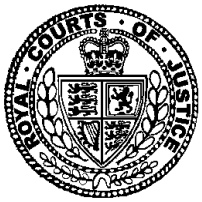

Neutral Citation Number: [2021] EWHC 1640 (Ch)

Case No: BL-2020-002244

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2021

Before:

MR JUSTICE FREEDMAN

- -

Between:

(1) STAR PUBS & BARS LTD
(2) PUNCH PARTNERSHIP (PTL) LTD

Claimants

- and –

AIDAN MCGRATH

Defendant

IN THE MATTER OF AN ARBITRATION BETWEEN

AIDAN MCGRATH

Claimant

- and –

(1) STAR PUBS & BARS LTD
(2) PUNCH PARTNERSHIP (PTL) LTD

Defendants

- -

Caroline Shea QC (instructed by **DLA Piper**) for the **Claimant**
Kerry Bretherton QC (instructed by **Pannone Corporate LLP**) for the **Defendant**

Hearing dates: 16 & 26 April 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 16 June 2021 at 10.30am.

MR JUSTICE FREEDMAN:

I Contents

II Introduction

1. This is a challenge under section 68 of the Arbitration Act 1996 ("Section 68") and/or an application for permission to appeal under section 69 of the Arbitration Act 1996 ("Section 69") against the award dated 1 December 2020 as amended on 16 December 2020 ("the Award") of Mr Nigel Davies as arbitrator ("Arbitrator"). By the Award, the Arbitrator determined that the Defendant Mr Aidan McGrath (who will be referred to as "the Tenant") had served a valid request for a rent assessment proposal ("RAP Request") pursuant to regulation 19(2)(a) of the Pubs Code etc. Regulations 2016 ("the Code").

2. The Tenant is a tied pub tenant (a "TPT") within the definition of section 70(1) of the Small Business Enterprise and Employment Act 2015 ("the 2015 Act") of Croham Arms, 1 Croham Road, South Croydon, Surrey, CR2 7BH ("the Pub"). The Tenant's lease of the Pub commenced on 19 March 2010 ("the Lease") for a term of 10 years. His tenancy ("the Tenancy") has the protection of the Landlord and Tenant Act 1954 ("the 1954 Act").

3. The rent was last reviewed on 19 March 2015, which was the last cyclical rent review date (prior to the issues in dispute in these proceedings).

4. On 29 August 2017 Punch Partnership (PTL) Ltd was acquired by Heineken UK Ltd. Star Pubs & Bars Ltd operates the pub for Heineken UK Ltd. Star Pubs and Bars Ltd and Punch Partnership (PTL) Ltd are the Claimants and are collectively referred to as "Landlord". Star Pubs & Bars Limited is a "*pub-owning business*" within the meaning of section 69 of the 2015 Act.

5. On 16 August 2019 the Landlord served a notice pursuant to section 25 of the 1954 Act ("the Section 25 Notice") and set out the proposed terms for a new lease for a term of 10 years at an annual rent of £45,000 per annum. The parties have agreed successive extensions of time regarding the deadline for the Tenant to apply to the court for a new tenancy in accordance with the provisions of the 1954 Act.

6. The Section 25 Notice was deemed to have been received two days after it was posted on 18 August 2019. The Tenant says that he did not actually receive the Section 25 Notice until 12 November 2019 when it was handed to him at a meeting. However, the deeming provision takes effect, and the Court has no power to extend his time for responding to the section notice.

7. On 19 November 2019, the Tenant served a request for a Market Rent Only ("MRO") Lease. On 25 November 2019, the Landlord wrote to the Tenant rejecting the MRO notice. The Landlord said that by Regulation 23(2)(b) of the Code, such a request had to be served within 21 days of the receipt of a relevant section 25 notice. In this case, the Section 25 Notice was served out of time and was therefore invalid. The Tenant referred this dispute ("the First Dispute") to arbitration on 29 December 2019. On 9 March 2020 the parties agreed in writing to extend the period for making an application for a new tenancy to 19 June 2020 (in default of such agreement the period for such an application would have ended on 20 March 2020). A number of subsequent agreements extended time further.

8. On 19 May 2020, the Tenant served a notice requesting a rent assessment proposal pursuant to regulation 19(2)(a). On 9 June 2020, the Landlord rejected the request for a rent assessment. It did so in an email. The Landlord argued that the lease contained a provision for annual uplifts in accordance with RPI. It contended that RPI reviews which had taken place over the previous five years were rent reviews. The Landlord also contended that it was impossible to carry out a rent review in the light of the emergency situation.

9. The Tenant referred the further dispute ("the Second Dispute") to arbitration on 23 July 2020. The referral form required the Tenant to complete a box. The form has two headings in relation to the type of issue. The first was "Non-Market Rent Only dispute in connection with…" with a series of boxes of which the Tenant crossed that which stated, "Duties of the [Pub Owning Business] POB in relation to Rent Assessments". The second was marked "Market Rent Only dispute in connection with…" followed by a series of options none of which were completed.

10. On 1 September 2020 the First Dispute proceeded to arbitration ("the First Arbitration"). Mr T. Molloy determined that the Tenant did not serve a valid MRO notice within the requisite period. He reached this conclusion on the basis that the Section 25 Notice was deemed to have been received two days after it was posted. His decision is conclusive on this issue.

