IN THE MATTER OF **Ref: ARB/WH/17/HELLIWELL**

THE PUBS CODE ARBITRATION BETWEEN: -

Garden Pub Limited **Claimant**

(Tied Pub Tenant)

-and-

Red Star Pub Company (WRIII) Limited **First Respondent**

and

Star Pubs and Bars Limited **Second Respondent**

(Pub-owning Business)

Arbitration Award
in relation the "stocking requirement" issues

Summary of Award

Paragraph 3 of Schedule 5 is not a stocking requirement and is a non-compliant term.

Paragraph 4 of Schedule 5 is a non-compliant stocking requirement.

Paragraph 5 of Schedule 5 is a compliant stocking requirement.

Order

The Second Respondent shall provide a revised MRO proposal to the Claimant.

Introduction

1. I refer the parties to the introduction, procedure and applicable law set out in my previous Award dated 26 February 2018, which is not repeated here. This further Award relates to the disputed stocking requirement in the proposed MRO lease.

Stocking Requirement

2. By virtue of section 68(7) a contractual obligation is a stocking requirement if:

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

3. Schedule 5 of the proposed lease provides:

> *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 5.

5. PPB Brands

5.1 The Tenant shall stock and offer for sale each of the following at all times during the Term:

5.1.1 two or more PPB Own Beer Brands; and

5.1.2 two or more PPB Own Cider Brands.

5.2 In effecting compliance with its obligations in clause 5.1, the Tenant shall

5.2.1 procure that not less than fifty percent of the Shelf Space is used to make available for sale either PPB Own Beer Brands of PPB Own Cider Brands;

5.2.2 equal prominence is provided to PPB Own Beer Brands and PPB Own Cider Brands such that at least fifty percent of the Shelf Space immediately on display to customers at any time gives visibility to such brands;

5.2.3 PPB Own Beer Brands and PPB Own Cider Brands are offered for sale at a reasonable market price taking into account the location and circumstance of the Property and being reasonably commensurate with the pricing of other Products offered for sale

5.3 Subject to clauses 5.1 and 5.2, the Tenant may stock and offer for sale any Premium Packaged Beers of Premium Packaged Ciders which it deems appropriate at its own discretion.

The Issues

4. The issues in dispute raised by the parties for my determination to which this award relates are as follows:

    8. Whether the Respondent's proposed stocking requirement:
        8.1. Is a stocking requirement within the meaning of s.68(7)(c) of the 2015 Act;
        8.2. Is an unreasonable term.

    9. Whether the Respondent is entitled to restrict, as opposed to prevent, the Claimant from stocking a competitor's brand.

    10. Whether section 68(7) of the 2015 Act affords any basis for comparison between the restrictions being placed on the stocking and sale of competitor products under the stocking requirement as compared to the previous tied position.

5. The Respondent understands the Claimant's objections to the stocking requirement to be threefold. First, that it is not common and therefore unreasonable pursuant to regulation 31(2)(c). Second, that the requirement to seek the Respondent's consent before introducing any competitor keg product is not within the meaning of a stocking requirement under section 68(7)(c). Third, that as a whole the stocking requirement offered by the Respondent has the effect, in practice, of restricting the brands which can be stocked as compared to the position under the Lease. I have found it convenient to address these issues, answering the question in points 8-10 of the list of issues in dispute, in narrative form rather in the discussion below.

Can a Stocking Requirement be non-compliant by virtue of being uncommon?

6. I am satisfied that the Claimant's first objection as summarised is in fact misconceived. Pursuant to section 43(4)(a)(ii) of the 2015 Act, for the proposed tenancy to be MRO compliant it must not contain "Any product or service tie other than one in respect of insurance…". A "product or service tie" is defined in section 72(1) of the 2015 Act to exclude a stocking requirement. Therefore it is plainly contemplated that a tenancy can be MRO-compliant if it contains a stocking requirement.

7. Stocking requirements are by their nature uncommon in free of tie leases more generally. The Respondent rightly observes that the stocking requirement is a product of the 2015 Act and accordingly will not appear in any leases which pre-date the coming into effect of the new legislative framework (on 21 July 2016).

8. It seems to me therefore that deeming a stocking requirement unreasonable (by virtue of regulation 31(2)(c) because they are "not common in agreements between landlords and pub tenants who are not subject to product or service ties") would conflict with the express provision of section 43(4)(a)(ii).

