**IN THE MATTER OF** **ARB/000322/Anderson**

**THE PUBS CODE ARBITRATION BETWEEN: -**

**EDWARD ANDERSON**

**Claimant**

**-and-**

**MARSTON'S PLC**

**Respondent**

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**Award**

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## Summary of Award

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

The proposed tenancy is not compliant because it has not been shown to be on reasonable terms and conditions as to:

- Internal and external redecorations
  The Respondent has conceded a condition that it would carry out external redecorations
- Deposit and rent in advance
- Dilapidations
- Landlord and Tenant Act 1954 protection (which cannot be given)

## Introduction

1) The Claimant is Mr Edward Anderson, tied-pub tenant ("TPT") of The Swan public house, 35-37 High Street, Cheltenham, Gloucestershire, GL50 3QL "(the

Pub"). He holds a lease dated 2 May 2012 with a term commencing on 11 October 2011 and ending on 27 April 2023. The Respondent is Marston's plc of Marstons House, Brewery Road, Wolverhampton, WV1 4JT. The Claimant is unrepresented, and the Respondent is represented by [redacted] of counsel, instructed by Flint Bishop LLP.

2) On 24 November 2017 Mr Anderson referred to the PCA for arbitration two disputes relating to the provisions of the Pubs Code etc. Regulations 2016, namely:

   a) A Rent Assessment Proposal[1]
   b) A Market Rent Option[2]

3) This award relates to the second of these issues only, that is, whether or not a proposed market rent only (or "MRO") tenancy served on the Claimant by the Respondent is compliant.

4) Case management directions were issued on 25 January 2018 and each party put forward its written case and documentary evidence. They were then unable to agree a list of issues in dispute for my determination.

5) Mr Anderson is the TPT of The Railway, New Street, Cheltenham, Gloucester GL50 3QL (and he also has a third pub). He has two other current referrals to the PCA for arbitration in relation to The Railway. Again, one relates to a Rent Assessment Proposal and another to a Market Rent Option. It seemed sensible and proportionate that overlapping issues in relation to The Railway and The Swan be dealt with together and so, with the agreement of the parties and after a telephone case management conference held on 14 September 2018, I ordered that the two Rent Assessment Proposal disputes be heard together at a hearing on 12 November 2018 (which hearing took place before the Pubs Code Adjudicator Mr Newby as arbitrator), and I ordered the two Market Rent Only disputes including this dispute be heard together by me as arbitrator at a hearing which took place on 10 December 2018.

6) At the hearing before me on 10 December Mr Anderson and [redacted] for the Respondent, gave evidence, and at the close I gave a summary oral determination in respect of this dispute as set out above in the Summary of Award[3]. I invited the parties to seek to agree the terms of the Order which I should make, which it appears from subsequent correspondence that they are likely to do.

7) This award relates to the MRO proposal at The Swan pub only. The MRO referral in relation to The Railway involved some jurisdictional issues, as I had previously issued an award on 27 February 2018 on a dispute relating to the full response served by the Respondent in respect of that pub. Whilst I heard submissions on

[1] Under section 48(1) of the 2015 Act

[2] Under regulation 32(2) of the Pubs Code etc. Regulations 2016

[3] This award fulfils my duty under section 52(3) of the Arbitration Act 1996 and Article 34(2) of the CIArb Rules that the form of the award shall be in writing.

the jurisdictional issues in relation to The Railway at the 10 December hearing, since then the parties have indicated to me (taking into account the principles of my oral determination in respect of The Swan) that the referral in relation to the MRO proposal at The Railway is likely to settle. If it does not, I shall issue a separate award in relation to that case.

## Background

8) The Small Business, Enterprise and Employment Act 2015 ("The 2015 Act") makes provision for tenants of tied pubs to be offered a MRO option in specified circumstances. As a result of a MRO notice served by the Claimant on the Respondent on 30 October 2017, the Claimant has the right to receive a compliant MRO proposal. On 17 November 2017 the Respondent purported to send to the Claimant a "full response"[4], including with its response a proposed tenancy. The Claimant considers that this proposed tenancy is not "MRO compliant", in that it is on unreasonable terms[5].