11. The Tenant filed a Statement of Case in relation to the Second Dispute on 14 October 2020. The issue which he addressed was whether the request which was served was valid. On 4 November 2020, the Landlord served a Defence. At paragraph 3 of the Defence, it was denied that the TPT was entitled to serve an RAP Request. At paragraph 4 it was contended that the RAP Request was invalid. On 18 November 2020, the Tenant served a response to the matters raised within the Statement of Defence. At paragraph 3 of the Response, the Tenant contended that it was irrelevant whether the TPT's receipt of a Rent Assessment Proposal would serve as another MRO 'trigger' event or not. The Tenant contended "This dispute solely concerns whether our notice was valid or not in line with regulation 19(2)(a). The [Landlord] is not entitled to reject a valid notice on the basis that they seek to protect themselves from the implications of that notice. All that is relevant is whether the notice itself was valid or not." The Tenant alleged that there was nothing within the Pubs Code to prevent a TPT exercising multiple rights and pointed out that there was nothing in the scheme to prevent the service of a separate notice in line with a separate clause.

12. The Second Dispute proceeded to arbitration on 1 December 2020 ("the Second Arbitration"). The Arbitrator held that the request for the rent assessment was valid and that the Landlord should send a rent assessment proposal without delay.

13. On 14 December 2020 the Landlord sought clarification regarding the decision of the Arbitrator in relation to the Second Dispute. The Arbitrator responding by emails of the same date. A clarified arbitration award was issued on 16 December 2020.

14. The Tenant failed to comply with procedural time limits. He delayed for at least 17 days in entering an acknowledgment of service, and failed to seek relief from sanctions in that regard until 7 April 2021, which was a further 2½ months later. As regards the application for permission to appeal (but not the section 68 challenge), he ought to have filed a notice of his opposition to the appeal if he wished to oppose the application for

permission to appeal and a skeleton argument both within 21 days after the time required to acknowledge service, that is by 29 January 2021: see PD62 12.6-12.7. This does not apply to the section 68 challenge where the skeleton argument may be served not later than the day before the hearing date: see PD62 6.7. The Tenant served the Respondent's Notice and the skeleton argument on 31 March 2021. I heard the Tenant's applications to extend time and for relief from sanctions on 16 April 2021 in respect of the time for filing notice of opposition to the section 69 appeal and skeleton argument. I allowed the applications, but reserved costs until after the outcome of the applications which are the subject of this judgment.

III The Statutory Scheme

15. Section 42 of Part 4 of the 2015 Act required the Secretary of State to make regulations about practices and procedures to be followed by pub-owning business in their dealings with their tied pub tenants. Those regulations were referred to as "the Pubs Code". By section 42(3) of the 2015 Act, the Secretary of State was required to ensure that the Code is consistent with:

> "(a) the principle of fair and lawful dealing by pub-owning businesses in relation to their tied tenants;
>
> (b) the principle that tied tenants should be no worse off than they would be if they were not subject to any product or service tie."

16. Section 42 of the 2015 Act anticipated that the Pubs Code would impose a series of obligations upon the pub-owning businesses. Various of these obligations relating to a market rent only option were identified in sections 43 - 45 of the 2015 Act. Sections 48 - 52 of the 2015 Act provided for arbitration by an Adjudicator. By sections 53 - 59 of the 2015 Act, the Adjudicator could conduct investigations, make recommendations, require information to be published, impose financial penalties on the pub-owing business and recover costs.

17. The Pubs Code came into force on 21 July 2016. It regulates the relationship between all pub companies owning 500 or more tied pubs in England and Wales and their tied pub tenants. As contemplated by the 2015 Act, it was designed to redress the unequal bargaining power between the largest pub-owning businesses and their tied tenants.

18. The Pubs Code has 17 Parts. Part 1 sets out general matters. Part 2 deals with the general duties of pub-owning businesses in their dealings with tied pub tenants. Part 3 sets out the duties of Pub Owning Businesses ("POBs") in relation to rent proposals. Part 4 deals with rent assessments and is considered in more detail below. Parts 5 - 8 deal with MRO notices and the relevant procedures.

19. Regulation 2(1)(b) defines a rent assessment proposal as one made in accordance with Part 4. Part 4 of the Code concerns the duties of pub-owning business in their dealings with their tied pub tenants in relation to rent assessments. It includes Regulation 19 to

22: Regulations 19 creates the duty to conduct a rent assessment; Regulation 20 specifies the rent assessment proposal; Regulation 21 sets out the conduct of the rent assessment; Regulation 22 specifies the effect of the rent assessment.

20. Regulation 19 provides:

> "Duty to conduct a rent assessment or an assessment of money payable in lieu of rent
>
> 19.—
>
> (1) A pub-owning business— (a) must conduct a rent assessment or an assessment of money payable in lieu of rent in connection with a rent review which is required under the terms of a tenancy or licence of a tied pub of which it is the landlord; and
>
> **(b) must conduct a rent assessment or an assessment of money payable in lieu of rent where a tied pub tenant of such a pub requests it under paragraph (2).**
>
> **(2) A tied pub tenant may request a rent assessment or an assessment of money payable in lieu of rent if —**
>
> a) **such an assessment has not ended within the period of 5 years ending with the date of the request;**
>
> (b) there is a significant increase in the price at which a product or service which is subject to a product or service tie is supplied to the tied pub tenant; or
>
> (c) the tied pub tenant demonstrates that a trigger event has occurred by means of a written analysis of the level of trading which is forecast for a period of 12 months or more beginning with the day on which the tenant makes the request.
>
> …."
>
> (emphasis added)

21. Regulation 20 provides:

> "The rent assessment proposal
>
> **(1) Where a pub-owning business is required to conduct a rent assessment or an assessment of money payable in lieu of rent under regulation 19(1), the pub-owning business must send the tied pub tenant a document ("the rent assessment proposal") containing—**

