach to calculating the new rent and I find I agree with the Respondent that it cannot provide the required percentage figures if it does not know the actual turnover, this being information that is not reasonably available in such circumstances.
61. However on the basis of the evidence before me in this case, I do find that I agree with the Claimant that since the Respondent knows the actual volume and the Claimant’s pricing, that the Respondent should be able to calculate the

actual turnover attributable to this volume. This is information that I consider should have been reasonably available to the Respondent and likely to assist in the understanding of the RAP, for example by illustrating the difference between the REO assumptions and the performance of the actual tenant.

No figures with regard to the volume of alcohol in respect of which duty was paid during the last 3 years (required under paragraph 5(c) of Schedule 2).

62. I note [REDACTED] evidence on this point, wherein [REDACTED] states that “Marstons has no reason to believe that the volume of alcohol in respect of which duty was paid during the last three years differs from the volume of alcohol purchased by the Claimant in that same period” and “The volume of alcohol on which duty was paid is identical to the volume of alcohol purchased by the Claimant. For example, where the Claimant has purchased a brewer’s barrel of 36 gallons, the required duty is paid on the sale of the same volume”. [REDACTED] submits that even if this is wrong the Respondent has produced an estimate of 2.5% wastage across all draught products and altered their proposals accordingly, and also that this is made clear in the valuation notes in each RAP.
63. [REDACTED] submits that the Claimant’s complaint is focused on the sediment issue, but says that the Respondent deals with this in the wastage calculations in the RAP. He further submits this to be a perfectly proper way to deal with things, and that in any event the Claimant has sufficient information to negotiate in an informed manner.
64. In [REDACTED] evidence, [REDACTED] states that the Code does not require details of the specific amount of duty actually paid to be provided, and re-iterates that in any event this is not reasonably available because Marstons pays a global duty figure across its estate. Further [REDACTED] states that “the distinction made by the Claimant between sediment and waste is of no relevance at all to the rental assessment and cannot reasonably be required for these purposes.” [REDACTED] also submits that in September 2017 the Respondent provided further information showing specific analysis relating to sediment. He further asserts that in relation to determining the best open market rent it is the position

of the “hypothetical purchaser” that is to be considered, which does not revolve around the detailed knowledge of the specific parties to the rent review, but rather what would be known in the general market as to matters including wastage and sediment.

65. In his witness evidence the Claimant states in relation to the profit and loss projections provided to him, that “they all imply that the container is full when it is delivered to me, they mention a ‘waste allowance’ but do not mention sediment at all”. The Claimant claims not to have previously understood, or at least fully understood, the impact of sediment and to have previously requested sediment lists from the Respondent that were not provided.

66. The Claimant states that the Respondent had explained that sediment lists were available with printed price lists up to September 2014, and between this date and 2017 were available from the Respondent’s Business Development Managers (BDM), which the Claimant claims was not supported by his follow up with the BDM concerned. The Claimant notes that a reformatted list was subsequently available on the Respondent’s website. The Claimant alleges that the Respondent has been operating in contravention of HMRC guidelines on beer duty concessions, and that the Respondent has now begun labelling its own products in respect of sediment content.

67. The Claimant refers to tests carried out by stocktakers to show the amount of sediment in cask beer and claims that the amounts concerned are not properly reflected in the Respondent’s “wastage allowance”. The Claimant considers that the Respondent has failed to comply with the requirement to show any difference between the volume supplied and the duty paid volume and claims to have been misled resulting in inflated rent. The Claimant distinguishes between sediment and wastage which is taxed beer that is not sold for other reasons and says that this is recognised by the separate provisions at paragraphs 5(c) and 5(f).

68. The Claimant also refers to calculations which are claimed to demonstrate that there could be theoretical circumstances where the Respondent’s 2.5%

allowance would be entirely sediment with no other wastage allowance. On this basis the Claimant challenges the Respondent's 2.5% allowance and asserts that the combined allowance for sediment and wastage should be considerably higher. The Claimant also claims that an illustration provided by the Respondent to show how the wastage including sediment is spread over all draught products would only leave a very small amount for waste other than sediment. The Claimant says that the Respondent failed to provide the required information in the RAP, and for a period subsequently to enable negotiations.

69. The Respondent must provide this duty paid volume if it is a) different from the volume purchased and b) it is reasonably available. I find that the Respondent must therefore provide this information whether or not it considers that an appropriate allowance has been made in the rent calculation, and/or that it does not consider the information has a material impact on the calculation and/or it considers that the Claimant has enough information to negotiate without this information.

