IN THE MATTER OF **Ref: ARB/17/DOYLE**

THE PUBS CODE ARBITRATION BETWEEN: -

CORRECTED AWARD PURSUANT TO ARTICLE 38(2) OF THE CIArb ARBITRATION RULES

ELIZABETH DOYLE

Claimant

-and-

PUNCH PARTNERSHIPS (PTL) LIMITED

First Respondent

STAR PUBS & BARS LIMITED

Second Respondent

Award

Summary of Award

The Proposed Tenancy is not MRO-compliant, and therefore the POB has failed to comply with the duty imposed on it under regulation 29(3)(b). The POB must therefore give a revised response which is MRO-compliant on terms to be determined by the arbitrator.

The Proposed Tenancy is not compliant because:

- It has not been shown to be on common terms
- It has not been shown to be on reasonable terms

- Reasonable terms as to dilapidations under the existing tenancy are absent.

Introduction

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 ("**the Pubs Code**") and paragraph 5 of Schedule 1, Part 1 of the Small Business, Enterprise and Employment Act 2015 ("**the 2015 Act**").

Procedure

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

3. This referral was made on 7 May 2017. Directions were issued for the management of the proceedings and each party has had the opportunity to put forward its statement of case and documentary evidence. I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 6 February 2018. The parties having been unable to agree a list of the issues in dispute in respect of which they sought my determination, in response to my direction on 3 April the parties subsequently agreed the specific terms of the proposed tenancy which are in dispute. These are:

    a. Definition of "Deposit" (Clause 1.2)
    b. Definitions of "Superior Landlord" and "Superior Lease" (Clause 1.2)
    c. Insurance charge (Clause 1.2 and Schedule 5, paragraph 3)
    d. Quarterly payment of rent (Clause 2.1.1)
    e. Rent deposit (Schedule 6, paragraph 8.3.7)

4. Certain essential documents not having been produced in evidence, on 24 May 2018 the Respondent produced the draft MRO lease offered to the Claimant and the documentation issued to accompany it, as well as the original lease and deed of assignment. Neither party has requested an oral hearing, and I have considered it appropriate to determine this matter on the documents alone.

5. It is disappointing to note that the issues in dispute do not seem to have been narrowed in any meaningful way since the Statement of Claim was filed. There is a statutory duty upon the parties to seek to negotiate an MRO compliant tenancy, and the PCA expects parties will continue to negotiate after a referral has been made in order to try and resolve issues without the need for an arbitral award, or at least to narrow the scope of the issues which the arbitrator must determine.

The Parties

6. The Claimant is Mrs Elizabeth Doyle of 1 Military Road, Heddon on the Wall, Newcastle NE15 0BQ and is the TPT of the Three Tuns ("the Pub") as assignee of the leasehold interest in a lease for a term of 20 years from 1 October 2002 granted on that date. The First Respondent is the landlord of the Pub, Punch Partnership (PTL) Limited. At the time of this referral, Punch Partnership (PTL) Limited was owned by Punch Taverns Plc, and so referral was initially made against Punch Taverns Plc as the POB. On 29 August 2017 Punch Partnership (PTL) Limited was purchased by Heineken UK Limited. The relevant POB is now Star Pubs & Bars Limited, which operates Heineken's pub portfolio, and Star has been added as Second Respondent for the purposes of enforcement.

7. The Claimant is represented by Mr Phil Doyle of 1 Military Road, Heddon on the Wall, Newcastle NE15 0BQ. The Respondents are represented by DLA Piper.

The Issues

8. On 3 April 2017, the Claimant gave the Respondent an MRO Notice in relation to the Pub. On 26 April 2017 the Respondent purported to send to the Claimant a "full response", in accordance with regulation 29(3) of the Pubs Code and including with its response a proposed tenancy (the "Proposed Tenancy") which is the subject of this dispute.

9. The Claimant considers that the Proposed Tenancy is not "MRO compliant" and has therefore made a referral to the Adjudicator pursuant to regulation 32(2), whereas the Respondent contends that it is "MRO compliant".

10. Specifically, the Claimant alleges that the individual terms in the Proposed Tenancy set out above are unreasonable – in that they fall foul of section 43(4)(a)(iii) of the 2015 Act – because of the adverse effect they would have on her, because they differ from the terms of the current lease and because they are not common in free of tie agreements. Further, the Claimant alleges that insistence of the use of a new lease by the Respondent, as opposed to the use of a deed of variation ("DOV") to the Claimant's current lease, is unreasonable in of itself.

Legal Reasoning

11. This case involves issues which have repeatedly arisen in Pubs Code arbitrations in respect of MRO full responses. They are complex legal issues, and for the sake of clarity and readability I have structured this award by stating in summary here certain conclusions on the law and facts that I have reached, whilst including in the appendices to this decision the full legal reasoning underpinning my conclusions. In March 2018 the PCA published an Advice Note on MRO Compliant Proposals, which is consistent with the conclusions that follow.

12. As a matter of law either a DOV or a new lease can be the vehicle for a compliant MRO proposal. The legislation requires the MRO proposal served by the POB to be compliant. There will be more than one way of achieving that and it is for the POB to make a reasonable choice as to the vehicle and choice of terms. It is permissible (but not necessary) for the POB to offer wholly new terms, but only where all terms and conditions are compliant in the particular case.

13. There is nothing in the legislation which restricts the POB to making only the minimum changes to the existing lease to make it compliant – the terms of the MRO tenancy do not by law have to be the same or substantially the same, but they must be reasonable. The existing lease terms are not the necessary starting point. The existing lease terms are not however an irrelevant consideration and on a case by case basis there may be reasons why they should be taken into account.

14. The proposed terms must not be uncommon in free of tie agreements. In addition to this, the terms must not be unreasonable when looked at individually and in combination in the proposed tenancy. Terms and conditions must be reasonable for both parties.

15. In considering whether the proposed terms and conditions are not unreasonable the core Pubs Code principles should be taken into account, and this means among other things that the POB cannot take advantage of the TPT's lack of negotiating strength – it must act as if it was seeking to agree a FOT tenancy with a tenant in the market (a new tenant, or an existing tenant the POB was motivated, not forced, to release from the tie). Reasonableness also means that the POB cannot offer unattractive terms and conditions if the intention in doing so is to persuade the TPT to stay tied, and if it chooses a new tenancy instead of a DOV it must have a good reason for that choice. The POB is expected to engage in reasonable and fair negotiations. Referral for arbitration should be the exception.

