IN THE MATTER OF A PUBS CODE STATUTORY ARBITRATION PURSUANT TO SECTION 94 OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BEFORE: NIGEL J. DAVIES, ARBITRATOR

DATED: 4 JUNE 2022

BETWEEN:

ANTHONY CHARLES GREGORY

(TIED PUB TENANT)

Claimant

– v –

(1) PUNCH TAVERNS LIMITED
(2) PUNCH PARTNERSHIPS (PML) LIMITED

(PUB-OWNING BUSINESS)

Respondents

AWARD

SAVE AS TO COSTS

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Award Summary

1. The proposed Market Rent Only (**MRO**) lease sent by the Respondents on 19 December 2021 is not compliant because Cl.2.1.1 of the Main Agreement and para.3.2, 3.3, 8.3.7, 9.7, 11.2 and 14.3 to Sch.6 (Tenant's covenants) as well as para.2 to Sch.7 (Landlord's covenants) of the proposed MRO lease are unreasonable terms and/or conditions. Further, even assuming the disputed terms were common terms in tie-free agreements, other than a signed (name not stated) MRO Compliance Record and Declaration of unknown date provided by the Respondents, there was little if no evidence that the Respondents had considered whether it would be reasonable for an existing tenant to accept them. For example, there was little if no consideration as to what terms the Respondents would offer to a tied tenant whom they were motivated to release from the tie.
2. Accordingly, the Pub-Owning Business (**POB**)/ Respondents has/have failed to comply with the duty imposed under Reg.29(3)(b) and Reg.32(2)(a) of The Pubs Code etc. Regulations 2016 (**the Code**) and s.42(3)(b) of the Small Business Enterprise and Employment Act 2015 (**SBEEA 2015**).

Order

3. The Respondents shall provide a revised MRO proposal/ response to the Claimant (within the meaning of Reg.33(3) of the Code) to the Claimant within 21 days of the date of this Award.

Introduction

4. The seat of this arbitration is London, England. The applicable law is that of England. The referral was received by the Pubs Code Adjudicator (**the PCA**) on 23 December 2021. On 3 February 2022 the Chartered Institute of Arbitrators' (**CIArb**) Dispute Appointment Service (**DAS**) wrote to the Parties to confirm that pursuant to Reg.58(2)(b) of the Code the PCA had appointed an alternative arbitrator in this case as of 3 February 2022.
5. Accordingly, I, Nigel J Davies (BSc(Hons) (Q.Surv), PGCert.Psych., GDipLaw, PGDipLP, DipArb, MSc, LLM, MSc, FRICS, FCIOB, FCInstCES, FCIArb, CArb and Solicitor-Advocate), was appointed as Arbitrator by the PCA on 3 February 2022 by virtue of s.48(5)(b) of the SBEEA 2015 and Reg.58(2)(b) of the Code in relation to a dispute regarding an alleged breach of the Code which creates a series of rights for tied tenants of pub-owning businesses.
6. This arbitration bears the PCA reference number 'DAS-01110-H0S1C/PCA130'.

The Parties

7. The parties to this arbitration are '**the Claimant**', Anthony Charles Gregory who is a Tied Pub Tenant (**TPT**) as defined by s.70 of the SBEEA 2015 of the Lamb Inn, Park Road, Paulton, Bristol BS39 7QQ (**The Lamb Inn**), which is a tied pub as defined by s.68 of the SBEEA 2015

and

'the Respondents', (1) Punch Taverns Ltd (Registered Company No.03752645), the registered office address of which is Jubilee House, Second Avenue, Burton on Trent, Staffordshire DE14 2WF, which owns (2) Punch Partnerships (PML) Ltd (Registered Company No.03321199), the registered office address of which is Jubilee House, Second Avenue, Burton on Trent, Staffordshire DE14 2WF; Punch Partnerships (PML) Ltd is the immediate 'Landlord' of The Lamb Inn and the Respondents are a Pub-Owning Business (**POB**) as defined by s.69 of the SBEEA 2015.

8. The Claimant and the Respondents are together referred to as '**the Parties**'.

The Party Representatives & Miscellaneous Matters

9. Chris Wright of Pubs Advisory Service Ltd represented the Claimant (Chris Wright, Pubs Advisory Service Ltd and the Claimant are before and hereinafter referred to together simply as 'the Claimant' for ease of reference); whereas [redacted] who is a Partner Solicitor at Weightmans LLP represented the Respondents ([redacted] Weightmans LLP and the Respondents are before and hereinafter referred to together simply as 'the Respondents' for ease of reference).
10. The Parties were represented by their respective representatives at all material times.
11. The party representatives were professional, courteous and cooperative throughout, I thank them for their assistance.
12. All figures stated before and hereafter are exclusive of VAT unless otherwise expressly stated.
13. 'Regulation' (including the plural of the same) is before and hereafter abbreviated to 'Reg.'; 'paragraph' and 'sub-paragraph' (including the plural of the same) are before and hereafter abbreviated to 'para.'; 'clause' and 'sub-clause' (including the plural of the same) are before and hereafter abbreviated to 'Cl.'. 'Section' is before and hereafter abbreviated to 's.' and the plural of the same is before and hereafter abbreviated to 'ss.'. 'Schedule' (including the plural of the same) is before and hereafter abbreviated to 'Sch.'.

The Dispute

14. The Lamb Inn is currently let to the Claimant under a tied pub form of tenancy of ten years commencing 3 July 2017 at below-market rent but requiring the Claimant to purchase alcohol sold at the Lamb Inn from the second Respondent.
15. Pursuant to Reg.23 of the Code, the Claimant sent a MRO notice on 25 November 2021.
16. The Claimant asserted that the MRO 'Full Response' lease proposal sent by the Respondents on 19 December 2021, in the form of a 'New Agreement', was not compliant with s.42(3) of the SBEEA 2015 and Reg.29(3) of the Code and therefore the Respondents had failed to properly

acknowledge the Claimant's notice and provide a full response contrary to Reg.32(2)(a) of the Code.

17. Between Statement of Claim (**SoC**) para.10 to 29 the Claimant took issue with twenty provisions contained within the proposed 19 December 2021 MRO lease the Respondents had offered.

18. The Claimant also objected to the Respondents' use of a New Agreement and described it as *"a surrender and re-grant"*. The Claimant instead wanted 'a simple low-cost variation' using a Deed of Variation (**DoV**) to the existing tied agreement in which all the newly proffered terms contained within the 19 December MRO response and to which the Claimant had objected would not be contained and all the existing tied supply terms would be deleted, in order to create what the Claimant said would be a MRO compliant lease agreement, i.e. the Claimant wished to amend the existing lease between the Claimant and the Respondents so that all the tied product terms would be deleted and nothing added; the Claimant also argued that if the Respondents wished to add anything to the lease such had to be negotiated and agreed upon by the Claimant first.

19. Accordingly, this arbitration was initiated by the Claimant under Reg.32 of the Code on the basis of the Claimant's contention that the proposed tenancy was not MRO compliant.

20. The Respondents denied that the proposed new MRO lease was not a full response in accordance with the Code and surrounding legislation.

21. The Respondents denied that the Claimant was entitled to insist upon a MRO lease by DoV to the existing lease. The Respondent also denied the Claimant's assertion that the requisite changes to the existing lease were limited to the extent necessary in order to release the tie.