70. Further the Respondent appears to have misunderstood the requirement. It is not the amount of duty paid that is to be provided but the volume on which duty is paid. On the basis of the evidence before me, the Respondent was aware of the sediment issue previously and yet failed to provide the paragraph 5(c) information in the RAP. I also note that by its own actions the Respondent has admitted that it had a sediment list at least as early as March 2017 (although it is not denied that there were earlier lists) and this was not disclosed until later in the proceedings in September 2017.

71. On the evidence before me I find that the duty paid volume is different to the purchased volume. Further I find that this information was reasonably available to the Respondent, and the explanation that a duty paid figure cannot be provided on an individual house basis demonstrates that the Respondent has not properly applied its mind to this issue. Whether intentionally or not initially, I find that I agree with the Claimant that the Respondent acted in breach of this specific Code requirement.

72. In considering the Claimant's submissions more broadly I find on this issue that the Respondent has failed to properly apply its mind to the wider provisions of Schedule 2. The "Rent Assessment Statement" in the valuation notes states "There is a wastage allowance of 2.5% for all draught barrels. The calculations above assume 280.8 pints are sold per barrel". The first point I note is that the Respondent adopts a standardised approach, from which it is evident that the Respondent is not considering this issue on case by case basis. This standard approach fails to make clear the allowances made for sediment and for other types of waste, which I conclude will be reasonably expected to vary from one property to another depending upon a variety of factors.
73. I agree with the Claimant that the distinction between sediment and other types of waste is highlighted by the separate provisions in paragraphs 5(c) and (f). Further the Claimant illustrates how the standard 2.5% allowance could be both inappropriate and inadequate. I find I am persuaded by the Claimant that the approach adopted towards these allowances will affect both the REO turnover and gross profit assumptions upon which the rent is calculated, and variations in these allowances will be site specific.
74. I am not persuaded by the Respondent that its approach to wastage does not have any material impact on the rent calculation, nor that the Claimant is not disadvantaged by this approach, since without accurate information for this particular pub neither the Claimant or the Respondent can know that this is the case. On this basis I find that the Respondent's information and figures on this issue are not sufficiently clear and detailed and are not appropriately justified as required by Paragraph 8 of Schedule 2. I find that the Respondent has acted in breach of this requirement and further that this approach is not consistent with the wider Code requirement for fair and lawful dealing.
75. While not forming any part of the basis of my decision in this award, I highlight in order to assist the parties, statutory Guidance under section 61(3) of the 2015 Act on beer waste and duty which was published by the PCA on 10 April 2019, and which came into effect on 1 July 2019. This Guidance shall be binding on the PCA in undertaking statutory functions from that date and the Respondent

can therefore use this Guidance to consider its approach to compliance going forward.

The estimated operating costs likely to affect the tied pub tenant's profit (as required under paragraph 5(g) of Schedule 2) assumed the Claimant is a live-in tenant and therefore does not need a manager but he in fact operates multiple pubs and therefore will incur the cost of a manager.

76. The Claimant submits that there is no estimated cost of a manager included in the forecast profit and loss calculations. He acknowledged that this is mentioned in the valuation notes but asserts that this assumes the basis of a live-in operator, while he is a multiple operator with 3 pubs.

77. The Respondent argues that the valuation assumes a live-in operator but comment is made in the document about the impact on net profit if a manager is employed. [REDACTED] evidence was that the document makes clear the assumption about the mode of operation relevant to the assessment of wage costs, and also makes it clear that this could be affected if a manager is employed. In addition, the Respondent does not have access to the Claimant's business records and so the actual cost of a manager is not information that is reasonably available. [REDACTED] noted that the requirement to provide the estimate cost of a manager is only "where relevant" and submits that in relation to setting the rent in this case it is not relevant.

78. It is evident that it is not in dispute in this case that the Claimant is actually a multiple operator and employs managers. The issue is the assumption made by the Respondent in the valuation method which, although unclear, implicitly appears to follow the RICS guidance. The valuation notes incorporate the wording "Wage expenditure does not include the cost of a manager's salary. The Rent Assessment Statement assumes the business is traded by a live-in tenant operator. In the event a manager is employed rather than direct operation by the tenant this will increase wage cost and reduce the profitability of the tenant". Whether or not the Respondent's assumption in this instance is justified is a matter of valuation. That is not the issue arising here in relation to the Code requirements. The issue seems to me to be that the Claimant does

not understand, and the Respondent has not made clear, the basis upon which this assumption is grounded. That is required under Paragraph 8 of Schedule 2.