## Legal Reasoning

9) My reasoning in this case is based in part on an analysis of complex legal issues which have repeatedly arisen in Pubs Code arbitrations in respect of MRO full responses. For the sake of clarity and readability I have included my full reasoning on these issues of law in the appendices to this decision. In March 2018 the PCA published an Advice Note on MRO Compliant Proposals, which is consistent with my reasoning. My decision below is an application of those overarching principles of law to the facts of this case.

## The Hearing

10) said in evidence that on receipt of a valid MRO notice the Respondent issues a standard free of tie ("FOT") lease in all cases, being a template lease used twice prior to the introduction of the Code, the Respondent's FOT estate being very small indeed.

11) Whilst Mr Anderson in his Statement of Case had raised 60 disputes in relation to the proposed MRO lease, I sought to clarify with him at the hearing what issues remained for me to determine, and the reasons why the proposed MRO lease was not one that he could accept. He objected firstly to a number of drafting errors, secondly to the Respondent's insistence on the use of a new lease as opposed to a deed of variation ("DOV"), and thirdly to certain terms of that proposed lease as being unreasonable because of the adverse effect they would have and because they differ from the terms of the current lease.

12) As to the drafting errors, the Respondent conceded them at the hearing. agreed in evidence that there were mistakes owing to oversights on the part of the Respondent in relying on its standard FOT lease and that it was not a document which the Claimant could be expected to accept in its current form.

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

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

She could not explain why these drafting errors had not been identified prior to issue of the MRO proposal as the surveyor, the in-house legal administration and external solicitors had all been involved, but not her.

13) Mr Anderson was concerned that there might be more drafting problems with the proposed MRO lease, but said he has not been willing to pay a solicitor to handle the execution of the lease when its terms were plainly unacceptable to him on the grounds of the errors he had identified. In light of this I have reserved jurisdiction to myself to determine any such drafting disputes as may be identified. Those identified and conceded were:

    a) The proposed lease terms (at 3.5.1) relating to the internal redecoration cycle did not take account of the fact that the proposed lease ends on 27 April 2023. The proposed lease (at 3.5.2) relating to the external redecoration cycle did suffered from a similar flaw, which would in practice require him to redecorate in two consecutive years. The terms proposed and dates do not work together to produce sensible liabilities upon the tenant. [redacted] acknowledged the problem with the decorating cycle but said the Respondent had not noticed it before.

    b) The proposed lease purported to grant protection under the Landlord and Tenant Act 1954, but the Respondent was prohibited from granting a lease with such protection, and the tied lease did not enjoy it.

14) Mr Anderson also observed that there was also a right to assign in the proposed lease which he did not enjoy under the existing lease. [redacted] said this was a standard term in its FOT lease.

**Terms and New Lease**

15) Mr Anderson considered that the costs of a new lease compared with a DOV made the Respondent's choice of a new lease unreasonable. He referred to legal fees, Stamp Duty Land Tax (SDLT) and Land Registry fees. However, he did not have any evidence of whether legal costs would be more in dealing with a new lease or DOV, how much the Land Registry fees would be, or what the SDLT liability would be (but noted that as his lease had been granted in 2012 he would be entitled to overlap relief). He had also taken valuation advice on the FOT rent and believed that it would not be higher than his existing rent.

16) Mr Anderson acknowledged very frankly at the hearing that he did not in truth object to a new lease rather than a DOV, but he said that the costs and the terms should not be a barrier to put him off accepting it, and that the new lease he had been offered was unacceptable because of the impact its terms and conditions would have upon him.

17) As a matter of law either a DOV or a new lease can be the vehicle for a compliant MRO proposal. The legislation requires the MRO proposal served by the POB to be compliant. There will be more than one way of achieving that and it is for the POB to make a reasonable choice as to the vehicle and choice of terms. The Respondent's evidence conflicted with Mr Anderson's (for example as to the

relative costs of using a standard new lease versus those of drafting a DOV), and overall there was no substantiated case that it would be unreasonable for him to accept a new lease, subject to its terms being MRO-compliant.