22. The Parties agreed that the substantive issues in dispute were as follows:

    22.1. Issue 1 – Whether there is to be a DoV or New Agreement?

    22.2. Issue 2 – Whether the twenty provisions objected to within the Statement of Claim (**SoC**), of which the Respondents have agreed to remove six and amend four, are reasonable in a MRO lease and whether the proposed lease was MRO compliant prior to the six concessions and four amendments?

    22.3. Issue 3 – What are my options in terms of the Remedy to be decided?

During the Arbitration

23. Upon issuing the Statement of Defence (**SoD**), ten out of the twenty contentious provisions ceased to be contentious because the Respondents agreed to remove six (a compensation provision, three nuisance provisions, a costs provision and a liability for repairs provision (SoC paras. 21, 22, 23, 24, 26 and 27)) (**Type A Provisions**) and amend four to meet the Claimant's objections (an insurance provision, two repair & decoration provisions and a rent payment

interval provision (SoC paras. 10, 13, 14 and 29) (**Type B Provisions**). Without prejudice to the Claimant's primary position that there should be a DoV as opposed to a New Agreement, the Claimant did not object to the amended four provisions. Accordingly, that left ten provisions, which the Claimant confirmed remained in contention in any event. Nevertheless, the reasonableness or otherwise of the original twenty contentious provisions continued to determine whether the 19 December 2021 proposed lease was MRO compliant.

24. The remaining ten provisions in contention between the Parties consisted of two relating to the Claimant's covenant to pay rent, one that related to repair and decoration, two that related to alteration, one that concerned an authorised guarantee agreement, two that related to alienation, one that concerned entry by the Landlord and the last was an upward only rent review (identified at SoC para. 11, 12, 15, 16, 17, 18, 19, 20, 25 and 28). Eight out of the ten possibly had a basis in the current lease (**Type C Provisions**) and two, identified at SoC para.11 (means by which rent is paid) and SoC para.28 (upwards only rent review), that appeared to be potentially couched in what is generally accepted to be common knowledge amongst professionals dealing day to day with commercial leases of this nature (**Type D Provisions**).

Procedure

25. This is a statutory arbitration within the meaning of s.94 of the Arbitration Act 1996 (**the 1996 Act**). The statutory framework governing this arbitration other than the 1996 Act is contained within Part 4 of the SBEEA 2015, the Code and The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 (**the Fee Regulations**).
26. Pursuant to s.51(5)(a) of the SBEEA 2015 and Reg.58(3)(a) of the Code, the applicable rules for the conduct of this arbitration are the 1 December 2015 edition of the Arbitration Rules of the Chartered Institute of Arbitrators (**the Rules**). If a conflict arises between the Pubs Code statutory framework (i.e. SBEEA 2015, the Code and the Fee Regulations) and the Rules or the 1996 Act, the Pubs Code statutory framework prevails.
27. In accordance with s.51(6) of the SBEEA 2015 the Respondents as POB are required to pay my reasonable fees and expenses except where I conclude that the referral or notice was vexatious. Lest there be doubt, I do not conclude that the referral or notice was vexatious.
28. The 'Request for Recommendation of an Arbitrator' form was received by the Chartered Institute of Arbitrators (**CIArb**). I was appointed as Arbitrator on 3 February 2022 and I wrote by letter and e-mail to the Parties on the same date enclosing my initial directions together with my terms and conditions of appointment.
29. In my letter dated 3 February 2022 I asked the Parties to provide me with all their submission documents in electronic format only.

30. I confirmed that all communications sent by e-mail were to be acknowledged as received by response e-mail by the intended recipient or their representative.
31. I also stated that any communication sent to me by either Party was to be sent simultaneously to the other Party by the same means; and, lest there be doubt, all written communications were to expressly state that copies had been sent to the other Party.
32. The Order for Directions No.1 was issued on 3 February 2022.
33. The Order for Directions No.2 was issued on 9 February 2022.
34. The Statement of Claim was received by e-mail dated 28 February 2022 timed 1645hrs.
35. The Order for Directions No.3 was issued on 21 April 2022.
36. The Statement of Defence was received by e-mail dated 21 March 2022 timed 1553hrs.
37. The Reply was received by e-mail dated 4 April 2022 timed 1539hrs.
38. Expert evidence was received by e-mail dated 6 May 2022 timed 1332hrs (after a one day extension was granted at the Respondents' request). Please note, the Respondents relied upon Expert Witness evidence in relation to the twenty contentious provisions to which the Claimant had objected whereas the Claimant did not rely upon Expert Witness evidence at all.

Burden and Standard of Proof

39. When considering the submissions made by the Parties, including (lest there be doubt) the evidence upon which they have sought to rely, I have borne in mind that the appropriate criteria by which to consider the Parties' assertions upon which to draw my conclusions, is the civil burden and standard of proof. Put simply, in reaching this, my Award, I have applied the civil burden and standard of proof.
40. Notwithstanding that the civil burden and standard of proof are well established principles, I nevertheless emphasise that essentially the burden of proving, in this process, rests upon the Party that asserts, whatever that may be, i.e. *'he who asserts, must prove',* and in the event that I conclude that an assertion is unproven, it shall fail.
41. Moreover, the standard of proof is also well established, being the standard necessary to be achieved, again, by the Party that asserts it to be so, on the balance of probability, i.e. it is to be shown that the assertion is likely to be correct.

***Punch Partnerships (PTL) Ltd & Anor v Jonalt Ltd* [2020] EWHC 1376 (Ch) (01 June 2020)**

42. Para.45 and 46 of the above judgment records the following:
"45. In the present case, the arbitration was initiated by the tenant under Regulation 32 of the Pubs Code on the basis of a contention that the proposed tenancy was not MRO compliant. The specific disputed issue (by the time the arbitrator reached his decision) was the reasonableness of the keg stocking requirement. On that point the tenant's claim was that the

requirement was unreasonable. The tenant therefore alleged a breach of Regulation 29 of the Pubs Code and s.43(4)(a)(iii) of the 2015 Act.

46. In principle, therefore, on the normal rules of the burden of proof, the onus lay on the tenant to establish the breach alleged. Nothing in the statutory framework set out in the 2015 Act and the Pubs Code suggests a reversal of that burden of proof. In those circumstances if the arbitrator considered that the burden of proof should be reversed, that should have been raised with the parties for their comment."

Evidence

43. The Parties in this arbitration have sought to present evidence in support of their respective positions and arguments. In weighing such, which sometimes was inconsistent with the other's evidence, I have done so on the basis of what is cogent and persuasive. I did not hold a meeting with the Parties and relied upon the written submissions made to me by the Parties in order to formulate my Award.

44. I emphasise that to the extent by which I am obliged to decide upon the evidence submitted to me on the civil standard of proof, as I have explained above, I do so by reference only to the evidence presented to me in this arbitration. I appreciate that which the Parties assert is genuinely believed to be correct by each, being an account of both their respective understanding and/ or recollection of matters. It follows that my choice between the evidence submitted to me by the Parties is not intended to be an implied slight upon the other, but instead it is an Award based upon the evidence presented in the context of the matters that fall to be decided.

Remedy Sought

45. The Claimant asserted that there were multiple breaches of the Code and the SBEEA 2015 the consequence of which was that the MRO lease was not a full response in accordance with the Code and the SBEEA 2015.

46. Between para.36 and 39 inclusive of the SoC the Claimant sought the following:

46.1. a 'low-cost' DoV to the existing lease in which all twenty terms which the Claimant asserted were unreasonable together with all existing tied supply terms are not included;

46.2. a declaration that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2)(a) of the Code and s.42(3) of the SBEEA 2015; and

46.3. a direction that the Respondents pay the Claimant's costs.

