IN THE HIGH COURT OF JUSTICE **No. PT-2019-000804**
BUSINESS AND PROPERTY COURTS
PROPERTY TRUSTS AND PROBATE LIST (Ch.D)

Neutral Citation Number: [2020] EWHC 1858 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 18 June 2020

Before:

MR JUSTICE MILES

B e t w e e n :

EI GROUP PLC **Claimant/applicant**

- and -

(1) JOHN CLARKE
(2) LESLEY MINNETT **Defendant/respondents**

Jamal Demachkie (instructed by Gosschalks Solicitors) for the **Claimant/Applicant**.

Duncan Macpherson (instructed by Gregg Latchams) for the **Defendants/Respondents**.

Hearing date: **17 June 2020**

J U D G M E N T

Mr Justice Miles:

1 The claimant seeks leave under s.69(3) of the Arbitration Act 1996 to appeal from the award of Professor Graham Chase dated 4 September 2019 in a statutory arbitration commenced by the defendants as tenants under Part 4 of the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") and the Pubs Code etc. Regulations 2016 ("the Pubs Code").

2 The defendants are tenants of the Pottery Hotel, Bournemouth, under a tied lease dated 13 January 2012. The claimant is a "pub-owning business" (or "POB") as defined by s.69(2) of the 2015 Act (being a landlord of 500 or more tied pubs whose tenants are obliged to purchase alcohol from the landlord or the landlord's nominee). The defendants are a "tied pub tenant" (or "TPT") for the purposes of the 2015 Act.

3 Part 4 of the 2015 Act and the Pubs Code give TPTs an option in certain circumstances to take a market rental only ("MRO") tenancy in place of their tied tenancy. The process for giving effect to the MRO option is laid down by s.43 of the 2015 Act and various provisions of the Pubs Code.

4 Section 41 of the 2015 Act establishes the office of a Pubs Code Adjudicator.

5 Section 42 of the 2015 Act provides for the Secretary of State to make the Pubs Code as regulations. By s.42(3), 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-owning businesses in relation to their tied pub tenants; and (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.

6 Section 43 of the 2015 Act provides for the MRO option. Section 43(1) provides that the Pubs Code must require POBs to offer their TPTs an MRO option in specified circumstances. Section 43(2) defines a "market rent-only option" as an option for the TPT to occupy the tied pub under a tenancy or licence which is MRO-compliant.

7 Section 43(4) and (5) provide as follows:

> "(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)."

8 Section 44 provides that the Pubs Code may make provision about the procedure to be followed in connection with the offer of the MRO option and may confer functions on the Adjudicator in connection with that procedure.

9 Section 45 provides that the Secretary of State may by regulations confer functions on the Adjudicator in connection with the resolution of disputes relating to the offer of an MRO option, including as to whether a proposed tenancy or licence is MRO-compliant. This includes provisions for referring disputes to arbitration.

10 The Pubs Code provides *inter alia* for the procedure for MRO-compliant offers and includes the following, so far as relevant:

(a) Where the TPT serves the appropriate notice, reg. 29 requires the POB on receipt of a valid MRO notice to send the tenant a "full response" including a proposed tenancy which is MRO compliant.

(b) Reg. 31 provides that the terms of a proposed tenancy should be regarded as unreasonable including (under sub-paragraph (2)(c)) where they "are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties".

(c) Reg. 58 sets out rules for the arbitration of disputes over the terms of any proposed MRO-compliant lease provided by the landlord. The regulations allow the Adjudicator to appoint an appropriate person as arbitrator.

11 The defendant served an MRO notice on the claimants on 1 November 2016. On 22 November 2016, the claimants sent their "full response", including a proposed MRO-compliant tenancy. On 8 December 2016, the defendant referred the matter to the Adjudicator claiming that the claimant had failed to provide a compliant MRO lease and offer. The defendants identified certain specific clauses in the draft lease which they contended were unreasonable.

12 The dispute has led to two separate arbitration awards. The first, dated 2 August 2018, was given by the Deputy Pubs Code Adjudicator, Ms Fiona Dickie ("the preliminary award"). The second is the award of 4 September 2019 from which the claimants now seek leave to appeal.