9. It is however the case that regulation 31(2)(c) is not qualified in respect of stocking requirements, and I have considered whether the statutory language protects a stocking requirement from being unreasonable by virtue of being uncommon in free of tie agreements. I am satisfied that it is proper to interpret the regulation in a manner that is consistent with Parliament's intention in passing the 2015 Act. The Explanatory Note to the 2015 Act confirms that intention when, in respect of section 68(7) it states:

> *"Subsection (6) makes clear that a stocking requirement is not a tie. Thus subsection (7) allows pub-owing businesses that are breweries to impose a stocking requirement on tenants and licensee with MRO-compliant tenancies or licences. The stocking requirement applies only to beer and cider produced by the pub owing business, and the tenant must be able to buy the beer or cider from any supplier of their choosing. The stocking requirement also allows the pub-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."*

10. Regulation 31(2)(c) provides that the terms and conditions of the proposal MRO tenancy are to be regarded as unreasonable if they "*are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties."* The comparison which is to be made should properly be understood. The comparison required by this regulation is with leases which are not subject to a tie (a stocking requirement not being a tie). Therefore applying this means that agreements which contain a stocking requirement, and no tie, are included in the basket of agreements for comparison. What must be compared against these leases is the terms of the MRO tenancy, which by definition (pursuant to regulation 31(2)(c), regulation 29(3)(b) and section 43(4)) may contain a stocking requirement. I understand this comparison, properly interpreted, to mean that the proposed tenancy, which may contain a stocking requirement, should be compared against tie-free tenancies, which may also contain stocking requirements.

11. It seems to me that in general when considering what is, or is not, common in free of tie agreements it is proper to give more weight to any comparable sub-set of such agreements which are particularly relevant to a subject pub and its trade. The comparison of a proposed stocking requirement with terms common in the free of tie market is rendered practicable where there is a basket of comparable tie-free tenancies which also contain a stocking requirement, like being compared with like. As at the commencement of the 2015 Act, there were no such leases and therefore the comparison, while required by the legislation, is meaningless, as there is no basket of comparable tenancies. In this way, the comparison cannot be made, or when made produces a null result. A meaningless comparison does not however serve to render a term non-compliant.

12. An alternate approach, which I do not adopt, would be to compare a proposed stocking requirement with tie-free leases without a stocking requirement, and determine the former unreasonable by virtue of regulation 31(2)(c) for having a term which was not common in tie free leases. If that were the case, no stocking requirement could be MRO compliant, and the intention of Parliament would be defeated.

13. I have considered the clarificatory note issued by the Department for Business, Energy and Industrial Strategy dated March 2017. I am not bound by this approach and I prefer a nuanced interpretation that the comparison required by regulation 31 is, this early in the life of the legislation, of no meaning in respect of a tenancy agreement which contains a stocking requirement, as there are insufficient leases with a stocking requirement against which to make a meaningful comparison. Therefore, over time, when the existence of stocking requirements in tie-free leases becomes more common, comparison of particular terms of that nature will be possible for the purpose of regulation 31(2)(c). My view is consistent with the PCA advice note issued in April 2017. The legislation cannot be said to inhibit the first of a kind emerging in a new market that includes free of tie leases with stocking requirements.

14. The point is not an easy one. In the present case I have not considered whether this rationale should apply more broadly to other classes of terms new to the market but not expressly permitted by the legislation in free of tie agreements. However, on balance I prefer the approach to statutory interpretation I have adopted to the alternative. That alternative would be that regulation 31(2)(c) is of no application in relation to a stocking requirement – which would mean that, even when they have become common in the market, there could never be a comparison with such terms in the market and never a test of uncommonness.

Is the Stocking Requirement Granular?

15. 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.

16. The Respondent argues that the stocking requirement in section 68(7) is not granular or prescriptive and does not require, for example, a competitor product to be sold in each and every category of beer and cider, noting that it was open to Parliament to make such a provision. The Respondent's position is therefore that the principle that competitor products may be restricted, though not prevented,

must be applied to the stocking requirement taken as a whole. Therefore, it argues, Schedule 5 complies 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.

Interpretation of the statutory provisions

17. The parties' arguments provide scant reference to the statutory language, but I have sought to analyse the provisions without their assistance. However, I would remark that they are overlapping and technical, and I have restricted my consideration only so as to address the issues before me in this case.

18. 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.

19. 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).

20. 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).

21. 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.

22. 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 against the interpretation the Respondent seeks to persuade me to adopt.

