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: [REDACTED], ARBITRATOR

DATED: 14 MARCH 2024

BETWEEN:

[REDACTED]

(TIED PUB TENANT)

Claimant

– and –

EI GROUP LIMITED

(PUB-OWNING BUSINESS)

Respondent

AWARD

SAVE AS TO COSTS

Prepared by:

[REDACTED]

CONTENTS

Award Summary 1
Order 4
Introduction 4
The Parties 4
The Party Representatives & Miscellaneous Matters 4
The Background 5
The Statutory Framework 6
Procedure 8
Burden and Standard of Proof 9
Punch Partnerships (PTL) Ltd & Anor v Jonalt Ltd [2020] EWHC 1376 (Ch) (01 June 2020) 10
Evidence 10
Remedy Sought 11
The Substantive Issues 11
Substantive Issue 1 – Whether a 5-year lease term is unreasonable 11
Substantive Issue 2 – Whether the inclusion of index-based, annual inflation-linked rental increases in short leases is uncommon and/or unreasonable 14
Substantive Issue 3 – If such indexing is to be included, whether it is uncommon and/or unreasonable to link annual rent increases to the Retail Price Index (**RPI**) 15
Conclusion 17
Decision 18
Costs 18
Operative Provisions 18

Award Summary

1. The proposed Market Rent Only (**MRO**) lease sent by the Respondent on 3 July 2023 is not compliant because:
   1.1. The Respondent's standard free of tie lease terms offered by the Respondent on the open market are for either 10 or 20 years or (when converting from a tied lease) the remaining term of the tied lease. Accordingly, the 5-year term offered by the Respondent is not standard in any of the Respondent's pubs that are being let free of tie in the open market and therefore is contrary to Chapter 4.13 of the Pubs Code Adjudicator's (**PCA**) Regulatory Compliance Handbook (Version 2: September 2020 amended April 2022).
   1.2. It therefore follows that the proposed 3 July 2023 MRO lease offered to the Claimant does not reflect the proposal that the Respondent would ordinarily offer if making a free of tie offer to a tenant, or prospective tenant, with negotiating strength, the 5-year term the Respondent had proposed made the MRO option unattractive to the Claimant and therefore contrary to the PCA's guidance and Small Business Enterprise and Employment Act 2015 (the **SBEEA**) s.43(4)(a)(iii). The 5-year lease term offered is therefore unreasonable in this instance.
   1.3. The five-year lease offered by the Respondent to the Claimant, characterised by annual inflation-linked rent increases and the statutory rent review under s.34 of the Landlord and Tenant Act 1954 at the end of the 5-year term, inadvertently institutes both an annual rent review and a five-yearly open market rent evaluation. This combination, as highlighted by the PCA in its 27 February 2023 article, is acknowledged by Stonegate as unusual and not customary in free-of-tie lease agreements. Consequently, the proposed MRO tenancy is unreasonable under SBEEA s.43(4) because it indirectly imposes both an annual rent review and a quinquennial open market rent assessment, which are collectively atypical in landlord-pub tenant agreements, contrary to Reg.31(2)(c) of the The Pubs Code etc. Regulations 2016 (**the Code**).
   1.4. Since the ONS has clearly stated in unequivocal words that it is the ONS's position that RPI is not a good measure of inflation *and* discourages its use, an indexing term or condition within a proposed lease agreement between a landlord and pub tenant based upon RPI is unreasonable, contrary to SBEEA s.43(4)(a)(iii).
2. Accordingly, the Pub-Owning Business (**POB**)/ Respondent has failed to comply with the duty imposed under Reg.29(3)(b), Reg.31(2)(c), and Reg.32(2)(a) of Code and s.42(3) and s.43(4)(a)(iii) of the SBEEA.

Order

3. In accordance with Reg.33(2) of the Code the Respondent shall provide a revised MRO response to the Claimant (within the meaning of Reg.33(3) of the Code) 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 26 October 2023. On 8 November 2023, 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 that date.
5. Accordingly, I, [redacted], was appointed as Arbitrator by the PCA on 8 November 2023 by virtue of Reg.58(2)(b) of the Code concerning 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 [redacted].