## Disputed terms and conditions

18) Mr Anderson challenged the reasonableness of terms and conditions as to external redecorations, dilapidations, rent in advance and deposit. There is no evidence in the present case that the Respondent has, prior to the offer or subsequently, properly applied its mind to whether the proposed terms are reasonable for this Pub. Nothing that is before me in evidence suggests that the Respondent has considered whether the terms proposed were reasonable in the circumstances of this particular case. There is no evidence to indicate that the terms have been negotiated to a reasonable level overall in this particular context.

19) There is nothing in the legislation which requires the terms of the MRO tenancy to be the same or substantially the same as the existing lease terms, but they must not be unreasonable and the current tied lease terms are not an irrelevant consideration in assessing reasonableness. On a case by case basis there may be reasons why they should be taken into account. The proposed terms must not be uncommon in FOT agreements. In addition to this, the terms must not be unreasonable when looked at individually and in combination in the proposed tenancy. Terms and conditions must be reasonable for both parties.

20) [redacted] agreed that in her witness statement she did not give evidence about why the Respondent on the facts of this case considered the proposed terms to be reasonable for this Pub, as she considered that if they were common terms then they were automatically reasonable. In submissions, counsel took this as the Respondent's primary submission on the meaning of unreasonableness[6]. However, as set out in the reasoning in the attached appendix I am of the view that a term common in free of tie leases[7] can still be unreasonable in the case of a particular MRO proposal.

21) Counsel for the Respondent argued that the burden of proof to show a proposal was not compliant lay on the tenant who brings the referral for arbitration. However, in the context of this legislation it is the statutory duty of the POB to serve a proposal which is compliant, and I understand it therefore to be the obligation of the POB to consider what would be compliant in the particular case when serving its proposal. It is thus appropriate to expect it to be able to show how it did this and in the present case, when looking at the challenges below properly raised by Mr Anderson and all of the evidence before me, it could not do so, and nor does a balanced assessment of the evidence show compliance.

*External redecorations*

[6] Pursuant to s.43(4) of the 2015 Act and regulation 31(2) of the Pubs Code

[7] See Appendix 3 to this Award

22) The proposed MRO lease placed a liability on the Claimant to carry out external redecorations every five years. Under his existing lease the Respondent bears liability for external redecorations. It covenants in clause 5(3)(c) to carry them out "when we [the Respondent] think it is reasonable."

23) Mr Anderson said that the last external redecorations to the Pub were carried out by the Respondent in about 2012. A copy invoice was made available to me which showed *"External Decoration – To invoice work completed all as agreed with* [redacted]" dated 5 December 2013 in the sum of £6,654.37 plus VAT. Mr Anderson said that this was just redecoration to the side of the Pub, and not the whole exterior redecoration, which had been done previously. In any event, the evidence was clear that external redecorations had not been carried out by the Respondent within the last five years.

24) [redacted] said that the Respondent had looked at doing the external redecorations at The Swan before the MRO notice was served in respect of The Railway, but that sometimes projects fall by the wayside. As was raised by the parties and considered at the hearing, I noted that the PCA Mr Newby found, on a previous referral for arbitration[8] considered on the papers, that Mr Anderson had not been subjected to detriment[9] on the grounds that he had attempted to exercise a right under the Pubs Code. Regardless of whether I would have reached that same conclusion, I invited the Respondent to consider its position in relation to the external redecorations. They had not carried them out in at least five years, yet the Respondent considered it reasonable to pass a decorating liability to Mr Anderson to redecorate every five years. The Respondent then confirmed at the hearing that in the circumstances it would carry out the external redecorations as a condition of the proposed MRO lease, though their timing would be subject to the weather.

