IN THE MATTER OF **Ref:ARB/000292/Magpie&Stump**

THE PUBS CODE ARBITRATION BETWEEN: -

MAGPIE AND STUMP LIMITED
(Tied Pub Tenant)

Claimant

-and-

(1) Ei GROUP PLC
(Pub-owning Business)

First Respondent

&

(2) UNIQUE PUB PROPERTIES LIMITED
(Subsidiary of the First Respondent and landlord of the Claimant)

Second Respondent

Re: The Magpie and Stump, 18 Old Bailey, London. EC4 7EP

Award

Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales. The Claimant is the tied pub tenant of the Magpie and Stump, 18 Old Bailey, London. EC4 7EP and is represented by RLS Law of Suite 30-33, The Hop Exchange, 24 Southwark Street, London. SE1 1TY. The Respondents are represented by Gosschalks Solicitors of Queens Gardens, Hull, HU1 3DZ.

2. The Claimant alleged in his referral made on 24 July 2017[1] that the proposed MRO tenancy[2] was not compliant. Case management directions were then issued on 17 October 2017. Directions were issued to the parties on the 10 October 2017, with a Statement of Claim being filed on the 10th October 2017 and a Defence dated 13th November 2017. A Response to the Defence is dated 28th November 2017. I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator on 31 January 2018 and listed a telephone case management

[1] Pursuant to reg 32(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code")

[2] Issued as part of its full response on 11 July 2017 pursuant to reg 29(3) of the Pubs Code

conference on 21 March 2018, as a result of which I issued Further Directions on 20 April 2018 for the instruction by the arbitrator of an expert leisure and pubs surveyor to prepare written evidence as to which of the lease terms in dispute in this matter are common in the market.

Expert Evidence

3. The parties thereafter agreed the instructions to that expert and that should be instructed, which instructions I approved. After some further clarification with the expert as to his instructions. was asked to advise on:
    a. Whether the disputed lease terms are individually common?
    b. Whether they are common in combination with the proposed lease terms as a whole?
    c. If uncommon individually or collectively, whether they could be amended so as to be common and in what terms?

4. In respect of the last question, it was made clear to that he was expected to provide advice on commonality of lease terms within his professional experience, and not on the drafting of alternative compliant terms.

5. By the end of August 2018, the process of clarifying instructions with the expert was complete, and produced his expert witness report dated 26 October 2018. The Respondent sought permission thereafter to put further questions to by letter dated 13 November 2018, and on 23 November 2018 I issued further agreed directions for the reply to the Respondent's further questions to the expert, and thereafter for the parties by 19 December 2018 to file an agreed list of issues in dispute together with further written submissions on the expert report limited to five pages. I also directed that, subject to further order from me, the matter would be dealt with by way of a paper determination. On 5 December 2018 replied to the Respondent's further questions.

6. relied in reaching his opinion, though not exclusively, on the documents produced by the parties to the proceedings. He also relied on his experience of a wide range of leases as they concern and are relevant to the public house sector. He specifically said he also had regard to new lettings that are known to him, considering that new lettings provide more of a balanced view of what is a common term in today's market rather than examining older leases or leases relating to properties let in shell condition.

7. Noting that the legislation does not define what is meant by "common terms", he said the following with regard to his interpretation of the expression:

    3.1.4 "In interpreting the phrase "common term" I have considered this to be a term which is found in institutionally acceptable leases or found more often than not in the sample leases I have examined, including those referred to within the Schedule. Where the term is not found in the leases I have looked at, I would have considered it to be common if it is widely found outside of the

pub sector and would be regarded as being common practice in similar circumstances.

"3.1.5 As we are moving towards a new market with very little precedent to draw upon. I have considered a clause to be common if it is widely found outside of the pub sector and would be regarded as being common practice in similar circumstances. One factor of this new market is that the landlords of such pub property will be corporate landlords who have a different focus to that of a one off landlord. This is how the full repairing and insuring institutionally acceptable lease in the property market has evolved, because it contains clauses that are regarded as common place across the landlord community."

8. With regard to the test of commonality, [redacted] declined, in response to an invitation from the Respondent, to specify a proportion in percentage terms of free of tie agreements which have to contain a term before it is classed as "common". He did not think common necessarily means a majority and did not consider that a percentage threshold is the correct way to approach this (unless decided by the PCA), and that this was a judgement call.

