Index to Consolidated Awards

The cases listed below were consolidated by the agreement of the parties and an order of the arbitrator. The cases were heard together with the same witnesses.

SPS Pubs Limited and EI Group PLC

The Hayes Pub Company and EI Group PLC

Mason and EI Group PLC

X and EI Group PLC - First Award (Please note a second Award was issued in this case and can be accessed via the following link)

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IN THE MATTER OF **Ref: ARB/000103/CLARKE**

THE PUBS CODE ARBITRATION BETWEEN: -

SPS PUBS LIMITED

Claimant

(Tied Pub Tenant)

-and-

EI GROUP PLC

Respondent

(Pub-owning Business)

Award

Summary of Award

The proposed tenancy is not MRO-compliant, and therefore the POB has failed to comply with the duty under regulation 29(3)(b). The POB must give a revised response which is MRO-compliant.

Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.

2. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 01 December 2017. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code") and paragraph 5 of Schedule 1 Part 1 of the Small Business, Enterprise and Employment Act 2015 ("the Act").

3. The Claimant is SPS Pubs Limited, the tied pub tenant (TPT) of The Eagle, 104 Chatham Road, London, SW11 6HG ("the Pub"). The Respondent is Ei Group Plc of, 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. On 9 November 2001 the current lease of the Pub was granted by the Respondent pub-owing business ("POB") for a term of 20 years. On 13 January 2006 the lease was assigned to the Claimant.

4. On 15 August 2016 the Claimant gave the Respondent a notice (an "MRO notice") in relation to the Pub in accordance with regulation 23 of the Pubs Code.

5. On 01 September 2016 the Respondent purported to send to the Claimant a "full response" for the purposes of regulation 30, including a proposed tenancy ("the proposed MRO tenancy") which is the subject of this dispute.

6. On 14 September 2016 the Claimant made a referral to the Office of the Pubs Code Adjudicator under regulation 32(2)(a), which provides for the TPT or the POB to refer the matter to the Adjudicator where the POB does not send a full response (in this case) under regulation 29(3). The duty on the POB under that regulation which the TPT disputes has been complied with is that in sub-paragraph (b) to send to the tenant a proposed tenancy which is MRO-compliant.

7. The Claimant is unrepresented and its director Mr Simon Clarke MRICS has acted on its behalf in these proceedings. The Respondent is represented Gosschalks Solicitors.

Procedure

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

9. The following is a brief chronology of the case management –

    - On 21 September 2017 the Claimant submitted its Statement of Claim
    - On 05 October 2017 the Respondent submitted its Statement of Defence
    - On 19 October 2017 the Claimant submitted a Response to Defence
    - On 8 November 2017 the Respondent submitted a Reply to the Response to Defence
    - On 24 November 2017 the parties submitted their agreed Statement of Facts and List of Issues in Dispute

10. The Respondent sought and was granted permission to file an expert witness report on whether disputed terms of the proposed lease were common terms. The Respondent relies on the report of [redacted] dated 17 December 2017.

11. An oral hearing took place on 9 and 10 May 2018 at the CIArb, 12 Bloomsbury Square, London, WC1A 2LP, at which Mr Clarke appeared for the Claimant and [redacted] of Counsel for the Respondent.

Issues

12. While the parties had the opportunity to agree a list of issues in dispute, this was refined for the purpose of the hearing by the use of a Scott Schedule. I have not considered it appropriate to structure this decision to deal with each of these issues in turn as they are set out in the schedule, but my award makes a determination on all matters in dispute between the parties. As summarised by [redacted] in his helpful Skeleton Argument, the issues sub-divide into two categories; the method of delivery of MRO and the disputed terms of the tenancy.

13. One of the requirements for a tenancy to be "MRO-compliant" is that the tenancy "*does not contain any unreasonable terms or conditions*" (section 43(4)(a)(iii) of the Act). Section 43(5) provides that the Pubs Code may specify descriptions of terms and conditions which "a*re to be regarded as reasonable or unreasonable for the purposes of subsection (4)*". Regulation 31 of the Pubs Code provides that one category of "*unreasonable*" terms as specified are "*terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.*"

14. The Respondent POB has purported to offer an MRO option, compliant for the purposes of section 43(4) of the Act, by way of an offer of a new lease in draft form. The Claimant's principal arguments are that the terms of the proposed MRO tenancy are not compliant, falling foul of section 43(4)(a)(iii), in that:
    - the use of a new lease (as opposed to a deed of variation ("DOV")) as the vehicle for delivering the MRO option is unreasonable and
    - the terms of the proposed new lease are unreasonable.

15. The position of the Claimant is, broadly, that the use of a new lease as the MRO vehicle (as well as many of its terms) is unreasonable given the terms of the existing lease, and the effect of the new lease and its terms on the TPT and are uncommon in tie free leases. The Respondent, on the other hand, says that the terms of the proposed lease are indeed reasonable, and has produced expert evidence and other tie free leases in support.

PCA Advice

16. A number of the issues in this arbitration are the subject of the PCA and DPCA Advice Note published on 2 March 2018. This is advice under s.60 of the Act, and not guidance under s.61, and is therefore not a matter which I am required to take into consideration in determining my award. As advice to POBs and TPTs and their representatives, it is open to any person to seek to persuade me that the Advice Note is wrong, or that for some other reason it should not be the basis of my decision. As the Advice Note states, it is based on the consideration of arguments put forward in a number of arbitrations determined prior to its issue. It also makes clear that it can be revised from time to time.

17. The Respondent does not agree with the content of that Advice but agreed with my summation of the situation in respect of this referral. I have a statutory duty to carry out functions both as regulator and arbitrator. Notwithstanding that I have exercised my statutory powers to give advice, as arbitrator I have a duty to consider evidence and argument impartially, and not to prejudge the issues in this case. This I have done.

Consolidation

18. This case had by consent been consolidated with three other referrals for the purposes of the hearing. The Claimants in these cases are different, although the Respondent is the same in each. There has been a limited waiver of confidentiality by the parties up to the hearing but not beyond, the Respondent requiring a separate confidential Award to be issued in respect of each referral.

19. The question of whether the MRO vehicle should be a new lease or a DOV is one which has taxed the industry since the introduction of the Pubs Code. The Claimants' representatives (including Mr Simon Clarke) have all been involved for many years in campaigns on behalf of pub tenants, and specifically in relation to the development of the Act and the Code. The argument that the proper vehicle for the MRO is a DOV is therefore contextualised by their expectations of what the Code would offer.

20. In addition to their campaigning activities these representatives, including Mr Clarke, also offer their services to tied pub tenants as representatives in arbitrations before the PCA. It is public knowledge that the top issues in arbitrations to the PCA to date have been in relation to the MRO full proposal, and that the most significant and repeated challenge has been to the fact that

a POB has made an offer of an MRO by way of a new lease. The Respondent is a regulated POB with a large estate and is a party to the largest number of arbitrations by far.

21. The strain placed on the PCA resources by this large volume of individual and confidential arbitrations which repeatedly raise overlapping issues is well known and in the public domain. I invited the Respondent to consent to the consolidation of a number of arbitrations, which I would then hear at an oral hearing, in order to seek to bring as much clarity as possible to the issues which repeatedly dog arbitrations in respect of MRO compliant proposals. Claimants' representatives and the Respondent have both had a full opportunity to put arguments before me as to the proper application of the statutory provisions.

Vehicle for the MRO Option

22. The Claimant contends that the DOV is the most common method of tie release, and the simplest and most effective (including cost-effective) method of achieving an MRO compliant tenancy and delivering parliamentary intention, in that with minimal variation the terms of the existing tied lease could be varied to make them MRO compliant. The Claimant considers that surrender and regrant of a new lease is not the common method of releasing the tie in a tied lease, is an unnecessary, time-consuming and onerous way of effecting the MRO option, and that the Respondent has in fact chosen to offer a wholly new tenancy in order to impose a set of new and unfavourable terms most disadvantageous to the tenant.

23. With the exception of the trading obligations, says the Claimant, the other terms found in the current lease of the Pub are commonly found in free of tie ("FOT") agreements. I note that pursuant to the terms of the existing lease (Clause 15.3.4), as is common in tied leases, the Respondent has the unilateral right to sever the tied trading terms by notice. However, releasing the tie in this way would not in itself create an MRO-compliant tenancy, as Mr Clarke acknowledged. The Claimant argues however that it is unreasonable for the Respondent not to effect the MRO via the simplest, most cost effective and common method available, being a DOV to that lease, amending the lease terms (which are not compliant), but only to the minimum that is necessary.

24. The Claimant argues therefore that the vehicle by which an MRO tenancy is proposed should be a DOV of the existing tenancy, and not a draft new lease. It was (as confirmed orally at the hearing) not contended by the Claimant that the legislation prohibits an MRO option by way of a new lease, but rather that its use is unreasonable or unfair.

25. In response, the Respondent's position is that it is restricted by the statutory language from using a DOV as the legislation requires that an MRO option must be offered only by way of a new lease. Alternatively, it argues that if an MRO compliant tenancy may be in the form of a new lease or a DOV, it alone has the choice of which vehicle to use and there is no provision in the Act or the Code for a tenant to challenge that choice. Therefore, a matter of statutory

construction arises as to the form of the vehicle by which an MRO option may be given.

Applicable Law

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

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

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

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

> *(2) A "market rent only option" means the option for the tied pub tenant –*
> *(a) to occupy the tied pub under a tenancy or licence which is MRO-compliant, and*
>
> *(b) to pay in respect of that occupation –*
> *(i) such rent as may be agreed between the pub-owing business and the tied pub tenant in accordance with the MRO procedure (see section 44), or*
> *(ii) failing such agreement, the market rent.*
>
> *(3) The Pubs Code may specify –*
> *(a) circumstances in which a market rent only option must or may be an option to occupy under a tenancy;*
>
> *(b) circumstances in which a market rent only option must or may be an option to occupy under a licence.*
>
> *(4) A tenancy or licence is MRO-compliant if—*
>
> *(a) taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence it—*
>
> *(i) contains such terms and conditions as may be required by virtue of subsection (5)(a),*

(ii) does not contain any product or service tie other than one in respect of insurance in connection with the tied pub, and

(iii) does not contain any unreasonable terms or conditions, and

(b) it is not a tenancy at will.

(5) The Pubs Code may specify descriptions of terms and conditions—

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

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

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

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

Terms and conditions required in proposed MRO tenancy

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

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

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

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

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

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

31 – (1) Paragraph (2) applies where—

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

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

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

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

…
(c) are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.
(3) Paragraph (4) applies where—

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

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

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

Burden of Proof

31. It was conceded on behalf of the Respondent that it bore the burden of proving that the tenancy is MRO compliant, which includes showing that the terms are not uncommon. The Respondent's position was that the Claimant who advances a case that some other type of term or tenancy would be compliant bears the burden of showing that term is not uncommon, and that if a counter-proposed term is not shown by a Claimant to be common, it is itself "uncommon" and automatically non-compliant by virtue of being unreasonable. It was argued for the Respondent that the Claimant, not having produced expert evidence, could not show that any other terms could be compliant and replace any disputed terms found by me to be non-compliant. Thus, said the Respondent, a finding of non-compliance might lead to the absurd situation of there being no compliant lease possible.

32. The matter referred for arbitration is the dispute as to the compliance of the lease terms proposed. I reject the Respondent's argument as being applicable only to the extent that I am ruling on the specific terms that are to be included in an MRO-compliant tenancy. If on a referral the POB considers that not only is a proposed term common, but it is the only common term of that nature, that is for the POB to prove.

Statutory Interpretation – the MRO Vehicle

33. It is immediately clear on reviewing the relevant legislation that there is no express provision in either the Act or the Pubs Code which states that an MRO-compliant tenancy must be provided either by way of a new lease or by way of a DOV. Indeed, there is no express provision as to its form at all, only as to its terms and conditions.

34. For the sake of completeness, I observe that it seems to be clear that the legislation does not by implication require an MRO-compliant option to be given

only by way of a DOV. Regulation 30(2) provides that an MRO tenancy will only be MRO-compliant if its term is at least as long as the remaining term of the existing tenancy, and its term can therefore expire after the date of expiry of the original lease. As a matter of law, where the term of a lease is extended by way of a DOV, it operates as a surrender of the existing lease and a grant of a new lease[1]. Furthermore, if the proposed tenancy was intended to be achieved by variation of the existing tenancy only, there would be no need for the provisions in regulation 31(3) and (4) preserving rights under the Landlord and Tenant Act 1954 ("the 1954 Act") afforded where they apply to existing leases, as such protection would be unaffected. Lastly, where the existing TPT is a tenant at will (as per section 70(2) of the Act) because pursuant to section 43(4)(b) an MRO tenancy cannot be a tenancy at will, the MRO must therefore be a new tenancy.

35. Counsel referred me to text[2] and authorities[3] to remind me of the route to interpretation of a statute. It is necessary objectively to ascertain, by the language of the relevant statute / statutory instrument, what Parliament intended. The language of the statute or regulation should be given its natural meaning rather than a strained one. Importantly, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule is that legislation should be construed according to the intention expressed in the language, and sight of this must not be lost. Regard should therefore first be had to the words themselves.

36. I am not persuaded that the word "tenancy" (in and of itself) gives any particular guidance; a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a new lease. It is the position of the Respondent that the statutory language is that of a separate agreement being entered into. However, I note that absent are clear words on the matter - such as the "grant" of a tenancy or its "commencement", or the "termination", "surrender" or "end" of the existing tenancy. The language used, for example "accept" and "enter into" in regulation 39, is to my mind consistent with a new tenancy or a varied one.

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

[1] Friends Provident Life Office v British Railways Board [1996] 1 All ER 336.

[2] Craies on Legislation (11th Edition, 2017): extracts (paras. 17.1.1 to 17.1.6 and 27.1.11.1)

[3] Melville Dundas Ltd. V George Wimpey UK Ltd. [2007] 1 WLR 1136 and Christian UYI Limited v HMRC [2018] UKUT 10 (TCC), where the principles were summarised.

section 43(5), which provides for the matters in respect of the content of a proposed tenancy which are delegated by the Act to the Code as follows:

> *The Pubs Code may specify descriptions of terms and conditions—*
>
> *(a)which are required to be contained in a tenancy or licence for it to be MRO-compliant;*
>
> *(b)which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).*

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

39. The Respondent sought in my view to place too much emphasis on the power delegated by section 44(1)(a) of the Act, which provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option (referred to in this Part as "the MRO procedure") …*". This delegates to the Code the procedure in connection with an offer of an MRO option, and not the form or content of the proposal, which is the subject of the separate delegation in section 43(5).

40. The Respondent relies on a number of provisions in the Pubs Code as indications that Parliament intended that the MRO option was to be implemented by the grant of a new tenancy rather than a DOV. I have considered these, and whether it is possible to construe the legislation in the way the Respondent suggests it must be, looking at the way in which the term "tenancy" is used in context within the legislation:
    - Regulation 29(3) requires the POB to send to the TPT "*a proposed tenancy which is MRO-compliant*"
    - Regulation 30(1)(a) and (c) refer to the "*existing tenancy*" and a "*proposed MRO tenancy*"
    - Regulation 30(2) refers to the term of the existing tenancy and the term of the proposed MRO tenancy, which must be "*at least as long as the remaining term of the existing tenancy*". This language, says the Respondent, pre-supposes the grant of a new term of years, not the continuation of an existing one (noting that if an existing term is extended by DOV, in law a new tenancy is created).
    - Regulations 34(2) and 37(1) refer to the *"proposed tenancy or licence".*
    - Regulation 39(2) and (4) (dealing with the end of the MRO procedure) refer to the POB and TPT *"entering into"* the tenancy or licence. The Respondent argues that this language is not appropriate for the execution of a DOV.

41. The Respondent sought further support in the Act:

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

- Section 43(4)(a) sets out the circumstances in which a tenancy or licence is "MRO-compliant" and in doing so refers to the "t*enancy or licence" "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owing business in connection with the tenancy or licence*". It was the Respondent's case that this does not support the argument that a DOV is permitted. For the purposes of the Pubs Code, the *"proposed tenancy"* is the MRO tenancy. As the Respondent understands the Claimant's case, this must be the existing tenancy and the DOV together. The reference to any *"other contractual documentation"* in section 43(4) must, the Respondent submits, be to something other than the MRO-tenancy, i.e. side-letters or collateral agreements. That being so, however, I do not see that the Claimant's case that the MRO tenancy can be the existing tenancy plus a DOV is undermined.

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

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

44. Furthermore, I am satisfied that the draftsman was alive to the need to specify a "new" MRO tenancy, if that was necessary to distinguish it from the existing tenancy, if such a need existed. The expression "new tenancy" appears in the Code no less than 19 times (within the definition of "new agreement", which refers only to a new tied tenancy). It would have been simple for the draftsperson to have made clear any restriction such as is argued by the Respondent to exist, and the complete and consistent failure to do so in the language of the Code demonstrates plainly in my view that no such restriction was intended.

45. To show that how the MRO-compliant lease was to be delivered was in the Government's contemplation, the Respondent relies on correspondence to the then Secretary of State Vince Cable MP dated 25 October 2013 from CAMRA and others advocating the MRO option, which referred expressly to the expectation that the POB would issue a DOV, to show that how the MRO-compliant lease was to be delivered was in the Government's contemplation. However, this only serves to demonstrate that, having been asked to contemplate a DOV, the Secretary of State did not make regulations which expressly prohibited it.

46. Several extracts from Section 9 of Part 1 of the Government Consultation on the new Pubs Code (October 2015) are relied upon by the Respondent. However, the fact that open language has been used does not mean that its meaning is unclear. I do not consider that it is. On the contrary, the ordinary meaning of the language is permissive of either a new lease or a lease varied by deed, and this is not a reason to look at other material to seek to interpret the ordinary meaning in a more restrictive way.

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

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

48. Furthermore, the Respondent directed me to no consultations prior to the passing of the Act, where the definition of an MRO-compliant tenancy is found (this is not surprising given that the MRO option was the result of an amendment passed unexpectedly), and Parliament cannot retrospectively express intention.

49. Nevertheless, if regard is to be had to the consultation documents, I do not find support in them for the Respondent's position. A number of references are extracted from Section 9 of this consultation, which considers the powers to be delegated under section 43(5) in respect of the compliant MRO tenancies, including:

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

50. It is clear that there was no intention to prescribe a form. An expectation as to the form is referenced which is a precursor to the commonness test in regulation 31(2)(c), the meaning of which does not require clarification by reference to this paragraph of the consultation. Notwithstanding the inclusion of the word "commercial" (which does not appear in the legislation) it is not clear

that Parliament is intending to exclude a lease varied by DOV, rather than leaving the matter to the market. Given paragraph 9.4, it would be hard to rely on other parts of the consultation to show that the Government did indeed intend to prescribe that the MRO-compliant agreement could not be in the form of a tied lease with a tie release by DOV, rather than to leave it to that to the market to decide.

51. The Respondent also relies on a few other extracts which refer to a new (MRO) agreement. The expression “new tenancy” is not found, however, even in 9.6 and 9.8 where a tenancy has already been referred to in the sentence, and the expression “new agreement”, which is not consistently used in the consultation, is not the unequivocal marker of intention the Respondent seeks. In 6.13 a “new agreement” which will end a rent assessment does not need to be a new tied tenancy after surrender of the old. The Respondent is to my view reading too much into the selected words of the consultation (and the Government's response to the consultation dated April 2016, where the expression “new agreement” does not occur in the context of the MRO at all).

52. Powers to make provision in relation to the MRO procedure, delegated under section 44(1), are considered in section 10 of the same Consultation, from which the only reference relied upon by the Respondent is:

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

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

54. Looking at these passages, they are far from conclusive. The Respondent looks for the silver bullet within them but, in my opinion, it is not there. These extracts cannot be viewed too selectively to be understood to point towards a prohibition on a DOV. These are a few of many references in the consultation documents to the MRO agreement. Read as a whole what is obviously lacking is any direct and decisive comment on the permissible vehicle for the MRO, which is consistent with an intention not to make unjustified intervention in commercial dealings between the parties.

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

56. In the present case, which was the only one of the four cases in which the Respondent's interest is a head leasehold interest held from a superior landlord, the Respondent would require the freeholder's consent to grant an extended lease, but not to grant a deed of variation of the existing lease. To my mind this further supports my conclusion that Parliament cannot have intended that the only vehicle for a compliant MRO tenancy could be a new lease, and that where the landlord has difficulty in obtaining freeholder consent it must be that a DOV is an available vehicle by which the tenant's statutory right could be upheld.

57. The Claimant argued that on its true construction the option defined in s.43(2)(a) of the Act is an option for the tenant to continue occupying the tied pub on the same terms as his existing lease, save only to the extent that it is necessary to vary those terms to ensure compliance for the purposes of s.43(4). He produced a draft deed of variation, varying and deleting the relevant terms, to illustrate his argument that a DOV was simple and effective to render an MRO compliant proposed lease. However, I reject this argument. It should also be observed that the legislation, in not prescribing the contents of the MRO-compliant tenancy except as set out in section 43(4) and regulation 31, has not expressly required that the terms of the MRO-compliant tenancy remain the same as the terms of the original tenancy, with variation only of the rent and severance of the tie. This is consistent with the MRO vehicle not being restricted to a DOV and is another matter for which there could easily have been provision if that was the legislator's intention. The Claimant directed me to no substantive argument on matters of statutory interpretation which could lead me to another conclusion.

MRO-compliant Tenancy

58. The facts of the four consolidated cases were not identical, and the proposed lease in the present case had a particular feature, in that the term, which was to expire on the term date of the existing lease (8 November 2021), was under 4 years as at the date of the hearing. In the statement of issues in dispute the length of the term was challenged as uncommon/unreasonable. In the pleadings the Claimant's case was that a minimum of 15 years would be appropriate. In the Scott Schedule prepared for the hearing the length of term proposed was challenged as not common. It was argued that over 10 years for a new lease is common.

59. The term of the MRO tenancy is addressed in regulation 30(2). The Code provides that where the trigger event is not a renewal under 1954 Act:

> *"the proposed MRO tenancy is MRO-compliant only if it contains provision the effect of which is that its term is for a period that is at least as long as the remaining term of the existing tenancy".*

60. The Respondent disputed that the duration of the lease is one of the "terms and conditions" referred to in s.43(4) and regulation 31(2) because it is dealt with separately in regulation 30(2), and thus contends that the test of

unreasonableness (including uncommonness) does not apply to the lease length.

61. It has not been necessary for me to consider that point further however, since by the date of the hearing the Claimant's position had changed, and the proposed lease term was no longer in dispute. Mr Clarke's revised position was to submit that the disputed proposed lease terms were all uncommon in short FOT leases. Thus, he considered that only short FOT leases were a relevant comparator in applying the test of commonality, and he emphasised that the evidence did not demonstrate that the terms in issue are common in short FOT agreements. The Respondent's position was that the Claimant had missed the point, as the MRO tenancy will be protected by the 1954 Act, and therefore capable of being renewed. In light of the Claimant's agreement as to the length of the term, the Respondent has conceded that there will be no provision for rent review within in the term of the MRO tenancy. The provision for rent review will therefore be a matter for the County Court on any renewal under the 1954 Act.

62. The Respondent's witness evidence is set out below, but I would observe that in respect of the short lease issue [redacted] under questioning confirmed that a term of 4 years would not be usual for a FOT lease. [redacted] was not able to say whether common lease terms are different in sub four-year leases to 20-year leases as he had no short leases to consider, and had not been instructed to consider the point. He did not believe that there was any evidence of common terms in a three-year tenancy. Mr Clarke's late repositioning of his argument did not allow the Respondent a proper opportunity to prepare a case in response to it.

63. To the extent that Mr Clarke was seeking to show that there are no common terms for sub four-year FOT leases, his position amounts to a submission that there can be no compliant MRO tenancy of that length. That is inconsistent with him having conceded his dispute as to the lease length of the proposed lease. If Parliament had allowed for an MRO tenancy to be of such a short length, it would appear to be an absurdity to interpret regulation 31(2)(d) as requiring the conclusion that there could be no common terms, and thus no compliant terms, of such a lease.

64. I would have expected much fuller and earlier argument from Mr Clarke on the interplay between regulations 30(2) and 31(2), and the opportunity for the Respondent to prepare evidence and argument to deal with the short lease comparator issue. I would have had to consider whether it is a proper interpretation of Parliamentary intention to apply regulation 31(2)(d) where there is no comparator set of leases, and whether a null result from such attempt at comparison should be such as to render a term non-compliant.

65. For present purposes, and making clear that I have an open mind in respect of a more fully argued case should such a case arise, I adopt the Respondent's position that, where a proposed MRO lease has a short term, but is capable of renewal pursuant to the 1954 Act, FOT agreements of longer duration form an appropriate comparator set for the purpose of assessing commonality.

66. By the date of the hearing, it was understood that there was no other challenge to the commonality of the proposed lease terms individually – in that each was "common" in FOT agreements of more usual term length when seen in isolation from each other, but the Claimant continued to contend that the terms (including the choice of vehicle) were unreasonable. In its Statement of Claim (at Paragraph 4.3), the Claimant argues that the "*MRO proposal is littered with terms that would ordinarily be negotiated, varied and possibly conceded by a landlord in an open market letting situation*", contending that it is unlikely that a lease containing all of these terms would be accepted by a reasonable tenant, instead some of them would be negotiated out in exchange for others remaining included.

67. The specific terms and conditions of the proposed MRO tenancy disputed by the Claimant are as follows.

- Firstly, upward only rent review and RPI increases combined with upward only rent review was contested. The Respondent asserts that the evidence of [redacted] shows that a combination of RPI increases and upwards only rent review is common in the free of tie market and has confirmed in any event that there will be no rent review due to the short term of the lease.

- That rent would be payable quarterly in advance. The Respondent argues that a requirement for quarterly rent payments is common and that this is supported by [redacted] evidence.

- That there be a requirement for 3 months' deposit. The initial deposit payable for the tied tenancy was 1 month. The Respondent contends that provision for less than 3 months' deposit is uncommon and therefore, upon its interpretation of regulation 31(2)(c), unreasonable.

- That there be a requirement for a guarantor. The Respondent argues that the Claimant does not have the covenant strength to take the lease without a guarantor and therefore to grant the lease without a guarantor would present an unacceptable risk to the Respondent and devalue its asset.

- That there be a hypothetical term on rent review of 20 years. The Respondent has confirmed that there will be no rent review during the lease term.

- That there is an obligation on the Claimant to pay superior landlord's costs. It is argued by the Respondent that in a situation where it is liable to pay costs to its superior landlord in respect of actions of the Claimant, it is reasonable that the Claimant be responsible for those costs.

- The Respondent to have power of attorney for licensing. During the hearing the Claimant conceded that it is reasonable for the Respondent to have a power of attorney for licensing purposes, and this challenge was withdrawn.

- That there is a disregard of inducements to tenants upon rent review. During the hearing it was accepted by the Claimant that its objection to the term involving disregard of inducements on rent review was based on a misunderstanding of the provision, and this challenge was also withdrawn.

- That the tenant must undergo a credit check. The Respondent has confirmed that it will bear the costs of any credit check.

- That the tenant must complete a business plan.

- Finally, that the Claimant would be liable for legal costs of the Respondent in relation to the new lease. During the proceedings, the Respondent has conceded that it will not seek any contribution from the Claimant towards its legal costs of executing an MRO-compliant tenancy.

68. The Respondent's primary argument is that the Secretary of State has specified what terms are to be regarded as unreasonable and (aside from the specific categories in regulations 31(2)(a) & (b) and (3)), that is to be determined by what terms are common in agreements between landlords and FOT tenants. At the conclusion of the hearing I gave permission to the Respondent to make written submissions in response to the Claimant's oral submissions as to reasonableness of the particular terms in dispute. These were received on 18 May 2018. I see that in the written submissions the Respondent makes open offer of concessions on certain matters, although it emphasises that it does not consider it is bound to offer them. In relation to this case the Respondent states that it offers 3 months for the Claimant to build the quarter's deposit, and 6 months to move to quarterly rent.

Statutory Interpretation – section 43(4) and regulation 31

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

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

71. The referral under regulation 32(2)(a) can be made where the POB does not send a full response under regulation 29(3), and that regulation requires the POB to send an MRO-compliant proposed tenancy. The definition of such a tenancy is in section 43(4) of the Act so it is clear to me that the Pubs Code Adjudicator has jurisdiction under the regulations to determine whether the tenancy complies with the requirements of that section.

72. Therefore, determining MRO-compliance is not simply a question of looking at each individual term to decide whether it is uncommon for the purposes of regulation 31, but whether the proposed MRO tenancy contains terms or conditions which are unreasonable.

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

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

Is the choice of MRO Vehicle subject to the test of unreasonableness?

75. The Claimant argues that the MRO-compliant tenancy should comprise the tied tenancy, minus the tied trading provisions, and with a revised rent, and that this would be a straightforward thing to achieve. However, I am not persuaded that this would amount to an "MRO-compliant tenancy" as provided for in the Code, as it may contain uncommon or otherwise unreasonable terms in a FOT lease, individually or collectively.

76. The Respondent submits that (if it is wrong that the MRO vehicle can only be a new lease) the mechanism by which the MRO tenancy is brought into effect is not a "term" or "condition" contained in the MRO tenancy, and that there is no obligation or other condition (express or implied) to enter into a new tenancy or

a DOV. Thus, it argues, the POB's decision as to the MRO vehicle cannot be subject to the test of unreasonableness. However, I do not accept this limited interpretation. Section 43(4) refers to a tenancy being MRO-compliant if "*taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence*" it does not contain any unreasonable terms and conditions pursuant to subsection (iii). I am satisfied that this is broad enough to encompass the requirement (as set out in the covering letter with the MRO proposal referred to in the evidence of [redacted] and dealt with below), to enter into a new tenancy.

77. Counsel for the Respondent in fact conceded that there were requirements specified in the MRO full response which were capable of being conditions contained within the MRO tenancy. The supposed distinction between such conditions and the requirement to surrender the existing tenancy was not substantiated at all.

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

Unreasonableness

79. In determining what is unreasonable, it is apparent that there is nothing in the statutory language which requires the meaning of that term to be determined only in light of open market considerations which would affect two unconnected parties entering into a new FOT lease. A term will be judged to be unreasonable or not based on all of the circumstances, as they are known (or ought to be known) to the parties, and each case will turn on its own facts. The term or terms of a lease may be unreasonable by virtue of words which are not included, and not just those that are. While a POB might achieve some certainty that particular lease terms are common in the tie free market, what is reasonable in one case for one particular pub may not be reasonable for another, and a blanket approach by the POB will therefore not be appropriate. I did not find the Claimant's reference to the Unfair Terms in Consumer Contract Regulations 1999 (which, together with the Unfair Contract Terms Act 1977, were consolidated and replaced by the Consumer Rights Act 2015, and render unfair terms unenforceable) helpful or relevant.

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

81. It is the Respondent's position that these core principles are relevant to the interpretation of the express provisions of the Code (because the regulations were required to be made in terms which adhere to these principles) but that they are not "free standing" in that they do not impose duties or obligations on the parties outside of the express terms which regulate the conduct of parties in the Code. I agree that these principles do not impose free standing rights. However, the Respondent argues that accordingly the question of whether it has complied with the statutory duty to send an MRO-complaint proposal cannot be answered by an appeal to the Code principles, including to "fairness". For the reasons which follow I do not agree with the Respondent's position.

82. It is clear that the core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the Pubs Code (including any regulations made under the power delegated in section 43(5)) are to be interpreted as consistent with the two core principles, if the provisions in the Act (in this case, as to reasonableness in section 43(4)(a)(iii)) are not, there would be a fundamental incompatibility between these instruments. I am furthermore satisfied that, were the language in the Act and Pubs Code not consistent with these principles, the Secretary of State would not have enacted the Pubs Code in its current form.

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

The Pubs Code Principles

Fair and lawful dealing

84. Its long title states that the Act is "*to make provision for the creation of a Pubs Code and Adjudicator for the regulation of dealings by pub-owing businesses with their tied pub tenants*" and the Code regulations, pursuant to section 42, are "*about practices and procedures to be followed by pub-owning businesses in their dealings with their tied pub tenants*." The term "dealings" is not defined

in the Act. I note there is some inconsistency between the Pubs Code provisions at regulations 54 and 55 (which imply that "dealings" with a TPT may take place in relation to the MRO provisions by virtue of certain exclusions provided for) and the Explanatory Note (which does not form part of the regulations).

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

No Worse Off

86. The second core principle requires a comparison of the position of TPTs with tenants who are tie free, and the former are intended to be no worse off than the latter. I am aware that this has been a principle in tied pub rent valuation since at least 2009, when it was referenced in relation to RICS guidance. It is not for me in this decision to consider an exhaustive definition of this principle, but provisionally it would seem to me to be a judgement of fact and degree in each case whether a TPT is worse off. That judgement would include financial matters, particularly profit, but could it seems also include considerations not directly expressed in financial terms – for example a difference in bargaining power and the reduced risk in having a tied deal, or the business support available to a TPT from a POB may be something of value for the TPT. By pursuing the MRO option, the TPT should be in the position of being able to compare, and make an informed choice between, the two options.

The Application of Pubs Code Principles

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

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

89. The commercial relationship between the TPT and the POB on service of an MRO notice is different. The TPT (except at renewal) does not have the right to walk away or contract elsewhere. It only has the right to keep its current tied deal or to accept the offer. Even at renewal, any goodwill earned will be a relevant consideration for the tenant, as will the availability of the County Court's jurisdiction to determine reasonable terms of the new tenancy. The TPT in the MRO procedure is not in an open market position, and I consider terms or conditions which were less favourable because of that fact would be unreasonable and inconsistent with the core Code principles.

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

91. I was referred to the "Impact Assessment on the Pubs Statutory Code and Adjudicator", dated 28 May 2014, which summarised that cumulative evidence received by the government has clearly established that in too many cases tenants are unable to secure a fair share of risk and reward in their agreements. It identified as one of the problems the inequality of bargaining power between pub company and tenant, saying "*Pubcos should recognise that they have a responsibility to ensure they do not exploit their position of economic strength*". The Code was intended to result in a transfer of profit from the pub companies to the tenant, where the tenant is currently being treated unfairly (the level of unfair treatment, and the value of this transfer, was unclear).

92. That is a recognition of the financial pressures upon tied pub tenants. Such pressures should not themselves represent an insurmountable obstacle to the exercise of the MRO option. Thus, though the current circumstances of the TPT are said by the Respondent to be irrelevant, I do not think that can be so. Parliament clearly did not intend that a TPT whose profit is being unfairly affected by a POB under a tied lease should be prevented from accessing the MRO because they have not made sufficient profit to afford high entry costs. It is unnecessary to analyse whether the particular tenant has been treated unfairly. High costs should not unreasonably prohibit access to the MRO.

93. The occurrence of a specified event is something which Parliament intended should give rise to a meaningful right to go tie free. Part of a tenant's anxiety about the proposed MRO tenancy can be accounted for in the MRO rent being

determined after the arbitration as to the compliant terms of the proposed tenancy. In that way, the tenant cannot be sure how more onerous terms will be reflected in the MRO rent. The terms of a lease (e.g. whether it is a full repairing lease) will in general be reflected in the rent for the pub (as the Respondent's expert witness confirmed). However, that seems to me to be fundamentally different from a consideration of entry costs.

94. Take, for example, a significant increase in price (an event which pursuant to regulation 24 gives the TPT the right to serve an MRO notice). This significant price increase would be a unilateral decision of the POB which may materially affect the commercial attractiveness of the tied deal. The TPT is not in the position of a tenant of a FOT lease, who may decide to accept or reject a supplier's prices. If the MRO option is financially prohibitive, it may not be a realistic option for the TPT to accept it. The only option would be to remain with the tied deal (which may now be a poor one) or accept an offer that a prospective new tenant of a tie free lease might not without negotiation, and in such negotiation that prospective tenant would be in a very different bargaining position to the TPT. The test of reasonableness requires that the POB, in offering the terms of the purported MRO tenancy, cannot take advantage of any absence of commercial bargaining power on the part of the existing TPT pursuing the MRO procedure.

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

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

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

98. It was contended by the Respondent that the Claimant's allegation that the Respondent was seeking to thwart the MRO process adds nothing to their

submissions on the question of whether the Respondent's response under regulation 29(3) complies with its duties under the Code. For the reasons above, I do not agree that these two things are unconnected.

Severing the Tie

99. The Claimant appeals to the market as to the mechanism it says is usually adopted to change from a tied tenancy to a FOT tenancy. To the extent that this argument places reliance on a term of the existing lease as being common does not invoke regulation 31(2)(c), as it is the uncommonness of such lease terms in tie free leases which is at issue. 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.

100. It is not enough for the Claimant to assert that the existing lease (with or without minor amendments) would be sufficient. 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 to me 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. The lease confers a unilateral right on the landlord, which it would presumably only exercise when satisfied it was in its interest to do so, and it has an absolute choice in respect of that. I do not see 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 the "minimum changes" sought by the Claimant to the existing tied tenancy to release the tenant from the tied trading provisions.

101. Even if this were the yardstick by which the Respondent's decision to send a new tenancy rather than a DOV falls to be judged, the Claimant produces insufficient evidence to prove that the grant of a new lease to a tied tenant is an "uncommon" means for a landlord to agree a new FOT tenancy with a tied tenant. The Claimant, appended to the Statement of Claim, produced five examples of variations to other leases, or of notices whereby the tie had been released or partially released. I note that three of these display the date of the documents, these being in 2010, 2013 and 2014. The EI tie release relied upon was an all-encompassing deed of variation dealing with partial tie release (e.g. from wines and minerals in exchange for an annual payment).

102. In considering whether the choice of vehicle is reasonable I was not impressed with the Claimant's evidence. Whilst a DOV is used in the market, they did not show it is the most common method of tie release, (to any extent that that is relevant to whether the use of a new lease was unreasonable). I note from the Respondent's evidence that a sizeable proportion of its new FOT tenancies granted since July 2014 have been to existing tenants (though I

comment below on the absence of evidence as to whether such leases were agreed by tenants who would thus become liable for high Stamp Duty Land Tax (SDLT).

103. 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 the context 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 simply not the same. When releasing the tie on an individual lease it did not have the opportunity to remodel its FOT estate, or to take any meaningful step towards creating a standardised lease form. These opportunities now present themselves to the Respondent and is proper to recognise they are genuine considerations for the POB (evidence of which was given by the Respondent's witnesses as discussed below).

Respondent's evidence - conclusions as to reasonableness (vehicle and terms)

104. I heard oral evidence from [redacted] at Gosschalks, and [redacted]. They dealt with certain factual matters of evidence concerning (a) the way in which the Respondent's FOT estate has developed, (b) the FOT market and (c) terms of leases in the Respondent's FOT estate and (d) the practicalities of the use of a DOV as opposed to a new tenancy.

The EI standard FOT lease v a DOV

105. [redacted]. He was the person who drafted the EI standard FOT tenancy in 2011 and who had overseen the amendments to it since. This lease evolved from the short form of the Inntrepreneur lease, which was widely adopted by pub companies in the 1990s.

106. Notably 2011 was before the market was aware of any prospect of the MRO. The Claimant observed that the Respondent knew of the campaign for the MRO at that point. However, the vote in the House of Commons to introduce the MRO into the draft Small Business and Enterprise Bill took place on 17 October 2014 and the outcome was a surprise. Whilst it is not clear on the evidence the extent of the use of this standard lease between 2011 and 2014, in any event the Respondent has plainly used this standard agreement since 2016 outside of the MRO context. I am therefore, on evidence before me, not persuaded to the Claimant's case that the proposed lease was drafted with a view to the MRO within the Code, (and the corollary of that is that it cannot have been drafted with a mind to incorporating only terms that were common in tie free leases in order to ensure compliance with the Code, which regulations were only finally made in July 2016).

107. [redacted] gave evidence that a tied tenant typically stays in a pub for about eight to nine years. He said that in 2008 during the recession that average shortened, and the Respondent made great effort to give tenants financial assistance. He freely acknowledged that it was too early to know if tenants would keep its current standard FOT leases for an average of eight years.

108. [redacted] described the Respondent's estate as made up of many different types of mainly inherited leases, many of which have individually been subject to various variations either by deed or side letter. He explained how starting with a standard new lease document would generally make the procedure quicker, less onerous and cheaper than using a DOV. He considered that it was harder to deduce a tenant's interests if there are a series of documents, mistakes are more likely, and drafting a DOV with more extensive variations could require up to 10 hours of drafting, with consideration of whether each clause was to remain, be amended or be deleted in the MRO compliant lease.