*Dilapidations*

25) In the MRO proposal the Respondent required that, as a condition of the proposed MRO lease, a terminal schedule of dilapidations would be produced, and all items of work must be carried out by the Claimant. However, in its skeleton argument dated 6 December 2018 the Respondent changed its position and agreed that only statutory compliance works would be required as a condition of the new lease, all other dilapidations being rolled over. The Claimant was happy with this revised offer.

26) This was the offer the Respondent had made in its revised MRO proposal in respect of The Railway, issued as a result of my finding in the previous arbitration award dated 27 February 2018 that the proposed MRO lease had been non-compliant as the proposed terms were unreasonable in failing to make fair provision in respect of dilapidations. The Respondent said it had changed its approach to dilapidations on a new MRO lease at that point.

[8] This was the subject of an award dated 24 September 2018 in a separate arbitration between the Claimant and Respondent

[9] Under regulation 50 of the Pubs Code

27) [redacted] said this change of position not been communicated earlier to Mr Anderson in respect of this Pub because he would not negotiate on the basis of the lease as proposed, and this is normally something that would be discussed between the tenant and the surveyor. She could not explain why the Respondent did not write to the Mr Anderson to communicate its revised position in respect of dilapidations.

28) The Respondent did not concede that its original proposal in respect of dilapidations had been non-compliant. However, for the reasons set out in the attached appendix 3 under "Terminal Dilapidations on surrender of the existing tenancy", I am satisfied that it was. There was no rationale put forward on the facts of the case for the failure to include reasonable terms and conditions which would mitigate the effect of terminal dilapidations arising on surrender of the existing lease, and I am satisfied that a motivated landlord and tenant in negotiations in the circumstances of this case would be likely to agree to these.

*Deposit and Rent in Advance*

29) Mr Anderson said the he simply could not afford the increase to three months deposit and three months' rent in advance at present owing to the low turnover at his tied pubs, and thus that the MRO was not actually a choice that was available to him. The MRO proposal required a deposit of £18,250 and rent in advance in the same amount. He told me something of his financial circumstances and profits under the tie, basing this on calculations he had produced in evidence. The Respondent pointed out that Mr Anderson has a £14,000 deposit for redecorations and repairs at the Pub which would be available to him on the termination of the tied lease to help meet his costs on going free of tie. Taking that into account, Mr Anderson said he would still have to find £12,500 (plus the cost of any dilapidations), which he said he could not do. Under the current lease of The Swan rent is payable quarterly in advance and the deposit is £10,000 (plus any interest due). Comparing his existing deposit and rent in advance at The Railway with the MRO proposal on that pub, it appears that he would need to find more than £20,000 to go free of tie there.

30) Mr Anderson felt that his financial position under the tie had suffered because of the way his rent had been assessed by the Respondent, and these issues were related to those for consideration by Mr Newby in the referrals relating to the Rent Assessment Proposals. However, he agreed that he could afford the cost of the proposed rent and deposit terms in dispute if he was offered a sufficient transitional period, and indeed he said he would be "overjoyed" to have that opportunity.

31) [redacted] said the Respondent had not considered whether the entry costs were attainable for the tenant. Counsel argued that the POB should not be exposed to the dangers of tenant default and that reasonableness in this context was an objective standard, not a subjective one. He observed that the Claimant did not have to pursue the MRO simultaneously on both pubs. However, I note that both MRO notices were served at rent review, and the Claimant has no control over the timing of that.

32) It seems to me that in negotiating in respect of the MRO a POB should be acting as if negotiating in the open market (with a new tenant, or an existing tenant the POB was motivated, not forced, to release from the tie) and on the basis of all relevant circumstances, and that there is indeed a subjective element to that. For the reasons further set out in the attached appendix, I take the view that the assessment of reasonableness must have regard to the circumstances of the particular case.

33) Even if the terms around deposit and quarterly rent payments are common in free of tie leases, such terms are serious financial commitments. The Claimant has a statutory right to go free of tie and the Respondent cannot use inaccessible entry costs as a barrier. There is insufficient evidence from the Respondent to show that these are reasonable terms for this Pub. In the context of the statutory scheme, it has not shown that it has applied its mind to whether it would be reasonable for this tenant to accept the financial terms, or whether they represent an unreasonable barrier to entry.

