NEUTRAL CITATION [2020] EWHC 714 (CH)

IN THE HIGH COURT OF JUSTICE **Claim No BL-2019-000810**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Mr M H Rosen QC sitting as a Judge of the Chancery Division
24 March 2020

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

BETWEEN:

(1) PUNCH PARTNERSHIPS (PTL) LIMITED
(2) STAR PUBS & BARS LIMITED **Claimants**

- and -

THE HIGHWAYMAN HOTEL (KIDLINGTON) LIMITED **Defendant**

-and-

THE OFFICE OF THE PUBS CODE ADJUDICATOR **Intervenor**

JUDGMENT

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(1) Introduction

1. The Highwayman Hotel in Kidlington, Oxford ("the Pub") is currently let to the Defendant Tenant by the First Claimant ("Punch") under a "tied pub" form of tenancy, at below market rent but requiring the Tenant to purchase alcohol sold at the Pub from the landlord or its nominee at above market prices, due to expire on 26 April 2022.

2. Punch is a subsidiary of the Second Claimant ("Star") which operates the pub estate business of Heineken UK Limited, the freehold owner of approximately 2,500 out of some 12,000 tied pubs in the UK. In this judgment I will call the Claimants together "the Landlords", although sometimes for simplicity that phrase is used to refer to only one of them.

3. By a claim form dated 25 April 2019, the Landlords seek to challenge an award dated 29 March 2019 ("the Award") made by Ms Fiona Dickie, the Deputy Pubs Code Adjudicator ("DPCA") in a statutory arbitration commenced by the Tenant under Part 4 of the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act") and the Pubs Code etc Regulations 2016 ("the Pubs Code").

4. The DPCA was and is a member of the Office ("OPCA") of the Pubs Code Adjudicator ("the PCA") established by section 41 of the 2015 Act and empowered under schedule 1 to do anything calculated to facilitate or to be otherwise conducive to her functions, which are regulatory and dispute-resolving under the 2015 Act. (Where I refer in this judgment to "OPCA", I intend to include the PCA and the DPCA.)

5. In the Award, the DPCA held that the terms of a so-called "market rent only" or "MRO" lease offered to the Tenant to replace the existing tenancy agreement in respect of the Pub, were unreasonable because the proposed lease expired on the same date as the tied tenancy that it was to replace, and ordered the Landlords to offer a new MRO lease for a minimum period of five years from the date of grant (and thus at least two years longer than the lease which they proposed).

6. By their claim form, the Landlords applied to have the Award set aside or varied on three grounds under the Arbitration Act 1996 ("the 1996 Act"), which I would summarise as follows:

   (a) that in finding that the MRO lease proposed was unreasonable due to the length of its term, the DPCA

      (i) erred in law so that the Award should be set aside pursuant to section 69 of the 1996 Act, and

      (ii) unlawfully relied upon information received in her capacity as regulator under the 2015 Act and the Pubs Code and breached her duty to act fairly and impartially and/or exceeded her powers, so that the Award should be set aside under section 68; and

   (b) in ordering the Claimants to offer an MRO lease of a particular length, the DPCA exercised a power that she did not have under the 2015 Act and/or the Pubs Code and so exceeded her powers and/or erred in law such that the Award should be set aside under sections 68 and/or 69 of the 1996 Act.

7. By an order of Zacaroli J dated 9 July 2019, the Landlords' challenges, including their application for leave to appeal the award under section 69 of the 1996 Act, were directed to be considered at an oral hearing.

8. At that hearing, listed to take place on 18 December 2019, on what the Claimants then told me, I granted them leave under section 69(3) and adjourned the matter for the OPCA to be represented, which it was at the adjourned hearing on 26 February 2020.

9. The Claimant Landlords were represented by Catherine Callaghan QC and Peter Stevenson, instructed by DLA Piper Scotland LLP, and adduced two witness statements of Hazel Moffat dated 25 April and 28 November 2019 in support of their challenges.

10. The Tenant did not serve any evidence or argument in these proceedings nor attend the hearing, but in correspondence with the PCA it identified an objection to the Claimants' challenges, namely that pursuant to Article 34 of the Rules of the Chartered Institute of Arbitrators ("ChIArb") which governed the arbitration, the parties waived any right to appeal.

11. There were also before the Court written "Arbitrator's Observations" served by the Government Legal Department on behalf of the DPCA on 1 October 2019, a letter of 9 December 2019 in response to Ms Moffat's second witness statement, and submissions on law only both written and oral from Adam Heppinstall, counsel on behalf of the OPCA.

(2) The Statutory Regime

12. The key provisions of the 2015 Act for the purpose of these proceedings are in section 43, subsection (1) of which states that the Pubs Code must require pub-owning businesses, among other things, to offer their tied pub tenants '*a market rent only option'* in specified circumstances. A "*market rent only option"* is defined in subsection (2) as an option for the tied tenant to occupy the tied pub under a tenancy which is '*MRO-compliant*' and to pay an agreed rent or (failing such agreement) a market rent.

13. Section 43(4) provides that a lease will be MRO-compliant if, among other things, it "*contains such terms and conditions as may be required by virtue of subsection (5)(a)"* and "*does not contain any unreasonable terms or conditions*"; and subsection (5) states that the Pubs Code may specify descriptions of terms and conditions (a) which are required to be contained in a tenancy or licence for it to be MRO-compliant; (b) which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).

14. By section 44(1) of the 2015 Act, the powers to determine the procedures to be followed by pub-owning businesses ("POBs") and their tenants in respect of MRO offers, known as "the MRO procedure' and the power to confer "*functions on the* [Pubs Code] *Adjudicator in connection with that procedure"* were delegated to the Secretary of State

15. Sections 44 and 45 anticipated two separate procedures for determining disputes between POBs and their tied tenants, namely

    (a) where the parties could not agree the rent payable under a proposed MRO lease, section 44(2) entitled the Secretary of State to impose an independent assessor to determine the market rent; and

    (b) as regards other disputes relating to the offer of an MRO lease, section 45(2) empowered the Secretary of State to confer functions on the Adjudicator to resolve such disputes and, in particular, disputes as to "*whether … a proposed tenancy or licence is MRO-compliant*".