109. [redacted] considered the Eagle pub lease as a perfect example of a case in which it would be difficult to excise the tied provisions, considering the set of documents so complicated that it is likely that mistakes would be made which would be just as likely to prejudice the tenant as the landlord. Prior to the hearing, the Mr Clark produced a draft DOV of this lease and submitted that this demonstrated that an MRO-compliant agreement could be achieved without great difficulty via such a document. [redacted] noted what he considered to be errors in the document and said that this supported his view that effecting MRO by Deed of Variation would be more complex and costly than via a new lease.

110. I found [redacted] to be a reliable and impartial witness. I accept that the use of a DOV will in each case require a line-by-line analysis on a case-by-case basis (given the numerous and various styles of lease within the Respondent's tied estate). That analysis will need to extend to all other collateral agreements which form part of the tied tenancy (such as variations and side letters). It would also be necessary to ensure that all other terms which are non-compliant are deleted from the existing tenancy. Renumbering and cross-referencing would be required.

111. The Claimant's tied lease is not on the Respondent's standard terms, having been brought into its estate from one of the past acquisitions of a portfolio of pub estates, takeovers of companies with their own portfolios, and individual acquisitions of assets let on a previous lessor's standard tied terms. Each acquisition meant that new variations of tied leases were included in the estate. The Respondent has over 20 main lease types, each of those having significant contractual variations. These differences have arisen from the letting policies of the various older companies and from the Respondent's own response to changing market conditions.

112. Questioned about the Respondent's use of a DOV to release a tie, [redacted] referred to this having been the case in respect of 2-300 Inntrepreneur leases, which came into its estate in 1998 on the purchase of Unique Pub Co., after a 1991 commitment to enter into one (said to have been made in error).

113. [redacted] explained that, where the parties agree an appropriate fee, the Respondent is content to partially release the tie in a tied lease, but that it remains a lease that is subject to a tie. From the Respondent's point of view, he considered a lease that was free of any tie to be a commercial lease and a very different animal.

Value to the Respondent of a new lease

114. [redacted] said that the Respondent, accepting that there is a transfer of annual value from the landlord to the tenant arising from the MRO process, has no objection to granting a FOT lease, and that the good news from its point of view is that if commercial leases are put in place they can be used to get a better outcome from the capital value of the Respondent's FOT estate, as the lease is more marketable. The investment community will pay good value for these new FOT leases, which have sold at yields of up to 7%, he said.

115. He also explained that standardisation of lease terms reduced management costs, making it easier to apply consistent policies across the estate (e.g. rental dispute resolution), allowing for better comparability of rents for different pubs, production of guidance for tenants and training for staff, and ease of producing deeds of variation and renewal leases. That seems to me to be a logical and uncontroversial analysis. There was no evidence from the Claimant to counter the Respondent's explanation of the value to it of a new lease over a DOV.

116. The sequential means by which the Respondent's estate was formed and FOT leases were created meant that for a long time it may not have had the same opportunity to seek rationalised and modernised FOT leases that now presents itself. The circumstances in which the Respondent or other pub company may have released the tie by notice or DOV is not therefore a useful comparator with the Respondent's choice of MRO vehicle now.

117. The introduction of the MRO represents an important change in the industry, given the number of MRO leases the Respondent might envisage (though I heard no evidence of projections). It is acknowledged to present a financial challenge to the Respondent. I was referred to EI's estimate in its Unaudited Interim Results for the six months ended 31 March 2017 that new FOT agreements (of which there had been 4) may result in a 18% reduction in net income, whereas tied deals negotiated after an MRO proposal would result in none. It seems to me natural for the Respondent to consider and plan for its business in light of the opportunity presented by the MRO to a tie free estate which is cheaper to manage and more attractive to investors.

118. Taking into account these considerations, the Respondent is in my view justified in general in having a policy requiring a tenant to enter into a new lease rather than using a DOV as the vehicle for the MRO, so long as its application is reasonable in the individual case taking into account the core Code

principles. I appreciate that in some cases the task of drafting and agreeing a DOV may be fairly straightforward, depending on the nature of the existing lease documents. However, it is not unreasonable for the Respondent to want in general to take a systematised high-level approach to the MRO process.

119. Importantly, however, that does not mean that there should be no exceptions to that general policy where its application produces unreasonable results for a particular tenant, or that there should no scope for negotiated variations to the standard terms. Indeed, there should be. The choice of MRO vehicle and terms must not be unreasonable for either party. There may, exceptionally, be individual cases where a condition as to surrender and re-grant would be unreasonable. The test of unreasonableness is a high bar, but in the present case the Respondent's choice exposes the Claimant to a liability for significant SDLT. On the assumption that this liability could be avoided by the use of a DOV to achieve FOT terms which were reasonable to both the landlord and tenant, this points heavily towards the Respondent's insistence on a new lease being unreasonable in this case.

Stamp Duty Land Tax

120. It is said by the Claimant that a new lease is unreasonable because Stamp Duty Land Tax (SDLT) would be incurred. The Respondent's position is that SDLT payable consequence of the exercise of the MRO by a new lease does not make its requirement for surrender and regrant unfair.

121. The Respondent has provided a breakdown of potential SDLT liability of £1,989, though it admitted that Mr Clarke was correct in observing that this figure was wrong and should be increased by 18% to allow for SDLT payable on VAT on the non-residential element of the rent.

122. The proposed lease term does not extend beyond the expiry date of the existing lease. I understand that overlap relief would not be available to this tenant, because the grant of the original lease was before the introduction of the SDLT regime in 2003 (and Stamp Duty under the previous law was paid). The SDLT liability would of course depend on the actual rent finally agreed between the parties or determined. There is provision for a variation of the lease to increase the rent to be treated as a new lease (except when by exercise of a provision in the lease), and further provisions apply to abnormal rent increases after the fifth year of the term[4]. It would also be the consequence of the exercise of the MRO by DOV if the lease term is extended (which the law treats as a surrender and regrant)[5] and SDLT might also be payable where the variation of a lease by deed amounts on the facts to the grant of a new lease (and to SDLT avoidance).

123. I have not analysed these provisions, but where SDLT liability is on the facts of a particular case a result of the POB's choice of MRO vehicle, it will be a cost to the tenant of taking the MRO option, but not the only one. Legal fees,

[4] Finance Act 2003, Schedule 17A, para 13, 14.

[5] s.43(3)(d) of the Finance Act 2003

dilapidations, deposit and rent in advance are amongst the others. It seems proper to take that liability into account in determining in an individual case whether the choice of vehicle, and the choice of other terms and conditions dictating costs to the tenant, including entry costs, are reasonable. In my view, whether or not SDLT is substantial should be considered in light of all of the costs the TPT would be required to pay for the particular new lease. Where these combined costs are so large as to act as a barrier to the MRO option they can outweigh the POB's reasons for wanting a new lease and make the choice of terms / conditions and vehicle unreasonable and non-compliant, but each case must be decided on its facts.

124. The Respondent has been silent as to the SDLT position in respect of the new leases granted to existing tenants since July 2014. I do not know whether there were any where overlap relief was not available and who faced such liabilities, and whether it negotiated any arrangements (to other entry costs, for example), or a DOV in the circumstances. Such evidence might be relevant to whether it is acting fairly by comparison in any given MRO procedure.

125. That said and standing back in the present case, whilst the SDLT figure is not very substantial (because there are so few years left on the lease term), assuming that compliant lease terms could be achieved by way of a DOV, the SDLT liability would be the result of the Respondent's choice of vehicle. If the Respondent is to show that choice is reasonable I would expect that fact to play a part in negotiations over costs overall, such that they are reasonable. If that is so, I do not consider there are other strong indications why the Respondent's choice of MRO vehicle would be unreasonable in this case.

Negotiated variations to the standard lease

126. As to the terms of the new lease, the POB is required to make the offer, whether or not that will negatively affect its profit. It would be naïve not to acknowledge that there may be a financial incentive for the Respondent to seek to offer a proposed tenancy on the terms most advantageous to the POB. Either a grant of a FOT on those terms, or a decision by the tenant to stay tied because those terms are too unattractive, would be a win for the POB to a greater or lesser degree. Owing to the absence of negotiating power on the part of the TPT, there is an expectation on the POB that it can show it is not taking advantage of its position of strength.

127. [redacted] agreed that lease terms relating to people with high covenant strength can be different to those with low covenant strength. He also referred to voluntary negotiations with a tied tenant to release the tie, and to the Respondent's 2015 (pre-MRO) target to have 900/100 FOT pubs by 2020), though it was not moving forward at that pace.

128. However, voluntary negotiations motivated by the Respondent's commercial interests (perhaps in targeting a rural food led pub for tie release) are in a very different category to MRO negotiations. [redacted] agreed for

example that a tenant who made a good offer to go free of tie would be in the driving seat in the negotiations, and if there was a good rent deal there would be a motivation for the landlord in the negotiation. He said negotiations would be on the basis of the Respondent's standard lease terms, but they might require personal concessions (and he gave the example of allowing the tenant to build up a deposit over the first year or allowing monthly payment of rent for the first year, as an aid to the incoming tenant in funding the costs of the new lease). readily agreed that MRO tenants should get the same flexibility. He thought the Respondent had been offering it, but I was not persuaded as to that on the evidence. However, I am clear, and consistent with opinion, that for the MRO proposed lease terms to be compliant, they must be terms which are similarly favourable as those that might be offered to the tenant of a targeted pub.

129. acknowledged that the evidence showed that in the 13 lease renewals amongst the Respondent's tie free lettings since 2014 the tenants had not been happy to accept a number of the standard terms and had successfully negotiated them. He did not know how many of these renewals had been with the benefit of 1954 Act protection. Though 91 of the new free of tie lettings had been to existing tenants, the evidence did not identify these tenancies, and it was therefore not possible to see if such tenants had been able to negotiate better terms. Furthermore, there was no evidence whether these existing tenants had been in distressed circumstances when they agreed to a surrender and re-grant or had been served with notice under the 1954 Act of the landlord's opposition to a new tenancy. In addition, there was no evidence whether there has been any additional consideration from the tenant or a favourable rent deal.

130. Where there is a material difference in the lease terms granted to existing rather than new tenants, which might also indicate that the experienced existing tenant who is valued by this particular landlord, in a market situation, has some negotiating power. The Respondent has not shown on the evidence that the terms it proposes are such that existing tenants, or preferred tenants, in a negotiation, would be willing to accept outside the MRO process. This does not tend towards a conclusion that its terms are reasonable.

Are the existing lease terms relevant?

131. The Claimant's argument is that the starting point for the MRO lease is the existing lease terms. However, there is no support in the legislation for this assertion. 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.

132. By comparison, when renewing a tenancy under section 32 to 35 of the 1954 Act (arguably says the Respondent the closest example on the statute books of a statutory jurisdiction to determine the terms of a commercial tenancy) "reasonable" terms by reference to the existing lease as a starting point. It is for the party seeking a departure from those terms to justify why it is

fair and reasonable, having regard to the purpose of the Act. The legislature would have been aware of the criteria used in the 1954 Act when enacting Part 4 of the Act and the Code and I agree with the Respondent that it is significant that it in doing so it did not choose to take the same path.

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

134. I therefore make it clear to the Claimant. 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.

135. However, in my view that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need to have regard to the existing contractual relationship between the parties. Indeed, counsel for the Respondent readily agreed that it is self-evident that the existing lease terms will be in the mind of the TPT who is entering into negotiations for a new lease. The landlord will have their own commercial considerations in mind. From their respective positions, parties motivated to reach an agreement rather than a stalemate will negotiate from these starting positions to one that is acceptable for both. Therefore, both will have to take into account the position of the other if they intend to reach a deal. This is what a landlord would do if it wanted to tempt a preferred tenant into a new contractual relationship. That is the position in which the TPT tenant should be in the MRO procedure.

136. There may be other reasons why the existing terms are relevant, but I cannot set out an exhaustive list. For example, where a landlord offered (perhaps fairly recently) very favourable deposit terms on the tied lease which suggests the tenant was viewed as a preferred operator, and there has been no relevant change of circumstance, if the POB will not offer favourable deposit terms now that may be an indicator that the POB is seeking to raise unmanageable entry costs and is not acting fairly, and that the terms are not therefore reasonable. The particular terms (e.g. a keep open clause) may have had an effect on trade and goodwill to date, such that it would be unreasonable to change them. There may be an occupation clause pursuant to which wider family members reside in the pub, and it may be unreasonable to restrict that. Each case must be looked at on its merits, but for the Respondent as it does to suggest the existing lease terms are always irrelevant is untenable in my view.

This MRO Proposal

137. In evidence was the covering letter dated 1 September 2016 that was sent with the MRO proposed tenancy. This began "*this letter is our Full*

Response" and contained a number of requirements with which the Claimant had to comply in order to take the MRO option, including the following:

Please note the following which I hope will help to inform your choices:

- *"If you wish to take an MRO-compliant lease it will be necessary for you to surrender your existing tied agreement and enter into a new commercial lease for the remaining unexpired term of your current tied agreement*
  …
- *Should you decide to continue with this new lease you will be required to complete the attached application form in order that we may undertake new credit checks.*
- *You will also be required to produce a Business Plan including a P&L forecast and cash flow forecast, that should reflect the increased rent, lease liabilities and the cash flow implications of rent becoming payable quarterly in advance and of the payments into a Repairs & Maintenance Fund.*
- *As with any other tied lease surrender we expect that the lease will be terminated only when all payments due, any existing breaches and all repairs required under that lease are resolved. We will also not enter into the new lease if you are unable to provide all statutory compliance certification to evidence that the premises and inventory are safe.*
- *I enclose a copy of a provisional completion statement to advise you of the funds which will be required on completion of the new lease. Any payment of rent already paid against your account will be offset against the statement on completion of the new lease.*
- *We must draw to your attention that you should expect the terms and conditions of such a FOT commercial lease to be rigorously enforced, including prompt payment of the rent, buildings insurance and R&M fund in full on the due dates and fulfilment of the full repairing obligations. You will be expected to operate your business independently without any support, services, concessions or the protection of any Code of Practice.*
- *The Pubs Code defines a sequence of steps with strict timetables and there are several points at which your claim could lapse if [sic] do not comply with those timetables. Entering into an arms-length lease on these commercial terms is also a serious commitment for you to make. We therefore strongly recommend that you take independent and professional legal, accounting, surveying and valuation advice before committing yourself to this new lease.*
- *You will pay a non-refundable deposit for £1,500.00 as a contribution towards our legal costs (made payable to Enterprise Inns plc).*

138. The letter included the following enclosures:
   a. FOT lease
   b. Benefits of the tie brochure
   c. Implications of becoming FOT brochure
   d. Application Form
   e. Statutory Requirements Schedule
   f. Specimen PCS [provisional completion statement] as at the date of the letter.

139. In evidence were the two brochures enclosed with the letter (items b. and c. of the list above), which [redacted] in his oral evidence said had been the product of a working group in which he had been involved. It is not convenient to set out in this decision the full text of these brochures, but it is safe to say

that they represent a one-sided assessment of the considerations affecting a tied tenant choosing whether to go FOT. The “Benefits of the tie brochure” could be described as a sales pitch for a tied lease. The "Risks" column in it does not actually set out any risks of staying tied at all, only stating that the risk is lower (than being FOT) and going on to emphasise the other benefits of being tied.

140. By contrast, the other brochure, concerning the implications of choosing to exercise the MRO to go FOT presents what [redacted] acknowledged in his evidence was a grim picture. He said that if a tenant has a tied agreement with SCORFA (special commercial or financial advantages) then tie release is bound to be a negative story. The tenant is told in this brochure *"We want our Publicans to take well informed decisions by laying out, over the page, some of the factors to be considered when deciding whether to take the commercial lease that we would be offering."* Those considerations set out are all, in fact, presented in a uniformly negative manner.

141. [redacted] acknowledged in his oral evidence that the perception of a recipient of these brochures is that the Respondent is encouraging them to stay tied. He also agreed that the statement that the Respondent would require all repairs to be resolved prior to granting the MRO lease could have been better expressed, explaining what was intended is that the Respondent would expect there to be a plan to resolve all outstanding repairs (meaning that some works could be done immediately, and others could be resolved later). This is most definitely not what the brochure says, however. On this issue alone, I would expect the Respondent to be reviewing this literature.

142. [redacted] said that the covering letter enclosing the proposed MRO tenancy had subsequently been amended to remove a request for a non-refundable deposit of £1500 towards the Respondent’s legal costs (and that this matter had been conceded in the present case). He admitted that the wording of the letter was such that a recipient could be expected to understand that they had to pay at least £1500 for the Respondent’s legal costs, whereas he said in fact at that time that amount was the only contribution that was expected. This is again not what the letter says, and I do not accept his evidence on this. [redacted] said this figure had been arrived at because Gosschalks had given a figure for producing and completing a new agreement in an average case (though that was much higher than the one [redacted] estimated in evidence for a straightforward case).

143. Notwithstanding what [redacted] said as to his degree of comfort with a tied tenant taking the MRO option, I do not accept on the evidence that has been the Respondent’s position. The tone and purpose of the covering letter and enclosures which form part of the MRO proposal are clear. They are intended to raise levels of uncertainty in the mind of the recipient, so they are less likely to take the risk of the MRO option. It is plain that this is the outcome that the Respondent sought on making the proposal.

144. I am also satisfied that the requests in the covering letter with which the Claimant was required to comply would be contractual agreements if accepted, which are to be taken together for the purposes of s.43(4). Further requirements

to complete credit checks; to produce a business plan including a profit and loss forecast; to make payment for all breaches, resolve all repairs and to pay a non-refundable deposit towards legal costs are all conditions which, if unreasonable, will render the MRO proposal non-compliant. It is plain to me that this collection of conditions, taken together, was a weapon deployed in furtherance of the Respondent's objective of persuading the tenant to stay tied, by making the MRO difficult to achieve. I am quite satisfied that, taken together, they are unreasonable conditions, and render the MRO proposal non-compliant. Nevertheless, the objective justification for requiring a new lease I have considered above.

145. That does not mean that they are individually unreasonable. There may be sound reasons, example, for making a business plan. I will not deal individually with these conditions (some have been conceded by the Respondent and some the Claimant does not challenge). However, the condition as to payment of dilapidations deserves special consideration.

Dilapidations

146. The Respondent argues that it is a fallacy that the Claimant will be liable for terminal dilapidations upon a surrender and regrant, as a landlord who grants a new lease to a sitting tenant cannot claim damages for dilapidations in the same way as it can when a tenant gives up and the Respondent does not assert that it would be entitled to bring such a claim. Firstly, by section 18(1) of the Landlord and Tenant Act 1927, the damages recoverable are capped at the diminution in value of the landlord's reversion. This would have effect in the same way whether a new lease is granted or a DOV entered into. Secondly, if there were more than three years of the term under either a new lease or the existing lease as varied by a DOV, the Respondent would need to obtain the leave of the Court under the Leasehold Property (Repairs) Act 1938 before bringing a claim for damages for dilapidations. Conversely, the obligation to repair is a continuing one and the landlord's right to enter to carry out repairs and recover the cost will apply at any time irrespective of whether a new lease is granted.

147. However, what is at issue here is the presentation of conditions by the Respondent as part of the MRO proposal. The covering letter forming part of the proposal requires all dilapidations to be paid for up front. This in my view is a condition of grant of the MRO. I do not accept [redacted] explanation that what was intended was that there would be "a plan" for dilapidations to be carried out. The meaning of the letter is clear. The Respondent's position was that it would require that the property is brought into repair before the new lease is granted. After the service of the MRO full response, the Respondent obtained a schedule of want and repair, costed in the sum of £[redacted].

148. There can be no real doubt that, when the cost of dilapidations is high, the requirement for their immediate payment may represent a real disincentive to a TPT to take the MRO option. A reasonable landlord should manage its estate responsibly throughout the term. The landlord should not be using surprises on the request for an MRO option as an adversarial weapon. The

need for fair dealing arises, and what is appropriate will depend on the facts of the individual case. It is appropriate for the POB to consider whether in the circumstances fair dealing requires it to mitigate the impact of dilapidations.

149. By the date of the hearing, the Respondent's position had changed dramatically, in that it did not require any remedial work as a precondition for a new FOT lease. The Respondent's original condition on dilapidations stands out as very severe. It did not set out any limit on its ability to require dilapidations at that stage and suggested no flexibility at all. This sits comfortably in my view with the tone and intention behind the covering letter.

150. If it is a logical assumption that a tenant with more bargaining power would negotiate with the landlord to carry out the repairs over a reasonable period the question that arises is therefore, if the Pub is not to revert to the POB until the end of the new lease term, why did it insist on the cost of dilapidations now (other than because it can as a matter of law)? I can find no good reason in the evidence before me and the Respondent did not in fact seek at the hearing to defend its original position, which I am satisfied was an unreasonable and non-compliant condition in this context, without good reason as to its imposition.

Uncommon Terms

EI's gathering of evidence of as to commonness

151. [redacted] gave evidence that the Respondent took steps to obtain evidence of comparable leases as relevant to the issue of the commonality of its proposed MRO lease terms (generally, and not in response to this particular tenant's MRO notice). It instructed Gosschalks solicitors to conduct a survey of FOT leases in the market; it collated evidence of its own new FOT leases granted since July 2014 and it asked the other regulated POBs if they would cooperate with some research of the terms of FOT leases (and it was agreed that the BBPA would collate that information). The result was a basket of anonymised evidence of 26 comparable leases granted by other three regulator POBs, though [redacted] acknowledged that there was no way the accuracy of this information could be verified for the hearing. [redacted] said in oral evidence that he had also asked Wellington for information on its FOT leases, but it would not cooperate.

152. However, all of this evidence was solely focused on new free of tie leases, which served to increase the apparent commonness of the Respondent's own standard lease terms. The email to Wellington's managing agent (Criterion Asset) of 4 July 2017, produced by [redacted] at the hearing after he referred to it, asked only for information on new leases (not all tie free agreements), and [redacted] said this was because the Respondent's brief was to look at new lettings on the open market. There was no written record of the apparently negative telephone response [redacted] said he had received from Criterion, or of the briefing he said he then gave the Respondent's Chief Executive and solicitors.

153. As for the collation carried out by BBPA, this was also only in relation to new leases (as confirmed by [redacted] and shown by the email dated 30 June 2017 from [redacted] to all the regulated POBs also produced at the hearing after [redacted] oral reference to it in evidence). The period for which this evidence was requested was not specified, and [redacted] did not seek to find out if any regulated POB had used a DOV in response to an MRO notice. He acknowledged in oral evidence however that both new lettings and new leases to existing tenants upon surrender and regrant would have been of interest. These limitations in the scope of comparable evidence undermined the Respondent's case that it has shown its standard lease terms are common in tie free agreements.

154. The existing lease terms are not the benchmark for the test of what is common in tie free leases, and it is not the case that there is only one set of common terms. The meaning of "common" is not defined and I should consider its ordinary meaning. Its synonyms include usual, ordinary, frequent, and routine and a term which is not common in tie free leases will be not usual, ordinary, frequent or routine. It does not set a test of prevalence or require that a majority of leases contain the term in question.

155. The Claimants argued that pub tenants are often ill-advised when entering tie free leases, and thus the terms which they are willing to accept should not unquestioningly be accepted as common. However, I reject this argument as legally irrelevant to the statutory definition of commonness.

156. The Respondent relied on the expert evidence of [redacted] as to "Whether the clauses listed in the Respondent's list of issues in dispute at paragraph 4 are "not common". The scope of the permission granted for the Respondent's expert evidence was that which it had requested. The Claimant elected not to call any expert evidence and did not object to the Respondent's reliance on its own. In spite of the concessions as to commonness made by the Claimant, it is appropriate that I set out here the conclusions I have reached on the expert evidence.

157. [redacted] is acknowledged to have extensive experience of leases of licensed premises. The Claimant however questioned him as to his ability to act independently. [redacted] confirmed he has acted for four of the regulated POBs - EI, Punch Taverns (including acting for them as tenant), Star and Greene King. The large majority of his Code related activities as expert have been for EI. Though he personally acted for no tenants in Code related matters at present, one of his colleagues at [redacted] was acting on behalf of a tenant against Star.

158. [redacted]

159. In my view, there is no reason why, given this history, could not be relied upon to provide independent expert evidence in accordance with the RICS guidance on Surveyors Acting as Expert Witnesses (4th edition), but as with all expert witnesses he was required to be assiduous in following that guidance. However, I identified three principle problems with his evidence, which on careful consideration and with respect to mean that I am not assisted by it.

160. The first of these is the limited nature of his instructions. had not been instructed to consider the commonness of the terms in question collectively in the proposed lease. He had only been instructed to give expert evidence as to whether each individual disputed term was common. Secondly, I found he had not sufficiently demonstrated independent judgement in respect of his instructions and the evidence which was relevant to his professional opinion. Thirdly, I found his methodology was not persuasive.

The Respondent's Instructions to Expert

161. confirmed that he was not instructed to give expert evidence as to whether the particular combination of lease terms in the proposed tenancy could be considered common in the tie free market, and thus was not able to offer such an opinion in these proceedings.

162. The Respondent disputed that the test of commonality applies to the lease as a whole, arguing that that would be unworkable. As discussed above when considering the test of reasonableness in section 43(4)(a)(iii) of the Act, the contrary is the case in my view. If the Respondent is correct, a lease might yet contain a combination of terms each individually common in the tie free market, yet which would never be found together in the same lease (because they were inconsistent, impracticable, rarely or never agreeable to a tenant, or did not make commercial sense), and that is what would in fact be unworkable. It would be permissible for a POB to select all of the common terms which were most favourable to it, even though it is unlikely that a new tenant in the open market would ever sign up to them. This in fact is what the Claimant contends the Respondent has done.

163. The Respondent has in its evidence only concerned itself with whether each individual disputed term is common in tie free leases. I cannot see that the scope of my directions as to expert evidence could preclude me, on a full hearing of the arguments, from making findings adverse to the Respondent on that basis – only it bore the responsibility for meeting the case against it and the statutory test. It may be that it is necessary to consider the commonness of a lease term differently from the commonness of lease terms collectively in a single lease. The frequency of finding the latter in the market could clearly be different from finding the former. However, in the absence of specific argument

on the point I think the legislation requires at the very least that the lease terms collectively can be shown not to be rare or unknown in the market.

164. I note that the tables in the Respondent's Statement of Defence show where quarterly rent and upward only rent reviews appear in the same new EI leases, as well as an undated sample of sales recording full repairing / insuring terms and quarterly rent in advance. Counsel for the Respondent submitted that the tables of terms found in comparable leases referred to in the expert evidence show that the combination of disputed terms can be found in a good many of the leases considered, but my concerns about the limits placed on the evidence so considered are addressed in this decision, and [redacted] expressly declined to give an expert opinion on the matter. It is not for counsel therefore to do so, nor I am I satisfied on the evidence that it is safe for me to reach such a conclusion.

165. [redacted] gave evidence of the number of FOT leases which are likely to comprise the "market" for the purpose of assessing commonality, the extent of that market, and the proportion of such leases in which the disputed terms may be found. The Respondent had first instructed him to "research the FOT sector in England and Wales" by way of separate instructions given prior to those in the present proceedings.

166. In oral evidence [redacted] confirmed that these first instructions had been given only orally somewhere between 12 and 18 months ago and he had spent time over a period of about three weeks conducting his research. [redacted] recalled that he talked generally with those at EI concerning matters they thought common and not common and about how they could prove that, but he could not add more detail, saying that his recollection was not ideal. However, he had not been given, and nor did he require, written instructions to proceed with his research on the FOT sector.

167. Amongst the relevant provisions of the mandatory RICS guidance at 3.4(e)) is the requirement for instructions (to give evidence as an expert witness) to be recorded in writing, and that particular care should be applied in deciding whether to accept instructions where the expert has previously acted for a party on a matter which requires, or may in future require, the giving of expert evidence (2.6).

168. [redacted] acknowledged to me that when he accepted those research instructions he was aware that in the future he might be instructed again to give expert evidence on behalf of the Respondent in individual Pubs Code arbitrations based upon it, and he agreed that it was difficult for me to determine what in fact his initial instructions had been at that point. It cannot be verified, for example, whether he was asked to conduct research to support propositions in the Respondent's interest. The absence of initial written instructions in the circumstances was not adequately explained and means that I cannot be satisfied that there was no conflict between them and those under which [redacted] now gives evidence in these proceedings, and this serves to undermine the value of his evidence.

Methodology

169. As to methodology, he makes an attempt to assess the size of the FOT sector based on the surprisingly limited information which is available, but his evidence is not without shortcomings. Firstly, he makes a professional judgement based on data from various sources as to the size of the market, which he assesses as approximately 5,150 FOT leasehold pubs in England and Wales. His analysis of the size of that market was sensible (though he acknowledged he had not included any research on the matter by Gerald Eve, who are consulted by the Valuation Office and for whom pub rating is a strong element of their work).

170. estimates 343 new letting events per annum in the FOT sector, on average, and that two thirds of these (approximately 226) are new lettings and one third "renewals or lease re-gears/term extensions". said in his oral evidence that the majority of events could be renewals and that 226 new leases per year might be too high.

171. This matter would not be such as to undermine his evidence, however. What causes me concern, however, is the excessive weight that he places on the terms of these new leases in his evidence and his judgement as to the appropriate comparable new leases, and these matters serve to undermine his conclusions.

Free of tie agreements

172. placed his focus on new leases rather than considering the terms of any other form of FOT agreement. He observes, for example, that lease renewals are influenced by the previously prevailing leases and he excluded these from consideration in reaching the figure for the size of the market (which he then uses in his analyses of the significance of the evidence of the Respondent's lettings). I am not content with this approach however and see no reason for it. In my view it may tend to skew the evidence and the legislation does not require exclusive consideration of a subset of tie free leases. It requires consideration of "*common terms in agreements between landlords and pub tenants who are not subject to product or service ties*." The pool of FOT agreements includes tenancies and leases, sale and leasebacks, renewals, DOVs and side letter variations, as acknowledged by in his oral evidence. Thus, I do not accept his opinion as to the size of the relevant tie free market, which is much larger than he suggests.

173. He was also aware of the practice of releasing the tied obligations by side letter (such as in relation to , which was then released from the tie, and the circa 1998 release of a number of ties by side letter). He said, having provided valuation and sales advice in respect of the matter,

[redacted] had not identified if EI had executed any tie releases by DOV in a relevant period, as this was he said not of interest to him as they are not indicative where it is the landlord's choice to release the tie rather than a market lease.

[redacted] *Comparable Evidence*

174. Setting aside these concerns, I was not in any event satisfied with [redacted]s consideration of the evidence of tie free leases and how that informed his judgement as to commonality. He conducted an empirical analysis of the frequency with which each of the terms in question was found in three different baskets of comparator leases:

g. All 225 EI FOT leases granted from July 2014 ("the EI leases");
h. A sample of FOT leases obtained by solicitors Gosschalks, solicitors for the Respondent ("the Gosschalks leases");
i. 14 FOT leases granted since 2016 in respect of which [redacted]s firm [redacted] had acted as agent ("the [redacted] leases");
j. The 26 recent FOT leases granted by the other POB regulated by the Pubs Code.

175. [redacted] discussed the modernisation of terms which take place over time and considered that recent lettings should have more evidential worth than more dated agreements, reflective of the continually changing market. He acknowledged that the legislation did not provide for the preclusion of any particular evidence but believed more contemporaneous evidence has more worth and the state of the market at the time. Whilst I do not fundamentally disagree with this approach, it was not reflected in his analysis of the comparable evidence, in that in three out of the four categories of comparable evidence he considered only new leases, and there was no consistency in or analysis of the relevance of the period represented by those baskets of comparables.

176. Where there was a variance between the commonality of a term in older and newer leases this was not identified and addressed by [redacted] in reaching his conclusions. It is not clear what, if any, weight he places upon the evidence in deciding, in respect of a lease term which is not present in older leases, that it is nevertheless common.

The EI Leases

177. [redacted] refers to the EI leases as being highly relevant, but he makes no reference at all to any granted prior to July 2014. It was clear from his oral evidence that he had based his expert evidence on the sample of these leases which the Respondent has chosen to provide to him, and he confirmed that the July 2014 long stop for this evidence had been dictated by the Respondent and not by him. He could not explain the significance of this date and confirmed he had not made enquiries as to that with the Respondent or

asked for any earlier EI leases to be provided to him. Surprisingly, [redacted] in his oral evidence said he had no idea either why the Respondent's sample of FOT leases given to [redacted] dated from July 2014. There was absolutely no rationale for the chosen sample available, and this is a matter in respect of [redacted] should have exercised his professional judgement.

178. The reliance placed by [redacted] on the 225 recent FOT leases granted by the Respondent needs to be put in perspective given the size of the tie free market as a whole. Moreover, he did not enquire, and there is no evidence before me to indicate, which of those leases was granted to an existing tenant (and thus whether such tenants are better able to negotiate individual concessions to the standard lease terms cannot be seen).

179. [redacted] was wrong in my view to place so much reliance on the Respondent's new FOT leases, without having had regard to the fact that (currently) there are around 70 MRO proposals on such terms that are in arbitration because TPTs have refused to accept them, and the arbitrator has yet to decide if they are common in the tie free sector and reasonable. Whilst it was argued for the Respondent that the 70 proposed tenancies in dispute are irrelevant as we do not know if it is the vehicle or terms (and which of them) that are challenged, that is precisely the uncertainty which in my view should have led to caution in placing too much weight on the recent EI leases.

The [redacted] Leases

180. It is also not clear in his report why [redacted] started his analysis of the [redacted] leases in 2016, and why he considered it appropriate that the EI and [redacted] lease samples should start from different dates. He said in oral evidence that his firm had undertaken tie free lettings prior to October 2016, but a limited amount (for example in 2014 and 2015 two pub lettings in each year).

181. The sample size is very small, and interestingly there is no letting other than the two by the Respondent in which all of the disputed terms (including as to the deposit as a multiple of the rent) appear. This is not supportive of the suggestion that the proposed lease terms are collectively common. Furthermore, the evidence of these two EI leases has been double counted - within the EI new lettings and again in the [redacted] lettings ([redacted]). The evidence based on the percentages resulting is consequently unreliable.

182. [redacted] said he had included these leases because they were new (but referred to over 100 examples tie free leases which would be in his office's files in relation to valuations carried out). His evidence based on these could have been meaningful in my view.

The Gosschalks Leases

183. [redacted] confirmed that the Gosschalks research had not been carried out at his request, the exercise already having been completed – and

that it was provided to him after he was instructed initially to carry out his research.

184. The Gosschalks leases were a sample of 21 lease types granted over time. The oldest in date was 1998, and the second oldest 2009, and they will have been used with more or less frequency (some of which will represent a significant number of lettings, and some only a single one). In oral evidence [redacted] said that he would expect there to be greater frequency of use for the large pub company or institutional leases, and that the landlords to the leases he did not recognise were probably used on one single occasion. However, his expert evidence did not sufficiently reference this knowledge and whether or how he had weighted this evidence as a result, and this affects its relevance.

The Regulated POB leases

185. Though it became clear that this sample was based on a request for new leases only, and without reference to any period of time, [redacted] confirmed he had not enquired of EI as to the scope of its request for evidence to the other regulated POBs.

Conclusions on the comparable evidence

186. The evidence does not demonstrate that all of these disputed terms (or their like) are found in any FOT leases other than new leases granted by this Respondent. The danger of over-emphasis on the EI leases is that it may be able to take advantage of the MRO procedure by proposing a lease which is never or rarely found elsewhere in the FOT market, and as the Respondent has said in relation to the historical make-up of its portfolio, other landlords take other approaches.

187. Where there was a large variance between the proportion of leases in each of the 4 samples (particularly between the EI leases and the Gosschalks leases) in which a disputed term was found, [redacted] did not explain to my satisfaction how he had analysed this evidence to reach a conclusion that the term was common.

188. What would have been helpful in [redacted] expert report is any indication that he had "stood back" and checked the evidence against his own professional judgement in being satisfied that the proposed lease terms were common. [redacted] said in oral evidence that this knowledge (based on the large number of leases that had passed through his office, especially in respect of valuations) largely accorded with the evidence that could be derived from the Gosschalks leases, and that these terms had been established by virtue of their longevity in the market. He considered that ultimately it is the rent which will affect the sustainability of a pub, much more than the lease terms. He confirmed however that the fundamental terms of a commercial lease had been prevalent for a significant period of time.

189. It may be in fact that how far into the past it is appropriate to look at lease terms to see if they are common in tie free leases may depend on the particular term. Some terms will have been established in the market for a long time (e.g. full repairing covenant) and some more recently. Other factors may be of relevance in weighing the relevance of terms in comparator FOT leases in addition to frequency and date (such as the type of agreement, property type and location). These factors were not addressed in [redacted] evidence and it is unclear where the relevance of the longevity of terms fits with his emphasis on the consideration of new leases.

190. I do note that the Claimant has not produced any expert evidence. However, [redacted] approach risks the evidence being weighted towards the small number of new EI tie free leases on standard terms which represents a tiny proportion of the tie free market, and that this can quickly suggest a commonness which, standing back, may not actually exist in that market as a whole. The legislation refers to terms not common in tie free leases, and not to terms not common only to new tie free leases available on the market as at the date of the MRO proposal. Furthermore, recent evidence only does not indicate convincingly that such terms are reasonable. The test of time will tell if they are sustainable for tenants or simply too unfavourable. Leases with greater longevity will more easily be shown to be not unreasonable in the general sense.

191. In my view the legislation requires consideration of whether the effect of the wording the particular clause is common, not just whether a clause of a particular type is common, but [redacted] was not entirely consistent as to how he would approach the question. He said that when assessing, for example, the commonality of a keep open clause he would be looking at how common any keep open clause is, and not how common that particular keep open clause is, but when considering the commonness of a term as to a deposit, he would be looking at the commonness of a term as to a deposit of that particular size.

192. [redacted] said he would not assess commonality differently for the type of agreement, term, pub and location, but it seems to me that this might be a relevant consideration. What are common terms for a pub in a rural location may not be common terms for a city centre pub, for example, and [redacted] agreed that he could not give evidence that common terms in short leases (of less than 5 years) were the same as common terms for leases of longer length.

193. It seems to me for all of the reasons above that the resulting conclusions in [redacted] evidence were not helpful to me, and the extent of evidence considered could tend to advantage the Respondent's case. I would add by way of comfort that the task [redacted] undertook is a novel one the need for which has been created by this legislation, and it cannot be easy to be among the first to approach giving expert evidence in new legal territory without decided authority as to its proper scope. No doubt therefore many of my observations will be treated as useful guidance to the Respondent and expert alike.

194. Only once a term is accepted in the relevant comparator part of the open market can it be common. Commonality can change, but this does not happen quickly. The legislation requires that the MRO tenant cannot be at the vanguard of that change. The MRO terms follow the tie free market, and form part of it, but do not define it. By looking at commonality over time can we can better understand that component of reasonableness. This standard lease is a relatively recent development by EI, and not long established in the market on the evidence produced by the Respondent. Thus, there is insufficient evidence before me that this standard lease is common in the tie free market. This in my view has been reflected in the incremental concession of 12 of its terms.

Conclusion and appropriate order

195. The Respondent has done no more than plead to the commonness of the individual terms and has not met the challenge to the reasonableness (including commonness) of the lease terms as a whole. For that reason, and as a result of my findings as to the range of harsh conditions imposed on the grant of a new lease, the Respondent's case fails. I find that the proposed MRO tenancy is not compliant as it contains terms and conditions which are unreasonable (including uncommon).

196. In circumstances where I conclude that an MRO response does not comply with regulation 29(3), the Code provides merely that I may "*rule that the pub owing business must provide a revised response to the tied pub tenant*". The Respondent accepts that in these circumstances it is within my power to make a determination as to what changes are required to the Respondent's MRO response to make it MRO-compliant and to direct that such revised response be provided pursuant to regulation 33(2). Standing back, however, I am satisfied that I should order the Respondent to give a revised MRO full response but not persuaded that in the present case I should exercise the power to order the specific terms of the revised MRO proposal that are compliant.

197. Firstly, this is because on the evidence presently before me I may fall into error if I make a selection of terms which are required to be altered. I would have insufficient confidence on the evidence available that I would be ordering common terms (individually and collectively).

198. Secondly, whilst both parties have put forward arguments to me as to the reasonableness of each disputed lease term (which I have not set out in this award), after careful consideration I find that it would not be appropriate or of value for me to reach a determination as to whether in isolation each term is reasonable in the more general sense.