The Parties

7. The parties to this arbitration are '**the Claimant**', [redacted] the registered office address of which is [redacted] which is a Tied Pub Tenant (**TPT**) as defined by s.70 of the SBEEA 2015 of [redacted], [redacted] [redacted], [redacted], which is a tied pub as defined by s.68 of the SBEEA 2015 and
   'the Respondent', EI Group Ltd (Company No.02562808), the registered office address of which is 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ which is a Pub-Owning Business (**POB**) as defined by s.69 of the SBEEA 2015.
8. The Claimant and the Respondent are together referred to as '**the Parties**'.

The Party Representatives & Miscellaneous Matters

9. John Keane of Thomas E Teague represented the Claimant (John Keane, Thomas E Teague and the Claimant are before and hereinafter referred to together simply as 'the Claimant' for ease of reference); whereas Rob Hastie (Barrister) of Wilberforce Chambers represented the Respondent (Rob Hastie and the Respondent are before and hereinafter referred to together simply as 'the Respondent' 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 Background

14. By way of background, and according to correspondence sent by the Respondent, Leased and Tenanted Pubs 2 Ltd is the freehold owner of [redacted] and there is an intercompany lease between Leased and Tenanted Pubs 2 Limited and the Respondent. The Respondent was acquired by Stonegate on 3 March 2020 and is a POB within the meaning of the Code. The Claimant occupies the [redacted] pursuant to a 10-year Lease commencing 8 December 2013 but has been in continuous occupation since September 2007. The leasehold title for [redacted], is registered to the Claimant under title number [redacted].
15. On 12 May 2023 the Claimant's solicitors served a s.26 notice on the Respondent (as Landlord) under the 1954 Act with the following proposals for a new tenancy:
    15.1. 10-year term;
    15.2. Annual rent of £25,000 excl VAT;
    15.3. Annual rent indexation to be changed from RPI to CPI subject to a 2% collar and 4% cap;
    15.4. Inclusion of a 'pandemic clause';
    15.5. Other terms as existing subject to modernisation.
16. On 17 May 2023 the Claimant served an MRO notice on the Respondent requesting an MRO option and on 3 July 2023 the Respondent issued its Full Response. The Full Response included certain required information including a proposed Pubs Code compliant free of tie lease and a rent valuation.
17. On 3 August 2023 the Respondent responded advising that it would not be contesting the Claimant's request and proposing the following terms:
    17.1. 5-year Retail Partnership Tenancy;
    17.2. Annual rent of £51,000 excl VAT;
    17.3. Free of tie, on wines, spirits and minerals;

17.4. Updated for assignments in line with the Landlord and Tenant (Covenants) Act.

18. Of the four original grounds of objection it was common ground between the Parties that two remained in dispute, as follows:

    18.1. Term – the Claimant asserted that the proposed 5-year term was unreasonable and should reflect the likelihood that at renewal the court would fix the term for a new tied lease at 10-years.

    18.2. Annual review of the rent – the Claimant asserted that the proposal in the Sixth Schedule to adjust the annual rent by reference to the Retail Prices Index (RPI), capped at 5% and collared at 2%, was neither common nor reasonable.

    It was also common ground that the Respondent had agreed that the cap on RPI linkage would be 4% instead of 5% and that the Claimant (as TPT) would no longer be required to disclose trading accounts. The Respondent was said by the Claimant not to have issued an updated Full Response to reflect these changes but that I should read the proposed lease on this basis.

19. Further, the Claimant stated that the proposed lease stipulates that rent is to be paid quarterly in advance but that the Respondent had offered a personal concession to the Claimant permitting rent to be paid monthly, which concession had been accepted by the Claimant.

20. Despite the above agreements, the Parties remained unable to agree on the terms of the MRO lease within the 3-month Resolution Period and so on 26 October 2023, the Claimant applied to the PCA for an arbitrator to be appointed.