16. In the present case the Claimant argues that on its true construction the legislation requires that the MRO lease should be on the existing terms varied only to the minimum extent necessary to ensure compliance. The Respondents argue that the legislation requires the vehicle for the MRO compliant proposal to be a new lease. For the reasons fully set out in the attached appendices I am satisfied that both parties are wrong in law.

This MRO Proposal

17. There is no evidence in the present case that any Respondent has prior to the offer or subsequently properly applied its mind to whether the proposed terms are reasonable, including compliant. Nothing that is before me in evidence suggests that the Respondents have considered whether the terms proposed were reasonable in the circumstances of this particular case. It is not apparent that it had sought to identify whether it was proposing terms which were common in the tie free market, both individually and collectively, such that it had a substantive basis for considering that these terms were common. If it had such a basis, it has

chosen not to explain it to me. There is nothing that indicates that the terms have been negotiated to a reasonable level overall in this particular context.

18. The parties had the opportunity to seek permission to rely on expert evidence, but neither has done so. The Respondents have not sought to rely on any expert evidence to show the proposed terms are common in free of tie agreements. They have also not sought to rely on any witness evidence to demonstrate what process was applied to considering and producing terms which were reasonable in this case. The only evidence on which the Respondents rely is three undated template free of tie leases, produced without explanation, analysis or argument, from:
    a. Punch Partnerships
    b. Enterprise Inns Plc/Unique Pub Properties Limited
    c. Wellington pub company

19. What reliance the Respondents seek to place on these documents, what they are considered by the Respondents to evidence, and what conclusions I am invited to draw from them is not explained.

20. In the event that they are produced in order that I should conduct my own analysis of them to identify if the disputed terms are within them, this is not made clear. Furthermore, it is not my role to conduct such analysis on behalf of the parties. In any event, these undated template leases on their own are incapable of demonstrating that the proposed terms are common in the free of tie market (if that is the purpose for which they are produced). There is no evidence of the frequency or period of use of the leases produced, or how prevalent they are in the free of tie market as a whole.

21. There is also no reasoning put forward by the Respondents for the choice of a new lease over a DOV as the vehicle for delivering the MRO tenancy. The Claimant's arguments on this point are in part incomplete – the claims that the grant of a new lease could give risk to higher registration and other administrative costs than a DOV are put forward as unevidenced and unsubstantiated assertions. However, in response to the Claimant's assertion that the grant of a new lease would give rise to a liability for Stamp Duty Land Tax ("SDLT") whereas a DOV would not (the Claimant was advised in the MRO proposal that SDLT would be £514), the Respondents state that the Claimant has taken no account of the availability of overlap relief. However, as the lease was granted prior to 1 December 2003, when SDLT came into existence, it is my understanding (though not referenced by the parties) that overlap relief would not be available.

22. It is not clear from the evidence from the Respondents that they have adequately addressed the impact of the new lease on the TPT in relation to SDLT. In my view a properly engaged and motivated POB would ensure that it understood at least in broad terms the approach to SDLT liability that would fall upon the TPT and factor that into their considerations of their proposal before issuing it.

23. In response to the PCA Advice Note on MRO Compliant Proposals, the Respondents did not seek to make further submissions in line with the PCA's

expectations that it would show fair reasons for the choice of MRO vehicle and terms.

24. The level of preparedness in this case of the Respondents to demonstrate to me that the statutory test of compliance has been met is very poor, and this causes me concern, particularly in light of the fact that the legislation does not provide for backdating of the MRO terms and rent. Such is the concern over the lack of evidence produced and the approach of the POBs to compliance and arbitrations, the PCA is actively taking further steps in its capacity as regulator to enforce informed and improved practices on the part of the POBs in the issuing of compliant MRO proposals.

25. The Claimant also produces in evidence two free of tie leases (an unsigned 2010 Enterprise Inns Plc lease and a 2010 DOV for a southwest London pub removing the tie provisions and varying the provisions for rent review), but without explaining to me what I am to draw from them. I cannot conduct analysis and presentation of evidence on her behalf. If the latter document is produced to show an available means of releasing the tie, that fact itself does not go to show that the MRO proposal is non-compliant.

Presentation of the MRO Proposal

26. On 26 April 2018, my office wrote to the parties asking that I be provided with a copy of every document which was sent to the Claimant with the proposed MRO lease (including any covering letters). In response to this, on 24 May 2018 the Respondents provided a copy of the draft lease and a leaflet entitled "MRO Cost Comparison" which stated that it set out "What leaving the tie would mean for your pub". It is not convenient to set out in this decision the full text of this leaflet, but it is safe to say that it represents a one-sided assessment of the considerations affecting a tied tenant choosing whether to go free of tie.

27. The leaflet does not mention credit checks, the production of a business plan, and the provision of all statutory compliance certification which have been raised by the Claimant. I therefore assume that there may be further correspondence which I have not had sight of. I note that the Respondent does not deny that it put in place these requirements, save that it states it will not require a business plan.

28. I am aware from information received by the PCA as regulator that this documentation provided by Punch Taverns Plc, as owner of Punch Partnerships (PTL) Ltd. at the time of issue of the proposal, has since February 2018 no longer been in use, and that the Second Respondent does not issue the MRO proposal with similar unbalanced information.

29. By virtue of its acquisition of Punch Partnerships (PTL) Ltd., Star Pubs and Bars Ltd. has brought around 1900 pubs into its estate. All MRO cases in which the Respondents are a party, within and outside arbitration, must be reviewed to ensure that TPTs are receiving consistent and compliant information about their Code rights in relation to the MRO and the Second Respondent must satisfy itself that it is not relying on old forms of documentation across its estate.

Dilapidations

30. At Paragraph 13(4) of the Statement of Claim, the Claimant states that a new lease would result in the Claimant being "exposed to the risk of an immediate claim for dilapidations whereas no such risk would exist if the Lease was varied". The Respondents' only submission on this point (at Paragraph 15.4 of the Statement of Defence) is "This is correct."

31. I have been provided with a Schedule of Dilapidations prepared for the premises which sets out that the total cost of works is £27,555.84. It does not appear to be disputed that as a consequence of the choice of a new lease as the MRO vehicle, that the dilapidations covenant in the existing lease will be triggered as a matter of law on its termination.