Substantive Issue 1 – Whether there is to be a Deed of Variation or New Agreement?

47. The Claimant relied upon the PCA Advice Note on MRO compliant proposals dated 18 March 2018 (**PCA Advice Note**) but it states amongst other things, at para.1.1, para.2.1, and para.4.2, the following:

"1.1 …

- *Market Rent Only (MRO) proposal does not have to be in the form of a new tenancy.*
- *The terms of the MRO proposal do not have to be the same as the tied tenancy but they do have to be reasonable.*
- *A MRO proposal should be consistent with the core principles of the Pubs Code (fair and lawful dealing, and no worse off).*
- *MRO is not the same as a negotiation on the open market and the POB should not take advantage of the fact that a TPT has limited negotiating power.*
- *The PCA will be likely to find it unreasonable for the POB to offer unattractive MRO tenancy terms if the intention is to persuade the TPT to stay tied.*
- *If the POB proposes a new tenancy for the MRO proposal without good reason, and this disadvantages the TPT, then the tenancy can be non-compliant for containing unreasonable terms or conditions.*
- *The PCA expects the POB to engage in reasonable and fair negotiations. Referral for arbitration should be the exception. Even if a case is referred, the PCA will expect both sides to carry on talking to each other, and to try and reach an agreement.*

2.1 There is nothing in the legislation which means that a MRO-compliant tenancy must be in the form of a new tenancy (or that it must be in the form of the existing tenancy varied by deed). Subject to its terms and conditions, either form is acceptable.

…

4.2 If the POB proposes a new tenancy (rather than a deed of variation) for the MRO proposal without sufficient reason for doing so, and that choice disadvantages the TPT [Tied Pub Tenant]*, then the tenancy can be non-compliant for containing unreasonable terms or conditions."*

48. Further, the arbitration has been initiated by the Claimant, as Tenant, under Reg.32 of the Code on the basis of a contention that the tenancy proposed was not MRO compliant, in relation to which, pursuant to the judgment in *Punch Partnerships (PTL) Ltd & Anor v Jonalt Ltd* [2020] EWHC 1376 (Ch) (01 June 2020), the onus rests upon the Claimant, as the Tenant, to establish the breach alleged in relation to the first substantive issue, i.e. that the use of a New Agreement rather than a Deed of Variation amounts to a breach.
49. The Claimant asserted that the Respondents' decision to use a New Agreement rather than a DoV resulted in additional costs that would otherwise not be incurred which the Claimant said

discourages from exercising its right to a MRO lease, however such additional costs were not identified, particularised and substantiated; they remain unknown to me.

50. The Claimant also asserted that it was unable to make an informed choice and was being presented with a wholly false choice to accept all new terms or give up on a MRO lease and stay tied. However, the Claimant did not identify, particularise and substantiate on what basis the Claimant was being denied the ability to make an informed choice. The Claimant also complained that there was no time to negotiate when presented with such an offer and said that the Code only allowed fourteen days in which to raise a dispute, however the PCA Advice explains that, even if a case is referred, the PCA will expect both sides to continue talking to each other and to try and reach agreement, in that context the Parties have had months to negotiate and not just fourteen days. The Claimant also complained that the sweeping changes presented by the surrendering of the existing lease and entering into a new agreement was a hurdle to normal business, excessive and unreasonable; however this assertion was not demonstrated either.

51. The Claimant also claimed that the Respondents were only entitled to make minimum changes to make a MRO compliant offer but did not particularise and substantiate its claim in this regard. Further, the Claimant's said assertion was not supported but instead contradicted by the PCA. Firstly, the PCA Advice Note made no such statement and instead required, amongst other things, that a MRO proposal shall be reasonable and shall not make the Tenant worse off. The Claimant did not demonstrate that using a New Agreement instead of a DoV was unreasonable or made the Claimant, as the Tenant, worse off.

52. Secondly, the PCA has already determined that there is no support in the legislation that the starting point is the existing lease. In the DPCA (now PCA) Award concerning *Elizabeth Doyle v Punch Partnerships (PTL) Ltd and Star Pubs & Bars Ltd* 9 November 2018 Ref: Arb/17/DOYLE it was written at paras.1 to 3 of Appendix 4, under the heading *"In law, the existing lease terms are not the necessary starting point, but they are not irrelevant in considering what is reasonable"*, as follows:

"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." (Emphasis added)

53. Thirdly, the reasoning in Arb/17/DOYLE is also contained and applied at Appendix 4 in both the DPCA (now PCA) Award concerning *Splash Taverns Ltd v Ei Group PLC and Unique Pub Properties Ltd* 1 July 2019 Ref: Arb/100842/SPLASH TAVERNS and the PCA Award concerning *Ms Deborah Rowen v Punch Taverns Plc* 10 April 2019 Ref: Arb/105072/Rowen.

54. Fourthly, at para.14 of the judgment in *Ei Group Plc v Clarke & Anor* (Rev 1) [2020] EWHC 1858 (Ch) (18 June 2020) Mr Justice Miles quoted amongst others para.76 of the preliminary award as follows:

"[76] I therefore make it clear to the Claimants: 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 [Free of Tie (**FOT**)] *FOT leases."*

Miles J continued to record at para.15 of his judgement as follows:

"There was no appeal from the preliminary award and the parties accept, for the purposes of this application, that Ms Dickie correctly stated and explained the legal principles."

55. At para.40 of his judgment Miles J also said amongst other things:

"Section 42(3)(b) of the 2015 Act does not require a comparison between the tied lease and the proposed lease to determine whether a particular term would leave the tenant worse off than under the existing tied lease. It is to my mind obviously wrong in law to regard differences between the two as a benchmark for assessing whether what is proposed is reasonable."

56. Fifthly, the terms aside, since they are considered in relation to the second Substantive Issue, the Claimant did not particularise and substantiate how the Respondent's reliance upon a New Agreement was without good reason and to the disadvantage of the Claimant.

57. Within the Respondents' covering letter dated 15 December 2021 enclosing the MRO proposal, the Respondents also gave good reason for the use of a New Agreement rather than a DoV, as follows:

"Your MRO proposal is by way of a new commercial FOT lease on the basis that a clean commercial lease is easier for both a landlord and a tenant to understand rather than a former tied lease with attached variation. A clean lease also provides greater clarity for any potential freehold purchaser as well as any potential assignee should the tenant wish to assign their interest therefore preserving both a landlord's potential capital value as well as a tenant's potential assignment value. This process also follows the principles of a 1954 Act renewal through taking the opportunity to provide modernisation to lease terms in line with the market."

58. I therefore decide that there is no obligation upon the Respondents to use a DoV (Deed of Variation) and that the Respondents were in principle, entitled to use a New Agreement. The Claimant, therefore, does not succeed in relation to the first substantive issue.

Substantive Issue 2 – Whether the twenty provisions objected to within the Statement of Claim, of which the Respondents have agreed to remove six and amend four, are reasonable in a Market Rent Only lease and whether the proposed lease was Market Rent Only compliant prior to the six concessions and four amendments?

59. Consistent with *Ms Deborah Rowen v Punch Taverns Plc* 10 April 2019 Ref: Arb/105072/Rowen, pursuant to s.43(4)(a)(iii) of the SEEA 2015 an MRO compliant tenancy cannot contain any unreasonable terms or conditions. Reg.31 of the Code makes provision for certain terms and conditions which will automatically be unreasonable, amongst them terms which are uncommon in tie-free leases. The terms set out in that regulation are not exhaustive but instead examples of unreasonable terms. Section 45(5)(b) of the SEEA 2015 is a power and not a duty, and s.43(4) renders a tenancy non-compliant for any unreasonable terms or conditions in any event. It is still necessary for all terms and conditions within a proposed MRO tenancy to be reasonable in a broader sense.

