IN THE MATTER OF **ARB/000282/CASK&BUTCHER**

THE PUBS CODE ARBITRATION BETWEEN: -

Cask and Butcher Ltd

(Tied Pub Tenant)

Claimant

-and-

EI Group PLC

First Respondent

Unique Pub Properties Limited

Second Respondent

Award

Summary of Award

The MRO proposal is not compliant because:

- It has not been shown to be on compliant terms.
- Reasonable terms as to dilapidations under the existing tenancy are absent.
- It has not been shown that entry costs are reasonable.

The arbitrator will determine compliant terms for a revised MRO proposal, to be ordered following consideration of the evidence of an expert to be appointed under s.37 of the Arbitration Act 1996.

Introduction

1) The dispute before me is whether or not a proposed market rent only (or "MRO") tenancy served on the Claimant by the Respondent is compliant. The Claimant is Cask and Butcher Ltd., the tied pub tenant ("TPT"[1]) of North Nineteen Public House, 194-196 Sussex Way, Upper Holloway, London N19 4HZ. ("the Pub") and is represented by its director Mr Anthony Cullen. The First Respondent is a regulated pub-owning business ("POB"[2]) and the Second Respondent, its subsidiary company, is the landlord of the Pub. I shall refer to both collectively as "the Respondent".

2) Parliament has provided for statutory arbitration as the means by which such disputes under the Pubs Code Regulations 2016 are to be resolved. The essence of arbitration is that it offers resolution of issues in dispute put forward by the parties. The principle problem in determining this referral for arbitration has been the difficulty in identifying what issues are in fact in dispute. However, given the length of time over which these proceedings have dragged on, I consider I should do my best to understand what is in dispute and determine the matter, and that I have sufficient material before me to be able to do so. With due respect to Mr Cullen, it is clear from the correspondence that he is disgruntled with arbitration procedure whereas the Respondent is very well resourced and is legally represented by Gosschalks Solicitors. As arbitrator, I must act fairly and impartially in determining the dispute.

3) While the issues between the parties have narrowed over time as the Respondent has made certain concessions on disputed terms reflecting their evolving position on compliance, I will say that this case represents a good example of the substantial investment of PCA time and resources that has been required to progress and resolve individual arbitration disputes in respect of the compliance of MRO full responses which cover the same or similar issues relating to the same POB.

4) Cases like this indicate the need to address the repetitive nature of issues brought to arbitration in three ways. Firstly, publication of arbitration awards should be a powerful aid in bringing an end to lengthy disputes on repeat issues, while improving the standard of evidence and argument presented. Secondly, it is more likely that in future cases an alternative arbitrator, who will have access to those awards, may be appointed in order to enable the PCA to have more direct regulatory input into managing repeat issues coming to arbitration. Thirdly, such is the concern over the approach of some POBs to compliance and arbitrations, the PCA is actively taking further steps in its capacity as regulator to enforce improved practices to ensure that before issuing each MRO proposal a POB considers on proper evidence whether it is on reasonable and common terms, reducing the likelihood of disputes and the need for expert evidence in proceedings. Arbitration has not to date proved effective in providing sufficient clarity in respect of compliant terms and the responsibility to seek to do this should lie with the POB.

[1] Within the meaning of section 70(1)(a) of the Small Business Enterprise and Employment Act 2015

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

5) The procedure and law applying to this arbitration is set out in Appendix A. Neither party having made a request for an oral hearing, I have considered it appropriate to determine this matter on the papers.

Background

6) The Respondent holds a headlease of the Pub granted on 22 October 1956 for a term of 80 years commencing on 16 November 1953. [redacted] is the freeholder. The Claimant holds an underlease dated 9 November 2007 for a term of 25 years, expiring on 7 November 2032, having taken that interest by an assignment on 19 September 2011.