199. As discussed above, reasonableness may not be an absolute, and all of the proposed lease terms have to be looked at in the round, after effective negotiations between two motivated parties. In the present case (whilst I obviously have no knowledge of the content of any without prejudice

correspondence) it is quite clear to me that, owing to both parties' respective erroneous positions in these proceedings, no such effective negotiations could ever have taken place.

200. The Claimant has taken a principled, intransigent, but ultimately incorrect view on the issue of the vehicle. The real question in this case is not, in fact, what is the correct vehicle for the MRO, but whether the terms and conditions of the proposed MRO tenancy are not unreasonable. A clearer focus on this in most cases (rather than on the mode of delivery) will be necessary to facilitate the effective resolution of this dispute and the efficient management of arbitrations by the PCA.

201. As for the Respondent, I am satisfied that its aim in the MRO process to persuade the Claimant to stay tied will have tainted its negotiating position. It has not treated the Claimant as a targeted operator it is motivated to release from the tie, and it has not been even handed or fair in the manner in which it has presented the offer (which was unequivocally done in a way which sought to discourage the TPT from taking the MRO option). That is not a free-standing breach of the Code, but it is evidential as to its unwillingness to offer reasonable terms which fit this tenant and supports my conclusion that the terms and conditions are not reasonable in light of the Code principles.

202. The landlord is now aware that it must be careful not to make the MRO unattainable owing to unreasonable costs, particularly entry costs, both in offering the terms and conditions of the MRO proposal, and in the manner of their presentation. It has incrementally, including subsequent to the hearing, made concessions on the proposed lease terms. The number and extent of those concessions in this case (which I have not set out in this decision) and more generally as to its standard lease terms since the introduction of the MRO, serves to my mind to emphasise the unreasonableness of its starting position. It is not appropriate for me, for the reasons given, to express a view as to whether it has now moved far enough.

203. It seems to me that two properly advised parties who are motivated to negotiate a new lease will be good arbiters of what is common and reasonable in the tie free market. They will between themselves be well placed to take a view on whether the lease terms as a totality are uncommon in tie free leases and will be the best judges of what is reasonable for them. Now that they are aware of my findings, they have the opportunity to negotiate the terms of a new lease. They have a duty to seek to agree them.

204. In the event that the revised MRO proposal is referred for arbitration on the issue of reasonableness, it may be necessary to take a very different approach to the evidence which will be of assistance to the arbitrator in deciding what lease terms would be not uncommon or unreasonable. The arbitrator should be particularly concerned that an award in respect of any such referral should be effective to resolve the dispute as to the compliant terms of the MRO tenancy, and may therefore be assisted by neutral expert advice throughout the proceedings, including at the time of making any order, as to the individual and collective commonness of the proposed terms (and of

alternative terms for the purpose of a ruling in the event that they are not). The arbitrator may therefore consider, in consultation with the parties, whether the early appointment of an expert under section 37 of the 1996 Act is appropriate to advise throughout the proceedings.

205. The arbitrator would have the opportunity carefully to consider the question of appropriate adverse costs orders in any such case in which there is no sufficient evidence of effective negotiation by both parties.

Operative provisions

206. In the light of the above:

- The Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant;
- The revised response must be provided to the Claimant within 28 days of the date of this Award, and a copy provided to the PCA;
- Jurisdiction in respect of any dispute as to the MRO-compliance of the revised response is reserved to the DPCA;
- Costs are reserved.

Arbitrator's Signature …  ……..

Date Award made: 06 August 2018……

Claimant's Ref: ARB/000103/CLARKE

Respondent's Ref: ARB/000103/CLARKE

IN THE MATTER OF **Ref: ARB/000294/HAYESM**

THE PUBS CODE ARBITRATION BETWEEN: -

THE HAYES PUB COMPANY LIMITED

Claimant

(Tied Pub Tenant)

-and-

EI GROUP PLC

Respondent

(Pub-owning Business)

Award

Summary of Award

The proposed tenancy is not MRO-compliant, and therefore the POB has failed to comply with the duty under regulation 29(3)(b). The POB must give a revised response which is MRO-compliant.

Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.

2. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 5 January 2018. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code") and paragraph 5 of Schedule 1 Part 1 of the Small Business, Enterprise and Employment Act 2015 ("the Act").

3. The Claimant is The Hayes Pub Company Limited and is the tied pub tenant (TPT) of the Barley Mow, Cox Green Lane, Maidenhead ("the Pub"). The Respondent is EI Group Plc of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. On 08 January 2010 the current lease of the Pub was granted by the Respondent pub-owing business ("POB") for a term of 15 years from 08 December 2009.

4. On 30 June 2017 the Claimant gave the Respondent a notice (an "MRO notice") in relation to the Pub in accordance with regulation 23 of the Pubs Code.

5. On 25 July 2017 the Respondent purported to send to the Claimant a "full response" for the purposes of regulation 29(3), including a proposed tenancy ("the proposed MRO tenancy") which is the subject of this dispute.

6. On 31 July 2017the Claimant made a referral to the Office of the Pubs Code Adjudicator under regulation 32(2)(a), which provides for the TPT or the POB to refer the matter to the Adjudicator where the POB does not send a full response (in this case) under regulation 29(3). The duty on the POB under that regulation which the TPT disputes has been complied with is that in sub-paragraph (b) to send to the tenant a proposed tenancy which is MRO-compliant.

7. The Claimant is represented by Mr Dave Mountford of the Pubs Advisory Service. The Respondent is represented by Gosschalks Solicitors.

Procedure

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

9. The following is a brief chronology of the case management:

- A Statement of Claim was filed on 14 September 2017 on behalf of the Claimant.
- A Statement of Defence was filed on 9 October 2017 on behalf of the Respondent.
- A Response to the Statement of Defence was filed on behalf of the Claimant on 28 October 2017.
- A Reply to Response to Statement of Defence was filed on behalf of the Respondent on 13 November2017.
- On 1 February 2018 the Claimant filed further written submissions.
- On 14 February 2018 the Respondent filed a Reply to those further submissions

10. The Respondent sought and on 5 February 2018 was granted permission to file an expert witness report. The Respondent relies on the report of [redacted] dated 14 February 2018.

11. An oral hearing took place on 9 and 10 May 2018 at the CIArb 12 Bloomsbury Square, London, WC1A 2LP, at which Mr Mountford appeared for the Claimant and [redacted] of Counsel for the Respondent.

Issues

12. While the parties had the opportunity to agree a list of issues in dispute, this was refined for the purpose of the hearing by the use of a Scott Schedule, which I have used as my guide in understanding what remains in dispute. I have not considered it appropriate to structure this decision to deal with each of these issues in turn as they are set out in the schedule, but my award makes a determination on all matters in dispute between the parties. As summarised by [redacted] in his helpful Skeleton Argument, the issues sub-divide into two categories; the method of delivery of MRO and the disputed terms of the tenancy.

13. One of the requirements for a tenancy to be "*MRO-compliant*" is that the tenancy "*does not contain any unreasonable terms or conditions*" (section 43(4)(a)(iii) of the Act). Section 43(5) provides that the Pubs Code may specify descriptions of terms and conditions which "a*re to be regarded as reasonable or unreasonable for the purposes of subsection (4)*". Regulation 31 of the Pubs Code provides that one category of "*unreasonable*" terms as specified are "*terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.*"

14. The Respondent POB has purported to offer an MRO option, compliant for the purposes of section 43(4) of the Act, by way of an offer of a new lease in draft form. The Claimant's principal arguments are that the terms of the proposed MRO tenancy are not compliant, falling foul of section 43(4)(a)(iii), in that:
    a. the use of a new lease (as opposed to a deed of variation ("DOV")) as the vehicle for delivering the MRO option is unreasonable and

b. the terms of the proposed new lease are unreasonable individually and collectively.

15. The position of the Claimant is, broadly, that the use of a new lease as the MRO vehicle (as well as many of its terms) is unreasonable given the terms of the existing lease, and the effect of the new lease and its terms on the TPT and are uncommon together in tie free leases. The Respondent, on the other hand, says that the terms of the proposed lease are indeed reasonable, and has produced expert evidence and other tie free leases in support.

PCA Advice

16. A number of the issues in this arbitration are the subject of the PCA and DPCA Advice Note published on 2 March 2018. This is advice under s.60 of the Act, and not guidance under s.61, and is therefore not a matter which I am required to take into consideration in determining my award. As advice to POBs and TPTs and their representatives, it is open to any person to seek to persuade me that the Advice Note is wrong, or that for some other reason it should not be the basis of my decision. As the Advice Note states, it is based on the consideration of arguments put forward in a number of arbitrations determined prior to its issue. It also makes clear that it can be revised from time to time.

17. The Respondent does not agree with the content of that Advice, but agreed with my summation of the situation in respect of this referral. I have a statutory duty to carry out functions both as regulator and arbitrator. Notwithstanding that I have exercised my statutory powers to give advice, as arbitrator I have a duty to consider evidence and argument impartially, and not to prejudge the issues in this case. This I have done.

Consolidation

18. This case had by consent been consolidated with three other referrals for the purposes of the hearing. The Claimants in these cases are different, although the Respondent is the same in each. There has been a limited waiver of confidentiality by the parties up to the hearing but not beyond, the Respondent requiring a separate confidential Award to be issued in respect of each referral.

19. The question of whether the MRO vehicle should be a new lease or a DOV is one which has taxed the industry since the introduction of the Pubs Code. The Claimants' representatives have all been involved for many years in campaigns on behalf of pub tenants, and specifically in relation to the development of the Act and the Code. The argument that the proper vehicle for the MRO is a DOV is therefore contextualised by their expectations of what the Code would offer.

20. The Claimants' representatives, in addition to their campaigning activities, also offer their services to tied pub tenants as representatives in arbitrations before the PCA. It is public knowledge that the top issues in arbitrations to the PCA to date have been in relation to the MRO full proposal, and that the most significant and repeated challenge has been to the fact that a POB has made an offer of an

MRO by way of a new lease. The Respondent is a regulated POB with a large estate and is a party to the largest number of arbitrations by far.

21. The strain placed on the PCA resources by this large volume of individual and confidential arbitrations which repeatedly raise overlapping issues is well known and in the public domain. I invited the Respondent to consent to the consolidation of a number of arbitrations, which I would then hear at an oral hearing, in order to seek to bring as much clarity as possible to the issues which repeatedly dog arbitrations in respect of MRO compliant proposals. Claimants' representatives and the Respondent have both had a full opportunity to put arguments before me as to the proper application of the statutory provisions.

Vehicle for the MRO Option

22. The Claimant contends that the DOV is the most common method of tie release, and the simplest and most effective (including cost-effective) method of achieving an MRO compliant tenancy and delivering parliamentary intention, in that with minimal variation the terms of the existing tied lease could be varied to make them MRO compliant. The Claimant considers that surrender and regrant of a new lease is not the common method of releasing the tie in a tied lease, is an unnecessary, time-consuming and onerous way of effecting the MRO option, and that the Respondent has in fact chosen to offer a wholly new tenancy in order to impose a set of new and unfavourable terms most disadvantageous to the tenant.

23. With the exception of the trading obligations, says the Claimant, the other terms found in the current lease of the Pub are commonly found in free of tie ("FOT") agreements. The Claimant relies on the fact that under the terms of the existing lease (as is common in tied leases), the Respondent has the unilateral right to sever the tied trading terms. I note that the current lease (at Schedule 4, Paragraph 7.1) permits the Respondent to sever the tie by written notice, but that (as the Claimant acknowledges) releasing the tie by notice in this way would not in itself create an MRO-compliant tenancy (not least because the provision allows the Respondent to re-impose the tie at any time). The Claimant argues however that it is unreasonable for the Respondent not to effect the MRO via the simplest and most cost effective method available, being a DOV to that lease, amending the lease terms (which are not compliant), but only to the minimum that is necessary.

24. The Claimant argues therefore that the vehicle by which an MRO tenancy is proposed should be a DOV of the existing tenancy, and not a draft new lease. It was (as confirmed orally at the hearing) not contended by the Claimant that the legislation prohibits an MRO option by way of a new lease, but rather that its use is unreasonable or unfair.

25. In response, the Respondent's position is that it is restricted by the statutory language from using a DOV as the legislation requires that an MRO option must be offered only by way of a new lease. Alternatively, it argues that if an MRO compliant tenancy may be in the form of a new lease or a DOV, it alone has the choice of which vehicle to use and there is no provision in the Act or the Code for

a tenant to challenge that choice. Therefore, a matter of statutory construction arises as to the form of the vehicle by which an MRO option may be given.

Applicable Law

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

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

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

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

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

(iii) does not contain any unreasonable terms or conditions, and

(b) it is not a tenancy at will.

(5) The Pubs Code may specify descriptions of terms and conditions—

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

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

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

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

Terms and conditions required in proposed MRO tenancy

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

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

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

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

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

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

31 – (1) Paragraph (2) applies where—

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

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

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

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

…

(c) are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.
(3) Paragraph (4) applies where—

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

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

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

Burden of Proof

31. It was conceded on behalf of the Respondent that it bore the burden of proving that the tenancy is MRO compliant, which includes showing that the terms are not uncommon. The Respondent's position was that the Claimant who advances a case that some other type of term or tenancy would be compliant bears the burden of showing that term is not uncommon, and that if a counter-proposed term is not shown by a Claimant to be common, it is itself "uncommon" and automatically non-compliant by virtue of being unreasonable. It was argued for the Respondent that the Claimant, not having produced expert evidence, could not show that any other terms could be compliant and replace any disputed terms found by me to be non-compliant. Thus, said the Respondent, a finding of non-compliance might lead to the absurd situation of there being no compliant lease possible.

32. The matter referred for arbitration is the dispute as to the compliance of the lease terms proposed. I reject the Respondent's argument as being applicable only to the extent that I am ruling on the specific terms that are to be included in an MRO-compliant tenancy. If on a referral the POB considers that not only is a proposed term common, but it is the only common term of that nature, that is for the POB to prove.

Detriment under regulation 50

33. In the Statement of Claim, the Claimant refers to having suffered a "*detriment*". The Claimant does not cite regulation 50 of the Pubs Code specifically, however I comment on this for the avoidance of doubt. Regulation 50 of the Pubs Code provides:

Tied pub tenant not to suffer detriment

A pub-owing business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.

34. For the avoidance of doubt, I will say at this point that regulation 50 does not provide a means to circumvent the provisions of the Pubs Code in respect of the MRO procedure. A dispute under regulation 50 is a separate challenge to an MRO challenge to the full response under regulation 32, and separate time limits apply. Regulation 58 makes reference to referrals to the PCA in respect of the MRO procedure, and does not list regulation 50, which is therefore not an MRO provision of the Pubs Code. Section 49(2) of the Act therefore applies. If the Claimant wishes to maintain a referral under regulation 50 then it must make a referral following the correct notice procedure. Parliament provided a specific means for challenging the MRO full response, and it was not the legislator's intention that regulation 50 be used as an alternative means for doing the same thing. In my view, the detriment relied upon must be outside of the challenge to the MRO proposal itself.

Statutory Interpretation – the MRO Vehicle

35. It is immediately clear on reviewing the relevant legislation that there is no express provision in either the Act or the Pubs Code which states that an MRO-compliant tenancy must be provided either by way of a new lease or by way of a DOV. Indeed, there is no express provision as to its form at all, only as to its terms and conditions.

36. For the sake of completeness, I observe that it seems to be clear that the legislation does not by implication require an MRO-compliant option to be given only by way of a DOV. Regulation 30(2) provides that an MRO tenancy will only be MRO-compliant if its term is at least as long as the remaining term of the existing tenancy, and its term can therefore expire after the date of expiry of the original lease. As a matter of law, where the term of a lease is extended by way of a DOV, it operates as a surrender of the existing lease and a grant of a new lease[1]. Furthermore, if the proposed tenancy was intended to be achieved by variation of the existing tenancy only, there would be no need for the provisions in regulation 31(3) and (4) preserving rights under the Landlord and Tenant Act 1954 ("the 1954 Act") afforded where they apply to existing leases, as such protection would be unaffected. Lastly, where the existing TPT is a tenant at will (as per section 70(2) of the Act) because pursuant to section 43(4)(b) an MRO tenancy cannot be a tenancy at will, the MRO must therefore must be a new tenancy.

37. Counsel referred me to text[2] and authorities[3] to remind me of the route to interpretation of a statute. It is necessary objectively to ascertain, by the language of the relevant statute / statutory instrument, what Parliament intended. The language of the statute or regulation should be given its natural meaning rather than a strained one. Importantly, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule is that legislation should be construed according to the intention expressed in the

[1] Friends Provident Life Office v British Railways Board [1996] 1 All ER 336.

[2] Craies on Legislation (11th Edition, 2017): extracts (paras. 17.1.1 to 17.1.6 and 27.1.11.1)

[3] Melville Dundas Ltd. V George Wimpey UK Ltd. [2007] 1 WLR 1136 and Christian UYI Limited v HMRC [2018] UKUT 10 (TCC), where the principles were summarised.

language, and sight of this must not be lost. Regard should therefore first be had to the words themselves.

38. I am not persuaded that the word “tenancy” (in and of itself) gives any particular guidance; a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a new lease. It is the position of the Respondent that the statutory language is that of a separate agreement being entered into. However, I note that absent are clear words on the matter - such as the “grant” of a tenancy or its "commencement", or the “termination”, “surrender” or “end” of the existing tenancy. The language used, for example “accept” and “enter into” in regulation 39, is to my mind consistent with a new tenancy or a varied one.

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

> *The Pubs Code may specify descriptions of terms and conditions—*
> *(a)which are required to be contained in a tenancy or licence for it to be MRO-compliant;*
>
> *(b)which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).*

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

41. The Respondent sought in my view to place too much emphasis on the power delegated by section 44(1)(a) of the Act, which provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option (referred to in this Part as “the MRO procedure”) …*". This delegates to the Code the procedure in connection with an offer of an MRO option, and not the form or content of the proposal, which is the subject of the separate delegation in section 43(5).

42. The Respondent relies on a number of provisions in the Pubs Code as indications that Parliament intended that the MRO option was to be implemented by the grant

of a new tenancy rather than a DOV. I have considered these, and whether it is possible to construe the legislation in the way the Respondent suggests it must be, looking at the way in which the term “tenancy” is used in context within the legislation:

a. Regulation 29(3) requires the POB to send to the TPT “*a proposed tenancy which is MRO-compliant*”
b. Regulation 30(1)(a) and (c) refer to the "*existing tenancy*" and a "*proposed MRO tenancy*"
c. Regulation 30(2) refers to the term of the existing tenancy and the term of the proposed MRO tenancy, which must be "*at least as long as the remaining term of the existing tenancy*". This language, says the Respondent, pre-supposes the grant of a new term of years, not the continuation of an existing one (noting that if an existing term is extended by DOV, in law a new tenancy is created).
d. Regulations 34(2) and 37(1) refer to the *"proposed tenancy or licence".*
e. Regulation 39(2) and (4) (dealing with the end of the MRO procedure) refer to the POB and TPT *"entering into"* the tenancy or licence. The Respondent argues that this language is not appropriate for the execution of a DOV.

43. The Respondent sought further support in the Act:

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

b. Section 43(4)(a) sets out the circumstances in which a tenancy or licence is "MRO-compliant" and in doing so refers to the "t*enancy or licence" "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owing business in connection with the tenancy or licence*". It was the Respondent's case that this does not support the argument that a DOV is permitted. For the purposes of the Pubs Code, the *"proposed tenancy"* is the MRO tenancy. As the Respondent understands the Claimant's case, this must be the existing tenancy and the DOV together. The reference to any *"other contractual documentation"* in section 43(4) must, the Respondent submits, be to something other than the MRO-tenancy, i.e. side-letters or collateral agreements. That being so, however, I do not see that the Claimant's case that the MRO tenancy can be the existing tenancy plus a DOV is undermined.

44. I also observe that Section 44(2)(b) of the Act sets out provision for a negotiation period for parties to agree rent *“in respect of the tied pub tenant’s occupation of the premises concerned under the proposed MRO-compliant tenancy or licence.”*

45. Having considered all of these provisions, I am not persuaded that there is anything in the way that the term tenancy is used in context that indicates that the MRO should only be offered by way of a new lease. There is nothing in the use of the phrases “existing tenancy” and “proposed tenancy” in regulations 30 and

31 to suggest that the existing and proposed tenancy must be different tenancies – i.e. that the latter must bring an end to the former, or that the proposed tenancy must be completely contained within a new document from that of the existing tenancy. Parliament chose not to make provision that a compliant MRO proposal must contain a new tenancy to be granted upon the surrender of the existing one, though it might easily have done so. The provisions relating to the market rent (in section 43(10) of the Act) relate to the rent under the MRO-compliant lease, but do not inform what those lease terms and conditions are.

46. Furthermore, I am satisfied that the draftsman was alive to the need to specify a "new" MRO tenancy, if that was necessary to distinguish it from the existing tenancy, if such a need existed. The expression "new tenancy" appears in the Code no less than 19 times (within the definition of "new agreement", which refers only to a new tied tenancy). It would have been simple for the draftsperson to have made clear any restriction such as is argued by the Respondent to exist, and the complete and consistent failure to do so in the language of the Code demonstrates plainly in my view that no such restriction was intended.

47. To show that how the MRO-compliant lease was to be delivered was in the Government's contemplation, the Respondent relies on correspondence to the then Secretary of State Vince Cable MP dated 25 October 2013 from CAMRA and others advocating the MRO option, which referred expressly to the expectation that the POB would issue a DOV, to show that how the MRO-compliant lease was to be delivered was in the Government's contemplation. However, this only serves to demonstrate that, having been asked to contemplate a DOV, the Secretary of State did not make regulations which expressly prohibited it.

48. Several extracts from Section 9 of Part 1 of the Government Consultation on the new Pubs Code (October 2015) are relied upon by the Respondent. However, the fact that open language has been used does not mean that its meaning is unclear. I do not consider that it is. On the contrary, the ordinary meaning of the language is permissive of either a new lease or a lease varied by deed, and this is not a reason to look at other material to seek to interpret the ordinary meaning in a more restrictive way.

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

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

50. Furthermore, the Respondent directed me to no consultations prior to the passing of the Act, where the definition of an MRO-compliant tenancy is found (this is not surprising given that the MRO option was the result of an amendment passed unexpectedly), and Parliament cannot retrospectively express intention.

51. Nevertheless, if regard is to be had to the consultation documents, I do not find support in them for the Respondent's position. A number of references are extracted from Section 9 of this consultation, which considers the powers to be delegated under section 43(5) in respect of the compliant MRO tenancies, including:

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

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

53. The Respondent also relies on a few other extracts which refer to a new (MRO) agreement. The expression "new tenancy" is not found, however, even in 9.6 and 9.8 where a tenancy has already been referred to in the sentence, and the expression "new agreement", which is not consistently used in the consultation, is not the unequivocal marker of intention the Respondent seeks. In 6.13 a "new agreement" which will end a rent assessment does not need to be a new tied tenancy after surrender of the old. The Respondent is to my view reading too much into the selected words of the consultation (and the Government's response to the consultation dated April 2016, where the expression "new agreement" does not occur in the context of the MRO at all).

54. Powers to make provision in relation to the MRO procedure, delegated under section 44(1), are considered in section 10 of the same Consultation, from which the only reference relied upon by the Respondent is:

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

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

56. Looking at these passages, they are far from conclusive. The Respondent looks for the silver bullet within them but, in my opinion, it is not there. These extracts cannot be viewed too selectively to be understood to point towards a prohibition on a DOV. These are a few of many references in the consultation documents to the MRO agreement. Read as a whole what is obviously lacking is any direct and decisive comment on the permissible vehicle for the MRO, which is consistent with an intention not to make unjustified intervention in commercial dealings between the parties.

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

58. It should also be observed that the legislation, however, in not prescribing the contents of the MRO-compliant tenancy except as set out in section 43(4) and regulation 31, has not expressly required that the terms of the MRO-compliant tenancy remain the same as the terms of the original tenancy, with variation only of the rent and severance of the tie. This is consistent with the MRO vehicle not being restricted to a DOV and is another matter for which there could easily have been provision if that was the legislator's intention. The Claimant directed me to no substantive argument on matters of statutory interpretation which could lead me to another conclusion.

MRO-compliant Tenancy

59. It was conceded by the Claimant that each of the terms objected to would individually be "common" in FOT agreements when seen in isolation from each other, but the Claimant contended that the combination of those terms in the same agreement would be unreasonable and uncommon. As was as set out in the Statement of Claim, the Claimant contends that the terms are a combination of the most onerous seen in the market. It argues it is extremely unlikely that a lease containing all of these terms would be accepted and (at Paragraph 4.3 of the Statement of Claim) that the "*MRO proposal is littered with terms that would ordinarily be negotiated and conceded by a landlord in an open market letting situation.*"

60. The Claimant argued that inclusion of all of the following terms was uncommon and unreasonable:

    a. Upward only rent review. The Respondent asserts that the evidence of its expert shows that an upwards only rent review is common in the FOT market.

    b. That rent would be payable quarterly in advance. The Respondent argues that a requirement for quarterly rent payments is common and that this is supported by its expert evidence.

c. That insurance would be payable quarterly in advance. The Respondent avers that this is an expense incurred annually by the landlord and there is no evidence of tenant's insurance contributions being payable monthly in the market in FOT leases.

d. The requirement for three months' deposit. The Claimant also avers the Respondent should be required to hold the deposit in a separate account and should not be permitted to deduct interest which accrues on the deposit account. The Respondent contends that provision for less than 3 months' deposit is uncommon and therefore, upon its interpretation of regulation 31(2)(c), unreasonable. It also argues that there is no evidence that a requirement for the deposit to be held in a separate account is common and in any event this would be an immense administrative burden on the Respondent. With regard to interest accrued, the Respondent states that this forms part of the refundable deposit, but it is uncommon and an unreasonable administrative burden to require a landlord to repay this to the tenant periodically rather than when the deposit is refunded.

e. That guarantors would not be permitted to be involved in rent reviews. It was accepted by the Claimant during the hearing that the objection to the term prohibiting the involvement of a guarantor in the rent review process was based on a misunderstanding. It was clarified that a tenant would always be able to be involved in the rent review, even if the individual director of that tenant company was a guarantor.

f. That there is a disregard of inducements to tenants upon rent review. During the hearing it was accepted by the Claimant that its objection to this proposed term was based on a misunderstanding of the provision.

g. That the Claimant would be liable for legal costs of the Respondent in relation to the new lease. During the proceedings, the Respondent has conceded that it will not seek any contribution from the Claimant towards its legal costs of executing an MRO-compliant tenancy.

61. The Respondent's primary argument is that the Secretary of State has specified what terms are to be regarded as unreasonable and (aside from the specific categories in regulations 31(2)(a) & (b) and (3)), that is to be determined by what terms are common in agreements between landlords and FOT tenants.

62. At the conclusion of the hearing I gave permission to the Respondent to make written submissions in response to the Claimant's oral submissions as to reasonableness of the particular terms in dispute. These were received on 18 May 2018. I see that in the written submissions the Respondent makes open offer of concessions on certain matters, although it emphasises that it does not consider it is bound to offer them. In relation to this case the Respondent states that it offers six months for the Claimant to move to quarterly rent.

Statutory Interpretation – section 43(4) and regulation 31

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

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

65. The referral under regulation 32(2)(a) can be made where the POB does not send a full response under regulation 29(3), and that regulation requires the POB to send an MRO-compliant proposed tenancy. The definition of such a tenancy is in section 43(4) of the Act so it is clear to me that the Pubs Code Adjudicator has jurisdiction under the regulations to determine whether the tenancy complies with the requirements of that section.

66. Therefore, determining MRO-compliance is not simply a question of looking at each individual term to decide whether it is uncommon for the purposes of regulation 31, but whether the proposed MRO tenancy contains terms or conditions which are unreasonable.

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

68. Thus, for example, were I to look individually at the payment of an increased deposit, rent in advance and payment of insurance annually in advance, I am looking at additional costs to the tenant. Other cost considerations at entry may be legal fees and the payment of dilapidations. Where costs, including entry costs, are excessive in total, but negotiated to a reasonable level overall, it may not be

correct to focus on an individual term and decide if that cost is or is not reasonable – it will depend on the context.

Is the choice of MRO Vehicle subject to the test of unreasonableness?

69. The Claimant argues that the MRO-compliant tenancy should comprise the tied tenancy, minus the tied trading provisions, and with a revised rent, and that this would be a straightforward thing to achieve. However, I am not persuaded that this would amount to an "MRO-compliant tenancy" as provided for in the Code, as it may contain uncommon or otherwise unreasonable terms in a FOT lease, individually or collectively.

70. The Respondent submits that (if it is wrong that the MRO vehicle can only be a new lease) the mechanism by which the MRO tenancy is brought into effect is not a "term" or "condition" contained in the MRO tenancy, and that there is no obligation or other condition (express or implied) to enter into a new tenancy or a DOV. Thus, it argues, the POB's decision as to the MRO vehicle cannot be subject to the test of unreasonableness. However, I do not accept this limited interpretation. Section 43(4) refers to a tenancy being MRO-compliant if "*taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence*" it does not contain any unreasonable terms and conditions pursuant to subsection (iii). I am satisfied that this is broad enough to encompass the requirement (as set out in the covering letter with the MRO proposal referred to in the evidence of [redacted] and dealt with below), to enter into a new tenancy.

71. Counsel for the Respondent in fact conceded that there were requirements specified in the MRO full response which were capable of being conditions contained within the MRO tenancy. The supposed distinction between such conditions and the requirement to surrender the existing tenancy was not substantiated at all.

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

Unreasonableness

73. In determining what is unreasonable, it is apparent that there is nothing in the statutory language which requires the meaning of that term to be determined only in light of open market considerations which would affect two unconnected parties

entering into a new FOT lease. A term will be judged to be unreasonable or not based on all of the circumstances, as they are known (or ought to be known) to the parties, and each case will turn on its own facts. The term or terms of a lease may be unreasonable by virtue of words which are not included, and not just those that are. While a POB might achieve some certainty that particular lease terms are common in the tie free market, what is reasonable in one case for one particular pub may not be reasonable for another, and a blanket approach by the POB will therefore not be appropriate.

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

75. It is the Respondent's position that these core principles are relevant to the interpretation of the express provisions of the Code (because the regulations were required to be made in terms which adhere to these principles) but that they are not "free standing" in that they do not impose duties or obligations on the parties outside of the express terms which regulate the conduct of parties in the Code. I agree that these principles do not impose free standing rights. However, the Respondent argues that accordingly the question of whether it has complied with the statutory duty to send an MRO-complaint proposal cannot be answered by an appeal to the Code principles, including to "fairness". For the reasons which follow I do not agree with the Respondent's position.

76. It is clear that the core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the Pubs Code (including any regulations made under the power delegated in section 43(5)) are to be interpreted as consistent with the two core principles, if the provisions in the Act (in this case, as to reasonableness in section 43(4)(a)(iii)) are not, there would be a fundamental incompatibility between these instruments. I am furthermore satisfied that, were the language in the Act and Pubs Code not consistent with these principles, the Secretary of State would not have enacted the Pubs Code in its current form.

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

The Pubs Code Principles

Fair and lawful dealing

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

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

No Worse Off

80. The second core principle requires a comparison of the position of TPTs with tenants who are tie free, and the former are intended to be no worse off than the latter. I am aware that this has been a principle in tied pub rent valuation since at least 2009, when it was referenced in RICS guidance. It is not for me in this decision to consider an exhaustive definition of this principle, but provisionally it would seem to me to be a judgement of fact and degree in each case whether a TPT is worse off. That judgement would include financial matters, particularly profit, but could it seems also include considerations not directly expressed in financial terms – for example a difference in bargaining power and the reduced risk in having a tied deal, or the business support available to a TPT from a POB may be something of value for the TPT. By pursuing the MRO option, the TPT should be in the position of being able to compare, and make an informed choice between, the two options.

The Application of Pubs Code Principles

81. It is consistent with the Pubs Code principles that the proposed tenancy which is made available to the TPT through the MRO procedure is not on worse conditions than that which would be made available to a FOT tenant after negotiations on the open market. This is for two reasons. Firstly, if the POB was able to get more favourable terms from the TPT using the MRO procedure than it would on the

open market, this would not be fair dealing. Secondly, the TPT would be worse off in having a choice to accept terms which were worse than would be available to a FOT tenant, including an existing FOT tenant renegotiating lease terms. In any event, it seems to me that these principles follow from the general concept of reasonableness, taking into account the relative negotiating positions of the parties within this statutory scheme.

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

83. The commercial relationship between the TPT and the POB on service of an MRO notice is different. The TPT (except at renewal) does not have the right to walk away or contract elsewhere. It only has the right to keep its current tied deal or to accept the offer. Even at renewal, any goodwill earned will be a relevant consideration for the tenant, as will the availability of the County Court's jurisdiction to determine reasonable terms of the new tenancy. The TPT in the MRO procedure is not in an open market position, and I consider terms or conditions which were less favourable because of that fact would be unreasonable and inconsistent with the core Code principles.

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

85. I was referred to the "Impact Assessment on the Pubs Statutory Code and Adjudicator", dated 28 May 2014, which summarised that cumulative evidence received by the government has clearly established that in too many cases tenants are unable to secure a fair share of risk and reward in their agreements. It identified as one of the problems the inequality of bargaining power between pub company and tenant, saying "*Pubcos should recognise that they have a responsibility to ensure they do not exploit their position of economic strength*". The Code was intended to result in a transfer of profit from the pub companies to the tenant, where the tenant is currently being treated unfairly (the level of unfair treatment, and the value of this transfer, was unclear).

86. That is a recognition of the financial pressures upon tied pub tenants. Such pressures should not themselves represent an insurmountable obstacle to the exercise of the MRO option. Thus, though the current circumstances of the TPT are said by the Respondent to be irrelevant, I do not think that can be so. Parliament clearly did not intend that a TPT whose profit is being unfairly affected by a POB under a tied lease should be prevented from accessing the MRO because they have not made sufficient profit to afford high entry costs. It is

unnecessary to analyse whether the particular tenant has been treated unfairly. High costs should not unreasonably prohibit access to the MRO.

87. The occurrence of a specified event is something which Parliament intended should give rise to a meaningful right to go tie free. Part of a tenant's anxiety about the proposed MRO tenancy can be accounted for in the MRO rent being determined after the arbitration as to the compliant terms of the proposed tenancy. In that way, the tenant cannot be sure how more onerous terms will be reflected in the MRO rent. The terms of a lease (e.g. whether it is a full repairing lease) will in general be reflected in the rent for the pub (as the Respondent's expert witness confirmed). However, that seems to me to be fundamentally different from a consideration of entry costs.

88. Take, for example, a significant increase in price (an event which pursuant to regulation 24 gives the TPT the right to serve an MRO notice). This significant price increase would be a unilateral decision of the POB which may materially affect the commercial attractiveness of the tied deal. The TPT is not in the position of a tenant of a FOT lease, who may decide to accept or reject a supplier's prices. If the MRO option is financially prohibitive, it may not be a realistic option for the TPT to accept it. The only option would be to remain with the tied deal (which may now be a poor one) or accept an offer that a prospective new tenant of a tie free lease might not without negotiation, and in such negotiation that prospective tenant would be in a very different bargaining position to the TPT. The test of reasonableness requires that the POB, in offering the terms of the purported MRO tenancy, cannot take advantage of any absence of commercial bargaining power on the part of the existing TPT pursuing the MRO procedure.

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

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

91. Whether the terms of the MRO proposal are reasonable will depend on the impact they have on both parties. The interests of one party cannot be considered in

isolation. The consideration must be balanced and the terms, and choice of vehicle, not unreasonable when viewed from either one's perspective.

92. It was contended by the Respondent that the Claimant's allegation that the Respondent was seeking to thwart the MRO process add nothing to their submissions on the question of whether the Respondent's response under regulation 29(3) complies with its duties under the Code. For the reasons above, I do not agree that these two things are unconnected.

Severing the Tie

93. The Claimant appeals to the market as to the mechanism it says is usually adopted to change from a tied tenancy to a FOT tenancy. To the extent that this argument places reliance on a term of the existing lease as being common does not invoke regulation 31(2)(c), as it is the uncommonness of such lease terms in tie free leases which is at issue. 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.

94. It is not enough for the Claimant to assert that the existing lease (with or without minor amendments) would be sufficient. 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 to me 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. The lease confers a unilateral right on the landlord, which it would presumably only exercise when satisfied it was in its interest to do so, and it has an absolute choice in respect of that. I do not see 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 the "minimum changes" sought by the Claimant to the existing tied tenancy to release the tenant from the tied trading provisions.

95. Even if this were the yardstick by which the Respondent's decision to send a new tenancy rather than a DOV falls to be judged, the Claimant produces no evidence to prove that that the grant of a new lease to a tied tenant is an "uncommon" means for a landlord to agree a new FOT tenancy with a tied tenant. I note from the Respondent's evidence however that a sizeable proportion of its new FOT tenancies granted since July 2014 have been to existing tenants. In considering whether the choice of vehicle is reasonable I was not impressed with the Claimant's evidence. Whilst a DOV is used in the market, they did not show it is the most common method of tie release, (to the extent that that is relevant to whether the use of a new lease was unreasonable).

96. 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 the

context 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 simply not the same. When releasing the tie on an individual lease it did not have the opportunity to remodel its FOT estate, or to take any meaningful step towards creating a standardised lease form. These opportunities now present themselves to the Respondent and is proper to recognise they are genuine considerations for the POB (evidence of which was given by the Respondent's witnesses as discussed below).

Respondent's evidence - conclusions as to reasonableness (vehicle and terms)

97. I heard oral evidence from [redacted] at Gosschalks, and [redacted] They dealt with certain factual matters of evidence concerning (a) the way in which the Respondent's FOT estate has developed, (b) the FOT market and (c) terms of leases in the Respondent's FOT estate and (d) the practicalities of the use of a DOV as opposed to a new tenancy.

98. They had each produced a short witness statement confirming the accuracy of parts of the Statement of Defence, and those parts overlapped. The Statement of Defence contained reference to legal argument as well as matters of fact. Identifying in respect of which parts of the Statement of Defence each gave evidence was therefore not straightforward. Certain parts of the overlapping sections contained factual matters more closely related to [redacted] personal experience within EI, and other parts were more closely related to [redacted] personal knowledge as a solicitor dealing with the Respondent's leases. I have done my best to attribute weight to the evidence according to its proper source.

The EI standard FOT lease v a DOV

99. [redacted] He was the person who drafted the EI standard FOT tenancy in 2011 and who had overseen the amendments to it since. This lease evolved from the short form of the Inntrepreneur lease, which was widely adopted by pub companies in the 1990s.

100. Notably 2011 was before the market was aware of any prospect of the MRO. The Claimant observed that the Respondent knew of the campaign for the MRO at that point. However, the vote in the House of Commons to introduce the MRO into the draft Small Business and Enterprise Bill took place on 17 October 2014 and the outcome was a surprise. Whilst it is not clear on the evidence the extent of the use of this standard lease between 2011 and 2014, in any event the Respondent has plainly used this standard agreement since 2016 outside of the MRO context. I am therefore, on evidence before me, not persuaded to the Claimant's case that the proposed lease was drafted with a view to the MRO within the Code, (and the corollary of that is that it cannot have been drafted with a mind to incorporating only terms that were common in tie free leases in order to ensure compliance with the Code, which regulations were only finally made in July 2016).

101. [redacted] gave evidence that a tied tenant typically stays in a pub for about eight to nine years. He said that in 2008 during the recession that average shortened, and the Respondent made great effort to give tenants financial assistance. He freely acknowledged that it was too early to know if tenants would keep its current standard FOT leases for an average of eight years.

102. [redacted] described the Respondent's estate as made up of many different types of mainly inherited leases, many of which have individually been subject to various variations either by deed or side letter. He explained how starting with a standard new lease document would generally make the procedure quicker, less onerous and cheaper than using a DOV. He considered that it was harder to deduce a tenant's interests if there are a series of documents, mistakes are more likely, and drafting a DOV with more extensive variations could require up to 10 hours of drafting, with consideration of whether each clause was to remain, be amended or be deleted in the MRO compliant lease.

103. I found [redacted] to be a reliable and impartial witness. I accept that the use of a DOV will in each case require a line-by-line analysis on a case-by-case basis (given the numerous and various styles of lease within the Respondent's tied estate). That analysis will need to extend to all other collateral agreements which form part of the tied tenancy (such as variations and side letters). It would also be necessary to ensure that all other terms which are non-compliant are deleted from the existing tenancy. Renumbering and cross-referencing would be required.