13 The preliminary award of Ms Dickie addressed a number of points of principle in the hope that the parties would then be able to resolve their differences. Ms Dickie summarised her award on page 1 as follows:

"a) Does a compliant MRO proposal have to be offered in the form of a new lease, a deed of variation ("DOV"), or is either vehicle permissible in law?

Either is permissible.

b) If either form is acceptable, in law what considerations apply to the choice of vehicle?

It must be reasonable.

c) Do the terms of any FOT [*sc.* free of tie] tenancy offered have to be the same or substantially the same as the terms of the existing lease, subject only to such variations as are necessary to render the tenancy MRO compliant?

No.

d) Is it permissible (or required) to offer wholly new terms, subject only to the requirements of section 43 of the Act?

It may be permissible but only if reasonable. It is not required.

e) Can a term be unreasonable for the purpose of section 43(4)(a)(iii) of the Act if it is not deemed unreasonable by virtue of regulation 31 of the Code?

Yes.

f) How is the test of reasonableness in section 43(4)(a)(iii) to be interpreted?

In accordance with the core Code principles and as set out below.

The remaining issues will be the subject of a further award if the referral is not settled by agreement between the parties."

14 In order to understand the argument on this application it is also necessary to set out [73] to [78] of the preliminary award:

"[73] The Claimants' position 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.

[74] By comparison, when renewing a tenancy under section 32 to 35 of the 1954 [Landlord and Tenant] Act (arguably the closest example on the statute books of a statutory jurisdiction to determine the terms of the commercial tenancy) "reasonable" terms [are determined] 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 consider it is significant that it in doing so it did not choose to take the same path.

[75] 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.

[76] I therefore make it clear to the Claimants: the existing lease is not the necessary starting point in this statutory procedure. A DOV is not the default option. The tie and tie free lease are fundamentally different relationships. That does not mean however that it will always be reasonable to change terms in the existing lease which are also common in FOT leases.

[77] 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. 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.

[78] 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 of 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 existing lease terms are always irrelevant is untenable in my view."

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

16 With the benefit of the general guidance provided by Ms Dickie, the dispute was then remitted to the arbitrator, Professor Chase. An agreed list of issues was set out in the award as follows:

1. Whether the [claimant had] provided an MRO compliant tenancy as part of the "full" response?

2. Whether it is reasonable for the MRO tenancy to be in the form of a new lease?

3. If the answer to 2 is "no", what form of DOV is reasonable:-

    a. DOV by reference (ie replacing the terms of the lease other than term, parties, and demise with the FOT terms in a schedule), or

    b. Line by line DOV (ie changing particular parts of the existing lease).

4. Are the following terms deemed to be unreasonable under Regulation 31(2)(c) of the Code because they are not common in agreements between landlords and pub tenants who are not subject to product or service ties and/or because they are not in the existing lease and/or because they remain to be negotiated and alongside the MOR process as with the amount of "the Rent":- [certain specific terms were then identified, which are addressed below].

5. Are the terms in paragraph 2 above collectively uncommon?

6. If it is accepted the same are properly pleaded, are the terms in paragraph 2 above reasonable for the purposes of section 43(4)(a)(iii)?

7. What costs order should be made?

17 The parties agree that the reference in issues 5 and 6 to paragraph 2 must have been intended as a reference to the terms identified in issue 4. The arbitrator also addressed a further issue, Issue 8, about the timing of rent payments, which does not affect the outcome of this application.

18 The arbitrator had the benefit of evidence and submissions from the parties and an independent report from a jointly instructed expert chartered surveyor, Mr Munton, who gave evidence *inter alia* as to whether the contested terms identified under Issue 4 were common in the market.

19 The arbitrator decided, in summary, as follows:

(a) Issue 1: The claimant had not provided an MRO-compliant tenancy because, as found elsewhere in the award, some of the terms in the draft were unreasonable or uncommon.

(b) Issue 2: The process for providing an MRO-compliant tenancy would most fairly and appropriately be achieved by the provision of a draft deed of variation ("DOV") rather than a new lease ("NL");

(c) Issue 3: This should be done by what the parties called the line by line DOV;

(d) Issue 4: Some of the contentious terms were reasonable while others were unreasonable.

(e) Issues 5 and 6: The decision on these issues followed from the earlier decisions.

(f) Issue 7: The question of costs would be adjourned pending the current appeal process.