60. Accordingly, again consistent with *Ms Deborah Rowen v Punch Taverns Plc* 10 April 2019 Ref: Arb/105072/Rowen, determining MRO compliance involves more than looking at each individual term to decide whether it is common for the purposes of Reg.31 of the Code but whether the proposed MRO tenancy contains terms or conditions which are reasonable. The terms or conditions of a proposed MRO lease may be unreasonable by virtue of both the words that are not included and those words that are. Further, two or more terms and conditions may

combine to render a proposed MRO tenancy unreasonable, for example because they are inconsistent with each other or by reason of the accumulative effect of the combination of such.

Type A Provisions (SoC paras. 21, 22, 23, 24, 26 and 27) (Removed by the Respondents)

(SoC para.21) Para.9.7 to Schedule 6 (Tenant's covenants)

61. (SoC para.21) Para.9.7 to Sch.6 (Tenant's covenants) imposes a requirement for the Claimant, as Tenant, to pay to the Landlord a fair proportion of any compensation received by it under statute.
62. Although I accept the Respondents' Expert's opinion that it is difficult to envisage a scenario, other than a compulsory purchase order, under which this provision would become effective. The Respondent's Expert Witness acknowledged that this clause was not one that the Expert was familiar with in other Free of Tie (**FOT**) pub leases, and consistent with the Expert's opinion in this regard the Respondents agreed to remove this provision from the proposed MRO lease.
63. The provisions of the proposed MRO lease was plainly not the same as the existing lease in this regard. Whilst the MRO proposal does not have to be the same as the tied tenancy it is nevertheless required to be reasonable, however, Cl.9.7 to Sch.6 of the proposed MRO lease was not reasonable because there did not appear to be good reason for its inclusion, it would disadvantage the Claimant, it is unattractive and it encourages the recipient to remain tied. I therefore decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

(SoC para.22) Para.11.2 to Schedule 6 (Tenant's covenants)

64. (SoC para.22) Para.11.2 to Sch.6 (Tenant's covenants) prohibits the Claimant, as Tenant, from installing in the premises any machinery other than normal light and quiet office machinery. It also obliges the Claimant to keep permitted machinery in good condition.
65. The Respondent's Expert Witness acknowledged that this clause was not one that the Expert was familiar with in other FOT pub leases, and consistent with the Expert's opinion in this regard the Respondents agreed to remove this provision from the proposed MRO lease.
66. The provisions of the proposed MRO lease was plainly not the same as the existing lease in this regard. Whilst the MRO proposal does not have to be the same as the tied tenancy it is nevertheless required to be reasonable, however, Cl.11.2 to Sch.6 of the proposed MRO lease was not reasonable because there did not appear to be good reason for its inclusion, it may disadvantage the Claimant, it is unattractive and it encourages the recipient to remain tied because the reason for its inclusion is unknown and uncertain. I therefore decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

(SoC para.23) Para.11.5 – 11.7 to Schedule 6 (Tenant's covenants)

67. (SoC para.23) Para.11.5 – 11.7 to Sch.6 (Tenant's covenants) obliges the Claimant, as Tenant, not to keep, produce or use any Hazardous Material on the Premises without Consent nor (whether or not Consent is given) cause any Environmental Damage. Further, the Claimant was obliged to provide the Landlord with information relating to such materials.
68. Whilst the Respondents' Expert and I were unaccustomed to finding a provision of this nature within a FOT pub lease such as the proposed MRO lease, there is no conceivable reasonable reason as to why a Tenant would object to such a provision, although it was bordering on the superfluous within the context of a FOT pub lease it was nevertheless reasonable and its inclusion understandable. Although I am not surprised the Respondents agreed to remove it I do not consider it would encourage a Tenant to remain tied. Accordingly, the Claimant did not demonstrate that its inclusion within the proposed MRO lease rendered it more onerous than the tied lease. It was self-evidently reasonable.
69. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.24) Para.11.8 to Schedule 6 (Tenant's covenants)

70. (SoC para.24) Para.11.8 to Sch.6 (Tenant's covenants) requires the Claimant, as the Tenant, to indemnify the Landlord against all losses, claims or demands in respect of any Environmental Damage arising from the use or occupation of The Lamb Inn or the state of repair of The Lamb Inn. The Claimant did not demonstrate that its inclusion within the proposed lease rendered it more onerous than the tied lease. It was self-evidently not unreasonable.
71. I agreed with the Respondents' Expert that since the Claimant, as Tenant, would be in sole occupation of The Lamb Inn, it was not unreasonable that the Claimant should bear such responsibility/ liability in this regard. Further, I agreed with the Respondents' Expert's opinion that most FOT pub leases include provisions that would address such matters.
72. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.26) Para.14.3 to Schedule 6 (Tenant's covenants)

73. (SoC para.26) Para.14.3 to Sch.6 (Tenant's covenants) states that the Claimant, as Tenant, shall pay on the grant of the lease the charges (including disbursements and VAT) of the Landlord's solicitors relating to the preparation negotiation and completion of this Lease.
74. I accept the Respondents' Expert admission that this was not a clause that frequently appears within FOT pub leases, i.e. it is uncommon. Whilst the costs referred to were not limited to

reasonable costs and there was no means by which such could be limited or assessed, the Fee Regulations would also apply. I consider the provision sufficiently unattractive, unparticularised, opaque, disadvantageous and unreasonable as to persuade a TPT, such as the Claimant in this instance, to stay tied because it would render the Claimant worse off. There was not an obvious good reason as to why this provision was included and I found it unreasonable and unfair. Although I note that the Respondents agreed to remove the clause, I decide that this particular clause introduced an obligation upon the Claimant, as the Tenant, that was not in keeping with those generally accepted/ seen as workable in the market. Therefore I decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

(SoC para.27) Para.2 to Schedule 7 (Landlord's covenants)

75. (SoC para.27) Para.2 to Sch.7 (Landlord's covenants) provided that:
"*The Landlord shall not be liable for delay in carrying out any repairs for which the Landlord is responsible under this Lease unless it has been given written notice of disrepair (except in an emergency) by the Tenant and has failed to carry out any necessary repair within a reasonable time of receiving such notice"*.
76. This provision sits within the broader context that under the proposed MRO lease the Claimant, as Tenant, bears responsibility for repair, consequently, the Respondents' Expert Witness said that such a provision is unnecessary/ superfluous within a FOT pub lease. Since it is unnecessary/ superfluous I decide that it is uncommon and as such is unreasonable, I therefore decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

Type B Provisions (SoC paras. 10, 13, 14 and 29) (Amended and Accepted by the Claimant)

(SoC para.10) Para.1.6 to Schedule 5 (Insurance)

77. (SoC para.10) Para.1.6 to Sch.5 (Insurance) recorded that if, *"The Landlord receives any commissions or other benefits for effecting or maintaining insurance under this Lease it shall not be obliged to pass the benefit of them on to the Tenant"*, i.e. the Claimant.
78. It was the Respondents' Expert Witness' evidence that the Expert was not familiar with any FOT pub lease that provided for the Landlord to pass on/share any benefit/ commission received as a consequence of effecting insurance, to the Tenant, and that the provision was reasonable.
79. Whilst I note that the Respondents have amended the provision to exclude reference to 'commission' to the Claimant's satisfaction, the Claimant's assertion that it was not reasonable

for the Claimant, as the Tenant, not to have any such benefit passed on to it was not substantiated and demonstrated.

80. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.13) Para.3.2 to Schedule 6 (Tenant's covenants)

81. (SoC para.13) Para.3.2 to Sch.6 (Tenant's covenants) stated an obligation on the part if the Claimant, as Tenant:
"To keep the Premises painted or otherwise decorated to a high standard and to redecorate to a high standard as to the exterior not less often than every Decorating Year[1] and as to the interior not less than every five years and also in each case in the three months preceding Determination".

82. The Claimant argued that it was not reasonable to impose a more onerous obligation upon the Claimant within the MRO lease offered under circumstances in which the tied Lease stated that the applicable standard for decoration was 'good condition'.

83. The Respondent's Expert statement at para.6.4.iv) of the Expert Witness Report dated 5 May 2022 simultaneously appeared to miss the point raised by the Claimant and appeared to be argumentative, rather than provide Expert's evidence; this was unfortunate. There did not seem to be a fair reason for seeking to implement a higher, more burdensome standard than that which had applied previously.

84. The Respondent wrote at SoD para.16 that it was agreeable to changing the applicable standard of decoration from 'high standard' to 'good standard'.

85. There did not appear to be a good reason for the change in the standard that was being specified. I agree with the Claimant that it is not reasonable to impose the more onerous obligation of 'high standard' without good reason and explanation and that it would be fair to amend the standard to 'good condition' consistent with the tied lease, otherwise the Claimant, as Tenant, may be persuaded to remain tied.

86. I therefore decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

(SoC para.14) Para.3.3 to Schedule 6 (Tenant's covenants)

87. (SoC para.14) Para.3.3 to Sch.6 (Tenant's covenants) provided that the Claimant, as Tenant, was: *"To replace with new and high quality items any Landlord's fixtures and fittings in the*

[1] Defined at the beginning of the proposed MRO lease as *"The fifth year of the Contractual Term every fifth year after that date and the last year of the Contractual Term"*

Premises including any plant and conduits exclusively serving the premises that are beyond repair at any time before Determination".

88. The Claimant explained that para.1.1, s.2 of the existing tied lease expressed an obligation to *"…repair and replace… as necessary"*, which the Claimant argued was less onerous because the standard which the Claimant was required to meet, was said to be lower, *"a lesser standard of condition"*, compared to that which the Respondents had included within the MRO proposal.

89. Under para.1.1, s.2 of the existing TPT lease dated 3 July 2017, the obligation upon the Claimant in terms of repairs was to keep the elements that formed the property in a clean, tidy and good condition and repair and replace as necessary. Further, the same said lease also defined 'The inventory' as *"the trade fixtures and fittings and trade equipment on or in the property…"*, 'fixtures and fittings' were not otherwise referred to. Para.1.6 of Section 2 of the existing lease also recorded the Claimant's agreement *"…to keep items on the inventory in good condition and in working order, renewing them when this becomes necessary"*.

90. The Respondents' Expert Witness reasoned that if something cannot be repaired, then replacement is necessary and inevitable, however this was presented as an argument and veered into advocacy whilst simultaneously not addressing the point raised by the Claimant. In so doing, the Respondents' Expert Witness did not address the more burdensome requirement placed upon the Claimant, as Tenant, under the proposed MRO lease, by which the Claimant would be obliged to replace with *"new and high quality"*. I was not provided with evidence to demonstrate such a provision was common and or reasonable whilst at the same time it appeared upon its face to be unreasonable, as well as in the context of the provisions of the tied tenancy.

91. Whilst the terms of the MRO proposal do not have to be the same as the tied tenancy, they do have to be reasonable. In that regard, para.3.3 to Sch.6 of the proposed MRO lease was more burdensome than the similar provisions contained within the tied tenancy, there was no obvious reason for why it was necessary to include the more burdensome provision and nor was it shown to be common. Further, the Respondents agreed to change the wording in the lease to *"good condition and working order and renewing where necessary"*, which was neither the same as the tied tenancy nor more burdensome.

92. I therefore decide that the original wording of para.3.3 to Sch.6 to the proposed MRO tenancy was unfair and would have made the Claimant worse off had the Claimant accepted the MRO tenancy on that basis. It had been enough to at least in part dissuade the Tenant from accepting the MRO tenancy that was offered. I therefore decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

(SoC para.29) Cl.2.1.1 of the Main Agreement and Para.1 to Schedule 4 (Review and Indexation of Basic Rent)

93. (SoC para.29) Cl.2.1.1 of the Main Agreement recorded that Basic Rent was to be paid yearly and proportionately for any part of the year by equal quarterly instalments in advance on the Quarter Days. It was also subject to upwards-only rent reviews every five years pursuant to Sch.4.
94. The Claimant objected to these provisions. The Claimant said they were more onerous than the tied lease because under the tied lease 'Payment days' were defined as the first day of each calendar month and para.1 of s.6 to the tied lease provided for an upwards and downwards rent review. The Claimant also appeared to object to rent reviews every five years.
95. However, despite objecting to reviews every five years, the rent 'Review dates' under the tied lease dated 3 July 2017 were defined as every five years; the tied lease and the proposed MRO lease were therefore fundamentally the same in relation to five-yearly rent reviews and so demonstrably common and perceived as fair by the Claimant since such provision had been previously accepted by the Claimant under the earlier tied lease. In addition, whereas upwards only rent reviews are not permitted in tied pub tenancies, they are not prohibited in MRO compliant tenancies under s.43 of the SBEEA 2015.
96. Whilst the Respondents were amenable by way of concession to allowing monthly payment cycles, both the Respondents and their Expert Witness nevertheless stated that rent payable in advance, subject to five yearly upwards only review, is the most typical/ standard wording in FOT pub leases.
97. Although I accept the Respondents' Expert's evidence in relation to upwards only rent in terms of FOT leases and in relation to the payment cycles, cash-flow is nevertheless a critical consideration in a TPT business and the imposition of a new quarterly payment cycle in place of a previous monthly cycle under a TPT lease could amount to a breach of the 'fair and lawful' and the 'no worse off' principles. The Respondents should have included in the terms of the proposed MRO lease for example, provision for a gradual transition from monthly to quarterly payments. The Respondents' failure to include such a mechanism rendered the term within the proposed MRO lease unreasonable, and which in turn rendered the proposed MRO tenancy not MRO compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

Type C Provisions (SoC para. 12, 15, 16, 17, 18, 19, 20 and 25)

98. The provisions referred to at SoC para. 12, 15, 16, 18, 19, 20 and 25 have a basis in the current lease. The current lease was argued by the Claimant to be reasonable save that in order to achieve a compliant MRO lease the existing tied supply terms would be required to be

removed. These terms did not relate to existing tied supply terms and therefore on the Claimant's analysis they are reasonable. That contained within SoC para.17 did not relate to existing tied terms but was nevertheless reasonable.