16. The 2015 Act also provided for the PCA to have regulatory functions as set out in sections 53 to 61, including the power to carry out investigations into whether a POB has failed to comply with the Pubs Code, to make recommendations, require information to be published or impose financial penalties on the POB and to give advice or publish guidance on any matter relating to the Pubs Code.

17. The Pubs Code (issued by the Secretary of State under section 42(1) of the 2015 Act on 20 July 2016) provides for MRO-compliant lease offers as follows:

    (a) Regulation 29 requires the POB, upon receipt of a valid MRO notice, to send the tenant a "*full response*" including a proposed tenancy which is "*MRO-compliant*";

    (b) Regulation 30(2) specifies that a proposed tenancy will only be MRO-compliant if "*its term is for a period which is at least as long as the remaining term of the existing tenancy"*; and

    (c) Regulation 31 specifies that the terms of a proposed tenancy shall be regarded as unreasonable if they (i) include a break clause exercisable only by the landlord; (ii) impose a service tie in respect of insurance (other than buildings insurance); or (iii) include terms which are not common in non-tied tenancies;

    (d) Regulation 58(3) provides that, in the event that the tenant or pub-owning business refers the dispute to arbitration, that arbitration must be conducted in accordance with *"(a) the rules regarding arbitrations issued from time to time by the Chartered Institute of Arbitrators; or (b) the rules of another dispute resolution body nominated by the arbitrator*."

18. In the event of a dispute concerning whether the proposed tenancy is MRO-compliant:

(a) under Regulation 32 the tenant or the POB may refer the matter to the Adjudicator (who, pursuant to Regulation 58(2), must either arbitrate the dispute or appoint another person to do so);

(b) under Regulation 33, if the Adjudicator rules that the POB "*must provide a revised response to the tied pub tenant"*, such "*revised response"* must be provided within 21 days of the ruling;

(c) under Regulation 34, the parties have a 56 day negotiation period, from the provision of the full response under Regulation 29 or the revised response under Regulation 33, in which to agree terms; and

(d) under Regulation 35, if an MRO tenancy is proposed during the negotiation period which the tenant considers is not MRO-compliant, it may again refer the matter to arbitration.

(3) Factual background

19. The Tenant triggered the MRO procedure under the 2015 Act and the Pubs Code by serving an MRO notice on PTL on 9 November 2016, and the steps then leading to the arbitration and the Award were in summary:

(a) on 6 December 2016, Punch sent its "full response" to the Tenant pursuant to Regulation 29(3) of the Pubs Code, including a proposed MRO tenancy to replace the existing tied tenancy, for a period matching the remaining term of the existing tenancy;

(b) on 3 January 2017, the Tenant (dissatisfied with PTL's full response) referred the dispute to arbitration alleging that the terms of the proposed tenancy were unreasonable on many grounds but without objecting to the proposed period;

(c) in an award made on 5 January 2018, the DPCA as arbitrator (as from November 2017) upheld three of those objections, holding that terms were unreasonable which (i) required the payment of a deposit of six months' rent; and (ii) the payment of insurance annually in advance and which (iii) triggered repair obligations;

(d) on 24 January 2018 Punch submitted a "*revised response*" seeking to address those points concerns;

(e) on 7 February 2018, the Tenant (rejecting the revised response) made a second referral to the PCA for arbitration in which it contended that the period of the proposed tenancy was unreasonable; and

(f) on 26 April 2018, the parties were notified that the DPCA was to act as arbitrator in respect of the second reference.

20. On 7 December 2018, while that (second) arbitration was on-going, the DPCA wrote to Star in her capacity as regulator, stating that the OPCA would shortly be issuing a further chapter of its regulatory compliance handbook which would deal with MRO proposals and requesting that Star provide information on its normal practice in respect of lease lengths.

21. On 21 January 2019, the information so requested was provided to the DPCA (as I have said, as regulator) and included the statement that:

> "*… it is Star Policy to offer to the Tied Pub Tenant (TPT) an agreement which is as long as the remaining term of the existing tenancy, as stipulated in the Pubs Code or a term of 10 years whichever is longer…there may be instances where an alternative duration may be offered, but this is not common practice".*

22. On 30 January 2019, this information (which I will call "Star's 10-year Policy") was forwarded by the DPCA to the Tenant in the arbitration and Star was required by the DPCA to state whether it had made this information known to the Tenant and to explain why a 10-year lease had not been offered.

23. On 1 February 2019, Star responded to the DPCA's letter in the context and for the purpose of the arbitration, explaining why it had not disclosed its policy to the Tenant and confirming that it regarded the term offered as appropriate and reasonable**.**

24. On 4 February 2019, the Landlords' solicitors wrote to the DPCA objecting to this information being shared with the Tenant, stating that it had been provided in the legitimate expectation that it would be utilised solely in the OPCA's regulatory capacity.

25. On 12 March 2019, the OPCA wrote to the Landlords' solicitors stating generally that information from a POB brought to the OPCA's attention in a regulatory capacity would be shared, where relevant, with the other party in an arbitration involving that POB and that*"... When acting as arbitrator and managing an arbitration, the PCA and Deputy PCA cannot 'un-know' information they have received as the regulator."*

(4) The Award

26. On 29 March 2019, the DPCA published her award in the second reference, now under challenge. Appendix 2 to the Award confirmed that the applicable rules for the conduct of the arbitration were the current ChIArb Rules and paragraph 12 of the Award acknowledged that (a) the Tenant had not raised any objection to the length of the proposed term in the first reference; and (b) the period of the proposed tenancy was as long as the remaining term of the existing tenancy as required by Regulation 30(2) of the Pubs Code.