(g) Issue 8: The position of the claimant about the timing of payments was correct and payments should be quarterly.

20 The arbitrator's overall conclusion was that the MRO response provided by the claimant did not comply with reg. 29(3) of the Pubs Code.

21 The claimant contends that the arbitrator made an error of law regarding s.42(3)(b) of the 2015 Act.

22 It was common ground before me that the comparison required by s.42(3)(b) of the 2015 Act is between: (a) the position the TPT would be in under the proposed MRO tenancy; and (b) the position of a free-of-tie tenant.

23 The claimant says that the arbitrator erred in taking s.42(3)(b) to require a different comparison, namely between: (a) the position the TPT would be in under the MRO tenancy; and (b) the position it was in under its existing tied tenancy. The claimant says that the arbitrator thought (wrongly) that if the tenant would be "worse off" in respect of a given term under (a) than (b) the proposed lease is non-compliant.

24 The claimant identifies the point of law as:

> "whether the Arbitrator erred in law in holding that the principle in s.42(3)(b) of [the 2015 Act] *"that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie"* requires that a proposed market rent only tenancy must be drafted to ensure that the tenant is no worse off under the MRO tenancy than they were under their existing tied tenancy."

25 The claimant seeks an order remitting the award to the arbitrator for reconsideration in light of the court's determination of the question of law.

26 Section 69(3) of the Arbitration Act provides:

> "(3) Leave to appeal shall be given only if the court is satisfied—
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
> (b) that the question is one which the tribunal was asked to determine,
> (c) that, on the basis of the findings of fact in the award—
> (i) The decision of the tribunal on the question is obviously wrong, or
> (ii) The question is one of general public importance and the decision of the tribunal is at least open to

serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

27 Russell on Arbitration [8-132] sets out three well-known principles relevant to the application of the section. First, as a matter of general approach, the court should strive to uphold arbitration awards; secondly, the approach is to read an arbitration award in a reasonable commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it; and, thirdly, not only will the court not be astute to look for defects, but in cases of uncertainty, it will, so far as possible, construe the award in such a way as to make it valid rather than invalid. I shall follow these principles.

28 Counsel for the defendants said that that deference should be paid to an arbitrator particularly in an area of specialisation. He referred to the eminence of the arbitrator in the present case. I take this also into account though it must be tempered as I understand that this may have been the first arbitration the arbitrator under to the 2015 Act and Pubs Code. But in any case the question identified by the claimant is not one depending on surveying expertise, it is a matter of interpretation of a statute.

29 Counsel for the defendants referred to MRI Trading AG v Erdenet Mining Corp LLC [2012] EWHC 1988 (Comm) at [15] where Eder J recorded the submissions of counsel as to the correct approach to the hearing of a substantive appeal under s.69 of the Arbitration Act and said he was prepared to assume that the submission was correct for the purposes of the appeal before him. At [15(d)], he recorded the submission of counsel as follows:

> "Fourthly, when a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself. It can interfere only when convinced that no reasonable person, applying the correct legal test, could have reached the conclusion which the tribunal did: or, to put it another way, it has to be shown that the tribunal's conclusion was necessarily inconsistent with the application of the right test: The "Sylvia" [2010] 2 Lloyd's Rep 81 at [54]-[55]. The same extremely circumscribed power of intervention applies when it is complained that a tribunal has incorrectly applied the law to the facts. It is only if the correct application of the law leads inevitably to one answer, and the tribunal has given another, that the court can interfere. Once a court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the Award: The Chrysalis [1983] 1 Lloyd's Rep 503 at 507."

30 Counsel for the defendants submits that the arbitrator's decision in the present case involved a mixed question of law and fact, or an application of the law to the facts, and that even if it was arguable that the arbitrator had erred, the court should only entertain an appeal if satisfied that the same conclusion could not have been reached in any event.

31 I do not accept this submission. First, the MRI case was not concerned with a leave application under s.69(3) and it is wrong to read across the principles for substantive

arbitration appeals into the test at the leave stage. Secondly, I consider that the argument is based on a misunderstanding. In the cases referred to by Eder J in the cited passage the appellant was seeking to argue that the arbitrator must, as a matter of deductive inference, have gone wrong in law because the result was one no reasonable arbitrator could have reached on a proper legal basis. That differs from a case where the arbitrator has expressly addressed a point of law and has erred. In such a case, it is no answer to say that the arbitrator's award involved a mixed question of law and fact, or the application of the law to the facts. I also find it hard to imagine that there are many arbitration awards which do not involve an application of the law to the facts.