7) The Small Business, Enterprise and Employment Act 2015 ("The 2015 Act") makes provision for tenants of tied pubs to be offered a MRO option in specified circumstances. As a result of a MRO notice served by the Claimant on the Respondent on 15 May 2017, the Claimant has the right to receive a compliant MRO proposal. On 6 June 2017 the Respondent purported to send to the Claimant a "full response"[3], including with its response a proposed tenancy. The Claimant considers that this proposed tenancy is not "MRO compliant", in that it is on unreasonable terms, and has therefore made a referral to the Adjudicator on 16 June 2017[4].

8) The Claimant alleged in its claim that the individual terms in the proposed tenancy are unreasonable[5] because of the adverse effect they would have, 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.

Procedural History

9) Though Mr Cullen's principle argument, that the proposed MRO lease should be by DOV not new lease, is understood, beyond this there have been difficulties in obtaining clarification from the parties as to what issues are in dispute, and whether these are issues in relation to which I ought to have expert evidence as to common terms in tie free agreements. There has been voluminous correspondence with the PCA throughout the proceedings, including regarding matters unrelated to the proceedings and not within the jurisdiction of the PCA. Directions were first issued for the management of the proceedings on 31 August 2017 and each party filed a statement of case and documentary evidence.

10) The parties were for a considerable period unable to agree a list of the issues in dispute for determination by the arbitrator. In January 2018 some negotiations took place, and there was a short stay of proceedings at the parties' request to allow for these. In February 2018 negotiations were continuing, and the Respondent served a without prejudice proposal. The PCA Advice Note on Compliant MRO Proposals

[3] in accordance with regulation 29(3) of the Pubs Code

[4] pursuant to regulation 32(2).

[5] contrary to section 43(4)(a)(iii) of the 2015 Act

was issued in March 2018 and shortly thereafter the Respondent set out proposed arrangements for negotiating in respect of outstanding dilapidations under the existing lease.

11) I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 23 March 2018. From 30 July 2018 until 11 October 2018 there was an administrative error in that the identity of the arbitrator was wrongly recorded on the PCA systems. Nevertheless, Mr Newby lawfully exercised his statutory power to arbitrate the dispute between these dates when he issued further directions on 1 October 2018 to the Respondent, with which it complied.

12) In his Statement of Claim Mr Cullen challenged a list of terms of the proposed tenancy as being unreasonable and/or not common terms, and on 28 November 2017 the Respondent asked for the arbitrator's permission to rely on expert evidence as to what terms were common in tie free leases. There are two ways in which expert evidence might be introduced into an arbitration. One is by ordering the parties to produce it (usually because one or the other has asked for permission to do this). The other is under Article 29 and s.37 of the Arbitration Act 1996, which enables the arbitrator directly to appoint experts and legal advisors to assist the arbitrator in making decisions, and the costs of this are the arbitrator's expense[6].

13) I held a case management conference by telephone on 11 April 2018, at which with the consent of both parties I issued directions for the appointment of a single joint expert to report on common terms. However, after that Mr Cullen changed his mind and decided against a joint expert. As a result, the Respondent again asked for permission to obtain evidence from its own expert on common terms. There were further exchanges with the parties, and on 5 July 2018 I held a further telephone case management conference for the purpose of considering revised directions, during which the parties finally reached agreement on the list of issues in dispute, and I gave the Respondent permission to obtain its own expert evidence on whether asserted clauses are 'not common'.

14) The agreed list of issues in dispute referred to a challenge to the commonness of all disputed terms and challenged only one term (permitted user) on the ground that it was otherwise unreasonable. After that second case management conference, however, the Respondent on reflection then changed its own mind about the need for expert evidence as to common terms, but its reasons for this cause me concern.

Dispute as to Common Terms

15) The Respondent on 9 July 2018 sought confirmation from the Claimant that the remaining terms in dispute were not challenged on the ground that they were not common, saying:

[6] See art 40.2(c) of the CIArb Rules dated 1 December 2015 and s 37(2) of the Arbitration Act 1996 for liability for these.

"From reviewing the pleadings it appears that it is not pleaded that any of the remaining clauses are uncommon. The clauses that were pleaded as being uncommon have been conceded."