104. The Claimant's tied lease is not on the Respondent's standard terms, having been brought into its estate from one of the past acquisitions of a portfolio of pub estates, takeovers of companies with their own portfolios, and individual acquisitions of assets let on a previous lessor's standard tied terms. Each acquisition meant that new variations of tied leases were included in the estate. The Respondent has over 20 main lease types, each of those having significant contractual variations. These differences have arisen from the letting policies of the various older companies and from the Respondent's own response to changing market conditions.

105. Questioned about the Respondent's use of a DOV to release a tie, [redacted] referred to this having been the case in respect of 2-300 Inntrepreneur leases, which came into its estate in 1998 on the purchase of Unique Pub Co., after a 1991 commitment to enter into one (said to have been made in error).

106. [redacted] explained that, where the parties agree an appropriate fee, the Respondent is content to partially release the tie in a tied lease, but that it remains a lease that is subject to a tie. From the Respondent's point of view, he considered a lease that was free of any tie to be a commercial lease and a very different animal.

Value to the Respondent of a new lease

107. [redacted] said that the Respondent, accepting that there is a transfer of annual value from the landlord to the tenant arising from the MRO process, has no objection to granting a FOT lease, and that the good news from its point of view is that if commercial leases are put in place they can be used to get a better outcome from the capital value of the Respondent's FOT estate, as the lease is more marketable. The investment community will pay good value for these new FOT leases, which have sold at yields of up to 7%, he said.

108. He also explained that standardisation of lease terms reduced management costs, making it easier to apply consistent policies across the estate (e.g. rental dispute resolution), allowing for better comparability of rents for different pubs, production of guidance for tenants and training for staff, and ease of producing deeds of variation and renewal leases. That seems to me to be a logical and uncontroversial analysis. There was no evidence from the Claimant to counter the Respondent's explanation of the value to it of a new lease over a DOV.

109. The sequential means by which the Respondent's estate was formed and FOT leases were created meant that for a long time it may not have had the same opportunity to seek rationalised and modernised FOT leases that now presents itself. The circumstances in which the Respondent or other pub company may have released the tie by notice or DOV is not therefore a useful comparator with the Respondent's choice of MRO vehicle now.

110. The introduction of the MRO represents an important change in the industry, given the number of MRO leases the Respondent might envisage (though I heard no evidence of projections). It is acknowledged to present a financial challenge to the Respondent. I was referred to EI's estimate in its Unaudited Interim Results for the six months ended 31 March 2017 that new FOT agreements (of which there had been 4) may result in a 18% reduction in net income, whereas tied deals negotiated after an MRO proposal would result in none. It seems to me natural for the Respondent to consider and plan for its business in light of the opportunity presented by the MRO to a tie free estate which is cheaper to manage and more attractive to investors.

111. Taking into account these considerations, the Respondent is in my view justified in general in having a policy requiring a tenant to enter into a new lease rather than using a DOV as the vehicle for the MRO, so long as its application is reasonable in the individual case taking into account the core Code principles. I appreciate that in some cases the task of drafting and agreeing a DOV may be fairly straightforward, depending on the nature of the existing lease documents. However, it is not unreasonable for the Respondent to want in general to take a systematised high-level approach to the MRO process.

112. Importantly, however, that does not mean that there should be no exceptions to that general policy where its application produces unreasonable results for a particular tenant, or that there should no scope for negotiated variations to the standard terms. Indeed, there should be. The choice of MRO vehicle and terms must not be unreasonable for either party. There may, exceptionally, be individual cases where a condition as to surrender and re-grant would be unreasonable. The test of unreasonableness is a high bar however. Subject to

a new lease being on reasonable terms and conditions, including reasonable overall costs to the tenant, I am not persuaded that the choice of vehicle is unreasonable in the present case.

Stamp Duty Land Tax

113. It is said by the Claimant that a new lease is unreasonable because Stamp Duty Land Tax (SDLT) would be incurred. The Respondent's position is that SDLT payable consequence of the exercise of the MRO by a new lease does not make its requirement for surrender and regrant unfair.

114. The Respondent has provided a breakdown of potential SDLT liability of £2,180. The proposed lease term does not extend beyond the expiry date of the existing lease. I understand that overlap relief would be available and that the SDLT liability is due to the proposed increase in rent (and the actual sum would therefore depend on the rent finally agreed between the parties or determined). There is provision for a variation of the lease to increase the rent to be treated as a new lease (except when by exercise of a provision in the lease), and further provisions apply to abnormal rent increases after the fifth year of the term[4]. It would also be the consequence of the exercise of the MRO by DOV if the lease term is extended (which the law treats as a surrender and regrant)[5] and SDLT might also be payable where the variation of a lease by deed amounts on the facts to the grant of a new lease (and to SDLT avoidance).

115. I have not analysed these provisions, but where SDLT liability is on the facts of a particular case a result of the POB's choice of MRO vehicle, it will be a cost to the tenant of taking the MRO option, but not the only one. Legal fees, dilapidations, deposit and rent in advance are amongst the others. It seems proper to take that liability into account in determining in an individual case whether the choice of vehicle, and the choice of other terms and conditions dictating costs to the tenant, including entry costs, are reasonable. In my view, whether or not SDLT is substantial should be considered in light of all of the costs the TPT would be required to pay for the particular new lease. Where these combined costs are so large as to act as a barrier to the MRO option they can outweigh the POB's reasons for wanting a new lease and make the choice of terms / conditions and vehicle unreasonable and non-compliant, but each case must be decided on its facts. In the present case the estimated SDLT is a significant figure. If it is a realistic estimate and if that potential liability is in fact the result of the Respondent's choice of vehicle (and it could be avoided by use of a DOV to achieve compliant terms reasonable to both parties), I would expect that to be a matter considered by them in negotiating entry costs overall for this tenant so as to ensure they are not unreasonable.

116. The Respondent has been silent as to the SDLT position in respect of the new leases granted to existing tenants since July 2014. I do not know whether there were any where overlap relief was not available and who faced large liabilities, and whether it negotiated any arrangements (to other entry costs, for example),

[4] Finance Act 2003, Schedule 17A, para 13, 14.

[5] s.43(3)(d) of the Finance Act 2003

or a DOV in the circumstances. Such evidence might be relevant to whether it is acting fairly by comparison in any given MRO procedure.

Negotiated variations to the standard lease

117. As to the terms of the new lease, the POB is required to make the offer, whether or not that will negatively affect its profit. It would be naïve not to acknowledge that there may be a financial incentive for the Respondent to seek offer a proposed tenancy on the terms most advantageous to the POB. Either a grant of a FOT on those terms, or a decision by the tenant to stay tied because those terms are too unattractive, would be a win for the POB to a greater or lesser degree. Owing to the absence of negotiating power on the part of the TPT, there is an expectation on the POB that it can show it is not taking advantage of its position of strength.

118. [redacted] agreed that lease terms relating to people with high covenant strength can be different to those with low covenant strength. He also referred to voluntary negotiations with a tied tenant to release the tie, and to the Respondent's 2015 (pre-MRO) target to have 900/100 FOT pubs by 2020), though it was not moving forward at that pace.

119. However, voluntary negotiations motivated by the Respondent's commercial interests (perhaps in targeting a rural food led pub for tie release) are in a very different category to MRO negotiations. [redacted] agreed for example that a tenant who made a good offer to go free of tie would be in the driving seat in the negotiations, and if there was a good rent deal there would be a motivation for the landlord in the negotiation. He said negotiations would be on the basis of the Respondent's standard lease terms, but they might require personal concessions (and he gave the example of allowing the tenant to build up a deposit over the first year or allowing monthly payment of rent for the first year, as an aid to the incoming tenant in funding the costs of the new lease). [redacted] readily agreed that MRO tenants should get the same flexibility. He thought the Respondent had been offering it, but I was not persuaded as to that on the evidence. However, I am clear, and consistent with [redacted] opinion, that for the MRO proposed lease terms to be compliant, they must be terms which are similarly favourable as those that might be offered to the tenant of a targeted pub.

120. [redacted] acknowledged that the evidence showed that in the 13 lease renewals amongst the Respondent's tie free lettings since 2014 the tenants had not been happy to accept a number of the standard terms and had successfully negotiated them. He did not know how many of these renewals had been with the benefit of 1954 Act protection. Though 91 of the new free of tie lettings had been to existing tenants, the evidence did not identify these tenancies, and it was therefore not possible to see if such tenants had been able to negotiate better terms. Furthermore, there was no evidence whether these existing tenants had been in distressed circumstances when they agreed to a surrender and re-grant or had been served with notice under the 1954 Act of the landlord's

opposition to a new tenancy. In addition, there was no evidence whether there has been any additional consideration from the tenant or a favourable rent deal.

121. Where there is a material difference in the lease terms granted to existing rather than new tenants, which might also indicate that the experienced existing tenant who is valued by this particular landlord, in a market situation, has some negotiating power. The Respondent has not shown on the evidence that the terms it proposes are such that existing tenants, or preferred tenants, in a negotiation, would be willing to accept outside the MRO process. This does not tend towards a conclusion that its terms are reasonable.

Are the existing lease terms relevant?

122. The Claimant's argument is that the starting point for the MRO lease is the existing lease terms. However, there is no support in the legislation for this assertion. 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.

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

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

125. I therefore make it clear to the Claimant. 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.

126. However, in my view that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need to have regard to the existing contractual relationship between the parties. Indeed, counsel for the Respondent readily agreed that it is self-evident that the existing lease terms will be in the mind of the TPT who is entering into negotiations for a new lease. The landlord will have their own commercial considerations in mind. From their respective positions, parties motivated to reach an agreement rather than a

stalemate will negotiate from these starting positions to one that is acceptable for both. Therefore, both will have to take into account the position of the other if they intend to reach a deal. This is what a landlord would do if it wanted to tempt a preferred tenant into a new contractual relationship. That is the position in which the TPT tenant should be in the MRO procedure.

127. There may be other reasons why the existing terms are relevant, but I cannot set out an exhaustive list. For example, where a landlord offered (perhaps fairly recently) very favourable deposit terms on the tied lease which suggests the tenant was viewed as a preferred operator, and there has been no relevant change of circumstance, if the POB will not offer favourable deposit terms now that may be an indicator that the POB is seeking to raise unmanageable entry costs and is not acting fairly, and that the terms are not therefore reasonable. The particular terms (e.g. a keep open clause) may have had an effect on trade and goodwill to date, such that it would be unreasonable to change them. There may be an occupation clause pursuant to which wider family members reside in the pub, and it may be unreasonable to restrict that. Each case must be looked at on its merits, but for the Respondent as it does to suggest the existing lease terms are always irrelevant is untenable in my view.

This MRO Proposal

128. In evidence was the covering letter dated 25 July 2017 that was sent with the MRO proposed tenancy. This began "*this letter is our Full Response*" and contained a number of requirements with which the Claimant had to comply in order to take the MRO option, including the following:

Please note the following which I hope will help to inform your choices:

- *"If you wish to take an MRO-compliant lease it will be necessary for you to surrender your existing tied agreement and enter into a new commercial lease for the remaining unexpired term of your current tied agreement*

…

- *Should you decide to continue with this new lease you will be required to complete the attached application form in order that we may undertake new credit checks.*
- *You will also be required to produce a Business Plan including a P&L forecast and cash flow forecast, that should reflect the increased rent, lease liabilities and the cash flow implications of rent becoming payable quarterly in advance and of the payments into a Repairs & Maintenance Fund.*
- *As with any other tied lease surrender we expect that the lease will be terminated only when all payments due, any existing breaches and all repairs required under that lease are resolved. We will also not enter into the new lease if you are unable to provide all statutory compliance certification to evidence that the premises and inventory are safe.*
- *I enclose a copy of a provisional completion statement to advise you of the funds which will be required on completion of the new lease. Any payment of rent already paid against your account will be offset against the statement on completion of the new lease.*
- *We must draw to your attention that you should expect the terms and conditions of such a FOT commercial lease to be rigorously enforced, including prompt payment of the rent, buildings insurance and R&M fund in full on the due dates and fulfilment of*

the full repairing obligations. You will be expected to operate your business independently without any support, services, concessions or the protection of any Code of Practice.

- *The Pubs Code defines a sequence of steps with strict timetables and there are several points at which your claim could lapse if [sic] do not comply with those timetables. Entering into an arms-length lease on these commercial terms is also a serious commitment for you to make. We therefore strongly recommend that you take independent and professional legal, accounting, surveying and valuation advice before committing yourself to this new lease.*
- *You will pay a non-refundable deposit for £1,950.00 as a contribution towards our legal costs (made payable to Enterprise Inns plc).*

129. The letter included the following enclosures:
    a. FOT lease
    b. Benefits of the tie brochure
    c. Implications of becoming FOT brochure
    d. Application Form
    e. Statutory Requirements Schedule
    f. Specimen PCS [provisional completion statement] as at the date of the letter.

130. In evidence were the two brochures enclosed with the letter (items b. and c. of the list above), which [redacted] in his oral evidence said had been the product of a working group in which he had been involved. It is not convenient to set out in this decision the full text of these brochures, but it is safe to say that they represent a one-sided assessment of the considerations affecting a tied tenant choosing whether to go FOT. The “Benefits of the tie brochure” could be described as a sales pitch for a tied lease. The "Risks" column in it does not actually set out any risks of staying tied at all, only stating that the risk is lower (than being FOT) and going on to emphasise the other benefits of being tied.

131. By contrast, the other brochure, concerning the implications of choosing to exercise the MRO to go FOT presents what [redacted] acknowledged in his evidence was a grim picture. He said that if a tenant has a tied agreement with SCORFA (special commercial or financial advantages) then tie release is bound to be a negative story. The tenant is told in this brochure *"We want our Publicans to take well informed decisions by laying out, over the page, some of the factors to be considered when deciding whether to take the commercial lease that we would be offering."* Those considerations set out are all, in fact, presented in a uniformly negative manner.

132. [redacted] acknowledged in his oral evidence that the perception of a recipient of these brochures is that the Respondent is encouraging them to stay tied. He also agreed that the statement that the Respondent would require all repairs to be resolved prior to granting the MRO lease could have been better expressed, explaining what was intended is that the Respondent would expect there to be a plan to resolve all outstanding repairs (meaning that some works could be done immediately, and others could be resolved later). This is most definitely not what the brochure says, however. On this issue alone, I would expect the Respondent to be reviewing this literature.

133. [redacted] said that the covering letter enclosing the proposed MRO tenancy had subsequently been amended to remove a request for a non-refundable deposit of £1950 towards the Respondent's legal costs (and that this matter had been conceded in the present case). He admitted that the wording of the letter was such that a recipient could be expected to understand that they had to pay at least £1950 for the Respondent's legal costs, whereas he said in fact at that time that amount was the only contribution that was expected. This is again not what the letter says, and I do not accept his evidence on this. [redacted] said this figure had been arrived at because Gosschalks had given a figure for producing and completing a new agreement in an average case (though that was much higher than the one [redacted] estimated in evidence for a straightforward case). [redacted] conceded that, standing back, a figure for costs of £1950 (assumed, though not specified to be, inclusive of VAT) appeared a bit high.

134. Notwithstanding what [redacted] said as to his degree of comfort with a tied tenant taking the MRO option, I do not accept on the evidence that has been the Respondent's position. The tone and purpose of the covering letter and enclosures which form part of the MRO proposal are clear. They are intended to raise levels of uncertainty in the mind of the recipient, so they are less likely to take the risk of the MRO option. It is plain that this is the outcome that the Respondent sought on making the proposal.

135. I am also satisfied that the requests in the covering letter with which the Claimant was required to comply would be contractual agreements if accepted, which are to be taken together for the purposes of s.43(4). Further requirements to complete credit checks; to produce a business plan including a profit and loss forecast; to make payment for all breaches, resolve all repairs and to pay a non-refundable deposit towards legal costs are all conditions which, if unreasonable, will render the MRO proposal non-compliant. It is plain to me that this collection of conditions, taken together, was a weapon deployed in furtherance of the Respondent's objective of persuading the tenant to stay tied, by making the MRO difficult to achieve. I am quite satisfied that, taken together, they are unreasonable conditions, and render the MRO proposal non-compliant. Nevertheless, the objective justification for requiring a new lease is as I have considered above.

136. That does not mean that they are individually unreasonable. There may be sound reasons, for example, for making a business plan. I will not deal individually with these conditions (some have been conceded by the Respondent and some the Claimant does not challenge). However, the condition as to payment of dilapidations deserves special consideration.

Dilapidations

137. The Respondent argues that it is a fallacy that the Claimant will be liable for terminal dilapidations upon a surrender and regrant, as a landlord who grants a new lease to a sitting tenant cannot claim damages for dilapidations in the same way as it can when a tenant gives up and the Respondent does not assert that it would be entitled to bring such a claim. Firstly, by section 18(1) of the Landlord and Tenant Act 1927, the damages recoverable are capped at the diminution in

value of the landlord's reversion. This would have effect in the same way whether a new lease is granted or a DOV entered into. Secondly, if there were more than three years of the term under either a new lease or the existing lease as varied by a DOV, the Respondent would need to obtain the leave of the Court under the Leasehold Property (Repairs) Act 1938 before bringing a claim for damages for dilapidations. Conversely, the obligation to repair is a continuing one and the landlord's right to enter to carry out repairs and recover the cost will apply at any time irrespective of whether a new lease is granted.

138. However, what is at issue here is the presentation of conditions by the Respondent as part of the MRO proposal. The covering letter forming part of the proposal requires all dilapidations to be paid for up front. This in my view is a condition of grant of the MRO. I do not accept [redacted] explanation that what was intended was that there would be "a plan" for dilapidations to be carried out. The meaning of the letter is clear. The Respondent's position was that it would require that the property is brought into repair before the new lease is granted.

139. There can be no real doubt that, when the cost of dilapidations is high, the requirement for their immediate payment may represent a real disincentive to a TPT to take the MRO option. A reasonable landlord should manage its estate responsibly throughout the term. The landlord should not be using surprises on the request for an MRO option as an adversarial weapon. The need for fair dealing arises, and what is appropriate will depend on the facts of the individual case. It is appropriate for the POB to consider whether in the circumstances fair dealing requires it to mitigate the impact of dilapidations.

140. By the date of the hearing, the Respondent's position had changed dramatically, in that, apart from statutory compliance, it did not require any remedial work as a precondition for a new FOT lease. To match the existing cycle, it requires year 1 to be the first external decorating year. The Respondent's original condition on dilapidations stands out as very severe. It did not set out any limit on its ability to require dilapidations at that stage and suggested no flexibility at all. This sits comfortably in my view with the tone and intention behind the covering letter.

141. If it is a logical assumption that a tenant with more bargaining power would negotiate with the landlord to carry out the repairs over a reasonable period the question that arises is therefore, if the Pub is not to revert to the POB until the end of the new lease term, why did it insist on the cost of dilapidations now (other than because it can as a matter of law)? I can find no good reason in the evidence before me and the Respondent did not in fact seek at the hearing to defend its original position, which I am satisfied was an unreasonable and non-compliant condition in this context, without good reason as to its imposition.

Uncommon Terms

EI's gathering of evidence of as to commonness

142. [redacted] gave evidence that the Respondent took steps to obtain evidence of comparable leases as relevant to the issue of the commonality of its proposed MRO lease terms (generally, and not in response to this particular tenant's MRO notice). It instructed Gosschalks solicitors to conduct a survey of FOT leases in the market; it collated evidence of its own new FOT leases granted since July 2014 and it asked the other regulated POBs if they would cooperate with some research of the terms of FOT leases (and it was agreed that the BBPA would collate that information). The result was a basket of anonymised evidence of 26 comparable leases granted by other three regulator POBs, though [redacted] acknowledged that there was no way the accuracy of this information could be verified for the hearing. [redacted] said in oral evidence that he had also asked Wellington for information on its FOT leases, but it would not cooperate.

143. However, all of this evidence was solely focused on new free of tie leases, which served to increase the apparent commonness of the Respondent's own standard lease terms. The email to Wellington's managing agent (Criterion Asset) of 4 July 2017, produced by [redacted] at the hearing after he referred to it, asked only for information on new leases (not all tie free agreements), and [redacted] said this was because the Respondent's brief was to look at new lettings on the open market. There was no written record of the apparently negative telephone response [redacted] said he had received from Criterion, or of the briefing he said he then gave the Respondent's Chief Executive and solicitors.

144. As for the collation carried out by BBPA, this was also only in relation to new leases (as confirmed by [redacted] and shown by the email dated 30 June 2017 from [redacted] to all the regulated POBs also produced at the hearing after [redacted] oral reference to it in evidence). The period for which this evidence was requested was not specified, and [redacted] did not seek to find out if any regulated POB had used a DOV in response to an MRO notice. He acknowledged in oral evidence however that both new lettings and new leases to existing tenants upon surrender and regrant would have been of interest. These limitations in the scope of comparable evidence undermined the Respondent's case that it has shown its standard lease terms are common in tie free agreements.

145. The existing lease terms are not the benchmark for the test of what is common in tie free leases, and it is not the case that there is only one set of common terms. The meaning of "common" is not defined and I should consider its ordinary meaning. Its synonyms include usual, ordinary, frequent, and routine and a term which is not common in tie free leases will be not usual, ordinary, frequent or routine. It does not set a test of prevalence or require that a majority of leases contain the term in question.

146. The Claimants argued that pub tenants are often ill-advised when entering tie free leases, and thus the terms which they are willing to accept should not unquestioningly be accepted as common. However, I reject this argument as legally irrelevant to the statutory definition of commonness.

147. The Respondent relied on the expert evidence of [redacted]. The Claimant elected not to call any expert evidence and did not object to the

Respondent's reliance on its own. The expert evidence in this case was dealt with differently from that in the other consolidated cases, in which [redacted] had produced a substantive report as to whether the clauses in dispute are "not common". The thrust of [redacted] evidence on that matter was contained in the body of the Respondent's Defence and attested to by [redacted] in all of the consolidated cases, and thus I consider it appropriate to address that evidence here without differentiation owing to the manner of its production, not least because I heard oral evidence from [redacted] on his substantive report at the hearing of all four cases. I do so below in paragraphs 148 – 185. The expert report itself in the present case focussed specifically on the challenge to the combination of otherwise common terms in the proposed lease. I consider these points in paragraphs 186 onwards.

148. [redacted] is acknowledged to have extensive experience of leases of licensed premises. The Claimant however questioned him as to his ability to act independently. [redacted] confirmed he has acted for four of the regulated POBs - EI, Punch Taverns (including acting for them as tenant), Star and Greene King. The large majority of his Code related activities as expert have been for EI. Though he personally acted for no tenants in Code related matters at present, one of his colleagues at [redacted] was acting on behalf of a tenant against Star.

149. [redacted].

150. In my view, there is no reason why, given this history, [redacted] could not be relied upon to provide independent expert evidence in accordance with the RICS guidance on Surveyors Acting as Expert Witnesses (4th edition), but as with all expert witnesses he was required to be assiduous in following that guidance. However, I identified three principle problems with his evidence, which on careful consideration and with respect to [redacted] mean that I am not assisted by it.

151. The first of these is the limited nature of his instructions. [redacted] had not been instructed to consider the commonness of the terms in question collectively in the proposed lease. He had only been instructed to give expert evidence as to whether each individual disputed term was common. Secondly, I found he had not sufficiently demonstrated independent judgement in respect of his instructions and the evidence which was relevant to his professional opinion. Thirdly, I found his methodology was not persuasive.

The Respondent's Instructions to Expert

152. [redacted] confirmed that he was not instructed to give expert evidence as to whether the particular combination of lease terms in the proposed tenancy could be considered common in the tie free market, and thus was not able to offer such an opinion in these proceedings.

153. The Respondent disputed that the test of commonality applies to the lease as a whole, arguing that that would be unworkable. As discussed above when considering the test of reasonableness in section 43(4)(a)(iii) of the Act, the contrary is the case in my view. If the Respondent is correct, a lease might yet contain a combination of terms each individually common in the tie free market, yet which would never be found together in the same lease (because they were inconsistent, impracticable, rarely or never agreeable to a tenant, or did not make commercial sense), and that is what would in fact be unworkable. It would be permissible for a POB to select all of the common terms which were most favourable to it, even though it is unlikely that a new tenant in the open market would ever sign up to them. This in fact is what the Claimant contends the Respondent has done.

154. The Respondent has in its evidence only concerned itself with whether each individual disputed term is common in tie free leases. I cannot see that the scope of my directions as to expert evidence could preclude me, on a full hearing of the arguments, from making findings adverse to the Respondent on that basis – only it bore the responsibility for meeting the case against it and the statutory test. It may be that it is necessary to consider the commonness of a lease term differently from the commonness of lease terms collectively in a single lease. The frequency of finding the latter in the market could clearly be different from finding the former. However, in the absence of specific argument on the point I think the legislation requires at the very least that the lease terms collectively can be shown not to be rare or unknown in the market.

155. I note that the tables in the Respondent's Statement of Defence show where quarterly rent and upward only rent reviews appear in the same new EI leases, as well as an undated sample of sales recording full repairing / insuring terms and quarterly rent in advance. Counsel for the Respondent submitted that the tables of terms found in comparable leases referred to in the expert evidence show that the combination of disputed terms can be found in a good many of the leases considered, but my concerns about the limits placed on the evidence so considered are addressed in this decision, and [redacted] expressly declined to give an expert opinion on the matter. It is not for counsel therefore to do so, nor I am I satisfied on the evidence that it is safe for me to reach such a conclusion.

156. [redacted] gave evidence of the number of FOT leases which are likely to comprise the "market" for the purpose of assessing commonality, the extent of that market, and the proportion of such leases in which the disputed terms may be found. The Respondent had first instructed him to "research the FOT sector in England and Wales" by way of separate instructions given prior to those in the present proceedings.

157. In oral evidence [redacted] confirmed that these first instructions had been given only orally somewhere between 12 and 18 months ago and he had spent time over a period of about three weeks conducting his research. [redacted] recalled that he talked generally with those at EI concerning matters they thought common and not common and about how they could prove that, but he could not add more detail, saying that his recollection was not ideal. However, he had not been given, and nor did he require, written instructions to proceed with his research on the FOT sector.

158. Amongst the relevant provisions of the mandatory RICS guidance at 3.4(e)) is the requirement for instructions (to give evidence as an expert witness) to be recorded in writing, and that particular care should be applied in deciding whether to accept instructions where the expert has previously acted for a party on a matter which requires, or may in future require, the giving of expert evidence (2.6).

159. [redacted] acknowledged to me that when he accepted those research instructions he was aware that in the future he might be instructed again to give expert evidence on behalf of the Respondent in individual Pubs Code arbitrations based upon it, and he agreed that it was difficult for me to determine what in fact his initial instructions had been at that point. It cannot be verified, for example, whether he was asked to conduct research to support propositions in the Respondent's interest. The absence of initial written instructions in the circumstances was not adequately explained and means that I cannot be satisfied that there was no conflict between them and those under which [redacted] now gives evidence in these proceedings, and this serves to undermine the value of his evidence.

[redacted] *Methodology*

160. As to [redacted] methodology, he makes an attempt to assess the size of the FOT sector based on the surprisingly limited information which is available, but his evidence is not without shortcomings. Firstly, he makes a professional judgement based on data from various sources as to the size of the market, which he assesses as approximately 5,150 FOT leasehold pubs in England and Wales. His analysis of the size of that market was sensible (though he acknowledged he had not included any research on the matter by Gerald Eve, who are consulted by the Valuation Office and for whom pub rating is a strong element of their work).

161. [redacted] estimates 343 new letting events per annum in the FOT sector, on average, and that two thirds of these (approximately 226) are new lettings and one third "renewals or lease re-gears/term extensions". [redacted] said in his oral evidence that the majority of events could be renewals and that 226 new leases per year might be too high.

162. This matter would not be such as to undermine his evidence, however. What causes me concern, however, is the excessive weight that he places on the terms of these new leases in his evidence and his judgement as to the

appropriate comparable new leases, and these matters serve to undermine his conclusions.

Free of tie agreements

163. [redacted] placed his focus on new leases rather than considering the terms of any other form of FOT agreement. He observes, for example, that lease renewals are influenced by the previously prevailing leases and he excluded these from consideration in reaching the figure for the size of the market (which he then uses in his analyses of the significance of the evidence of the Respondent's lettings). I am not content with this approach however and see no reason for it. In my view it may tend to skew the evidence and the legislation does not require exclusive consideration of a subset of tie free leases. It requires consideration of "*common terms in agreements between landlords and pub tenants who are not subject to product or service ties*." The pool of FOT agreements includes tenancies and leases, sale and leasebacks, renewals, DOVs and side letter variations, as acknowledged by [redacted] in his oral evidence. Thus, I do not accept his opinion as to the size of the relevant tie free market, which is much larger than he suggests.

164. [redacted] He was also aware of the practice of releasing the tied obligations by side letter (such as in relation to the [redacted], which was then released from the tie, and the circa 1998 release of a number of ties by side letter). He said, having provided valuation and sales advice in respect of the matter, [redacted] had not identified if EI had executed any tie releases by DOV in a relevant period, as this was he said not of interest to him as they are not indicative where it is the landlord's choice to release the tie rather than a market lease.

[redacted] *Comparable Evidence*

165. Setting aside these concerns, I was not in any event satisfied with [redacted] consideration of the evidence of tie free leases and how that informed his judgement as to commonality. He conducted an empirical analysis of the frequency with which each of the terms in question was found in three different baskets of comparator leases:

a. All 225 EI FOT leases granted from July 2014 ("the EI leases");
b. A sample of FOT leases obtained by solicitors Gosschalks, solicitors for the Respondent ("the Gosschalks leases");
c. 14 FOT leases granted since 2016 in respect of which [redacted] firm [redacted] had acted as agent [redacted]");
d. The 26 recent FOT leases granted by the other POB regulated by the Pubs Code.

166. [redacted] discussed the modernisation of terms which take place over time and considered that recent lettings should have more evidential worth than more dated agreements, reflective of the continually changing market. He acknowledged that the legislation did not provide for the preclusion of any particular evidence but believed more contemporaneous evidence has more worth and the state of the market at the time. Whilst I do not fundamentally disagree with this approach, it was not reflected in his analysis of the comparable evidence, in that in three out of the four categories of comparable evidence he considered only new leases, and there was no consistency in or analysis of the relevance of the period represented by those baskets of comparables.

167. Where there was a variance between the commonality of a term in older and newer leases this was not identified and addressed by [redacted] in reaching his conclusions. It is not clear what, if any, weight he places upon the evidence in deciding, in respect of a lease term which is not present in older leases, that it is nevertheless common.

The EI Leases

168. [redacted] refers to the EI leases as being highly relevant, but he makes no reference at all to any granted prior to July 2014. It was clear from his oral evidence that he had based his expert evidence on the sample of these leases which the Respondent has chosen to provide to him, and he confirmed that the July 2014 long stop for this evidence had been dictated by the Respondent and not by him. He could not explain the significance of this date and confirmed he had not made enquiries as to that with the Respondent or asked for any earlier EI leases to be provided to him. Surprisingly, [redacted] in his oral evidence said he had no idea either why the Respondent's sample of FOT leases given to [redacted] dated from July 2014. There was absolutely no rationale for the chosen sample available, and this is a matter in respect of which [redacted] should have exercised his professional judgement.

169. The reliance placed by [redacted] on the 225 recent FOT leases granted by the Respondent needs to be put in perspective given the size of the tie free market as a whole. Moreover, he did not enquire, and there is no evidence before me to indicate, which of those leases was granted to an existing tenant (and thus whether such tenants are better able to negotiate individual concessions to the standard lease terms cannot be seen).

170. [redacted] was wrong in my view to place so much reliance on the Respondent's new FOT leases, without having had regard to the fact that (currently) there are around 70 MRO proposals on such terms that are in arbitration because TPTs have refused to accept them, and the arbitrator has yet to decide if they are common in the tie free sector and reasonable. Whilst it was argued for the Respondent that the 70 proposed tenancies in dispute are irrelevant as we do not know if it is the vehicle or terms (and which of them) that are challenged, that is precisely the uncertainty which in my view should have led to caution in placing too much weight on the recent EI leases.

The [redacted] Leases

171. It is also not clear in his report why [redacted] started his analysis of the [redacted] leases in 2016, and why he considered it appropriate that the EI and [redacted] lease samples should start from different dates. He said in oral evidence that his firm had undertaken tie free lettings prior to October 2016, but a limited amount (for example in 2014 and 2015 two pub lettings in each year).

172. The sample size is very small, and interestingly there is no letting other than the two by the Respondent in which all of the disputed terms (including as to the deposit as a multiple of the rent) appear. This is not supportive of the suggestion that the proposed lease terms are collectively common. Furthermore, the evidence of these two EI leases has been double counted - within the EI new lettings and again in the [redacted] lettings ([redacted]. The evidence based on the percentages resulting is consequently unreliable.

173. [redacted] said he had included these leases because they were new (but referred to over 100 examples of tie free leases which would be in his office's files in relation to valuations carried out). His evidence based on these could have been meaningful in my view.

The Gosschalks Leases

174. [redacted] confirmed that the Gosschalks research had not been carried out at his request, the exercise already having been completed – and that it was provided to him after he was instructed initially to carry out his research.

175. The Gosschalks leases were a sample of 21 lease types granted over time. The oldest in date was 1998, and the second oldest 2009, and they will have been used with more or less frequency (some of which will represent a significant number of lettings, and some only a single one). In oral evidence [redacted] said that he would expect there to be greater frequency of use for the large pub company or institutional leases, and that the landlords to the leases he did not recognise were probably used on one single occasion. However, his expert evidence did not sufficiently reference this knowledge and whether or how he had weighted this evidence as a result, and this affects its relevance.

The Regulated POB leases

176. Though it became clear that this sample was based on a request for new leases only, and without reference to any period of time, [redacted] confirmed he had not enquired of EI as to the scope of its request for evidence to the other regulated POBs.

Conclusions on the comparable evidence

177. The evidence does not demonstrate that all of these disputed terms (or their like) are found in any FOT leases other than new leases granted by this

Respondent. The danger of over-emphasis on the EI leases is that it may be able to take advantage of the MRO procedure by proposing a lease which is never or rarely found elsewhere in the FOT market, and as the Respondent has said in relation to the historical make-up of its portfolio, other landlords take other approaches.

178. Where there was a large variance between the proportion of leases in each of the 4 samples (particularly between the EI leases and the Gosschalks leases) in which a disputed term was found, [redacted] did not explain to my satisfaction how he had analysed this evidence to reach a conclusion that the term was common.

179. What would have been helpful in [redacted] expert report is any indication that he had "stood back" and checked the evidence against his own professional judgement in being satisfied that the proposed lease terms were common. [redacted] said in oral evidence that this knowledge (based on the large number of leases that had passed through his office, especially in respect of valuations) largely accorded with the evidence that could be derived from the Gosschalks leases, and that these terms had been established by virtue of their longevity in the market. He considered that ultimately it is the rent which will affect the sustainability of a pub, much more than the lease terms. He confirmed however that the fundamental terms of a commercial lease had been prevalent for a significant period of time.

180. It may be in fact that how far into the past it is appropriate to look at lease terms to see if they are common in tie free leases may depend on the particular term. Some terms will have been established in the market for a long time (e.g. full repairing covenant) and some more recently. Other factors may be of relevance in weighing the relevance of terms in comparator FOT leases in addition to frequency and date (such as the type of agreement, property type and location). These factors were not addressed in [redacted] evidence and it is unclear where the relevance of the longevity of terms fits with his emphasis on the consideration of new leases.

181. I do note that the Claimant has not produced any expert evidence. However, his approach risks the evidence being weighted towards the small number of new tie EI free leases on standard terms which represents a tiny proportion of the tie free market, and that this can quickly suggest a commonness which, standing back, may not actually exist in that market as a whole. The legislation refers to terms not common in tie free leases, and not to terms not common only to new tie free leases available on the market as at the date of the MRO proposal. Furthermore, recent evidence only does not indicate convincingly that such terms are reasonable. The test of time will tell if they are sustainable for tenants or simply too unfavourable. Leases with greater longevity will more easily be shown to be not unreasonable in the general sense.

182. In my view the legislation requires consideration of whether the effect of the wording of the particular clause is common, not just whether a clause of a particular type is common, but [redacted] was not entirely consistent as to how he would approach the question. He said that when assessing, for

example, the commonality of a keep open clause he would be looking at how common any keep open clause is, and not how common that particular keep open clause is, but when considering the commonness of a term as to a deposit, he would be looking at the commonness of a term as to a deposit of that particular size.

183. [redacted] said he would not assess commonality differently for the type of agreement, term, pub and location, but it seems to me that this might be a relevant consideration. What are common terms for a pub in a rural location may not be common terms for a city centre pub, for example, and [redacted] agreed that he could not give evidence that common terms in short leases (of less than 5 years) were the same as common terms for leases of longer length.

184. It seems to me for all of the reasons above that the resulting conclusions in [redacted] were not helpful to me, and the extent of evidence considered could tend to advantage the Respondent's case. I would add by way of comfort that the task [redacted] undertook is a novel one the need for which has been created by this legislation, and it cannot be easy to be among the first to approach giving expert evidence in new legal territory without decided authority as to its proper scope. No doubt therefore many of my observations will be treated as useful guidance to the Respondent and expert alike.

185. Only once a term is accepted in the relevant comparator part of the open market can it be common. Commonality can change, but this does not happen quickly. The legislation requires that the MRO tenant cannot be at the vanguard of that change. The MRO terms follow the tie free market, and form part of it, but do not define it. By looking at commonality over time can we can better understand that component of reasonableness. This standard lease is a relatively recent development by EI, and not long established in the market on the evidence produced by the Respondent. Thus, there is insufficient evidence before me that this standard lease is common in the tie free market. This in my view has been reflected in the incremental concession of 12 of its terms.

Expert Evidence on the Combination of Terms

186. In the present case [redacted] gave expert evidence on the following issues distilled by the Respondent from further submissions made by the Claimant:

a) Is it common for heads of terms to be negotiated down by agreement so that quarterly rent and a quarter's deposit become quarterly rent and a monthly deposit or nil deposit and a quarter's rent?
b) Would other terms be negotiated down due to the desire of the POB to negotiate a quick entry for the respective tenant or for other reasons?
c) Are the terms proposed by the Respondent a combination of the most onerous?
d) Would it be extremely unlikely that the offer would be expected to be accepted by reasonable operators having taken reasonable advice on an arm's length transaction in line with RICS guidelines?

This evidence however does not assist the Respondent because, first of all, it is affected by the same weaknesses in the expert evidence discussed above, including its reliance on limited and incomplete market data. Secondly, its value is reduced by virtue of [redacted] acknowledgement in oral evidence that he was not usually instructed in relation to the negotiation of lease terms. Thirdly, it deals in too narrow a way with the market reality that terms and conditions of a lease may be subject to negotiation. Mr Mountford said:

"*many of those Heads of Terms are negotiated down by agreement … for this reason I am reluctant to accept that the points are common because they are negotiated based on a variety of other factors, including the desire of the POB's to negotiate a quick entry for a prospective tenant. My argument remains that in the instance of the Hayes MRO agreement the terms are a combination of the most onerous and therefore it would extremely unlikely that the offer would be expected to be accepted by a reasonable operator having taken reasonable advice in an arm's length transaction in line with the RICs guidelines."*

187. I understand him from this to have been addressing precisely the issue of the market negotiating power of a preferred tenant, in relation to which I heard evidence from [redacted] and the relevance of which to the MRO process has been fully addressed in this award.

Conclusion and appropriate order

188. The Respondent has done no more than plead to the commonness of the individual terms and has not met the challenge to the reasonableness (including commonness) of the lease terms as a whole. For that reason, and as a result of my findings as to the range of harsh conditions imposed on the grant of a new lease, the Respondent's case fails. I find that the proposed MRO tenancy is not compliant as it contains terms and conditions which are unreasonable (including uncommon).

189. In circumstances where I conclude that an MRO response does not comply with regulation 29(3), the Code provides merely that I may "*rule that the pub owing business must provide a revised response to the tied pub tenant*". The Respondent accepts that in these circumstances it is within my power to make a determination as to what changes are required to the Respondent's MRO response to make it MRO-compliant and to direct that such revised response be provided pursuant to regulation 33(2). Standing back, however, I am satisfied that I should order the Respondent to give a revised MRO full response but not persuaded that in the present case I should exercise the power to order the specific terms of the revised MRO proposal that are compliant.