27. The reasons stated in the Award for accepting the Tenant's submission that such a period was unreasonable, were as follows:

> *"41. When I was on the point of completing my award at the end of January 2019, as regulator I came into possession of information regarding the Respondents' policy in respect of the lease length that it would offer in its proposed MRO tenancies…*
>
> "*53. Given that the length of the term of the proposed lease must not be unreasonable, it is for the Respondents to show what their reasons were for offering the lease length that they did and that they were reasonable ones. They have not shown their reasons…*
>
> *"54. Having failed to put forward a reason for having chosen not to apply its usual policy to lease length, I find that the Respondents had no good reason for its choice, and that the lease length proposed is unreasonable and not compliant."*

28. The Award then held that the DPCA had the power to order Punch to offer a new lease with a minimum term of 5 years:

> *"61. In submissions dated 4 June 2018* [the Landlords] *argued that, properly interpreted, the legislation* [the 2015 Act and the Pubs Code] *did not empower me to order the precise terms of the revised response…*[and] *my powers are limited to ordering the service of a revised response, but not to determining what that revised response must contain. However, I find no support for such a construction in the legislation pursuant to which I derive my powers, the drafting of regulation 33(2) being broad.*
>
> *"62. I take the view that the reference to my powers in that regulation is not exhaustive. Its language is permissive, in that it does not restrict me in the scope of any ruling I may make as to the terms of the revised proposal. I must arbitrate the dispute, and that means that I should ensure that* [the Tenant] *obtains a compliant MRO proposal without the need to refer for further arbitration on the terms of the MRO lease. History indicates to me that the parties are unable to negotiate to an effective agreement, and therefore in this case I have determined that I should order the compliant lease term on which the revised proposal must be made.* [The Landlords'] *interpretation of my powers under regulation 33(2) is such as to provide the potential for locking a tied pub tenant into a cycle of litigation. Such delay would place a greater burden on the tenant than on* [the Landlords] *as a huge international brand with deep pockets."*

(5) The 1996 Act - jurisdiction

29. The Arbitration Act 1996 permits a challenge to an award in limited circumstances. Under section 68 a party may challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award; and under section 69 a party may appeal to the court on a question of law arising out of the award.

30. Under section 68(2), a "serious irregularity" is defined as meaning *"an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant* [including] - *(a) failure by the tribunal to comply with section 33 (general duty of tribunal)… (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction….).*

31. Under section 69(3), the Court may grant leave to appeal for an error of law if satisfied that "*the determination of the* [question of law] *would substantially affect the rights of one or more of the parties …., the question is one which the tribunal was asked to determine, …. on the basis of the findings of fact in the award, the question is one of general public importance and ... the decision of the tribunal is at least open to serious doubt, and… it is just and proper in all the circumstances for the court to determine the question".* On what I was told on behalf of the Landlords on 18 December 2019, I considered that this test was satisfied, subject to the OPCA having an opportunity to address the questions of law at an adjourned hearing, which it took up as Intervenor.

32. Section 33 provides that

> *"(1) The tribunal shall - (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined….*
>
> *"(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*
>
> *"(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may - (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."*

33. Section 94 provides that *"(1) The provisions of Part I apply to every arbitration under an enactment (a 'statutory arbitration), whether the enactment was passed or made before or after the commencement of this Act, subject to the adaptations and exclusions specified in sections 95 to 98… (2) The provisions of Part I do not apply to a statutory arbitration if or to the extent that their application (a) is inconsistent with the provisions of the enactment concerned, with any rules or procedure authorised or recognised by it, or (b) is excluded by any other enactment."*

34. Article 34(2) of the ChIArb Rules published on 1 December 2015 (to which the Tenant referred in its email to OPCA dated 9 May 2019) states:

> *"… All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay. By adopting these Rules, the parties waive their right to any form of appeal or recourse to a court or other judicial authority insofar as such waiver is valid under the applicable law."*

35. The Tenant's objection to jurisdiction in the present case cannot apply to the challenge under section 68 which is of mandatory effect *"notwithstanding any agreement to the contrary"* under section 4(1) of the 1996 Act. Arbitral rules that waive recourse to a court insofar as such waiver is valid under English law, do not waive the right to challenge an award under section 68.

36. By contrast, section 69 is not of mandatory application and an appeal on law under that section is only available *'unless otherwise agreed by the parties*'. However,

(a) section 51(5) of the 2015 Act and Regulation 58 of the Pubs Code provide that the statutory arbitration will be '*conducted in accordance'* with those Rules. Thus only those rules associated with the conduct of the reference are engaged, and this did not extend to Article 34 of the ChIArb Rules, which is concerned with the form and effect of an award, including "appealability", and was not incorporated in the procedure of the arbitration now in issue; and

(b) in any event, the applicability of the ChIArb Rules to the conduct of arbitration was not "agreed by the parties" for the purpose of section 68, but was imposed by the 2015 Act as statute (and in other cases could be potentially imposed by the choice of the arbitrator given that power under section 51 of the 2015 Act).

37. I might add that this also appears to be the position of OPCA as stated in a letter dated 23 May 2019 to the parties, in its Factsheet 14, and in its submissions in the statutory review of the Pubs Code, to the effect that awards made under the 2015 Act can be appealed on the narrow range of grounds provided for in the Arbitration Act 1996, including sections 68 and 69, as confirmed by its counsel's submissions before me. I was also referred to a decision of another court (without it seems any argument) in

Punch Taverns Ltd v Swan Hospitality Limited [2018] EWHC 905, granting the POB leave to appeal a OPCA award pursuant to section 69 of the Arbitration Act.

(6) The challenges to the finding that the period offered was unreasonable

38. This section of my judgment addresses the first two challenges to the Award together, in the order which I have put them above, although they were argued separately (and each at considerable length). There is an obvious danger in over-focus on specific issues, without also considering the case in the round, and risking "not seeing the wood for the trees".

39. The first two challenges include separate points of principle as preliminaries, both also then raise a common question as to whether Star's 10-year Policy was relevant to whether the Landlords' offer was MRO-compliant, the subject (of course) of the arbitration reference.

40. I save for the subsequent section (7) of this judgment, where they bite deeper in favour of the Landlords, various points concerning the overarching intention of the 2015 Act and the Pubs Code and what constitutes substantial injustice under section 68 of the 1996 Act, but I have taken account of them on the first two challenges as well.