16) I do not agree with that assessment of the Claimant's case. All disputed terms were clearly pleaded as being uncommon, and not all of the terms asserted in the Statement of Claim and List of Issues in Dispute as not common had been conceded. The Respondent also sought confirmation from me whether, in light of Mr Cullen's response, I would still need expert evidence. However, it is not for me to decide whether the Respondent needs to produce its own expert evidence in support of its case.

17) The Respondent on 12 July asked Mr Cullen:

"with a view to trying to move things along, are you able to confirm whether you dispute the terms at Paragraph 6(a) to (h) of the agreed Statement of Agreed Facts (copy attached) on the basis that you consider them to be not common. It is not your pleaded case. Your pleaded case is that the terms left in dispute are unreasonable. If the position is as per your pleadings, we believe that expert evidence is not required. However, it will obviously be for the PCA to decide if they disagree and want expert evidence on the reasonableness of the terms in dispute."

18) Again, I do not agree with the Respondent's misstatement of Mr Cullen's case that was put to him. His reply of 13 July 2018 was that he accepted that the terms:

"are common in new lettings, but it is not reasonable to insist on them when all is required is to sever my tied terms."

19) In light of Mr Cullen's response, the Respondent decided, after its express and sustained intention over many months to obtain expert evidence, not to do so. The Respondent said this approach was to bring a swifter resolution to the dispute and avoid the need for any expert evidence, including the need for an expert appointed under s.37 of the Arbitration Act 1996.

20) However, I do not consider Mr Cullen's clear and persistent challenge to the commonness of the disputed terms to have been abandoned by the acknowledgement that they *"are common in new lettings"*. If that is not the case, his position is at best equivocal in the particular context and I am entitled to proceed on the basis of the pleaded case. The statutory test for compliance is that the terms are common in free of tie agreements. It is far from clear that the appropriate pool of comparators in deciding if a term is common is limited to new lettings only. Indeed, it is not likely to be, since focussing on new lettings only may wrongly suggest the commonness of new and emerging terms which have not yet become established as common in the market. For terms to be common they may need to have been shown to be commercially viable by being present over a period of time.

21) The Respondent itself in its Statement of Defence did not dispute the relevance of lettings other than new ones - it argued that the more historic a market based free of tie agreement is, the less relevant it is in determining whether a term is not

common in the tie free market. Furthermore, there is nothing in the legislation that limits comparison with new lettings only, as opposed to free of tie agreements upon renewal or by DOV. I therefore do not agree with the Respondent's assumption that the Claimant's challenge to terms alleged to be uncommon has been aborted, and the Respondent having decided not to produce evidence of common terms I find it has failed to show, in the light of the clear complaints of unreasonableness, that the asserted terms are common and thus compliant.

22) The Respondent has, in response to the introduction of the MRO procedure in the Pubs Code, commissioned research as to common terms in the free of tie ("FOT") sector in England and Wales, as referred in its Defence, having instructed [redacted] to report on the matter. It set out in section D of its Statement of Defence entitled "The FOT Sector in England and Wales" the conclusions of [redacted] factual research. However, the Respondent having decided not to produce evidence from [redacted] in these proceedings I can have little regard to these parts of its pleadings. Had it done so, I would very likely have wished to hear his evidence in person, so that he could submit to cross-examination on his conclusions.

23) I do not consider it would be appropriate to allow the Respondent a further opportunity to evidence its case. The progress of this referral to a resolution has been painfully slow, and the Respondent's submissions already complex and voluminous. The Claimant filed on 13 September 2017 a 9-page Statement of Claim, and in response on 25 September 2017 the Respondent filed a Defence divided into 15 sections and stretching to 79 pages, and the documents (largely sample leases) it relies upon are very substantial. It seems to me that given the TPT is a litigant in person the Respondent should have taken particular care in summarising the nature of the Claimant's case, and that the contents of the correspondence identified above may well have confused Mr Cullen in what has been a protracted set of proceedings in which the end was never clearly in sight for the tenant.