The Statutory Framework

21. The Claimant relied on s.43(4) of the SBEEA, as well as Reg.30(2) and Reg.31(2) of the Code as the basis on which it disputed that the lease which the Respondent had proposed on 3 July 2023 was not MRO-compliant. The Respondent agreed save that it argued that Reg.30(2) of the Code (which sets a minimum length of term for MRO tenancies) does not apply to MRO referrals based on Reg.26 of the Code. The omission is significant because the Code could have, but did not, specify what length of term has to be offered on a renewal. For instance, it could have stated that the term of the MRO tenancy had to be the same length as the expiring tied lease or that the test in s.33 of the 1954 Act applied. The absence of a prescription of MRO tenancy length leaves the question open, which must be assumed to have been deliberate.

22. The Claimant also asserted that when considering whether a proposed MRO lease is Pubs Code compliant, one must look at the two tests of commonality and reasonableness. The Claimant argued that these are not alternatives and both must apply for a proposed clause to be considered compliant. These two issues were said to have been considered several times

by the PCA who had said, *'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.'* (para.14 - Elizabeth Doyle and Punch Partnerships PTL) Limited and Star Pubs & Bars Limited ref ARB/17/DOYLE).

23. The Claimant also averred that detailed advice as to how the commonality and reasonableness tests are to be approached was issued by the DPCA as an appendix to *Doyle* and has been included as part of a suite of standard appendices in several Awards since.

24. The Respondent argued that *Doyle* was a decision of the previous PCA in February 2018, and did not represent the up-to-date position. The current sources of authority on the test of reasonableness were said to be:

    24.1. *Punch Partnerships (PTL) Ltd & Anor v Jonalt Ltd* [2020] EWHC 1376 (Ch) which provided clarification of the law around the burden of proof;

    24.2. *EI Group Ltd v Clarke & Minnett* [2020] EWHC 1858 which provided clarification of the approach to the *'no worse off test'*;

    24.3. The PCA's Regulatory Compliance Handbook (Version 2: September 2020 amended April 2022) (**the Handbook**) which is Statutory Advice under s.60 of the SBEEA;

    24.4. The PCA's Guidance on clarity in the MRO procedure published 17 March 2023 (**the Guidance**), which is Statutory Guidance under s.61 of the SBEEA.

25. The High Court cases are binding precedent. The Statutory Guidance is binding. The PCA's awards or Statutory Advice is authoritative, but not binding on me. The Respondent stated that it was not aware of any arbitration awards having dealt with the length of term of an MRO tenancy following a Reg.26 renewal MRO event.

26. The Respondent argued the Claimant has the burden of proving that the two clauses it challenged were uncommon and/or unreasonable on the following basis:

    26.1. This is a statutory arbitration for the purposes of the Arbitration Act 1996.

    26.2. Evidential matters are (generally) governed by Arbitration Act 1996 s.34 which gives the tribunal powers to decide procedural and evidential matters.

    26.3. By Reg.58(3)(a) of the Code the 1 December 2015 edition of the Arbitration Rules of the Chartered Institute of Arbitrators (**the Rules**) apply to this arbitration. Accordingly:

        26.3.1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

26.3.2. Witnesses, including expert witnesses, who are presented by the Parties may be any individual notwithstanding that the individual is a party to the arbitration or in any way related to a party.

26.3.3. At any period of time during the arbitral proceedings, the arbitral tribunal may require the Parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

26.3.4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. (Rules 27(1) to 27(4)).

27. The Claimant asserted that the proposed MRO lease put forward by the Respondent did not comply with the Code and that the Respondent should be ordered to issue a revised response in accordance with Reg.33(2) and 33(3) of the Code.

28. The Respondent argued that:

28.1. The Claimant had not demonstrated that the terms proposed by the Respondent were unreasonable or that RPI is not common.