79. The Respondent has stated what the assumption is but has not provided an adequate explanation as to why it is adopted in this instance. This exemplifies my earlier finding that the Respondent has not provided a summary of the method used to calculate the rent, with associated information/justification.

80. The Respondent considers that this is not a relevant requirement in this instance, but the fact the Respondent recognises that the Claimant is a multiple operator and flags the manager's salary issue in the valuation notes, suggests to me that it does in fact have some relevance, even if the Respondent believes that it has made a correct valuation assumption. I find that the Respondent has had some regard to this requirement but has not considered carefully enough the circumstances in this case and then responded accordingly to provide enough justification or supporting evidence for its assumptions in accordance with paragraph 8(b) of Schedule 1.

81. The Respondent suggests that because the Claimant's business accounts are not available, provision of the manager's salary is information that is not reasonably available. I do not agree with this given that the requirement in paragraph 5(g) is in fact to provide where relevant (which I find to be the case in this instance) "the estimated cost of a manager during that year, where the tied pub tenant is not the manager of the tied pub". The requirement is for the Respondent to provide an estimate rather than an actual cost, which I consider it should be able to do with the industry knowledge and resources at its disposal, and to do so where the tenant is not the manager, which applies in this instance. I find therefore that the Respondent has not complied with this requirement.

The profit and loss statement provided under paragraph 5 must refer to relevant and current data available publicly in connection with the typical costs of operating a tied pub in the United Kingdom and explain any variance between

the costs referred to and the pub-owning business's costs estimate (as required under paragraph 7 of Schedule 2).

82. There are two limbs to this requirement. First the profit and loss forecast must refer to relevant and current public data of typical UK pub operating costs. Second there must be an explanation of any variance between this reference data and the POB's costs estimate.

83. The Respondent's purported RAP provides estimates of various costs under the heading "Expenditure" and includes an additional column providing a comparison with benchmark figures that are referenced in the valuation notes, where there is the statement "Comparable Benchmark figures are based on those provided by the BBPA for a pub categorised as Town centre pub with turnover circa £10,000 per week (ex. VAT)". The Claimant acknowledges that comparable benchmark figures are provided but says that the Respondent's purported RAP does not provide any explanation of the variation between the benchmark and adopted costs.

84. The Respondent considers that there is an explanation provided in the RAP that references the REO approach to the valuation. The RAP provides "valuation comments" at page 5, however upon consideration of these I consider that the Claimant is unlikely to find this explanation particularly accessible or simple to understand. Even if I am wrong on this I find that the limited explanation provided by the Respondent does not satisfy the requirement to "explain any variance between the costs referred to and the pub-owning business's costs estimate". I find that the Respondent does not provide adequate or sufficient information that provides an explanation of the costs variance that I consider would be consistent with this requirement. I therefore find that the Respondent has complied with the first limb of this requirement but not the second limb.

85. I find I agree with the Claimant that the Respondent has not complied with this requirement and that the information that is provided by the Respondent is likely

to be confusing to the Claimant. I also consider that the failure to provide a summary of the method of valuation and related information for calculating the new rent results in a lack of context for the Claimant to understand the Respondent's costs approach.

The statement, figures and other information which the POB provides to the TPT under paragraphs 5 to 7 must include justification or supporting evidence given for any assumptions to allow the TPT to understand the basis on which the estimated figures have been calculated (as required under paragraph 8 of Schedule 2).

86. The Claimant asserts that there is no such information provided in the RAP.

87. I note [REDACTED] comments that the Claimant does not specify what is considered to be missing and that all relevant assumptions are set out in the RAP, in this case the reasonably efficient operator assumption with accompanying justification, and that there are no other assumptions made that require justification or supporting evidence. [REDACTED] submits that the ultimate requirement is that the Claimant is able to understand the basis on which the estimated figures have been calculated and that this is clear from the valuation comments and notes.

88. The forecast profit and loss statement, figures and other information provided by the POB under Paragraphs 5 to 7 of Schedule 2 must be sufficiently clear and detailed and include justification or supporting evidence for any assumptions, so that the TPT can understand the estimated figures and new rent calculation. I consider the meaning of paragraph 8 to be clear and unambiguous, and on the basis of a number of my findings up to this point, I agree with the Claimant that the Respondent has not complied with this requirement.