(SoC para.12) Para.1.4 to Schedule 6 (Tenant's covenants)

99. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 and that it was unreasonable to impose the more onerous provision in the MRO lease upon the Claimant.
100. (SoC para.12) Para.1.4 to Sch.6 (Tenant's covenants) of the proposed MRO lease states: "*If the Landlord refuses to accept Rent because an event referred to in Clause 5.1 has occurred and the Landlord does not wish to waive its rights under the Clause then such unpaid Rent shall nevertheless bear interest under Paragraph 1.3 until the date the Rent in question is accepted."*
101. Para.3.2 of s.1 to the existing tied lease records: *"If we refuse to accept rent from you because you have not fulfilled all your obligations under this agreement, you must pay interest at the agreed rate from the due date until we are able to accept payment from you again."*
102. Accordingly, since a provision enabling the Landlord to refuse to accept rent because of a forfeiture event has occurred exists in both the existing TPT lease dated 3 July 2017 and the proposed MRO lease, the factual basis of the Claimant's assertion is incorrect.
103. Further, the current lease was argued by the Claimant to be reasonable save that the removal of the existing tied supply terms would be required in order to achieve a compliant MRO lease.
104. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.15) Para.3.7 to Schedule 6 (Tenant's covenants)

105. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 and that it was unreasonable to impose the more onerous provision in the MRO lease upon the Claimant.
106. (SoC para.15) Para.3.7 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides that the Claimant, as Tenant, covenants to: *"To keep the Premises in a clean and tidy condition and clear of rubbish and to keep any grass plants trees or other areas of soft landscaping at the Premises properly mown or tended as appropriate and to replace any plants or trees which die."*
107. Para.1.1 of s.2 to the existing tied lease obliges the Claimant to maintain any areas inside the boundary of the property including forecourts, car parks, gardens, grounds and play areas as follows, amongst other things:

    "1.1 You are responsible for maintaining the following:

- *the whole of the property including the structure, roof, foundations any additions to it, windows and other glass, lettering, signage and notices (and their lighting);*
- *all fences, gates, hedges or boundary structures; and*
- *any areas inside the boundary of the property including forecourts, car parks, gardens, grounds and play areas.*

You must keep them clean, tidy and in good condition and you must repair and replace them as necessary…"

108. Accordingly, equivalent provisions exist in the two documents and the factual basis of the Claimant's assertion is therefore incorrect. Lest there be doubt, this provision has a basis in the current tied lease dated 3 July 2017.
109. Further, the current lease was argued by the Claimant to be reasonable save that in order to achieve a compliant MRO lease the existing tied supply terms would be required to be removed.
110. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.16) Para.6.1 to Schedule 6 (Tenant's covenants)

111. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 and that it was unreasonable to impose the more onerous provision in the MRO lease upon the Claimant.
112. (SoC para.16) Para.6.1 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides that the Claimant, as Tenant, covenants to:

"Not to demolish any building on the Premises or construct new buildings or make any alteration or addition to the Premises whether structural or otherwise (unless the Tenant is required to carry out such alterations or additions in order to comply with any statutory requirements relating to the Premises and has provided the Landlord with a copy of any letter or notice relating to the works and plans and specification providing the Landlord with details of the works) except as expressly permitted under Paragraph 6.2."

113. Para.2.1 and 2.2 of s.2 to the existing tied lease states in relation to the Claimant, as the Tenant:

"2.1 You must not make any structural alterations, outside alteration or add anything to the property. 2.2 You can make any other alterations but you must let us have two sets of the specification and plans showing all the work you want to do, at least ten days before work starts. These must have been prepared by a suitably-qualified person. We can ask you to enter into an agreement setting out all the terms we reasonably require before you start. In relation to any work you do under paragraph you must…"

114. Accordingly, equivalent provisions exist in the two documents and the factual basis of the Claimant's assertion is therefore incorrect. Lest there be doubt, this provision has a basis in the current tied lease dated 3 July 2017.
115. Further, the current lease was argued by the Claimant to be reasonable save that in order to achieve a compliant MRO lease the existing tied supply terms would be required to be removed.
116. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.17) Para.6.2.4 to Schedule 6 (Tenant's covenants)

117. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 and that it was unreasonable to impose the more onerous provision in the MRO lease upon the Claimant.
118. (SoC para.17) Para.6.2.4 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides that the Claimant, as Tenant, covenants that it *"…may carry out alterations or additions to the Premises which do not affect any part of the exterior or structure of the Premises where: …the Tenant has if reasonably so required by the Landlord provided the Landlord with suitable security which will allow the Landlord to carry out and complete the works if the Tenant fails to do so;…"*
119. At SoD para.20 the Respondents claimed that the content of para.6.2.4 to Sch.6 of the proposed MRO lease was the same as that contained within para.2.1 and 2.2 of s.2 to the existing tied lease dated 3 July 2017, however, 'security' is not referred to within s.2 of the existing tied lease and the factual basis of the Respondent's assertion in this regard was incorrect.
120. Further, the Respondent's Expert Witness did not appear to identify that the substantive issue concerned the matter of the requirement to provide security in relation to alterations etc., and instead focused their attention on the inclusion of the word 'reasonably' within the new para.6.2.4 to Sch.6 and a simple single sentence statement that the Expert viewed such provision as reasonable without material elucidation.
121. Nevertheless, a MRO proposal does not have to be the same as the tied tenancy although it has to be reasonable, in regard to which I agree with the Respondents' Expert that the content of para.6.2.4 of Sch.6 to the proposed MRO lease is reasonable. Further, the new provision proposed within the MRO lease would not leave the Claimant worse off and/or persuade the Claimant, as Tenant, to remain tied.
122. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.18) Para.8.3.5 to Schedule 6 (Tenant's covenants)

123. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 to provide an authorised guarantee agreement in the event the Claimant, as Tenant, wishes to transfer The Lamb Inn and that it was unreasonable to impose the more onerous requirement to do so in the MRO lease upon the Claimant.

124. (SoC para.18) Para.8.3.5 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides that the Landlord shall not unreasonably withhold Consent to an assignment but that the Landlord may do so unless, amongst other conditions cited at para.8.3 to Sch.6, the following is satisfied immediately before the Landlord's consent is given if such was not satisfied at the time of seeking the Landlord's Consent:
"8.3.5 the Tenant (any former tenant who by virtue of there having been an excluded assignment as defined in Section 11 of the 1995 Act has not been released from the Tenant's covenants in this Lease) enters into an authorised guarantee agreement within the meaning of Section 16 of the 1995 Act with the Landlord in such terms as the Landlord may reasonably require;…"

125. At SoD para.21 the Respondents claimed that para.1.4.1 of s.7 to the existing tied lease dated 3 July 2017 required the Claimant, as the Tenant, to give an authorised guaranteed agreement and that such is a standard commercial term and is common and reasonable.

126. Para.1.4.1 of s.7 to the existing tied lease states in relation to the Claimant, as the Tenant:
"1.4 When you transfer the property (having first obtained our permission under paragraph 1.2 above) you must either:
1.4.1 give us a legal guarantee that the person you plan to transfer the property to will fulfil all your obligations under the agreement (that guarantee being on such reasonable terms as we require); or
1.4.2 pay us either [redacted] *of the amount for which you sell the business including the amount for which you sell the inventory, or* [redacted] *whichever is more…"*

127. On that basis, said the Respondents, the requirement to provide an authorised guarantee agreement was common to both the existing tied lease and the proposed MRO lease and therefore reasonable.

128. Accordingly, equivalent provisions exist in the two documents and the factual basis of the Claimant's assertion is therefore incorrect. Lest there be doubt, this provision has a basis in the current tied lease dated 3 July 2017.

129. Further, the current lease was argued by the Claimant to be reasonable save that in order to achieve a compliant MRO lease the existing tied supply terms would be required to be removed.

130. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.19) Para.8.3.7 to Schedule 6 (Tenant's covenants)

131. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 that required a rent deposit from an assignee on assignment of six months' rent on top of the 25% for the lease (presumably representing the quarterly rent in advance), and that it was unreasonable to impose the more onerous requirement to do so in the proposed MRO lease upon the Claimant.