Lease Terms in Dispute

24) The table below represents my understanding from all of the documents in the case as to the proposed lease terms in issue between the parties. Those in bold are still in dispute and those not in bold have been conceded by the Respondent over time, as set out in the List of Issues in Dispute dated 6 July 2018 and a letter dated 4 October 2018. However, in light of the matters discussed above in respect of the dispute as to common terms, and the need for me to make a determination as to the appropriate order in this arbitration, I have decided to rely on the evidence of an expert I shall appoint under s.37 of the Arbitration Act 1996 before I determine the compliant terms of the MRO lease, and shall not consider further these disputed terms in this award, other than these two issues as to over-arching reasonableness:

a) Firstly, the Respondent has not explained why broadening permitted use to A3 and A4 is reasonable for this Pub. Its arguments are entirely general in submitting that the distinction between a public house and restaurant has

become blurred, and that this change gives a tenant the flexibility to change its business model, However, the tenant does not want that flexibility (and is concerned it will increase the rent), and the headlease permits the use of the Premises only as a public house with ancillary uses (but not primarily as a restaurant). Having not addressed that point specifically I find the Respondent's case is not made out.

b) Secondly, in light of the Respondent's qualified concession in respect of insurance set out below, it is important that I consider reasonable insurance provisions in determining compliant terms on consideration of expert advice as to what is common in the case of a sublease.

Terms challenged as unreasonable and / or not common		
Statement of Claim	Disputed in List of 6 July 2018	Respondent's Letter 4 October 2018
Clause 1(13) Permitted user	**Yes**	
Clause 1(17) definition of Rent Payment Days making rent payable quarterly in advance	**Yes (as Fourth Schedule, clause 1(2) quarterly rent in advance)**	
First Schedule, clause 2(1) regarding insurance where there is a superior landlord		Conceded 2 February 2018. "but the Claimant will be paying twice for the same insurance."
Eleventh Schedule, Repair and Maintenance fund		Conceded 2 February 2018
Fourth Schedule, Clause 9(5) – Requirements in relation to gas and electrical equipment and installations	**Yes**	
Fourth Schedule, clause 9(6), "Jervis v Harris" clause	No. Conceded by Respondent	
Fourth Schedule, clause 12(6), prohibition on assignment within the first two years		Conceded 2 February 2018
Fourth Schedule, clause 12(6)(B)(ii), landlord withholding consent to assignment	**Yes as Fourth Schedule, clause 12(6)(B)(ii) – assignment conditions – undertaking to pay costs incurred**	
Fourth Schedule, clause 12(6)(B)(iv), landlord withholding consent to assignment where manner and style of the proposed assignee may reduce value of company interest		Conceded 2 February 2018
Fourth Schedule, clause 12(6)(D), landlord's right of pre-emption		Conceded 11 April 2018
Fourth Schedule, clause 14(2)(d) permitted alterations to be carried out to the satisfaction of the Company	**Yes as Fourth Schedule, clause 14(2)(d) – alterations to be carried out to the reasonable**	**On 2 February 2018 the Respondent inserted the word "reasonable" into**

	satisfaction of the landlord.	**the drafting of the alteration clause**
Fourth Schedule, clause 19 – tenant to pay landlord's costs of insurance valuation		Conceded 7 May 2018
Fourth Schedule, clause 19 – tenant to pay landlord's costs of any suspected breach of tenant's obligations	**Yes**	
Fourth Schedule, clause 19 tenant to give prior security for costs.	**Yes**	
Fourth Schedule, Part I, clause 24 keep open clause		Conceded 11 April 2018
Fourth Schedule, Part II, clause 6 internet access and email account		Conceded 2 February 2018
Fourth Schedule, Part II, clause 7 pay as you go utility supplies on landlord's request		Conceded 2 February 2018
Seventh Schedule, clause 3(2) determination of open market rent by independent surveyor acting as arbitrator	**Yes**	