> **(a) a proposal for the rent or money payable in lieu of rent which is to be paid under the tenancy or licence at the end of the assessment (the "new rent");**
>
> **(b) the information specified in Schedule 2, if it is reasonably available to the pub-owning business;**
>
> **(c) such other information as may be required to ensure that the tenant is able to negotiate, in an informed manner, the new rent.**
>
> (2) The rent assessment proposal must be provided to the tied pub tenant—
>
> (a) in the case of an assessment conducted under regulation 19(1)(a), at least 6 months before the rent review date;
>
> (b) in the case of an assessment conducted under regulation 19(1)(b), within the period of 21 days beginning with the day on which the tied pub tenant requests the assessment.
>
> **(3) The pub-owning business must prepare the rent assessment proposal in accordance with the RICS guidance and the rent assessment proposal, when provided, must be accompanied by written confirmation from a member or fellow of the RICS that the rent assessment proposal has been so prepared."**
>
> (emphasis added)

22. Regulations 23 -27 provide:

> **"23.— (1) A tied pub tenant may give a notice (an "MRO notice") to the pub-owning business where—**
>
> (a) the event specified in regulation 24 or 25 occurs; or
>
> **(b) the event specified in regulation 26 or 27 occurs and the investment exception does not apply (see regulation 56).**
>
> (2) The MRO notice must be—
>
> (a) in writing; and
>
> (b) received by the pub-owning business within the period of 21 days beginning with the day on which the event mentioned in paragraph (1) occurred.
>
> (3) The MRO notice must include—

(a) the tenant's name, postal address, email address (if any) and telephone number;

(b) the date on which the notice is being sent;

(c) the name of the tied pub in relation to which the request for an offer of a market rent only option is being made and its address;

(d) the date on which the event mentioned in paragraph (1) occurred; and

(e) a description of that event which, in the tenant's opinion, demonstrates that it is an event specified in regulation 24, 25, 26 or 27.

(4) A tied pub tenant may not give an MRO notice to the pub-owning business where—

(a) the tenant has already given an MRO notice under paragraph (1); and

(b) the MRO procedure which relates to that notice has not ended.

A significant increase in the price of a product or service

24. The event specified in this regulation is that the tied pub tenant receives notification of a significant increase in the price at which a product or service which is subject to a product or service tie is supplied to the tied pub tenant.

A trigger event

25.— (1) The event specified in this regulation is that the tied pub tenant sends the pub-owning business, during the relevant period, a relevant analysis which demonstrates that a trigger event has occurred.

(2) In paragraph (1)—

(a) "the relevant period" means the period of 56 days beginning with the day after that on which the trigger event occurred;

(b) "a relevant analysis" means a written analysis of the level of trading which is forecast for a period beginning with the day on which the trigger event occurred and ending at least 12 months later.

The renewal of a pub arrangement

> **26.— (1) The event specified in this regulation is that a pub arrangement is renewed.**
>
> **(2) For the purposes of section 43(6) of SBEEA 2015 (and so of this regulation), a protected 1954 Act tenancy is renewed between the tied pub tenant and the pub-owning business—**
>
> **(a) on the day on which the tied pub tenant receives the pub-owning business's notice under section 25(1) of the Landlord and Tenant Act 1954; or**
>
> **(b) on the day on which the landlord receives the tied pub tenant's request under section 26 of that Act.**
>
> (3) For the purposes of section 43(6) of SBEEA 2015 (and so of this regulation), a tenancy which is not a protected 1954 Act tenancy is renewed between the tied pub tenant and the pub-owning business on the first day on which the tenancy may be renewed under the terms of the tenancy. A rent assessment or an assessment of money payable in lieu of rent.
>
> **27. The event specified in this regulation is that the tied pub tenant receives a rent assessment proposal sent by the pub-owning business under regulation 20(1) in respect of the tenancy or licence."**
>
> (emphasis added)

IV The submissions of the parties as recorded by the Arbitrator

23. In this application, the Landlord accepts that the submissions have been "recorded faithfully" by the Arbitrator. The criticism of the Landlord is that the reasoning part of the Award, which appears thereafter under the heading identifying what the Arbitrator termed "the Substantive Issue", is set out in 5 paragraphs in less than one page (paras 65-69). It is said that the Substantive Issue was wrongly identified and does not reflect the First Point identified by the Landlord which the Arbitrator characterised as "not relevant" to the dispute to be decided. The Landlord submits that the reasoning is wholly deficient. In these paragraphs, it submits that the Arbitrator decided deliberately not to determine a matter central to the decision which he was charged to make, amounting to a serious irregularity which has caused or will cause substantial injustice to the applicant. This has given rise to the Section 68 challenge on the basis of a failure to deal with all of the issues which were put to him. Further or in the alternative, if and to the extent that the Arbitrator decided the points put to him, the Landlord submits that he was obviously wrong and/or the decision of the Arbitrator is at least open to serious doubt and the questions before him were of general public importance.