132. (SoC para.19) Para.8.3.7 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides that the Landlord shall not unreasonably withhold Consent to an assignment but that the Landlord may do so unless, amongst other conditions cited at para.8.3 to Sch.6, the following is satisfied immediately before the Landlord's consent is given if such was not satisfied at the time of seeking the Landlord's Consent:
"8.3.7 if the Landlord reasonably requires, a deposit of 6 months' Basic Rent (as reviewed from time to time) [identified on the first page of the proposed lease as £[redacted] *plus VAT is deposited with the Landlord on such terms as the Landlord shall reasonably require to secure payment of the Rents due under this Lease and observance of the covenants on the part of the Tenant;…"*

133. At SoD para.22 the Respondents claimed that para.1.3.4 of s.7 to the existing tied lease dated 3 July 2017 allowed the Landlord to require a security deposit, as specified in the agreement as increased by RPI from the start of the lease. Under the proposed MRO lease the Respondents said that the Landlord can only require a rent deposit if it is 'reasonably required' and so, it was argued, the provision within the proposed MRO lease to which the Claimant objected was nevertheless said to be reasonable.

134. Para.1.3.4 of s.7 to the existing tied lease states in relation to the Claimant, as the Tenant:
"1.3 Anyone you want to transfer the property to must:

…

1.3.4 pay us a security deposit. This will be calculated using the following formula or it will be any other amount we reasonably decide is appropriate

$$\textit{The security deposit} \times \frac{\textit{the closing index}}{\textit{The opening index}}$$

[the 'Security deposit' was defined in the body of the agreement as [redacted] *or any other amount that applies under paragraph 1.3.4 of section 7"*]

The 'Index' is the 'all items' index of the Retail Prices Index.

The 'closing index' is the figure quoted in the index in the month before you transfer the property.

The 'opening index' is the figure quoted in the index in the month before the date of this agreement;"

135. The Respondents' Expert Witness evidence in this regard was not of any material assistance and simply claimed it was reasonable.
136. The provisions of the proposed MRO lease were plainly not the same as the existing lease in this regard. Whilst the MRO proposal does not have to be the same as the tied tenancy it is nevertheless required to be reasonable, however, Cl.8.3.7 to Sch.6 of the proposed MRO lease was not reasonable because it would leave the Claimant worse off in terms of risk and/or persuade the Claimant, as Tenant, to remain tied. I therefore decide that the MRO lease offered was non-compliant and breached Reg.29(3) of the Code, Reg.32(2) of the Code and s.42(3)(b) of the SBEEA 2015 as a consequence.

<u>(SoC para.20) Para.8.7 to Schedule 6 (Tenant's covenants)</u>

137. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 that obliged the Claimant, as Tenant, to promptly provide the Landlord with particulars of all derivative interests and copy documents from time to time to the Landlord, and that it was unreasonable to impose the more onerous requirement to do so in the MRO lease upon the Claimant.
138. (SoC para.20) Para.8.7 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides that:
"From time to time on demand during the Term the Tenant shall promptly provide the Landlord with particulars of all derivative interests of or in the Premises including particulars of rents rent reviews and service and maintenance charges payable in respect of them and copies of any relevant documents and the identity of the occupiers of the Premises."
139. At SoD para.23 the Respondents claimed that para.1.2 of s.7 to the existing tied lease dated 3 July 2017 entitles the Landlord to impose conditions as are reasonable to do so and para.1.5 of the same section 'effectively' required the Claimant, as the Tenant, to disclose derivative interests. On that basis, said the Respondents, the contents of para.8.7 to Sch.6 of the proposed MRO lease was similar to that already included in the existing tied lease and therefore reasonable. The Respondents' Expert Witness added that such was found in FOT pub leases and that he did not consider such to be unreasonable.
140. In relation to circumstances in which the Claimant wishes to transfer its interest in The Lamb Inn to another, para.1.2 of s.7 to the existing tied lease dated 3 July 2017 provides that, subject to restrictions identified within para.1.1 of the same section, the Claimant, as Tenant, can

transfer the whole of the property as long as the Landlord's permission is sought first and that the Claimant agrees to any reasonable conditions or requirements requested by the Landlord in connection with the proposed transfer. Further, para.1.5 of the same section also provides, amongst other things, that if any transfer, mortgage, legal charge or other agreement relating to The Lamb Inn does occur that the Claimant should send to the Landlord a copy of the relevant document and any other details that the Landlord requests.

141. Accordingly, under the proposed MRO lease there is an obligation upon the Claimant to provide particulars of derivative interest and copy documents to the Landlord on demand by the Landlord, whereas under the existing lease the requirement to provide such information is limited to circumstances in which the Claimant wishes to transfer its interest in The Lamb Inn to another. The two provisions are therefore not the same, and arguably not similar either.
142. Nevertheless, a MRO proposal does not have to be the same as the tied tenancy although they have to be reasonable, in regard to which I agree with the Respondents' Expert that the content of para.8.7 of Sch.6 to the proposed MRO lease is reasonable. Further, the new provision proposed within the MRO lease would not leave the Claimant worse off and/or persuade the Claimant, as Tenant, to remain tied.
143. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

<u>(SoC para.25) Para.13.1 to Schedule 6 (Tenant's covenants)</u>

144. The Claimant asserted that there is no equivalent provision within the existing tied lease dated 3 July 2017 that entitled the Landlord to enter the premises at all times and that it was unreasonable to impose the more onerous requirement to do so in the MRO lease upon the Claimant.
145. The Respondents argued that similar rights of entry were included in both the 3 July 2017 tied lease and the proposed MRO lease and as such what was included within the proposed MRO lease was reasonable.
146. (SoC para.25) Para.13.1 to Sch.6 (Tenant's covenants) of the proposed MRO lease provides, under the paragraph heading 'Entry by the Landlord', actually provided as follows:
"Upon reasonable prior written notice (except in emergency when no notice need be given) the Tenant shall permit the Landlord and those authorised by it at all times to enter (and remain unobstructed on) the premises for the purpose of:
13.1.1 exercising the rights reserved by schedule 3; or
13.1.2 inspecting the Premises [i.e. The Lamb Inn] *for any purpose; or*
13.1.3 making surveys or drawings of the Premises; or

13.1.4 complying with the Landlord's obligations under this lease or with any other legal obligation of the Landlord; or

13.1.5 erecting a noticeboard stating that the Premises are to let or for sale (which the Tenant shall not remove interfere with or obscure);

13.1.6 carrying out works which are the responsibility of the Tenant under this Lease but which the Tenant has failed to do."

147. At SoD para.25 the Respondents also claimed that para.6.1 and 7.1 of s.5 of the proposed MRO lease also referred to rights of entry. Para.6.1 of s.5 concerned 'Alterations' and did not relate to rights to entry. Further, s.5 of the proposed MRO lease did not contain a para.7.1; the only para.7.1 was in the body of the proposed agreement (concerning notices) and Sch.6 (relating to 'Signs').

148. Para.3.2 of s.15 of the tied lease dated 3 July 2017 stated under the paragraph heading "*Rights we* [i.e. the Landlord] *retain"* as follows:

"To enter the property for the purpose of:-

(a) viewing the state and condition of the property and to ascertain whether you have complied with your covenants in this agreement; and

(b) carrying out repairs to and/or decoration to the property or other works which you have failed to carry out although obliged to do so under this agreement; and

(c) carrying out works of repair maintenance renewal inspection decoration alteration or construction to adjoining premises the person exercising such right making good any damage caused to the property."