190. Firstly, this is because on the evidence presently before me I may fall into error if I make a selection of terms which are required to be altered. I would have insufficient confidence on the evidence available that I would be ordering common terms (individually and collectively).

191. Secondly, whilst both parties have put forward arguments to me as to the reasonableness of each disputed lease term (which I have not set out in this award), after careful consideration I find that it would not be appropriate or of value for me to reach a determination as to whether in isolation each term is reasonable in the more general sense.

192. As discussed above, reasonableness may not be an absolute, and all of the proposed lease terms have to be looked at in the round, after effective negotiations between two motivated parties. In the present case (whilst I obviously have no knowledge of the content of any without prejudice correspondence) it is quite clear to me that, owing to both parties' respective erroneous positions in these proceedings, no such effective negotiations could ever have taken place.

193. The Claimant has taken a principled, intransigent, but ultimately incorrect view on the issue of the vehicle. The real question in this case is not, in fact, what is the correct vehicle for the MRO, but whether the terms and conditions of the proposed MRO tenancy are not unreasonable. A clearer focus on this in most cases (rather than on the mode of delivery) will be necessary to facilitate the effective resolution of this dispute and the efficient management of arbitrations by the PCA.

194. As for the Respondent, I am satisfied that its aim in the MRO process to persuade the Claimant to stay tied will have tainted its negotiating position. It has not treated the Claimant as a targeted operator it is motivated to release from the tie, and it has not been even handed or fair in the manner in which it has presented the offer (which was unequivocally done in a way which sought to discourage the TPT from taking the MRO option). That is not a free-standing breach of the Code, but it is evidential as to its unwillingness to offer reasonable terms which fit this tenant and supports my conclusion that the terms and conditions are not reasonable in light of the Code principles.

195. The landlord is now aware that it must be careful not to make the MRO unattainable owing to unreasonable costs, particularly entry costs, both in offering the terms and conditions of the MRO proposal, and in the manner of their presentation. It has incrementally, including subsequent to the hearing, made concessions on the proposed lease terms. The number and extent of those concessions in this case (which I have not set out in this decision) and more generally as to its standard lease terms since the introduction of the MRO, serves to my mind to emphasise the unreasonableness of its starting position. It is not appropriate for me, for the reasons given, to express a view as to whether it has now moved far enough.

196. It seems to me that two properly advised parties who are motivated to negotiate a new lease will be good arbiters of what is common and reasonable in the tie free market. They will between themselves be well placed to take a view on whether the lease terms as a totality are uncommon in tie free leases and will be the best judges of what is reasonable for them. Now that they are aware of my findings, they have the opportunity to negotiate the terms of a new lease. They have a duty to seek to agree them.

197. In the event that the revised MRO proposal is referred for arbitration on the issue of reasonableness, it may be necessary to take a very different approach to the evidence which will be of assistance to the arbitrator in deciding what lease terms would be not uncommon or unreasonable. The arbitrator should be particularly concerned that an award in respect of any such referral should be effective to resolve the dispute as to the compliant terms of the MRO tenancy, and may therefore be assisted by neutral expert advice throughout the proceedings, including at the time of making any order, as to the individual and collective commonness of the proposed terms (and of alternative terms for the purpose of a ruling in the event that they are not). The arbitrator may therefore consider, in consultation with the parties, whether the early appointment of an expert under section 37 of the 1996 Act is appropriate to advise throughout the proceedings.

198. The arbitrator would have the opportunity carefully to consider the question of appropriate adverse costs orders in any such case in which there is no sufficient evidence of effective negotiation by both parties.

Operative provisions

In the light of the above:

- The Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant;
- The revised response must be provided to the Claimant within 28 days of the date of this Award, and a copy provided to the PCA;
- Jurisdiction in respect of any dispute as to the MRO-compliance of the revised response is reserved to the DPCA;
- Costs are reserved.

Arbitrator's Signature ……..

Date Award made 17 July 2018

IN THE MATTER OF **Ref: ARB/000261/MASON**

THE PUBS CODE ARBITRATION BETWEEN: -

MS JEANNE MASON

Claimant

(Tied Pub Tenant)

-and-

EI GROUP PLC

Respondent

(Pub-owning Business)

Award

Summary of Award

The proposed tenancy is not MRO-compliant, and therefore the POB has failed to comply with the duty under regulation 29(3)(b). The POB must give a revised response which is MRO-compliant.

Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.

2. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 04 December 2017. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code") and paragraph 5 of Schedule 1 Part 1 of the Small Business, Enterprise and Employment Act 2015 ("the Act").

3. The Claimant is Ms Jeanne Mason and is the tied pub tenant (TPT) of Red Lion Inn, Church Lane, Litton, Buxton, SK17 8QU ("the Pub"). The Respondent is EI Group Plc of 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ. The current lease of the Pub was granted by the Respondent pub-owning business ("POB") for a term of 20 years from 18 September 2007. That lease was assigned to the Claimant on 18 September 2014.

4. On 24 March 2017 the Claimant gave the Respondent a notice (an "MRO notice") in relation to the Pub in accordance with regulation 23 of the Pubs Code.

5. On 12 April 2017 the Respondent purported to send to the Claimant a "full response" for the purposes of regulation 29(3), including a proposed tenancy ("the proposed MRO tenancy") which is the subject of this dispute.

6. On 28 April 2017 the Claimant made a referral to the Office of the Pubs Code Adjudicator under regulation 32(2)(a), which provides for the TPT or the POB to refer the matter to the Adjudicator where the POB does not send a full response (in this case) under regulation 29(3). The duty on the POB under that regulation which the TPT disputes has been complied with is that in sub-paragraph (b) to send to the tenant a proposed tenancy which is MRO-compliant.

7. The Claimant is represented by Mr Dave Mountford of the Pubs Advisory Service. The Respondent is represented by Gosschalks Solicitors.

Procedure

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

9. The following is a brief chronology of the case management:

    - A Statement of Claim was filed on 9 September 2017 on behalf of the Claimant.
    - A Statement of Defence was filed on 20 September 2017 on behalf of the Respondent.
    - A Response to the Statement of Defence was filed on behalf of the Claimant on 13 October 2017.
    - A Reply to Response to Statement of Defence was filed on behalf of the Respondent on 27 October 2017.

10. The Respondent sought and on 4 December 2017 was granted permission to file an expert witness report on whether disputed terms of the proposed lease were common terms. The Respondent relies [redacted] dated 18 December 2017.

11. An oral hearing took place on 9 and 10 May 2018 at the CIArb 12 Bloomsbury Square, London, WC1A 2LP, at which Mr Mountford appeared for the Claimant and [redacted] of Counsel for the Respondent.

Issues

12. While the parties had the opportunity to agree a list of issues in dispute, this was refined for the purpose of the hearing by the use of a Scott Schedule, which I have used as my guide in understanding what remains in dispute. I have not considered it appropriate to structure this decision to deal with each of these issues in turn as they are set out in the schedule, but my award makes a determination on all matters in dispute between the parties. As summarised by [redacted] in his helpful Skeleton Argument, the issues sub-divide into two categories; the method of delivery of MRO and the disputed terms of the tenancy.

13. One of the requirements for a tenancy to be "*MRO-compliant*" is that the tenancy "*does not contain any unreasonable terms or conditions*" (section 43(4)(a)(iii) of the Act). Section 43(5) provides that the Pubs Code may specify descriptions of terms and conditions which "a*re to be regarded as reasonable or unreasonable for the purposes of subsection (4)*". Regulation 31 of the Pubs Code provides that one category of "*unreasonable*" terms as specified are "*terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.*"

14. The Respondent POB has purported to offer an MRO option, compliant for the purposes of section 43(4) of the Act, by way of an offer of a new lease in draft form. The Claimant's principal arguments are that the terms of the proposed MRO tenancy are not compliant, falling foul of section 43(4)(a)(iii), in that:
    a. the use of a new lease (as opposed to a deed of variation ("DOV")) as the vehicle for delivering the MRO option is unreasonable and

b. the terms of the proposed new lease are unreasonable individually and collectively.

15. The position of the Claimant is, broadly, that the use of a new lease as the MRO vehicle (as well as many of its terms) is unreasonable given the terms of the existing lease, and the effect of the new lease and its terms on the TPT and are uncommon together in tie free leases. The Respondent, on the other hand, says that the terms of the proposed lease are indeed reasonable, and has produced expert evidence and other tie free leases in support.

PCA Advice

16. A number of the issues in this arbitration are the subject of the PCA and DPCA Advice Note published on 2 March 2018. This is advice under s.60 of the Act, and not guidance under s.61, and is therefore not a matter which I am required to take into consideration in determining my award. As advice to POBs and TPTs and their representatives, it is open to any person to seek to persuade me that the Advice Note is wrong, or that for some other reason it should not be the basis of my decision. As the Advice Note states, it is based on the consideration of arguments put forward in a number of arbitrations determined prior to its issue. It also makes clear that it can be revised from time to time.

17. The Respondent does not agree with the content of that Advice, but agreed with my summation of the situation in respect of this referral. I have a statutory duty to carry out functions both as regulator and arbitrator. Notwithstanding that I have exercised my statutory powers to give advice, as arbitrator I have a duty to consider evidence and argument impartially, and not to prejudge the issues in this case. This I have done.

Consolidation

18. This case had by consent been consolidated with three other referrals for the purposes of the hearing. The Claimants in these cases are different, although the Respondent is the same in each. There has been a limited waiver of confidentiality by the parties up to the hearing but not beyond, the Respondent requiring a separate confidential Award to be issued in respect of each referral.

19. The question of whether the MRO vehicle should be a new lease or a DOV is one which has taxed the industry since the introduction of the Pubs Code. The Claimants' representatives have all been involved for many years in campaigns on behalf of pub tenants, and specifically in relation to the development of the Act and the Code. The argument that the proper vehicle for the MRO is a DOV is therefore contextualised by their expectations of what the Code would offer.

20. The Claimants' representatives, in addition to their campaigning activities, also offer their services to tied pub tenants as representatives in arbitrations before the PCA. It is public knowledge that the top issues in arbitrations to the PCA to date have been in relation to the MRO full proposal, and that the most significant and repeated challenge has been to the fact that a POB has made an offer of

an MRO by way of a new lease. The Respondent is a regulated POB with a large estate and is a party to the largest number of arbitrations by far.

21. The strain placed on the PCA resources by this large volume of individual and confidential arbitrations which repeatedly raise overlapping issues is well known and in the public domain. I invited the Respondent to consent to the consolidation of a number of arbitrations, which I would then hear at an oral hearing, in order to seek to bring as much clarity as possible to the issues which repeatedly dog arbitrations in respect of MRO compliant proposals. Claimants' representatives and the Respondent have both had a full opportunity to put arguments before me as to the proper application of the statutory provisions.

Vehicle for the MRO Option

22. The Claimant contends that the DOV is the most common method of tie release, and the simplest and most effective (including cost-effective) method of achieving an MRO compliant tenancy and delivering parliamentary intention, in that with minimal variation the terms of the existing tied lease could be varied to make them MRO compliant. The Claimant considers that surrender and regrant of a new lease is not the common method of releasing the tie in a tied lease, is an unnecessary, time-consuming and onerous way of effecting the MRO option, and that the Respondent has in fact chosen to offer a wholly new tenancy in order to impose a set of new and unfavourable terms most disadvantageous to the tenant.

23. With the exception of the trading obligations, says the Claimant, the other terms found in the current lease of the Pub are commonly found in free of tie ("FOT") agreements. The Claimant relies on the fact that under the terms of the existing lease (as is common in tied leases), the Respondent has the unilateral right to sever the tied trading terms. I note that the current lease (at Schedule 4, Paragraph 7.1) permits the Respondent to sever the tie by written notice, but that (as the Claimant acknowledges) releasing the tie by notice in this way would not in itself create an MRO-compliant tenancy (not least because the provision allows the Respondent to re-impose the tie at any time). The Claimant argues however that it is unreasonable for the Respondent not to effect the MRO via the simplest and most cost effective method available, being a DOV to that lease, amending the lease terms (which are not compliant), but only to the minimum that is necessary.

24. The Claimant argues therefore that the vehicle by which an MRO tenancy is proposed should be a DOV of the existing tenancy, and not a draft new lease. It was (as confirmed orally at the hearing) not contended by the Claimant that the legislation prohibits an MRO option by way of a new lease, but rather that its use is unreasonable or unfair.

25. In response, the Respondent's position is that it is restricted by the statutory language from using a DOV as the legislation requires that an MRO option must be offered only by way of a new lease. Alternatively, it argues that if an MRO compliant tenancy may be in the form of a new lease or a DOV, it alone has the choice of which vehicle to use and there is no provision in the Act or the Code

for a tenant to challenge that choice. Therefore, a matter of statutory construction arises as to the form of the vehicle by which an MRO option may be given.

Applicable Law

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

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

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

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

> *(2) A "market rent only option" means the option for the tied pub tenant –*
> *(a) to occupy the tied pub under a tenancy or licence which is MRO-compliant, and*
>
> *(b) to pay in respect of that occupation –*
> *(i) such rent as may be agreed between the pub-owing business and the tied pub tenant in accordance with the MRO procedure (see section 44), or*
> *(ii) failing such agreement, the market rent.*
>
> *(3) The Pubs Code may specify –*
> *(a) circumstances in which a market rent only option must or may be an option to occupy under a tenancy;*
>
> *(b) circumstances in which a market rent only option must or may be an option to occupy under a licence.*
>
> *(4) A tenancy or licence is MRO-compliant if—*
>
> *(a) taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence it—*
>
> *(i) contains such terms and conditions as may be required by virtue of subsection (5)(a),*

(ii) does not contain any product or service tie other than one in respect of insurance in connection with the tied pub, and

(iii) does not contain any unreasonable terms or conditions, and

(b) it is not a tenancy at will.

(5) The Pubs Code may specify descriptions of terms and conditions—

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

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

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

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

Terms and conditions required in proposed MRO tenancy

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

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

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

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

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

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

31 – (1) Paragraph (2) applies where—

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

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

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

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

…
(c) are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.
(3) Paragraph (4) applies where—

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

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

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

Burden of Proof

31. It was conceded on behalf of the Respondent that it bore the burden of proving that the tenancy is MRO compliant, which includes showing that the terms are not uncommon. The Respondent's position was that the Claimant who advances a case that some other type of term or tenancy would be compliant bears the burden of showing that term is not uncommon, and that if a counter-proposed term is not shown by a Claimant to be common, it is itself "uncommon" and automatically non-compliant by virtue of being unreasonable. It was argued for the Respondent that the Claimant, not having produced expert evidence, could not show that any other terms could be compliant and replace any disputed terms found by me to be non-compliant. Thus, said the Respondent, a finding of non-compliance might lead to the absurd situation of there being no compliant lease possible.

32. The matter referred for arbitration is the dispute as to the compliance of the lease terms proposed. I reject the Respondent's argument as being applicable only to the extent that I am ruling on the specific terms that are to be included in an MRO-compliant tenancy. If on a referral the POB considers that not only is a proposed term common, but it is the only common term of that nature, that is for the POB to prove.

Detriment under regulation 50

33. In the Statement of Claim, the Claimant contends that the proposed MRO tenancy in the form offered by the Respondent constitutes a detriment under regulation 50 of the Pubs Code as it seeks to deny the MRO option to the Claimant by making it unreasonably difficult or prohibitive to obtain. Regulation 50 of the Pubs Code provides:

Tied pub tenant not to suffer detriment

A pub-owing business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.

34. For the avoidance of doubt, I will say at this point that regulation 50 does not provide a means to circumvent the provisions of the Pubs Code in respect of the MRO procedure. A dispute under regulation 50 is a separate challenge to an MRO challenge to the full response under regulation 32, and separate time limits apply. Regulation 58 makes reference to referrals to the PCA in respect of the MRO procedure, and does not list regulation 50, which is therefore not an MRO provision of the Pubs Code. Section 49(2) of the Act therefore applies. If the Claimant wishes to maintain a referral under regulation 50 then it must make a referral following the correct notice procedure. Parliament provided a specific means for challenging the MRO full response, and it was not the legislator's intention that regulation 50 be used as an alternative means for doing the same thing. In my view, the detriment relied upon must be outside of the challenge to the MRO proposal itself. It however was ultimately conceded by the Claimant that she would not pursue a complaint under regulation 50 in these proceedings.

Statutory Interpretation – the MRO Vehicle

35. It is immediately clear on reviewing the relevant legislation that there is no express provision in either the Act or the Pubs Code which states that an MRO-compliant tenancy must be provided either by way of a new lease or by way of a DOV. Indeed, there is no express provision as to its form at all, only as to its terms and conditions.

36. For the sake of completeness, I observe that it seems to be clear that the legislation does not by implication require an MRO-compliant option to be given only by way of a DOV. Regulation 30(2) provides that an MRO tenancy will only be MRO-compliant if its term is at least as long as the remaining term of the existing tenancy, and its term can therefore expire after the date of expiry of the original lease. As a matter of law, where the term of a lease is extended by way of a DOV, it operates as a surrender of the existing lease and a grant of a new lease[1]. Furthermore, if the proposed tenancy was intended to be achieved by variation of the existing tenancy only, there would be no need for the provisions in regulation 31(3) and (4) preserving rights under the Landlord and Tenant Act 1954 ("the 1954 Act") afforded where they apply to existing leases, as such protection would be unaffected. Lastly, where the existing TPT is a tenant at will (as per section 70(2) of the Act) because pursuant to section 43(4)(b) an MRO tenancy cannot be a tenancy at will, the MRO must therefore must be a new tenancy.

37. Counsel referred me to text[2] and authorities[3] to remind me of the route to interpretation of a statute. It is necessary objectively to ascertain, by the language of the relevant statute / statutory instrument, what Parliament intended. The language of the statute or regulation should be given its natural

[1] [1] Friends Provident Life Office v British Railways Board [1996] 1 All ER 336.

[2] Craies on Legislation (11th Edition, 2017): extracts (paras. 17.1.1 to 17.1.6 and 27.1.11.1)

[3] Melville Dundas Ltd. V George Wimpey UK Ltd. [2007] 1 WLR 1136 and Christian UYI Limited v HMRC [2018] UKUT 10 (TCC), where the principles were summarised.

meaning rather than a strained one. Importantly, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule is that legislation should be construed according to the intention expressed in the language, and sight of this must not be lost. Regard should therefore first be had to the words themselves.

38. I am not persuaded that the word “tenancy” (in and of itself) gives any particular guidance; a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a new lease. It is the position of the Respondent that the statutory language is that of a separate agreement being entered into. However, I note that absent are clear words on the matter - such as the “grant” of a tenancy or its "commencement", or the “termination”, “surrender” or “end” of the existing tenancy. The language used, for example “accept” and “enter into” in regulation 39, is to my mind consistent with a new tenancy or a varied one.

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

> *The Pubs Code may specify descriptions of terms and conditions—*
> *(a)which are required to be contained in a tenancy or licence for it to be MRO-compliant;*
>
> *(b)which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).*

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

41. The Respondent sought in my view to place too much emphasis on the power delegated by section 44(1)(a) of the Act, which provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option (referred to in this Part as “the MRO procedure”) …*". This delegates to the Code the procedure in connection with

an offer of an MRO option, and not the form or content of the proposal, which is the subject of the separate delegation in section 43(5).

42. The Respondent relies on a number of provisions in the Pubs Code as indications that Parliament intended that the MRO option was to be implemented by the grant of a new tenancy rather than a DOV. I have considered these, and whether it is possible to construe the legislation in the way the Respondent suggests it must be, looking at the way in which the term "tenancy" is used in context within the legislation:
    a. Regulation 29(3) requires the POB to send to the TPT "*a proposed tenancy which is MRO-compliant*"
    b. Regulation 30(1)(a) and (c) refer to the "*existing tenancy*" and a "*proposed MRO tenancy*"
    c. Regulation 30(2) refers to the term of the existing tenancy and the term of the proposed MRO tenancy, which must be "*at least as long as the remaining term of the existing tenancy*". This language, says the Respondent, pre-supposes the grant of a new term of years, not the continuation of an existing one (noting that if an existing term is extended by DOV, in law a new tenancy is created).
    d. Regulations 34(2) and 37(1) refer to the *"proposed tenancy or licence".*
    e. Regulation 39(2) and (4) (dealing with the end of the MRO procedure) refer to the POB and TPT *"entering into"* the tenancy or licence. The Respondent argues that this language is not appropriate for the execution of a DOV.

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

    b. Section 43(4)(a) sets out the circumstances in which a tenancy or licence is "MRO-compliant" and in doing so refers to the "t*enancy or licence" "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owing business in connection with the tenancy or licence*". It was the Respondent's case that this does not support the argument that a DOV is permitted. For the purposes of the Pubs Code, the *"proposed tenancy"* is the MRO tenancy. As the Respondent understands the Claimant's case, this must be the existing tenancy and the DOV together. The reference to any *"other contractual documentation"* in section 43(4) must, the Respondent submits, be to something other than the MRO-tenancy, i.e. side-letters or collateral agreements. That being so, however, I do not see that the Claimant's case that the MRO tenancy can be the existing tenancy plus a DOV is undermined.

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

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

46. Furthermore, I am satisfied that the draftsman was alive to the need to specify a “new” MRO tenancy, if that was necessary to distinguish it from the existing tenancy, if such a need existed. The expression "new tenancy" appears in the Code no less than 19 times (within the definition of "new agreement", which refers only to a new tied tenancy). It would have been simple for the draftsperson to have made clear any restriction such as is argued by the Respondent to exist, and the complete and consistent failure to do so in the language of the Code demonstrates plainly in my view that no such restriction was intended.

47. To show that how the MRO-compliant lease was to be delivered was in the Government’s contemplation, the Respondent relies on correspondence to the then Secretary of State Vince Cable MP dated 25 October 2013 from CAMRA and others advocating the MRO option, which referred expressly to the expectation that the POB would issue a DOV, to show that how the MRO-compliant lease was to be delivered was in the Government’s contemplation. However, this only serves to demonstrate that, having been asked to contemplate a DOV, the Secretary of State did not make regulations which expressly prohibited it.

48. Several extracts from Section 9 of Part 1 of the Government Consultation on the new Pubs Code (October 2015) are relied upon by the Respondent. However, the fact that open language has been used does not mean that its meaning is unclear. I do not consider that it is. On the contrary, the ordinary meaning of the language is permissive of either a new lease or a lease varied by deed, and this is not a reason to look at other material to seek to interpret the ordinary meaning in a more restrictive way.

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

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

50. Furthermore, the Respondent directed me to no consultations prior to the passing of the Act, where the definition of an MRO-compliant tenancy is found (this is not surprising given that the MRO option was the result of an amendment passed unexpectedly), and Parliament cannot retrospectively express intention.

51. Nevertheless, if regard is to be had to the consultation documents, I do not find support in them for the Respondent's position. A number of references are extracted from Section 9 of this consultation, which considers the powers to be delegated under section 43(5) in respect of the compliant MRO tenancies, including:

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

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

53. The Respondent also relies on a few other extracts which refer to a new (MRO) agreement. The expression “new tenancy” is not found, however, even in 9.6 and 9.8 where a tenancy has already been referred to in the sentence, and the expression “new agreement”, which is not consistently used in the consultation, is not the unequivocal marker of intention the Respondent seeks. In 6.13 a “new agreement” which will end a rent assessment does not need to be a new tied tenancy after surrender of the old. The Respondent is to my view reading too much into the selected words of the consultation (and the Government's response to the consultation dated April 2016, where the expression “new agreement” does not occur in the context of the MRO at all).

54. Powers to make provision in relation to the MRO procedure, delegated under section 44(1), are considered in section 10 of the same Consultation, from which the only reference relied upon by the Respondent is:

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

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

56. Looking at these passages, they are far from conclusive. The Respondent looks for the silver bullet within them but, in my opinion, it is not there. These extracts cannot be viewed too selectively to be understood to point towards a prohibition on a DOV. These are a few of many references in the consultation documents to the MRO agreement. Read as a whole what is obviously lacking is any direct and decisive comment on the permissible vehicle for the MRO, which is consistent with an intention not to make unjustified intervention in commercial dealings between the parties.

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

58. It should also be observed that the legislation, however, in not prescribing the contents of the MRO-compliant tenancy except as set out in section 43(4) and regulation 31, has not expressly required that the terms of the MRO-compliant tenancy remain the same as the terms of the original tenancy, with variation only of the rent and severance of the tie. This is consistent with the MRO vehicle not being restricted to a DOV and is another matter for which there could easily have been provision if that was the legislator's intention. The Claimant directed me to no substantive argument on matters of statutory interpretation which could lead me to another conclusion.

MRO-compliant Tenancy

59. It was clarified and conceded at the hearing by the Claimant that each of the terms objected to would individually be "common" in FOT agreements when seen in isolation from each other, but the Claimant continued to contend that the combination of those terms in the same agreement would be unreasonable and uncommon. As was as set out in the Statement of Claim, the Claimant contends that the terms are a combination of the most onerous seen in the market. She argues it is extremely unlikely that a lease containing all of these terms would be accepted and (at Paragraph 4.3 of the Statement of Claim) that

the "*MRO proposal is littered with terms that would ordinarily be negotiated and conceded by a landlord in an open market letting situation.*"

60. The specific terms and conditions of the proposed MRO tenancy disputed by the Claimant are as follows.

    a. Upward only rent review. The Respondent asserts that the evidence of its expert shows that an upwards only rent review is common in the FOT market.

    b. That rent would be payable quarterly in advance. The Respondent argues that a requirement for quarterly rent payments is common and that this is supported by its expert evidence.

    c. That insurance would be payable quarterly in advance. The Respondent avers that this is an expense incurred annually by the landlord and there is no evidence of tenant's insurance contributions being payable monthly in the market in FOT leases.

    d. The requirement for three months' deposit. The Claimant also avers the Respondent should be required to hold the deposit in a separate account and should not be permitted to deduct interest which accrues on the deposit account. The Respondent contends that provision for less than 3 months' deposit is uncommon and therefore, upon its interpretation of regulation 31(2)(c), unreasonable. It also argues that there is no evidence that a requirement for the deposit to be held in a separate account is common and in any event this would be an immense administrative burden on the Respondent. With regard to interest accrued, the Respondent states that this forms part of the refundable deposit, but it is uncommon and an unreasonable administrative burden to require a landlord to repay this to the tenant periodically rather than when the deposit is refunded.

    e. That guarantors would not be permitted to be involved in rent reviews. It was accepted by the Claimant during the hearing that the objection to the term prohibiting the involvement of a guarantor in the rent review process was based on a misunderstanding. It was clarified that a tenant would always be able to be involved in the rent review, even if the individual director of that tenant company was a guarantor.

    f. That there is a disregard of inducements to tenants upon rent review. During the hearing it was accepted by the Claimant that its objection to this proposed term was based on a misunderstanding of the provision.

    g. That the Claimant would be liable for legal costs of the Respondent in relation to the new lease. During the proceedings, the Respondent has conceded that it will not seek any contribution from the Claimant towards its legal costs of executing an MRO-compliant tenancy.

61. The Respondent's primary argument is that the Secretary of State has specified what terms are to be regarded as unreasonable and (aside from the specific categories in regulations 31(2)(a) & (b) and (3)), that is to be determined by what terms are common in agreements between landlords and FOT tenants.

62. At the conclusion of the hearing I gave permission to the Respondent to make written submissions in response to the Claimant's oral submissions as to reasonableness of the particular terms in dispute. These were received on 18 May 2018. I see that in the written submissions the Respondent makes open offer of concessions on certain matters, although it emphasises that it does not consider it is bound to offer them. In relation to this case the Respondent states that it offers six months for the Claimant to move to quarterly rent.

Statutory Interpretation – section 43(4) and regulation 31

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

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

65. The referral under regulation 32(2)(a) can be made where the POB does not send a full response under regulation 29(3), and that regulation requires the POB to send an MRO-compliant proposed tenancy. The definition of such a tenancy is in section 43(4) of the Act so it is clear to me that the Pubs Code Adjudicator has jurisdiction under the regulations to determine whether the tenancy complies with the requirements of that section.

66. Therefore, determining MRO-compliance is not simply a question of looking at each individual term to decide whether it is uncommon for the purposes of regulation 31, but whether the proposed MRO tenancy contains terms or conditions which are unreasonable.

67. Furthermore, I do not consider that the language of the Act and Pubs Code requires consideration of each term or condition in isolation. A judgement as to whether an individual term or condition is unreasonable may be affected by the other terms and conditions of the proposed tenancy. Two or more terms and conditions together may render the proposed tenancy unreasonable, for example, where they are inconsistent with each other, or whether their

combined effect is too onerous for the tenant. Indeed, this is reflected in the normal course of negotiations between parties in the market, in which a tenant may not look at each term or condition in isolation to decide if it is reasonable. A tenant may consider that a number of terms together in a lease may make the proposed terms unreasonable. There may be some particular terms which are make or break, but often some terms objected to may be rendered acceptable by virtue of concessions elsewhere in the negotiation. It is necessary therefore to consider not just whether the individual terms are unreasonable, but also whether that test applies to the proposed lease as a whole.

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

Is the choice of MRO Vehicle subject to the test of unreasonableness?

69. The Claimant argues that the MRO-compliant tenancy should comprise the tied tenancy, minus the tied trading provisions, and with a revised rent, and that this would be a straightforward thing to achieve. However, I am not persuaded that this would amount to an "MRO-compliant tenancy" as provided for in the Code, as it may contain uncommon or otherwise unreasonable terms in a FOT lease, individually or collectively.

70. The Respondent submits that (if it is wrong that the MRO vehicle can only be a new lease) the mechanism by which the MRO tenancy is brought into effect is not a "term" or "condition" contained in the MRO tenancy, and that there is no obligation or other condition (express or implied) to enter into a new tenancy or a DOV. Thus, it argues, the POB's decision as to the MRO vehicle cannot be subject to the test of unreasonableness. However, I do not accept this limited interpretation. Section 43(4) refers to a tenancy being MRO-compliant if "*taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence*" it does not contain any unreasonable terms and conditions pursuant to subsection (iii). I am satisfied that this is broad enough to encompass the requirement (as set out in the covering letter with the MRO proposal referred to in the evidence of [redacted] and dealt with below), to enter into a new tenancy.

71. Counsel for the Respondent in fact conceded that there were requirements specified in the MRO full response which were capable of being conditions contained within the MRO tenancy. The supposed distinction between such conditions and the requirement to surrender the existing tenancy was not substantiated at all.

72. I consider that the question of whether the choice of MRO vehicle is unreasonable can correctly be analysed in both of the following ways. Firstly,

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

Unreasonableness

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

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

75. It is the Respondent's position that these core principles are relevant to the interpretation of the express provisions of the Code (because the regulations were required to be made in terms which adhere to these principles) but that they are not "free standing" in that they do not impose duties or obligations on the parties outside of the express terms which regulate the conduct of parties in the Code. I agree that these principles do not impose free standing rights. However, the Respondent argues that accordingly the question of whether it has complied with the statutory duty to send an MRO-complaint proposal cannot be answered by an appeal to the Code principles, including to "fairness". For the reasons which follow I do not agree with the Respondent's position.

76. It is clear that the core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the Pubs Code (including any regulations made under the power delegated in section 43(5)) are to be interpreted as

consistent with the two core principles, if the provisions in the Act (in this case, as to reasonableness in section 43(4)(a)(iii)) are not, there would be a fundamental incompatibility between these instruments. I am furthermore satisfied that, were the language in the Act and Pubs Code not consistent with these principles, the Secretary of State would not have enacted the Pubs Code in its current form.

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

The Pubs Code Principles

Fair and lawful dealing

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

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

No Worse Off

80. The second core principle requires a comparison of the position of TPTs with tenants who are tie free, and the former are intended to be no worse off than

the latter. I am aware that this has been a principle in tied pub rent valuation since at least 2009, when it was referenced in RICS guidance. It is not for me in this decision to consider an exhaustive definition of this principle, but provisionally it would seem to me to be a judgement of fact and degree in each case whether a TPT is worse off. That judgement would include financial matters, particularly profit, but could it seems also include considerations not directly expressed in financial terms – for example a difference in bargaining power and the reduced risk in having a tied deal, or the business support available to a TPT from a POB may be something of value for the TPT. By pursuing the MRO option, the TPT should be in the position of being able to compare, and make an informed choice between, the two options.

The Application of Pubs Code Principles

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

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

83. The commercial relationship between the TPT and the POB on service of an MRO notice is different. The TPT (except at renewal) does not have the right to walk away or contract elsewhere. It only has the right to keep its current tied deal or to accept the offer. Even at renewal, any goodwill earned will be a relevant consideration for the tenant, as will the availability of the County Court's jurisdiction to determine reasonable terms of the new tenancy. The TPT in the MRO procedure is not in an open market position, and I consider terms or conditions which were less favourable because of that fact would be unreasonable and inconsistent with the core Code principles.

84. The test of unreasonableness is the counterbalance to the negotiating strength of the POB, with its inherent potential for unfair dealing towards a TPT in the MRO procedure (or any step to make the tenant worse off than if they were

FOT). In addition, an attempt to thwart the MRO process by making the MRO proposed tenancy too unattractive would not be lawful dealing.

85. I was referred to the "Impact Assessment on the Pubs Statutory Code and Adjudicator", dated 28 May 2014, which summarised that cumulative evidence received by the government has clearly established that in too many cases tenants are unable to secure a fair share of risk and reward in their agreements. It identified as one of the problems the inequality of bargaining power between pub company and tenant, saying "*Pubcos should recognise that they have a responsibility to ensure they do not exploit their position of economic strength*". The Code was intended to result in a transfer of profit from the pub companies to the tenant, where the tenant is currently being treated unfairly (the level of unfair treatment, and the value of this transfer, was unclear).

86. That is a recognition of the financial pressures upon tied pub tenants. Such pressures should not themselves represent an insurmountable obstacle to the exercise of the MRO option. Thus, though the current circumstances of the TPT are said by the Respondent to be irrelevant, I do not think that can be so. Parliament clearly did not intend that a TPT whose profit is being unfairly affected by a POB under a tied lease should be prevented from accessing the MRO because they have not made sufficient profit to afford high entry costs. It is unnecessary to analyse whether the particular tenant has been treated unfairly. High costs should not unreasonably prohibit access to the MRO.

87. The occurrence of a specified event is something which Parliament intended should give rise to a meaningful right to go tie free. Part of a tenant's anxiety about the proposed MRO tenancy can be accounted for in the MRO rent being determined after the arbitration as to the compliant terms of the proposed tenancy. In that way, the tenant cannot be sure how more onerous terms will be reflected in the MRO rent. The terms of a lease (e.g. whether it is a full repairing lease) will in general be reflected in the rent for the pub (as the Respondent's expert witness confirmed). However, that seems to me to be fundamentally different from a consideration of entry costs.

88. Take, for example, a significant increase in price (an event which pursuant to regulation 24 gives the TPT the right to serve an MRO notice). This significant price increase would be a unilateral decision of the POB which may materially affect the commercial attractiveness of the tied deal. The TPT is not in the position of a tenant of a FOT lease, who may decide to accept or reject a supplier's prices. If the MRO option is financially prohibitive, it may not be a realistic option for the TPT to accept it. The only option would be to remain with the tied deal (which may now be a poor one) or accept an offer that a prospective new tenant of a tie free lease might not without negotiation, and in such negotiation that prospective tenant would be in a very different bargaining position to the TPT. The test of reasonableness requires that the POB, in offering the terms of the purported MRO tenancy, cannot take advantage of any absence of commercial bargaining power on the part of the existing TPT pursuing the MRO procedure.

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

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

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

92. It was contended by the Respondent that the Claimant's allegation that the Respondent was seeking to thwart the MRO process add nothing to their submissions on the question of whether the Respondent's response under regulation 29(3) comply with its duties under the Code. For the reasons above, I do not agree that these two things are unconnected.

Severing the Tie

93. The Claimant appeals to the market as to the mechanism it says is usually adopted to change from a tied tenancy to a FOT tenancy. To the extent that this argument places reliance on a term of the existing lease as being common does not invoke regulation 31(2)(c), as it is the uncommonness of such lease terms in tie free leases which is at issue. 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.

94. It is not enough for the Claimant to assert that the existing lease (with or without minor amendments) would be sufficient. 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 to me 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. The lease confers a unilateral right on the landlord, which it would presumably only exercise when satisfied it was in its interest to do so, and it has an absolute

choice in respect of that. I do not see 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 the "minimum changes" sought by the Claimant to the existing tied tenancy to release the tenant from the tied trading provisions.

95. Even if this were the yardstick by which the Respondent's decision to send a new tenancy rather than a DOV falls to be judged, the Claimant produces no evidence to prove that that the grant of a new lease to a tied tenant is an "uncommon" means for a landlord to agree a new FOT tenancy with a tied tenant. I note from the Respondent's evidence however that a sizeable proportion of its new FOT tenancies granted since July 2014 have been to existing tenants. In considering whether the choice of vehicle is reasonable I was not impressed with the Claimant's evidence. Whilst a DOV is used in the market, they did not show it is the most common method of tie release, (to the extent that that is relevant to whether the use of a new lease was unreasonable).

96. It 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 the context 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 simply not the same. When releasing the tie on an individual lease it did not have the opportunity to remodel its FOT estate, or to take any meaningful step towards creating a standardised lease form. These opportunities now present themselves to the Respondent and is proper to recognise they are genuine considerations for the POB (evidence of which was given by the Respondent's witnesses as discussed below).

Respondent's evidence - conclusions as to reasonableness (vehicle and terms)

97. I heard oral evidence from [redacted] at Gosschalks, and [redacted] They dealt with certain factual matters of evidence concerning (a) the way in which the Respondent's FOT estate has developed, (b) the FOT market and (c) terms of leases in the Respondent's FOT estate and (d) the practicalities of the use of a DOV as opposed to a new tenancy.

98. They had each produced a short witness statement confirming the accuracy of parts of the Statement of Defence, and those parts overlapped. The Statement of Defence contained reference to legal argument as well as matters of fact. Identifying in respect of which parts of the Statement of Defence each gave evidence was therefore not straightforward. Certain parts of the overlapping sections contained factual matters more closely related to [redacted] personal experience within EI, and other parts were more closely related to [redacted]

personal knowledge as a solicitor dealing with the Respondent's leases. I have done my best to attribute weight to the evidence according to its proper source.

The EI standard FOT lease v a DOV

99. [redacted] is the [redacted]. He was the person who drafted the EI standard FOT tenancy in 2011 and who had overseen the amendments to it since. This lease evolved from the short form of the Inntrepreneur lease, which was widely adopted by pub companies in the 1990s.

100. Notably 2011 was before the market was aware of any prospect of the MRO. The Claimant observed that the Respondent knew of the campaign for the MRO at that point. However, the vote in the House of Commons to introduce the MRO into the draft Small Business and Enterprise Bill took place on 17 October 2014 and the outcome was a surprise. Whilst it is not clear on the evidence the extent of the use of this standard lease between 2011 and 2014, in any event the Respondent has plainly used this standard agreement since 2016 outside of the MRO context. I am therefore, on evidence before me, not persuaded to the Claimant's case that the proposed lease was drafted with a view to the MRO within the Code, (and the corollary of that is that it cannot have been drafted with a mind to incorporating only terms that were common in tie free leases in order to ensure compliance with the Code, which regulations were only finally made in July 2016).

101. [redacted] gave evidence that a tied tenant typically stays in a pub for about eight to nine years. He said that in 2008 during the recession that average shortened, and the Respondent made great effort to give tenants financial assistance. He freely acknowledged that it was too early to know if tenants would keep its current standard FOT leases for an average of eight years.

102. [redacted] described the Respondent's estate as made up of many different types of mainly inherited leases, many of which have individually been subject to various variations either by deed or side letter. He explained how starting with a standard new lease document would generally make the procedure quicker, less onerous and cheaper than using a DOV. He considered that it was harder to deduce a tenant's interests if there are a series of documents, mistakes are more likely, and drafting a DOV with more extensive variations could require up to 10 hours of drafting, with consideration of whether each clause was to remain, be amended or be deleted in the MRO compliant lease.

103. I found [redacted] to be a reliable and impartial witness. I accept that the use of a DOV will in each case require a line-by-line analysis on a case-by-case basis (given the numerous and various styles of lease within the Respondent's tied estate). That analysis will need to extend to all other collateral agreements which form part of the tied tenancy (such as variations and side letters). It would also be necessary to ensure that all other terms which are non-compliant are deleted from the existing tenancy. Renumbering and cross-referencing would be required.