24. In order to do justice to these submissions, it is necessary to set out in full the submissions as recorded by the Arbitrator. The references to the Claimant are to the

Tenant. The references to the Respondents are to the Landlord. The relevant paragraphs of the Award are as follows:

> "Statement of Case
>
> Claimant's Claim
>
> 30. The Claimant said that the last date a rent assessment ended at the property was in line with the last cyclical rent review date of 19 March 2015. This was the last date on which the rent was reviewed following rent assessment and a new rental was agreed following the receipt of a rent assessment proposal and negotiation between the Parties. The Claimant also said that the last rent review date was in line with the fifth year anniversary of the term of the lease as per the Rent Review provisions contained within Cl.7 of the Lease. On that basis the Claimant said that 20 March 2020 was a full five years since a rent assessment had last ended.
>
> 31. The Claimant asserted that Code Reg.19(2)(a) must be read severally. The Claimant said it was clear that the Respondents had a duty to conduct a rent assessment where the TPT requests such an assessment if such an assessment has not ended within the period of 5 years ending with the date of the request.
>
> 32. The Claimant said that because his rent assessment request was dated 19 May 2020, it was more than 5 years since the end of the last such rent assessment and he was within his rights as a TPT to request a rent assessment.
>
> Respondents' Defence
>
> 33. The Respondents said that it is necessary to understand the scheme of the Code in relation to 1954 Act tenancies as follows:
>
> 33.1. Where a tied lease has the protection of the 1954 Act, its provisions continue to apply.
>
> 33.2. Such a tied lease can accordingly be terminated in accordance with the termination provisions of the 1954 Act.
>
> 33.3. These provisions allow the party terminating the relevant lease to propose the terms of the new lease and the rent payable thereunder, in the usual way; and the receiving party to make counter proposals, in the usual way.
>
> 33.4. The Code interferes with this process in two important respects:
>
> 33.4.1. it permits a tenant on receipt of a notice pursuant to s.25 of the 1954 Act to make a request to convert its tenancy into an MRO tenancy at that point;

33.4.2. it provides that the renewal tenancy commences on the date of receipt of the s.25.

33.5. As to the first of those, the tenant is given 21 days for that purpose. The time limit is strict and is not liable to be extended (and the Claimant is not arguing that it should be).

33.6. The effect is that in the absence of any such request the tenant has lost its right to request an MRO tenancy, and the mechanism of the 1954 Act, as modified by the Code, continues.

33.7. That mechanism includes the ability to apply to the court to determine the terms of and, crucially, the rent payable under the tenancy pursuant to ss.34 and 35 of the 1954 Act in the usual way.

33.8. Reg.26(2)(a) of the Code provides that for the purposes of s.43(6) of the 2015 Act, a protected 1954 Act tenancy is renewed on the day on which the TPT receives the POB's notice pursuant to s.25 of the 1954 Act.

33.9. The Code then envisages that the procedure to determine the terms of and the rent payable under the tenancy should continue in accordance with the provisions of the 1954 Act save only as to the time limited ability of the tenant to apply for an MRO compliant lease within 21 days of having received the s.25 Notice.

33.10. Accordingly, the rent payable under the new lease falls to be either agreed between the parties or determined by the court.

34. The Respondents said that the scheme is quite clear. If a tenant such as the Claimant is allowed to deploy any other procedure to make a request for an MRO compliant lease, that would have the effect of usurping the statutory scheme whereby the 1954 Act protection (both for the landlord and the tenant) was intentionally preserved, subject only to the limited right to apply for an MRO compliant lease within the specified time limits (“First Point”).

35. Further, and crucially said the Respondents, the new lease is itself a rent assessment for the purposes of the Code (“Second Point”).

36. The Respondents asserted that it necessarily involves the agreement or determination of a new rent payable under the new lease. As a matter of ordinary language and of statutory interpretation, such a determination was said by the Respondents to qualify as a "rent assessment". The Respondents said that not

only is there nothing in the language of the Code to suggest otherwise, the transitional provisions of Reg.65 and 66 were claimed by the Respondents to support this view. Where arrangements between landlord and tenant are "renewed", and a new lease granted, including a revised assessment of the rent payable under the new lease, this as a matter of ordinary language and was said by the Respondents to qualify as a "rent assessment". This was averred by the Respondents on the asserted basis that “rent assessment” is not defined under the Code.

37. The First and the Second Points were claimed by the Respondents to be decisive. The Respondents said that firstly, Parliament intentionally preserved the parties' rights under the 1954 Act, save only to give the tenant the opportunity upon termination to request an MRO compliant lease, and to determine that the new lease arose on receipt of a s.25 notice. Secondly said the Respondent, the renewal itself operates as a rent assessment. The Respondents asserted that it cannot be the case that the Code both provides for a rent assessment on lease renewal and at the same time allows the tenant to request a further rent assessment to take place on a different basis. Such an outcome was said by the Respondents to be conceptual nonsense. The Respondents said that the fact that the rent assessment under the new lease had not yet taken place was irrelevant: the renewal had already and irrevocably occurred as at the date of receipt of the s.25 Notice; the terms remain either to be agreed or determined pursuant to s.35 of the 1954 Act; when they are so agreed or determined the rent will be assessed on the basis of those terms, again either by agreement or in accordance with s.34 of the 1954 Act. That rent will be payable as from the date of the new lease, being the date of receipt of the s.25 Notice.

38. Accordingly said the Respondents, there is a logical flaw deep at the heart of the Claimant's position which fatally undermines his own argument. The new lease commenced on 20 August 2019, the deemed date of receipt of the s.25 Notice. Rent under the new lease will be payable from that date, whether it is agreed by the Parties or determined by the Court. That, said the Respondent, qualified as a rent assessment. The Respondents said that is what parliament provided for, subject to the time limited opportunity for the tenant, upon receipt of a notice pursuant to s.25 of the 1954 Act, to divert the statutory operation of the 1954 Act and to claim in the alternative an MRO compliant lease. Where that alternative is not pursued, the Respondents said the scheme provided for by Parliament must be allowed to operate. The Respondents claimed that the Claimant’s RAP Request was inconsistent with, and logically precluded by, that scheme. The Code was to be interpreted

accordingly. I was requested to find, in particular, that there is no scope for the operation of Reg.19(1)(b) following service of a notice pursuant to section 25 of the 1954 Act.