(a) The alleged unreasonableness of a period expiring with the current tied lease

41. As the Landlords put it, this challenge to the Award concerns the interaction between (i) the requirement imposed by section 43(4)(a)(i), that a compliant tenancy contain such terms and conditions as may be required by virtue of section 43(5)(a); and (ii) the requirement imposed by section 43(4)(a)(iii), that a compliant tenancy not contain any unreasonable terms.

42. According to the Government Response to the Consultation Paper '*Pubs Code and Pubs Code Adjudicator'* (April 2016), the purpose of the power under section 43(5)(a) of the 2015 Act to specify particular terms which are required to be contained in a tenancy or licence for it to be MRO-compliant was to "*propose minimum requirements designed to ensure that a tenant enjoys no less – but also no more – protection or security of tenure under their new MRO agreement than they previously had under their old tied agreement.*"

43. The Landlords submit that the only "minimum requirement" specified in the Pubs Code pursuant to that power is the requirement imposed in Regulation 30 that "*the proposed MRO tenancy is MRO-compliant only if its term is for a period which is at least as long as the remaining term of the existing tenancy"* and that this reflects the significance of lease length in MRO negotiations.

44. It appears that this minimum requirement replaced an original proposal that *'MRO compliant agreements should be for a minimum of five years'* because it was thought that a requirement which did not mirror the terms of the existing lease would unduly interfere with the parties' existing rights:

> *"Retaining the consultation proposal that an MRO-compliant tenancy must be for a minimum of at least five years or the remainder of the existing tenancy, whichever is the shorter, would not provide a realistic MRO offer for tenants. It would create an inequality where tenants could have to exchange security of tenure in exchange for an MRO compliant tenancy…*
>
> *"Equally establishing that an MRO-compliant tenancy must be for the greater of a period of at least 5 years or the remainder of the existing tied tenancy would have distorting consequences in that tenants would be able to obtain additional security of tenure through the mechanism of the MRO option."*

45. The Landlords' case is that a lease proposal which offers to (at least) match the period of the existing lease in compliance with Regulation 30, ***cannot*** be unreasonable for the purposes of section 43(4)(a) (iii), and by finding to the contrary, the DPCA erred in law. They argue that by requiring an MRO offer which meets that Regulation 30 requirement, the Pubs Code ***satisfies*** the basic principle that underlies the 2015 Act that the tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.

46. I reject that submission. To the extent that the Government's response to the Consultation Paper may be of any assistance, it does not determine or change the obvious interpretation of the 2015 Act and the Pubs Code, which is that whilst an MRO-compliant tenancy must be for a period at least as long as to the remaining period of the tied lease, that does not ***entail*** the reasonableness of such a period on offer or exclude the possibility that in any particular case, it is unreasonable.

47. In short, the requirements in Regulation 30 as to the minimum offered lease period, and in section 43(4) and (5) and Regulation 3l as to the reasonableness of offered lease terms, are cumulative as to what might be an MRO-compliant offer as to lease terms including period. The reasonableness or otherwise of the period offered is not ***determined*** merely because it complies with the minimum requirement in Regulation 30(2). It might still be unreasonable under section 43(4) and (5) and Regulation 31.

(b) The alleged misuse of the Landlords' information

48. The Landlords complain vigorously at the disclosure and use of Star's 10 year Policy by the DPCA in the arbitration and the Award. They stress first that she requested and received that information as regulator, responsible for exercising a public law function by way of investigating and monitoring and enforcing compliance with the Pubs

Code, and not in her capacity to arbitrate and resolve commercial disputes between tied pub tenants and POBs as to whether a proposed tenancy is MRO-compliant.

49. Under paragraph 19 of Schedule 1 to the 2015 Act, the OPCA has an express power to require a person to provide documents or information in that person's possession or control, for the purposes of an investigation or for monitoring whether a pub-owning business has followed a recommendation or "*for the purposes of exercising functions in relation to the offer of a market rent only option*"; and under paragraphs 20 to 22, it is an offence, punishable by a fine, to fail to comply with a requirement to provide information or documents, or knowingly to provide false information in response to such a requirement.

50. The Landlords next pray in aid the so-called "Marcel Principle" as enunciated in *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225, in which Sir Christopher Slade stated (at 262C-D):

> *"In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The user for any other purpose of documents seized in exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation".*

51. In *Re Arrows Ltd (No 4)* [1995] 2 AC 75, the House of Lords upheld the Marcel Principle, Lord Browne-Wilkinson stating (at 102G and 104D):

> *"In my view, where information has been obtained under statutory powers the duty of confidence owed on the Marcel principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure…*
>
> *"The extraction of private and confidential information under compulsion from a witness otherwise than in the course of inter partes litigation is an exorbitant power. It is right that such information should not be generally available but should be used only for the purposes for which the power was conferred."*

52. In *Re Atlantic Computers Ltd* [1998] BCC 200, Robert Walker J (as he then was) applying the Marcel Principle, held that a liquidator's powers to obtain information under the Insolvency Act 1986 should not be used to give the liquidator as a litigant in ordinary litigation, any special advantages in that litigation.

53. In *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] 1 WLR 4164 the Supreme Court also applied the Marcel Principle (as stated by Lord Toulson at [17]) in determining whether a Revenue official had acted lawfully in disclosing the claimants' confidential tax information to journalists, and held that a statutory exception to that duty of confidentiality, which permitted disclosures "*made for the purposes of a function of the Revenue and Customs*", should be construed strictly so as to permit disclosure only to the extent reasonably necessary for HMRC to fulfil its primary function.

54. The Landlords submitted that the Marcel Principle applies to the Star 10-year Policy as (a) confidential and commercially sensitive information (b) acquired by the DPCA pursuant to her legal powers as regulator; the fact that this was without express reference to her statutory power of compulsion was immaterial, because she could only request such information, and Star would only have provided it, because of her coercive powers; and therefore it could not be disclosed to any third party or used unless required or authorised by statute.