32 I move, then, to consider the criteria under s. 69(3). It is convenient to start with the question whether the arbitrator's decision was obviously wrong or at least open to serious doubt.

33 The first question under this head is whether the claimants have properly identified an error of law as opposed to one of fact. In my judgment, the alleged error would, if established, constitute one of law, concerning the interpretation of the 2015 Act.

34 The next question is whether the decision was wrong or at least open to serious doubt. Although he was not invited to revisit points of principle, the arbitrator considered and commented on the requirements of the 2015 Act and the Pubs Code when carrying out his role. At a number of points in his award, he referred to the principle in s.42(3)(b) that pub tenants should not be worse off than they would be if they were not subject to any product or service tie. At one point in the award, he set out this wording in full, but at other points he referred more shortly to the tenant "not being worse off".

35 I agree with the submission of the claimant that the arbitrator thought that this provision required that the proposed MRO-compliant tenancy must be drafted to ensure that the tenant is no worse off under the MRO tenancy than it was under the existing tied tenancy. This appears to be the basis of his reasoning in a number of places including [4.31], [4.35], [4.36], [4.39], [4.52], [4.71], [4.90], [4.95] and [4.96].

36 The point is illustrated by [4.35] where he said "such an approach ignores, at least in part, the principles [s.43(3) of the 2015 Act] and the Pubs Code Principle of fair and lawful dealing and the tenant being no worse off as a tenant free of tie." The arbitrator's reference to "the tenant being no worse off <u>as</u> a tenant free of tie" shows that he thought that a comparison had to be made between the tenant's position under its existing tied lease and its position free of the tie. That is the wrong comparison.

37 The arbitrator's approach is also shown by [4.36] where he said:

> "My interpretation and application of Ms Dickie's explanation of the law, with which I agree, does not make the existing lease the starting point but any change to any lease term will be the benchmark to establish if the new term or condition is reasonable, common or leaves the tenant in a worse position. The difference is a subtle one but an important one."

38 Though the arbitrator said in this passage that though he has not taken the existing lease as the starting point, he nevertheless takes changes between the existing lease

and proposed lease as a "benchmark" for assessing whether the new clause is reasonable or common or leaves the tenant in a worse position. He calls the distinction subtle but important. By taking it as a "benchmark", he is treating the changes as the point from which to measure compliance.

39 I find this reasoning very hard to follow. It is not what Ms Dickie held in the passages I have cited above. She emphasised not just that the existing tenancy was not the starting point, but that the 2015 Act did not generally require a comparison between the existing tenancy and the proposed MRO tenancy to determine whether the tenant would be "worse off" in a given respect under the latter than the former. She highlighted the textual differences between the 2015 Act and the Pubs Code, on the one hand, and the Landlord and Tenant Act 1954 on the other. She then went on to say that the existing terms *might*, in some circumstances, be relevant to the question whether the proposed MRO-compliant tenancy was reasonable, and that the outcome would be sensitive to the particular facts. For instance, if there were favourable deposit terms in the existing tied tenancy it might be unreasonable in all the circumstances to require a different and more onerous deposit arrangement in the proposed new lease. She did not, however, suggest that the tenant could complain about a particular term *merely* on the basis that it would leave it in a worse position than under the existing tied tenancy in a given respect.

40 I consider that the arbitrator made an obvious error on the question of law in these passages. Section 42(3)(b) of the 2015 Act does not require a comparison between the tied lease and the proposed lease to determine whether a particular term would leave the tenant worse off than under the existing tied lease. It is to my mind obviously wrong in law to regard differences between the two as a benchmark for assessing whether what is proposed is reasonable.

41 Given this conclusion, the decision of the arbitrator on this question is at least open to serious doubt.

42 I also consider the question is one of general public importance. The evidence shows that there are a great many outstanding disputes between POBs and TPTs about the exercise of the MRO option. The legislation is relatively new and there are few authorities about it. It is of general public importance that the correct approach to the 2015 Act and Pubs Code is followed, both by parties' advisers and arbitrators called upon to determine disputes.