104. The Claimant's tied lease is not on the Respondent's standard terms, having been brought into its estate from one of the past acquisitions of a portfolio of pub estates, takeovers of companies with their own portfolios, and individual acquisitions of assets let on a previous lessor's standard tied terms. Each acquisition meant that new variations of tied leases were included in the estate. The Respondent has over 20 main lease types, each of those having significant contractual variations. These differences have arisen from the letting policies of the various older companies and from the Respondent's own response to changing market conditions.

105. Questioned about the Respondent's use of a DOV to release a tie, [redacted] referred to this having been the case in respect of 2-300 Inntrepreneur leases, which came into its estate in 1998 on the purchase of Unique Pub Co., after a 1991 commitment to enter into one (said to have been made in error).

106. [redacted] explained that, where the parties agree an appropriate fee, the Respondent is content to partially release the tie in a tied lease, but that it remains a lease that is subject to a tie. From the Respondent's point of view, he considered a lease that was free of any tie to be a commercial lease and a very different animal.

Value to the Respondent of a new lease

107. [redacted] said that the Respondent, accepting that there is a transfer of annual value from the landlord to the tenant arising from the MRO process, has no objection to granting a FOT lease, and that the good news from its point of view is that if commercial leases are put in place they can be used to get a better outcome from the capital value of the Respondent's FOT estate, as the lease is more marketable. The investment community will pay good value for these new FOT leases, which have sold at yields of up to 7%, he said.

108. He also explained that standardisation of lease terms reduced management costs, making it easier to apply consistent policies across the estate (e.g. rental dispute resolution), allowing for better comparability of rents for different pubs, production of guidance for tenants and training for staff, and ease of producing deeds of variation and renewal leases. That seems to me to be a logical and uncontroversial analysis. There was no evidence from the Claimant to counter the Respondent's explanation of the value to it of a new lease over a DOV.

109. The sequential means by which the Respondent's estate was formed and FOT leases were created meant that for a long time it may not have had the same opportunity to seek rationalised and modernised FOT leases that now presents itself. The circumstances in which the Respondent or other pub company may have released the tie by notice or DOV is not therefore a useful comparator with the Respondent's choice of MRO vehicle now.

110. The introduction of the MRO represents an important change in the industry, given the number of MRO leases the Respondent might envisage (though I heard no evidence of projections). It is acknowledged to present a financial challenge to the Respondent. I was referred to EI's estimate in its Unaudited Interim Results for the six months ended 31 March 2017 that new FOT agreements (of which there had been 4) may result in a 18% reduction in net income, whereas tied deals negotiated after an MRO proposal would result in none. It seems to me that natural for the Respondent to consider and plan for its business in light of the opportunity presented by the MRO to a tie free estate which is cheaper to manage and more attractive to investors.

111. Taking into account these considerations, the Respondent is in my view justified in general in having a policy requiring a tenant to enter into a new lease rather than using a DOV as the vehicle for the MRO, so long as its application is reasonable in the individual case taking into account the core Code principles. I appreciate that in some cases the task of drafting and agreeing a DOV may be fairly straightforward, depending on the nature of the existing lease documents. However, it is not unreasonable for the Respondent to want in general to take a systematised high-level approach to the MRO process.

112. Importantly, however, that does not mean that there should be no exceptions to that general policy where its application produces unreasonable results for a particular tenant, or that there should no scope for negotiated variations to the standard terms. Indeed, there should be. The choice of MRO vehicle and terms must not be unreasonable for either party. There may, exceptionally, be individual cases where a condition as to surrender and re-grant would be unreasonable. The test of unreasonableness is a high bar however. Subject to a new lease being on reasonable terms and conditions, including reasonable overall costs to the tenant, I am not persuaded that the choice of vehicle is unreasonable in the present case.

Stamp Duty Land Tax

113. It is said by the Claimant that a new lease is unreasonable because Stamp Duty Land Tax (SDLT) would be incurred. The Respondent's position is that SDLT payable consequence of the exercise of the MRO by a new lease does not make its requirement for surrender and regrant unfair.

114. The Respondent has provided a breakdown of potential SDLT liability of £1,423. The proposed lease term does not extend beyond the expiry date of the existing lease. I understand that overlap relief would be available and that the SDLT liability is due to the proposed increase in rent (and the actual sum would therefore depend on the rent finally agreed between the parties or determined). There is provision for a variation of the lease to increase the rent to be treated as a new lease (except when by exercise of a provision in the lease), and further provisions apply to abnormal rent increases after the fifth year of the term[4]. It would also be the consequence of the exercise of the MRO

[4] Finance Act 2003, Schedule 17A, para 13, 14.

by DOV if the lease term is extended (which the law treats as a surrender and regrant)[5] and it might also be payable where the variation of a lease by deed amounts on the facts to the grant of a new lease (and to SDLT avoidance).

115. I have not analysed these provisions, but where SDLT liability is on the facts of a particular case a result of the POB's choice of MRO vehicle, it will be a cost to the tenant of taking the MRO option, but not the only one. Legal fees, dilapidations, deposit and rent in advance are amongst the others. It seems proper to take that liability into account in determining in an individual case whether the choice of vehicle, and the choice of other terms and conditions dictating costs to the tenant, including entry costs, are reasonable. In my view, whether or not SDLT is substantial should be considered in light of all of the costs the TPT would be required to pay for the particular new lease. Where these combined costs are so large as to act as a barrier to the MRO option they can outweigh the POB's reasons for wanting a new lease and make the choice of terms / conditions and vehicle unreasonable and non-compliant, but each case must be decided on its facts.

116. The Respondent has been silent as to the SDLT position in respect of the new leases granted to existing tenants since July 2014. I do not know whether there were any where overlap relief was not available and who faced large liabilities, and whether it negotiated any arrangements (to other entry costs, for example), or a DOV in the circumstances. Such evidence might be relevant to whether it is acting fairly by comparison in any given MRO procedure.

Negotiated variations to the standard lease

117. As to the terms of the new lease, the POB is required to make the offer, whether or not that will negatively affect its profit. It would be naïve not to acknowledge that there may be a financial incentive for the Respondent to seek offer a proposed tenancy on the terms most advantageous to the POB. Either a grant of a FOT on those terms, or a decision by the tenant to stay tied because those terms are too unattractive, would be a win for the POB to a greater or lesser degree. Owing to the absence of negotiating power on the part of the TPT, there is an expectation on the POB that it can show it is not taking advantage of its position of strength.

118. [redacted] agreed that lease terms relating to people with high covenant strength can be different to those with low covenant strength. He also referred to voluntary negotiations with a tied tenant to release the tie, and to the Respondent's 2015 (pre-MRO) target to have 900/100 FOT pubs by 2020), though it was not moving forward at that pace.

119. However, voluntary negotiations motivated by the Respondent's commercial interests (perhaps in targeting a rural food led pub for tie release) are in a very different category to MRO negotiations. [redacted] agreed for

[5] s.43(3)(d) of the Finance Act 2003

example that a tenant who made a good offer to go free of tie would be in the driving seat in the negotiations, and if there was a good rent deal there would be a motivation for the landlord in the negotiation. He said negotiations would be on the basis of the Respondent's standard lease terms, but they might require personal concessions (and he gave the example of allowing the tenant to build up a deposit over the first year or allowing monthly payment of rent for the first year, as an aid to the incoming tenant in funding the costs of the new lease). [redacted] readily agreed that MRO tenants should get the same flexibility. He thought the Respondent had been offering it, but I was not persuaded as to that on the evidence. However, I am clear, and consistent with [redacted] opinion, that for the MRO proposed lease terms to be compliant, they must be terms which are similarly favourable as those that might be offered to the tenant of a targeted pub.

120. [redacted] acknowledged that the evidence showed that in the 13 lease renewals amongst the Respondent's tie free lettings since 2014 the tenants had not been happy to accept a number of the standard terms and had successfully negotiated them. He did not know how many of these renewals had been with the benefit of 1954 Act protection. Though 91 of the new free of tie lettings had been to existing tenants, the evidence did not identify these tenancies, and it was therefore not possible to see if such tenants had been able to negotiate better terms. Furthermore, there was no evidence whether these existing tenants had been in distressed circumstances when they agreed to a surrender and re-grant or had been served with notice under the 1954 Act of the landlord's opposition to a new tenancy. In addition, there was no evidence whether there has been any additional consideration from the tenant or a favourable rent deal.

121. Where there is a material difference in the lease terms granted to existing rather than new tenants, which might also indicate that the experienced existing tenant who is valued by this particular landlord, in a market situation, has some negotiating power. The Respondent has not shown on the evidence that the terms it proposes are such that existing tenants, or preferred tenants, in a negotiation, would be willing to accept outside the MRO process. This does not tend towards a conclusion that its terms are reasonable.

Are the existing lease terms relevant?

122. The Claimant's argument is that the starting point for the MRO lease is the existing lease terms. However, there is no support in the legislation for this assertion. 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.

123. By comparison, when renewing a tenancy under section 32 to 35 of the 1954 Act (arguably says the Respondent the closest example on the statute books of a statutory jurisdiction to determine the terms of a commercial tenancy) "reasonable" terms by reference to the existing lease as a starting point. It is for the party seeking a departure from those terms to justify why it is

fair and reasonable, having regard to the purpose of the Act. The legislature would have been aware of the criteria used in the 1954 Act when enacting Part 4 of the Act and the Code and I agree with the Respondent that it is significant that it in doing so it did not choose to take the same path.

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

125. I therefore make it clear to the Claimant. The existing lease is 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.

126. However, in my view that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need to have regard to the existing contractual relationship between the parties. Indeed, counsel for the Respondent readily agreed that it is self-evident that the existing lease terms will be in the mind of the TPT who is entering into negotiations for a new lease. The landlord will have their own commercial considerations in mind. From their respective positions, parties motivated to reach an agreement rather than a stalemate will negotiate from these starting positions to one that is acceptable for both. Therefore, both will have to take into account the position of the other if they intend to reach a deal. This is what a landlord would do if it wanted to tempt a preferred tenant into a new contractual relationship. That is the position in which the TPT tenant should be in the MRO procedure.

127. There may be other reasons why the existing terms are relevant, but I cannot set out an exhaustive list. For example, where a landlord offered (perhaps fairly recently) very favourable deposit terms on the tied lease which suggests the tenant was viewed as a preferred operator, and there has been o relevant change of circumstance, if the POB will not offer favourable deposit terms now that may be an indicator that the POB is seeking to raise unmanageable entry costs and is not acting fairly, and that the terms are not therefore reasonable. The particular terms (e.g. a keep open clause) may have had an effect on trade and goodwill to date, such that it would be unreasonable to change them. There may be an occupation clause pursuant to which wider family members reside in the pub, and it may be unreasonable to restrict that. Each case must be looked at on its merits, but for the Respondent as it does to suggest the existing lease terms are always irrelevant is untenable in my view.

This MRO Proposal

128. In evidence was the covering letter dated 12 April 2017 that was sent with the MRO proposed tenancy. This began "*this letter is our Full Response*"

and contained a number of requirements with which the Claimant had to comply in order to take the MRO option, including the following:

Please note the following which I hope will help to inform your choices:

- *"If you wish to take an MRO-compliant lease it will be necessary for you to surrender your existing tied agreement and enter into a new commercial lease for the remaining unexpired term of your current tied agreement*
  …
- *Should you decide to continue with this new lease you will be required to complete the attached application form in order that we may undertake new credit checks.*
- *You will also be required to produce a Business Plan including a P&L forecast and cash flow forecast, that should reflect the increased rent, lease liabilities and the cash flow implications of rent becoming payable quarterly in advance and of the payments into a Repairs & Maintenance Fund.*
- *As with any other tied lease surrender we expect that the lease will be terminated only when all payments due, any existing breaches and all repairs required under that lease are resolved. We will also not enter into the new lease if you are unable to provide all statutory compliance certification to evidence that the premises and inventory are safe.*
- *I enclose a copy of a provisional completion statement to advise you of the funds which will be required on completion of the new lease. Any payment of rent already paid against your account will be offset against the statement on completion of the new lease.*
- *We must draw to your attention that you should expect the terms and conditions of such a FOT commercial lease to be rigorously enforced, including prompt payment of the rent, buildings insurance and R&M fund in full on the due dates and fulfilment of the full repairing obligations. You will be expected to operate your business independently without any support, services, concessions or the protection of any Code of Practice.*
- *The Pubs Code defines a sequence of steps with strict timetables and there are several points at which your claim could lapse if [sic] do not comply with those timetables. Entering into an arms-length lease on these commercial terms is also a serious commitment for you to make. We therefore strongly recommend that you take independent and professional legal, accounting, surveying and valuation advice before committing yourself to this new lease.*
- *You will pay a non-refundable deposit for £1,950.00 as a contribution towards our legal costs (made payable to Enterprise Inns plc).*

129. The letter included the following enclosures:
   a. FOT lease
   b. Benefits of the tie brochure
   c. Implications of becoming FOT brochure
   d. Application Form
   e. Statutory Requirements Schedule
   f. Specimen PCS [provisional completion statement] as at the date of the letter.

130. In evidence were the two brochures enclosed with the letter (items b. and c. of the list above), which [redacted] in his oral evidence said had been the product of a working group in which he had been involved. It is not convenient to set out in this decision the full text of these brochures, but it is safe to say

that they represent a one-sided assessment of the considerations affecting a tied tenant choosing whether to go FOT. The “Benefits of the tie brochure” could be described as a sales pitch for a tied lease. The "Risks" column in it does not actually set out any risks of staying tied at all, only stating that the risk is lower (than being FOT) and going on to emphasise the other benefits of being tied.

131. By contrast, the other brochure, concerning the implications of choosing to exercise the MRO to go FOT presents what acknowledged in his evidence was a grim picture. He said that if a tenant has a tied agreement with SCORFA (special commercial or financial advantages) then tie release is bound to be a negative story. The tenant is told in this brochure *"We want our Publicans to take well informed decisions by laying out, over the page, some of the factors to be considered when deciding whether to take the commercial lease that we would be offering."* Those considerations set out are all, in fact, presented in a uniformly negative manner.

132. acknowledged in his oral evidence that the perception of a recipient of these brochures is that the Respondent is encouraging them to stay tied. He also agreed that the statement that the Respondent would require all repairs to be resolved prior to granting the MRO lease could have been better expressed, explaining what was intended is that the Respondent would expect there to be a plan to resolve all outstanding repairs (meaning that some works could be done immediately, and others could be resolved later). This is most definitely not what the brochure says, however. On this issue alone, I would expect the Respondent to be reviewing this literature.

133. said that the covering letter enclosing the proposed MRO tenancy had subsequently been amended to remove a request for a non-refundable deposit of £1950 towards the Respondent’s legal costs (and that this matter had been conceded in the present case). He admitted that the wording of the letter was such that a recipient could be expected to understand that they had to pay at least £1950 for the Respondent’s legal costs, whereas he said in fact at that time that amount was the only contribution that was expected. This is again not what the letter says, and I do not accept his evidence on this. said this figure had been arrived at because Gosschalks had given a figure for producing and completing a new agreement in an average case (though that was much higher than the one estimated in evidence for a straightforward case). conceded that, standing back, a figure for costs of £1950 (assumed, though not specified to be, inclusive of VAT) appeared a bit high.

134. Notwithstanding what said as to his degree of comfort with a tied tenant taking the MRO option, I do not accept on the evidence that has been the Respondent’s position. The tone and purpose of the covering letter and enclosures which form part of the MRO proposal are clear. They are intended to raise levels of uncertainty in the mind of the recipient, so they are less likely to take the risk of the MRO option. It is plain that this is the outcome that the Respondent sought on making the proposal.

135. I am also satisfied that the requests in the covering letter with which the Claimant was required to comply would be contractual agreements if accepted, which are to be taken together for the purposes of s.43(4). Further requirements to complete credit checks; to produce a business plan including a profit and loss forecast; to make payment for all breaches, resolve all repairs and to pay a non-refundable deposit towards legal costs are all conditions which, if unreasonable, will render the MRO proposal non-compliant. It is plain to me that this collection of conditions, taken together, was a weapon deployed in furtherance of the Respondent's objective of persuading the tenant to stay tied, by making the MRO difficult to achieve. I am quite satisfied that, taken together, they are unreasonable conditions, and render the MRO proposal non-compliant. Nevertheless, the objective justification for requiring a new lease is I have considered above.

136. That does not mean that they are individually unreasonable. There may be sound reasons, example, for making a business plan. I will not deal individually with these conditions (some have been conceded by the Respondent and some the Claimant does not challenge). However, the condition as to payment of dilapidations deserves special consideration.

Dilapidations

137. The Respondent argues that it is a fallacy that the Claimant will be liable for terminal dilapidations upon a surrender and regrant, as a landlord who grants a new lease to a sitting tenant cannot claim damages for dilapidations in the same way as it can when a tenant gives up and the Respondent does not assert that it would be entitled to bring such a claim. Firstly, by section 18(1) of the Landlord and Tenant Act 1927, the damages recoverable are capped at the diminution in value of the landlord's reversion. This would have effect in the same way whether a new lease is granted or a DOV entered into. Secondly, if there were more than three years of the term under either a new lease or the existing lease as varied by a DOV, the Respondent would need to obtain the leave of the Court under the Leasehold Property (Repairs) Act 1938 before bringing a claim for damages for dilapidations. Conversely, the obligation to repair is a continuing one and the landlord's right to enter to carry out repairs and recover the cost will apply at any time irrespective of whether a new lease is granted.

138. However, what is at issue here is the presentation of conditions by the Respondent as part of the MRO proposal. The covering letter forming part of the proposal requires all dilapidations to be paid for up front. This in my view is a condition of grant of the MRO. I do not accept [redacted] explanation that what was intended was that there would be "a plan" for dilapidations to be carried out. The meaning of the letter is clear. The Respondent's position was that it would require that the property is brought into repair before the new lease is granted. Subsequently, and in evidence in these proceedings, the Respondent provided a schedule for repairs in the sum of £22,543.50.

139. There can be no real doubt that, when the cost of dilapidations is high, the requirement for their immediate payment may represent a real disincentive

to a TPT to take the MRO option. A reasonable landlord should manage its estate responsibly throughout the term. The landlord should not be using surprises on the request for an MRO option as an adversarial weapon. The need for fair dealing arises, and what is appropriate will depend on the facts of the individual case. It is appropriate for the POB to consider whether in the circumstances fair dealing requires it to mitigate the impact of dilapidations.

140. By the date of the hearing, the Respondent's position had changed dramatically, in that, apart from statutory compliance, it did not require any remedial work as a precondition for a new FOT lease. To match the existing cycle, it requires year 1 to be the first external decorating year. The Respondent's original condition on dilapidations stands out as very severe. It did not set out any limit on its ability to require dilapidations at that stage and suggested no flexibility at all. This sits comfortably in my view with the tone and intention behind the covering letter.

141. If it is a logical assumption that a tenant with more bargaining power would negotiate with the landlord to carry out the repairs over a reasonable period the question that arises is therefore, if the Pub is not to revert to the POB until the end of the new lease term, why did it insist on the cost of dilapidations now (other than because it can as a matter of law)? I can find no good reason in the evidence before me and the Respondent did not in fact seek at the hearing to defend its original position, which I am satisfied was an unreasonable and non-compliant condition in this context, without good reason as to its imposition.

Uncommon Terms

EI's gathering of evidence of as to commonness

142. [redacted] gave evidence that the Respondent took steps to obtain evidence of comparable leases as relevant to the issue of the commonality of its proposed MRO lease terms (generally, and not in response to this particular tenant's MRO notice). It instructed Gosschalks solicitors to conduct a survey of FOT leases in the market; it collated evidence of its own new FOT leases granted since July 2014 and it asked the other regulated POBs if they would cooperate with some research of the terms of FOT leases (and it was agreed that the BBPA would collate that information). The result was a basket of anonymised evidence of 26 comparable leases granted by other three regulator POBs, though [redacted] acknowledged that there was no way the accuracy of this information could be verified for the hearing. [redacted] said in oral evidence that he had also asked Wellington for information on its FOT leases, but it would not cooperate.

143. However, all of this evidence was solely focused on new free of tie leases, which served to increase the apparent commonness of the Respondent's own standard lease terms. The email to Wellington's managing agent (Criterion Asset) of 4 July 2017, produced by [redacted] at the hearing after he referred to it, asked only for information on new leases (not all tie free

agreements), and [redacted] said this was because the Respondent's brief was to look at new lettings on the open market. There was no written record of the apparently negative telephone response [redacted] said he had received from Criterion, or of the briefing he said he then gave the Respondent's Chief Executive and solicitors.

144. As for the collation carried out by BBPA, this was also only in relation to new leases (as confirmed by [redacted] and shown by the email dated 30 June 2017 from [redacted] to all the regulated POBs also produced at the hearing after [redacted] oral reference to it in evidence). The period for which this evidence was requested was not specified, and [redacted] did not seek to find out if any regulated POB had used a DOV in response to an MRO notice. He acknowledged in oral evidence however that both new lettings and new leases to existing tenants upon surrender and regrant would have been of interest. These limitations in the scope of comparable evidence undermined the Respondent's case that it has shown its standard lease terms are common in tie free agreements.

145. The existing lease terms are not the benchmark for the test of what is common in tie free leases, and it is not the case that there is only one set of common terms. The meaning of "common" is not defined and I should consider its ordinary meaning. Its synonyms include usual, ordinary, frequent, and routine and a term which is not common in tie free leases will be not usual, ordinary, frequent or routine. It does not set a test of prevalence or require that a majority of leases contain the term in question.

146. The Claimants argued that pub tenants are often ill-advised when entering tie free leases, and thus the terms which they are willing to accept should not unquestioningly be accepted as common. However, I reject this argument as legally irrelevant to the statutory definition of commonness.

147. The Respondent relied on the expert evidence of [redacted] as to "Whether the clauses listed in the Respondent's list of issues in dispute at paragraph 4 are "not common". The scope of the permission granted for the Respondent's expert evidence was that which it had requested. The Claimant elected not to call any expert evidence and did not object to the Respondent's reliance on its own. In spite of the concessions as to commonness made by the Claimant, it appropriate that I set out here the conclusions I have reached on the expert evidence.

148. [redacted] is acknowledged to have extensive experience of leases of licensed premises. The Claimant however questioned him as to his ability to act independently. [redacted] confirmed he has acted for four of the regulated POBs - EI, Punch Taverns (including acting for them as tenant), Star and Greene King. The large majority of his Code related activities as expert have been for EI. Though he personally acted for no tenants in Code related matters at present, one of his colleagues at [redacted] was acting on behalf of a tenant against Star.

149. [redacted]

150. In my view, there is no reason why, given this history, [redacted] could not be relied upon to provide independent expert evidence in accordance with the RICS guidance on Surveyors Acting as Expert Witnesses (4th edition), but as with all expert witnesses he was required to be assiduous in following that guidance. However, I identified three principle problems with his evidence, which on careful consideration and with respect to [redacted] mean that I am not assisted by it.

151. The first of these is the limited nature of his instructions. [redacted] had not been instructed to consider the commonness of the terms in question collectively in the proposed lease. He had only been instructed to give expert evidence as to whether each individual disputed term was common. Secondly, I found he had not sufficiently demonstrated independent judgement in respect of his instructions and the evidence which was relevant to his professional opinion. Thirdly, I found his methodology was not persuasive.

The Respondent's Instructions to Expert

152. [redacted] confirmed that he was not instructed to give expert evidence as to whether the particular combination of lease terms in the proposed tenancy could be considered common in the tie free market, and thus was not able to offer such an opinion in these proceedings.

153. The Respondent disputed that the test of commonality applies to the lease as a whole, arguing that that would be unworkable. As discussed above when considering the test of reasonableness in section 43(4)(a)(iii) of the Act, the contrary is the case in my view. If the Respondent is correct, a lease might yet contain a combination of terms each individually common in the tie free market, yet which would never be found together in the same lease (because they were inconsistent, impracticable, rarely or never agreeable to a tenant, or did not make commercial sense), and that is what would in fact be unworkable. It would be permissible for a POB to select all of the common terms which were most favourable to it, even though it is unlikely that a new tenant in the open market would ever sign up to them. This in fact is what the Claimant contends the Respondent has done.

154. The Respondent has in its evidence only concerned itself with whether each individual disputed term is common in tie free leases. I cannot see that the scope of my directions as to expert evidence could preclude me, on a full hearing of the arguments, from making findings adverse to the Respondent on that basis – only it bore the responsibility for meeting the case against it and

the statutory test. It may be that it is necessary to consider the commonness of a lease term differently from the commonness of lease terms collectively in a single lease. The frequency of finding the latter in the market could clearly be different from finding the former. However, in the absence of specific argument on the point I think the legislation requires at the very least that the lease terms collectively can be shown not to be rare or unknown in the market.

155. I note that the tables in the Respondent's Statement of Defence show where quarterly rent and upward only rent reviews appear in the same new EI leases, as well as an undated sample of sales recording full repairing / insuring terms and quarterly rent in advance. Counsel for the Respondent submitted that the tables of terms found in comparable leases referred to in the expert evidence show that the combination of disputed terms can be found in a good many of the leases considered, but my concerns about the limits placed on the evidence so considered are addressed in this decision, and [redacted] expressly declined to give an expert opinion on the matter. It is not for counsel therefore to do so, nor I am I satisfied on the evidence that it is safe for me to reach such a conclusion.

156. [redacted] gave evidence of the number of FOT leases which are likely to comprise the "market" for the purpose of assessing commonality, the extent of that market, and the proportion of such leases in which the disputed terms may be found. The Respondent had first instructed him to "research the FOT sector in England and Wales" by way of separate instructions given prior to those in the present proceedings.

157. In oral evidence [redacted] confirmed that these first instructions had been given only orally somewhere between 12 and 18 months ago and he had spent time over a period of about three weeks conducting his research. [redacted] recalled that he talked generally with those at EI concerning matters they thought common and not common and about how they could prove that, but he could not add more detail, saying that his recollection was not ideal. However, he had not been given, and nor did he require, written instructions to proceed with his research on the FOT sector.

158. Amongst the relevant provisions of the mandatory RICS guidance at 3.4(e)) is the requirement for instructions (to give evidence as an expert witness) to be recorded in writing, and that particular care should be applied in deciding whether to accept instructions where the expert has previously acted for a party on a matter which requires, or may in future require, the giving of expert evidence (2.6).

159. [redacted] acknowledged to me that when he accepted those research instructions he was aware that in the future he might be instructed again to give expert evidence on behalf of the Respondent in individual Pubs Code arbitrations based upon it, and he agreed that it was difficult for me to determine what in fact his initial instructions had been at that point. It cannot be verified, for example, whether he was asked to conduct research to support propositions in the Respondent's interest. The absence of initial written instructions in the circumstances was not adequately explained and means that

I cannot be satisfied that there was no conflict between them and those under which now gives evidence in these proceedings, and this serves to undermine the value of his evidence.

Methodology

160. As to methodology, he makes an attempt to assess the size of the FOT sector based on the surprisingly limited information which is available, but his evidence is not without shortcomings. Firstly, he makes a professional judgement based on data from various sources as to the size of the market, which he assesses as approximately 5,150 FOT leasehold pubs in England and Wales. His analysis of the size of that market was sensible (though he acknowledged he had not included any research on the matter by Gerald Eve, who are consulted by the Valuation Office and for whom pub rating is a strong element of their work).

161. estimates 343 new letting events per annum in the FOT sector, on average, and that two thirds of these (approximately 226) are new lettings and one third "renewals or lease re-gears/term extensions". said in his oral evidence that the majority of events could be renewals and that 226 new leases per year might be too high.

162. This matter would not be such as to undermine his evidence, however. What causes me concern, however, is the excessive weight that he places on the terms of these new leases in his evidence and his judgement as to the appropriate comparable new leases, and these matters serve to undermine his conclusions.

Free of tie agreements

163. placed his focus on new leases rather than considering the terms of any other form of FOT agreement. He observes, for example, that lease renewals are influenced by the previously prevailing leases and he excluded these from consideration in reaching the figure for the size of the market (which he then uses in his analyses of the significance of the evidence of the Respondent's lettings). I am not content with this approach however and see no reason for it. In my view it may tend to skew the evidence and the legislation does not require exclusive consideration of a subset of tie free leases. It requires consideration of "*common terms in agreements between landlords and pub tenants who are not subject to product or service ties*." The pool of FOT agreements includes tenancies and leases, sale and leasebacks, renewals, DOVs and side letter variations, as acknowledged by in his oral evidence. Thus, I do not accept his opinion as to the size of the relevant tie free market, which is much larger than he suggests.

164. He was also aware of the practice of releasing the tied

obligations by side letter (such as in relation to the , which was then released from the tie, and the circa 1998 release of a number of ties by side letter). He said, having provided valuation and sales advice in respect of the matter, had not identified if EI had executed any tie releases by DOV in a relevant period, as this was he said not of interest to him as they are not indicative where it is the landlord's choice to release the tie rather than a market lease.

Comparable Evidence

165. Setting aside these concerns, I was not in any event satisfied with consideration of the evidence of tie free leases and how that informed his judgement as to commonality. He conducted an empirical analysis of the frequency with which each of the terms in question was found in three different baskets of comparator leases:

g. All 225 EI FOT leases granted from July 2014 ("the EI leases");
h. A sample of FOT leases obtained by solicitors Gosschalks, solicitors for the Respondent ("the Gosschalks leases");
i. 14 FOT leases granted since 2016 in respect of which firm had acted as agent ("the ");
j. The 26 recent FOT leases granted by the other POB regulated by the Pubs Code.

166. discussed the modernisation of terms which take place over time and considered that recent lettings should have more evidential worth than more dated agreements, reflective of the continually changing market. He acknowledged that the legislation did not provide for the preclusion of any particular evidence but believed more contemporaneous evidence has more worth and the state of the market at the time. Whilst I do not fundamentally disagree with this approach, it was not reflected in his analysis of the comparable evidence, in that in three out of the four categories of comparable evidence he considered only new leases, and there was no consistency in or analysis of the relevance of the period represented by those baskets of comparables.

167. Where there was a variance between the commonality of a term in older and newer leases this was not identified and addressed by in reaching his conclusions. It is not clear what, if any, weight he places upon the evidence in deciding, in respect of a lease term which is not present in older leases, that it is nevertheless common.

The EI Leases

168. refers to the EI leases as being highly relevant, but he makes no reference at all to any granted prior to July 2014. It was clear from his oral evidence that he had based his expert evidence on the sample of these

leases which the Respondent has chosen to provide to him, and he confirmed that the July 2014 long stop for this evidence had been dictated by the Respondent and not by him. He could not explain the significance of this date and confirmed he had not made enquiries as to that with the Respondent or asked for any earlier EI leases to be provided to him. Surprisingly, [redacted] in his oral evidence said he had no idea either why the Respondent's sample of FOT leases given to [redacted] dated from July 2014. There was absolutely no rationale for the chosen sample available, and this is a matter in respect of [redacted] should have exercised his professional judgement.

169. The reliance placed by [redacted] on the 225 recent FOT leases granted by the Respondent needs to be put in perspective given the size of the tie free market as a whole. Moreover, he did not enquire, and there is no evidence before me to indicate, which of those leases was granted to an existing tenant (and thus whether such tenants are better able to negotiate individual concessions to the standard lease terms cannot be seen).

170. [redacted] was wrong in my view to place so much reliance on the Respondent's new FOT leases, without having had regard to the fact that (currently) there are around 70 MRO proposals on such terms that are in arbitration because TPTs have refused to accept them, and the arbitrator has yet to decide if they are common in the tie free sector and reasonable. Whilst it was argued for the Respondent that the 70 proposed tenancies in dispute are irrelevant as we do not know if it is the vehicle or terms (and which of them) that are challenged, that is precisely the uncertainty which in my view should have led to caution in placing too much weight on the recent EI leases.

The [redacted] Leases

171. It is also not clear in his report why [redacted] started his analysis of the [redacted] leases in 2016, and why he considered it appropriate that the EI and [redacted] lease samples should start from different dates. He said in oral evidence that his firm had undertaken tie free lettings prior to October 2016, but a limited amount (for example in 2014 and 2015 two pub lettings in each year).

172. The sample size is very small, and interestingly there is no letting other than the two by the Respondent in which all of the disputed terms (including as to the deposit as a multiple of the rent) appear. This is not supportive of the suggestion that the proposed lease terms are collectively common. Furthermore, the evidence of these two EI leases has been double counted - within the EI new lettings and again in the [redacted] lettings ([redacted] The evidence based on the percentages resulting is consequently unreliable.

173. [redacted] said he had included these leases because they were new (but referred to over 100 examples tie free leases which would be in his office's files in relation to valuations carried out). His evidence based on these could have been meaningful in my view.

The Gosschalks Leases

174. [redacted] confirmed that the Gosschalks research had not been carried out at his request, the exercise already having been completed – and that it was provided to him after he was instructed initially to carry out his research.

175. The Gosschalks leases were a sample of 21 lease types granted over time. The oldest in date was 1998, and the second oldest 2009, and they will have been used with more or less frequency (some of which will represent a significant number of lettings, and some only a single one). In oral evidence [redacted] said that he would expect there to be greater frequency of use for the large pub company or institutional leases, and that the landlords to the leases he did not recognise were probably used on one single occasion. However, his expert evidence did not sufficiently reference this knowledge and whether or how he had weighted this evidence as a result, and this affects its relevance.

The Regulated POB leases

176. Though it became clear that this sample was based on a request for new leases only, and without reference to any period of time, [redacted] confirmed he had not enquired of EI as to the scope of its request for evidence to the other regulated POBs.

Conclusions on the comparable evidence

177. The evidence does not demonstrate that all of these disputed terms (or their like) are found in any FOT leases other than new leases granted by this Respondent. The danger of over-emphasis on the EI leases is that it may be able to take advantage of the MRO procedure by proposing a lease which is never or rarely found elsewhere in the FOT market, and as the Respondent has said in relation to the historical make-up of its portfolio, other landlords take other approaches.

178. Where there was a large variance between the proportion of leases in each of the 4 samples (particularly between the EI leases and the Gosschalks leases) in which a disputed term was found, [redacted] did not explain to my satisfaction how he had analysed this evidence to reach a conclusion that the term was common.

179. What would have been helpful in [redacted] expert report is any indication that he had "stood back" and checked the evidence against his own professional judgement in being satisfied that the proposed lease terms were common. [redacted] said in oral evidence that this knowledge (based on the large number of leases that had passed through his office, especially in respect of valuations) largely accorded with the evidence that could be derived from the Gosschalks leases, and that these terms had been established by virtue of their longevity in the market. He considered that ultimately it is the rent which will affect the sustainability of a pub, much more than the lease terms.

He confirmed however that the fundamental terms of a commercial lease had been prevalent for a significant period of time.

180. It may be in fact that how far into the past it is appropriate to look at lease terms to see if they are common in tie free leases may depend on the particular term. Some terms will have been established in the market for a long time (e.g. full repairing covenant) and some more recently. Other factors may be of relevance in weighing the relevance of terms in comparator FOT leases in addition to frequency and date (such as the type of agreement, property type and location). These factors were not addressed in [redacted] evidence and it is unclear where the relevance of the longevity of terms fits with his emphasis on the consideration of new leases.

181. I do note that the Claimant has not produced any expert evidence. However, his approach risks the evidence being weighted towards the small number of new tie EI free leases on standard terms which represents a tiny proportion of the tie free market, and that this can quickly suggest a commonness which, standing back, may not actually exist in that market as a whole. The legislation refers to terms not common in tie free leases, and not to terms not common only to new tie free leases available on the market as at the date of the MRO proposal. Furthermore, recent evidence only does not indicate convincingly that such terms are reasonable. The test of time will tell if they are sustainable for tenants or simply too unfavourable. Leases with greater longevity will more easily be shown to be not unreasonable in the general sense.

182. In my view the legislation requires consideration of whether the effect of the wording the particular clause is common, not just whether a clause of a particular type is common, but [redacted] was not entirely consistent as to how he would approach the question. He said that when assessing, for example, the commonality of a keep open clause he would be looking at how common any keep open clause is, and not how common that particular keep open clause is, but when considering the commonness of a term as to a deposit, he would be looking at the commonness of a term as to a deposit of that particular size.

183. [redacted] said he would not assess commonality differently for the type of agreement, term, pub and location, but it seems to me that this might be a relevant consideration. What are common terms for a pub in a rural location may not be common terms for a city centre pub, for example, and [redacted] agreed that he could not give evidence that common terms in short leases (of less than 5 years) were the same as common terms for leases of longer length.

184. It seems to me for all of the reasons above that the resulting conclusions in [redacted] were not helpful to me, and the extent of evidence considered could tend to advantage the Respondent's case. I would add by way of comfort that the task [redacted] undertook is a novel one the need for which has been created by this legislation, and it cannot be easy to be among the first to approach giving expert evidence in new legal territory without

decided authority as to its proper scope. No doubt therefore many of my observations will be treated as useful guidance to the Respondent and expert alike

185. Only once a term is accepted in the relevant comparator part of the open market can it be common. Commonality can change, but this does not happen quickly. The legislation requires that the MRO tenant cannot be at the vanguard of that change. The MRO terms follow the tie free market, and form part of it, but do not define it. By looking at commonality over time can we can better understand that component of reasonableness. This standard lease is a relatively recent development by EI, and not long established in the market on the evidence produced by the Respondent. Thus, there is insufficient evidence before me that this standard lease is common in the tie free market. This in my view has been reflected in the incremental concession of 12 of its terms.

Conclusion and appropriate order

186. The Respondent has done no more than plead to the commonness of the individual terms and has not met the challenge to the reasonableness (including commonness) of the lease terms as a whole. For that reason, and as a result of my findings as to the range of harsh conditions imposes on the grant of a new lease, the Respondent's case fails. I find that the proposed MRO tenancy is not compliant as it contains terms and conditions which are unreasonable (including uncommon).

187. In circumstances where I conclude that an MRO response does not comply with regulation 29(3), the Code provides merely that I may "*rule that the pub owing business must provide a revised response to the tied pub tenant*". The Respondent accepts that in these circumstances it is within my power to make a determination as to what changes are required to the Respondent's MRO response to make it MRO-compliant and to direct that such revised response be provided pursuant to regulation 33(2). Standing back, however, I am satisfied that I should order the Respondent to give a revised MRO full response but not persuaded that in the present case I should exercise the power to order the specific terms of the revised MRO proposal that are compliant.

188. Firstly, this is because on the evidence presently before me I may fall into error if I make a selection of terms which are required to be altered. I would have insufficient confidence on the evidence available that I would be ordering common terms (individually and collectively).

189. Secondly, whilst both parties have put forward arguments to me as to the reasonableness of each disputed lease term (which I have not set out in this award), after careful consideration I find that it would not be appropriate or of value for me to reach a determination as to whether in isolation each term is reasonable in the more general sense.

190. As discussed above, reasonableness may not be an absolute, and all of the proposed lease terms have to be looked at in the round, after effective negotiations between two motivated parties. In the present case (whilst I obviously have no knowledge of the content of any without prejudice correspondence) it is quite clear to me that, owing to both parties' respective erroneous positions in these proceedings, no such effective negotiations could ever have taken place.

191. The Claimant has taken a principled, intransigent, but ultimately incorrect view on the issue of the vehicle. The real question in this case is not, in fact, what is the correct vehicle for the MRO, but whether the terms and conditions of the proposed MRO tenancy are not unreasonable. A clearer focus on this in most cases (rather than on the mode of delivery) will be necessary to facilitate the effective resolution of this dispute and the efficient management of arbitrations by the PCA.

192. As for the Respondent, I am satisfied that its aim in the MRO process to persuade the Claimant to stay tied will have tainted its negotiating position. It has not treated the Claimant as a targeted operator it is motivated to release from the tie, and it has not been even handed or fair in the manner in which it has presented the offer (which was unequivocally done in a way which sought to discourage the TPT from taking the MRO option). That is not a free-standing breach of the Code, but it is evidential as to its unwillingness to offer reasonable terms which fit this tenant and supports my conclusion that the terms and conditions are not reasonable in light of the Code principles.

193. The landlord is now aware that it must be careful not to make the MRO unattainable owing to unreasonable costs, particularly entry costs, both in offering the terms and conditions of the MRO proposal, and in the manner of their presentation. It has incrementally, including subsequent to the hearing, made concessions on the proposed lease terms. The number and extent of those concessions in this case (which I have not set out in this decision) and more generally as to its standard lease terms since the introduction of the MRO, serves to my mind to emphasise the unreasonableness of its starting position. It is not appropriate for me, for the reasons given, to express a view as to whether it has now moved far enough.