32. The leaflet sent to the Claimant with the MRO proposal confirms that cost of dilapidations under the current lease will be payable on day one of the new lease (cost to be confirmed). In stark contrast, this is compared with the situation if the existing tenancy was continued: "Cost of dilapidations as identified under your tied agreement (spread over the remaining term of your agreement)."

33. Under the present lease repairing covenants are imposed on the tenant. Dilapidations represent the cost of complying with those lease covenants (subject to any applicable limit on them). Dilapidations claims are limited by law so that the landlord cannot claim terminal dilapidations for amounts that exceed the extent to which the value of the landlord's interest in the property is diminished by the repair.

34. In the absence of an express release the TPT will remain liable for breaches of repairing covenant which arise before the surrender. It would be open to the Respondents, instead of insisting on immediate payment of dilapidations upon the surrender of the existing lease to deal with the matter in the terms of the new lease in preserving the landlord's right in respect of the breaches but mitigating the impact of the dilapidations liabilities. The fact that it has not chosen to do so is unexplained.

35. A reasonable landlord should manage its estate responsibly throughout the term. The landlord should not be using surprises on the request for an MRO option as an adversarial weapon. There is no evidence of enforcement of repairing covenants under the existing lease.

36. If a POB seeks to use a new lease as the MRO vehicle, when a DOV might not have given rise to the same impact, it is appropriate for the POB to consider whether in the circumstances fair dealing requires it to mitigate the impact of its choice of vehicle in an appropriate way so as to make that choice reasonable. If it is a logical assumption that a tenant with more bargaining power than this Claimant would negotiate with the landlord to carry out the repairs over a reasonable period, a POB which refuses to do that now may be acting in a

manner that is inconsistent with the principle of fair dealing and giving rise to unreasonable terms and conditions.

37. If the Pub is not to revert to the landlord until the end of the new lease term, it is not clear why it insists on the cost of terminal dilapidations now (other than because it can as a matter of law). I can find no good reason in the evidence, and I conclude that the Respondents have not, either at the time of service of the MRO proposal or since, adequately turned their mind to a fair approach to dilapidations at the end of the lease. As such, the proposed MRO tenancy is on unreasonable terms and conditions in failing to make fair provision.

38. It is my understanding that now neither the original nor current POB Respondent expects completion of all dilapidations prior to the grant of an MRO tenancy. Given that the POB has a duty to seek to agree terms of a compliant MRO proposal I would have expected the Respondents to have openly altered their stance on dilapidations in this referral. Again, in all existing cases in which it is a party within and outside arbitration, the Second Respondent must now conduct a review to satisfy itself that it has taken a reasonable and compliant position in respect of dilapidations in any offer of a MRO tenancy.

Decision

39. There is insufficient evidence from the Respondents to demonstrate that the disputed terms are common terms, both collectively and individually, in tie free agreements.

40. There is insufficient evidence from the Respondents to show that these are reasonable terms for this Pub. Even assuming the disputed terms are indeed common terms, there is no evidence that the Respondents have considered whether it is reasonable for an existing tenant to accept them. For example, there is no consideration of what terms the Respondents would offer to a tied tenant who it was motivated to release from the tie. Would it offer more favourable terms? Would it be more flexible as to quarterly rent and deposit?

41. Even if the terms around deposit and quarterly rent payments are common in free of tie lease, such terms are serious financial commitments. The Claimant has a statutory right to go free of tie and the Respondents cannot use inaccessible entry costs as a barrier. There is no indication that the Respondents have considered whether they are reasonable for this Pub or present an unreasonable obstacle to accessing the MRO for this tenant.

42. Accordingly, I find that the terms of this proposed tenancy are not complaint.

Next Steps

43. It is necessary for me to consider what order I should make in respect of this referral.

44. Since January 2018 I have issued a number of awards in respect of referrals to the PCA under regulation 32(2)(a). Regulation 33(2) empowers me to rule on

such a referral that the POB must provide a revised response to the tied tenant, and a “revised response” is defined in regulation 33(3) as a response which includes the information mentioned in regulation 29(3)(a) to (c) (which required information includes a proposed tenancy which is MRO-compliant).

45. The power in regulation 33(2) is not prescriptive. It does not restrict the nature of the ruling which I may make. The Respondents have made no submissions as to the extent of my power under regulation 33(2). The Claimant has not produced precise terms for a revised proposed lease and it would be impossible for me on the current evidence to determine compliant alternative terms which I could lawfully order should form part of the revised response.

46. Having determined the issues in dispute between the parties, the revised response should be such that further disputes as to the compliance of the revised proposal do not arise. Based on my experience, where I find an MRO proposal to be non-compliant and direct a revised response without specifying its precise form, there is the risk of ongoing disagreement between the parties about interpretation of my award.

47. The legislation, and the MRO Advice Note, make clear the expectation that parties will seek to negotiate mutually acceptable lease terms. In other cases, where I have found an MRO proposal non-compliant but considered on the particular facts of a case that the parties should enter into final negotiations to seek to agree compliant terms, there being a reasonable prospect of such negotiations being successful, I have expressly retained jurisdiction to determine those terms if not agreed.

48. I now need to consider the appropriate exercise of my powers under regulation 33(2) in this particular case. Being responsive to learnings from my role as arbitrator and there being no indication of open concessions or meaningful negotiations by the Respondents, in the circumstances of the present case I consider that the appropriate course of action is for me to proceed to determine the complete terms of a compliant MRO proposal such that my ruling under regulation 33(2) can be for the POB (now the Second Respondent) to provide a revised response in the precise terms that I shall order. Article 29 of the CIArb Rules and section 37 of the Arbitration Act 1996 empower the arbitrator to appoint experts and legal advisors to assist the arbitrator in making decisions. I will need expert assistance in order to be in a position to determine MRO-compliant terms in this case.

Costs

49. Issues as to costs of the arbitration are reserved pending the parties’ opportunity to make submissions as to costs.

Operative provisions

50. In the light of the above:
    a. Determination of MRO-compliant terms to be made by the arbitrator.

b. The Second Respondent is ordered to provide a revised response to the Claimant within 28 days of the arbitrator's determination of its terms;

c. The Second Respondent must notify the PCA when it has complied with the requirements in paragraphs 29 and 38.

d. Directions to be issued for the purpose of determination by the arbitrator of compliant MRO terms.

e. Costs are reserved.