28.2. The duration challenge based on the Reg.30(2) of the Code was fundamentally flawed and undermined all of the Claimant's subsequent arguments based upon it.

28.3. In relation to RPI challenge based on commonality, if, notwithstanding the breadth of expert evidence available, I felt it necessary, I could obtain the advice of an expert chartered surveyor with deep experience of the free-of-tie pub letting market.

29. 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.

Procedure

30. 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**).

31. Pursuant to s.51(5)(a) of the SBEEA 2015 and Reg.58(3)(a) of the Code, the Rules apply to the conduct of this arbitration. 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.

32. In accordance with s.51(6) of the SBEEA 2015 the Respondent as POB is 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.

33. The 'Request for Recommendation of an Arbitrator' form was received by the Chartered Institute of Arbitrators (**CIArb**). I was appointed as Arbitrator on 8 November 2023 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.
34. In my letter dated 8 November 2023 I asked the Parties to provide me with all their submission documents in electronic format only.
35. 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.
36. 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.
37. The Order for Directions No.1 was issued on 8 November 2023. 38. The Order for Directions No.2 was issued on 10 November 2023.
39. The Order for Directions No.3 was issued on 12 December 2023.
40. The Statement of Claim was received by e-mail dated 19 December 2023 timed 1250hrs.
41. The Order for Directions No.4 was issued on 15 January 2024.
42. The Statement of Defence was received by e-mail dated 25 January 2024 timed 1215hrs.
43. The Order for Directions No.5 was issued on 15 February 2024.
44. The Reply was received by e-mail dated 5 March 2024 timed 1830hrs.
45. The Respondent wrote to me by email dated 7 March 2024 timed 0959hrs to state as follows: *'Whilst the Respondent takes issue with the points made in Reply, we do not think it worthwhile having further submissions and are content to rest on our Defence, witness statement and the expert witness evidence disclosed, particularly as you have indicated that you do not see the benefit in obtaining further expert evidence.*
We would therefore invite you to proceed to your award on the challenges identified.'
46. The Order for Directions No.6 was issued on 9 March 2024.

Burden and Standard of Proof

47. 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.

48. 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.

49. 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)**

50. 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

51. 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.

52. 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

53. The Claimant asserted that the proposed MRO lease put forward by the Respondent did not comply with the Code and that the Respondent should be ordered to issue a revised response in accordance with Reg.33(2) and 33(3) of the Code.

54. The Claimant said it is aware that I am unable to impose terms but should I agree that a 5-year term is not compliant, and in order to avoid potential issues over the duration of a revised MRO lease, the Claimant said it would be helpful if I could provide guidance as to the appropriate length of lease and whether it is common or reasonable to have RPI linked rents in longer leases and with what cap and collar.

The Substantive Issues

55. Based upon communications with the Parties, in my email to the Parties dated 23 February 2024 timed 1118hrs I recorded that the Substantive Issues in dispute between the Parties were whether:

    55.1. A 5-year lease term is unreasonable.

    55.2. The inclusion of index-based, annual inflation-linked rental increases in short leases is uncommon and/or unreasonable.

    55.3. If such indexing is to be included, whether it is uncommon and/or unreasonable to link annual rent increases to the Retail Price Index (RPI).

Substantive Issue 1 – Whether a 5-year lease term is unreasonable

56. The Claimant relied upon Reg.30(2) of the Code to claim that the Code stipulates that the proposed MRO lease must be for *'a period that is at least as long as the remaining term of the existing tenancy'*. The Claimant also argued that the 5-year term offered by the Respondent in the Full Response dated 3 July 2023 was unreasonable because it did not take into account the likelihood of the court deciding that the renewal lease should be for 10 years; the Respondent had already rejected the possibility of taking back the pub for occupation as a managed house; the 5-year term was a device to make the MRO option unattractive to the Claimant contrary to the PCA's guidance; and, that it is evident from material published by the Respondent on the internet in connection with properties being offered to let on new free of tie leases in the open market by the Respondent that a 5-year term is not standard.