43 I also consider that the question identified by the claimant was also one the tribunal was asked to determine. Although it was not identified as a separate question of principle in the agreed list of issues, the defendant's representative appears to have submitted that the proposed MRO-compliant tenancy put the defendants in a worse position than the terms of their existing lease and the claimant's representative appears to have argued that that was not the correct approach.

44 I turn to the question whether the determination of the question will substantially affect the rights of one or more of the parties. Russell on Arbitration [8-146] refers to The Northern Pioneer [2002] EWCA Civ 1878, [2003] 1 WLR 1015, where the Court of Appeal held that the uncertain juridical basis of the shipowner's right to withdraw a vessel for non-payment of hire within a reasonable time was enough to cast serious doubt on the arbitrator's decision, but this was not enough to pass the "substantially affect the rights of the parties" test. This was because the delay in purporting to cancel the charterparty for over a month was inconsistent with an

intention to terminate for non-payment, and the Court of Appeal was confident that the arbitrators would have reached the same decision on alternative grounds no matter what juridical basis they had chosen to base their decision on.

45 With this in mind I turn to examine whether, despite the error of law identified by the claimants, the court can be confident that the arbitrator would have reached the same result in any event on independent, alternative, grounds.

46 As already explained, Issue 1 was whether the claimant had provided an MRO-compliant tenancy as part of the full response. The arbitrator's decision was, in essence, that because he found (under Issue 4) that some of the terms set out in the claimant's full response were unreasonable and/or uncommon, Issue 1 went against the claimant. I shall return to Issue 4 in a moment.

47 Issue 2 was whether it was reasonable for the MRO tenancy to be in the form of a new lease rather than a DOV. Ms Dickie had concluded in the preliminary award that there was no presumption in favour of either a new lease or a DOV and that the question was fact specific. At [4.25], the arbitrator referred to the "no worse off" principle and at [4.27], he criticised the claimant for not giving "sufficient attention to the existing term (sic) that is to be changed and establishing if the new arrangement will be fair and reasonable or place the tenant in a worse position". I agree with the claimant that these passages appear to proceed on his erroneous understanding of the "no worse off" criterion. It was also in this section that the arbitrator made the erroneous benchmarking point in [4.36].

48 However, it seems to me that the crux of the arbitrator's reasoning on Issue 2 was found in [4.38] to [4.41] which may be summarised as follows: first, setting out the terms in a draft DOV would be fairer to the tenant because there were a number of areas in which the new terms were contested and might prove unreasonable; secondly, the claimant's arguments about wishing to put forward standardised terms to improve estate management and ease its dealings with lenders and others did not carry any significant weight since such advantages to the claimant were not relevant to what was fair and reasonable as between the parties; thirdly, that requiring a DOV rather than a new lease would reduce the chances of an unfair or unreasonable term being included; and, fourthly, the use of a DOV was a common methodology for effecting lease changes.

49 As I read the award, none of this reasoning relied on the "no worse off" criterion. So, though the arbitrator did refer to the "no worse off" point as part of his general discussion of Issue 2, I am confident that that he would have reached the same conclusion in any event, irrespective of his misunderstanding on that point.

50 The claimant submits that it is not possible to separate the arbitrator's reliance on the "no worse off" point from the other aspects of his reasoning. It says that the error of law affected his entire approach. I do not accept this submission. The arbitrator explained at [4.48] – [4.41] the reasons for his conclusion. The "no worse off" point did not form part of the reasons for his actual decision on Issue 2.

51 There was no dispute between the parties as to Issue 3 if the answer to Issue 2 was in favour of the defendant.

52 Issue 4 concerned the specific terms that the parties had identified as contentious.

53 Issue 4(a) concerned with the requirement of pub opening hours. The claimant's position was that the draft should follow the suggestion of Mr Munton's report with some tweaks. In addressing this issue, the arbitrator appears, at [4.51], to have thought that the "no worse off" criterion required a comparison of the position under the proposed arrangement with the existing lease, and this was an error. However, his conclusion was that the wording should be as recommended by Mr Munton with the tweaks suggested by the claimant. Hence, allowing an appeal on the point of law would not affect the rights of the parties.