Arbitrator's Signature …… ……

Date Award made ……09 November 2018 ……

Claimant's Ref: ARB/17/DOYLE

Respondent's Ref: ARB/17/DOYLE

Appendix 1 – Applicable Law

1. Section 42 of the 2015 Act makes provision for the Secretary of State to make regulations about practice and procedures to be followed by POBs in their dealings with TPTs, to be referred to as "the Pubs Code", and subsection (3) provides:

> *The Secretary of State must seek to ensure that the Pubs Code is consistent with –*
>
> *(a) the principle of fair and lawful dealing by pub-owing businesses in relation to their tied pub tenants;*
>
> *(b) the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.*

2. Section 43 of the 2015 Act provides that the Pubs Code must require POBs to offer TPTs (defined as a tenant or licensee of a tied pub) a market rent only option ("an MRO option") in specified circumstances.

3. Subsections (2) to (5) of section 43, being those relevant to the matters at issue, provide:

> *(2) A "market rent only option" means the option for the tied pub tenant –*
>
> *(a) to occupy the tied pub under a tenancy or licence which is MRO-compliant, and*
>
> *(b) to pay in respect of that occupation –*
>
> *(i) such rent as may be agreed between the pub-owing business and the tied pub tenant in accordance with the MRO procedure (see section 44), or*
>
> *(ii) failing such agreement, the market rent.*
>
> *(3) The Pubs Code may specify –*
>
> *(a) circumstances in which a market rent only option must or may be an option to occupy under a tenancy;*
>
> *(b) circumstances in which a market rent only option must or may be an option to occupy under a licence.*
>
> *(4) A tenancy or licence is MRO-compliant if—*
>
> *(a) taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence it—*
>
> *(i) contains such terms and conditions as may be required by virtue of subsection (5)(a),*
>
> *(ii) does not contain any product or service tie other than one in respect of insurance in connection with the tied pub, and*
>
> *(iii) does not contain any unreasonable terms or conditions, and (b) it is not a tenancy at will.*
>
> *(5) The Pubs Code may specify descriptions of terms and conditions*
>
> *(a) which are required to be contained in a tenancy or licence for it to be MRO-compliant;*

(b) which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).

4. Regulation 23 of the Code provides for the TPT to give the POB an MRO notice where a specified event occurs. Where the POB agrees that the TPT's description in the notice demonstrates that a relevant event has taken place, pursuant to regulation 29(3) the POB must send the TPT a statement confirming its agreement and, where the MRO notice relates to a tenancy or licence, a proposed tenancy or licence respectively which is MRO-compliant.

5. So far as is relevant, regulations 30 and 31 of the Code provide:

Terms and conditions required in proposed MRO tenancy

30 - (1) Paragraph (2) applies where –

(a) a tied pub tenant is subject to a tenancy ("the existing tenancy") granted by the pub-owning business;

(b) the tied pub tenancy gives an MRO notice to the pub-owning business; and

(c) the pub-owning business sends a proposed tenancy ("the proposed MRO tenancy") to the tied pub tenant as part of a full response under regulation 29(3) ….

(2) Where the MRO notice states that the event specified in regulation 24, 25 or 27 has occurred, the proposed MRO tenancy is MRO-compliant only if it contains provisions the effect of which is that its term is for a period that is at least as long as the remaining term of the existing tenancy.

Terms and conditions regarded as unreasonable in relation to proposed MRO tenancy etc.

31 – (1) Paragraph (2) applies where—

(a)a tied pub tenant is subject to a tenancy ("the existing tenancy") granted by the pub-owning business;

(b)the tied pub tenant gives an MRO notice to the pub-owning business; and

(c)the pub-owning business sends a proposed tenancy ("the proposed MRO tenancy") to the tied pub tenant as part of a full response under regulation 29(3) or a revised response under regulation 33(2) or otherwise during the negotiation period.

(2) The terms and conditions of the proposed MRO tenancy, taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy, are to be regarded as unreasonable for the purposes of section 43(4) of SBEEA 2015 if they-

…

(c) are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.

(3) Paragraph (4) applies where—

(a) the conditions in paragraph (1)(a) to (c) are met, and

(b) the existing tenancy is a protected 1954 Act tenancy.

(4) The terms and conditions of the proposed MRO tenancy, taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy, are to be regarded as unreasonable for the purposes of section 43(4) of SBEEA 2015 if they exclude the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to the proposed MRO tenancy.

Appendix 2 –

Unreasonableness

The terms and conditions must not be unreasonable overall. Uncommonness is merely one way in which terms can be unreasonableness.

1. Pursuant to section 43(4) an MRO-compliant tenancy cannot contain any unreasonable terms or conditions. Regulation 31 of the Code makes provision for certain terms and conditions which will automatically be unreasonable, amongst them (under paragraphs (2)(c)) terms which are uncommon in tie free leases.

2. It is necessary first to consider whether the terms set out in that regulation are an exhaustive list of all unreasonable terms and conditions, but it is clear from a straightforward reading of the legislation that they are not and are merely particular examples of unreasonable terms. Section 43(5)(b) is a power not a duty, and section 43(4) renders a tenancy non-compliant for any unreasonable terms or conditions in any event, notwithstanding that the Secretary of State might not have chosen to exercise that power to specify descriptions of terms and conditions to be regarded as reasonable or unreasonable. It is still necessary for all terms and conditions in the proposed tenancy to be reasonable in a broader sense.

3. Therefore, determining MRO-compliance is not simply a question of looking at each individual term to decide whether it is uncommon for the purposes of regulation 31, but whether the proposed MRO tenancy contains terms or conditions which are unreasonable. The term or conditions of a lease may be unreasonable by virtue of words which are not included, and not just those that are.

The terms and conditions must not individually and collectively be unreasonable

4. Furthermore, it is not the case that the language of the 2015 Act and Pubs Code requires consideration of each proposed term or condition in isolation. A judgement as to whether an individual term or condition is unreasonable may be affected by the other terms and conditions of the proposed tenancy. Two or more terms and conditions together may render the proposed tenancy unreasonable, for example, where they are inconsistent with each other, or where their combined effect is too onerous for the tenant. Indeed, this is reflected in the normal course of negotiations between parties in the market, in which a tenant may not look at each term or condition in isolation to decide if it is reasonable. A tenant may consider that a number of terms together in a lease may make the proposed terms unreasonable. There may be some particular terms which are make or break, but often some terms objected to may be rendered acceptable by virtue of concessions elsewhere in the negotiation. It is necessary therefore to consider not just whether the individual terms are unreasonable, but also whether that test applies to the proposed lease as a whole.