57. The Claimant also asserted that there is little statutory guidance as to how the court should fix the term under a renewed lease other than it cannot exceed 15 years and it should be reasonable in all circumstances (s.33 of the Landlord and Tenant Act 1954).

58. However, the availability of the County Court's jurisdiction to determine reasonable terms of a new tenancy is not a relevant consideration in this instance. This is because the Code does not specify a length of term that has to be offered on renewal given that Reg.30(2) of the Code does not stipulate that it applies to MRO referrals based on renewal notices under Reg.26 of the Code, which appears to have been a deliberate omission. I therefore conclude that Reg.30(2) of the Code does not apply to a Reg.26 of the Code lease renewal MRO event.

59. Further, since Reg.30 of the Code does not refer to s.33 of the Landlord and Tenant Act 1954, there is nothing within the SBEEA or the Code to support the Claimant's assertion that *'to decide whether a 5-year MRO term is reasonable*', I must *'first determine whether, on the balance of probability, the court is likely to fix a longer term than that for a renewed tied lease'*. I therefore conclude that Reg.30 of the Code is not relevant to a challenge to the duration of a lease offered.

60. The correct approach to reasonableness commences with SBEEA s.43(4), the commentary of the courts and the Statutory Guidance and Statutory Advice published by the PCA.

61. SBEEA s.43(4)(a)(iii) provides that a tenancy or licence is MRO-compliant if it does not contain any unreasonable terms or conditions.

62. In relation to the Claimants arguments to secure a grant of a lease for a term longer than the Respondent wishes to offer, in accordance with the High Court judgment in *Punch Partnerships (PTL) Ltd v Highwayman Hotel (Kidlington) Ltd* [2020] EWHC 714 (Ch), it cannot be doubted that clear language would be required within the applicable legislation to empower me to substantially interfere with the property rights of the Respondent to which the Claimant did not direct my attention within the SBEEA and/or the Code, nor which I could locate.

63. Further and in addition, the additional benefit of the 5-year lease proposed by the Respondent is that on expiry of the term the Claimant will have the benefit of a rent review under s.34 of the Landlord and Tenant Act 1954, if the lease is renewed.

64. However, the Claimant also noted that the PCA had sought to remove barriers to TPT's pursuing a free of tie arrangement and had published the Guidance. At para.18 of the Guidance the PCA recorded that one of the requirements for a tenancy to be MRO-compliant is that it does not contain any unreasonable terms or conditions (as per SBEEA s.43(4)). The Guidance continues to explain in the paragraph that:

'Where the issue arises the PCA (or arbitrator so appointed) is empowered to determine (and may be required to determine) when a MRO proposal is non-compliant because a tenant asserts that its terms or conditions are unreasonable. Reasonableness is to be considered in all the circumstances of the case both individually and in combination. In arbitration, it may well be that the person asserting a term or condition is unreasonable needs to show that it is.'

65. In this regard, the Claimant alleged that the 5-year term the Respondent had proposed made the MRO option unattractive to the Claimant and therefore contrary to the PCA's guidance.

66. In response, the Respondent purported to refer to Chapter 4.14 of the Handbook which was said to include the following, amongst other things:
'The pub-owning business should be able to demonstrate that its MRO proposal reflects the position that it would adopt if making a free of tie offer to a tenant, or prospective tenant, with negotiating strength.' [The wording cited was actually to be found within Chapter 4.13 of the Handbook.]

67. In the context of the above quotation, the Respondent referred to and claimed to cite an answer to a FAQ published by the Respondent but unfortunately, the Respondent omitted to provide me with a copy of the FAQs from which it claimed to quote or direct my attention to where I could locate a copy to read.