54 On Issues 4(b), (c), and (e), the arbitrator again found for the claimants. So, again, an appeal would make no difference to the rights of the parties.

55 On Issue 4(d), the question was whether the new lease should contain a clause allowing the claimant to carry out repairs and charge the tenants the costs, and to preserve other remedies for breach of the covenant to maintain the premises in good repair. At [4.70] the arbitrator noted that Mr Munton had advised that while the principle of the claimant's proposal was a common term, the form of words adopted by the claimant in the draft lease was uncommon. At [4.71] the arbitrator expressed concern that the tenants would be worse off compared with their position in the current lease. This is another example of his erroneous approach to the "no worse off" test. At [4.72] the arbitrator stated his conclusions. He found against the claimant on the basis, first, that the proposed wording was uncommon and, secondly, that the tenants would be worse off than under the existing lease. To my mind, these were clearly separate, alternative, reasons for the decision. He decided that the proposed term (as worded) was uncommon. Terms or conditions which are uncommon in FOT leases are deemed to be unreasonable for the purposes of the 2015 Act and the Pubs Code. This reason was, first, sufficient for the decision and, secondly, unaffected by the identified legal error. I am therefore confident that the arbitrator would have reached the same decision in any event on independent grounds.

56 The claimant again submits that the "no worse off" point infected all aspects of the arbitrator's reasoning on this issue and that it is inappropriate to parse or analyse his reasoning in the way that I have. I do not accept this. He gave two separate reasons for his conclusions and, as I read them, each was independently sufficient to determine Issue 4(d) against the claimant.

57 Issues 4(f) and (g) concerned the application of the retail price index ("RPI") to the rent. As to Issue 4(f), the arbitrator noted at [4.91] that Mr Munton's evidence suggested that a dual market was emerging with some tie-free leases including indexation and others not, depending on whether the landlord was a POB. At [4.96] he found that the RPI term as worded was unreasonable as it was likely to create a rental burden on the tenant different from a market rent. At [4.97] he concluded that the term was unreasonable, and that it would leave the defendant worse off. He made similar points in relation to Issue 4(g). In this part of his reasoning, the arbitrator appears to have been making a different "worse off" comparison from that identified above, namely that between an indexed rent and a market rent with rent reviews. As I read the award, his point was that, because RPI might outstrip increases in market rents, the TPT would be worse off with indexation than otherwise.

58 At any rate, I am again confident that the arbitrator's first and principal reason for his decision under this head was that an indexed rent was not the same as a market

rent and that the proposed term in the draft lease was not a reasonable one. This did not depend on the "no worse off" point but was expressed as a separate reason. Again, I do not accept the claimant's submission that any error the arbitrator made about the "no worse off" point infected all of his reasoning on Issues 4(f) and (g). I consider, reading the award commercially and fairly, that the reasons he gave were alternative and independent and separately sufficient. I am again confident that the arbitrator would have reached the same conclusion in any event and irrespective of any error he may have made about the effect of s.42(3)(b) of the 2015 Act.

59 The arbitrator's conclusions on Issues 5 and 6 followed from his earlier conclusions and no separate or independent challenges were made in respect of them on the current hearing. I am again confident in the light of my conclusions about the earlier issues that the arbitrator would have reached the same decision on these issues irrespective of his error of law about s.42(3)(b).

60 Issue 7 concerned the costs and is not relevant for present purposes.

61 On Issue 8, whether rent should be paid monthly or quarterly, the arbitrator found in favour of the claimant so an appeal would not affect the rights of the parties.

62 I am, therefore, confident that the arbitrator would have reached the same decision on each of the points he found in favour of the defendant irrespective of any error he made in interpreting the "no worse off" principle under the 2015 Act. I therefore conclude that the determination of the question of law identified by the claimant would not substantially affect the rights of the parties.

63 I do not need to consider the final question under s. 69(3) whether it would be just and proper in all the circumstances for the court to determine the question of law. That would have required a consideration of the delays there have been since the defendants served an MRO notice by the tenant as long ago as 2016. The 2015 Act and Pubs Code are clearly intended to allow a tied tenant to obtain a FOT lease reasonably quickly after serving a notice. In light of my decision I do not need to attribute responsibility for the delay since 2016 but it is troubling that the defendants have still not obtained a MOR-compliant lease.

64 The application is dismissed.