5. Thus, for example, the payment of an increased deposit, rent in advance and payment of insurance annually in advance would constitute additional costs to the tenant. Other cost considerations at entry may be legal fees and the payment of dilapidations. Where costs, including entry costs, are excessive in total, but negotiated to a reasonable overall, it may not be correct to focus on an individual term or condition in isolation to and decide if that cost is or is not reasonable – it may depend on the context.

6. A tenancy will not be compliant if its terms and conditions, individually or collectively, are unreasonable. That this is the correct approach to considering whether proposed lease

terms are uncommon is furthermore clear from the wording of regulation 31(2), which refers to terms and conditions only in the plural. Therefore, this regulation requires consideration of whether the agreement as a whole is one which is not common in tie free agreements.

The choice of vehicle for delivering the MRO cannot be unreasonable

7. Section 43(4) refers to a tenancy being MRO-compliant if "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owing business in connection with the tenancy or licence" it does not contain any unreasonable terms and conditions pursuant to subsection (iii). There is no necessity to restrict the interpretation of "contained" to the express terms of the proposed tenancy document alone. This is broad enough to encompass the requirement to enter into a new tenancy. Therefore, the choice of vehicle is subject to a test of unreasonableness.

8. The question of whether the choice of MRO vehicle is unreasonable can correctly be analysed in both of the following two ways. Firstly, the lease terms individually and collectively cannot be unreasonable, and if they are in the form of a new lease which unreasonably imposes an excessive burden on the TPT, then those terms can be unreasonable and non-compliant. Secondly, the fact that the POB offers the proposed MRO tenancy only by way of new lease can amount to an implied condition (precedent) in the lease, in that the MRO option can only be exercised if the TPT agrees to a new lease. The method of delivery would on that analysis be a term or condition which, if challenged by the TPT, falls for consideration under section 43(4) of the 2015 Act and may be unreasonable if there is no good reason for any resulting disadvantage imposed on the TPT (while noting that it is only uncommon terms, not uncommon conditions that fall foul of the wording of regulation 31(2)).

Unreasonableness - meaning

9. The legislation imposes on the POB a statutory duty to serve on the TPT a proposed tenancy which is compliant. Accordingly, it is for the POB to make the choice of terms and vehicle, and that choice must not be unreasonable in the particular case. Communicating those reasons will help to avoid disputes and is consistent with the fair dealing principle.

10. In determining what is unreasonable, it is apparent that there is nothing in the statutory language which requires the meaning of that term to be determined only in light of open market considerations which would affect two unconnected parties entering into a new FOT lease. A term will be judged to be unreasonable or not based on all of the circumstances, as they are known (or ought to be known) to the parties, and each case will turn on its own facts. While a POB might achieve some certainty that particular lease terms are common in the tie free market, what is reasonable in one case for one particular pub may not be reasonable for another.

11. It is necessary to consider whether there is statutory guidance which assists in applying the test of unreasonableness. The starting point to understanding the Pubs Code and the statute which enabled it is the core principles, found in section 42 of the 2015 Act. Parliament's instruction to the Secretary of State in making the Pubs Code (which includes particular examples of unreasonable terms and conditions made pursuant to a power in the 2015 Act) is that she/he must seek to ensure that it is consistent with those principles.

12. The core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise

of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the Pubs Code (including any regulations made under the power delegated in section 43(5)) are to be interpreted as consistent with the two core principles, if the provisions in the 2015 Act (in this case, as to reasonableness in section 43(4)(a)(iii)) are not, there would be a fundamental incompatibility between these instruments. Were the language in the 2015 Act and Pubs Code not consistent with these principles, the Secretary of State would not have enacted the Pubs Code in its current form.

13. It is proper to conclude therefore that the Pubs Code and s.43(4)(a)(iii) of the 2015 Act, read together, can be interpreted in a manner consistent with the principles of fair and lawful dealing by pub-owing businesses in relation to their tied pub tenants and that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie. If it is necessary to call statutory interpretation principles in aid, this is a purposive approach. Thus, these principles are relevant to my understanding of what terms and conditions may be "unreasonable", and some consideration is appropriate as to what they might mean in practice.

The Pubs Code Principles

Fair and lawful dealing

14. Its long title states that the 2015 Act is "to make provision for the creation of a Pubs Code and Adjudicator for the regulation of dealings by pub-owing businesses with their tied pub tenants" and the Code regulations, pursuant to section 42, are "about practices and procedures to be followed by pub-owing businesses in their dealings with their tied pub tenants." The term "dealings" is not defined in the 2015 Act. I note there is some inconsistency between the Pubs Code provisions at regulations 54 and 55 (which imply that "dealings" with a TPT may take place in relation to the MRO provisions by virtue of certain exclusions provided for) and the Explanatory Note (which does not form part of the regulations).

15. Overall, there is nothing in the statutory language which excludes the POB's conduct in the MRO procedure from being "dealings" with the TPT. The meaning of the term is broad, and it is fit to encompass any of the activities in the business relationship between the TPT and POB regulated by the Pubs Code. The term references the existing commercial relationship between them and includes interactions pursuant to the current lease as well as their business practices with each other in relation to a proposed lease and more generally. The requirement that such dealings are fair means that Parliament intended that, in addition to complying with legislation and private law principles, they should be in good faith, equitable and without unjust advantage.

No Worse Off

16. The second core Pubs Code principle requires a comparison of the position of TPTs with tenants who are tie free, and the former are intended to be no worse off than the latter. It would seem to me to be a judgement of fact and degree in each case whether a TPT is worse off. That judgement would include financial matters, particularly profit, but could it seems also include considerations not directly expressed in financial terms – for example a difference in bargaining power and the reduced risk in having a tied deal, or the business support available to a TPT from a POB may be something of value for the TPT. By pursuing the MRO option, the TPT should be in the position of being able to compare, and make an informed choice between, the two options.