68. The quotation that was claimed to be cited by the Respondent was asserted to state as follows:
*'**Q: How long will my MRO tenancy be?** A: The length of term offered will depend on when the MRO option has been exercised. If MRO has been exercised mid-term, then the proposal will be based on the remainder of the existing tied tenancy. If exercised at renewal or within the last 12 months of the term (and we aren't opposing renewal on this occasion) then the proposal will be based on what we would be prepared to offer for a tied renewal. This is usually 5 years, based on a possible intention to take back for our own occupation under our growing managed estate. These decisions are made by our Asset Optimisation Panel, who carry out a full asset review to determine what the most appropriate operating model is for the pub. Where the tied tenancy contains a contractual right to renewal this will also be taken into account.'*

69. In the Reply the Claimant provided printed copies of two new free of tie leases being offered on the open market in respect of the Great Shefford at Shefford and The Red Lion at Upper Poppleton currently being offered by the Respondent online (published on the Stonegate Group website and which I was also able to read online). The FAQs included the question *'What term of lease is offered?'* to which the Respondent had answered in relation to each as follows:

'Our standard lease is 10 or 20 years, but we can offer 15 years, or even 25 years, by exception, if the Tenant is undertaking a substantial investment.'

70. The Claimant's evidence in this regard was substantiated and the Respondent's evidence was not, I therefore preferred the Claimant's evidence and decide that the Respondent's standard free of tie lease terms that are being offered by the Respondent on the open market are for either 10 or 20 years or (when converting from a tied lease) the remaining term of the tied lease. I conclude that the 5-year term offered by the Respondent is not standard in any of the Respondent's pubs that are being let free of tie on the open market and therefore is contrary to Chapter 4.13 to the PCA's Regulatory Compliance Handbook (Version 2: September 2020 amended April 2022).

71. It therefore follows that the proposed 3 July 2023 MRO lease offered to the Claimant does not reflect the proposal that the Respondent would ordinarily offer if making a free of tie offer to a tenant, or prospective tenant, with negotiating strength. I therefore conclude that the 5-year term the Respondent had proposed made the MRO option unattractive to the Claimant and therefore contrary to the PCA's guidance and SBEEA s.43(4)(a)(iii). The 5-year lease term offered is therefore unreasonable in this instance.

Substantive Issue 2 – Whether the inclusion of index-based, annual inflation-linked rental increases in short leases is uncommon and/or unreasonable.

72. The Claimant defined a 'short lease' as one of 7 years or less, i.e. one that dies not require registration under s.3(3) of the Land Registration Act 2002. The Respondent did not object to this definition. The Claimant asserted that a 5-year term for a free of tie lease is short by that standard.

73. Para.9 of the proposed MRO deed offered by the Respondent to the Claimant on 3 July 2023 stated under the heading *'Rent Review' – 'The Rent is subject to increase in accordance with the Sixth Schedule'* which Schedule provided for annual inflation-linked rental increases.

74. This gave rise to the Claimant's second ground of objection, which was the inclusion of annual inflation-linked rental review increase terms within a 5-year lease such as that proposed to the Claimant, was uncommon and/or unreasonable.

75. The Respondent argued that annual RPI rent increases are common and reasonable.

76. However, as the Claimant identified, on 27 February 2023, the PCA published a news article online bearing the heading *'Stonegate offers to change non-compliant rent review terms in MRO agreements'*. The PCA recorded that around 70 MRO lessees had received an offer from Stonegate to remove the upward only open market rent review from its agreement when combined with an RPI linked rent review.