9. [redacted] subsequently clarified that by "institutionally acceptable lease" he meant a lease that is in a form acceptable to an institution, such as a pension fund or insurance company, as an investment. This would be a full repairing and insuring (FRI) lease with upward only rent reviews. Bearing in mind that under regulation 31(2) of the Pubs Code the only leases to be considered are agreements between landlords and pub tenants who are not subject to product or service ties, he also confirmed in response to a question from the Respondent that none of his conclusions would change with the market were limited in that way.

10. I set out below in a table the lease terms in dispute and the opinion of [redacted], in summary form. In respect of some of these terms he provided further narrative opinion which is not set out here.

Lease Term in Dispute	**Opinion of** [redacted]
Requirement for a Rent Deposit New rent deposit to be payable by the tenant when the existing Claimant's lease (and draft new MRO lease) already provides two guarantors.	*This is a common term. Would usually expect a rent deposit agreement to exist in free of tie arrangements between landlord and individuals or smaller companies.*
Assignment Ban A block on assignment of the lease during the first two years of the term.	*Whether this term is common is variable depending on the circumstances, but noting that the Respondent had dropped this requirement from its latest leases.*

Pre-emption Right A landlord right of pre-emption on any proposed assignment of the lease.	*Whether this term is common is variable and circumstance led, and noting that the Respondent had removed this requirement from its latest leases.*
Change of Control Change of control provisions for shareholder transfers by the tenant company	*This is a common term, and usually landlord's consent to a change of control is not to be unreasonably withheld.*
Reasonable Assignment Conditions Provisions in connection with assignment requiring a proposed assignee to be of a "sufficient status" as well as a "substantial person firm or company" as well as meeting a sufficient financial standing test.	*Terms of this type requiring the assignee to be of sufficient financial standing are common, but the drafting of the proposed clause is considered to be clumsy.*
Keep Open A keep open covenant to keep the premises open for trade every day at least between 11 am and 11 pm.	*Such terms are common "but not specific on hours". A general keep open clause is uncommon and unworkable given local circumstances of a particular pub and trade, noting that the Respondent has deleted its keep open clause in its most recent leases.*
Fixtures and Fittings An obligation not to part with possession of any of the tenant's own fixtures fittings and equipment without the landlord's consent.	This is not a common term, and is very specific to a tied pub company (though not considered to be detrimental to the tenant)
Fixtures and Fittings Purchase Option A right and option for the landlord to purchase all of the tenant's fixtures fittings and equipment to be exercised at the end of the term regardless of the tenant's intentions for the same.	This is not a common term, and is very specific to a tied pub company. It is however common in the leases of the regulated POBs. In response to further questions, [redacted] agreed that pubs are normally valued as a going concern, fully fitted and ready to trade immediately, and that while this term was not necessarily common (though it is now standard in Wellington leases) he considered it beneficial to both landlord and tenant.
Head Lease Not incorporating the necessary rights and terms of the applicable superior lease.	This is not a common term. It is common to incorporate those necessary rights. The lease should refer to the Head Lease and the Head Tenant should comply with obligations

	in so far as they are the responsibility of the tenant, including insurance.
Rent Reviews 5 yearly open market rent reviews as well as provision for yearly increases in rent in line with the increase in the index of retail prices in the UK.	This is not a common term. It is common to have either open market rent reviews, rather than both open market rent reviews and annual indexation. If the rent review clause also includes an RPI provision, it is common to have a cap and collar. This is usually between 1% and 4%. [redacted] clarified in response to further questioning that he did not consider RPI in conjunction with five-yearly open market rent reviews to be common if they are capped at 4%. He was of the opinion that in a cyclical review cycle the rent review is usually to open market and not to both. The combination of RPI and open market at year 5 seems to [redacted] to be in the minority and one which is being put forward by lawyers acting for the same pub company (Gosschalks acting for both Ei and Wellington).
Use Extended tenant user clause to include A3 (restaurant use) as well as A4 use (pubs, bars).	This is a common term. Pubs have generally had tight user clauses relating to “public house only”. Some leases in town centres now have a wider user clause to include A3 user and this is true in the case of other pub companies.
Rent Review Provisions a) Defining the expression 'open market rent' to be the rent payable after the expiry of any rent free or reduced rent period which might be allowed for any reason (rather than in relation to fitting out only).	This is not a common term. The effect of this clause is to create a headline rent and from the schedules it is clear that the term is uncommon in that we are to assess the rent after a rent review or reduced period, but this usually relates to fitted out works. The words in the clause “for any reason (rather than in relation to fitting out only) should be deleted and instead state for fitting out works. [redacted] clarified that the valuer, when considering comparable evidence, will ignore *usual* rent free periods and inducements for the purposes of rental valuation, but will