89. I do not agree with the Respondent that there are no assumptions in the rent calculation that need to be justified or supported by evidence in compliance with this requirement. In fact, I find that there are various such assumptions that are unjustified and unsupported. For example, there is little or no information

about how the assumed levels of non-drink turnover are derived or about the composition of the figure for “working capital and inventory”. Similarly, there is virtually no explanation for the rental bid adopted. This is not an exhaustive list. In relation to supporting evidence, which in the case of a rent calculation would normally include consideration of comparable property evidence regarding both trade assumptions and rental value, little or nothing is provided. I find that the Respondent has not provided the Claimant with an adequate explanation of the basis on which the rent calculation is made.

The Respondent did not provide copies of previous profit and loss forecasts when the Claimant requested them.

90. The Claimant argues that he was not provided with copies of previous profit and loss forecasts for the pub when he requested them. He contends that he has requested these to aid his understanding of the process in relation to the information used previously.

91. In [redacted] witness evidence [redacted] notes that the Claimant has the actual profit and loss figures for the last 5/6 years and considers that there is no benefit to having sight of forecasts going back more than 7 years. [redacted] submits that the Claimant requested this information after receiving the RAP, and submits that this is not “other information” under reg 20(1)(c) but “further information” covered by reg 21(3). The Respondent also contends that these documents are not relied upon by the Respondent in the way it calculates its rent proposal and therefore are not documents required to ensure that the tenant is able to negotiate the new rent.

92. The Claimant has requested this information under regulation 21(3), and the Respondent is obliged to comply if it is further information which is relevant for negotiation of the new rent, or alternatively provide a reasonable explanation why the information is not provided.

93. The Claimant considers that the information could be relevant whereas the Respondent says it is not relevant and is therefore not provided. The Respondent’s further explanation is that the previous forecasts are not relevant

because they will be superseded by actual figures. This explanation seems to me to misunderstand the valuation process. I consider that previous forecasts, if they have been undertaken in accordance with RICS guidance will be based on the REO/FMT approach, which may be different from the actual performance of the particular tenant, be that whether actual trade is above or below the REO level for whatever reason. In this way previous assumptions that have been made about REO performance and evidence of a consistent approach to the valuation method are likely to have relevance to the assessment of a new rent.

94. I find having regard to the evidence before me in this instance that I am persuaded by the Claimant that it is relevant to consider what previous assumptions the Respondent has made. On this basis I find that the Respondent has not properly considered the basis of the Claimant's request and has failed to provide a reasonable explanation for not providing the further information requested. I further find that in this case the Respondent should provide the requested information under regulation 21(3).

Remedy

95. It was argued by the Respondent at the hearing that the purported RAP is not invalidated by a failure to comply with regulation 20(1). These submissions primarily concerned statutory interpretation and proportionality.

96. As discussed above, the Pubs Code imposes a statutory requirement on a POB in relation to the preparation, content and service of a RAP. The Code however does not specify what the consequences of a failure to comply with those requirements should be. It falls for my consideration whether this failure totally invalidates the RAP, or whether it is the case that deficiencies in a RAP can be remedied at a later date. I was referred by Counsel for the Respondent to Chapter 7 of Bennion on Statutory Interpretation and to relevant case law, including in particular the case of *Natt v Osman* [2014] EWCA Civ 1520.

100. In analysing the relevant aspects of *Natt v Osman* I have considered the approach set out by the Court of Appeal as it applies here. It was expressed by the Court that "*the modern approach is to determine the consequence of*

non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole.”

101. I have considered the intention of the legislation in this respect in the event of an act done in breach of the provision. It is necessary to consider the language of the relevant provisions and the scope and objective of these statutory provisions as a whole.

102. I consider that the over-riding purpose of the legislation in this respect is that a tenant should be in a position to obtain agreement to a tied rent offer and, if the tenant so chooses, also a MRO proposal so that it can decide which of the two is the best choice for its particular circumstances, and that it should be able to do so having regard to the statutory timescales. This must be seen in the light of the two core Pubs Code 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. In this context, and looked at as a whole, regulations 20 and 21 of the Pubs Code intend that the tenant should be able to obtain the information it requires, including but not limited to the prescribed information set out in Schedule 2, in order to be able to properly understand, consider and negotiate the POB's tied rent offer.

103. In my view the consequence of a POB failing to provide all or some of the information required under regulation 20 and 21 would be that the TPT does not receive the information which the legislature intended would be the proper level of information to enable them to understand, consider and negotiate the tied rent in a way which is in accordance with the core Code principles of fair and lawful dealing and no worse off. It is clearly set out in the legislation that the information that the POB must provide as intended by the legislature to achieve that goal is the information which the POB is obliged to provide under regulations 20 and 21, and Schedule 2.