149. The Respondents Expert Witness added that para.13.1 to Sch.6 of the proposed MRO lease was a standard FOT pub lease clause and reasonable.

150. The two provisions are therefore similar and a MRO proposal does not have to be the same as the tied tenancy although the provisions of such have to be reasonable, in regard to which I agree with the Respondents' Expert that the content of para.13.1 of Sch.6 to the proposed MRO lease is reasonable. Further, the new provision proposed within the MRO lease would not leave the Claimant worse off and/or persuade the Claimant, as Tenant, to remain tied.

151. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

Type D Provisions (SoC para. 11 and 28)

<u>(SoC para.11) Para.1.2 to Schedule 6 (Tenant's covenants)</u>

152. (SoC para.11) Para.1.2 to Schedule 6 (Tenant's covenants) stated the Claimant, as the Tenant, covenanted to pay the Basic Rent by banker's standing order or direct debit if required by the Landlord.

153. The Claimant objected on the basis that it claimed that there is no equivalent provision within the tied lease dated 3 July 2017 and complained that it was not reasonable to impose a more onerous provision within the proposed MRO lease.
154. The Respondents observed that what the Claimant had objected to was a standard provision in modern commercial (FOT) leases and that such was common and reasonable.
155. The Respondents' Expert Witness also observed that the provision was a typical FOT pub lease rent payment clause and could not appreciate how such could be perceived as anything but reasonable.
156. I entirely agreed with both the Respondents and their Expert Witness. Whether there is an equivalent provision within the tied lease or not is not determinative, especially where, as in this instance, the provision objected to is unremarkable, common and reasonable.
157. I therefore decide that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

(SoC para.28) Cl.2.1.1 of the Main Agreement and Para.1 to Schedule 4 (Review and Indexation of Basic Rent)

158. At SoC para.28 the Claimant objected to an upwards-only rent review and did so again at SoC para.29. I have already addressed, amongst other things, the Claimant's objection to upwards-only rent reviews between para.93 to 97 above, and have decided that the Claimant's assertion that this provision is unreasonable is unproven and therefore does not succeed.

Conclusion

159. The MRO 'Full Response' lease proposal sent by the Respondents on 19 December 2021, in the form of a 'New Agreement', did not comply with s.42(3)(b) of the SBEEA 2015, Reg.29(3) of the Code and Reg.32(2)(a) of the Code because either taken individually or together the following provisions:
    159.1. Cl.2.1.1 of the Main Agreement (SoC para.29) (Type B); and/or
    159.2. para.3.2 to Sch.6 (Tenant's covenants) (SoC para.13) (Type B); and/or
    159.3. para.3.3 to Sch.6 (Tenant's covenants) (SoC para.14) (Type B); and/or
    159.4. para.8.3.7 to Sch.6 (Tenant's covenants) (SoC para.19) (Type C); and/or
    159.5. para.9.7 to Sch.6 (Tenant's covenants) (SoC para.21) (Type A); and/or
    159.6. para.11.2 to Sch.6 (Tenant's covenants) (SoC para.22) (Type A); and/or
    159.7. para.14.3 to Sch.6 (Tenant's covenants) (SoC para.26) (Type A); and/or
    159.8. para.2 to Sch.7 (Landlord's covenants) (SoC para.27) (Type A)

were unreasonably more burdensome than those provided within the existing 3 July 2017 TPT lease and rendered the proposed MRO terms unattractive thereby encouraging the Claimant to remain tied.

160. I note again that during the Arbitration the Respondents agreed to remove the Type A and amend the Type B provisions to the Claimant's satisfaction. As a Type C provision, para.8.3.7 to Schedule 6 (Tenant's covenants) (SoC para.19) was neither removed nor amended by the Respondents during the Arbitration.

Substantive Issue 3 – Remedy

161. On the basis of and given my conclusions in relation to the first and second substantive issues, it therefore follows that the Respondents shall provide a revised MRO proposal/ response to the Claimant (within the meaning of Reg.33(3) of the Code) within 21 days of the date of this Award.

Decision

162. I, Nigel Davies, having carefully considered the evidence and the written representations of the Parties, do hereby make this Award only on the issues which it addresses.
163. There is no obligation upon the Respondents to use a DoV (Deed of Variation) and that the Respondents were, in principle, entitled to use a New Agreement.
164. The proposed MRO lease sent by the Respondents on 19 December 2021 is not compliant because Cl.2.1.1 of the Main Agreement and para.3.2, 3.3, 8.3.7, 9.7, 11.2 and 14.3 to Sch.6 (Tenant's covenants) as well as para.2 to Sch.7 (Landlord's covenants) of the lease are unreasonable terms and/or conditions. Further, even assuming the disputed terms were common terms in tie-free agreements, other than a signed (name not stated) MRO Compliance Record and Declaration of unknown date provided by the Respondents, there was little if no evidence that the Respondents had considered whether it would be reasonable for an existing tenant to accept them. For example, there was little if no consideration of what terms the Respondents would offer to a tied tenant who they were motivated to release from the tie.
165. Even if Cl.2.1.1 of the Main Agreement and para.3.2, 3.3, 8.3.7, 9.7, 11.2 and 14.3 to Sch.6 (Tenant's covenants) as well as para.2 to Sch.7 (Landlord's covenants) of the proposed MRO lease are common in FOT leases, such terms are unreasonably more burdensome than the current tie arrangement. 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.
166. Accordingly, I find that the POB/ Respondents has/have failed to comply with the duty imposed under Reg.29(3)(b) and Reg.32(2)(a) of the Code and s.42(3)(b) of the SBEEA 2015, and lest

there be doubt, the terms of the MRO lease proposed on 19 December 2021 are not MRO compliant.

167. The Respondents shall provide a revised MRO proposal/ response to the Claimant (within the meaning of Reg.33(3) of the Code) to the Claimant within 21 days of the date of this Award.

Costs

168. Issues as to the cost of this arbitration are reserved pending the Parties' opportunity to make submissions as to costs within 7 days of the date of this Award. The Fee Regulations set out, amongst other provisions, who pays the costs of the arbitration and the rules around the TPT's exposure to costs.

Operative Provisions

169. In consideration of the above:
    169.1. the Respondents are to provide a revised response (within the meaning of Reg.33(3) of the Code to the Claimant within 21 days of the date of this Award; and
    169.2. costs are reserved.

I confirm that I have taken account of all other matters raised by the Parties in making my Award (Save as to Costs) whether or not specifically mentioned herein, where I have not expressly referred to specific facts or arguments in my Award I have not done so because I do not consider such to be relevant to my reasoning.

MADE AND PUBLISHED BY ME AT 31 PEARCE DRIVE, FARINGDON, OXFORDSHIRE SN7 7ND, 4 JUNE 2022

Nigel J. Davies, Arbitrator

PCA reference: DAS-01110-H0S1C/PCA130

IN THE MATTER OF A PUBS CODE STATUTORY ARBITRATION PURSUANT TO SECTION 94 OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BEFORE: NIGEL J. DAVIES, ARBITRATOR

DATED: 4 JUNE 2022

BETWEEN:

ANTHONY CHARLES GREGORY

(TIED PUB TENANT)

Claimant

– v –

(1) PUNCH TAVERNS LIMITED
(2) PUNCH PARTNERSHIPS (PML) LIMITED
(PUB-OWNING BUSINESS)

Respondents

AWARD

SAVE AS TO COSTS

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