	need to take account of any rent free periods or inducements if they could be considered above the market norm.
Rent Review Provisions b) An assumption that the lease is 'freely assignable'.	This is not a common term. The word “freely” should be deleted to make it common. The fact that the non-assignment period has been taken out of new leases makes this clause redundant.
Rent Review Provisions c) An assumption that the willing tenant has no fitting out costs.	This is not a common term. The words “no fitting out costs” should be deleted.
Rent Review Provisions d) A disregard of any increase in rental value attributable to any authorised improvements carried at the expenses of the tenant during the term of the lease, but no disregard of any prior alterations/ improvements which have been carried out by the tenant at its own cost pursuant to any previous occupation.	This is not a common term. The clause should allow the definition of term to include a previous term and the tenant should also refer to predecessors in title.
Rent Review Provisions e) A disregard of goodwill 'uniquely attributable' to the Tenant in occupation and no disregard of any goodwill associated with the tenant, and under tenant of their predecessors in title that have been in occupation of the premises or any part thereof.	This is not a common term. The word “uniquely” should be deleted. He further explained that he could not see why goodwill has to be defined further and noted that the word “uniquely” does not appear in Wellington leases.
Rent Review Provisions f) Provision that if the new rent has not been agreed by the rent review date then the rent will in any event be subject to an increase in accordance with RPI.	This is not a common term as it is unusual to have both RPI and open market reviews. If the lease only has RPI then it would be common to increase by RPI at the review date

Jurisdiction to make an order under regulation 33(2)

11. On 10 December 2018 I invited the parties to advise me whether the dispute could now be settled, whether a hearing was required and what further directions were appropriate, and if they are agreed. The Respondent thereafter declined to respond with this information, instead inviting the PCA to provide [redacted] with guidance on the appropriate test that should apply to the word “common” before it could do so. The PCA has issued no statutory guidance in respect of

that matter[3], and since the proper interpretation and application of legislation is a matter for determination in this arbitration, it would have been inappropriate of me to express a view in the absence of submissions from the parties, and the Respondent sought no directions in respect of that.

12. Neither party complied with the 19 December 2018 deadline to provide an agreed list of issues in dispute together with further written submissions on the expert report limited to five pages. I repeated my request to the parties on 28 December that they should advise if the matter could be settled and what further directions were appropriate.

13. Following that, the Respondent instead said that it wished to review its MRO tenancy offered to send a revised version to form the basis for negotiations, and the parties thereafter entered into further exchanges of correspondence and agreed on 4 January the Respondent would serve the Claimant with a proposed form of agreement it believed to be compliant, and agreed to a further stay to negotiate. On 18 January 2019 the Respondent sent to the Claimant a proposed agreement in the form of a deed of variation, reflecting some concessions on proposed terms and some amendments suggested by , saying that in relation to the method of delivery of the MRO tenancy its proposal reflected recent arbitration awards and the amount of Stamp Duty Land Tax payable (in respect of a new lease for the length of the remaining term of the existing lease). I understand this to be in the region of £13,000 to £22,000, depending on the rent.

14. I did not order a stay, however, as I considered it appropriate in the circumstances to clarify with the parties the jurisdiction pursuant to which I continued to act in respect of this referral, and accordingly asked the Respondent on 6 February 2019 to confirm whether or not it continued to contend that its proposed lease in its full response had been MRO-compliant.

15. The Respondent replied to me on 12 February 2019 advising it was not making a formally pleaded admission and did not, at that point, formally accept the original MRO tenancy was not MRO compliant. It expressed concern that this would lead to “ripping up and starting again”, which would increase uncertainty, costs and delay.