34) Agreed personal concessions are not uncommon in a commercial negotiation, and it is a question of fact in each case what offer a willing landlord would make in order to attract a willing tied tenant to a FOT tenancy, and the Respondent should act in a similar way in this statutory scheme. I bear in mind Parliament's intention that the MRO should be a real choice to TPTs.

35) Accordingly, I find that the terms of this proposed tenancy are not compliant. I am not satisfied on the evidence that the Respondent has made reasonable provisions as to deposit and rent in advance on the facts in this case.

**Observations**

36) After the publication of the PCA Advice Note on the Market Rent Option in March 2018, emphasising the duty on the parties to seek to negotiate a MRO-compliant tenancy even after a referral has been made, I sought to understand from the Respondent whether all reasonable options for settlement had been exhausted. The Respondent on 12 June 2018 wrote to me that in spite of email and face to face negotiations, no resolution had been achieved.

37) A concerning feature of this case, particularly in light of the fact that the legislation does not provide for backdating of the MRO terms and rent, is the Respondent's failure promptly to identify and acknowledge non-compliant features of its proposed MRO tenancy. Owing to concern over the approach of the POBs to compliance and arbitrations, the PCA is actively taking further steps in its capacity as regulator to make sure that the POBs implement informed and improved practices in the issuing of compliant MRO proposals. A POB ought to be proactive in conceding obvious drafting errors or omissions, and changes of position on its part, and it should not be necessary for them to be part of a process of negotiation.

## Next Steps

38) Accordingly, I find as set out above that the terms and conditions of this proposed tenancy are not compliant, though the arguments that the choice of a new lease is unreasonable are weak. It is therefore necessary for me to consider what order I should make in respect of this referral in exercise of my powers in this particular case. The parties advise me that in light of my oral decision handed down on the date of the hearing they are close to an agreement. I must consider what order to make if such agreement is not reached in a reasonable time.

39) Since January 2018 I have issued a number of awards in respect of referrals to the PCA under regulation 32(2)(a). Regulation 33(2) empowers me to rule on such a referral that the POB must provide a revised response to the tied tenant, and a "revised response" is defined in regulation 33(3) as a response which includes the information mentioned in regulation 29(3)(a) to (c) (which required information includes a proposed tenancy which is MRO-compliant).

40) The power in regulation 33(2) is not prescriptive. It does not restrict the nature of the ruling which I may make. The Claimant has not produced precise terms for a revised proposed lease, and it would be impossible for me on the current evidence to determine compliant alternative terms which I could lawfully order should form part of the revised response.

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

42) Being responsive to learnings from my role as arbitrator, I consider that the appropriate course of action is for me to proceed to determine the complete terms of a compliant MRO proposal such that my ruling under regulation 33(2) can be for the Respondent to provide a revised response in the precise terms that I shall order. I shall do so unless the MRO tenancy is agreed by the parties.

## Costs

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

## Operative provisions

44) In the light of the above:
   a) Determination of MRO-compliant terms to be made by the arbitrator;
   b) The Respondent is ordered to provide a revised response to the Claimant within 28 days of the arbitrator's determination of its terms;
   c) Directions to be issued for the determination by the arbitrator of compliant MRO terms if those terms are not agreed;

d) Jurisdiction of the arbitrator in relation to any other terms to be disputed as drafting errors is reserved;
e) Costs are reserved.