New Lease or DOV

25) The Claimant makes general challenges to the Respondent's offer of a new lease, arguing that the MRO proposal should be in the form of a DOV of the existing lease. In the List of Issues in Dispute, the parties have set out the related issues as follows:

a) Does a MRO compliant tenancy have to be offered by means of a new tenancy, or should a DOV be offered?
b) Can the Respondent ultimately choose which option is appropriate in the circumstances and impose new terms and treat any MRO request as equal to any other tenant who is undertaking or in the position of a new letting or renewal?
c) Do the terms of any FOT tenancy offered have to be the same as the terms of the existing lease, subject only to such variations as are necessary to render the tenancy MRO compliant, so that the proposed tenancy is not a proposed tenancy for the purposes of Regulation 29(3)(b) of the Code, or the terms offered which unnecessarily differ from the terms of the existing lease are unreasonable or is it permissible (or required) to offer wholly new terms, subject only to the requirements of Section 43 of the Act?
d) If the FOT tenancy should differ from the existing terms only to the extent necessary to render it MRO compliant, what terms would be required to be varied in the subject lease, and which would not be required to be varied, so that, in so far as the proposed tenancies purport to vary them, they are not MRO compliant or are unreasonable?
e) Is it common for parties to undertake a new letting when just wanting to sever ties or is it common to do this by DOV?

26) The parties also identify a further issue for my determination:
a) Can a term be unreasonable for the purposes of Section 43(4)(a)(iii) of the Act if it is not deemed unreasonable by Regulation 31 of the Code?

27) Similar disputes have repeatedly arisen in Pubs Code arbitrations in respect of MRO full responses. They involve complex legal issues, and for the sake of clarity and readability I have structured this award by explaining in summary my decision on these issues together based on my conclusions on the law, whilst including in the appendices to this decision the full legal reasoning underpinning my conclusions, which reasoning is consistent with the PCA published Advice Note on MRO Compliant Proposals.

28) I am disappointed that the Respondent has not been willing to disclose information to this Claimant in relation to other cases decided by the PCA on the same or similar issues.

Summary of Decision on the MRO Vehicle Issues

29) In the present case Mr Cullen 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 the following principle points of statutory interpretation:

a) "Unreasonable" terms are defined by reference to terms which are "not common" in the FOT market and cannot be otherwise unreasonable.
b) The existing terms of the lease are not relevant to consideration of compliance.
c) A compliant proposal must be by way of a new lease.

30) For the reasons fully set out in the attached appendices I am satisfied that both parties are wrong in law in respect of all of these matters. The Respondent has since the publication of the MRO Advice Note not argued that the principles in it are not to be followed in this case, nor has it sought to amend its pleadings or file additional evidence as to reasonableness.

31) 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.

32) 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.

33) 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.

34) 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). The MRO proposal should be reasonably accessible to the TPT. 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.

35) The Claimant 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 tied 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 the Claimant's 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.

36) The Claimant also produces an email from [redacted] (the previous name of the Respondent), dated 22 March 2013 offering by way of DOV to release him from a tie in respect of a number of products for a fee. I note that draft beer and cider are not among the products in respect of which this offer was made. He also produces a rent concession letter served on him by the [redacted] dated 13 January 2009. I cannot find support for the Claimant's case in these documents. It is important that, where possible, claimants are properly advised in putting forward their arguments in arbitration

This MRO Proposal

37) Turning from the over-arching law to look at the facts of this particular case, the Claimant objects to a new lease on the following grounds. However, these are pleaded very generally, in unspecific and unevidenced terms which as it happens are identical to those, apparently drafted by third parties, that I have seen relied upon by claimants in numerous arbitrations. I have not seen the leaflets accompanying this particular proposal, however the Respondent is under a duty to ensure the contents of such literature supports the Code's core principles, as it is aware.

SDLT

38) The Claimant argues that the grant of a new lease would give rise to a liability for SDLT whereas a DOV would not. The Respondent has in compliance with Mr Newby's direction calculated the potential liability at the proposed MRO rent of £70,000 plus VAT, based on a start date of 9 November 2018, at £1,013.00. Taking into account the legal costs likely to be associated with a line-by-line variation of the existing lease by deed in order to render its terms compliant, that is not to my mind a figure in and of itself which would put off the tied tenant negotiating over a

free of tie agreement and does not make the choice of MRO vehicle in this case unreasonable. I would observe that I do not have evidence whether a negotiating tenant might be advised that SDLT liability could arise in any event in relation to a DOV containing all amendments as may be appropriate to produce a compliant MRO tenancy by variation of the existing lease in this case.