16. I responded to the parties on 4 March 2019 observing the age of this referral and that my powers to make an order under regulation 33 derive from a finding (or admission) that full response, from which my statutory jurisdiction arises, was compliant or non-compliant. Since the Respondent did not admit that its full response was non-compliant, it would fall to me to determine whether it was. The further offers of settlement have no statutory significance. I made clear to the Respondent my expectation that it should concede a full response that it believes to have been non-compliant, not use it as a tool in negotiations; avoid wasted time and costs in arbitration; and enable to arbitrator to make an order under regulation 33(2), which is the outcome of a non-compliant proposal envisaged by Parliament. I invited the parties to confirm if in their view a determination on the

[3] Pursuant to s.61 of the Small Business, Enterprise and Employment Act 2015

compliance of the full response could now be reached on the basis of the evidence currently before me. The Claimant provided this confirmation on 7 March 2019.

17. The Respondent was silent as to that matter in its response on 13 March 2019, instead confirmed that the initial full response sent to the Claimant on 1 July 2017 was non-compliant[4]. It believed that the latest version of the DOV sent to the Claimant on 4 March 2019 is compliant and should be the terms of the proposed DOV that should be determined. It asked for a stay of the proceedings for the purpose of continued negotiations. The parties have continued to negotiate, the Claimant maintaining challenges in respect of the reasonableness of some proposed lease terms (including rent deposit and user) as well as challenges to commonality.

Determination

18. Given that there is no agreement between the parties, and the time these proceedings have taken, I do not consider that it is appropriate that I should order a further stay. In light of the Respondent's concession and the uncontested evidence before me, it is appropriate for me to issue an award in respect of the full response, ordering under regulation 33(2)(b) in light of its non-compliance the service of a revised response on terms which I will determine.

19. The terms of such an order are at my discretion, and the terms of the revised response must be compliant. I am aware that neither party complied with the direction to make written submissions on the expert evidence by 19 December 2018. Accordingly, I have before me the unchallenged report of [redacted]. Given the material that has been advanced in these proceedings by the parties, it is not for me to weigh the merit of each of his conclusions, and I therefore accept them in their entirety for the purpose of determining the dispute between these parties.

20. The Respondent in conceding the non-compliance of the full response did not identify in respect of what disputed terms and conditions that non-compliance was acknowledged. It is important that there is no room for debate that my discretion to make an order under regulation 33(2) is somehow limited to those terms and conditions which were non-compliant, and thus that some procedure is required in order to revisit which of them were, and thus extend the proceedings further while determinations are reached, or concessions made, in respect of the compliance or otherwise of the individual terms and conditions of the full response.

21. The statutory duty on a POB is to serve a proposed MRO tenancy which is compliant, and the jurisdiction of the arbitrator on a referral under regulation 32(2) is to determine whether that proposal was compliant. Where it was not, the jurisdiction under regulation 33(2) is different, in that the terms of the revised response are not the choice of the POB. They are at the discretion of the arbitrator. It is for the arbitrator to exercise the discretion to order compliant

[4] As it did not comply with section 43(4)(a)(iii) of the 2015 Act

terms, and thus not for the POB to expect that order to be in the form of its latest proposed tenancy terms put forward in negotiations. The arbitrator's discretion must be exercised reasonably, taking into account all of the issues, circumstances and evidence in the case. Thus, the POB which serves a non-compliant full response loses the statutory right to advance the terms entirely of its choice to form part of the revised response. Both parties will have the right to make submissions as to the compliant terms that I should order. Those terms must together as well as individually be compliant.

22. The parties are, of course, free to negotiate a settlement of the dispute on terms which are mutually agreeable. I consider it appropriate to reflect the Respondent's altered position in respect of the vehicle for delivery of the MRO, particularly in light of the SDLT considerations of a new lease.

23. In a regulatory capacity the D/PCA will be setting out further expectations of POBs in relation to commonness of terms to ensure compliance to reduce the likelihood of further costly and timely litigation to tied-pub tenants.

Costs

24. The Claimant intends to seek its costs of the proceedings, and normal costs principles would apply in light of the issue of this award.

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

Operative provisions

26. In the light of the above:

a) The revised response is to be in the form of a deed of variation of the existing lease on MRO-compliant terms to be determined by the arbitrator;
b) The First Respondent is ordered to provide a revised response to the Claimant within 28 days of the arbitrator's determination of its terms;
c) Directions to be issued for the purpose of determination by the arbitrator of compliant MRO terms;
d) Costs are reserved.

Arbitrator's Signature:

Date Award made: 16 April 2019