55. These are powerful points leading to the Landlords' key submission on this aspect, namely that the 2015 Act does not contemplate that confidential information acquired from a POB by OPCA as regulator could be disclosed and used in an arbitration under the 2015 Act with a tied pub tenant, absent any express provision to that effect.

56. The Landlords put forward four overlapping reasons for this. First, they say that under the *eiusdem generis* principle of construction, the PCA's power to obtain information "*for the purposes of exercising functions in relation to the offer of a market rent only option*" in paragraph 19(3) is to be interpreted as a reference only to the PCA's regulatory functions (eg to provide advice or guidance on MRO offers under sections 60 and 61) and if Parliament had intended that information relating to the offer of a MRO option acquired in the PCA's regulatory capacity could then be used in the resolution of an arbitral dispute, it would have said so expressly (*cf* section 45, which makes express reference to the PCA's functions "*in connection with the resolution of disputes*").

57. Secondly, the Landlords draw attention to indications that Parliament was alive to the possibility of a conflict between the PCA's regulatory and arbitral roles, and sought to guard against a blurring of those roles (a) in section 48(5) which provides that where a dispute between a tied pub tenant and a pub-owning business is referred to the PCA for arbitration, the PCA can either arbitrate the dispute itself or "*appoint another person to arbitrate the dispute*", as explained in the Note to the effect that this provision enables the PCA to appoint another arbitrator where a conflict of interest may exist, for example, where the PCA has previously advised or investigated an issue relevant to the dispute; and (b) in paragraph 10 of Schedule 1, which requires

the OPCA to make procedural arrangements for dealing with any conflict of interest affecting its officers or staff.

58. Thirdly, in a similar vein, section 52 of the 2015 Act provides that, where the PCA appoints another person as arbitrator, the PCA may require the arbitrator or the parties to the arbitration to provide information to assist the PCA in carrying out functions under Part 4 of the 2015 Act. Thus, it is said, information obtained during the dispute resolution process can be used for regulatory purposes, but there is no similar provision permitting information to flow in the opposite direction, indicating that Parliament did not intend that information obtained for regulatory purposes could be used in arbitration proceedings.

59. Fourthly, the OPCA has recognised that information obtained in arbitrations should not be shared with third parties, and thus implicitly accepted the converse, that information obtained for regulatory purposes should not be used in arbitrations. Pursuant to paragraph 10 of Schedule 1, OPCA published a Conflicts of Interest Policy in July 2016, and the following statements on its website:

> *"The PCA is aware of both the need to separate the roles of regulator and arbitrator and to be as transparent as possible about the way it carries out each of these roles…*
>
> *"In discussions with pub companies or any other person or body, the PCA will never discuss individual cases which are or may be the subject to arbitration…*
>
> *"The PCA is aware that parties to arbitrations are entitled to have full confidence that the arbitrator has no conflict of interest and conducts arbitrations fairly. A further safeguard is provided through the oversight of the PCA's Compliance Officer, who will take all necessary steps to ensure that there is a clear separation of functions and that neither the PCA nor the Deputy PCA does anything that could compromise that confidence or give rise to a reasonable perception of bias."*

60. On this basis, the Landlords contend that the DPCA had a conflict in acting as statutory arbitrator in this matter and since she had information as regulator from Star which could not be disclosed and used in the arbitration with the Tenant, without its consent, she could not decide the matter fairly and impartially and she should have (a) resigned as arbitrator or (b) if under any uncertainty as to that, told the parties that she was in possession of information as regulator and invited the parties to make submissions to her on admissibility before disclosure to the Tenant, rather than merely commenting on the content of the information, after disclosure to the Tenant in the first place.

61. In the Award, and in observations and submissions to the Court, the DPCA and then the OPCA first submitted that where it acquires information from a POB as regulator which is "*directly connected*" to issues raised in an arbitration, that information should be made known to the Tenant; and if the POB does not do that, then the arbitrator cannot "*un-know*" information received as regulator, and therefore it is only fair for her to provide the information to the Tenant.

62. This raises the crucial question of whether Star's general policy on MRO tenancy duration was relevant or disclosable information in the arbitration. The Landlords attempted to persuade the Court that it was not, because Star might depart from that policy in some instances, and in any event it was a subjective process, which could have no bearing on whether or not the particular term length offered to the Tenant was objectively reasonable in the circumstances of this case.

63. By providing the Tenant in this arbitration with commercially sensitive information, it was put in a better position than it would have been in had it been free of tie, inconsistent with the principles underlying the 2015 Act, and inconsistent with the ruling in *Re Atlantic* which prohibited the arbitrator from deciding unilaterally to disclose that information to the Tenant without proper authorisation.

64. After weighing these arguments, I am far from convinced by the Landlords' arguments. First, the Marcel Principle requires them to establish that the relevant statutory framework did not include as one of the purposes of the OPCA's "regulatory" powers, the proper resolution of disputes as to MRO-compliance through the statutory arbitration and other processes envisaged.

65. It seems to me that the 2015 Act and the Pubs Code, read as a whole, implicitly allowed for that and there is no good reason to exclude such a purpose from the object of the OPCA's regulatory powers. The provisions as regards possible conflicts do not dictate that the arbitrator must recuse herself if she has relevant information as regulator; and transmission of information from arbitrations to the regulator, far from dictating that information cannot be passed the other way, supports an integrated view of the OPCA's dual functions.

66. I do not read the 2015 Act and Pubs Code as laying down an absolute dichotomy, a complete separation between the OPCA officers' role as regulators and as arbitrators. Nor do I see the need for justice in its arbitrations, involving the possible need for disclosure, as opposed to or even a counterweight to the Marcel Principle. On the contrary, the functions of OPCA as regulator sit in harmony with its arbitrations, serving the same purposes in achieving fairness in the industry including MRO-compliant leases.

67. It is inherently likely that the OPCA as regulator would be or become aware of matters concerning or obtained from POBs and relevant to MRO disputes which its

officers arbitrate. It is then a matter for the judgment of the arbitrator whether any particular such matter is of such significance to the dispute that it would or might feature in the reasons for deciding it such that fairness requires it to be disclosed to the tenant for that purpose and to enable equal opportunity for submissions on both sides.