Claimant's Reply

39. In response the Claimant said it was not denied that receipt of the s.25 Notice serves as a trigger event for the Claimant to serve an MRO notice and that it accepted Mr Molloy's findings that the Claimant served an earlier MRO notice out of time.

40. However, the Claimant said it was irrelevant whether receipt of the Claimant's RAP request would serve as another MRO trigger event or not. The dispute referred was said by the Claimant to be solely concerned with whether the Claimant's request for a rent assessment was valid under Reg.19(2)(a).

41. The Claimant said that the request for an RAP pursuant to Reg.19(2)(a) of the Code and the serving of an MRO notice were completely separate matters. The Claimant said that the Respondents' suggestion that he should be denied a statutory right because the Respondents could choose or for that matter not choose to rely upon the receipt of an RAP as a trigger event was logically flawed.

42. The Claimant also said that there was nothing in the Code to prevent the Claimant exercising multiple rights and that there was nothing in the Code that determines that if a tenant is out of time serving an MRO notice they are then prevented from serving a separate notice in line with a separate provision since otherwise the TPT would be denied their statutory rights.

43. The Claimant also denied that the new lease constitutes a rent assessment. The Claimant said that Reg.19(2)(a) stated that such an assessment may not have ended in the previous 5 years from the date of request. On that basis, said the Claimant, if the proposed rent within the new lease is the end of a rent assessment, then the Claimant would be denied the right to negotiate or reject the proposed rent, which the Claimant said was flawed since a rent assessment can only end when the rent is agreed/ settled which would be the point at which the new lease is executed not proposed."

V The Arbitrator's decision

25. There now follow the five paragraphs of the Award at the heart of the challenge of the Landlord.

> "Substantive Issue – Did the POB Respondents send a Code Reg.20 compliant RAP to the Claimant within the period of 5 years ending 19 May 2020?
>
> 65. The Respondents' First Point was not relevant to the dispute to be decided. Code Reg.20(1) provides that for a POB to have conducted a rent assessment under Code Reg.19(1) the POB will have sent to the TPT a Code Reg.20 compliant RAP. Reg.19(2) of the Code also provides that a TPT may not request a rent assessment if such has not ended within the period of 5 years ending with the date of the request which in this instance is 19 May 2020.
>
> 66. Under cover of its solicitors' letter dated 16 August 2019 the Respondents wrote to the Claimant. Enclosed with the 16 August 2019 letter and as identified at page 2 of the same the Respondents provided to the Claimant a three page "Rent Proposal" pursuant to Reg.15(1) and (2) of the Code. Whilst the three page "Landlord's Notice Ending a Business Tenancy with Proposals for a New One" proposed a rent which was to be paid under the tenancy, it did not appear to provide all the information required of an RAP pursuant to Schedule 2 of the Code and nor was it accompanied by written confirmation from a member or fellow of the RICS stating that the proposal had been prepared in accordance with the RICS guidance.
>
> 67. Further, (and in relation to the Respondents' Second Point), if the new lease proposed by the Respondents under cover of the 16 August 2019 letter had included the information required to be contained within an RAP pursuant to Reg.20 of the Code, then the new lease would have been a rent assessment for the purposes of the Code as well, but since it did not contain a Code Reg.20 compliant RAP the Rent Proposal dated 16 August 2020 was not a rent assessment for the purposes of the Code.
>
> 68. I therefore decide that the Respondents have not sent to the Claimant a Reg.20 compliant RAP within the period of 5 years ending 19 May 2020 and that a rent assessment has therefore not ended within the period of 5 years ending 19 May 2020.
>
> 69. Accordingly, I also decide that the Claimant's rent assessment request dated 19 May 2020 was a valid request under Reg.19(2)(a) of the Code."

VI Submissions of the Landlord

26. The Landlord refers to the First Point and the Second Point set out in paragraphs 34 and 35 of the Award. The submission is that there is no reference, express or implied, to the First Point. On the contrary, it was avoided by the words that it was "not relevant

to the dispute to be decided" (para. 65 of the Award). In other words, there was a deliberate decision not to consider a question before the Arbitrator. There was no express reference to the Second Point, although it may be taken to have been rejected by the finding that the rent proposal contained in the Section 25 Notice "was not a rent assessment for the purposes of the Code". There was a failure to address the bases on which the Landlord contended that the Tenant was not entitled to make the RAP Request, and therefore a failure to deal with the two central issues before him.

27. By letter dated 14 December 2020, issued by way of e-mail timed at 11.40am on that date, the Landlord made a request pursuant to section 57 of the Arbitration Act 1996 ("the 1996 Act") seeking clarification of the Award by reference to the reasons upon which the Arbitrator reached his conclusions, with particular reference to the Arguments, both being reasons relied on by the Landlord as to why the Tenant was not entitled to make the RAP Request ("Section 57 Request"). By email dated 14 December 2020 timed at 12.21pm, the Arbitrator responded to the Section 57 Request. He indicated that the First Point "was not relevant to the dispute to be decided"; and confirmed that the reasoning contained in paragraph 67 of the Award related to the Second Point. By further email of the same date, he indicated that he would amend the Award accordingly.

28. The Landlord says that

> (1) taking into account the Arbitrator's response to the Section 57 Request, the Arbitrator has failed properly to deal with all of the issues before him, within the meaning of Section 68(2)(d); and
>
> (2) under Section 69, the questions being ones that the Arbitrator was asked to determine, his decision is obviously wrong; or the questions are of general public importance and the decision of the Arbitrator is at least open to serious doubt; that it is just and proper in all the circumstances for the court to determine the question; that leave to appeal should be granted; and the Award set aside and varied accordingly.