104. It is consistent with the core principle of fair and lawful dealing that the POB acting reasonably must provide the tenant with a RAP that includes the information which is specified to be required by the Pubs Code, and where this is not the case the RAP will be defective. Where the TPT considers that there may be *further* information relevant to negotiations then it can request such information under regulation 21(3). Where it is alleged that the POB has failed to comply with the RAP requirements then I consider that the principle of fair and lawful dealing, and potential for commercial imbalance between the parties, places the onus upon the POB to demonstrate compliance.

105. I note section 48 of the 1996 Act, which provides for the powers of the arbitrator as to remedy. This provides that the arbitrator may make a declaration as to any matter to be determined in the proceedings, may order the payment of a sum of money and has the same powers as the Court to order a party to do or refrain from doing anything, to order specific performance of a contract (other than a contract relating to land), to order the rectification, setting aside or cancellation of a deed or other document. This is subject to any alternative provision as agreed between the parties. Section 95(1) of the 1996 Act states that “The provisions of Part 1 apply to a statutory arbitration [...] as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement”. The Pubs Code statutory framework therefore applies as though it were that arbitration agreement. Where the Pubs Code statutory framework provides for a specific remedy for a specific breach then this is treated as being the remedy so agreed between the parties that the arbitrator is empowered to order upon a finding of such a breach. However, where there is no such remedy specified, the arbitrator exercises the powers set out in the 1996 Act in this respect.

106. The Pubs Code does not make specific provision for a particular remedy in the case of a breach of regulations relating to provision of a compliant RAP. Regulation 20 sets out the requirements that a POB must comply with in respect of provision of specified information for a RAP to be compliant under

the Pubs Code. I also note that the provision of regulation 21(3) which requires a POB to comply with reasonable requests for further information requested by a TPT. In light of these provisions I consider that it is proper for me to order that, due to breaches of the Code requirements on the evidence before me in this case, the Respondent provide the Claimant with a Code compliant RAP. This award sets out the ways in which the Respondent failed to comply with the provisions of the Pubs Code. The Respondent must now provide a RAP that is compliant. Where any element of the previously served purported RAP has not been deemed in this determination to be defective the Respondent should also consider whether the previously served information is still correct and relevant. Where it is, the Respondent should confirm that to the Claimant; and where it is not the Respondent should provide an updated version of that information. In totality that information as provided should then constitute a Code compliant RAP.

107. I understand that the Claimant and Respondent may now have reached an agreement as to the terms and rent of a MRO tenancy for The Swan. If the parties have entered into a MRO tenancy by the date of this award, the Claimant will no longer be a TPT. If that is the case then my order that the Respondent provide a Code compliant RAP in relation to The Swan will be of no utility and of no effect.

Conclusion

108. I find that the purported RAP provided by the Respondent to the Claimant was not in compliance with the requirements under the Pubs Code as set out above in this award.

109. On the basis of my findings the Respondent's approach in this case is significantly deficient contrary to both the specific requirements and core principles of the Code. The Respondent should therefore undertake a detailed review of its approach to the preparation and service of RAPs and the procedure to be adopted in relation to delegations 20, 21 and Schedule 2 to ensure that going forward it acts in a Code compliant manner.

110. By 20 August 2019 the Respondent should demonstrate to the Pubs Code Adjudicator the steps it has taken to implement this review and the amendments it has made to RAP preparation and procedure to ensure compliance.

Costs

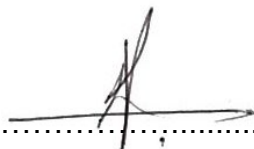
111. Issues as to costs of the arbitration are reserved pending the parties' opportunity to make submissions as to costs.

Operative Provisions

112. In light of the above I order:

- a. The Respondent is to provide to the Claimant a RAP which is compliant with the provisions of the Pubs Code and also is to provide the previous profit and loss forecast requested by the Claimant under regulation 21(3) within 21 days of the date of this award, unless the parties have entered into a MRO tenancy in relation to The Swan by that date;
- b. Jurisdiction of the PCA as to any dispute regarding compliance with this order is reserved;
- c. The Respondent is to undertake a detailed review of its approach to the preparation and service of RAPs and the procedure to be adopted in relation to regulations 20, 21 and Schedule 2 to ensure compliance with the Pubs Code in relation to its future dealings. The Respondent is to report to the Pubs Code Adjudicator in writing by 20 August 2019 with a detailed statement of the steps it has taken to implement this review and the amendments it has made to RAP preparation and procedure to ensure compliance, with appropriate evidence to demonstrate this compliance.
- d. Costs are reserved.

Arbitrator's Signature:



Date Award made: 09 July 2019

