IN THE MATTER OF **ARB/105165/Weedon**
THE PUBS CODE ARBITRATION BETWEEN:

DAVID WEEDON AND DIANNE WEEDON
(Tied Pub Tenants) Claimants

-and-

STAR PUBS & BARS LIMITED
(Pub-owning Business) Respondent

AWARD

Introduction

1. This award relates to the terms of a proposed stocking requirement and not to other issues in dispute in this referral for arbitration. A stocking requirement is, broadly, a contractual obligation in a pub tenancy or licence that requires the tenant or licensee to stock beer or cider produced by a brewing pub-owing business regulated under the Pubs Code, but which does not have to be purchased from any particular supplier. A stocking requirement is not a tie.

Parties and Procedure

2. The Claimants are David Weedon and Dianne Weedon of The Crab and Lobster Tap, Grove Road, Ventnor, PO38 1TH ("the Pub") and are the tied pub tenants ("TPT")[1] of the Pub which they occupy under the terms of a lease granted on 8 October 2003 for a term of twenty years commencing on 23 May 2003. The Respondent, Star Pubs & Bars Ltd., is a pub-owning business ("POB")[2] and operating Heineken's pub portfolio.

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

[1] Within the meaning of section 70(1)(a) of the 2015 Act
[2] Within the meaning of section 69(1) of the 2015 Act

Background

4. The Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") makes provision for tenants of tied pubs to be offered a market rent only ("MRO") option in specified circumstances. As a result of an MRO notice[3] served by the Claimants on 22 June 2018 on the Respondent, the Claimants have the right to receive a compliant MRO proposal. The Respondent purported to serve on the Claimants a full response[4] dated 12 July 2018 and this contained a draft MRO lease including a proposed term which purported to be a stocking requirement. The definition of a stocking requirement[5] is set out in Appendix B to this award.

5. The Claimants made a referral to the PCA on 2 August 2018[6]. They dispute that the Respondent has complied with the duty[7] to send the tenants a proposed tenancy which is MRO-compliant.

6. In October 2018 the proceedings were stayed on the request of the parties for the purpose of settlement negotiations in the light of the Respondent's acknowledgement on 8 October 2018 that "inadvertently the incorrect form of MRO lease was issued" to the Claimants. However, the parties were unable to reach agreement on the terms of the lease.

7. I therefore issued directions on 18 December 2018, and the Claimants filed a Statement of Claim on 8 January 2019. The Respondent filed a Statement of Defence on 21 January 2019. Those pleadings however did not address the dispute that was referred for arbitration – namely whether the full response was compliant. Both parties had filed pleadings relating to whether an offer made in settlement by the Respondent to the Claimants on 31 October 2018 was compliant.

8. On 4 February 2019 correspondence was issued to the parties from my office, in light of the Respondent's acknowledgement of 8 October 2018, observing:

> *"as it is clear that the revised response has been withdrawn, the arbitrator invites the parties to confirm that the full response was non-compliant and that the arbitrator's remaining jurisdiction in this matter is under regulation 33(2)(b)."*

9. It is pursuant to regulation 33(2)(b) that I have the power to order the Respondent to serve a revised response. The Respondent replied on 11 February 2019 that:

> *"The issuing of a new lease by our client on 31 October 2018 is not in any way an admission that the Full Response was non-compliant: the*

[3] In accordance with regulation 23
[4] Within the meaning of regulation 29(3) of the Pubs Code
[5] In section 68(7) of the 2015 Act
[6] Under regulation 32(2)(b)
[7] Under regulation 29(3)

Respondent considers that such determination would be for the DPCA or PCA alone."

10. The Respondent also invited me to treat the new lease issued on 31 October 2018 as the proposed tenancy in dispute for the purposes of regulation 29(3)(b). The Claimants were content with this approach, though they maintained that the proposed lease in the full response was non-compliant.