23. The Respondent has relied on the Explanatory Note to the 2015 Act in support of its case, but I would observe that this in fact provides support for the Claimant's position on the question of statutory interpretation, in that it 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). Accordingly 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. The Respondent has not produced

evidence to satisfy me that a PPB lager can, for example, be accurately described as a competitor to cask ale.

24. The Respondent's argument therefore is most unattractive, and I reject it. Taking it to its extreme, it could prevent the sale of any draught beer and any draft 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 each of Paragraphs 3-5 of Schedule 5 individually.

Is Paragraph 3 of Schedule 5 a stocking requirement?

25. I am satisfied for the reasons that follow that the Claimant correctly argues that Paragraph 3 of Schedule 5 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 keg brands.

26. For the reasons set out above, the permissions under Paragraphs 4 and 5 cannot bring the whole of Schedule 5 within the definition of a stocking requirement. Paragraph 3 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 5 makes it clear that the Respondent may waive any restrictions to make these less onerous on the tenant. The Respondent argues that this reflects the commercial reality that where there is a genuine business reason (for example adding this product would grow sales, improve the value of the Pub and/or address an obvious gap in the offerings to market) to ask for the inclusion of a particular competitor brand then it is likely that the Respondent

would agree to such a request, not least because economically it would also benefit the Respondent.

27. I pause to note, however, that 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. Whilst the Respondent rightly observes that the Claimant has not in fact specified any request for approval to sell a competitor keg product, that is not the point. Such a request only becomes relevant if the proposed lease term is MRO compliant, and the market need to make such a request could arise at any time during the term of the MRO lease.

28. 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 5 is that it prevents such sales unless the landlord dictates otherwise. This is nothing other than a prohibition.

29. 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 permit it offends the principle in section 68(7)(c) and is not a stocking requirement (though I remark that in such circumstances the proposed tenancy is not 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.

30. I do not consider that the legislation is ambiguous. In the event that it is, the Respondent invites me to consider statements made in the House of Commons. However, that relied upon (and not set out here) does not lend the weight to the

Respondent's case. I do agree with its statement, however, that the policy intent behind s.68(7) and its language was "to permit the Respondent to protect its route to market – in other words – ensure that its brands of beer and cider are can [sic] be sold in its own pubs". True though this statement is, this does not assist in interpreting the statute to place greater restrictions than can be understood from its wording. The Respondent'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.

31. The Respondent places particular emphasis on its portfolio of beer and cider as relevant to whether or not the proposed clause is indeed within the meaning of section 68(7)(c). It refers to its position as Europe's largest brewer, with over 250 of its own leading global beer and cider brands, constantly developed in response to consumer demand. In the UK specifically it brews, owns and markets many of the top selling mainstream and premium beers including Fosters and Kronenbourg 1666. Its John Smith's beer has been the top selling pale ale in the UK since the 1990s and its Deperados is the fastest selling premium bottled beer in the UK. Heineken is also the name behind iconic cider brands including Strongbow, the UK's top selling mainstream cider, and Bulmers, the UK's top selling premium cider. The Respondent explains that the breadth and quality of this portfolio means that it has a leading "offering" of cider and beer in all categories. In this respect it considers it is in a unique position as a brewer pub-owing company and its position is markedly different as compared to the other brewer POBs which have a much more limited range of products.

32. It is explained that, the Respondent offering a top selling beer or cider in almost every category of product, its stocking requirement clause reflects this, is logical, and is entirely within the letter and spirit of section 68(7). I fail to see, however, how the statutory interpretation of a stocking requirement could be affected by the business model and success of a particular brewing POB seeking to impose such a term, and could vary depending on the identity of that POB. I consider the fact of the Respondent's broad portfolio to be of particular relevance in considering whether a proposed stocking requirement is unreasonable (and therefore non-compliant), rather than as a factor in interpretation of the statute.

The Respondent disputes that a test of reasonableness applies, and I now consider the point.

Does a Stocking Requirement have to be reasonable?

33. The Respondent asserts in its Reply that the stocking requirement, as set out in section 68(7), stands alone and is not subject to the reasonableness test which is set out in section 43(4)(a)(iii). The Respondent was not permitted to raise new issues in its Reply and did not seek permission to amend its Statement of Defence to include this and the Claimant has not had the opportunity to respond in pleadings to this argument. For this reason I am entitled to disregard an argument that a reasonableness test does not apply to a stocking requirement.