Land Registry and Administrative Costs

39) The Claimant argues that the grant of a new lease could give rise to registration costs at the Land Registry, at a much higher rate than a DOV. There is no evidence before me as to what these would be, however, and I dismiss this objection.

40) The Claimant also argues that it would be subjected to a number of administrative costs, as indicated by the covering letter accompanying the Respondent's MRO proposal, including those of credit checks, the production of a business plan and the provision of all statutory compliance certification, which are not necessary for a DOV. These costs are not quantified or even estimated, and no further particulars of this argument are put forward. It is not for me to investigate the Claimant's case on its behalf, and I cannot conclude any such costs amount to unreasonable conditions.

Landlord and Tenant Act 1954 renewal

41) It is also argued that the grant of a new lease could have unintended consequences on a renewal of the agreement, if the court in the future reduces the term length granted when renewing the MRO lease (which is a shorter term than the existing lease). Whilst I consider the Respondent should in general offer comfort that it will not seek to rely on the MRO lease length at renewal, this lease does not expire until 2032 (in 14 years), and as the maximum term at renewal is 15 years, this matter is not particularly relevant in the present case.

Head Landlord's Consent

42) The Respondent is a leaseholder of the premises. The Claimant asserts that (i) the headlease terms do not permit the Respondent to accept a surrender from the tenant in occupation or to vary any of the lease terms, other than tied terms, without the freeholder's consent and (ii) that the grant of a new tenancy would require the freeholder's consent, which has not yet been sought. Mr Cullen does not direct me to any relevant terms of the headlease, which has been produced in evidence, and the Respondent points out that there is in fact no such obligation in the headlease to obtain the freeholder's consent for a surrender or a variation of the lease, or to obtain consent to sublet. The only requirement is for the Respondent to serve notice of the underlease upon the freeholder within 3 months of completion and this only applies if the sublease exceeds 21 years which the MRO proposed tenancy does not. This appears to me to be a repeat of an allegation that I have heard in other Pubs Code arbitrations. It is appropriate for me to comment that the repeated reliance in arbitrations on generic and formulaic arguments by tenants which have apparently been drafted by third parties without reference to the facts of the individual case does nothing to advance the objectives of the Code, nor does it further the swift conclusion of arbitration proceedings themselves. Both parties

have the responsibility to put forward issues that are relevant to their particular case.

Repairs

43) On 7 November 2018 Mr Cullen said:

> *"I'm waiting (in my 5th year waiting) for a subsidence issue to be resolved!"*

There is no further evidence or argument on this point, but the Respondent should be alive to the fact that compliant MRO terms should consider reasonable provision in respect of any outstanding obligations which fall upon the landlord under the existing lease.

Entry Costs

44) In summary, the Claimant in the Statement of Claim argues that entry costs (rent in advance, in conjunction with having to pay an additional deposit, dilapidations and other costs) are too high, and will affect working capital. In correspondence dated 18 September 2018 Mr Cullen makes his point abundantly clear when he says:

> *"I cannot take a new agreement as I don't have the funds for EI 3 months in advance and 3 months deposit & their exorbitant/imaginary dilapidations."*

45) He then explains the commercial position of the business. Rent is currently payable monthly in advance, and moving to quarterly, potentially on an increased rent, represents a financial commitment for the tenant which Mr Cullen says is an unreasonable barrier to him. Whilst indicating in its Statement of Defence that in general the Respondent can negotiate minor variations to its standard terms, such as a build-up of the deposit and rent, there is no such open offer or concession in this case, in which it has insisted on advance payment of both, and no reasons have been put forward for this. This does not demonstrate that the Respondent has considered what terms and conditions are reasonable in the present case and I find it has failed to demonstrate reasonable terms and conditions in this respect. As the MRO should be reasonably accessible to the TPT, entry costs should not represent an unreasonable barrier. Parliament intended that there should be a genuine choice to the TPT whether to go free of tie or remain tied.