68. The fact that this may intrude, both from the regulatory and dispute resolution viewpoints, on the POB's commercial freedom and property rights (as discussed further below) does not militate against that reading under the statutory framework. Such an intrusion may be a proportionate, due response to the purposes and needs of the system set up under the 2015 Act and the Pubs Code.

69. Indeed to debar OPCA officers from acting as arbitrators when they obtain relevant information as regulators would create a considerable potential for disrupting that system. This is entirely different from a conflict which may arise for other reasons, contrary to the need for independence in arbitrators. The co-dependency of the regulatory and arbitral functions of OPCA under the 2015 Act and the Pubs Code, as I read them, and the particularly advantageous position of OPCA's officials, with all their knowledge as regulators, strongly tends against such possible disruption.

70. Moreover in the context of the statutory framework as a whole, where various disclosure and conflict questions are expressly addressed, the absence of any explicit restrictions on the OPCA in this regard supports the common sense inference that its officers are and remain authorised to act as arbitrators where (or even where) it has obtained relevant information from the POB under, or under the threat (explicit or implicit) of, compulsion as regulator.

71. The fallacy in the Landlords' position, so it seems to me, is exposed by their emphatic and repeated contention that "*In an arm's length commercial negotiation between a* [POB*] and a tenant who is free of tie, the [POB] would not be required to divulge its estate management policy. For that reason, the DPCA's actions have made the Tenant better off than he would be if he were not tied*." This is based on the false premise that the 2015 Act and Pubs Code must treat a Tenant who rejects an MRO offer as if the dispute was unregulated, to the extent that the POB was free to decide on what was and was not reasonable without objective determination with the benefit of disclosure and other processes imposed by the statutory scheme.

72. The Pubs Code, as the Landlord acknowledges is based on the principle of fair dealing and this may require proportionate intrusions into the POBs' business and property rights. If the Landlords were not obliged to disclose relevant information or the arbitrator was precluded from using relevant information (ensuring that both parties knew of it and could make submissions as to its effect), the purposes of the 2015 Act would be subverted.

73. As for the Landlords' contention that Star's 10-year Policy was irrelevant because it was subjective and could be departed from in any particular case, I regard that as wholly untenable. The MRO offer being assessed as reasonable or not was made by the very POB which devised and used such a general policy. Whether or not it reflected terms common in non-tied tenancies (under Regulation) is not determinative, but to claim the policy and reasons for departing from it were subjective and thus wholly irrelevant to the objective question of reasonableness, is absurd.

74. A POB's policy as to the lease periods it will generally offer is a valid, possible starting point or at least a factor in considering what is reasonable not only in its fair interests but (especially when it is a major POB with some 20% of tied houses) also in the market. Of course there may be good reasons to depart from that policy, but these cannot be argued out if the landlord does not explain them.

75. In short a general policy of a landlord and the reasons for seeking to depart from it may possibly be important considerations in deciding whether a particular offer is justified, where that question has to be adjudicated; and to seek to exclude such evidence entirely, without more, might well give rise to suspicion as to the "fair dealing" or otherwise of the landlord concerned.

76. However, be that as it may, the extent to which Star's 10-year Policy ***was*** significant in this case, was for the arbitrator to assess, after submissions from both sides. If the ground for alleged inadmissibility was its irrelevance, the same points and perhaps more would feature in arguing the substance; and unless it was inadmissible on some other ground, there would be no purpose in a two-stage consideration.

(c) The questions of reasonableness and justice in the Award

77. The Landlords criticise the conclusion in the Award to the effect that the Landlords had failed to show what their reasons were for offering the lease that they did and that they were reasonable ones. They say that in an arbitration commenced by a tenant under Regulation 32, the burden of proving the unreasonableness of the POB's response lies on the tenant and not the POB, and that the POB's reasons for not applying its general policy were irrelevant.

78. In my judgment the question of burden in this case is artificial. The arbitrator was entitled as a matter of law to find that, having failed to put forward a reason for not applying its usual policy to lease length, there was no good reason and that the lease length proposed by the Landlords was accordingly unreasonable and not compliant. I decline to set aside or vary the Award for any error of law under section 69 of the 1996 Act in this regard.

79. Pursuant to section 33 of the 1996 Act, the DPCA was required to act fairly and impartially between the parties, and to adopt procedures suitable to the circumstances of the particular case. But I do not accept the Landlords' contention that by disclosing

Star's confidential commercial information to the Tenant, without prior notice or consent, the DPCA contravened the Marcel Principle and/or failed to comply with her general duty under section 33, thereby exceeded her powers contrary to section 68(2)(a) of the 1996 Act or purported to exercise a power which she did not have, to disclose information acquired in her regulatory capacity to the Tenant in the arbitration, contrary to section 68(2)(b).

80. It seems to me that the above questions of principle sought to be raised by the Landlords in this case, fundamentally fail because of the obvious relevance of Star's 10-year Policy sought and known to the OPCA as regulator, to the issue of reasonableness or unreasonableness of their MRO offer, the subject of the arbitration. Even if the DPCA had breached section 33, which she did not, it did not cause substantial or any injustice to the Landlords as required under the section 68 jurisdiction.

81. The Landlords submitted on this aspect that:

(a) but for the alleged procedural irregularity, the outcome of the arbitration may have been different, because if the DPCA had not used that information in the arbitration, she may have concluded that the period of the lease offered was reasonable; and

(b) if the Award is permitted to stand, the Landlords would face an invidious choice between complying with their regulatory obligations to provide information requested by OPCA, which can then be deployed in a private arbitration with a tied pub tenant to their disadvantage, or refusing to comply with their regulatory obligations which is a criminal offence under the 2015 Act, punishable by a fine.

82. Not for the first time, this reasoning, in my judgment, acts against the Landlords and exposes the justice in the Award. The fact that Star's 10-year Policy was disclosed in the arbitration and available to be argued as significant or not for the reasonableness of the Landlords' revised lease offer, tended to the efficacy of the arbitration and the purposes of the 2015 Act and the Pubs Code.