194. It seems to me that two properly advised parties who are motivated to negotiate a new lease will be good arbiters of what is common and reasonable in the tie free market. They will between themselves be well placed to take a view on whether the lease terms as a totality are uncommon in tie free leases and will be the best judges of what is reasonable for them. Now that they are aware of my findings, they have the opportunity to negotiate the terms of a new lease. They have a duty to seek to agree them.

195. In the event that the revised MRO proposal is referred for arbitration on the issue of reasonableness, it may be necessary to take a very different approach to the evidence which will be of assistance to the arbitrator in deciding what lease terms would be not uncommon or unreasonable. The arbitrator should be particularly concerned that an award in respect of any

such referral should be effective to resolve the dispute as to the compliant terms of the MRO tenancy, and may therefore be assisted by neutral expert advice throughout the proceedings, including at the time of making any order, as to the individual and collective commonness of the proposed terms (and of alternative terms for the purpose of a ruling in the event that they are not). The arbitrator may therefore consider, in consultation with the parties, whether the early appointment of an expert under section 37 of the 1996 Act is appropriate to advise throughout the proceedings.

196. The arbitrator would have the opportunity carefully to consider the question of appropriate adverse costs orders in any such case in which there is no sufficient evidence of effective negotiation by both parties.

Operative provisions

In the light of the above:

- The Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant;
- The revised response must be provided to the Claimant within 28 days of the date of this Award, and a copy provided to the PCA;
- Jurisdiction in respect of any dispute as to the MRO-compliance of the revised response is reserved to the DPCA;
- Costs are reserved.

Arbitrator's Signature …… ……

Date Award made ……22 June 2018……

Claimant's Ref: ARB/000261/MASON

Respondent's Ref: ARB/000261/MASON

IN THE MATTER OF **Ref:** [redacted]

THE PUBS CODE ARBITRATION BETWEEN: -

[redacted] **Claimant**

(Tied Pub Tenant)

-and-

EI GROUP PLC

First Respondent

(Pub-owning Business)

-and-

UNIQUE PUB PROPERTIES LTD

Second Respondent

Award

Summary of Award

The proposed tenancy is not MRO-compliant, and therefore the POB has failed to comply with the duty under regulation 29(3)(b). The POB must give a revised response which is MRO-compliant.

Introduction

1. The seat of this arbitration is Birmingham, England. The applicable law is that of England and Wales.

2. I, Ms Fiona Dickie, Deputy Pubs Code Adjudicator, am the arbitrator. I replaced Mr Paul Newby, Pubs Code Adjudicator, as arbitrator of this dispute on 04 December 2017. I act pursuant to my powers under regulation 58(2) of the Pubs Code etc. Regulations 2016 ("the Pubs Code") and paragraph 5 of Schedule 1 Part 1 of the Small Business, Enterprise and Employment Act 2015 ("the Act").

3. The Claimant and is the tied pub tenant (TPT) of the ("the Pub"). On 2002 the current lease of the Pub was granted for a term of 30 years from 2002. On this lease was assigned to the Claimant. The Respondent pub-owning business ("POB") is Ei Group Plc of, 3 Monkspath Hall Road, Solihull, West Midlands, B90 4SJ.

4. On 03 February 2017 the Claimant gave the Respondent a notice (an "MRO notice") in relation to the Pub in accordance with regulation 23 of the Pubs Code.

5. On 21 February 2017 the Respondent purported to send to the Claimant a "full response" for the purposes of regulation 30, including a proposed tenancy ("the proposed MRO tenancy") which is the subject of this dispute.

6. On 06 March 2017 the Claimant made a referral to the Office of the Pubs Code Adjudicator under regulation 32(2)(a), which provides for the TPT or the POB to refer the matter to the Adjudicator where the POB does not send a full response (in this case) under regulation 29(3). The duty on the POB under that regulation which the TPT disputes has been complied with is that in sub-paragraph (b) to send to the tenant a proposed tenancy which is MRO-compliant.

7. The Claimant is represented by Mr Chris Wright of the Pubs Advisory Service. The Respondent is represented by Gosschalks Solicitors.

Procedure

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

9. The following is a brief chronology of the case management—

    a. On 31 May 2017 the Claimant submitted its Statement of Claim.

    b. On 14 June 2017 the Respondent submitted its Statement of Defence.

    c. On 27 June 2017 the Claimant submitted a Response to Defence.

    d. On 11 July 2017 the Respondent submitted a Reply to the Response to Defence.

10. The Respondent sought and was granted permission to file an expert witness report on whether disputed terms of the proposed lease were common terms. The Respondent relies on the report of [redacted] dated 15 January 2018.

11. An oral hearing took place on 9 and 10 May 2018 at the CIArb, 12 Bloomsbury Square, London, WC1A 2LP, at which Mr Wright appeared for the Claimant and [redacted] of Counsel for the Respondent.

Issues

12. While the parties had the opportunity to agree a list of issues in dispute, this was refined for the purpose of the hearing by the use of a Scott Schedule, which I have used as my guide in understanding what remains in dispute. I have not considered it appropriate to structure this decision to deal with each of these issues in turn as they are set out in the schedule, but my award makes a determination on all matters in dispute between the parties. As summarised by [redacted] in his helpful Skeleton Argument, the issues sub-divide into two categories; the method of delivery of MRO and the disputed terms of the tenancy.

13. One of the requirements for a tenancy to be "*MRO-compliant*" is that the tenancy "*does not contain any unreasonable terms or conditions*" (section 43(4)(a)(iii) of the Act). Section 43(5) provides that the Pubs Code may specify descriptions of terms and conditions which "a*re to be regarded as reasonable or unreasonable for the purposes of subsection (4)*". Regulation 31 of the Pubs Code provides that one category of "*unreasonable*" terms as specified are "*terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.*"

14. The Respondent POB has purported to offer an MRO option, compliant for the purposes of section 43(4) of the Act, by way of an offer of a new lease in draft form. The Claimant's principal arguments are that the terms of the proposed MRO tenancy are not compliant, falling foul of section 43(4)(a)(iii), in that:
    a. the use of a new lease (as opposed to a deed of variation ("DOV")) as the vehicle for delivering the MRO option is unreasonable and
    b. the terms of the proposed new lease are unreasonable.

15. The position of the Claimant is, broadly, that the use of a new lease as the MRO vehicle (as well as many of its terms) is unreasonable given the terms of the existing lease, and the effect of the new lease and its terms on the TPT and are uncommon in tie free leases. The Respondent, on the other hand, says that the terms of the proposed lease are indeed reasonable, and has produced expert evidence and other tie free leases in support.

PCA Advice

16. A number of the issues in this arbitration are the subject of the PCA and DPCA Advice Note published on 2 March 2018. This is advice under s.60 of the Act, and not guidance under s.61, and is therefore not a matter which I am required to take into consideration in determining my award. As advice to POBs and TPTs and their representatives, it is open to any person to seek to persuade me that the Advice Note is wrong, or that for some other reason it should not be the basis of my decision. As the Advice Note states, it is based on the consideration of arguments put forward in a number of arbitrations determined prior to its issue. It also makes clear that it can be revised from time to time.

17. The Respondent does not agree with the content of that Advice but agreed with my summation of the situation in respect of this referral. I have a statutory duty to carry out functions both as regulator and arbitrator. Notwithstanding that I have exercised my statutory powers to give advice, as arbitrator I have a duty to consider evidence and argument impartially, and not to prejudge the issues in this case. This I have done.

Consolidation

18. This case had by consent been consolidated with three other referrals for the purposes of the hearing. The Claimants in these cases are different, although the Respondent is the same in each. There has been a limited waiver of confidentiality by the parties up to the hearing but not beyond, the Respondent requiring a separate confidential Award to be issued in respect of each referral.

19. The question of whether the MRO vehicle should be a new lease or a DOV is one which has taxed the industry since the introduction of the Pubs Code. The Claimants' representatives have all been involved for many years in campaigns on behalf of pub tenants, and specifically in relation to the development of the Act and the Code. The argument that the proper vehicle for the MRO is a DOV is therefore contextualised by their expectations of what the Code would offer.

20. The Claimants' representatives, in addition to their campaigning activities, also offer their services to tied pub tenants as representatives in arbitrations before the PCA. It is public knowledge that the top issues in arbitrations to the PCA to date have been in relation to the MRO full proposal, and that the most significant and repeated challenge has been to the fact that a POB has made an offer of an MRO by way of a new lease. The Respondent is a regulated POB with a large estate and is a party to the largest number of arbitrations by far.

21. The strain placed on the PCA resources by this large volume of individual and confidential arbitrations which repeatedly raise overlapping issues is well known and in the public domain. I invited the Respondent to consent to the consolidation of a number of arbitrations, which I would then hear at an oral hearing, in order to seek to bring as much clarity as possible to the issues which repeatedly dog arbitrations in respect of MRO compliant proposals. Claimants' representatives and the Respondent have both had a full opportunity to put arguments before me as to the proper application of the statutory provisions.

Vehicle for the MRO Option

22. The Claimant contends that the DOV is the most common method of tie release, and the simplest and most effective (including cost-effective) method of achieving an MRO compliant tenancy and delivering parliamentary intention, in that with minimal variation the terms of the existing tied lease could be varied to make them MRO compliant. The Claimant considers that surrender and regrant of a new lease is not the common method of releasing the tie in a tied lease, is an unnecessary, time-consuming and onerous way of effecting the MRO option, and that the Respondent has in fact chosen to offer a wholly new tenancy in order to impose a set of new and unfavourable terms most disadvantageous to the tenant.

23. With the exception of the trading obligations, says the Claimant, the other terms found in the current lease of the Pub are commonly found in free of tie ("FOT") agreements. I note that under Schedule 6, paragraph 7(1) the terms of the existing lease (as is common in tied leases), the Respondent has the unilateral right to sever the tied trading terms by notice. However, releasing the tie in this way would not in itself create an MRO-compliant tenancy (not least because the provision allows the Respondent to re-impose the tie at any time). The Claimant argues however that it is unreasonable for the Respondent not to effect the MRO via the simplest, most cost effective and common method available, being a DOV to that lease, amending the lease terms (which are not compliant), but only to the minimum that is necessary.

24. The Claimant argues therefore that the vehicle by which an MRO tenancy is proposed should be a DOV of the existing tenancy, and not a draft new lease. It was (as confirmed orally at the hearing) not contended by the Claimant that the legislation prohibits an MRO option by way of a new lease, but rather that its use is unreasonable or unfair.

25. In response, the Respondent's position is that it is restricted by the statutory language from using a DOV as the legislation requires that an MRO option must be offered only by way of a new lease. Alternatively, it argues that if an MRO compliant tenancy may be in the form of a new lease or a DOV, it alone has the choice of which vehicle to use and there is no provision in the Act or the Code for a tenant to challenge that choice. Therefore, a matter of statutory construction arises as to the form of the vehicle by which an MRO option may be given.

Applicable Law

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

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

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

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

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

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

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

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

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

Terms and conditions required in proposed MRO tenancy

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

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

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

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

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

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

31 – (1) Paragraph (2) applies where—

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

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

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

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

…

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

(3) Paragraph (4) applies where—

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

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

(4) The terms and conditions of the proposed MRO tenancy, taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy, are to be regarded as

unreasonable for the purposes of section 43(4) of SBEEA 2015 if they exclude the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to the proposed MRO tenancy.

Burden of Proof

31. It was conceded on behalf of the Respondent that it bore the burden of proving that the tenancy is MRO compliant, which includes showing that the terms are not uncommon. The Respondent's position was that the Claimant who advances a case that some other type of term or tenancy would be compliant bears the burden of showing that term is not uncommon, and that if a counter-proposed term is not shown by a Claimant to be common, it is itself "uncommon" and automatically non-compliant by virtue of being unreasonable. It was argued for the Respondent that the Claimant, not having produced expert evidence, could not show that any other terms could be compliant and replace any disputed terms found by me to be non-compliant. Thus, said the Respondent, a finding of non-compliance might lead to the absurd situation of there being no compliant lease possible.

32. The matter referred for arbitration is the dispute as to the compliance of the lease terms proposed. I reject the Respondent's argument as being applicable only to the extent that I am ruling on the specific terms that are to be included in an MRO-compliant tenancy. If on a referral the POB considers that not only is a proposed term common, but it is the only common term of that nature, that is for the POB to prove.

Detriment under regulation 50

33. The Claimant originally contended that the proposed MRO tenancy in the form offered by the Respondent constitutes a detriment under regulation 50 of the Pubs Code, which provides:

    Tied pub tenant not to suffer detriment

    A pub-owing business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.

34. For the avoidance of doubt, I will say at this point that regulation 50 does not provide a means to circumvent the provisions of the Pubs Code in respect of the MRO procedure. A dispute under regulation 50 is a separate challenge to an MRO challenge to the full response under regulation 32, and separate time limits apply. Regulation 58 makes reference to referrals to the PCA in respect of the MRO procedure, and does not list regulation 50, which is therefore not an MRO provision of the Pubs Code. Section 49(2) of the Act therefore applies. If the Claimant wishes to maintain a referral under regulation 50 then it must make a referral following the correct notice procedure. Parliament provided a specific means for challenging the MRO full response, and it was not the legislator's intention that regulation 50 be used as an alternative means for doing the same thing. In my view, the detriment relied upon must be outside of the challenge to the MRO proposal itself. It however was in any event conceded

by the Claimant that it would not pursue a complaint under regulation 50 in these proceedings.

Statutory Interpretation – the MRO Vehicle

35. It is immediately clear on reviewing the relevant legislation that there is no express provision in either the Act or the Pubs Code which states that an MRO-compliant tenancy must be provided either by way of a new lease or by way of a DOV. Indeed, there is no express provision as to its form at all, only as to its terms and conditions.

36. For the sake of completeness, I observe that it seems to be clear that the legislation does not by implication require an MRO-compliant option to be given only by way of a DOV. Regulation 30(2) provides that an MRO tenancy will only be MRO-compliant if its term is at least as long as the remaining term of the existing tenancy, and its term can therefore expire after the date of expiry of the original lease. As a matter of law, where the term of a lease is extended by way of a DOV, it operates as a surrender of the existing lease and a grant of a new lease[1]. Furthermore, if the proposed tenancy was intended to be achieved by variation of the existing tenancy only, there would be no need for the provisions in regulation 31(3) and (4) preserving rights under the Landlord and Tenant Act 1954 ("the 1954 Act") afforded where they apply to existing leases, as such protection would be unaffected. Lastly, where the existing TPT is a tenant at will (as per section 70(2) of the Act) because pursuant to section 43(4)(b) an MRO tenancy cannot be a tenancy at will, the MRO must therefore must be a new tenancy.

37. Counsel referred me to text[2] and authorities[3] to remind me of the route to interpretation of a statute. It is necessary objectively to ascertain, by the language of the relevant statute / statutory instrument, what Parliament intended. The language of the statute or regulation should be given its natural meaning rather than a strained one. Importantly, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule is that legislation should be construed according to the intention expressed in the language, and sight of this must not be lost. Regard should therefore first be had to the words themselves.

38. I am not persuaded that the word "tenancy" (in and of itself) gives any particular guidance; a DOV, when incorporated into the existing lease, will comprise a tenancy just as effectively as a new lease. It is the position of the Respondent that the statutory language is that of a separate agreement being entered into. However, I note that absent are clear words on the matter - such as the "grant" of a tenancy or its "commencement", or the "termination", "surrender" or "end" of the existing tenancy. The language used, for example "accept" and "enter

[1] Friends Provident Life Office v British Railways Board [1996] 1 All ER 336.

[2] Craies on Legislation (11th Edition, 2017): extracts (paras. 17.1.1 to 17.1.6 and 27.1.11.1)

[3] Melville Dundas Ltd. V George Wimpey UK Ltd. [2007] 1 WLR 1136 and Christian UYI Limited v HMRC [2018] UKUT 10 (TCC), where the principles were summarised.

into” in regulation 39, is to my mind consistent with a new tenancy or a varied one.

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

> *The Pubs Code may specify descriptions of terms and conditions—*
> *(a)which are required to be contained in a tenancy or licence for it to be MRO-compliant;*
>
> *(b)which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).*

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

41. The Respondent sought in my view to place too much emphasis on the power delegated by section 44(1)(a) of the Act, which provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option (referred to in this Part as “the MRO procedure”) …*". This delegates to the Code the procedure in connection with an offer of an MRO option, and not the form or content of the proposal, which is the subject of the separate delegation in section 43(5).

42. The Respondent relies on a number of provisions in the Pubs Code as indications that Parliament intended that the MRO option was to be implemented by the grant of a new tenancy rather than a DOV. I have considered these, and whether it is possible to construe the legislation in the way the Respondent suggests it must be, looking at the way in which the term “tenancy” is used in context within the legislation:
    a. Regulation 29(3) requires the POB to send to the TPT “*a proposed tenancy which is MRO-compliant*”
    b. Regulation 30(1)(a) and (c) refer to the "*existing tenancy*" and a "*proposed MRO tenancy*"

c. Regulation 30(2) refers to the term of the existing tenancy and the term of the proposed MRO tenancy, which must be "*at least as long as the remaining term of the existing tenancy*". This language, says the Respondent, pre-supposes the grant of a new term of years, not the continuation of an existing one (noting that if an existing term is extended by DOV, in law a new tenancy is created).
d. Regulations 34(2) and 37(1) refer to the *"proposed tenancy or licence".*
e. Regulation 39(2) and (4) (dealing with the end of the MRO procedure) refer to the POB and TPT *"entering into"* the tenancy or licence. The Respondent argues that this language is not appropriate for the execution of a DOV.

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

    b. Section 43(4)(a) sets out the circumstances in which a tenancy or licence is "MRO-compliant" and in doing so refers to the "t*enancy or licence" "taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owing business in connection with the tenancy or licence*". It was the Respondent's case that this does not support the argument that a DOV is permitted. For the purposes of the Pubs Code, the *"proposed tenancy"* is the MRO tenancy. As the Respondent understands the Claimant's case, this must be the existing tenancy and the DOV together. The reference to any *"other contractual documentation"* in section 43(4) must, the Respondent submits, be to something other than the MRO-tenancy, i.e. side-letters or collateral agreements. That being so, however, I do not see that the Claimant's case that the MRO tenancy can be the existing tenancy plus a DOV is undermined.

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

45. Having considered all of these provisions, I am not persuaded that there is anything in the way that the term tenancy is used in context that indicates that the MRO should only be offered by way of a new lease. There is nothing in the use of the phrases "existing tenancy" and "proposed tenancy" in regulations 30 and 31 to suggest that the existing and proposed tenancy must be different tenancies – i.e. that the latter must bring an end to the former, or that the proposed tenancy must be completely contained within a new document from that of the existing tenancy. Parliament chose not to make provision that a compliant MRO proposal must contain a new tenancy to be granted upon the surrender of the existing one, though it might easily have done so. The provisions relating to the market rent (in section 43(10) of the Act) relate to the

rent under the MRO-compliant lease, but do not inform what those lease terms and conditions are.

46. Furthermore, I am satisfied that the draftsman was alive to the need to specify a “new” MRO tenancy, if that was necessary to distinguish it from the existing tenancy, if such a need existed. The expression "new tenancy" appears in the Code no less than 19 times (within the definition of "new agreement", which refers only to a new tied tenancy). It would have been simple for the draftsperson to have made clear any restriction such as is argued by the Respondent to exist, and the complete and consistent failure to do so in the language of the Code demonstrates plainly in my view that no such restriction was intended.

47. To show that how the MRO-compliant lease was to be delivered was in the Government’s contemplation, the Respondent relies on correspondence to the then Secretary of State Vince Cable MP dated 25 October 2013 from CAMRA and others advocating the MRO option, which referred expressly to the expectation that the POB would issue a DOV, to show that how the MRO-compliant lease was to be delivered was in the Government’s contemplation. However, this only serves to demonstrate that, having been asked to contemplate a DOV, the Secretary of State did not make regulations which expressly prohibited it.

48. Several extracts from Section 9 of Part 1 of the Government Consultation on the new Pubs Code (October 2015) are relied upon by the Respondent. However, the fact that open language has been used does not mean that its meaning is unclear. I do not consider that it is. On the contrary, the ordinary meaning of the language is permissive of either a new lease or a lease varied by deed, and this is not a reason to look at other material to seek to interpret the ordinary meaning in a more restrictive way.

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

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

50. Furthermore, the Respondent directed me to no consultations prior to the passing of the Act, where the definition of an MRO-compliant tenancy is found (this is not surprising given that the MRO option was the result of an amendment passed unexpectedly), and Parliament cannot retrospectively express intention.

51. Nevertheless, if regard is to be had to the consultation documents, I do not find support in them for the Respondent's position. A number of references are extracted from Section 9 of this consultation, which considers the powers to be

delegated under section 43(5) in respect of the compliant MRO tenancies, including:

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

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

53. The Respondent also relies on a few other extracts which refer to a new (MRO) agreement. The expression "new tenancy" is not found, however, even in 9.6 and 9.8 where a tenancy has already been referred to in the sentence, and the expression "new agreement", which is not consistently used in the consultation, is not the unequivocal marker of intention the Respondent seeks. In 6.13 a "new agreement" which will end a rent assessment does not need to be a new tied tenancy after surrender of the old. The Respondent is to my view reading too much into the selected words of the consultation (and the Government's response to the consultation dated April 2016, where the expression "new agreement" does not occur in the context of the MRO at all).

54. Powers to make provision in relation to the MRO procedure, delegated under section 44(1), are considered in section 10 of the same Consultation, from which the only reference relied upon by the Respondent is:

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

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

56. Looking at these passages, they are far from conclusive. The Respondent looks for the silver bullet within them but, in my opinion, it is not there. These extracts cannot be viewed too selectively to be understood to point towards a prohibition

on a DOV. These are a few of many references in the consultation documents to the MRO agreement. Read as a whole what is obviously lacking is any direct and decisive comment on the permissible vehicle for the MRO, which is consistent with an intention not to make unjustified intervention in commercial dealings between the parties.

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

58. The Claimant argued that on its true construction the option defined in s.43(2)(a) of the Act is an option for the tenant to continue occupying the tied pub on the same terms as his existing lease, save only to the extent that it is necessary to vary those terms to ensure compliance for the purposes of s.43(4). However, I reject this argument. It should also be observed that the legislation, in not prescribing the contents of the MRO-compliant tenancy except as set out in section 43(4) and regulation 31, has not expressly required that the terms of the MRO-compliant tenancy remain the same as the terms of the original tenancy, with variation only of the rent and severance of the tie. This is consistent with the MRO vehicle not being restricted to a DOV and is another matter for which there could easily have been provision if that was the legislator’s intention. The Claimant directed me to no substantive argument on matters of statutory interpretation which could lead me to another conclusion.

MRO-compliant Tenancy

59. It was clarified and conceded at the hearing by the Claimant that each of the terms objected to would individually be "common" in FOT agreements when seen in isolation from each other, but the Claimant continued to contend that the terms (including the choice of vehicle) were unreasonable.

60. The specific terms and conditions of the proposed MRO tenancy disputed by the Claimant are as follows.

    a. Firstly, that the Permitted Use of the Pub in the proposed MRO Tenancy is wider than under the current lease, which the Claimant does not need, and it claims is likely to increase the rent. The Respondent contends that no evidence was advanced by the Claimant in relation to any disadvantage caused by the user covenant.

    b. That rent would be payable quarterly in advance. The Respondent argues that a requirement for quarterly rent payments is common and that this is supported by expert evidence.

    c. That the Claimant would be required to undertake to pay the Respondent's costs on assignment. The Respondent asserts that this is a standard provision in a commercial lease.

d. That any permitted alterations should be carried out "to the satisfaction of the Company". The Respondent has agreed to qualify this so that alteration must be carried out to the landlord's "reasonable satisfaction".

e. That the tenant must pay the landlord's reasonable costs relating to “Any breach or suspected breach of the Tenant’s obligations” and that there is a requirement for the tenant to give prior security for those costs. The Respondent argues that this is common in free of tie agreements.

f. That there is provision for determination of the open market rent by an independent surveyor acting as arbitrator. The Respondent contends that this is common in free of tie agreements.

g. That the tenant must undergo a credit check. The Respondent has confirmed that it will bear the costs of any credit check.

h. That the tenant must complete a business plan.

i. Finally, that the Claimant would be liable for legal costs of the Respondent in relation to the new lease. During the proceedings, the Respondent has conceded that it will not seek any contribution from the Claimant towards its legal costs of executing an MRO-compliant tenancy.

61. The Respondent's primary argument is that the Secretary of State has specified what terms are to be regarded as unreasonable and (aside from the specific categories in regulations 31(2)(a) & (b) and (3)), that is to be determined by what terms are common in agreements between landlords and FOT tenants. At the conclusion of the hearing I gave permission to the Respondent to make written submissions in response to the Claimant's oral submissions as to reasonableness of the particular terms in dispute. These were received on 18 May 2018. I see that in the written submissions the Respondent makes open offer of concessions on certain matters, although it emphasises that it does not consider it is bound to offer them. In relation to this case the Respondent, taking into account that there is a £10,000 deposit, that existing rent is payable monthly and the level of SDLT that would be payable, it would offer 12 months to move to quarterly rent.

Statutory Interpretation – section 43(4) and regulation 31

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

63. It is necessary first to consider whether the terms set out in that regulation are an exhaustive list of all unreasonable terms and conditions, as the Respondent suggests, but it is clear to me from a straightforward reading of the legislation

that they are not, and are merely particular examples of unreasonable terms. Section 43(5)(b) is a power not a duty, and section 43(4) renders a tenancy non-compliant for any unreasonable terms or conditions, notwithstanding that the Secretary of State might not have chosen to exercise that power to specify descriptions of terms and conditions to be regarded as reasonable or unreasonable. It is still necessary for all terms and conditions in the proposed tenancy to be reasonable in a broader sense.

64. The referral under regulation 32(2)(a) can be made where the POB does not send a full response under regulation 29(3), and that regulation requires the POB to send an MRO-compliant proposed tenancy. The definition of such a tenancy is in section 43(4) of the Act so it is clear to me that the Pubs Code Adjudicator has jurisdiction under the regulations to determine whether the tenancy complies with the requirements of that section.

65. Therefore, determining MRO-compliance is not simply a question of looking at each individual term to decide whether it is uncommon for the purposes of regulation 31, but whether the proposed MRO tenancy contains terms or conditions which are unreasonable.

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

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

Is the choice of MRO Vehicle subject to the test of unreasonableness?

68. The Claimant argues that the MRO-compliant tenancy should comprise the tied tenancy, minus the tied trading provisions, and with a revised rent, and that this would be a straightforward thing to achieve. However, I am not persuaded that

this would amount to an "MRO-compliant tenancy" as provided for in the Code, as it may contain uncommon or otherwise unreasonable terms in a FOT lease, individually or collectively.

69. The Respondent submits that (if it is wrong that the MRO vehicle can only be a new lease) the mechanism by which the MRO tenancy is brought into effect is not a "term" or "condition" contained in the MRO tenancy, and that there is no obligation or other condition (express or implied) to enter into a new tenancy or a DOV. Thus, it argues, the POB's decision as to the MRO vehicle cannot be subject to the test of unreasonableness. However, I do not accept this limited interpretation. Section 43(4) refers to a tenancy being MRO-compliant if "*taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence*" it does not contain any unreasonable terms and conditions pursuant to subsection (iii). I am satisfied that this is broad enough to encompass the requirement (as set out in the covering letter with the MRO proposal referred to in the evidence of [redacted] and dealt with below), to enter into a new tenancy.

70. Counsel for the Respondent in fact conceded that there were requirements specified in the MRO full response which were capable of being conditions contained within the MRO tenancy. The supposed distinction between such conditions and the requirement to surrender the existing tenancy was not substantiated at all.

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

Unreasonableness

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

reasonable in one case for one particular pub may not be reasonable for another, and a blanket approach by the POB will therefore not be appropriate.

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

74. It is the Respondent's position that these core principles are relevant to the interpretation of the express provisions of the Code (because the regulations were required to be made in terms which adhere to these principles) but that they are not "free standing" in that they do not impose duties or obligations on the parties outside of the express terms which regulate the conduct of parties in the Code. I agree that these principles do not impose free standing rights. However, the Respondent argues that accordingly the question of whether it has complied with the statutory duty to send an MRO-complaint proposal cannot be answered by an appeal to the Code principles, including to "fairness". For the reasons which follow I do not agree with the Respondent's position.

75. It is clear that the core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the Pubs Code (including any regulations made under the power delegated in section 43(5)) are to be interpreted as consistent with the two core principles, if the provisions in the Act (in this case, as to reasonableness in section 43(4)(a)(iii)) are not, there would be a fundamental incompatibility between these instruments. I am furthermore satisfied that, were the language in the Act and Pubs Code not consistent with these principles, the Secretary of State would not have enacted the Pubs Code in its current form.

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

The Pubs Code Principles

Fair and lawful dealing

77. Its long title states that the Act is "*to make provision for the creation of a Pubs Code and Adjudicator for the regulation of dealings by pub-owing businesses*

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

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

No Worse Off

79. The second core principle requires a comparison of the position of TPTs with tenants who are tie free, and the former are intended to be no worse off than the latter. I am aware that this has been a principle in tied pub rent valuation since at least 2009, when it was referenced in RICS guidance. It is not for me in this decision to consider an exhaustive definition of this principle, but provisionally it would seem to me to be a judgement of fact and degree in each case whether a TPT is worse off. That judgement would include financial matters, particularly profit, but could it seems also include considerations not directly expressed in financial terms – for example a difference in bargaining power and the reduced risk in having a tied deal, or the business support available to a TPT from a POB may be something of value for the TPT. By pursuing the MRO option, the TPT should be in the position of being able to compare, and make an informed choice between, the two options.

The Application of Pubs Code Principles

80. It is consistent with the Pubs Code principles that the proposed tenancy which is made available to the TPT through the MRO procedure is not on worse terms and conditions than that which would be made available to a FOT tenant after negotiations on the open market. This is for two reasons. Firstly, if the POB was able to get more favourable terms from the TPT using the MRO procedure than it would on the open market, this would not be fair dealing. Secondly, the TPT would be worse off in having a choice to accept terms which were worse than would be available to a FOT tenant, including an existing FOT tenant renegotiating lease terms. In any event, it seems to me that these principles

follow from the general concept of reasonableness, taking into account the relative negotiating positions of the parties within this statutory scheme.

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

82. The commercial relationship between the TPT and the POB on service of an MRO notice is different. The TPT (except at renewal) does not have the right to walk away or contract elsewhere. It only has the right to keep its current tied deal or to accept the offer. Even at renewal, any goodwill earned will be a relevant consideration for the tenant, as will the availability of the County Court's jurisdiction to determine reasonable terms of the new tenancy. The TPT in the MRO procedure is not in an open market position, and I consider terms or conditions which were less favourable because of that fact would be unreasonable and inconsistent with the core Code principles.

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

84. I was referred to the "Impact Assessment on the Pubs Statutory Code and Adjudicator", dated 28 May 2014, which summarised that cumulative evidence received by the government has clearly established that in too many cases tenants are unable to secure a fair share of risk and reward in their agreements. It identified as one of the problems the inequality of bargaining power between pub company and tenant, saying "*Pubcos should recognise that they have a responsibility to ensure they do not exploit their position of economic strength*". The Code was intended to result in a transfer of profit from the pub companies to the tenant, where the tenant is currently being treated unfairly (the level of unfair treatment, and the value of this transfer, was unclear).

85. That is a recognition of the financial pressures upon tied pub tenants. Such pressures should not themselves represent an insurmountable obstacle to the exercise of the MRO option. Thus, though the current circumstances of the TPT are said by the Respondent to be irrelevant, I do not think that can be so. Parliament clearly did not intend that a TPT whose profit is being unfairly affected by a POB under a tied lease should be prevented from accessing the MRO because they have not made sufficient profit to afford high entry costs. It is unnecessary to analyse whether the particular tenant has been treated unfairly. High costs should not unreasonably prohibit access to the MRO.

86. The occurrence of a specified event is something which Parliament intended should give rise to a meaningful right to go tie free. Part of a tenant's anxiety about the proposed MRO tenancy can be accounted for in the MRO rent being determined after the arbitration as to the compliant terms of the proposed tenancy. In that way, the tenant cannot be sure how more onerous terms will be reflected in the MRO rent. The terms of a lease (e.g. whether it is a full repairing lease) will in general be reflected in the rent for the pub (as the Respondent's expert witness confirmed). However, that seems to me to be fundamentally different from a consideration of entry costs.

87. Take, for example, a significant increase in price (an event which pursuant to regulation 24 gives the TPT the right to serve an MRO notice). This significant price increase would be a unilateral decision of the POB which may materially affect the commercial attractiveness of the tied deal. The TPT is not in the position of a tenant of a FOT lease, who may decide to accept or reject a supplier's prices. If the MRO option is financially prohibitive, it may not be a realistic option for the TPT to accept it. The only option would be to remain with the tied deal (which may now be a poor one) or accept an offer that a prospective new tenant of a tie free lease might not without negotiation, and in such negotiation that prospective tenant would be in a very different bargaining position to the TPT. The test of reasonableness requires that the POB, in offering the terms of the purported MRO tenancy, cannot take advantage of any absence of commercial bargaining power on the part of the existing TPT pursuing the MRO procedure.

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

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

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

91. It was contended by the Respondent that the Claimant's allegation that the Respondent was seeking to thwart the MRO process adds nothing to their submissions on the question of whether the Respondent's response under regulation 29(3) complies with its duties under the Code. For the reasons above, I do not agree that these two things are unconnected.

Severing the Tie

92. The Claimant appeals to the market as to the mechanism it says is usually adopted to change from a tied tenancy to a FOT tenancy. To the extent that this argument places reliance on a term of the existing lease as being common does not invoke regulation 31(2)(c), as it is the uncommonness of such lease terms in tie free leases which is at issue. 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.

93. It is not enough for the Claimant to assert that the existing lease (with or without minor amendments) would be sufficient. 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 to me 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. The lease confers a unilateral right on the landlord, which it would presumably only exercise when satisfied it was in its interest to do so, and it has an absolute choice in respect of that. I do not see 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 the "minimum changes" sought by the Claimant to the existing tied tenancy to release the tenant from the tied trading provisions.

94. Even if this were the yardstick by which the Respondent's decision to send a new tenancy rather than a DOV falls to be judged, the Claimant produces no evidence to prove that that the grant of a new lease to a tied tenant is an "uncommon" means for a landlord to agree a new FOT tenancy with a tied tenant. In considering whether the choice of vehicle is reasonable I was not impressed with the Claimant's evidence. Whilst a DOV is used in the market, they did not show it is the most common method of tie release, (to any extent that that is relevant to whether the use of a new lease was unreasonable). I note from the Respondent's evidence that a sizeable proportion of its new FOT tenancies granted since July 2014 have been to existing tenants (though I comment below on the absence of evidence as to whether such leases were agreed by tenants who would thus become liable for high Stamp Duty Land Tax (SDLT).

95. 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 the context 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 simply not the same. When releasing the tie on an individual lease it did not have the opportunity to remodel its FOT estate, or to take any meaningful step towards creating a standardised lease form. These opportunities now present themselves to the Respondent and is proper to recognise they are genuine considerations for the POB (evidence of which was given by the Respondent's witnesses as discussed below).

Respondent's evidence - conclusions as to reasonableness (vehicle and terms)

96. I heard oral evidence from [redacted] at Gosschalks, and [redacted]. They dealt with certain factual matters of evidence concerning (a) the way in which the Respondent's FOT estate has developed, (b) the FOT market and (c) terms of leases in the Respondent's FOT estate and (d) the practicalities of the use of a DOV as opposed to a new tenancy.

The EI standard FOT lease v a DOV

97. [redacted]. He was the person who drafted the EI standard FOT tenancy in 2011 and who had overseen the amendments to it since. This lease evolved from the short form of the Inntrepreneur lease, which was widely adopted by pub companies in the 1990s.

98. Notably 2011 was before the market was aware of any prospect of the MRO. The Claimant observed that the Respondent knew of the campaign for the MRO at that point. However, the vote in the House of Commons to introduce the MRO into the draft Small Business and Enterprise Bill took place on 17 October 2014 and the outcome was a surprise. Whilst it is not clear on the evidence the extent of the use of this standard lease between 2011 and 2014, in any event the Respondent has plainly used this standard agreement since 2016 outside of the MRO context. I am therefore, on evidence before me, not persuaded to the Claimant's case that the proposed lease was drafted with a view to the MRO within the Code, (and the corollary of that is that it cannot have been drafted with a mind to incorporating only terms that were common in tie free leases in order to ensure compliance with the Code, which regulations were only finally made in July 2016).

99. [redacted] gave evidence that a tied tenant typically stays in a pub for about eight to nine years. He said that in 2008 during the recession that average shortened, and the Respondent made great effort to give tenants financial assistance. He freely acknowledged that it was too early to know if tenants would keep its current standard FOT leases for an average of eight years.

100. described the Respondent's estate as made up of many different types of mainly inherited leases, many of which have individually been subject to various variations either by deed or side letter. He explained how starting with a standard new lease document would generally make the procedure quicker, less onerous and cheaper than using a DOV. He considered that it was harder to deduce a tenant's interests if there are a series of documents, mistakes are more likely, and drafting a DOV with more extensive variations could require up to 10 hours of drafting, with consideration of whether each clause was to remain, be amended or be deleted in the MRO compliant lease.

101. I found to be a reliable and impartial witness. I accept that the use of a DOV will in each case require a line-by-line analysis on a case-by-case basis (given the numerous and various styles of lease within the Respondent's tied estate). That analysis will need to extend to all other collateral agreements which form part of the tied tenancy (such as variations and side letters). It would also be necessary to ensure that all other terms which are non-compliant are deleted from the existing tenancy. Renumbering and cross-referencing would be required.

102. The Claimant's tied lease is not on the Respondent's standard terms, having been brought into its estate from one of the past acquisitions of a portfolio of pub estates, takeovers of companies with their own portfolios, and individual acquisitions of assets let on a previous lessor's standard tied terms. Each acquisition meant that new variations of tied leases were included in the estate. The Respondent has over 20 main lease types, each of those having significant contractual variations. These differences have arisen from the letting policies of the various older companies and from the Respondent's own response to changing market conditions.

103. Questioned about the Respondent's use of a DOV to release a tie, referred to this having been the case in respect of 2-300 Inntrepreneur leases, which came into its estate in 1998 on the purchase of Unique Pub Co., after a 1991 commitment to enter into one (said to have been made in error).

104. explained that, where the parties agree an appropriate fee, the Respondent is content to partially release the tie in a tied lease, but that it remains a lease that is subject to a tie. From the Respondent's point of view, he considered a lease that was free of any tie to be a commercial lease and a very different animal.

Value to the Respondent of a new lease

105. said that the Respondent, accepting that there is a transfer of annual value from the landlord to the tenant arising from the MRO process, has no objection to granting a FOT lease, and that the good news from its point of view is that if commercial leases are put in place they can be used to get a better outcome from the capital value of the Respondent's FOT estate, as the lease is more marketable. The investment community will pay good value for these new FOT leases, which have sold at yields of up to 7%, he said.

106. He also explained that standardisation of lease terms reduced management costs, making it easier to apply consistent policies across the estate (e.g. rental dispute resolution), allowing for better comparability of rents for different pubs, production of guidance for tenants and training for staff, and ease of producing deeds of variation and renewal leases. That seems to me to be a logical and uncontroversial analysis. There was no evidence from the Claimant to counter the Respondent's explanation of the value to it of a new lease over a DOV.

107. The sequential means by which the Respondent's estate was formed and FOT leases were created meant that for a long time it may not have had the same opportunity to seek rationalised and modernised FOT leases that now presents itself. The circumstances in which the Respondent or other pub company may have released the tie by notice or DOV is not therefore a useful comparator with the Respondent's choice of MRO vehicle now.

108. The introduction of the MRO represents an important change in the industry, given the number of MRO leases the Respondent might envisage (though I heard no evidence of projections). It is acknowledged to present a financial challenge to the Respondent. I was referred to EI's estimate in its Unaudited Interim Results for the six months ended 31 March 2017 that new FOT agreements (of which there had been 4) may result in a 18% reduction in net income, whereas tied deals negotiated after an MRO proposal would result in none. It seems to me natural for the Respondent to consider and plan for its business in light of the opportunity presented by the MRO to a tie free estate which is cheaper to manage and more attractive to investors.