11. The parties were advised on 12 February 2019 that the proposed approach was not acceptable to me in light of my statutory jurisdiction arising from the referral of the full response. I directed the Respondent to file within 7 days grounds upon which it asserted that its full response was compliant. By email of 18 February 2019 the Respondent declined to do so and invited me, without making a finding on the compliance of the full response, to make an order under regulation 33(2) that it serve a revised response, such revised response having already been served on 31 October 2018.

12. On 21 February 2019 the parties were advised that I considered the invitation to order the service of a revised response to be unacceptable in the circumstances and that the Respondent was incorrect that the revised response had already been served. By law, it cannot come into existence until ordered pursuant to regulation 33(2). The compliance or otherwise of the full response can be a matter of relevance to the appropriate terms of an order to be made under regulation 33(2) as to the service of the revised response, as well as to costs.

Unless Order

13. The letter to the parties of 21 February 2019 set out that the purported proposed stocking requirement in question included terms which:

    a. Prohibited the sale of competitor keg brands without landlord consent;
    b. By virtue of the lease definitions of Landlord Cask Brewery and Control, did not relate only to products produced by the landlord and its group undertakings as defined in statute.

14. I made an unless order in the following terms:

    UNLESS the Respondent by 12 noon on Monday 25 February 2019 files grounds upon which it continues to assert that its stocking requirement in the full response was MRO compliant, including how it met the statutory definition of a stocking requirement, the arbitrator will find in the Claimant's favour on that point.

15. I also made clear that I would thereafter make an order under regulation 33(2) in the appropriate terms. The Respondent has confirmed on 25 February 2019 that it does not intend to make any submissions on this point. It has not, however, conceded that its proposed purported stocking requirement was not compliant. It is not appropriate for a regulated POB neither to concede nor to

defend the terms of its full response, thus putting me as arbitrator to the task of issuing an award in respect of the matter.

My Decision in respect of the Full Response

16. The Respondent having breached the terms of the unless order made on 21 February 2019, I find that the purported stocking requirement was not compliant. Though reasons are not required for my finding, this being an order issued in default of compliance with my directions, I have in any event set out my legal reasoning for reaching this conclusion in the attached Appendix D and make the following findings:

Keg Brands

a. The Keg Brand stocking term does not fall within the definition of a stocking requirement as it imposes an absolute prohibition on the sale of competitor brands.

b. I also make the following observations, in respect of which I did not specifically invite submissions:

   i. The lease definition of "Landlord Keg Brands" means "*any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Company of the Landlord (including Heineken UK Limited) from time to time during the Term*". "Group Company" is defined in clause 1 of the lease to mean "*a company which is a member of the same group of companies as the Tenant (as defined in section 42(1) of the 1954 Act)",* which definition is "*two bodies corporate shall be taken to be members of a group if and only if one is a subsidiary of the other or both are subsidiaries of a third body corporate or the same person has a controlling interest in both*". I have not considered representations as to whether the use of that definition of Group Company, and not group undertaking as provided for in s.67, brings the Keg Brand stocking term outside of the statutory definition of a stocking requirement.

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

Cask Brands

c. The Cask Brand restriction is unreasonable as no evidence has been put forward to show that it is reasonable.

d. The Cask Brand stocking term does not fall within the definition of a stocking requirement as a stocking requirement can relate "*only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord.*" A requirement which extends to beer or cider not produced by the landlord or its group undertaking does not come within the definition of a stocking requirement in section 68(7). A "group undertaking" in section 68(7)(a) has the meaning given to it by section 1161(5) of the Companies Act

2006[8], and is an undertaking which is (a) a parent undertaking or subsidiary undertaking of that undertaking, or (b) a subsidiary undertaking of any parent undertaking of that undertaking. By reason of the definition of "Control" in the definition of "Landlord Cask Brewery" in the proposed MRO lease, such a brewery may be a brewery in which the Respondent or its Group Undertaking "holds a majority of the voting rights or has the right to exercise a dominant influence". This does not restrict the lease definition of Group Undertaking to those entities in which there is a subsidiary or parent relationship with the Respondent, but extends beyond the definition of group undertaking in s.1161 of the Companies Act 2006 used in the statutory definition of a stocking requirement.

e. The observation made above in respect of the use of the word "manufactured" rather than "produced" in the definition of a Landlord Keg Brand is repeated here in respect of the lease definition of Landlord Cask Brands.

f. The definition of a stocking requirement does not make provision for the term to influence the re-selling price of products covered by it and this award does not imply that I am of the view that such a term is compliant.

Decision and Next Steps

17. I find that the purported stocking requirement in the full response was not compliant. I have made no findings in relation to the other items in dispute (apparently relating to completion of dilapidations), and the parties have been requested to confirm if that matter is settled or remains in dispute.

18. It will be for me to make an order under regulation 33(2) that the Respondent serve a revised response. The terms of such an order are a matter for my discretion. The wording of that power is broad. I take the view that the reference to those powers is not exhaustive. Its language is permissive, in that it does not restrict me in the scope of any ruling I may make as to the terms of the revised proposal.

19. The lease offered of 31 October 2018 is not part of the full response, and it is not part of any revised response[9]. I have considered whether I should accede to the Respondent's request and make an order in such terms that permit the revised response to be served in the terms of the offer of 31 October 2018. However, at least in respect of the terms of the proposed stocking requirement in that offer, I decline to do so because:

    a. The parties have had sufficient opportunity to negotiate on the basis of the 31 October 2018 lease and its terms are not agreed. I see no reason why, the Respondent having issued the wrong form of lease as far back 12 July 2018, it should now have the opportunity to start the

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

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

process again with another proposed lease containing terms of its choosing.

b. I can immediately see that the purported stocking requirement in this proposed lease is not likely to be MRO compliant, not least because:

i. It is not made apparent that the Cask Brand restriction is within the definition of a stocking requirement owing to the definition of "Landlord Cask Brewery" to mean any brewery which is either owned by the Landlord or a Group Undertaking of the Landlord or in which the Landlord or a Group Undertaking of the Landlord has Control. I can find no lease definition of “Control”. A stocking requirement may only relate to products brewed by the landlord or its group undertaking.

ii. It is not made apparent that the Keg Brand restriction is within the definition of a stocking requirement, owing to the definition of "Landlord Keg Brands" to mean any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Company of the Landlord (including Heineken UK Limited) from time to time during the Term. “Group Company” is defined by reference to s.42(1) of the Landlord and Tenant Act 1954 and includes two companies where the same person has a controlling interest in both. It is not clear to me that this is equivalent to a “group undertaking”, which in section 68(7)(a) has the meaning given to it by section 1161(5) of the Companies Act 2006[10], and is an undertaking which is (a) a parent undertaking or subsidiary undertaking of that undertaking, or (b) a subsidiary undertaking of any parent undertaking of that undertaking.

20. I shall instead determine the terms of the stocking requirement to form part of the revised response, upon submissions and evidence from the parties, unless such terms are agreed.

Operative Provisions

21. In light of the above findings:
    a. The Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimants within 28 days of determination by the DPCA as to its terms;
    b. Determination as to the remaining issues in dispute to be made on submissions and evidence by the parties, if not settled.
    c. Costs are reserved.

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

Arbitrator's Signature

Fiona Dickie, Deputy Pubs Code Adjudicator

Date Award made 13 March 2019

Appendix A - Procedure

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

2. This is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996. The statutory framework governing this arbitration, other than the 1996 Act, is contained in Part 4 of the 2015 Act; the Pubs Code; and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016**.** The applicable rules for the conduct of this arbitration are the Chartered Institute of Arbitrators Rules. Where a conflict arises between the Pubs Code statutory framework (being the 2015 Act, the Pubs Code and/or the Fees Regulations) and either the CIArb Rules or the 1996 Act, the Pubs Code statutory framework shall prevail.

Appendix B - The Law

Section 68(7) of the 2015 Act defines a contractual obligation to be a stocking requirement if:

(a) it relates only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord,
(b) it does not require the tied pub tenant to procure the beer or cider from any particular supplier, and
(c) it does not prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such sales).