83. The regulatory and arbitration functions of OPCA, and the obligations of disclosure by the Landlords both regulatory and as arbitration parties, cannot be chopped apart in an attempt to ensure that their commercial interests outweigh their statutory obligations. By seeking to exclude Star's 10-year Policy from the arbitration, the Landlords might be hoping to outwit both procedural and (subject to any explanation for disregarding their general policy) substantive fairness in resolving the dispute.

(7) The challenge to the finding that the Landlords must offer a 5 year period

84. The Landlords forcefully contend also that the power assumed by the DPCA in the Award to require them to offer a lease period of at least 5 years, interferes significantly with their fundamental rights to contract on such terms and to dispose of their property as they choose because it deprives them of possession or as they put it "full access" to the Pub their property for a period two years longer than they were prepared to offer to the Tenant voluntarily.

85. It cannot be doubted that clear language is required to displace the presumption against state interference with a person's property rights or other economic interests (see *Bennion on Statutory Interpretation* 7th ed. at para 27.8) and if there is any doubt as to the way in which statutory language should be construed *"it should be construed in favour of the party who is to be dispropriated rather than otherwise*", as it was put by Buckley LJ in *Methuen-Campbell v Walters* [1979] QB 525 at 542.

86. Section 3 of the Human Rights Act 1998 requires that, insofar as it is possible to do so, primary and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights, which includes the right, under Article 1 of the First Protocol to the European Convention on Human Rights, to the peaceful enjoyment of possessions. Any derogation from those rights requires clear statutory language.

87. As Lord Hoffmann stated in *R v Secretary of State for the Home Office, ex p Simms* [2000] 2 AC 115 at 131E:

> *"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*

88. That being clear law, the Landlords submitted first that there is no clear language in the 2015 Act nor in the Pubs Code permitting the DPCA to interfere in the commercial negotiations between the Tenant and the Claimants and order a landlord to offer specific terms. To the contrary, section 45(2) of the 2015 Act indicates that

the PCA's powers are limited to determining the question of whether terms proposed by the pub-owning business are MRO-compliant.

89. The scope of a statutory arbitration between a tied tenant and pub-owning business is defined by section 45 of the 2015 Act which permits the Secretary of State to make provision for dispute resolution in respect of MRO disputes concerning "*whether … (b) a proposed tenancy or licence is MRO-compliant …*".

90. Regulation 32(2) of the Pubs Code specifies that the tenant "may refer the matter to the Adjudicator". The matter capable of being referred (and therefore the scope of the reference) is thus limited, in this case, to whether the POB's full response (including the proposed MRO tenancy) complied with the requirements of Regulation 29.

91. Regulation 33 of the Pubs Code spells out the consequences in an arbitration concerning the compliance of an MRO tenancy offer with Regulation 29, including "*…(2) Where - (a) a matter is referred to the Adjudicator under regulation 32(2)(a) to (c); and (b) the Adjudicator rules that the pub-owning business must provide a revised response to the tied pub tenant, the* [POB] *must provide that response within the period of 21 days beginning with the day of the Adjudicator's ruling or by such a day as may be specified in the Adjudicator's ruling. (3) A "revised response" is a response which includes the information mentioned in regulation 29(3)(a) to (c)."*

92. Thus the result of a finding that the MRO offer is non-compliant is that the POB must provide a 'revised response' within 21 days. Regulation 32 does not state that the arbitrator can determine the separate and logically subsequent question of whether, if a proposed tenancy is not MRO-compliant, it would be rendered compliant by the insertion of a particular term, and still less does it state that she can order at the same time that the pub-owning business include that particular term in order to make a tenancy MRO-compliant.

93. There is no other provision entitling the arbitrator to determine the content of the revised response and no other suggestion in the Pubs Code that such an order may be made. If the arbitrator were permitted to order the terms that the POB is required to include in its revised response, there would be no need for a dispute resolution mechanism in respect of the revised response.

94. The Landlords point out, secondly, by way of contrast, where the 2015 Act and the Pubs Code does permit interference with a POB's rights and commercial interests, it expressly identifies the basis for that interference and the manner in which it is to be exercised: see for example sections 44(2) and 45(3) of the 2015 Act and Part 7 (Regulations 36, 37 and 59) of the Pubs Code under which the rent payable under a proposed MRO lease can be imposed upon the POB in the event of a failure to reach agreement with the tenant.

95. Similarly: (a) Part 13 of the Pubs Code expressly provides for the avoidance of terms of a tied-pub tenancy which purport to restrict the rights of the tenant under the Code; and (b) Regulation 28 of the Pubs Code restricts the pub-owning business from exercising any right to recover rent during the pendency of the MRO procedure. The absence of any equivalent language entitling the PCA to determine the content of the other clauses of an MRO tenancy offer is a clear indication that Parliament did not intend to confer such a power on the PCA.

96. Thirdly, the Landlords rely on the letter dated 9 December 2019 to the Court from the Government Legal Department on behalf of OPCA apparently acknowledging the absence of clear language granting the power in issue, by stating that "… *the PCA and DPCA consider that they have jurisdiction to issue a 'positive' award where necessary and appropriate, but have brought the need for a better drawn basis for their powers, to the attention of the Secretary of State, as part of the Review".*

97. Fourth, the Landlords' repeat the overarching submission on this and their other challenges, addressed above, that the intention of the statutory scheme, and the MRO regime in particular, was to set out certain minimum requirements which are designed to secure that tied pub tenants are treated fairly and are no worse off – but no better off - than they would be under a non-tied agreement, but otherwise to give the parties commercial freedom as to how they choose to conduct their relationship.