**Arbitrator's Signature** …… …

**Date Award made** ……28 January 2019……

**Claimant's Ref: ARB/000322/Anderson**

**Respondent's Ref: ARB/000322/Anderson**

## Appendix 1 – Applicable Procedure and Law

**Procedure**

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

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

**Law**

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

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

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

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

> *(2) A "market rent only option" means the option for the tied pub tenant –*
>
> *(a) to occupy the tied pub under a tenancy or licence which is MRO-compliant, and*
>
> *(b) to pay in respect of that occupation –*
>
> *(i) such rent as may be agreed between the pub-owing business and the tied pub tenant in accordance with the MRO procedure (see section 44), or*
>
> *(ii) failing such agreement, the market rent.*
>
> *(3) The Pubs Code may specify –*
>
> *(a) circumstances in which a market rent only option must or may be an option to occupy under a tenancy;*
>
> *(b) circumstances in which a market rent only option must or may be an option to occupy under a licence.*
>
> *(4) A tenancy or licence is MRO-compliant if—*

*(a) taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence*

*(i) contains such terms and conditions as may be required by virtue of subsection (5)(a),*

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

*(iii) does not contain any unreasonable terms or conditions, and (b) it is not a tenancy at will.*

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

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

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

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

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

***Terms and conditions required in proposed MRO tenancy***

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

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

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

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

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

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

*31 – (1) Paragraph (2) applies where—*

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

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

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

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

*…*

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

*(3) Paragraph (4) applies where—*

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

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

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

## Appendix 2 –

## Vehicle for the MRO Option

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

**Interpreting the Legislation**

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

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

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

   *The Pubs Code may specify descriptions of terms and conditions—*

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

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

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

6. Section 44(1)(a) of the 2015 Act provides that the Pubs Code may "*make provision about the procedure to be followed in connection with an offer of a market rent only option (referred to in this Part as “the MRO procedure”) …*". This delegates to the Code the

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

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

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

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

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

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

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

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

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

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

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

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

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

that no such restriction was intended. Indeed, where a head landlord's consent to the grant of a new lease is required but cannot be obtained, the practical necessity of this construction becomes clear.

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

**Background Material**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Appendix 3 –

## Unreasonableness

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

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

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

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

**The terms and conditions must not individually and collectively be unreasonable**

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

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

6. A tenancy will not be compliant if its terms and conditions, individually or collectively, are unreasonable. That this is the correct approach to considering whether proposed lease terms are uncommon is furthermore clear from the wording of regulation 31(2), which

refers to terms and conditions only in the plural. Therefore, this regulation requires consideration of whether the agreement as a whole is one which is not common in tie free agreements.

**The choice of vehicle for delivering the MRO cannot be unreasonable**

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

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

**Unreasonableness - meaning**

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

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

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

12. The core Code principles are at the heart of the statutory purpose behind the establishment of the Pubs Code regime under the 2015 Act and relevant to the exercise of discretion or evaluative judgements pursuant to it. Furthermore, since provisions in the

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

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

**The Pubs Code Principles**

**Fair and lawful dealing**

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

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

**No Worse Off**

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

**The Application of Pubs Code Principles**

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

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

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

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

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

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

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

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

**Terminal Dilapidations on surrender of the existing tenancy**

25. As a consequence of the choice of a new lease as the MRO vehicle the dilapidations covenant in the existing lease will be triggered as a matter of law on its termination. Dilapidations represent the cost of complying with the existing lease covenants to repair (subject to any applicable limit on them). Dilapidations claims are limited by law so that the landlord cannot claim terminal dilapidations for amounts that exceed the extent to which the value of the landlord's interest in the property is diminished by the repair.

26. 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.

27. Where the POB chooses a new lease over a DOV, the landlord may have to take steps to mitigate the impact of the tenant's liability for dilapidations if it is to show it is acting reasonably. If it is a logical assumption that a tenant with more bargaining power than a TPT in the MRO process would negotiate with the landlord to carry out any repairs over a reasonable period, then a POB which refuses to do that now may be acting in a manner that is inconsistent with the principle of fair dealing and giving rise to unreasonable terms and conditions.

## Appendix 4 – Severing the Tie and Existing Lease Terms

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

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

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

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

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

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

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

7. Furthermore, that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need to have regard to the existing contractual relationship between the parties. The existing lease terms will be in the mind of the TPT who is entering into negotiations for a new

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

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

- end -