The Application of Pubs Code Principles

17. It is consistent with the Pubs Code principles that the proposed tenancy which is made available to the TPT through the MRO procedure is not on worse terms and conditions than that which would be made available to a free of tie ("FOT") tenant after negotiations on the open market. This is for two reasons. Firstly, if the POB was able to get more favourable terms from the TPT using the MRO procedure than it would on the open market, or than it would offer to a TPT it was motivated for business reasons, not required, to release from the tie, this would not be fair dealing. Secondly, the TPT would be worse off in having a choice to accept terms which were worse than would be available to a FOT tenant, including for example an existing FOT tenant renegotiating terms on lease renewal. In any event, these principles follow from the general concept of reasonableness, taking into account the relative negotiating positions of the parties within this statutory scheme.

18. Furthermore, the proposed new lease would be unreasonable and inconsistent with Pubs Code principles if it represented an unreasonable barrier to the TPT taking an MRO option, and thus frustrated Parliamentary intention. If the POB, in a new letting on the open market made a lease offer, the prospective new tenant would have various options available – including accepting the offer, negotiating different terms, negotiating better terms in respect of a different pub with one of the POB's competitors, or walking away.

19. The commercial relationship between the TPT and the POB on service of an MRO notice is different. The TPT (except at renewal) does not have the right to walk away or contract elsewhere. It only has the right to keep its current tied deal or to accept the offer. Even at renewal, any goodwill earned will be a relevant consideration for the tenant, as will the availability of the County Court's jurisdiction to determine reasonable terms of the new tenancy. The TPT in the MRO procedure is not in an open market position.

20. The test of unreasonableness is the counterbalance to the negotiating strength of the POB, with its inherent potential for unfair dealing towards a TPT in the MRO procedure (or any step to make the tenant worse off than if they were FOT). In addition, an attempt to thwart the MRO process by making the MRO proposed tenancy too unattractive would not be lawful dealing.

21. It must be emphasised that the existing tied deal is one to which the TPT contractually agreed. However, the occurrence of a specified event giving rise to the right to serve an MRO notice in each case is by its nature something which has affected the commercial balance of that deal as between the parties, and Parliament intended that this should give rise to a meaningful right to go tie free. The test of reasonableness requires that the POB, in offering the terms of the purported MRO tenancy, cannot take advantage of any absence of commercial bargaining power on the part of the existing TPT pursuing the MRO procedure.

22. It is in this particular context that a POB must be able to show that its choice of MRO vehicle is not unreasonable. This may be the case if there is a significant negative impact on the TPT arising from that choice, including one which operates as an unreasonable disincentive to taking the MRO option. Furthermore, the POB must be able to show that its choice of terms of the MRO tenancy are not unreasonable, and they may be if they have an impact of that nature. The choice of vehicle and proposed terms and conditions cannot be used to create an obstacle to the TPT exercising the right to an MRO option. There must be an effective choice available to the TPT.

23. Showing that the landlord's choices are not unreasonable naturally includes being able to articulate good reasons for them. This is necessary if the POB is to show it is not taking advantage of its negotiating strength. Communicating those reasons would reduce the chance of disputes (and it would support the fair dealing principle for the POB to provide those reasons alongside the MRO proposal, to aid negotiation). There must be fair reasons for the POB's choice of MRO vehicle, and fair reasons for proposing the particular terms. Where fair reasons cannot be shown to exist, the terms and conditions of the MRO proposal may be considered unreasonable and not compliant.

24. Whether the terms of the MRO proposal are reasonable will depend on the impact they have on both parties. The interests of one party cannot be considered in isolation. The consideration must be balanced and the terms, and choice of vehicle, not unreasonable when viewed from either party's perspective.

Terminal Dilapidations on surrender of the existing tenancy

25. The offer of a new tenancy by the POB instead of a variation of the existing one is therefore a choice and not a legal requirement. Where the choice of a new lease over a DOV leads to a liability on the part of the tenant to terminal dilapidations, the landlord may have to take steps to mitigate the impact of that liability if it is to show it is acting reasonably in its choice of vehicle.

26. Terminal dilapidations arise on the termination by surrender of an existing lease. There can be no real doubt however that, when the cost of dilapidations is high, the requirement for their immediate payment may represent a real disincentive to a TPT to take the MRO option. A reasonable landlord should manage its estate responsibly throughout the term. The landlord should not be using surprises on the request for an MRO option as an adversarial weapon. The need for fair dealing arises, and what is appropriate will depend on the facts of the individual case.

Appendix 3 –

Vehicle for the MRO Option

1. There has been much debate as to whether the MRO should be delivered by way of a new lease, or by way of a variation by deed of the terms of the existing lease. There is no express provision in either the 2015 Act or the Pubs Code which states that an MRO-compliant tenancy must be provided either by way of a new lease or by way of a deed of variation. Indeed, there is no express provision as to its form at all, only as to its terms.

Interpreting the Legislation

2. In interpreting legislation, it is necessary to ascertain objectively, by reference to the language used in it, what Parliament intended. That language should be given its natural meaning rather than a strained one, and background material must not take precedence over the clear meaning of the words used. Legislation should be construed according to the intention expressed in the language.

3. The word “tenancy” (in and of itself) does not gives any particular guidance; a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a new lease. The statutory language does not suggest that a new and separate agreement must be entered into. There are no clear words which would indicate this - such as the “grant” of a tenancy or its "commencement", or the “termination”, “surrender” or “end” of the existing tenancy. The language used, for example “accept” and “enter into” in regulation 39, is consistent with a new tenancy or a varied one.

4. When interpreting the Code, it is proper to have regard to the extent of the rule-making power conferred by the primary legislation. The 2015 Act requires the Code to confer on the TPT a "*market rent only option*" - Section 43(1) of the 2015 Act provides that the Pubs Code must "*require the pub-owning business to offer their tied pub tenants falling within s.70(1)(a) a market rent only option in specified circumstances*". Section 43(2)(a) provides that the "*market rent only option*" means the option for the TPT to occupy the tied pub under a tenancy or licence which is MRO-compliant. Subsection (4) specifies the circumstances in which a tenancy or licence is "*MRO-compliant*". Therefore, the definition of an MRO-compliant tenancy is set out within the 2015 Act, not the Code, other than as delegated under section 43(5), which provides for the matters in respect of the content of proposed tenancy which are delegated by the Act to the Code as follows:

   The Pubs Code may specify descriptions of terms and conditions—

   (a)which are required to be contained in a tenancy or licence for it to be MRO-compliant;

   (b)which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).