77. The PCA wrote that it prevents pub companies from offering tied lessees MRO terms that are not common in free of tie agreements and that the terms must also be reasonable.
78. Where required in a free of tie lease, the PCA wrote that an upwards only open market rent review will typically take place every 5 years, *or* a Retail Price Index (**RPI**) rent review will typically increase the rent annually.
79. I record that I was also provided with copies of four redacted expert witness reports by the Respondent which had been submitted in previous arbitrations. None of the four reports were inconsistent with the PCA's 27 February 2023, and two of the four expert witness reports specifically addressed the issue which the PCA's article concerned.
80. In response to PCA correspondence, the PCA recorded that Stonegate had acknowledged that it was not, and never had been, common to find these two rent review terms together in the same free of tie lease. The Respondent (before its acquisition by Stonegate) stopped offering MRO agreements with these terms in combination in 2019 as a result of expert evidence obtained in arbitration. However, since the first MRO agreements had been completed in 2017, a number of them across different pub companies had entered the market containing both types of rent review.
81. In relation to the first Substantive Issue, the Respondent acknowledged that by reason of the proposed 5-year term of the lease which it proposed there would be a rent review under s.34 of the Landlord and Tenant Act 1954, if the lease was renewed. This was clearly in addition to the annual inflation-linked rental increases included in the proposed lease.
82. I determine that the five-year lease offered by the Respondent to the Claimant, characterised by annual inflation-linked rent increases and the statutory rent review under s.34 of the Landlord and Tenant Act 1954 at the end of the 5-year term, inadvertently institutes both an annual rent review and a five-yearly open market rent evaluation. This combination, as highlighted by the PCA in its 27 February 2023 article, is acknowledged by Stonegate as unusual and not customary in free-of-tie lease agreements. Consequently, I find the proposed MRO tenancy to be unreasonable under SBEEA s.43(4), as it indirectly imposes both an annual rent review and a quinquennial open market rent assessment, which are collectively atypical in landlord-pub tenant agreements, contrary to Reg.31(2)(c) of the Code.

Substantive Issue 3 – If such indexing is to be included, whether it is uncommon and/or unreasonable to link annual rent increases to the Retail Price Index (RPI).

83. The Claimant contended that using the Retail Price Index (RPI) as a measure for index-based, annual inflation-linked rent increases is an unreasonable metric to use. The Claimant proposed that the more appropriate benchmark for such adjustments should be the Consumer

Prices Index (**CPI**), arguing that CPI provides a more reasonable standard for adjusting rent in line with inflation. On 27 February 2023, the PCA published a news article online bearing the heading *'Stonegate offers to change non-compliant rent review terms in MRO agreements'* in which the PCA wrote amongst other things, that *'The PCA has made clear to the regulated pub companies that they should not rely on terms which they know or ought to know are noncompliant as evidence of terms which are common in the free of tie market'.* Referring to Reg.31(2)(c) of the Code, the Claimant said it was clear that a proposed clause must be common in pub leases and not necessarily reflect what is happening in the wider property market.

84. The Claimant also referred to and relied upon an article published by The Office for National Statistics on its website on 8 March 2018 bearing the heading *'Shortcomings of the Retail Prices Index as a measure of inflation'*. In the article the ONS wrote amongst other things that, *'The issue of measuring inflation is hugely important and, either directly or indirectly, affects individuals and businesses throughout the UK. It is the role of the Office for National Statistics (**ONS**) to develop good measures of changing prices and costs that are suitable for a wide variety of uses.*
This document summarises the analysis that has been done to offer a clear view on our current understanding of the drawbacks of the Retail Prices Index (RPI). Overall, RPI is a very poor measure of general inflation, at times greatly overestimating and at other times underestimating changes in prices and how these changes are experienced.
In 2013, the RPI lost its status as a National Statistic. Our position on the RPI is clear: we do not think it is a good measure of inflation and discourage its use. There are other, better measures available and any use of RPI over these far superior alternatives should be closely scrutinised.
…RPI does not have the potential to become a good measure of inflation.'

85. In addition, Reg.31(2) builds upon SBEEA s.43(4) which provides at (a)(iii) that a tenancy or licence is MRO-compliant if taken together with any other contractual agreement entered into by the TPT with the POB in connection with the tenancy or licence it does not contain any unreasonable terms or conditions.

86. I therefore decide that since the ONS has clearly stated in unequivocal words that it is the ONS's position that RPI is not a good measure of inflation *and* discourages its use, an indexing term or condition within a proposed lease agreement between a landlord and pub tenant based upon RPI is unreasonable, contrary to SBEEA s.43(4)(a)(iii).