Appendix C - Stocking Requirement in the MRO Lease

Clause 3.24 of the proposed MRO lease provides:

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

SCHEDULE 6: STOCKING REQUIREMENT

1. Preamble

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

2. Definitions

In this schedule:

…

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

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

…

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

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

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

…

3. Keg Brands

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

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

4. Cask Brands

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

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

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

…

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

Appendix D – My Reasoning

Is the Stocking Requirement Granular?

1. It is relevant to consider whether the principle that competitor products may be restricted, though not prevented, must be applied to the stocking requirement taken as a whole, or whether it must be applied to each type or category of beer and cider (that is, whether the stocking requirement is granular). In the present case, it is only competitor Keg Brands which are prohibited. Competitor Cask Brands and PPB are not. Therefore, does Schedule 6 comply with s.68(7) in that it does allow a range of competitor products to be sold in both beer and cider categories? It is necessary to consider the wording of the statute.

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

Interpretation of the statutory provisions

3. I would remark that the provisions are overlapping and technical, and I have restricted my consideration only so as to address the issues before me in this case.

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

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

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

7. The drafting of s.68(7) is therefore broad – no beer or cider produced by another person may be prohibited for sale. There is no reason to restrict the meaning of this provision. In any particular case the simple and correct way to approach the matter is to ask “is this product beer or cider produced by another person?”. If the answer is

yes, and if the lease term prevents its sale, then the term does not fall within the definition of a stocking requirement.

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

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

10. Taking the alternative interpretation to its extreme, that the stocking requirement should be looked at as a whole to determine if it prohibits the stocking of competitor products, it could, for example, prevent the sale of any draught beer and any draught cider at all from another producer, and permit only PBB sales from other producers (even though these might be products which do not sell well in the particular pub in question). If restrictions which could have such wide effect were intended, I would expect there to be express words in the 2015 Act to make such provision. I find that to fall within the definition of a stocking requirement the sale of any type of competitor beer or cider product must be permitted. Therefore, a stocking requirement is granular, and each provision restricting the sale of a type of competitor beer or cider must comply with the definition of a stocking requirement. I therefore turn to consider Paragraphs 3 and 4 of Schedule 6 individually.

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

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

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

13. By virtue of section 68(7)(c) a stocking requirement is a contractual obligation which cannot "prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such

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

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

15. I do not consider that the legislation is ambiguous. The policy intent behind s.68(7) and its language was to permit the Respondent to protect its route to market. A brewer POB's route to market can indeed be protected, and this can lawfully be achieved by restricting sales of competitor products, but not by prohibiting them.

Is the Proposed Stocking Term a Tie?

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

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

MRO-Compliance

18. A proposed term will not be MRO-compliant if it is unreasonable[11] and any terms which are not common in free of tie agreements will automatically be unreasonable[12]. An uncommon term is only one example of an unreasonable term[13]. As such, in order to be MRO-compliant, a term which is common must still be reasonable in the more general sense. If I am correct that the proposed stocking terms (the 100% Keg Brand requirement and a restriction on the sale of Landlord Cask Brands applying a definition of a "group undertaking" which extends beyond the statutory one) do not fall within the statutory definition of a "stocking requirement", and because I am not satisfied that such a term is a tie, it is still necessary for me to consider whether they are in any event MRO-compliant terms.

19. However, I can deal with the matter very shortly. I will not address the question of how the test of commonality must be applied to a stocking requirement (though I have considered it in other awards) given the manner of disposal I have adopted in this case. It is a matter of some legal intricacy and not raised by the parties here. However, in summary I will say that I am satisfied that the uncommonness of a

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

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

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

proposed stocking requirement (which meets the statutory definition) does not render that stocking requirement non-compliant. A proposed stocking term (which does not meet the statutory definition of a stocking requirement) is not common in free of tie leases, and will not therefore be compliant.

Reasonableness

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

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

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

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

- end -