29. The relevant sections of the 1996 Act are as follows:

> **"68 Challenging the award: serious irregularity.**
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (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: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(emphasis added)

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(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.

(4) The leave of the court is required for any appeal from a decision of the court under this section."

69 Appeal on point of law.

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a)with the agreement of all the other parties to the proceedings, or

(b)with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

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

(emphasis added)

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

> (7) On an appeal under this section the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award,
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
>
> (d) set aside the award in whole or in part.
>
> The court shall not exercise its power to set aside an award, 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.
>
> (8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
>
> But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

30. The Landlord draws attention to the obligation to state reasons for the award unless there is an agreement to dispense with reasons: see section 52(4) of the 1996 Act. Under section 70(2)(b) of the 1996 Act, an application/appeal under Section 68 and/or Section 69 may not be brought if the applicant/appellant has not first exhausted any available recourse under section 57 of the 1996 Act. Under section 57(3) of the 1996 Act, a party may apply to an arbitrator to correct, clarify or remove any ambiguity in the award.

31. The Landlord submits that the Defendant defended the claim on the basis of the First Point and the Second Point referred to at paragraphs 34 and 35 of the Award and quoted above. It was impossible to see how the First Point was not relevant when it was at the heart of the case before the Arbitrator. The Substantive Issue was not the issue which the Landlord put before the Tribunal. It is not an answer to say that one of the two issues which the Landlord asks the Tribunal to decide is not relevant. There was no reason given why it was not relevant.

32. As regards the Second Point, the finding in paragraph 67 of the Award does not engage with the relevant issue or address the submissions set out in support of it. This does not engage with the submission of the Landlord that the new lease was itself a rent assessment for the purposes of the Code. The submission of the Landlord is that it necessarily involves the agreement or determination of the new rent payable under the new lease.

33. The Landlord submits that the legislature intentionally preserved the rights of the parties under the 1954 Act save only to give the tenant a narrow window following the points of termination to request an MRO compliant lease, and to determine the new

lease which had arisen on receipt of a Section 25 Notice. The submission is that it cannot be the case that the Code both provides for a rent assessment and lease renewal, and at the same time allows the tenant to request a further rent assessment to take place on a different basis and to demand a different lease. Such an outcome would make no sense conceptually. The Landlord submits that the fact that the rent payable under the rent assessment implicit in the new lease has not yet taken place is irrelevant. The renewal has already and irrevocably occurred as the date of receipt of the Section 25 Notice, and when agreed or fixed, rent will be payable from the date of the new lease, being the date of deemed receipt of the Section 25 Notice. It is said that that qualifies as a "rent assessment, logically, commercially, and as a matter of necessary inference."

34. The Landlord draws attention to the fact that the phrase "rent assessment" is not defined, but that it is obvious that the agreement or determination by the Court of the rent payable under a renewed lease must qualify as a "rent assessment". Otherwise, the statutory renewal and the Code would be liable to be removed at the whim of the tenant, despite the tenant not availing itself of the 21-day window following service of the Section 25 Notice to seek an MRO compliant lease, and would either have agreed, or had the chance for the court to determine the terms and rent of the renewed tenancy. The obvious sense is that once a lease has been renewed pursuant to the 1954 Act, then the date from which the new rent becomes payable must necessarilybe regarded as the date on which a rent assessment takes place. If the TPT does not take the chance to seek an MRO compliant lease, the 1954 Act operates in the usual way.

35. The Substantive Issue arose because the Arbitrator did not address the First Point at all or consider correctly the Second Point. The failure to deal with the essential issues will of itself cause substantial injustice: see *Van der Giessen-de-Nord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), [2009] 1 Lloyd's Rep 273.

VII Submissions of the Tenant

36. The Tenant says that the argument of the Landlord that the Tenant was precluded from applying for an RAP requires consideration of Regulation 19. This makes the duty to carry out a rent assessment mandatory in the circumstances there set out. A POB must conduct a rent assessment "where a [TPT]…requests it under paragraph (2)". The three situations in Regulation 19(2) in which the TPT can request the rent assessment and so trigger the mandatory duty include where a rent assessment has not ended within the period of five years ending with the date of the request. The rent assessment procedure is under Part 4 including Regulations 19 and 20. The MRO is governed by Parts 5 – 8. There is no prohibition against seeking a rent assessment in circumstances in which an MRO lease has not been requested following service of a section 25 notice within Regulation 19. The Arbitrator was not being asked to consider the request for an MRO lease under Parts 5 - 8, but a rent assessment under Part 4. There is no reason why the failure to ask for an MRO lease should prevent a request for a rent assessment on the basis that the MRO procedure is discrete from the request for a rent assessment. The fact that a request for an MRO lease can be made consequent upon receipt of a rent assessment proposal does not affect this analysis (Regulation 27).

37. The references to the purpose and policy of the 2015 Act and the Code are enshrined in the primary legislation at section 42(3) of the 2015 Act as referred to above. The aim was to redress the imbalance in negotiating positions between TPTs and POBs. The Tenant submits that this is consistent with that policy objective, conferring protection on TPTs to seek rent assessments and so is consistent with the policy objectives of the primary legislation and the Code. The way in which it was expressed by the Tenant in the skeleton argument on behalf of the Tenant at para. 54 was as follows:

> "The MRO process enables the TPT to seek an MRO lease in a variety of circumstances. This includes following receipt of a s25 notice or receipt of a rent assessment proposal. There are a range of circumstances in which the TPT can seek an MRO lease and there is nothing to suggest that there was any intention. In common with the rent assessment process, it is clear that there could be overlap between these options and it would have been a simple matter of drafting to provide to the contrary."