5. It is under this section 43(5) power that regulations 30 (regarding lease terms) and 31 (as to terms and conditions regarded as unreasonable) are made, and these are the only regulations in the Code that provide for the form and content of the MRO-compliant tenancy. Neither provision relates to the form or content of the proposed MRO tenancy as being the terms of a new lease or the terms of the existing tied lease varied by deed. It was open to Parliament to make further provision as empowered by section 43(5), but it conspicuously did not.

6. Section 44(1)(a) of the 2015 Act provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option*

(referred to in this Part as "the MRO procedure") …". This delegates to the Code the procedure in connection with an offer of an MRO option, and not the form or content of the proposal, which is the subject of the separate delegation in section 43(5).

7. Considering the language of the Pubs Code and looking at the way in which the term "tenancy" is used in context within the legislation does not indicate that Parliament intended the MRO option was to be implemented by the grant of a new tenancy only and not a DOV. The provisions referring to a "tenancy" include:

    1. Regulation 29(3) requires the POB to send to the TPT "*a proposed tenancy which is MRO-compliant*"

    2. Regulation 30(1)(a) and (c) refer to the "*existing tenancy*" and a "*proposed MRO tenancy*"

    3. Regulation 30(2) refers to the term of the existing tenancy and the term of the proposed MRO tenancy, which must be "*at least as long as the remaining term of the existing tenancy*". Regulations 34(2) and 37(1) refer to the *"proposed tenancy or licence".*

    4. Regulation 39(2) and (4) (dealing with the end of the MRO procedure) refer to the POB and TPT *"entering into"* the tenancy or licence.

    There is nothing in the language of these provisions that is not appropriate for the execution of a DOV.

8. Considering the following language also provides no grounds to undermine the proposition that the MRO can be the existing tenancy amended by deed:

    1. The definition of "market rent" in section 43(10) of the 2015 Act, which provides for an estimated rent based on certain assumptions, including that the lease is entered into on the date the determination of the estimated rent is made, in an arm's length transaction.

    2. Section 43(4)(a) sets out the circumstances in which a tenancy or licence is "MRO-compliant" and in doing so refers to the "t*enancy or licence" "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owing business in connection with the tenancy or licence*".

    3. Section 44(2)(b) of the 2015 Act sets out provision for a negotiation period for parties to agree rent *"in respect of the tied pub tenant's occupation of the premises concerned under the proposed MRO-compliant tenancy or licence."*

9. There is nothing in the way that the term tenancy is used in context that indicates that the MRO could only be offered by way of a new lease. There is nothing in the use of the phrases "existing tenancy" and "proposed tenancy" in regulations 30 and 31 to suggest that the existing and proposed tenancy must be different tenancies – i.e. that the latter must bring an end to the former, or that the proposed tenancy must be completely contained within a new document from that of the existing tenancy. Parliament chose not to make provision that a compliant MRO proposal must contain a new tenancy to be granted upon the surrender of the existing one, though it might easily have done so. The provisions relating to the market rent (in section 43(10) of the 2015 Act) relate to the rent under the MRO-compliant lease, but do not inform what those lease terms and conditions are.

10. Furthermore, the draftsman was alive to the need to specify a "new" MRO tenancy to distinguish it from an existing tenancy, if such need existed. This is clear from the expression "new tenancy" appeared in the Code no less than 19 times (within the definition of "new agreement", which refers only to a new tied tenancy). It would have been simple for the draftsperson to have made clear any restriction against the use of a DOV, and the

complete and consistent failure to do so in the language of the Code demonstrates plainly that no such restriction was intended.

11. That the legislation does not by implication require an MRO-compliant option to be given only by way of a DOV seems to be clear however. Regulation 30(2) provides that an MRO tenancy will only be MRO-compliant if its term is at least as long as the remaining term of the existing tenancy, and its term can therefore expire after the date of expiry of the original lease. As a matter of law, where the term of a lease is extended by way of a DOV, it operates as a surrender of the existing lease and a grant of a new lease. Furthermore, if the proposed tenancy was intended to be achieved by variation of the existing tenancy only, there would be no need for the provisions in regulation 31(3) and (4) preserving rights under the Landlord and Tenant Act 1954 where they apply to existing leases, as such protection would be unaffected. Lastly, where the existing TPT is a tenant at will (as per section 70(2) of the 2015 Act) because pursuant to section 43(4)(b) an MRO tenancy cannot be a tenancy at will, the MRO must therefore be a new tenancy.

Background Material

12. Correspondence to the then Secretary of State Vince Cable MP dated 25 October 2013, from CAMRA and others advocating the MRO option, referred expressly to the expectation that the POB would issue a DOV. This serves to illustrate that, having been specifically asked to contemplate a DOV, the Secretary of State did not make regulations which expressly prohibited it.

13. The fact that open language has been used in the Government Consultation on the new Pubs Code (October 2015) does not mean that its meaning is unclear. In fact, it is not. On the contrary, the ordinary meaning of the language is permissive of either a new lease or a lease varied by deed, and this is not a reason to look at other material to seek to interpret the ordinary meaning in a more restrictive way.

14. Such background material must not be allowed to take precedence over the clear meaning of the words used. In *Milton v DPP* [2007] EWHC 532 (Admin), Smith LJ stated at [24] (as cited with approval in *Christian UYI Limited v HMRC* [2018] UKUT 0010) that:

> *"If the meaning is clear, there is no need to delve into the policy background. If the court is uncertain as to the meaning, it may well be helpful to consider background material in order to discover the "mischief" at which the change in the new law was aimed."*

15. Section 9 of this consultation considers the powers to be delegated under section 43(5) in respect of the compliant MRO tenancies, including:

> *9.4 The Government does not propose to prescribe a model form of MRO-compliant agreement in the Code. Rather we expect MRO agreements to be modelled on the standard types of commercial agreements that are already common for free-of-tie tenants.*

16. It is clear that there was no intention to prescribe a form. An expectation as to the form is referenced which is a precursor to the commonness test in regulation 31(2)(c), the meaning of which does not require clarification by reference to this paragraph of the consultation. Notwithstanding the inclusion of the word “commercial” (which does not appear in the legislation) it is not clear that Parliament is intending to exclude a lease varied by DOV, rather than leaving the matter to the market. Given paragraph 9.4, it would be hard to rely on other parts of the consultation to show that the Government did indeed intend to prescribe that the MRO-compliant agreement could not be in the form of a tied lease with a tie release by DOV, rather than to leave it to that to the market to decide.