87. The Respondent argued that CPI is far less common than RPI and that Reg.31(2)(c) of the Code prevents uncommon clauses being used. However, I do not read this regulation from prohibiting a landlord for including an unusual term which is advantageous to the tenant. If the Respondent was correct, which I do not accept it is, but if it was, then it would have the effect of preventing any new variation from being introduced for whatever reason as it would not be common. It is still subject to the overriding requirement to be reasonable and the requirement for fair dealing. Accordingly, simply because it is less common to use CPI as an alternative to RPI is insufficient reasoning not to use CPI.

Conclusion

88. The MRO 'Full Response' lease proposal sent by the Respondent on 3 July 2023, in the form of a 'New Agreement', did not comply with s.43(4)(a)(iii) of the SBEEA and Reg.31(2)(c) of the Code because:

88.1. The Respondent's standard free of tie lease terms offered by the Respondent on the open market are for either 10 or 20 years or (when converting from a tied lease) the remaining term of the tied lease. Accordingly, the 5-year term offered by the Respondent is not standard in any of the Respondent's pubs that are being let free of tie in the open market and therefore is contrary to Chapter 4.13 to the PCA's Regulatory Compliance Handbook (Version 2: September 2020 amended April 2022)

88.2. It therefore follows that the proposed 3 July 2023 MRO lease offered to the Claimant does not reflect the proposal that the Respondent would ordinarily offer if making a free of tie offer to a tenant, or prospective tenant, with negotiating strength. I therefore conclude that the 5-year term the Respondent had proposed made the MRO option unattractive to the Claimant and therefore contrary to the PCA's guidance and SBEEA s.43(4)(a)(iii). The 5-year lease term offered is therefore unreasonable in this instance.

88.3. The five-year lease offered by the Respondent to the Claimant, characterised by annual inflation-linked rent increases and the statutory rent review under s.34 of the Landlord and Tenant Act 1954 at the end of the 5-year term, inadvertently institutes both an annual rent review and a five-yearly open market rent evaluation. This combination, as highlighted by the PCA in its 27 February 2023 article, is acknowledged by Stonegate as unusual and not customary in free-of-tie lease agreements. Consequently, I find the proposed MRO tenancy to be unreasonable under SBEEA s.43(4), as it indirectly imposes both an annual rent review and a quinquennial open market rent assessment, which are collectively atypical in landlord-pub tenant agreements, contrary to Reg.31(2)(c) of the Code.

88.4. Since the ONS has clearly stated in unequivocal words that it is the ONS's position that RPI is not a good measure of inflation *and* discourages its use, an indexing term or condition within a proposed lease agreement between a landlord and pub tenant based upon RPI is unreasonable, contrary to SBEEA s.43(4)(a)(iii).

Decision

89. I, [redacted], having carefully considered the evidence and the written representations of the Parties, do hereby make this Award only on the issues which it addresses.

90. The proposed MRO lease sent by the Respondent on 3 July 2023 is not MRO-compliant.

91. The Respondent failed to comply with the duty imposed under Reg.29(3)(b), Reg.31(2)(c), and Reg.32(2)(a) of the Code and SBEEA s.42(3)(b).

92. In accordance with Reg.33(2) of the Code the Respondent shall provide a revised MRO 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

93. Issues as to the cost of this arbitration are reserved pending the Parties' opportunity to make submissions as to costs within 21 days of the date of this Award.

Operative Provisions

94. In consideration of the above:

94.1. the Respondent shall 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

94.2. 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

[redacted], 14 MARCH 2024

Award Save as to Costs dated: 14 March 2024

[redacted], Arbitrator

PCA reference: [redacted]

Award Save as to Costs dated: 14 March 2024

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: [redacted], ARBITRATOR

DATED: 14 MARCH 2024

BETWEEN:

[redacted]

(TIED PUB TENANT)

Claimant

– and –

EI GROUP LIMITED

(PUB-OWNING BUSINESS)

Respondent

AWARD

SAVE AS TO COSTS

Prepared by: