Star Pubs and Bars Ltd v Pubs Code Adjucator

Court
Queen's Bench Division (Administrative Court)

2021 WL 01951061

Neutral Citation Number: [2021] EWHC 1291 (Admin)

Case No: CO/4053/2020

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17 May 2021

Before:

THE HONOURABLE MR JUSTICE MORRIS

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Between:

STAR PUBS & BARS LIMITED	**Appellant**
- and -	
THE PUBS CODE ADJUDICATOR	**Respondent**

- -

- -

Catherine Callaghan QC and Naina Patel (instructed by **DLA Piper Solicitors**) for the **Appellant**

Adam Heppinstall QC and Conor McCarthy (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 28 and 29 April 2021

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Approved Judgment

Mr Justice Morris:

Introduction

1.This is a preliminary hearing in the appeal by Star Pubs & Bars Ltd ("Star") against a penalty of £2 million ("the Penalty") imposed by the Pubs Code Adjudicator ("the PCA") pursuant to section 58(3) of the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act").

2.The issues to be determined at this preliminary hearing, pursuant to my order dated 9 March 2021, are as follows:

1. Star's application to amend its Notice of Appeal to add a ground of appeal as set out in its Amended Grounds of Appeal: (Issue 1);

2. Star's application for permission to rely on the witness statement of Lawson Mountstevens dated 1 December 2020: (Issue 2);

3. Star's application for specific disclosure and inspection of three categories of document: (Issue 3);

(4) Whether, in an appeal under section 58(3) of the 2015 Act, Star may appeal against the imposition of a financial penalty or its amount on the basis that findings in the investigation report published under section 54, which are relied upon as grounds for the imposition of the penalty, or taken into account when calculating the amount of the penalty, were unfair, unjustified, incorrect and/or do not justify the imposition of a penalty. Depending on the answer to this question, the further question arises as to whether Star's related claim for judicial review should be heard at the same time as the final hearing of the appeal: (Issue 4);

(5) Whether the issue of whether the appeal should proceed by way of "rehearing" or by way of "review" should be determined in advance of the final hearing of the appeal, and if so, the substance of that issue: (Issue 5).

3.The first three issues are raised by Star's application notice dated 1 December 2020.

The Factual Background

The PCA and the Pubs Code

4.The PCA is the creation of Part 4 of the 2015 Act. The 2015 Act also makes provision for the creation of a statutory code, found in the Pubs Code etc. Regulations 2016 (known as the Pubs Code), to regulate various aspects of the commercial relationship between pub-owning businesses ("POBs") and their tied pub tenants (as defined in sections 68-70 of the 2015 Act). Ms Fiona Dickie is the PCA. Star is the pub estate business of Heineken UK Limited and is a POB within the meaning of the 2015 Act. At the end of June 2019, it operated over 2000 tied pubs in England and Wales.

5.In broad terms, section 43 of the 2015 Act makes provision for POBs to offer their tied pub tenants a "market rent only option" ("MRO") in specified circumstances. This is an option for a tied pub to go free-of-tie and pay a market rent. A "tie" (or more specifically, a "product tie") obliges a tenant to sell alcohol supplied only by the landlord or its nominee. A "stocking requirement", with which this appeal is concerned, is essentially a requirement to stock beer or cider *produced* by a brewer landlord, but which permits the tenant to *purchase* such stocks from *any* supplier *and* also to sell beer or cider produced by the brewer landlord's *competitors* (see sections 68 and 72). A stocking requirement is not regarded as a tie under the 2015 Act (see sections 43(4)(a)(ii), 68(5) to (7) and 72), and so can properly be included in an MRO-compliant offer.

6.MROs are offered pursuant to an MRO procedure set out in the Pubs Code (see section 44). The PCA has certain functions in connection with the MRO procedure, including adjudicating on whether a proposed tenancy is MRO-compliant (see section 45). An MRO-compliant tenancy must not contain unreasonable terms and the Pubs Code specifies terms which are unreasonable (see section 43(4) and (5)). The PCA also has separate investigatory and enforcement powers in relation to the Pubs Code. These are sections 53 to 58, with which this appeal is concerned.

The relevant statutory provisions

7.Section 53 of the 2015 Act, headed "Investigations", provides as follows:

"*(1) The Adjudicator may investigate whether a pub-owning business has failed to comply with the Pubs Code if the Adjudicator has reasonable grounds to suspect that—*

(a) the business has failed to comply with the Pubs Code , or

(b) the business has failed to follow a recommendation made under section 56.

(2) The Adjudicator may not carry out an investigation until the guidance required by section 61(1) has been published." (emphasis added)

8.Section 54, headed "Investigation reports", provides as follows:

"*(1) Following an investigation, the Adjudicator must—*

(a) publish a report on the outcome of the investigation, and

(b) consider whether to use any of the enforcement powers mentioned in section 55 .

(2) An investigation repor t must, in particular, specify —

(a) any findings that the Adjudicator has made ,

(b) any action that the Adjudicator has taken or proposes to take , and

(c) the reasons fo r the findings and any action taken or proposed .

(3) An investigation report need not identify the pub-owning business concerned.

(4) If a pub-owning business is identified in a report, the business must have been given a reasonable opportunity to comment on a draft of the report before publication ." (emphasis added)

9.Section 55 headed "forms of enforcement" provides as follows:

"*(1) If, as a result of an investigation, the Adjudicator is satisfied that a pub-owning business has failed to comply with the Pubs Code , or has failed to follow a recommendation made under section 56, the Adjudicator may take one or more of the following enforcement measures—*

(a) make recommendations;

(b) require information to be published;

(c) impose financial penalties .

…" (emphasis added)

Sections 56 and 57 then address, respectively, "recommendations" and "requirements to publish information.

10.Section 58, headed "Financial penalties", provides as follows:

"*(1) If the Adjudicator chooses to enforce through imposing financial penalties , that means imposing a penalty on the pub-owning business of an amount not exceeding the permitted maximum (see subsection (6)).*

(2) The financial penalty is imposed by giving the pub-owning business written notice specifying —

(a) the grounds for imposing the penalty ,

(b) the amount of the penalty,

(c) the period within which it must be paid, and

(d) how it must be paid.

(3) The pub-owning business may appeal to the High Court against—

(a) the imposition of a financial penalty, or

(b) its amount .

(4) Financial penalties under this section are recoverable by the Adjudicator as a debt.

(5) Financial penalties received by the Adjudicator must be paid into the Consolidated Fund.

(6) The Secretary of State must make regulations—

(a) specifying the permitted maximum, or

(b) specifying how the permitted maximum is to be determined." (emphasis added)

Section 60 further provides that the PCA may give "advice" on any matter relating to the Pubs Code to, inter alia, tied tenants and POBs.

The investigation of Star

11.On 10 July 2019 the PCa commenced an investigation into Star to consider whether Star had failed to comply with the Pubs Code in relation to its use of stocking requirements. At the same time it gave Notice of Investigation. On 30 July 2020 the PCA provided Star with a draft of its report ("the Draft Report") and Star was given an opportunity to comment on the Draft Report in accordance with section 54(4). It is common ground that the Draft Report did not contain any reference to whether the PCA proposed to take any enforcement measures (or other action), nor, if so, what they might be. Star contends that it was given no opportunity to comment on the imposition of the Penalty, including the grounds for its imposition and its amount.

12.On 3 September 2020 Star provided its response to the Draft Report, running to more than 70 pages ("the Response"). In the Response, Star made reference to enforcement measures, submitting, in brief and general terms, that its conduct did not warrant the imposition of a penalty. On 7 October 2020, the PCA made a formal request of Star to provide its turnover figures for the year ending September 2020. Star provided these, by the deadline of 9 October 2020.

13.By a notice given to Star on 14 October 2020 pursuant to section 58(2) of the 2015 Act ("the Penalty Notice"), the PCA imposed a financial penalty on Star of £2 million. The PCA's report of its investigation into Star ("the Report"), which accompanied and supported the Penalty Notice and which was published on 15 October 2020, found that Star had breached the Pubs Code in relation to proposed stocking requirements during the period from 21 July 2016 (when the Pubs Code was introduced) to 10 July 2019 (when the investigation commenced). The Report differs from the Draft Report in that it contains a new section addressing "enforcement measures", which summarises the contents of the Penalty Notice. The PCA determined that, in addition to other available enforcement measures, it was appropriate to impose the Penalty on Star to reflect the serious nature of the breaches of the Code, the scale of harm allegedly caused to Star's tenants by them, and Star's awareness of those breaches.

The Penalty Notice

14.The structure and content of the Penalty Notice is as follows. Section 3 is headed "Outcome of the investigation". After referring to the fact that the investigation was now complete and the Report was published, at paragraph 3.2 the Penalty Notice repeats verbatim the twelve findings of "breach of the Code" contained in the Report. Sections 4 and 5 summarise the PCA's enforcement powers, and in particular its power to impose financial penalties, and refers to considerations relevant to the latter set out in the PCA's Statutory Guidance on Investigation & Enforcement ("the Statutory Guidance").

15.The substance of the reasoning for *the imposition* of the Penalty is contained in section 6 of the Penalty Notice. This is headed "Grounds for imposing the penalty". The grounds are based on three considerations: "the nature of Star's breaches … in the context of the Code" (paragraphs 6.1 to 6.5); "the scale of the harm caused by Star's breaches" (paragraphs 6.6 to 6.11); and "Star's awareness of its breaches" (paragraphs 6.12 to 6.26). Section 6 concludes by setting out reasons why other enforcement measures are inadequate (paragraph 6.27 to 6.29). Section 7 addresses the *amount* of the penalty. Sections 8, 9 and 10 deal with how the penalty must be paid, when it must be paid and refer to the right of appeal.

16.Notably, as regards the "nature of Star's breaches", the PCA relies on the first six breaches of the Code only, as justifying the imposition of the penalty. The Penalty Notice provides as follows:

"*6.1 The PCA is mindful that a financial penalty is one of the most punitive forms of enforcement and should be imposed where other enforcement measures alone are inadequate.*

6.2 Star's breaches of the Code were particularly serious because they frustrated the core Code principles of fair and lawful dealing in relation to tied pub tenants, and that tied pub tenants should be no worse off than if they were not subject to any tie.

6.3 The MRO process is the critical route by which the "no worse" off principle can be delivered, and by which tied pub tenants can instigate meaningful negotiations with pub owning businesses in respect of their tied and free of tie options. The process is dependent upon compliant MRO proposals forming the foundation upon which fair negotiations between tied pub tenants and POBs can occur. The offer of non-compliant MRO terms compromises that foundation and undermines the effective working of Code. The PCA considers the infringements below to be particularly serious examples of non-compliance, in respect of which the PCA will impose a financial penalty:

(a)…"

Sub-paragraphs (a) to (f) of paragraph 6.3 then set out, verbatim, the first six findings of breach which are set out at paragraph 3 of the Penalty Notice. The Penalty Notice goes on to explain that it has not taken into account the remaining six breaches when calculating the level of penalty.

17.As regards the second consideration, "scale of harm", the Penalty Notice states:

"*6.6 When considering the scale of any Code breaches, the PCA will take into account not only actual harm caused, but also any harm the breach was capable of causing. When assessing impact on tenants, the PCA will assess both the number of tenants or groups of tenants that were or could have been affected, and the extent of the impact on individual tenants or groups of tenants.*

…

6.8 One of the PCA's main concerns from the evidence she reviewed has been the deterrent effect of Star's proposed stocking terms. An unreasonable stocking term allows the POB to distort the negotiating process, by impeding the ability of the tenant to have a commercially viable free of tie tenancy or to use the MRO offer to negotiate fairer tied terms at rent review, and creating a disincentive to tenants who are considering exercising their statutory right to MRO. This frustrates Parliament's intention to create a viable alternative to the tied option.

6.9 It is not possible to determine definitively the reason why any of Star's tenants chose to withdraw from the MRO process, or why others may have settled on the tied terms that they did or decided not to pursue the option altogether. Star's use of standard approaches across its whole tied estate was bound to give rise to breaches in individual cases, and this was therefore foreseeable. The PCA received documentary evidence from Star of its interactions with individual tenants in negotiations and arbitration proceedings, supported by accounts from a wide range of tenants who had requested MRO, demonstrating that tenants perceived detrimental impacts from Star's stocking terms . The PCA is satisfied that Star's proposed terms served as a structural barrier to MRO." (emphasis added)

Then at paragraph 6.10 the Penalty Notice sets out, under six heads, examples of ways in which Star's conduct affected particular tenants. Under some, but not all, of those heads, there is reference to the evidence of the tenants.

18.As regards the third consideration, "awareness of breaches", the Penalty Notice sets out the reasoning in relation to each of the six serious breaches, finding in some cases that Star was or ought to have been aware of certain matters, and in general terms that Star's conduct had been negligent and/or "wilfully negligent".

The appeal

19.On 3 November 2020, Star filed an appeal against both the imposition of the Penalty and the amount of the Penalty, pursuant to section 58(3) of the 2015 Act. The grounds of appeal run to some 15 pages, identifying a substantial number of grounds, sub-grounds and sub-sub-grounds. The following is a summary.

20.As regards imposition of the Penalty (as opposed to the amount), Star puts forward three grounds. Under the first of those three grounds Star contends that the PCA was wrong to impose any financial penalty on Star for the following reasons:

(1) The nature of the breaches of the Code does not justify the imposition of a financial penalty (addressing in turn the six breaches relied upon at paragraph 6.3 of the Penalty Notice). In relation to each breach, it is contended that it was "unfair and unjustified" to impose a penalty, for a number of detailed reasons or "circumstances". This is the challenge to the first of the PCA's three considerations.

(2) The scale of the harm allegedly caused by the breaches does not justify the imposition of a financial penalty. The PCA failed to produce adequate evidence of actual or potential harm caused to tenants by Star's proposed MRO tenancies, for a number of reasons. This is the challenge to the second of the PCA's three considerations.

(3) There was a serious procedural irregularity in the process operated by the PCA which led to the imposition of a financial penalty, namely the PCA's reliance on anonymous evidence from third parties (Star's tenants and their representatives) to which Star was given no access during the investigation (and still has had no access), in breach of principles of natural justice. This is relevant to Issue 3 below.

(4) Star's alleged awareness of its breaches does not justify the imposition of a financial penalty. Four sub-grounds are put forward. The first is that there is no evidence that Star's conduct was anything other than inadvertent. In particular, Star contends that the PCA erred in law in its definition of wilful negligence and that there is no evidence that Star knew it had breached the Pubs Code or was recklessly careless as to any such breach (and the PCA erred in law in finding that Star's breaches were wilfully negligent). Other sub-grounds contend that the PCA's various conclusions on awareness were "unfair and justified". This is the challenge to the third of the PCA's three considerations.

21.In the second and third grounds challenging the imposition of the Penalty, Star contends that a financial penalty was not justified given that Star had addressed the majority of the issues identified in the Report by the time the investigation commenced and given other possible enforcement measures. Further Star contends that the amount of the Penalty was manifestly excessive, advancing five discrete grounds.

Subsequent developments

22.Thereafter, on 13 November 2020 the parties filed a consent order pursuant to which Star would file its Skeleton Argument in support of the appeal ("the Appeal Skeleton") and any accompanying evidence by 1 December 2020, and the PCA would indicate by 8 December 2020 whether it sought to raise an issue as to the proper scope of an appeal under section 58(3) of the 2015 Act. The PCA had initially raised this issue prior to the filing of the appeal.

23.On 1 December 2020, Star filed its Appeal Skeleton Argument. It runs to 80 pages and 250 paragraphs. It is effectively a full written case. At the same time it filed its application notice seeking the orders as set out in paragraph 2(1) to (3) above.

24.On 8 December 2020, the PCA confirmed in correspondence that it intended to raise issues with regard to the scope and/or jurisdiction of the appeal. In particular, the PCA's position was that section 58(3) does not confer any right to appeal against the underlying findings made against Star, even if such findings constitute or underpin the grounds for imposing the financial penalty or determining the amount; any challenge to such findings had to be brought by way of judicial review.

The Judicial Review Claim

25.In light of the position taken by the PCA on the scope of the appeal, on 29 December 2020 Star commenced, on a protective basis, a claim for judicial review seeking ("the Judicial Review Claim") to challenge those (and only those) findings *in the Report* which formed the basis of the PCA's grounds for imposing a financial penalty and determining its amount, as set out in the Penalty Notice. Star contends that those findings in the Report were unsupported by the evidence, were unreasonable, reached by error of law and/or error of fact, or following a breach of natural justice and/or breach of Article 1 Protocol 1 ECHR. More specifically, in the Statement of Facts and Grounds ("SFG"), it is stated that it is not possible to disentangle the PCA's grounds for imposing the financial penalty from its underlying findings in the Report and for that reason, the grounds for judicial review overlap with or are similar to some of Star's grounds of appeal. In the SFG, the first six of the specified grounds are directed specifically at the six breaches identified in paragraphs 6.3(a) to (f) of the Penalty Notice, but in each case in the following terms:

"*the findings in the Investigation Report (replicated at paragraph 6.3(..)) of the Penalty Notice) ... were unsupported by the evidence, for the reasons set out in paragraphs .... of [the Appeal Skeleton]. The PCA therefore acted unreasonably or unlawfully or erred in fact in reaching those findings" (emphasis added)*

26.The seventh and eighth grounds challenge findings in the Report relevant to "scale of harm". The ninth ground challenges findings in the Report relevant to "awareness". The tenth ground challenges findings in the Report relevant to paragraph 6.28 of the Penalty Notice. The remaining grounds address the amount of the penalty and the two pleas of procedural unfairness.

27.A consent order staying that claim until final determination of the scope of the appeal was approved by the Administrative Court on 21 January 2021.

28.On 12 February 2021, Mr Justice Swift listed a half-day hearing to deal with Star's applications made on 1 December 2020. Thereafter, following liaison between the parties, on 18 February 2021, the PCA applied to vary the Order of Mr Justice Swift to provide for the preliminary hearing to cover two additional issues: the scope of the appeal (now Issue 4) and whether the appeal should proceed by way of a rehearing or review (now Issue 5). The PCA explained that Star did not agree that the second issue was properly for determination at the preliminary hearing. On 9 March 2021 I made a further order.

29.I turn now to deal with each of the five issues in turn.

Issue 1: Amendment

30.Star seeks permission to amend its Notice of Appeal to add a further ground of appeal, namely:

"*…the PCA's investigation was procedurally unfair in that the PCA failed to give Star an opportunity to make representations on enforcement measures, in particular, on whether a financial penalty should be imposed or its amount, before such penalty was imposed, contrary to section 54 of the 2015 Act or alternatively, contrary to common law requirements of fairness or the procedural requirements of Article 1 of the First Protocol of the European Convention on Human Rights. As a result of this serious procedural irregularity, Star was deprived of the opportunity to persuade the PCA not to impose a penalty or to impose a penalty of a lower amount."*

31.It is agreed that the only issue is whether this ground has a real prospect of success. There is no issue on timing of the application or prejudice arising from it. Further, there is no issue that, if admitted, this ground is properly within the scope of an appeal under section 58(3).

The parties' contentions

32.*Star contends* that the proposed new ground of appeal has a real prospect of success (as opposed to no, or a fanciful, prospect of success). It puts forward three legal bases for the obligation to provide an opportunity to make representations. It further contends that in fact it was not given such an opportunity.

33.*The PCA contends* that the proposed ground is without merit. In particular the PCA had no obligation under the 2015 Act to give Star an opportunity to comment on a draft penalty notice before deciding to impose a financial penalty, because the section 55(1) step of imposing an enforcement measure only comes after the section 54(4) step of providing comments on a draft report and finalising the report. Secondly, Star's opportunity to comment on the Draft Report also provided the opportunity to comment on enforcement measures, and, in particular, the imposition of a financial penalty; and that Star availed itself of that opportunity by stating in the Response that its conduct did not warrant a financial penalty. Thirdly, Star's duty to provide turnover information to the PCA in response to a Disclosure Notice after it had made submissions on the Draft Report provided a further opportunity to comment on enforcement measures, and since Star asked to be informed of its appeal rights, it clearly understood that a financial penalty was possible. The PCA further submits that the effect of this amendment is to allow the Court to take into account an extraordinary amount of new material on the topic of financial penalty, through the admission of the witness statement of Mr Mountstevens.

Analysis

34.Two issues arise under the proposed ground: was there an obligation to give an opportunity to comment on penalty before it was imposed; and did the PCA adequately give Star such an opportunity? It is not for me to decide those issues now. The question is whether Star has a real prospect of success in establishing its case.

35.First, as to the alleged obligation to give an opportunity, in my judgment, it is arguable that the PCA was required to do so under section 54. There is an issue of construction as to whether " *any action that the Adjudicator ... proposes to take* " (section 54(2)(b)) includes "*use of any of the enforcement powers mentioned in section 55*" (section 54(1)(b)). Mr Heppinstall contends that such "action" excludes "enforcement measures" and is reference to other action, such as for example, the power to give advice under section 60. Ms Callaghan contends that such action at least includes "enforcement measures", even if it also covers other action.

36.I consider that, as a matter of construction of section 54, Star has a real prospect of establishing that contention. If that is right, then it is arguable that, where it is intended to impose a financial penalty, the draft report under section 54(4) must include within "the action proposed to be taken and the reasons" the proposed imposition of the penalty and the PCA's reasons, and the POB must be given an opportunity to comment on the draft report on that issue. Further, as pointed out above, in the present case, whilst the Draft Report made no reference to penalty, the Report did set out the decision to impose a penalty, thus very arguably "specifying the reasons for ... any action taken or proposed". It is further arguable, therefore, that by omitting any reference to the penalty, the Draft Report did not adequately constitute "a draft of the report" under section 54(4). In addition Star puts forward two alternative legal bases for the alleged obligation: common law (relying in particular on *Bank Mellat v HM Treasury No 2 [2014] AC 700* at §§29-30); and Article 1 Protocol 1 ECHR. In my judgment each of those contentions also have a real prospect of success.

37.Secondly, Star's case is that in fact, the PCA did not provide a sufficient opportunity for representation on the penalty. The Draft Report made no reference to enforcement measures at all. The request for turnover was the first indication of a penalty; no grounds were provided. It was not until 14 October 2020 that Star became aware of the penalty, the grounds of its imposition and/or amount. The PCA's contention is that, in fact, Star did make representations on enforcement measures, and in particular on penalty, in the Response. In my judgment, Star has a real prospect of establishing its case here. The comments made in the Draft Report were, arguably, of the most general nature and made at a time when Star was not aware of the PCA's intention to impose a penalty nor its reasons.

38.Thirdly, I consider that this issue is distinct from the issue as to the admission of Mr Mountstevens' witness statement. The question here is whether, in principle, the proposed ground has a real prospect of success. In any event, the suggestion that Mr Mountstevens' evidence is unfairly extensive is more illusory than real.

39.For these reasons I grant Star permission to amend its grounds of appeal in the terms set out in paragraph 30 above.

Issue 2: Witness statement of Mr Mountstevens

40.Star has filed the witness statement of Mr Mountstevens in support of the proposed amendment to the Notice of Appeal (Issue 1) and seeks permission to rely upon it. Mr Mountstevens is managing director of Star. The witness statement is 30 pages long and the exhibit to it runs to more than 1000 pages. Mr Mountstevens states that the witness statement contains the representations Star would have made on financial penalty if it had been given the opportunity to do so prior to the imposition of a financial penalty. At the end of the statement, Mr Mountstevens gives additional evidence about the impact of COVID-19 upon Star's business, suggesting that the Penalty does not adequately reflect that impact. Some of this evidence relates to events since the imposition of the Penalty.

41.Star submits that, if (contrary to its primary case) the Court at the substantive appeal hearing considers that it is necessary for Star to establish that being given the opportunity to make representations on penalty might have made a difference to the outcome, then the representations set out in the witness statement might have affected whether the PCA would have decided to impose a financial penalty at all, or a penalty of £2 million. The PCA does not accept that it is *not* necessary to show such prejudice.

42.The PCA's primary objection to the admission of this evidence was that since the new ground of appeal should not be permitted, it follows that there is no reason to admit the new evidence. Its further objection was based on the statement producing "*an extraordinary amount of new material"* particularly in the exhibit. However, Mr Heppinstall fairly accepted in oral argument, that if permission were to be granted under Issue 1, the PCA did not strongly oppose the application. As regards the second objection, much of that material in the exhibit was put before the PCA in the course of the investigation, and as Ms Callaghan suggested, much of it will find its way into the appeal bundle in any event. I accept Mr Heppinstall's argument that submissions on the relevance of this evidence can be made at the substantive appeal hearing.

43.Whilst in written submissions there was substantial argument on the applicability and application of the *Ladd v Marshall* test for the admission of new evidence on appeal, I am satisfied that, in the particular circumstances of the nature of this challenge, it is appropriate for the Court to exercise its power, under CPR 52.21(2)(b) to admit this evidence, whether on the basis that this is a case where *Ladd v Marshall* should not apply or on the basis that it does apply. On the basis of Star's case, there had been no opportunity to place this evidence before "the court below".

44.For these reasons, I grant permission to Star to rely upon the witness statement of Mr Mountstevens.

Issue 3: Disclosure

45.Star seeks specific disclosure and inspection of three categories of document:

1. The 24 submissions received by the PCA from tenants and other interested parties, which the PCA considered to be in-scope in respect of the issues under investigation, referred to in paragraph 11.8 of the Report;

2. The PCA's follow-up communications sent to all respondents by email, referred to in paragraph 11.9 of the Report; and

3. The transcripts or notes of the PCA's telephone interviews with respondents, and any follow-up documentary evidence obtained from respondents following those interviews, referred to in paragraph 11.9 of the Report.

46.Star's case in its grounds of appeal is:

"*The PCA's investigation was procedurally unfair in that the PCA relied on anonymous tenant evidence to which Star was given no access, contrary to the established principles in regulatory investigations that require access to file and contrary to established principles of natural justice. This is notwithstanding the PCA's obligations to restrict the use of that information (see section 241 of the Enterprise Act 2002, which permits a public authority to disclose information otherwise restricted by sections 237-238 of the same Act to exercise a function it has under an enactment which includes Part 4 of the 2015 Act). As a result of relying on anonymous tenant evidence, which was withheld from Star, Star's ability to understand and respond to the*

case against it was seriously compromised. In addition, Star has not been provided with copies of the evidence received by the PCA on which it chose not to rely, which may have been exculpatory".

47.On any view, this challenge is properly brought by way of this appeal. As in the case of Issue 2, it is common ground at this stage that, in order to establish this ground of procedural unfairness, Star may need to establish that such procedural unfairness caused Star prejudice (i.e. that having access to this evidence would or might have made a difference to the PCA's decision to impose the Penalty). Moreover, it seems to me, that, in the event that Star establishes such procedural unfairness and if this Court were then to go on itself to reconsider the issue of penalty, this evidence might be relevant to the case which Star would wish to present to the Court on such reconsideration.

Relevant legal background

Disclosure before the PCA: the PCA's powers and duties of disclosure

48.The PCA is subject to the regime in Part 9 of the Enterprise Act 2002 ("the 2002 Act"). Under that regime there is a general restriction of "specified information" by the PCA. The PCA must adhere to this prohibition unless there is a gateway for disclosure under the 2002 Act. Breach of the prohibition carries criminal sanctions.

49.Section 241(1) provides a discretionary power, under which the PCA "may disclose that information for the purpose of facilitating the exercise of its statutory functions." It is for the PCA to exercise that discretion, taking into account the statutory scheme. Star had no right to disclosure of the specified information.

50.Section 244(2) to (4) sets out three considerations to which the PCA "must have regard" in deciding whether to disclose information, as follows:

"*(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest .*

(3) The second consideration is the need to exclude from disclosure (so far as practicable)—

1. *commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or*
2. *information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.*

4. *The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure." (emphasis added)*

51.As regards section 244(2), "public interest" is not defined. It goes beyond considerations of confidentiality. The PCA submits, and I accept, that it is capable of including matters such as a chilling effect disclosure may have on the willingness of certain persons to assist with future investigations. As regards section 244(4), this covers information necessary to enable a "defendant" to exercise its rights of defence. The touchstone is "necessity". The PCA observes that as regards "necessity" it may only be "necessary" to disclose some but not all of certain categories of information, or for the gist of information to be provided in the course of an investigation.

The position of the Competition and Markets Authority

52.These provisions of the 2002 Act also apply to the Competition and Markets Authority ("CMA") when conducting investigations, inter alia, under the Competition Act 1998. In its Appeal Skeleton, Star refers to and relies upon the "*Guidance on the CMA's investigation proceedings in Competition Act 1998 cases: CMA 8"* which sets out the CMA's policy in application of these provisions. As regards confidentiality of complaints, at §§3.20 and 3.21, the CMA, by reference to Part 9 of the 2002 Act, points out that, whilst it understands complainants may want to ensure that details of their complaints are not made public,

at some point during the course of a formal investigation it may need to reveal a complainant's identity and/or the information supplied by it so as to allow the business under investigation to respond properly to the information provided. At §§7.6 to 7.15, the CMA refers to its practice in relation to handling confidential information more generally (including from third parties). Again, by reference to the strict rules in Part 9 of the 2002 Act, the CMA points out that, even if it agrees that the information is confidential, it may consider that it is necessary to disclose the information to the parties in the investigation in order to enable them to exercise their rights of defence. It will also consider use of confidentiality rings or data rooms so as to handle disclosure of confidential information to a limited group of persons. In my judgment, this Guidance illustrates the CMA's approach to the delicate balancing, required by sections 241 and 244 of the 2002 Act, of the interests of those who provide information to the public authority and the rights of defence of the person being investigated by that authority.

Disclosure before this Court

53.CPR 52.20(1) provides that an appeal court has all the powers of "the lower court". In the normal course an appeal court may make an order for specific disclosure that a lower court might make: *Kingdom of Spain v London Steam-Ship Owners' Mutual Insurance Association Ltd [2020] 1 WLR 1538* at §§10-11. The general test for specific disclosure is that disclosure must be "necessary for fairly disposing of the proceedings". Relevance is a factor but not of itself sufficient: *Canadian Imperial Bank of Commerce v Beck [2009] EWCA Civ 619* at §22. In my judgment, this is the test to be applied by the Court on this application. Two particular points arise. First, the unusual feature here is that, under the provisions of CPR 52.20 which apply to this appeal, there is no "lower court" as such. The nature and position of the PCA, an administrative, rather than judicial body, does not readily fit the description of "a court". Unlike the general run of appeals under CPR 52, this appeal is the first judicial hearing of the issues. For this reason I do not consider that CPR 52.20(1) requires this Court to apply strictly the specific powers and duties of the PCA in relation to disclosure i.e. the provisions of Part 9 of the 2002 Act. Secondly, I have considered whether this Court is itself directly bound by the provisions of Part 9. Whilst this Court is a "public authority" within the meaning of section 238(3), the prohibitions and permissions covered by sections 237 to 244 relate to information "held by" the public authority. It is not clear to me that this Court "holds" the information, for which disclosure from the PCA is sought by Star. Nevertheless in considering whether disclosure is necessary for fairly disposing of this appeal, I take account of the competing public interest considerations for, and against, disclosure.

The approach of the Competition Appeal Tribunal

54.I have been referred to case law on the approach to disclosure - particularly of third party evidence gathered by the CMA - adopted by the CAT both in judicial review cases under section 120 of the 2002 Act and in appeal proceedings under the Competition Act 1998. Since a different regime applies to the CAT, these cases are not of direct application, although they might provide some useful insight into its approach to similar issues. In particular, in the context of judicial review before the CAT, there is no general obligation to disclose all material referred to in the CMA's decision or collected by the CMA in the course of its investigation. In such a case where the final report on a merger contains the gist of the competitor evidence, the starting point is that disclosure of the competitors underlying' responses is not necessary: see *Sabre Corporation v CMA [2020] CAT 19* at §§19-24. On the other hand, in appeal proceedings under the Competition Act 1998, schedule 4 of the 2002 Act requires the CAT to conduct a balancing exercise; certainly in cases involving the imposition of a penalty, the CAT will order material to be disclosed where the overriding interest in fairness requires an applicant to be supplied with material: see *Argos v OFT [2004] CAT 5* at §§54-57, citing *Umbro v OFT [2003] CAT 26* .

Confidentiality ring

55.In proceedings in the CAT (as well as before the CMA itself), the competing considerations are frequently balanced by putting in place a confidentiality ring, limiting disclosure to named specific individuals, normally the party's external legal advisers and sometimes to include specific individuals employed by the party, such as in-house lawyers. Such a confidentiality ring may also be imposed by this Court in civil proceedings, including an appeal: see *Libyan Investment Authority v Société Générale [2015] EWHC 550 (QB)* at §§20-25 and 34, and most recently, *Bugsby Property LLC v LGIM Commercial Lending Ltd [2021] EWHC 1054 (Comm)* at §§77-88. This occurs most commonly in competition or intellectual property litigation in order to protect commercial confidences. I am satisfied that in principle a confidentiality ring is available to protect other, "public interest", concerns (such as those falling within section 244(2) of the 2002 Act).

The factual background

56.By the Notice of Investigation, the PCA made a general invitation to any person to provide evidence that might assist the investigation. Both that Notice and the Statutory Guidance state effectively that persons providing information "will not be identified in the *investigation report* without their consent". In response the PCA received 24 "in-scope" submissions from tenants and other interested parties (relating to 44 individual pubs). Follow-up calls were held with all the individuals who had provided those responses. In each of those calls, the individual was told that:

"*No individual tenant or pub will be named, or otherwise be identifiable in any way, in the report . However the PCA may refer in its investigation report to evidence from the call for evidence submissions in an anonymized way. That means that we might refer to your evidence, but it will not be recognisable that it has been given to us by you in particular." (emphasis added)*

57.In her witness statement for this hearing, Ms Dickie explained that the assurance was given that any "potentially identifying details" would not be disclosed, on the basis that this would have enabled Star to identify tenants, even if individual names were redacted. Ms Dickie went on to explain that some individual tenants raised queries in relation to confidentiality during the course of the investigation and, as a result, in the course of further correspondence with tenants, the PCA reiterated the assurance about anonymisation in the report, adding "*neither you nor your pub will be named anywhere in the report, nor will Star be aware that you made any of the comments.* " *(emphasis added)*

58.The Draft Report (as did the Report) referred to third party evidence in anonymized form. In the Response, Star complained that the Draft Report contained very limited information about the source of the third party evidence, contending that that overrode Star's rights of defence. At paragraph 22.2 of the Report, the PCA disagreed with that contention, putting forward four reasons: first, the PCA had provided Star with a reasonable opportunity to comment on the draft; secondly the PCA had provided express assurances that the third parties would not be identified in the report, consistent with its obligations in Part 9 of the 2002 Act; thirdly, apart from matters referred to in the Draft Report, the PCA was not aware that it had received any third party evidence which was exculpatory; fourthly the third party evidence served only to corroborate Star's evidence.

59.The third party evidence, in this anonymised form, and obtained in this way is referred to and, in part, relied upon in the Report, and in particular at Annex B in the section dealing with Star's approach to negotiating with tenants: see, in particular, paragraphs 64.6 to 64.8. More particularly in the Penalty Notice, this evidence is referred to and relied upon where the PCA considers the scale of the harm caused by Star's breaches, and in particular, expressly and by reference to individual respondents, at paragraphs 6.9 and 6.10 (b) (e) and (f). This evidence is, in places, said to "support" evidence received from Star itself.

Ms Dickie's evidence

60.In her recent witness statement, Ms Dickie also gave evidence of the importance to the PCA of the assurances of anonymity and of the use made of the third party evidence in her decision on penalty.

61.First, as to the importance to the PCA giving the assurances of anonymity and the consequent risk of a "chilling effect" if the PCA were not able to do so, she said as follows:

"*It was important to extend assurances of anonymity to TPTs and third parties in respect of information provided in the course of the investigation into the Appellant. If this had not been done there was considered to be a serious risk that the Appellant's tenants would be inhibited in coming forward to provide information in an open and honest manner which could potentially be critical of the Appellant. As the landlord of the relevant premises, the Appellant is in the stronger commercial position and its tenants may be concerned about potentially being subjected to detrimental treatment if they were identifiable as having provided such information to the PCA. Outside of this investigation, my Office also receives communications from tenants direct, and from industry bodies representing tenants, who express concerns or request my assistance but are concerned not to be identifiable to the POB. As a regulator tasked with enforcing the Pubs Code, it is imperative that those whom the Pubs Code is designed to protect trust that the PCA will keep their identities confidential when they come forward with information about potential breaches of the Code. Otherwise, there is a risk to the ability of the PCA to regulate effectively, including a risk to future investigations and receipt of regulatory intelligence."*

She went on to ask the Court to withhold the identifying details of the tenants, explaining that:

"*it is very important that I retain the trust and confidence of all stakeholders. If that trust were to be broken by the Appellant either obtaining the identities of the tenants or the means to identify them… then I fear that my statutory duties of investigation (including of complaints received from tenants) would be compromised".*

She added that it would make no difference to the harm if disclosure was limited to Star as it is the identification by Star principally that tenants are likely to be concerned with.

62.Ms Dickie also explained the relevance of the third party evidence to the conclusions in the Report and the Penalty Notice. She said that the evidence received direct from tenants merely corroborated that which had been provided direct by Star or information received in the arbitration proceedings which were known to Star. Her conclusions were made based on the actions and evidence of Star itself. Furthermore the Penalty was imposed, not only for specific harm caused to individual tenants, but by reference to the actual or potential harm arising from Star's policies imposed across the entire estate. She concluded that the third party evidence, although serving to corroborate the information on which she did rely, "*did not materially impact either my decision to impose a financial penalty or its amount.*"

The parties' contentions

63.*Star contends* that this application is made in support of the procedural fairness challenge set out in paragraph 46 above. It submits that, if the Court deciding the substantive appeal concludes that Star needs to establish prejudice, it will be necessary for the PCA to give disclosure and permit inspection of this material. Further, Star's request is narrow and focused, the documents sought are clearly relevant to the appeal and it is therefore in accordance with the overriding objective to order disclosure and inspection. As a fall back, the Court should order disclosure into a confidentiality ring, such ring to include Star's in-house lawyers.

64.*The PCA opposes* disclosure. First, it relies on the fact that it assured Star's tenants that they would not be identified in the Report. Secondly, while Star has not seen the raw materials, it has had access to the evidence because the content of the evidence was set out in Annex B of the Report. It is not understood what would be gained from seeing the raw materials beyond the biographical details of the providers which the PCA promised to withhold from Star to encourage people to be frank about their current or former landlord. Thirdly, if this application succeeds, Star will be obtaining by "the back door" that which the PCA, in the proper exercise of its discretion, declined to provide. The grant of an order now would effectively decide the ground of appeal. Another pragmatic way is to leave the matter to be decided by the Court hearing the substantive appeal, which could order disclosure at that stage. Finally, and most importantly, the evidence on which she ultimately relied in support of her findings was obtained from Star itself, with third party evidence only serving to corroborate that evidence and understand the experience of tenants. The PCA asserts that she relied on the evidence from Star alone. For this reason, Star is, and will be, unable to show that the outcome of the Penalty would have been any different, even if it had been able to know the identity of the tenants who provided evidence.

65.*Star responds* that, first, the PCA did not, prior to the third parties giving their initial response, give any undertaking not to disclose their identities evidence to Star; the only undertaking was not to identify the tenants in the Report. In any event confidentiality is not a bar to disclosure, particularly when mechanisms such as confidentiality rings exist for managing such issues. Secondly, summaries of the evidence in Annex B are not sufficient to comply with the requirements of fairness. Fairness demanded that Star be provided with the raw materials themselves. As a result of not having access to the raw materials, including the tenants' biographical information, Star's ability to understand and respond to the case against it was (and is) seriously compromised. Thirdly, the PCA's assertion that she did not rely on tenant evidence is not borne out by the Penalty Notice itself. The Penalty Notice makes specific reference to the relevant third-party representations: see, for example, paragraph 6.10(b), (e) and (f). Finally, as to the concerns about deciding the appeal ground by the "back door", whether what the PCA did at the time was procedurally fair is a separate issue: see *Tobii v CMA [2020] CAT 1* at §§7, 11 and 141-144.

Analysis

66.I make two preliminary observations. First, this application only arises now because of the need for Star to be able to show prejudice arising from the procedural unfairness. Secondly, I recognise the concern that this decision now on the application may have a significant bearing on the outcome of the substantive ground of appeal (set out in paragraph 46 above). Nevertheless I am proceeding to make my decision now. Whether the PCA's exercise of its discretion under section 241 *at the time* was fair is a separate question from this Court's decision as to whether disclosure is necessary for the fair disposal of this appeal; and it will remain open to either party to contend, respectively, that, at the time, it was, or was not, fair. Further, to leave the determination of the disclosure application until the substantive hearing of the appeal would run the risk of procedural complexity and delay in the hearing of the appeal, in the event that the application were successful – necessitating a partial adjournment of the hearing for what might be a considerable period of time. I turn therefore to consider the application.

67.In considering whether disclosure is necessary for the fair disposal of this appeal, the Court is here required to conduct a delicate, and difficult balance, between important competing interests: the public interest in the PCA's ability to carry out its investigatory functions (including respecting the confidentiality concerns of their parties) and the essential right of Star to defend itself against serious allegations and to the imposition of a substantial penalty.

68.*On one side of the balance*, first, I consider that the assurances given by the PCA to the tenants both prior to, and in the course of, them responding to the call for evidence are highly material. Whilst the initial assurances were in terms directed towards anonymity in the Report, I accept Mr Heppinstall's submission that those assurances contain an implicit assurance not to disclose to Star. The principal (even if not the only) concern on the part of the tenants to ensure anonymity was so that the fact that they had given evidence to the PCA was not revealed to their landlord and commercial counterparty, namely Star. From their point of view, the primary risk and concern would be knowledge of their identity on the part of Star. It was "recognition" by Star and not more generally by members of the public or press, that must have been the concern of the tenant. (I consider below more precisely what is meant by "Star" in this context.) The fact that this assurance was subsequently made express, after evidence had been provided, only goes to confirm what was implicit in the original assurance.

69.Secondly, I accept the evidence of Ms Dickie of the risk that tenants would be inhibited in coming forward to provide information, absent the assurances of anonymity and of the risk to her ability to regulate effectively in the future, if such assurances are not given or effective. There must be a risk of such a "chilling effect" if this material were disclosed. Even accepting that there is no evidence to suggest that in fact Star would subject any tenant to detrimental treatment, there is a risk that tenants would *fear* such treatment and that fear alone might inhibit them from coming forward. That some tenants might have such fears is borne out by Ms Dickie's evidence that in the course of the investigation some tenants raised queries.

70.*On the other side of the balance*, Star's right to appeal against the imposition of a penalty and to have a fair and full first judicial hearing of its case is of great weight. First, I accept Ms Callaghan's submission that the PCA did directly rely upon this third party evidence in reaching her conclusions on "the scale of the harm caused by Star's breaches". In this regard, what is stated in the Penalty Notice itself is of particular importance. Those conclusions are one of the three essential foundations for the decision to impose the penalty. Even if the PCA relied upon other evidence, and even if the third party evidence is truly only "corroboration", nevertheless it is relied upon in the Penalty Notice and, presumably, for good reason. Even if only part of the evidence, it might be evidence which tipped the balance. Secondly, this is not generalised market information. It is evidence from specific tenants of direct harm caused to them by Star, which in turn is part of the foundation of this element of the Penalty decision. If Star had been able (and is now able) to demonstrate that a tenant's evidence was wrong, or misinterpreted, it is at least possible that the outcome would have been different. Whilst accepting the desire to keep confidential the identity of the tenants, given the nature of their evidence relied upon, I accept that without this information, Star's ability to make an assessment of the extent or scale of the alleged harm is hampered. It is unclear from the Report how many tenants are referred to as having been adversely affected by Star's conduct and it was difficult for Star to respond to individual cases relied on by the PCA. In this way it is certainly arguable that Star is unable to respond to or refute the allegations without knowing the identity of those tenants or having access to their evidence.

71.There are thus weighty matters on each side of the balance; the Court is on the horns of a dilemma. If there is a way to balance those interests so as to maximise the protection of each, then the Court should strain to do so. In my judgment, in this case, there is such a way to balance those interests effectively; namely by ordering disclosure within a confidentiality ring, where disclosure is limited to Star's external lawyers and one (or two) internal in-house lawyers. Disclosure on this limited basis will, on the one hand, enable Star to investigate the particular evidence relied upon coming from a particular tenant, and, to respond with its own specific evidence relevant to that tenant. Ms Callaghan indicated in oral submission that it was not necessary for Star's commercial personnel from its Estates department to be involved in this process. On the other hand, the very fact that

those within Star responsible for commercial dealings with the tenants will not learn of their identity will preserve the essential purpose of the assurances given and, at the same time prevent the risk of the "chilling effect". Indeed the assurances and the chilling effect are two facets of the same concern. The chilling effect arises from a fear on the part of the tenant of commercial retaliation by Star. Such commercial retaliation would be the fear of action by those within Star responsible for dealing with the tied estate. Insofar as the assurance was an implied assurance not to disclose to Star, in my judgment that implied assurance is in essence an assurance not to disclose to those individuals within Star responsible for those commercial relations. To that extent the tenant did not have an expectation of non-disclosure to external lawyers and internal lawyers only, in circumstances where the restriction on disclosure is tight and effective.

72.I conclude that, in so far as the assurance of anonymity carried an implication of non-disclosure to Star, then that assurance went only so far as being an assurance of non-disclosure to commercial personnel within Star and did not import any wider assurance in relation to Star's lawyers. It follows that disclosure limited to this category would not be a breach of expectation. Similarly if disclosure is limited in this way, then the risk of a chilling effect will not arise because the tenant cannot reasonably fear commercial retaliation in circumstances where those responsible for the commercial relationship will not be aware of their identity.

73.I therefore conclude that the way to set the appropriate balance between the expectation of anonymity and the PCA's concern about the risk of a chilling effect and, on the other hand, the ability of Star properly to pursue its case on appeal is to permit disclosure within a confidentiality ring on a limited basis. The terms of that confidentiality ring will be a matter for agreement or further argument.

74.Finally I consider that disclosure on this limited basis does not require that the tenants themselves be given an opportunity to make representations in relation to this disclosure, on the basis that I have found that they have no expectation arising from the assurance that disclosure would not be made to external and in-house lawyers only.

Issue 4: Appeal or judicial review

75.The issue here is whether, and to what extent, it is permissible on an appeal against penalty under section 58(3) to challenge findings of an investigation report under section 54 (2). More precisely, the issue as formulated is as follows:

"*Whether, in an appeal under section 58(3) of the 2015 Act, Star may appeal against the imposition of a financial penalty or its amount on the basis that findings in the investigation report published under section 54, which are relied upon as grounds for the imposition of the penalty, or taken into account when calculating the amount of the penalty, were unfair , unjustified , incorrec t and/or do not justify the imposition of a penalty."*

In my observations when making directions on 9 March, I also raised the question about whether this issue needs to be determined at this preliminary hearing or can be determined at the substantive hearing. It is common ground that if (and in so far as) the answer to the question is No and that is determined now, then the Judicial Review Claim should be heard at the same time as the appeal.

76.Each party's primary position is that this issue should be determined, in its favour, at this preliminary hearing. In oral argument, Ms Callaghan added that, if not decided in Star's favour, the issue should not be decided now.

The parties' submissions

77.*Star contends* that the position is clear and that, on this appeal, it must be able to challenge findings of breach of the Code. It makes the following points:

(1) As a matter of construction of section 58(3), the High Court can consider an appeal against both "*the imposition of a financial penalty*" and its amount. The meaning of the phrase "*the imposition of a financial penalty*" is to be understood by reference to section 58(2). That provision makes clear that "*the financial penalty is imposed by ... specifying the grounds for imposing the penalty*". It is therefore axiomatic that, in challenging "*the imposition of a financial penalty*" under section 58(3)(a), Star

is entitled to challenge the grounds for imposing the penalty. So, the statutory language envisages that an appeal against the imposition of a financial penalty may encompass a challenge to the grounds for imposing the penalty, which are set out in the penalty notice.

(2) In the present case, in the Penalty Notice, as made clear by the heading to the section, the "grounds" for imposing the penalty are all that material contained within section 6 of the Penalty Notice. The grounds comprise both the findings of breach and the assessment of gravity, harm and awareness. As expounded in the SFG, the grounds for the imposition of the penalty are based on some of the findings in the Report as to the existence of breaches, their impact and Star's awareness of them. The fact that grounds may have first been identified in the investigation report, against which no separate right of appeal lies, cannot inure them from scrutiny on an appeal under section 58(3).

(3) Where those "grounds" are identical to findings of breach of the Code in the Report, Star must be able to challenge those findings of breach. For that reason, in this appeal Star is challenging, and is entitled to challenge, findings of breach and, in particular, those set out at paragraph 6.3(a) to (f) of the Penalty Notice. In the present case, Star cannot meaningfully challenge the grounds for imposing the Penalty without being able to challenge "*whether or not"* it committed the relevant six breaches (and if so whether those breaches, individually or collectively, are serious enough to warrant a financial penalty). Star must also be able to challenge *whether* any harm was caused by those breaches (and if so, whether the harm was serious enough to warrant a financial penalty), and *whether or not* Star was aware of those breaches (and if so, whether the level of knowledge was sufficient to warrant a financial penalty). As to this latter point, the grounds for imposing the penalty include the finding (at paragraph 6.10) that Star ought to have been aware that its approach to keg stocking was non-compliant with the Pubs Code. Star cannot meaningfully challenge this assessment without being able to challenge the finding (which originates in the Report) that Star ought to have known that its conduct was non-compliant.

(4) The current position is strongly analogous to that under section 40 Medical Act 1983. In medical (and a number of other professional disciplinary) proceedings the right of appeal to the High Court against the imposition of a sanction necessarily includes a right of appeal against the underlying findings of fact and misconduct, in respect of which the sanction is imposed: see *Preiss v General Dental Council [2001] 1 WLR 1926* at §§1-2, 8-9 and 26-27; *Gupta v General Medical Council [2002] 1 WLR 1691* at §§8-10; and *General Medical Council v Raychaudhuri [2018] EWCA Civ 2027 [2019] 1 WLR 324* at §48(ii).

(5) If the PCA is correct, it means that in a case such as the present, a party wishing to appeal against a penalty on the ground that the underlying findings of breach of the Code were wrong will have to bring two sets of proceedings (an appeal and an application for judicial review). This will require not only duplication, but different court procedures, involving different requirements and steps, probably running in parallel. This is costly and a disproportionate use of the parties' and the court's resources. Parliament cannot have intended such a result.

78.*The PCA* submits as follows:

(1) It is clear from both the words of section 58, and the overall structure of sections 53 to 58, that the scope of an appeal under section 58(3) is limited to being against the decision to impose the penalty (and its amount). The decision to impose the penalty comprises the assessment of whether the breaches of the Code found in the prior investigation report are such as to warrant the imposition of a financial penalty. That assessment comprises consideration of seriousness, impact and awareness of the breaches. That assessment is properly the subject of an appeal under Section 58(3). The structure of sections 53 to 58 is to identify distinct stages in the process and to ring-fence the prior findings of fact in the investigation report. None of those stages (investigating, publication of report, using enforcement powers) is subject to a right of appeal *except* the decision to impose a financial penalty (or its amount).

(2) Any challenge to the findings in the Report, including the findings of breach of the Code, can only be brought by judicial review. There is a substantial difference between the approach of the Court on judicial review and that on appeal. It is right that Parliament intended that any challenge to findings in the Report must satisfy the higher threshold set by public law grounds of judicial review.

(3) Whilst accepting that, for large parts of the Grounds of Appeal, it is difficult to identify which parts do, or do not, properly fall within the ambit of an appeal, this becomes apparent from the SFG where it is clear that underlying findings in the Report are being challenged, and being challenged in the appeal.

(4) The correct analogy is an appeal against sentence, but not conviction, in criminal proceedings. Like the present case, an appeal against sentence is an appeal against the decision to impose a particular sanction, but does not permit a challenge to the underlying conviction. Further, section 58(3) falls to be compared with section 46 of the Competition Act 1998, which, unlike the present case, expressly gives a person distinct rights of appeal against infringement and against the imposition of a penalty for such an infringement.

(5) This issue should be resolved now, first, because the PCA is keen to establish (in the public interest) the correct line of demarcation for future cases, and in any event, the parties need to know, in advance of the hearing, how to marshal their arguments and evidence targeted at the correct procedures.

Analysis

79.First, I start by distinguishing the issue of principle as to the construction of section 58(3) of the 2015 Act from the question of how that construction applies in the present case, both to the Penalty Notice and to the Grounds of Appeal.

80.Secondly, it is common ground that, as matters presently stand, there is some difficulty in identifying and/or disentangling, both in the Penalty Notice and in the Grounds of Appeal, findings (of fact and of breach of the Code) which underlie the conclusions in the Report and findings which are the grounds for the imposition of the Penalty, and findings which might be said to go to both. Mr Heppinstall accepted in argument that in the Penalty Notice there is a mixture of findings from the Report with evaluative conclusions of seriousness, harm and awareness; and further that it is difficult to disentangle this mixture. He also accepted that it is difficult to disentangle within the Grounds of Appeal what is a challenge to a breach of the Code and what is a challenge to seriousness.

81.Thirdly, because of this practical difficulty of disentangling, I have given careful consideration to deferring determination of this issue until the substantive hearing of the appeal (and, at the same time, of the judicial review), on the basis that, by that stage, the Court will have had the benefit of the detailed examination of the findings (and underlying evidence) and the detailed bases upon which those findings are attacked.

82.Fourthly, however, I have decided that the better course is to decide the issue of principle now, as submitted by the parties. Any practical issue of "disentangling" can be addressed in the light of a ruling on principle, and, in advance of the final hearing. Leaving the issue of principle (and with it, the issue of disentangling) to the substantive hearing is likely to cause substantial practical difficulties, both as regards the preparation for, and argument in, the appeal and for the court itself. The parties would have to prepare arguments on a number of different alternatives, and the Court might have to make alternative, and potentially, inconsistent rulings – by being required to decide issues on the basis of potentially differing alternative standards of review. As I explain below, it is possible to decide the issue of principle now, and there is considerable benefit in so doing.

The issue of principle

83.In my judgment, the issue of principle is a question of construction of *the 2015 Act* and of section 58(3) in particular. In this regard, I accept Mr Heppinstall's submissions. First, the structure of sections 53 to 58 is to identify a number of discrete stages: first, under section 53, an investigation as to whether there has been a failure to comply with the Code (i.e. breach of the Code); secondly, under section 54, publication of a report with the PCA's findings and proposed action, and consideration of whether to use any of three enforcement measures; thirdly, under section 55, where, and only where, there are findings of breach of the Code, a power to take one or more of three different enforcement measures; fourthly, and fifthly, under sections 56 and 57, distinct procedures for the enforcement measures of recommendations and publication of information; and, sixthly, the procedure, in section 58, for the imposition of a penalty. There is an express right of appeal in relation to the enforcement measure of a penalty; there is no right of appeal in relation to the other two enforcement measures. Thus, even where there are findings of breach of the Code (under section 55), but either no enforcement measure at all, or enforcement by recommendation or publication of information there is no right of appeal either against the enforcement measure (if any) or against a finding of breach.

84.Secondly, as to the wording of section 58 itself, the right is to appeal "*against the imposition of*" the penalty. Set against the structure of the sections, and in the further context of the opening words in section 58(1) (the PCA "*chooses to enforce through imposing*" a penalty), section 58(3) confers a right of appeal against that choice of enforcement measure (as opposed to one of the other measures, or no measure).

85.I accept Ms Callaghan's submission that, the reference to "*grounds for imposing the penalty*", in section 58(2)(a), indicates that it is permissible (and indeed necessary) to appeal against the PCA's "grounds" for the imposition of the penalty. But that merely begs the question: what are "the grounds"? I consider that "grounds" are a reference to the distinct reasons for choosing to enforce by way of penalty, rather than for choosing one of the other alternatives. Whilst on a "but for" approach to reasons, findings of breach of the Code (under section 55(1)) are a necessary condition for the imposition of a penalty, they are not sufficient. In view of the structure of sections 53 to 58, the reasons for the imposing of a penalty must be something over and above the mere findings of breach of the Code.

86.Further, the fact that, in the present case, the PCA has chosen to include everything in section 6 of the Penalty Notice under the heading "Grounds for imposing the penalty" cannot be determinative of the issue of principle of the construction of the Act. The repetition of the findings of breach of the Code in section 6 and under this heading does not, of itself, render those findings "grounds" for the imposition of the penalty.

87.As regards other statutory regimes, I start with the observation that the Court should be extremely wary of construing the words of a particular statute, in an attempt to ascertain the intention of Parliament, by reading across from language in other, unrelated, statutes enacted in different fields and in different terms.

88.The most compelling analogy in favour of Star's construction of the 2015 Act is provided by the position under the Medical Act 1983 (and other legislation governing professional disciplinary proceedings). Under section 40(1)(a) and (4A), the right of appeal to the High Court is expressed to be a right of appeal only against a decision *of sanction* of the Medical Practitioners Tribunal (a sanction of erasure from the register, suspension or conditional registration). Nevertheless, as is clear from the authorities referred to in paragraph 77(4) above, it is accepted principle that in any such appeal the doctor may challenge the underlying findings of fact, of misconduct and of impairment of fitness to practise upon which the sanction imposed is founded. It is also the case that if in any case no sanction (or a lesser sanction) is imposed, there is no right of appeal at all, including against the underlying findings of fact, misconduct and/or impairment. In this way, on Star's case, this would mirror the position under the 2015 Act. The underlying rationale for this approach in such professional regulatory appeals is not clearly expressed in the cases cited to me, although it may be based on Article 6 ECHR considerations.

89.However, the statutory language, framework and context of those cases and the present case are very different. In the case of professional regulatory appeals, what is in issue is a decision in relation to one individual where professional privileges and livelihood are at stake. In the present case, what is in issue is the regulation of pub-owning businesses including through the imposition of financial penalties which are capped at 1% of the pub-owning group's annual turnover. Whilst not in any way minimising the seriousness of such a penalty for the pub-owning business, it is of a different nature to the sanction imposed upon an individual medical practitioner. Further there is an important practical difference between a full appeal in respect of a professional regulatory decision concerning one individual, and a full appeal in respect of a commercial regulatory decision, regarding business practices spanning a period of several years, and potentially involving multiple parties.

90.On the other hand, it might be said that the position under the Competition Act 1998 is closer in subject matter and statutory wording and context to that of the present case. By section 46(1), (2) and (3)(a)(c) and (i), there are distinct rights of appeal: against a decision of the CMA finding an infringement of either the Chapter I or Chapter II prohibition; and, separately, against a decision " *as to the imposition of any penalty ... or as to the amount of any such penalty"* imposed by the CMA in respect of such infringement. The wording of the right of appeal against penalty is very similar to that in section 58(3). This seems to point to a conclusion that where Parliament intends to confer a right of appeal against findings of breach (or infringement) which lead to the imposition of a penalty, it does so expressly. However, there may be a relevant distinction. Under the Competition Act 1998, there is a right of appeal against infringement, even where no penalty is imposed. Infringement (alone) gives rise to an express statutory right to claim damages for any person who has sustained loss caused by such infringement; and unless appealed, any CMA finding of infringement is binding on the court considering such a claim: see sections 47A and 58A. For this reason, a specific and distinct right to appeal against infringement alone is required.

91.In my judgment, these other statutory provisions, pointing in different directions, do not ultimately assist the Court in its task of construing section 58, and do not affect my conclusion that, as a matter of construction, the grounds for the imposition of the penalty do not include the underlying findings of breach of the Code.

92.Further I do not accept the submission that Parliament cannot have intended, by requiring challenge to breaches of the Code by way of judicial review only, to create two distinct routes of challenge to the outcome of a PCA investigation. First, it is understandable why Parliament set the higher threshold for a challenge to findings of breach of the Code, given the nature, scope and wide subject matter of the PCA's investigation powers and process. Secondly, as illustrated by the further directions agreed in principle by the parties in the present case, where appropriate two sets of proceedings can be effectively case managed so as to minimise duplication and to lead to a single final hearing.

93.As to what is comprised by the "grounds", I consider that they include all matters relevant to the assessment of the "gravity" or otherwise of the breaches of the Code: the PCA's assessment of the nature and seriousness of the breach, and the level of harm and issues of awareness in the assessment of whether the conduct was deliberate or wilfully negligent i.e. the matters referred to in the Statutory Guidance as referred to in paragraphs 5.2 to 5.4 of the Penalty Notice. Thus, whether the (accepted) finding of breach "justified" the imposition of the penalty is properly within the scope of the appeal.

94.What may not be challenged in an appeal under section 58(3) is "*whether or not"* the pub-owning business committed the breaches of the Code. Thus, in my judgment, it is not permissible to challenge the findings of breach themselves. This does not mean that it is not permissible to challenge, by way of appeal, *any* finding *of fact* in the investigation report, merely because it is contained within the investigation report. However any finding of fact which is essential to the finding of breach of the Code cannot be challenged in an appeal. Whilst, in any particular case, there may be scope for argument as to whether a finding is "essential", this can be tested by considering whether, if such a finding were to be set aside, it would fundamentally undermine the finding of breach.

95.I make two further observations. First, if, in a particular case, it appears that, in a penalty notice, the PCA does not rely upon anything beyond the fact of breach of the Code (found in the investigation report), then the imposition of such a penalty might be open to challenge on the basis of no, or inadequate, reasons. Secondly, where it appears that the PCA has relied upon the same fact both as the (or a) basis for a finding of breach of the Code, and as a ground for the imposition of a penalty, in my judgment, in principle it remains impermissible to challenge that finding of fact on an appeal under section 58(3). (Although I express no concluded view, this *might* be the case in relation to the finding that "Star ought to have been aware" in paragraph 6.3(a) of the Penalty Notice). The *significance* of the particular facts involved in the breach may well be relevant to the assessment of gravity, but that does not allow those facts themselves to be challenged. Again, in such a case, it may be possible to argue that no distinct reasons have been given for the imposition of the penalty.

96.Thus, in answer to the issue as formulated, I conclude that, in an appeal under section 58(3) of the 2015 Act, an appellant may not appeal against the imposition of a penalty or its amount on the basis that findings, in an investigation report published under section 54, of breach of the Code (and findings of fact upon which those findings of breach are based) were unfair or unjustified or incorrect.

Consequences of this ruling

97.As regards the application of this ruling of principle to the facts of the present case, I do not attempt to "disentangle" what is, and is not permitted, in this appeal and what must be the subject of the Judicial Review Claim. This is a matter for further consideration, following this judgment and in advance of the final hearing of the appeal and the Judicial Review Claim.

98.In fact, the extent to which Star is in fact challenging findings of breach of the Code, and other underlying findings of fact in the Report is not clear on its currently "pleaded" case (in the Grounds of Appeal, in the Appeal Skeleton and in the SFG). For example, whilst both parties seem to be saying that Star is challenging the findings of breach of the Code identified in paragraph 6.3(a) to (f) of the Penalty Notice, Star's case in paragraph 1(1) of the Grounds of Appeal is that the nature of the breaches "does not justify" the imposition of a penalty, and goes on, in each of sub-paragraphs (a) to (f), to allege that it was "unfair and justified to impose a financial penalty". It is not easy to identify there what allegations are made that the finding of breach itself was unfair and unjustified (and certainly not without examining in each case the detail of the "circumstances" relied upon). Similarly, the relevant paragraphs of the Appeal Skeleton appear to be based on a contention that it was the imposition of the penalty (rather than the finding of breach of the Code) that is wrong and unjust. It is not clear that, *in this appeal*, Star is challenging whether or not it had breached the Code. On the other hand, in the Judicial Review Claim, which has been brought on the basis that, in substance, it makes the same case, it appears that there is a challenge made to the findings of breach: see paragraphs 12 to 17 SFG, where each of the six breaches are alleged to be unsupported by evidence. However the reasons relied upon in the SFG are in turn those set out in the Appeal Skeleton: see paragraph 25 above.

99.In order to clarify the position, the PCA should identify precisely those parts of the Grounds of Appeal (and not those parts of the SFG) which it says, in the light of this ruling, are impermissible; and should do so by reference to specific wording in the Grounds. Given the composite heading to section 6 of the Penalty Notice, the PCA should further identify those parts of the Penalty Notice which it contends are findings of breach of the Code (and essential underlying findings of fact) and those parts which it contends are the "grounds" for imposing the Penalty. Furthermore Star should clarify its case on the SFG and in particular whether the underlying findings of breach of the Code are in fact being challenged. I will hear the parties on the terms of appropriate directions.

Issue 5: Rehearing or Review

100.This appeal is governed by CPR 52. CPR 52.21(1) provides, so far as relevant, that "every appeal will be limited to a review of the lower court unless …, (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing".

101.The PCA contends that this appeal should proceed by way of "review". Star contends that it should proceed by way of "rehearing". The PCA contends that this issue should be determined now. Star contends that it should be determined at the hearing of the substantive appeal. For this reason, the order for directions included the prior question of whether the issue needs to be decided now.

The parties' contentions

102.It is the PCA which has placed this issue before the Court now. *She contends* as follows:

1. There is a significant difference between "rehearing" and "review". A rehearing is a "rehearing in the fullest sense" in which the appeal court hears de novo all the evidence, including, if need be, oral evidence. In the present case, on a rehearing, this Court will be free from the outset to reconsider all the evidence and re-exercise all relevant discretions. On the other hand, on a "review", the Court cannot exercise fresh discretion until it reaches the conclusion that the decision of the PCA was wrong or unjust within CPR 52.21(3).

(2) This proposition is established clearly by the Court of Appeal decisions in *Audergon v La Baguette Ltd [2002] EWCA Civ 10* , *[2002] CP Rep 27* and, in particular, *E I Dupont de Nemours & Co v ST Dupont (Practice Note) [2003] EWCA Civ 1368* , *[2006] 1WLR 279*, and is consistent with *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642* , *[2003] 1 WLR 577*.

(3) What Star truly seeks is to be relieved of the burden of having to establish that the PCA's decisions are wrong or unjust before the Court will consider re-exercising discretion.

(4) Further, even if, strictly, in both cases it is necessary for the appeal court to find that the court below was "wrong", in the case of review the Court has to identify an error (the appellant must "target the errors"), whereas in the case of a rehearing the Court just starts again; in this case, this means with all the evidence that was before the PCA running to in excess of 40,000 documents.

(5) For this reason the Court should find now that the appeal is by way of review so that the parties know at what target they are aiming at the hearing of the appeal. Counsel can accordingly tailor their written and oral advocacy according to whether the CPR 52.21 condition precedent needs to be met before this Court re-exercises its discretion or whether the parties should prepare the appeal on the basis that the Court is simply free, from the outset, to reconsider the evidence and re-exercise the discretions.

103.In response, *Star contends*:

1. Whether the appeal should proceed by way of review or rehearing is for the Court to determine, having considered what is in the interests of justice in the circumstances of this particular appeal. This is not a question which is properly capable of determination at a preliminary hearing. It is a matter for the Court to determine at the final hearing, having heard the entirety of the submissions and considered the evidence in full. There is a risk that if the Court were to determine the issue now it would reach an incorrect decision on incomplete information which would be binding on the Court hearing the appeal.

(2) The PCA has not properly analysed the relevant case authorities: see *Meadow v General Medical Council [2006] EWCA Civ 1390* at §126-128. A "rehearing" is not necessarily a rehearing "in the fullest sense". Star had made it clear that in seeking a "rehearing", it will not invite the Court to re-conduct the investigation or treat the PCA investigation and fact-finding as if it had not happened, nor will it be requesting the Court to hear oral evidence. There will be no material difference between the Court's processes and procedures whether it is conducting a review or a rehearing. The only real difference between a review and a rehearing in the context of this appeal will be as to nature and intensity of the Court's consideration of the original decision and the extent to which the Court can exercise its own discretion in place of the original decision-maker. A decision now will not have a material impact on the length or nature of the final hearing.

(3) In so far as the Court considers it is necessary to determine this issue at this stage, the appeal should proceed as a rehearing in the manner and for the reasons set out in the Appeal Skeleton. In summary, it is in the interests of justice that there should be a rehearing given that to date Star has not had any judicial hearing of its case. Further the Court should give limited deference to the decision of the PCA.

Analysis

104.There is substantial case authority on the difference between "review" and "rehearing" and how that difference affects different types of issues arising in an appeal (for example, issues of: primary fact (particularly where involving oral evidence), secondary (or inferential) fact, evaluative assessment or the exercise of discretion properly so called). It seems to me that in the present case the PCA's decision may be centred on evaluative assessment, rather than pure discretion: see *Assicurazioni Generali SpA* at §§18 to 20. Whilst, for present purposes, the Court has not engaged in close textual analysis of the principal case authorities (referred to by the parties), the distinction (and consequences of the distinction) are not as clear-cut as suggested by the PCA in argument. I make the following observations.

105.First, it is clear that in *both* "review" and "rehearing", the appellant must establish that the decision of the lower court was "wrong" or "unjust because of serious procedural irregularity": *Meadow* at §127. Mr Heppinstall accepted that in both cases, the appellant has to show that the lower court "has exceeded the generous ambit within which reasonable disagreement

is possible" (see *Audergon* at §85, and §75 citing *G v G* at §32). The approach to drawing of inferences is also the same: CPR 52.21(4).

106.Secondly, "rehearing" is not always a rehearing "in the fullest sense". It may have a range of meaning and at the lesser end of the range it "merges with "review": see *DuPont* at §98 and *Meadow* at §128. As set out above, Star has made its position clear that it is not seeking a rehearing "in the fullest sense". It will not be necessary to put the in excess of 40,000 documents before the Court. This *may* be one of those cases where the distinction is "thin", particularly where the challenge is primarily one as to an evaluative assessment.

107.Thirdly, at this stage, and without the benefit of close textual analysis, I am yet to understand fully the PCA's explanation of the "constraints" of a review (with a requirement for a "targeted attack" on the decision of the lower court) which do not apply on a rehearing.

108.Finally, and crucially, even if the PCA is correct as to the meaning of "rehearing" and what that means in the present case, this will make little, if any, practical difference to the evidence that will be placed before the Court hearing the substantive appeal or to the preparation and conduct of the appeal. If PCA is correct, then on a "rehearing", Star will ask the Court to review all the evidence (to the extent it has indicated). On a "review", Star's case will, first, have to meet the threshold of showing that the decision of the PCA was wrong. But Star will necessarily go on and invite the Court to retake the decision on the basis of its own assessment, and in so doing to consider precisely the same evidence. Accordingly I am not satisfied that any decision now will have a material effect on either the preparation for, or the conduct of, the substantive appeal. Whether the appeal should be a "rehearing" or a "review" is to be decided in the interests of justice in the circumstances of this case and that decision is best taken by the court hearing the substantive appeal, having considered all relevant material.

109.For these reasons, I decline to decide, as a preliminary issue, whether the appeal should proceed by way of rehearing or by way of review.

Conclusions

110.For the reasons given above, I grant Star's applications under Issues 1 and 2. On Issue 3 I will order disclosure into a confidentiality ring. On Issue 4 I determine the issue in the terms set out in paragraph 96 above. I decline to determine Issue 5 as a preliminary issue.

111.I am grateful to counsel and solicitors both for the high quality of the argument and for the helpful manner in which this case has been prepared and conducted.