98. As the Parliamentary Under-Secretary of State for DBIS, Baroness Neville-Rolfe stated: *"… the only requirement for a lease to be MRO compliant are set out in Clause 43(4). Other than this, it is up to the pub company to decide what the MRO lease or licence looks like. The pub company will be free to offer a new lease or tenancy without it being considered to be discriminatory."*

99. After considering those strong submissions, and the observations of the DPCA and the submissions of law by counsel on behalf of OPCA, I am persuaded that, notwithstanding the practical points advanced against the Landlords, they are right in denying the power on the part of arbitrators under the relevant statutory provisions, to order that the provision whose absence rendered the POB's offer unreasonable, to be inserted in the resulting revised offer.

100. There is obviously a major distinction between a finding that an offer is unreasonable because it contains a proposed period of less than 5 years, and an order that the revised offer contain a period of at least 5 years. Apart from anything else, in principle – although I do not say for one moment that it would or could be appropriate in the present case - the POB might consider the former and produce a revised offer with compensatory terms in return for a period of less than 5 years, for example by rent or repair provisions more favourable to the Tenant.

101. As the Landlords put it, it could not have been intended in the statutory framework that OPCA, as arbitrator of whether an offer was MRO-compliant, would have the power unilaterally to ***change*** one term in an MRO offer, given that any MRO offer represents a commercially balanced package of terms which are inter-dependent, without clear express wording.

102. I consider with respect that paragraph 62 of the Award, to the effect that the powers of the arbitrator in Regulation 33(2) are "*not exhaustive…* [and] *its language is permissive in that it does not restrict [the arbitrator] in the scope of any ruling* [she] *may make as to the terms of the revised proposal",* is wrong. The language of the 2015 Act and the Pubs Code is restrictive as well as permissive, or more simply put, permissive language is not sufficient to empower the arbitrator to interfere with the economic and property interests of the parties unless clearly expressed and applicable to that end.

103. I am sympathetic to the OPCA's objection, that if the arbitrator is not permitted the power to specify and impose reasonable terms in a revised offer (this already having been the second arbitration reference between the parties), there is a danger of locking a tied tenant into a cycle of litigation, as the Landlords might repeatedly propose terms, which are repeatedly referred to arbitration, the arbitrator decides that the terms proposed are no longer unreasonable and thus MRO compliant, so leaving the rest of the statutory MRO procedure and the Pub's future as free-of-tie inabeyance.

104. The point is well-made and I am not wholly satisfied by the Landlords' two answers to this fear, which they deny in any event that they have any intention or reason to escalate. First, they say that the 2015 Act and the Pubs Code empower OPCA as regulator to control or address the risk which it identifies, by investigating whether a POB has failed to comply with the Pubs Code and if a POB has failed to comply, imposing financial penalties or making further recommendations.

105. Secondly the Landlords suggest that if OPCA considers the regulatory powers provided by the statute are insufficient or that additional arbitral powers are required, it should recommend a change to the legislation. In particular, they say, section 46 of the 2015 Act imposes an obligation upon the Secretary of State to review the Pubs Code at regular intervals and to recommend to Parliament any revisions to the code that would enable it to reflect more fully its essential principles.

106. Pursuant to that provision, the DBIS is currently undertaking a statutory review, in which OPCA has (so far) said that the Secretary of State may "*wish to consider whether the Code should provide further prescriptions or presumptions on…the nature of compliant terms, to reduce the risk of protracted challenge either in arbitration or to the exercise of the regulator's powers in this area*", although it has

not (yet) recommended any extension or clarification of the powers of an arbitrator appointed pursuant to the Pubs Code.

107. I cannot but consider these may not be practical solutions for now, and that at least in theory there is a risk of further delay, cost and attrition involved in repeated offers and arbitrations, which might harm the Tenant more than the Landlords. But whilst these points do not cure easily the lack of power, on my understanding of the 2015 Act and the Pubs Code, for the arbitrator to impose what she might consider a reasonable period and/or other terms of a POB's offer for an MRO-compliant lease, that does not dissuade me from the conclusion of law to which I am driven as to the absence of such a power in the arbitrator within the statutory framework as it stands.

108. It seems to me that given the absence of such a power, paragraphs 61 and 62 do cause substantial injustice to the Landlords, given that it has not been established that they cannot formulate a reasonable revised offer with a lease period of less than 5 years, but with other compensatory terms. The error in this part of the Award is therefore an appealable irregularity under section 68(2)(b) of the 1996 Act.

109. The leading authority, *Lesotho Highlands Authority v. Impregilo SpA* [2006] 1 AC 221, puts the central question as to whether section 68 or section 69 may apply - see Lord Steyn at para [24] - as "*whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have*". This case falls into the first category: by ordering the Landlords to include a specific term in their revised response – a minimum 5 year period - the DPCA did not merely erroneously exercise a power that she had, rather she exercised a power that she did not have under the relevant legislation.

110. Section 68 of the 1996 Act is of course a "long stop" provision designed to correct cases in which a tribunal has gone seriously wrong: see *Lesotho Highlands* at para [27]. The threshold test to establish such a significant error is whether it results in a substantial injustice. As correctly stated in *Merkin, Arbitration* Law at paragraph 20.8:

> *"…The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable."*

111. In my judgment, the third challenge passes this test. If the DPCA had reached the correct conclusion about the extent of her powers, she could not have made that part of the Award to the extent of requiring the revised offer to contain a proposed lease period of at least 5 years, rather than simply directing the Landlords to issue a revised response as provided by Regulation 33, in which they would no doubt take account of her views including lease period, or risk detriment in further or other processes under the 2015 Act. This was a serious irregularity.

(8) Conclusion

112. For the reasons set out above, I dismiss the first and second challenge as I have listed them in this judgment, concerning the reasonableness of the Landlords' offer, but allow the third challenge and vary the Award, so that the ruling in paragraphs 61 and 62 thereof is set aside under section 68(3) of the 1996 Act.

113. It is unnecessary and inappropriate to remit the Award for reconsideration by the DPCA in the circumstances which I have set out, and (in case my view on this matters) I do not consider that my finding as to her error in relation to the third challenge entails that she be debarred from determining any further arbitration reference between the Landlords and the Tenant.

114. I would ask Counsel to prepare a draft order for my approval, and to make any consequential applications in writing within 7 days.