109. Taking into account these considerations, the Respondent is in my view justified in general in having a policy requiring a tenant to enter into a new lease rather than using a DOV as the vehicle for the MRO, so long as its application is reasonable in the individual case taking into account the core Code principles. I appreciate that in some cases the task of drafting and agreeing a DOV may be fairly straightforward, depending on the nature of the existing lease documents. However, it is not unreasonable for the Respondent to want in general to take a systematised high-level approach to the MRO process.

110. Importantly, however, that does not mean that there should be no exceptions to that general policy where its application produces unreasonable results for a particular tenant, or that there should no scope for negotiated variations to the standard terms. Indeed, there should be. The choice of MRO vehicle and terms must not be unreasonable for either party. There may, exceptionally, be individual cases where a condition as to surrender and re-grant would be unreasonable. The test of unreasonableness is a high bar, but in the present case the Respondent's choice exposes the Claimant to a liability for significant SDLT. On the assumption that this liability could be avoided by the use of a DOV to achieve FOT terms which were reasonable to both the landlord and tenant, this points heavily towards the Respondent's insistence on a new lease being unreasonable in this case.

Stamp Duty Land Tax

111. It is said by the Claimant that a new lease is unreasonable because SDLT would be incurred. The Respondent's position is that SDLT payable consequence of the exercise of the MRO by a new lease does not make its requirement for surrender and regrant unfair.

112. The Respondent has provided a breakdown of potential SDLT liability of £7,016. The proposed lease term does not extend beyond the expiry date of the existing lease. I understand that overlap relief would not be available to this tenant, because the grant of the original lease was before the introduction of the SDLT regime in 2003 (and Stamp Duty under the previous law was paid). The SDLT liability would of course depend on the actual rent finally agreed between the parties or determined. There is provision for a variation of the lease to increase the rent to be treated as a new lease (except when by exercise of a provision in the lease), and further provisions apply to abnormal rent increases after the fifth year of the term[4]. It would also be the consequence of the exercise of the MRO by DOV if the lease term is extended (which the law treats as a surrender and regrant)[5] and SDLT might also be payable where the variation of a lease by deed amounts on the facts to the grant of a new lease (and to SDLT avoidance).

113. I have not analysed these provisions, and I did not have specific evidence that SDLT liability could be avoided by use of a DOV whilst still achieving particular compliant terms reasonable to both parties, and what legal costs would be incurred. Where SDLT liability is on the facts of a particular case a result of the POB's choice of MRO vehicle, it will be a cost to the tenant of taking the MRO option, but not the only one. Legal fees, dilapidations, deposit and rent in advance are amongst the others. It seems proper to take that liability into account in determining in an individual case whether the choice of vehicle, and the choice of other terms and conditions dictating costs to the tenant, including entry costs, are reasonable. In my view, whether or not SDLT is substantial should be considered in light of all of the costs the TPT would be required to pay for the particular new lease. Where these combined costs are so large as to act as a barrier to the MRO option they can outweigh the POB's reasons for wanting a new lease and make the choice of terms / conditions and vehicle unreasonable and non-compliant, but each case must be decided on its facts.

114. Looking at the facts of the present case, the amount of SDLT is a significant sum and likely in my view to act as a disincentive to the tenant to enter into the lease as currently offered. It is therefore relevant to the reasonableness of the Respondent's choice of vehicle. I set out my conclusions on this at the end of this award. Notably, the Respondent has been silent as to the SDLT position in respect of the new leases granted to existing tenants since July 2014. I do not know therefore whether there were any where overlap relief was not available and who faced large liabilities, and whether the Respondent negotiated any arrangements where it was motivated to ensure an agreement

[4] Finance Act 2003, Schedule 17A, para 13, 14.

[5] s.43(3)(d) of the Finance Act 2003

(for example, to other entry costs), or agreed to a DOV in the circumstances. Such evidence might be relevant to whether it is acting fairly by comparison in any given MRO procedure.

Negotiated variations to the standard lease

115. As to the terms of the new lease, the POB is required to make the offer, whether or not that will negatively affect its profit. It would be naïve not to acknowledge that there may be a financial incentive for the Respondent to seek to offer a proposed tenancy on the terms most advantageous to the POB. Either a grant of a FOT lease on those terms, or a decision by the tenant to stay tied because those terms are too unattractive, would be a win for the POB to a greater or lesser degree. Owing to the absence of negotiating power on the part of the TPT, there is an expectation on the POB that it can show it is not taking advantage of its position of strength.

116. [redacted] agreed that lease terms relating to people with high covenant strength can be different to those with low covenant strength. He also referred to voluntary negotiations with a tied tenant to release the tie, and to the Respondent's 2015 (pre-MRO) target to have 900/100 FOT pubs by 2020), though it was not moving forward at that pace.

117. However, voluntary negotiations motivated by the Respondent's commercial interests (perhaps in targeting a rural food led pub for tie release) are in a very different category to MRO negotiations. [redacted] agreed for example that a tenant who made a good offer to go free of tie would be in the driving seat in the negotiations, and if there was a good rent deal there would be a motivation for the landlord in the negotiation. He said negotiations would be on the basis of the Respondent's standard lease terms, but they might require personal concessions (and he gave the example of allowing the tenant to build up a deposit over the first year or allowing monthly payment of rent for the first year, as an aid to the incoming tenant in funding the costs of the new lease). [redacted] readily agreed that MRO tenants should get the same flexibility. He thought the Respondent had been offering it, but I was not persuaded as to that on the evidence. However, I am clear, and consistent with [redacted] opinion, that for the MRO proposed lease terms to be compliant, they must be terms which are similarly favourable as those that might be offered to the tenant of a targeted pub.

118. [redacted] acknowledged that the evidence showed that in the 13 lease renewals amongst the Respondent's tie free lettings since 2014 the tenants had not been happy to accept a number of the standard terms and had successfully negotiated them. He did not know how many of these renewals had been with the benefit of 1954 Act protection. Though 91 of the new free of tie lettings had been to existing tenants, the evidence did not identify these tenancies, and it was therefore not possible to see if such tenants had been able to negotiate better terms. Furthermore, there was no evidence whether these existing tenants had been in distressed circumstances when they agreed to a surrender and re-grant or had been served with notice under the 1954 Act of the landlord's

opposition to a new tenancy. In addition, there was no evidence whether there has been any additional consideration from the tenant or a favourable rent deal.

119. Where there is a material difference in the lease terms granted to existing rather than new tenants, which might also indicate that the experienced existing tenant who is valued by this particular landlord, in a market situation, has some negotiating power. The Respondent has not shown on the evidence that the terms it proposes are such that existing tenants, or preferred tenants, in a negotiation, would be willing to accept outside the MRO process. This does not tend towards a conclusion that its terms are reasonable.

Are the existing lease terms relevant?

120. The Claimant's argument is that the starting point for the MRO lease is the existing lease terms. However, there is no support in the legislation for this assertion. 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.

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

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

123. I therefore make it clear to the Claimant. 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 it will always be reasonable to change terms in the existing lease which are also common in FOT leases.

124. Furthermore, in my view that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need to have regard to the existing contractual relationship between the parties. Indeed, counsel for the Respondent readily agreed that it is self-evident that the existing lease terms will be in the mind of the TPT who is entering into negotiations for a new lease. The landlord will have their own commercial considerations in mind. From their

respective positions, parties motivated to reach an agreement rather than a stalemate will negotiate from these starting positions to one that is acceptable for both. Therefore, both will have to take into account the position of the other if they intend to reach a deal. This is what a landlord would do if it wanted to tempt a preferred tenant into a new contractual relationship. That is the position in which the TPT tenant should be in the MRO procedure.

125. There may be other reasons why the existing terms are relevant, but I cannot set out an exhaustive list. For example, where a landlord offered (perhaps fairly recently) very favourable deposit terms on the tied lease which suggests the tenant was viewed as a preferred operator, and there has been no relevant change of circumstance, if the POB will not offer favourable deposit terms now that may be an indicator that the POB is seeking to raise unmanageable entry costs and is not acting fairly, and that the terms are not therefore reasonable. The particular terms (e.g. a keep open clause) may have had an effect on trade and goodwill to date, such that it would be unreasonable to change them. There may be an occupation clause pursuant to which wider family members reside in the pub, and it may be unreasonable to restrict that. Each case must be looked at on its merits, but for the Respondent as it does to suggest the existing lease terms are always irrelevant is untenable in my view.

This MRO Proposal

126. In evidence was the covering letter dated 21 February 2017 that was sent with the MRO proposed tenancy. This began "*this letter is our Full Response*" and contained a number of requirements with which the Claimant had to comply in order to take the MRO option, including the following:

Please note the following which I hope will help to inform your choices:

- *"If you wish to take an MRO-compliant lease it will be necessary for you to surrender your existing tied agreement and enter into a new commercial lease for the remaining unexpired term of your current tied agreement*
  …
- *Should you decide to continue with this new lease you will be required to complete the attached application form in order that we may undertake new credit checks.*
- *You will also be required to produce a Business Plan including a P&L forecast and cash flow forecast, that should reflect the increased rent, lease liabilities and the cash flow implications of rent becoming payable quarterly in advance and of the payments into a Repairs & Maintenance Fund.*
- *As with any other tied lease surrender we expect that the lease will be terminated only when all payments due, any existing breaches and all repairs required under that lease are resolved. We will also not enter into the new lease if you are unable to provide all statutory compliance certification to evidence that the premises and inventory are safe.*
- *I enclose a copy of a provisional completion statement to advise you of the funds which will be required on completion of the new lease. Any payment of rent already paid against your account will be offset against the statement on completion of the new lease.*
- *We must draw to your attention that you should expect the terms and conditions of such a FOT commercial lease to be rigorously enforced, including prompt payment of the rent, buildings insurance and R&M fund in full on the due dates and fulfilment*

of the full repairing obligations. You will be expected to operate your business independently without any support, services, concessions or the protection of any Code of Practice.

- *The Pubs Code defines a sequence of steps with strict timetables and there are several points at which your claim could lapse if [sic] do not comply with those timetables. Entering into an arms-length lease on these commercial terms is also a serious commitment for you to make. We therefore strongly recommend that you take independent and professional legal, accounting, surveying and valuation advice before committing yourself to this new lease.*
- *You will pay a non-refundable deposit for £1,950.00 as a contribution towards our legal costs (made payable to Enterprise Inns plc).*

127. The letter included the following enclosures:
    a. FOT lease
    b. Benefits of the tie brochure
    c. Implications of becoming FOT brochure
    d. Application Form
    e. Statutory Requirements Schedule
    f. Specimen PCS [provisional completion statement] as at the date of the letter.

128. In evidence were the two brochures enclosed with the letter (items b. and c. of the list above), which [redacted] in his oral evidence said had been the product of a working group in which he had been involved. It is not convenient to set out in this decision the full text of these brochures, but it is safe to say that they represent a one-sided assessment of the considerations affecting a tied tenant choosing whether to go FOT. The “Benefits of the tie brochure” could be described as a sales pitch for a tied lease. The "Risks" column in it does not actually set out any risks of staying tied at all, only stating that the risk is lower (than being FOT) and going on to emphasise the other benefits of being tied.

129. By contrast, the other brochure, concerning the implications of choosing to exercise the MRO to go FOT presents what [redacted] acknowledged in his evidence was a grim picture. He said that if a tenant has a tied agreement with SCORFA (special commercial or financial advantages) then tie release is bound to be a negative story. The tenant is told in this brochure *"We want our Publicans to take well informed decisions by laying out, over the page, some of the factors to be considered when deciding whether to take the commercial lease that we would be offering."* Those considerations set out are all, in fact, presented in a uniformly negative manner.

130. [redacted] acknowledged in his oral evidence that the perception of a recipient of these brochures is that the Respondent is encouraging them to stay tied. He also agreed that the statement that the Respondent would require all repairs to be resolved prior to granting the MRO lease could have been better expressed, explaining what was intended is that the Respondent would expect there to be a plan to resolve all outstanding repairs (meaning that some works could be done immediately, and others could be resolved later). This is most definitely not what the brochure says, however. On this issue alone, I would expect the Respondent to be reviewing this literature.

131. [redacted] said that the covering letter enclosing the proposed MRO tenancy had subsequently been amended to remove a request for a non-refundable deposit of £1950 towards the Respondent's legal costs (and that this matter had been conceded in the present case). He admitted that the wording of the letter was such that a recipient could be expected to understand that they had to pay at least £1950 for the Respondent's legal costs, whereas he said in fact at that time that amount was the only contribution that was expected. This is again not what the letter says, and I do not accept his evidence on this. [redacted] said this figure had been arrived at because Gosschalks had given a figure for producing and completing a new agreement in an average case (though that was much higher than the one [redacted] estimated in evidence for a straightforward case). [redacted] conceded that, standing back, a figure for costs of £1950 (assumed, though not specified to be, inclusive of VAT) appeared a bit high.

132. Notwithstanding what [redacted] said as to his degree of comfort with a tied tenant taking the MRO option, I do not accept on the evidence that has been the Respondent's position. The tone and purpose of the covering letter and enclosures which form part of the MRO proposal are clear. They are intended to raise levels of uncertainty in the mind of the recipient, so they are less likely to take the risk of the MRO option. It is plain that this is the outcome that the Respondent sought on making the proposal.

133. I am also satisfied that the requests in the covering letter with which the Claimant was required to comply would be contractual agreements if accepted, which are to be taken together for the purposes of s.43(4). Further requirements to complete credit checks; to produce a business plan including a profit and loss forecast; to make payment for all breaches, resolve all repairs and to pay a non-refundable deposit towards legal costs are all conditions which, if unreasonable, will render the MRO proposal non-compliant. It is plain to me that this collection of conditions, taken together, was a weapon deployed in furtherance of the Respondent's objective of persuading the tenant to stay tied, by making the MRO difficult to achieve. I am quite satisfied that, taken together, they are unreasonable conditions, and render the MRO proposal non-compliant. Nevertheless, the objective justification for requiring a new lease is as I have considered above.

134. That does not mean that they are individually unreasonable. There may be sound reasons, for example, for making a business plan. I will not deal individually with these conditions (some have been conceded by the Respondent and some the Claimant does not challenge). However, the condition as to payment of dilapidations deserves special consideration.

Dilapidations

135. The Respondent argues that it is a fallacy that the Claimant will be liable for terminal dilapidations upon a surrender and regrant, as a landlord who grants a new lease to a sitting tenant cannot claim damages for dilapidations in the same way as it can when a tenant gives up and the Respondent does not assert that it would be entitled to bring such a claim. Firstly, by section 18(1) of

the Landlord and Tenant Act 1927, the damages recoverable are capped at the diminution in value of the landlord's reversion. This would have effect in the same way whether a new lease is granted or a DOV entered into. Secondly, if there were more than three years of the term under either a new lease or the existing lease as varied by a DOV, the Respondent would need to obtain the leave of the Court under the Leasehold Property (Repairs) Act 1938 before bringing a claim for damages for dilapidations. Conversely, the obligation to repair is a continuing one and the landlord's right to enter to carry out repairs and recover the cost will apply at any time irrespective of whether a new lease is granted.

136. However, what is at issue here is the presentation of conditions by the Respondent as part of the MRO proposal. The covering letter forming part of the proposal requires all dilapidations to be paid for up front. This in my view is a condition of grant of the MRO. I do not accept [redacted] explanation that what was intended was that there would be “a plan” for dilapidations to be carried out. The meaning of the letter is clear. The Respondent’s position was that it would require that the property is brought into repair before the new lease is granted. Subsequently, and in evidence in these proceedings, the Respondent provided a schedule for repairs dated 9 March 2018 in the sum of £[redacted].

137. There can be no real doubt that, when the cost of dilapidations is high, the requirement for their immediate payment may represent a real disincentive to a TPT to take the MRO option. A reasonable landlord should manage its estate responsibly throughout the term. The landlord should not be using surprises on the request for an MRO option as an adversarial weapon. The need for fair dealing arises, and what is appropriate will depend on the facts of the individual case. It is appropriate for the POB to consider whether in the circumstances fair dealing requires it to mitigate the impact of dilapidations.

138. The Respondent’s original condition on dilapidations stands out as very severe. It did not set out any limit on its ability to require dilapidations at that stage and suggested no flexibility at all. This sits comfortably in my view with the tone and intention behind the covering letter.

139. If it is a logical assumption that a tenant with more bargaining power would negotiate with the landlord to carry out the repairs over a reasonable period the question that arises is therefore, if the Pub is not to revert to the POB until the end of the new lease term, why did it insist on the cost of dilapidations now (other than because it can as a matter of law)? I can find no good reason in the evidence before me and the Respondent did not in fact seek at the hearing to defend its original position, which I am satisfied was an unreasonable and non-compliant condition in this context, without good reason as to its imposition.

140. By the date of the hearing, the Respondent’s position was that it was willing to negotiate over the dilapidations. It should indeed do so, and should bear in mind that it would have an ongoing ability to enforce the tenant’s repairing obligations at the property and that its aim should be to negotiate

reasonable terms as to compliance over a reasonable time, and not to present an unlawful barrier to the TPT's statutory right to go FOT.

Uncommon Terms

EI's gathering of evidence of as to commonness

141. [redacted] gave evidence that the Respondent took steps to obtain evidence of comparable leases as relevant to the issue of the commonality of its proposed MRO lease terms (generally, and not in response to this particular tenant's MRO notice). It instructed Gosschalks solicitors to conduct a survey of FOT leases in the market; it collated evidence of its own new FOT leases granted since July 2014 and it asked the other regulated POBs if they would cooperate with some research of the terms of FOT leases (and it was agreed that the BBPA would collate that information). The result was a basket of anonymised evidence of 26 comparable leases granted by other three regulator POBs, though [redacted] acknowledged that there was no way the accuracy of this information could be verified for the hearing. [redacted] said in oral evidence that he had also asked Wellington for information on its FOT leases, but it would not cooperate.

142. However, all of this evidence was solely focused on new free of tie leases, which served to increase the apparent commonness of the Respondent's own standard lease terms. The email to Wellington's managing agent (Criterion Asset) of 4 July 2017, produced by [redacted] at the hearing after he referred to it, asked only for information on new leases (not all tie free agreements), and [redacted] said this was because the Respondent's brief was to look at new lettings on the open market. There was no written record of the apparently negative telephone response [redacted] said he had received from Criterion, or of the briefing he said he then gave the Respondent's Chief Executive and solicitors.

143. As for the collation carried out by BBPA, this was also only in relation to new leases (as confirmed by [redacted] and shown by the email dated 30 June 2017 from [redacted] to all the regulated POBs also produced at the hearing after [redacted] oral reference to it in evidence). The period for which this evidence was requested was not specified, and [redacted] did not seek to find out if any regulated POB had used a DOV in response to an MRO notice. He acknowledged in oral evidence however that both new lettings and new leases to existing tenants upon surrender and regrant would have been of interest. These limitations in the scope of comparable evidence undermined the Respondent's case that it has shown its standard lease terms are common in tie free agreements.

144. The existing lease terms are not the benchmark for the test of what is common in tie free leases, and it is not the case that there is only one set of common terms. The meaning of "common" is not defined and I should consider its ordinary meaning. Its synonyms include usual, ordinary, frequent, and routine and a term which is not common in tie free leases will be not usual, ordinary, frequent or routine. It does not set a test of prevalence or require that

a majority of leases contain the term in question. I therefore reject Mr Wright's argument that "common" refers to the most frequent and well established familiar terms in the market.

145. The Claimant argued that pub tenants are often ill-advised when entering tie free leases, and thus the terms which they are willing to accept should not unquestioningly be accepted as common. However, I reject this argument as legally irrelevant to the statutory definition of commonness.

146. The Respondent relied on the expert evidence of as to "Whether the clauses listed in the Respondent's list of issues in dispute at paragraph 4 are "not common". The scope of the permission granted for the Respondent's expert evidence was that which it had requested. The Claimant elected not to call any expert evidence and did not object to the Respondent's reliance on its own. In spite of the concessions as to commonness made by the Claimant, it appropriate that I set out here the conclusions I have reached on the expert evidence.

147. is acknowledged to have extensive experience of leases of licensed premises. The Claimant however questioned him as to his ability to act independently. confirmed he has acted for four of the regulated POBs - EI, Punch Taverns (including acting for them as tenant), Star and Greene King. The large majority of his Code related activities as expert have been for EI. Though he personally acted for no tenants in Code related matters at present, one of his colleagues at was acting on behalf of a tenant against Star.

148.

149. In my view, there is no reason why, given this history, could not be relied upon to provide independent expert evidence in accordance with the RICS guidance on Surveyors Acting as Expert Witnesses (4th edition), but as with all expert witnesses he was required to be assiduous in following that guidance. However, I identified three principle problems with his evidence, which on careful consideration and with respect to mean that I am not assisted by it.

150. The first of these is the limited nature of his instructions. had not been instructed to consider the commonness of the terms in question collectively in the proposed lease. He had only been instructed to give expert evidence as to whether each individual disputed term was common. Secondly, I found he had not sufficiently demonstrated independent judgement in respect of his instructions and the evidence which was relevant to his professional opinion. Thirdly, I found his methodology was not persuasive.

The Respondent's Instructions to Expert

151. [redacted] confirmed that he was not instructed to give expert evidence as to whether the particular combination of lease terms in the proposed tenancy could be considered common in the tie free market, and thus was not able to offer such an opinion in these proceedings.

152. If the commonality test does not apply to the terms as a whole, a lease might yet contain a combination of terms each individually common in the tie free market, yet which would never be found together in the same lease (because they were inconsistent, impracticable, rarely or never agreeable to a tenant, or did not make commercial sense). It would be permissible for a POB to select all of the common terms which were most favourable to it, even though it is unlikely that a new tenant in the open market would ever sign up to them.

153. The Respondent has in its evidence only concerned itself with whether each individual disputed term is common in tie free leases. The lay submissions of Mr Wright did not draw out the importance of doing this. Nevertheless, I must apply a statutory test and I am satisfied that test requires consideration of the reasonableness of the lease terms individually and collectively. The Respondent bears the burden of proving reasonableness and, as counsel for the Respondent recorded in further written submissions made after the hearing, the Claimant adopted the argument in oral submissions that the disputed terms are not collectively common in FOT agreements, and the matter was addressed by both parties. I cannot see that the scope of my directions as to expert evidence could preclude me, on a full hearing of the arguments, from making findings adverse to the Respondent on that basis. Importantly, where I find a full response non-compliant, if I am to proceed to order particular compliant lease terms I must be satisfied that they meet the statutory test and are compliant collectively. It may be that it is necessary to consider the commonness of a lease term differently from the commonness of lease terms collectively in a single lease. The frequency of finding the latter in the market could clearly be different from finding the former. However, in the absence of specific argument on the point I think the legislation requires at the very least that the lease terms collectively can be shown not to be rare or unknown in the market.

154. Counsel for the Respondent submitted that the tables of terms found in comparable leases referred to in the expert evidence show that the combination of disputed terms can be found in a good many of the leases considered, but my concerns about the limits placed on the evidence so considered are addressed in this decision, and [redacted] expressly declined to give an expert opinion on the matter. It is not for counsel therefore to do so, nor I am I satisfied on the evidence that it is safe for me to reach such a conclusion.

155. [redacted] gave evidence of the number of FOT leases which are likely to comprise the "market" for the purpose of assessing commonality, the extent of that market, and the proportion of such leases in which the disputed terms may be found. The Respondent had first instructed him to "research the

FOT sector in England and Wales" by way of separate instructions given prior to those in the present proceedings.

156. In oral evidence confirmed that these first instructions had been given only orally somewhere between 12 and 18 months ago and he had spent time over a period of about three weeks conducting his research. recalled that he talked generally with those at EI concerning matters they thought common and not common and about how they could prove that, but he could not add more detail, saying that his recollection was not ideal. However, he had not been given, and nor did he require, written instructions to proceed with his research on the FOT sector.

157. Amongst the relevant provisions of the mandatory RICS guidance at 3.4(e)) is the requirement for instructions (to give evidence as an expert witness) to be recorded in writing, and that particular care should be applied in deciding whether to accept instructions where the expert has previously acted for a party on a matter which requires, or may in future require, the giving of expert evidence (2.6).

158. acknowledged to me that when he accepted those research instructions he was aware that in the future he might be instructed again to give expert evidence on behalf of the Respondent in individual Pubs Code arbitrations based upon it, and he agreed that it was difficult for me to determine what in fact his initial instructions had been at that point. It cannot be verified, for example, whether he was asked to conduct research to support propositions in the Respondent's interest. The absence of initial written instructions in the circumstances was not adequately explained and means that I cannot be satisfied that there was no conflict between them and those under which now gives evidence in these proceedings, and this serves to undermine the value of his evidence.

Methodology

159. As to methodology, he makes an attempt to assess the size of the FOT sector based on the surprisingly limited information which is available, but his evidence is not without shortcomings. Firstly, he makes a professional judgement based on data from various sources as to the size of the market, which he assesses as approximately 5,150 FOT leasehold pubs in England and Wales. His analysis of the size of that market was sensible (though he acknowledged he had not included any research on the matter by Gerald Eve, who are consulted by the Valuation Office and for whom pub rating is a strong element of their work).

160. estimates 343 new letting events per annum in the FOT sector, on average, and that two thirds of these (approximately 226) are new lettings and one third "renewals or lease re-gears/term extensions". said in his oral evidence that the majority of events could be renewals and that 226 new leases per year might be too high.

161. This matter would not be such as to undermine his evidence, however. What causes me concern, however, is the excessive weight that he places on the terms of these new leases in his evidence and his judgement as to the appropriate comparable new leases, and these matters serve to undermine his conclusions.

Free of tie agreements

162. placed his focus on new leases rather than considering the terms of any other form of FOT agreement. He observes, for example, that lease renewals are influenced by the previously prevailing leases and he excluded these from consideration in reaching the figure for the size of the market (which he then uses in his analyses of the significance of the evidence of the Respondent's lettings). I am not content with this approach however and see no reason for it. In my view it may tend to skew the evidence and the legislation does not require exclusive consideration of a subset of tie free leases. It requires consideration of "*common terms in agreements between landlords and pub tenants who are not subject to product or service ties*." The pool of FOT agreements includes tenancies and leases, sale and leasebacks, renewals, DOVs and side letter variations, as acknowledged by in his oral evidence. Thus, I do not accept his opinion as to the size of the relevant tie free market, which is much larger than he suggests.

163. . He was also aware of the practice of releasing the tied obligations by side letter (such as in relation to the which was then released from the tie, and the circa 1998 release of a number of ties by side letter). He said, having provided valuation and sales advice in respect of the matter, had not identified if EI had executed any tie releases by DOV in a relevant period, as this was he said not of interest to him as they are not indicative where it is the landlord's choice to release the tie rather than a market lease.

Comparable Evidence

164. Setting aside these concerns, I was not in any event satisfied with consideration of the evidence of tie free leases and how that informed his judgement as to commonality. He conducted an empirical analysis of the frequency with which each of the terms in question was found in three different baskets of comparator leases:

g. All 225 EI FOT leases granted from July 2014 ("the EI leases");
h. A sample of FOT leases obtained by solicitors Gosschalks, solicitors for the Respondent ("the Gosschalks leases");
i. 14 FOT leases granted since 2016 in respect of which had acted as agent ("the leases");

j. The 26 recent FOT leases granted by the other POB regulated by the Pubs Code.

165. discussed the modernisation of terms which take place over time and considered that recent lettings should have more evidential worth than more dated agreements, reflective of the continually changing market. He acknowledged that the legislation did not provide for the preclusion of any particular evidence but believed more contemporaneous evidence has more worth and the state of the market at the time. Whilst I do not fundamentally disagree with this approach, it was not reflected in his analysis of the comparable evidence, in that in three out of the four categories of comparable evidence he considered only new leases, and there was no consistency in or analysis of the relevance of the period represented by those baskets of comparables.

166. Where there was a variance between the commonality of a term in older and newer leases this was not identified and addressed by in reaching his conclusions. It is not clear what, if any, weight he places upon the evidence in deciding, in respect of a lease term which is not present in older leases, that it is nevertheless common.

The EI Leases

167. refers to the EI leases as being highly relevant, but he makes no reference at all to any granted prior to July 2014. It was clear from his oral evidence that he had based his expert evidence on the sample of these leases which the Respondent has chosen to provide to him, and he confirmed that the July 2014 long stop for this evidence had been dictated by the Respondent and not by him. He could not explain the significance of this date and confirmed he had not made enquiries as to that with the Respondent or asked for any earlier EI leases to be provided to him. Surprisingly, in his oral evidence said he had no idea either why the Respondent's sample of FOT leases given to dated from July 2014. There was absolutely no rationale for the chosen sample available, and this is a matter in respect of which should have exercised his professional judgement.

168. The reliance placed by on the 225 recent FOT leases granted by the Respondent needs to be put in perspective given the size of the tie free market as a whole. Moreover, he did not enquire, and there is no evidence before me to indicate, which of those leases was granted to an existing tenant (and thus whether such tenants are better able to negotiate individual concessions to the standard lease terms cannot be seen).

169. was wrong in my view to place so much reliance on the Respondent's new FOT leases, without having had regard to the fact that (currently) there are around 70 MRO proposals on such terms that are in arbitration because TPTs have refused to accept them, and the arbitrator has yet to decide if they are common in the tie free sector and reasonable. Whilst it was argued for the Respondent that the 70 proposed tenancies in dispute are

irrelevant as we do not know if it is the vehicle or terms (and which of them) that are challenged, that is precisely the uncertainty which in my view should have led to caution in placing too much weight on the recent EI leases.

The [redacted] Leases

170. It is also not clear in his report why [redacted] started his analysis of the [redacted] leases in 2016, and why he considered it appropriate that the EI and [redacted] lease samples should start from different dates. He said in oral evidence that his firm had undertaken tie free lettings prior to October 2016, but a limited amount (for example in 2014 and 2015 two pub lettings in each year).

171. The sample size is very small, and interestingly there is no letting other than the two by the Respondent in which all of the disputed terms (including as to the deposit as a multiple of the rent) appear. This is not supportive of the suggestion that the proposed lease terms are collectively common. Furthermore, the evidence of these two EI leases has been double counted - within the EI new lettings and again in the [redacted] lettings ([redacted] The evidence based on the percentages resulting is consequently unreliable.

172. [redacted] said he had included these leases because they were new (but referred to over 100 examples tie free leases which would be in his office's files in relation to valuations carried out). His evidence based on these could have been meaningful in my view.

The Gosschalks Leases

173. [redacted] confirmed that the Gosschalks research had not been carried out at his request, the exercise already having been completed – and that it was provided to him after he was instructed initially to carry out his research.

174. The Gosschalks leases were a sample of 21 lease types granted over time. The oldest in date was 1998, and the second oldest 2009, and they will have been used with more or less frequency (some of which will represent a significant number of lettings, and some only a single one). In oral evidence [redacted] said that he would expect there to be greater frequency of use for the large pub company or institutional leases, and that the landlords to the leases he did not recognise were probably used on one single occasion. However, his expert evidence did not sufficiently reference this knowledge and whether or how he had weighted this evidence as a result, and this affects its relevance.

The Regulated POB leases

175. Though it became clear that this sample was based on a request for new leases only, and without reference to any period of time, [redacted]

confirmed he had not enquired of EI as to the scope of its request for evidence to the other regulated POBs.

Conclusions on the comparable evidence

176. The evidence does not demonstrate that all of these disputed terms (or their like) are found in any FOT leases other than new leases granted by this Respondent. The danger of over-emphasis on the EI leases is that it may be able to take advantage of the MRO procedure by proposing a lease which is never or rarely found elsewhere in the FOT market, and as the Respondent has said in relation to the historical make-up of its portfolio, other landlords take other approaches.

177. Where there was a large variance between the proportion of leases in each of the 4 samples (particularly between the EI leases and the Gosschalks leases) in which a disputed term was found, did not explain to my satisfaction how he had analysed this evidence to reach a conclusion that the term was common.

178. What would have been helpful in expert report is any indication that he had "stood back" and checked the evidence against his own professional judgement in being satisfied that the proposed lease terms were common. said in oral evidence that this knowledge (based on the large number of leases that had passed through his office, especially in respect of valuations) largely accorded with the evidence that could be derived from the Gosschalks leases, and that these terms had been established by virtue of their longevity in the market. He considered that ultimately it is the rent which will affect the sustainability of a pub, much more than the lease terms. He confirmed however that the fundamental terms of a commercial lease had been prevalent for a significant period of time.

179. It may be in fact that how far into the past it is appropriate to look at lease terms to see if they are common in tie free leases may depend on the particular term. Some terms will have been established in the market for a long time (e.g. full repairing covenant) and some more recently. Other factors may be of relevance in weighing the relevance of terms in comparator FOT leases in addition to frequency and date (such as the type of agreement, property type and location). These factors were not addressed in evidence and it is unclear where the relevance of the longevity of terms fits with his emphasis on the consideration of new leases.

180. I do note that the Claimant has not produced any expert evidence. However, approach risks the evidence being weighted towards the small number of new tie EI free leases on standard terms which represents a tiny proportion of the tie free market, and that this can quickly suggest a commonness which, standing back, may not actually exist in that market as a whole. The legislation refers to terms not common in tie free leases, and not to terms not common only to new tie free leases available on the market as at the date of the MRO proposal. Furthermore, recent evidence only does not indicate convincingly that such terms are reasonable. The test of time will

tell if they are sustainable for tenants or simply too unfavourable. Leases with greater longevity will more easily be shown to be not unreasonable in the general sense.

181. In my view the legislation requires consideration of whether the effect of the wording of the particular clause is common, not just whether a clause of a particular type is common, but [redacted] was not entirely consistent as to how he would approach the question. He said that when assessing, for example, the commonality of a keep open clause he would be looking at how common any keep open clause is, and not how common that particular keep open clause is, but when considering the commonness of a term as to a deposit, he would be looking at the commonness of a term as to a deposit of that particular size.

182. [redacted] said he would not assess commonality differently for the type of agreement, term, pub and location, but it seems to me that this might be a relevant consideration. What are common terms for a pub in a rural location may not be common terms for a city centre pub, for example, and [redacted] agreed that he could not give evidence that common terms in short leases (of less than 5 years) were the same as common terms for leases of longer length.

183. It seems to me for all of the reasons above that the resulting conclusions in [redacted] were not helpful to me, and the extent of evidence considered could tend to advantage the Respondent's case. I would add by way of comfort that the task [redacted] undertook is a novel one the need for which has been created by this legislation, and it cannot be easy to be among the first to approach giving expert evidence in new legal territory without decided authority as to its proper scope. No doubt therefore many of my observations will be treated as useful guidance to the Respondent and expert alike.

184. Only once a term is accepted in the relevant comparator part of the open market can it be common. Commonality can change, but this does not happen quickly. The legislation requires that the MRO tenant cannot be at the vanguard of that change. The MRO terms follow the tie free market, and form part of it, but do not define it. By looking at commonality over time can we can better understand that component of reasonableness. This standard lease is a relatively recent development by EI, and not long established in the market on the evidence produced by the Respondent. Thus, there is insufficient evidence before me that this standard lease is common in the tie free market. This in my view has been reflected in the incremental concession of 12 of its terms.

Conclusion and appropriate order

185. The Respondent has not persuaded me as to the reasonableness (including commonness) of the lease terms as a whole. For that reason, and as a result of my findings as to the range of harsh conditions imposed on the grant of a new lease, the Respondent's case fails. I find that the proposed MRO

tenancy is not compliant as it contains terms and conditions which are unreasonable (including uncommon).

186. In circumstances where I conclude that an MRO response does not comply with regulation 29(3), the Code provides merely that I may "*rule that the pub owing business must provide a revised response to the tied pub tenant*". The Respondent accepts that in these circumstances it is within my power to make a determination as to what changes are required to the Respondent's MRO response to make it MRO-compliant and to direct that such revised response be provided pursuant to regulation 33(2). Standing back, however, I am satisfied that I should order the Respondent to give a revised MRO full response but not persuaded that in the present case I should exercise the power to order the specific terms of the revised MRO proposal that are compliant.

187. Firstly, this is because on the evidence presently before me I may fall into error if I make a selection of terms which are required to be altered. I would have insufficient confidence on the evidence available that I would be ordering common terms (individually and collectively).

188. Secondly, whilst both parties have put forward arguments to me as to the reasonableness of each disputed lease term (which I have not set out in this award), after careful consideration I find that it would not be appropriate or of value for me to reach a determination as to whether in isolation each term is reasonable in the more general sense.

189. As discussed above, reasonableness may not be an absolute, and all of the proposed lease terms have to be looked at in the round, after effective negotiations between two motivated parties. In the present case (whilst I obviously have no knowledge of the content of any without prejudice correspondence) it is quite clear to me that, owing to both parties' respective erroneous positions in these proceedings, no such effective negotiations could ever have taken place.

190. I am satisfied that the Respondent's aim in the MRO process to persuade the Claimant to stay tied will have tainted its negotiating position. It has not treated the Claimant as a targeted operator it is motivated to release from the tie, and it has not been even handed or fair in the manner in which it has presented the offer (which was unequivocally done in a way which sought to discourage the TPT from taking the MRO option). That is not a free-standing breach of the Code, but it is evidential as to its unwillingness to offer reasonable terms which fit this tenant and supports my conclusion that the terms and conditions are not reasonable in light of the Code principles.

191. The landlord is now aware that it must be careful not to make the MRO unattainable owing to unreasonable costs, particularly entry costs, both in offering the terms and conditions of the MRO proposal, the vehicle for those terms and conditions, and in the manner of their presentation. It has incrementally, including subsequent to the hearing, made concessions on the proposed lease terms. The number and extent of those concessions in this case

(which I have not set out in this decision) and more generally as to its standard lease terms since the introduction of the MRO, serves to my mind to emphasise the unreasonableness of its starting position. It is not appropriate for me, for the reasons given, to express a view as to whether it has now moved far enough.

192. It seems to me that two properly advised parties who are motivated to negotiate a new lease will be good arbiters of what is common and reasonable in the tie free market. They will between themselves be well placed to take a view on whether the lease terms as a totality are uncommon in tie free leases and will be the best judges of what is reasonable for them. Now that they are aware of my findings, they have the opportunity to negotiate the MRO vehicle and terms. They have a duty to seek to agree them.

193. In the event that the revised MRO proposal is referred for arbitration on the issue of reasonableness, it may be necessary to take a very different approach to the evidence which will be of assistance to the arbitrator in deciding what lease terms would be not uncommon or unreasonable. The arbitrator should be particularly concerned that an award in respect of any such referral should be effective to resolve the dispute as to the compliant terms of the MRO tenancy, and may therefore be assisted by neutral expert advice throughout the proceedings, including at the time of making any order, as to the individual and collective commonness of the proposed terms (and of alternative terms for the purpose of a ruling in the event that they are not). The arbitrator may therefore consider, in consultation with the parties, whether the early appointment of an expert under section 37 of the 1996 Act is appropriate to advise throughout the proceedings.

194. The arbitrator would have the opportunity carefully to consider the question of appropriate adverse costs orders in any such case in which there is no sufficient evidence of effective negotiation by both parties.

Must the MRO vehicle be a DOV in the present case?

195. This a question to which the parties want my answer. The best answer I can provide at the present time and on the present evidence is that a DOV may be required in this case. Importantly, it will in reality depend on the Respondent reasonably approaching its right to enforce dilapidations such that it does not prevent the Claimant from exercising the statutory right to a FOT lease, and on how flexible the Respondent is willing to be in offering terms which wholly or largely offset to the tenant the impact of SDLT arising from its choice of vehicle in comparison with any SDLT payable as a result of the use of a DOV to agree terms reasonable to both parties. The Respondent is justified in general in wanting standardised terms for its FOT estate, but it cannot reasonably insist on this in every case regardless of the impact of this on the tenant. It seems to me that, given the lack of overlap relief available, pre-10 July 2003 leases are likely to require special treatment if the Respondent is determined that the MRO in such cases should be effected by a new lease, and if reasonable terms can be achieved, and SDLT avoided, through the use of a DOV. As noted above, the Respondent did not produce evidence of how it had treated such cases when identifying pubs for tie release. If it is not willing to offer a package overall

which is sufficiently attainable, it may not be acting reasonably in refusing to enter into a DOV.

Operative provisions

In the light of the above:

- The Respondent is to provide a revised response (within the meaning of regulation 33(3) of the Pubs Code) to the Claimant;
- The revised response must be provided to the Claimant within 28 days of the date of this Award, and a copy provided to the PCA;
- Jurisdiction in respect of any dispute as to the MRO-compliance of the revised response is reserved to the DPCA;
- Costs are reserved.

Arbitrator's Signature ……..

Date Award made 23 July 2018