38. It therefore followed that the Arbitrator was entitled to conclude that the First Point was irrelevant. The Arbitrator was not being asked to consider a request for an MRO lease. He was determining the issue he identified as a heading "Did the Respondents send a Code Reg. 20 compliant RAP to the Claimant within the period of 5 years ending 19 May 2020?" The failure to seek an MRO lease had no relevance to the validity of an RAP Request. In context, it was apparent that the Arbitrator was accepting the submissions to this effect of the Tenant, which he had recited, and especially at para.41 to the effect that the request for an RAP pursuant to Reg.19(2)(a) of the Code and the serving of an MRO notice were completely separate matters. There was nothing in the Code to prevent the Tenant from exercising multiple rights. If the new lease was a rent assessment, the rent was not concluded until agreement or the fixing of the same by the Court: there was neither agreement nor assessment by the Court. It therefore followed that rent assessment had not ended within the period of 5 years ending with the date of the RAP request.

VIII Discussion

39. The heart of the section 68 challenge is the question whether the Tribunal failed to deal with all or any of the issues which were put to it. The submission is that the First Point (as referred to a paragraph 34 of the Award) was not addressed at all. On the contrary, it was said to be "not relevant to the dispute to be decided". The submission is then that the Award formulated a different question called the "Substantive Issue" which was not before it. If the case was as stark as that, Section 68(2)(b) would have been engaged. However, this is not a fair summary of the position.

40. The starting point is to ask whether the Tribunal dealt with the First Point: not whether its reasoning was compressed, confusing or unsatisfactory. As Flaux J. stated in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm) at [40]:

> "Once it is recognised that it [the tribunal] has dealt with the issue, there is no scope for the application of s.68(2)(d). As [Counsel] correctly put it, once it is recognised that the tribunal has 'dealt with' the issue, the sub-section does not involve some qualitative assessment of how the tribunal dealt with it. Provided the tribunal has dealt with it, it does not matter whether it has done so well, badly or indifferently."

41. There are cases where the Court considers an arbitral award in the light of extracts from evidence and the transcripts of the hearing in order to interpret the tribunal's reasoning relating to the issue. In the words of Russell on Arbitration 24th Ed. at para. 8-107, "on occasion the court has been prepared to embark on a detailed detective process, examining much of the evidence which was before the tribunal, in order to deduce the tribunals' reasoning and to uphold the award where at all possible to do so."

42. In the context of a decision under the Town and Country Planning legislation, Lord Brown said the following in *South Buckinghamshire District Council and Another v Porter (No 2)* [2004] UKHL 33; [2003] 2 AC 558 at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration."

43. In my judgment, the instant Award is intelligible without any detective process and by seeing the reasoning of the Award as a whole. The flaw in the argument for the Landlord is to look at paragraphs 65-69 (dismissed as a single page of reasoning) in a vacuum removed from the arguments before the Tribunal. The Landlord does not criticise the summary of the arguments which are described as being "recorded faithfully" and set out "verbatim" in the Award at paras. 33-38. The Landlord says that the arguments were never addressed.

44. The wording in paragraphs 65-69 is entirely informed by the arguments of the parties which have been set out extensively in the Award. The sentence at the start of paragraph 65 is "the Respondents' First Point was not relevant to the dispute to be decided (emphasis added)." The characterisation of irrelevance of the First Point does not arise for the first time in the finding of the Arbitrator. It is a part of the reply of the

Tenant (Award para. 40), namely that the Tenant said, "it was irrelevant whether receipt of the Claimant's RAP request would serve as another MRO trigger event or not (emphasis added)."

45. The context in which that submission arose was as follows. The First Point (Award para. 34) was the Landlord's submission that if a tenant was allowed to deploy any other procedure to make a request for an MRO compliant lease, that would have the effect of usurping the statutory scheme whereby the 1954 Act protection was preserved, subject to the limited right to apply for an MRO compliant lease within the specified time limits. The Tenant's answer (Award para. 40) was that it was irrelevant whether the RAP request would in turn serve as another MRO trigger event under Part 5. The referred dispute was solely concerned with whether the RAP request was valid under Reg. 19(2)(a). The request for an RAP and the serving of an MRO notice were completely separate matters (Award para.41).

46. There was nothing in the Code to prevent the Tenant exercising multiple rights: here being out of time for serving an MRO notice and serving a separate notice under a separate provision (Award para. 42). The Tenant's case was that the Code Reg. 19(2)(a) must be read severally (Award para. 31). The Arbitrator accepted these arguments. The issue is not about a request for an MRO lease, but for an RAP. For the purpose of the hearing, Ms Bretherton QC for the Tenant said that the arguments of the Landlord "were irrelevant and were wrong because a failure to seek an MRO lease when an entitlement arises has no relevance to the validity of an RAP request" (skeleton argument dated 29 March 2021 para. 57).

47. The First Point was predicated upon the Section 25 Notice under the Code giving a tenant the opportunity to seek an MRO provided that this was requested within 21 days of service of the Section 25 Notice. This did not occur, leading to the argument of the Landlord that this was the only opportunity for an MRO. However, on the basis of the Tenant's argument as recorded by the Arbitrator, this did not prevent the making of an RAP Request under Regulation 19, provided that there was a basis for seeking a request under Regulation 19. When the Arbitrator rejected the First Point as irrelevant, he was in context stating that he accepted this submission of the Tenant.