Dilapidations

46) The Claimant in his Statement of Case argued that the choice of a new lease was unreasonable because it gave rise to a claim for terminal dilapidations on the required surrender of the existing one. In the covering letter accompanying the MRO proposal, the Respondent said:

> *"As with any other tied lease surrender we expect that the lease will be terminated only when all payments due, any existing breaches and all repairs required under that lease are resolved."*

47) A schedule of dilapidations was prepared dated 2 October 2017 by [redacted] but it is not costed. However, I note in an email of 2 March 2018 Mr Cullen referred to a claim from the Respondent that there are some £116,000 of dilapidations works required on his existing lease, a figure he considers to be ludicrous.

48) On 8 March 2018 the Respondent suggested a without prejudice meeting between building surveyors appointed by the parties to re-assess the dilapidations and try to agree a mutually acceptable Statement of Works of Repair which would identify elements of works not required, or not relevant for some time, elements requiring to be addressed immediately, and elements to be addressed within the next 12 months whether or not there is any change of agreement.

49) Mr Cullen replied on 8 March 2018 that he considered no schedule of dilapidations should have been done at all, as it is only due at the end of the lease, and he did not want a surrender and regrant. He wanted the mode of delivery to be determined before the question of dilapidations should be revisited. However, the parties are aware that there is to be no determination of the mode of delivery as a preliminary issue.

50) The List of Issues in Dispute dated 6 July 2018 does not list dilapidations as an issue for determination by the arbitrator. However, the Respondent's letter dated 8 October 2018 makes no reference to dilapidations as a matter agreed or conceded. This was obviously confusing, and on 7 November 2018 the parties were in writing requested to clarify to me if I am required to consider the issue of liability for dilapidations under the existing lease. Mr Cullen confirmed that it was to be considered, and the Respondent did not reply.

51) Understanding there to be no agreement in respect of the matter I have determined it and, putting my decision simply, I am satisfied that the MRO proposal is non-compliant for failing to make reasonable provision as to dilapidations under the existing lease.

52) The Respondent did seek to negotiate the matter, but that does not amount to a change of offered terms and conditions from that put forward in the MRO proposal, for example to require only compliance with urgent works to make the premises safe or statutorily compliant, or those required to be done to prevent further deterioration in the fabric of the property, as a condition of entering into an MRO tenancy.

53) The POB should conduct a review to ensure that it is taking a reasonable approach to dilapidations in each and every existing or new MRO proposal, and that in no other cases is it still openly taking an inflexible and unreasonable position in respect of terminal dilapidations.

54) In correspondence dated 22 March 2018 the Respondent set out reasons why a Schedule of Wants of Repair could be relevant at any time during the lease and why the extent of repair could be relevant to the trading figures (and thus relevant to the FOT rent). However, whilst the Respondent has expressed a willingness to negotiate over dilapidations, even noting Mr Cullen's unwillingness this does not

amount to having altered its non-compliant primary position in respect of terminal dilapidations in the present case. The statement at point 3 in that email completely misses the point when it says that "the knowledgeable, prudent and willing landlord would assess by way of credit searches the ability of the tenant to meet all the obligations of the new lease or DOV, especially if disrepair is rolled forward into the new lease or DOV." The point is that in this case the Respondent has never made an offer to the Claimant to roll forward disrepair into the new lease. It has required its completion before the grant.

55) 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 or conditions 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 openly offered to do so is not sufficiently explained. There is no evidence of enforcement of repairing covenants under the existing lease.

56) 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. As such, the proposed MRO tenancy is on unreasonable terms and conditions in failing to make fair provision.