34. I would be satisfied in any event that the Respondent's position is wrong. It is not advanced with more than a bare assertion, but on a plain reading of section 43(4)(a), 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.

35. Therefore, though the Respondent is correct in observing that there is no qualification on the right to restrict sales of competing beers and ciders, the restrictions cannot be unreasonable. I refer to my comments in my previous Award as to the way in which unreasonableness must be understood in light of the Pubs Code core principles. There is no reason why the existing contractual relationship between the parties must be an irrelevant factor in deciding what is reasonable in all of the circumstances. I refer to the advice issued by myself and the PCA, Mr Paul Newby, on 2 March 2018 under section 60 of the 2015 Act on MRO compliant tenancies, which is entirely reflective of my decision in my previous Award in the present case, and I am mindful of the limited negotiating power of the Claimant within the MRO process.

36. Accordingly I must consider whether the terms of Schedule 5 (whether or not they meet the definition of a stocking requirement) are reasonable. The Respondent

submits that it is important to consider the policy intent behind the stocking requirement, and the breadth and quality of the Respondent's portfolio of beer and cider. I do not disagree that these matters may be of relevance.

Are the proposed stocking requirements reasonable?

Reasonableness Generally

37. A stocking requirement must be reasonable to be MRO-compliant, and as explained above reasonableness will be determined having regard to all the circumstances of the case. I am determining this dispute only on the basis of the evidence and argument put before me in this individual case. I have considered the legislative intention and the fact that the Respondent offers a particularly broad range of beer and cider products. However, the consideration of reasonableness is not confined to these matters. In particular, the nature and trade of this pub will also be a consideration. What is a reasonable stocking requirement for one pub may not be a reasonable stocking requirement for another pub in another location, operating in a completely different market, with a different offer and clientele. The Respondent's case relies on the range of its own portfolio of products, which is relevant, but what it has not sought to do is to understand the particular market factors affecting *this* pub, and address whether the requirements are reasonable for its particular circumstances.

38. If the test of reasonableness applies to a stocking requirement, the Respondent's position is that the terms of the existing lease are not relevant to that test. However it has not analysed why it should be that the trading arrangement between the parties to the lease of this Pub, in existence for over 10 years, should not be relevant to considering the reasonableness of the new trading arrangements. It seems to me clear that the offer the Pub has made available over the period of the existing lease, as a result of its terms and the products made available under the tie, will have had an effect on the trade and goodwill it has built up. To prevent or restrict it from stocking products (or the amount of product) it has been selling under its tied deal could logically present a risk to the business which the Respondent has not demonstrated to be reasonable, or even

given reasons for. Clearly, the type of trading arrangement is new, but customer expectations and demand at this Pub during the tied arrangement are not. A brewer POB which seeks to impose a stocking requirement but, in response to a substantive challenge to reasonableness, cannot show that it has considered whether it is reasonable for the particular pub in question will not satisfactorily be able to explain why the term can be reasonable in all of the circumstances.

Paragraph 3

39. Being a prohibition on stocking competitor cask ales in conflict with Parliamentary intention, and not within the definition of a stocking requirement, I am satisfied that Paragraph 3 of Schedule 5 is unreasonable and therefore non-compliant in all of the circumstances, which include the matters discussed below.

40. The Claimant states that in relation to keg beers it currently dispenses eight products under the tied lease, five of which are owned by Heineken and three of which are not. This, it states, equates to 62.5% Heineken products. The Respondent in seeking to impose 100% of Heineken keg products on the Claimant, the latter's position is that this puts it in a worse position than at present. However, the Respondent disputes this – listing the eight keg brands currently sold, and stating that only one of these (Guinness) is not a Heineken brand. The Respondent is of the view that the Claimant may in error have classified Theakston as a non-Heineken brand (two of the keg brands currently sold by the Claimant are Theakston products). However, it clarifies that Heineken has significant equity in this brewer and therefore would class its products as Heineken brands for the purposes of the stocking requirement.

41. The Respondent in merely referencing its significant shareholding in Theakston, has not sought to assert, or produced evidence to show, that Theakston is its "group undertaking", such that it falls within the definition of a Landlord Keg Brand (which is defined in Paragraph 2 of Schedule 5 as "any brands or denominations of Keg Brands which are manufactured by the Landlord or a Group Company of the Landlord (including Heineken UK Limited) …". A "Group Company" is defined in Clause 1.1 of the proposed 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). That section of the Landlord and Tenant Act 1954 provides that for two companies to be members of the same group one must be the subsidiary of the other or both must be subsidiaries of a third company.