17. The expression “new tenancy” is not found in other paragraphs of the consultation which refer to a new (MRO) agreement, even in 9.6 and 9.8 where a tenancy has already been referred to in the sentence, and the expression “new agreement”, which is not consistently used in the consultation, is not an unequivocal marker of intention. In 6.13 a “new agreement” which will end a rent assessment does not need to be a new tied tenancy after surrender of the old. There should not be too much read into selected words of the consultation or into the Government's response to the consultation dated April 2016, where the expression “new agreement” does not occur in the context of the MRO at all.

18. Powers to make provision in relation to the MRO procedure, delegated under section 44(1), are considered in section 10 of the same Consultation:

> *10.11 However, where the tenant requests an MRO agreement, their intention is to move to a completely new form of contractual relationship with the pub-owning business. Changes to the old tied terms that occur during the MRO procedure will have no equivalent terms in the MRO agreement. It is therefore neither appropriate nor practical to alter the MRO offer to take account of the increased prices paid by the tenant during the MRO procedure.*

19. All that this means is that the “form of contractual relationship” (i.e. tie free) is new, not necessarily that the contractual documentation itself is a wholly new entity. The remainder of this paragraph deals with changes in tied terms during the MRO procedure (and not as a result of it), and the rent.

20. Looking at these passages, they are far from conclusive that only a new lease can be compliant. There is no silver bullet within them. These extracts cannot be viewed too selectively to be understood to point towards a prohibition on a DOV. These are a few of many references in the consultation documents to the MRO agreement. Read as a whole what is obviously lacking is any direct and decisive comment on the permissible vehicle for the MRO, which is consistent with an intention not to make unjustified intervention in commercial dealings between the parties.

21. There is nothing in the legislation which precludes or requires the grant of a new tenancy, and if this had been the intention of Parliament or the Secretary of State, there would be express provision to one effect or the other. Accordingly, either a DOV or a new lease (subject to its terms and conditions) is capable of bringing about an MRO-compliant tenancy.

22. It should also be observed that the legislation, however, in not prescribing the contents of the MRO-compliant tenancy except as set out in section 43(4) and regulation 31, has not expressly required that the terms of the MRO-compliant tenancy remain the same as the terms of the original tenancy, with variation only of the rent and severance of the tie. This is consistent with the MRO vehicle not being restricted to a DOV and is another matter for which there could easily have been provision if that was the legislator’s intention.

Appendix 4 – Severing the Tie and Existing Lease Terms

In law, the existing lease terms are not the necessary starting point, but they are not irrelevant in considering what is reasonable.

1. It is not enough for a tenant to assert that the existing lease (with or without minor amendments) would be sufficient. The fact that the common terms in a tied lease or by notice between a landlord and tied tenant to effect tie release would be by DOV is not the point. However, it is possible to consider whether the terms of the existing lease, including any as to the release of the tie, are relevant to the question of unreasonableness more generally. Doing so, it does not seem that the fact that many tied tenancies may contain an option for the landlord to release the tie is a helpful comparison. The option here is that of the tenant, who exercises a right conferred by statute. Many leases confer a unilateral right on the landlord, and it has an absolute choice in respect of that. There are not sufficient parallels between that and the landlord's position in the statutory scheme to make it unreasonable in all cases not to exercise that right, or to make more than the minimum changes necessary to the lease, during the MRO process. The principle of fair dealing cannot be stretched to provide the tenant with a right which was not in the contemplation of the parties when they signed the original lease. There is nothing in the legislation which requires only minimum changes to the existing tied tenancy to release the tenant from the tied trading provisions.

2. It is also relevant to recognise that a POB in severing a tie by notice under the lease, or by DOV, was exercising a right in an individual case, and not in light of a statutory scheme which could make substantial changes to its business. The considerations for the POB in deciding on the means of tie release are not now the same.

3. There is no support in the legislation for an assertion that the starting point for an MRO tenancy is the existing lease. A tenancy which contains product or service ties and an MRO tenancy are treated as different creatures by the Act and the Code. The definition of an MRO-compliant tenancy (in section 43(4) and (5)) makes no reference to the terms of the existing tied tenancy.

4. By comparison, when renewing a tenancy under section 32 to 35 of the 1954 Act (arguably the closest example on the statute books of a statutory jurisdiction to determine the terms of a commercial tenancy) terms are to be determined by the court by reference to the existing lease as a starting point. It is for the party seeking a departure from those terms to justify why it is fair and reasonable, having regard to the purpose of the Act. The legislature would have been aware of the criteria used in the 1954 Act when enacting Part 4 of the 2015 Act and it is significant that it in doing so it did not choose to take the same path.

5. Moreover, there are instances in the Code where reference is made back to the tied tenancy, e.g. in relation to provisions for security of tenure (regulation 31(3)(b)) and the duration of the new term (regulation 30(2)). The absence of any reference to the terms of the tied tenancy in both section 43(4) and (5) is significant.

6. The existing lease is not the necessary starting point in this statutory procedure. A DOV is not the default option. The tie and tie free lease are fundamentally different relationships. That does not mean however that it will always be reasonable to change terms in the existing lease which are also common in FOT lease.

7. Furthermore, that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need

to have regard to the existing contractual relationship between the parties. The existing lease terms will be in the mind of the TPT who is entering into negotiations for a new lease. The landlord will have their own commercial considerations in mind. From their respective positions, parties motivated to reach an agreement rather than a stalemate will negotiate from these starting positions to one that is acceptable for both. Therefore, both will have to take into account the position of the other if they intend to reach a deal. This is what a landlord would do if it wanted to tempt a preferred tenant into a new contractual relationship. That is the position in which the TPT tenant should be in the MRO procedure.

8. There may be other reasons why the existing terms are relevant, but it would not be appropriate to set out an exhaustive list. For example, where a landlord offered (perhaps fairly recently) a particularly favourable term on the tied lease which suggests the tenant was viewed as a preferred operator, and without good reason will not offer a comparably favourable term now, that may be an indicator that the POB is not acting fairly, and that the terms are not therefore reasonable. The particular terms (e.g. a keep open clause) may have had an effect on trade and goodwill to date, such that it would be unreasonable to change them. There may be an occupation clause pursuant to which wider family members reside in the pub, and it may be unreasonable to restrict that. Each case must be looked at on its merits, but to suggest the existing lease terms are always irrelevant is untenable.

- end -