Conclusion

57) The Claimant's case that a DOV is lawful and that a new lease is unreasonable in this case is not made out. Subject to there being reasonable terms and conditions individually and together, (e.g. with regard to entry costs, repairs and dilapidations), there is no bar on the use of a new lease to deliver a MRO compliant proposal. The Respondent explains that it wants its free of tie estate to be homogenous (having historically acquired a wide variety of lease types through acquisitions and mergers) and having a variety of free of tie leases would be problematic – making it harder to develop policies across the estate, such as for enforcing repairing covenants; there would be less comparability of rents for pubs let on different terms; staff training and guidance on lease terms would be harder; greater management and surveyor time would be expended on dealing with the varieties of leases across the estate and insurance on a block policy would be cheaper if relevant terms reflected in the premium are consistent. All of these are relevant considerations for the Respondent in choosing the vehicle for the MRO tenancy not addressed by the Claimant, and the MRO proposal must be on reasonable terms both for the TPT and the POB.

Decision and Next Steps

58) Accordingly, I find as set out above that the terms and conditions of this proposed tenancy are not compliant, given the lack of evidence from the Respondent to show that they are not unreasonable, including not being uncommon, though the arguments that the choice of a new lease is unreasonable are weak. It is therefore

necessary for me to consider what order I should make in respect of this referral in exercise of my powers in this particular case.

59) 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).

60) The power in regulation 33(2) is not prescriptive. It does not restrict the nature of the ruling which I may make. The Respondent has 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.

61) 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 a significant risk of ongoing disagreement between the parties about interpretation of my award.

62) In spite of the expectation that parties will seek to negotiate mutually acceptable lease terms, I do not hold out great hope that these parties will be able to do so even now. I hope I am wrong. Mr Cullen's argument was based on the mistaken belief that a DOV would and could not alter terms of his existing lease unless strictly necessary, but there is no support for such an assumption in the legislation. The PCA MRO Advice Note did not, contrary to his suggestion, invite such an assumption. Perhaps now both parties understand why I consider their arguments to be wrong, they will be in a position to agree negotiated terms.

63) Failing such agreement however, and being responsive to learnings from my role as arbitrator and given the relative intransigence of the parties reflected in the evidence, 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 Respondent to provide a revised response in the precise terms that I shall order. I will need expert advice as to what terms would be uncommon, and I may need legal assistance in respect of drafting of the MRO lease terms. I propose to appoint such experts as required under Article 29 of the CIArb Rules and section 37 of the Arbitration Act 1996.

Costs

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

Operative provisions

65) In the light of the above:

a) Determination of MRO-compliant terms to be made by the arbitrator;
b) The Respondent is ordered to provide a revised response to the Claimant within 28 days of the arbitrator's determination of its terms;
c) The Respondent must notify the PCA when it has complied with the requirements in paragraph 53;
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 21 December 2018

Claimant's Ref: ARB/000282/CASK&BUTCHER

Respondent's Ref: ARB/000282/CASK&BUTCHER

Appendix A

Part 1 - Applicable Procedure and Law

Procedure

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

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.

Law

3. 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.*

4. 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.

5. 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).

6. 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.

7. 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.

Part 2 - 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 DOV. 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. Indeed, where a head landlord’s consent to the grant

of a new lease is required but cannot be obtained, the practical necessity of this construction becomes clear.

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.

Part 3 - 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

7. 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

8. 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.

9. 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

10. 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.

11. 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.

12. 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.

13. 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))

14. 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.

15. 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

16. 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).

17. 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

18. 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

19. 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

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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

27. 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.

28. 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

29. As a consequence of the choice of a new lease as the MRO vehicle the dilapidations covenant in the existing lease will be triggered as a matter of law on its termination. Dilapidations represent the cost of complying with the existing lease covenants to repair (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.

30. There can be no real doubt 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.

31. Where the POB chooses a new lease over a DOV, the landlord may have to take steps to mitigate the impact of the tenant's liability for dilapidations if it is to show it is acting reasonably. If it is a logical assumption that a tenant with more bargaining power than a TPT in the MRO process would negotiate with the landlord to carry out any repairs over a reasonable period, then 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.

Part 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

8. 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.

9. 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.

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