42. Therefore the Respondent has not satisfied me that Theakston is a Landlord Keg Brand, and I find as a fact that it is not. Therefore according to the proposed Paragraph 3 of Schedule 5 it cannot (unless the Respondent exercises its absolute discretion to allow it) be stocked by the Claimant. It is therefore the case that Paragraph 3 (subject to the Respondent's absolute discretion) places a much greater restriction on the Claimant's ability to stock and sell keg brand beer than in practice it places under the tied lease at present. Under the terms of the Sixth Schedule of the existing lease, the tenant must purchase its drinks from the landlord's Price List. I have not been provided with this Price List, but there appears to be no dispute that it contains items produced both by the Respondent's group of companies and by other companies.

43. The Respondent has not explained why it considers it reasonable to place greater contractual restrictions on the Claimant than under the existing lease. It may be that the Respondent is indicating it would exercise that discretion in respect of Theakston, in particular because of its own financial interest in that brand, but the decision it states it would currently make in its absolute discretion is not in my view a matter relevant to the reasonableness of the proposed lease term (and such decision could change with a change in the level of the Respondent's financial investment in Theakston or a competitor brand).

44. In relation to keg ciders, the proposed tenancy requires 100% of keg brands stocked to be Heineken. The Claimant however states that it wishes to have the freedom to stock real cider as recognised by CAMRA, the Campaign for Real Ale. The Respondent considers the term "real cider" requires clarification and the Claimant has produced copy pages from the CAMRA website about real cider and perry. The Respondent also asserts that its brand portfolio contains ciders which potentially fall within the category of real cider, but as it produces no evidence of this I have disregarded its claim. The Respondent relies on its

absolute discretion under the proposed lease terms to allow the Claimant to stock keg brands other than Heineken. However, it does not explain why it is reasonable that the Claimant should have no absolute right to stock real cider. For all of these reasons, Paragraph 3 is not MRO-compliant.

Paragraph 4

45. In relation to cask ales, the Claimant states that the Respondent offers on average [redacted] cask ales each month, including many of Heineken's rivals. The Respondent states that the Claimant has never expressed dissatisfaction with its current offering of products, or said that it is losing custom due to the range of products on offer. That, I believe, is of assistance to the Claimant's case. Of those [redacted] cask ales, it is not disputed there is currently no stipulation under the tied lease that any of them purchased need to be produced by Heineken-owned breweries. However, the terms of the proposed lease require 60% of the total volume of cask ales to be comprised of the Respondent's brands, and I accept the Claimant's case that this represents a greater restriction on the range of cask products that can be sold than is in place at present. Notably, the Respondent does not dispute that the requirements are more restrictive.

46. In the absence of explanation by the Respondent as to why it considers it is reasonable, given the trade at this particular pub, to impose what in practice are increased restrictions, I find the terms of Paragraph 4 are unreasonable. 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.

Paragraph 5

47. Though the Claimant's case is that the proposed stocking requirement, looked at as a whole, has the effect of restricting the brands which can be stocked when compared to the existing lease, its position specifically in relation to Paragraph 5 is unclear as it makes no specific challenge to these terms.

48. In terms of bottled beer and cider the Claimant must stock and offer for sale at least two of each of Heineken's own bottled beers and ciders but has freedom to stock and sell any competitor products beyond this and can stock competitor products in up to 50% of the fridge shelf space.

49. The Claimant does not provide argument that the proposed term is unreasonable based on the existing trading arrangements at the Pub, or for other reasons. Where a substantive issue of unreasonableness is not made out by a Claimant it is proper for me to dismiss the ground of dispute. I find that, in the absence of an argued and evidenced case, the provisions of Paragraph 5 of Schedule 5 are a reasonable and compliant stocking requirement.

Next Steps

50. The outstanding Schedule 2 issue is to be determined after consideration of the need for expert evidence and will be the subject of a separate award.

Costs

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

Operative Provisions

52. In light of the above and the findings in my previous Award:
    52.1. The Second Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant;
    52.2. The revised response must be provided to the Claimant within 21 days of the date of this Award;
    52.3. Costs are reserved.

Arbitrator's Signature

Date Award made **13 March 2018**

Claimant's Ref: ARB/17/HELLIWELL

Respondent's Ref: ARB/17/HELLIWELL