48. This then led to the question as to whether there had been an assessment within the period of 5 years ending with the date of the request, namely 19 May 2020. This then gave rise to the consideration at para. 66 of the Award as to whether a rent assessment had concluded at the time of the Section 25 Notice. The Arbitrator referred to the three-page Rent Proposal sent pursuant to Reg. 15(1) and (2) of the Code. Whilst it proposed a rent, it did not provide the information required under Schedule 2 of the Code nor was it accompanied by a written confirmation from a member or fellow of the RICS stating that the proposal had been prepared in accordance with the RICS guidance.

49. If it had included this information, then according to the Arbitrator, the new lease would have been a rent assessment for the purposes of the Code pursuant to Reg. 20 of the Code. Since it did not contain a Reg. 20 compliant RAP, the Rent Proposal was not a rent assessment for the purpose of the Code (Award para. 67). It followed that the Landlord did not send to the Tenant a Reg. 20 compliant RAP within the period of 5 years ending 19 May 2020 and that a rent assessment had therefore not ended within the period of 5 years ending 19 May 2020 (Award para. 68).

50. In context, the Arbitrator accepted the Tenant's arguments as recorded in the Award that

> (1) the right to request a rent assessment under Reg. 19 was separate and distinct from the right to request an MRO: the Code Reg. 19(2)(a) in Part 4 must be read severally from the MRO provisions in Parts 5 – 8, and hence the First Point was irrelevant;
> (2) the Tenant had a right to request a rent assessment under Reg. 19(2)(a) which had not expired because it was more than 5 years since the end of the assessment which occurred in March 2015 (Award para. 68);
> (3) there had not been a rent assessment in the interim because the document sent with the Section 25 Notice on 16 August 2019 did not comply with the requirements of Reg 15(1) and (2) or with Reg 20 without the Schedule 2 information and the statement about compliance with the RICS guidance (Award para. 67);
> (4) the request for a rent assessment dated 19 May 2020 was a valid request under Reg 19(2)(a) (Award para. 69).

51. The First Point was therefore disposed of by the acceptance of the argument of the Tenant referred to above, which kept separate the rights to RAP from an MRO and did not qualify the right to an RAP because it might give rise to an event towards securing an MRO.

52. As a matter of construction, the First Point of the Landlord does not involve the application of any principle of statutory construction. It is based on an assertion that the Code must have intended the right to request an MRO within 21 days of a section 25 notice to be a limited right (Regulation 26) so as to exclude such a right as a corollary of a tenant receiving a rent assessment proposal under Regulation 20(1) (Regulation 27). There is no principled reason why this should be the case. It was submitted on behalf of the Landlord that since the Code interfered with freedom of contract, the Code was interpreted restrictively. There was no basis for this, and in any event, it did not sit well with the enabling statute to the Pubs Code, namely section 42(3) of the 2015 Act with broad principles in favour of TPT's. If the First Point were a good point, one might have expected the Code to have limited the right under Regulation 19(2)(a) to an RAP after a section 25 notice or to restrict the right to an MRO under Regulation 27 in such an event. It did not. There is no such restriction.

53. As regards the Second Point, the Arbitrator rejected the notion that the new lease was a rent assessment for the purposes of the Code. It would have been a rent assessment, but it did not contain a Regulation 20 compliant RAP for the reasons identified above. In the end, this point was critical to the analysis. Thus, the Arbitrator was entitled to refer to this as the Substantive Issue. In determining the matters before the Arbitrator, the key point became whether the Landlord had sent a Regulation 20 compliant RAP to the Claimant within the period of 5 years ending 19 May 2020. That was not to re-write the issues. Having decided that the First Point was irrelevant because of the analysis of Regulation 19 providing an independent right to have an RAP, the Arbitrator went on to consider the Second Point. He decided that the rent assessment with the Section 25 Notice was non-compliant for the purposes of Regulation 20, and therefore found that this did not count as an intervening rent assessment. It followed that there

had not been a rent assessment ending in the five years preceding 19 May 2020. The Second Point was therefore expressly rejected, and a reason was provided for this.

54. The fact that this would in due course enable the Tenant to obtain an MRO under Regulation 27 is a consequence of the way in which the Code is written. The arguments that it ought not to have been construed in that way is to seek to introduce wording which is not in the Code.

55. In the light of the foregoing, the Court can deal with the arguments under section 68 and 69.

IX Section 68

56. In my judgment, there was not a failure on the part of the Arbitrator to deal with the issues that were put to him. In the manner set out above, he dealt with the First Point and with the Second Point. Accordingly, the submission that there was an irregularity under section 68(2)(d) is rejected. In my judgment, this point stands by itself even if the Arbitrator had made an error of law. When the reasoning is seen as a whole and particularly in the context of the arguments of the Tenant and the Landlord which were recorded "faithfully", the Arbitrator followed and accepted the arguments of the Tenant and rejected the arguments of the Landlord.

57. When viewed as a whole, although "briefly stated", the reasons are intelligible and adequate. The reader is able to understand why the case has been decided on the principal important controversial issues. By reading the conclusions alongside the arguments of the parties, it is apparent how and why the Arbitrator came to the conclusions which he did. On the First Point, he accepted the analysis of the Tenant that the First Point was not relevant. There had been a request for a rent assessment proposal, and so the question was whether there had been a compliant proposal under Regulation 20. Once that is ruled upon, it is apparent in the context of the rival contentions as summarised "faithfully" by the Arbitrator that he rejected the argument of the Landlord that the fact that an MRO was not sought within 21 days of receipt of the Section 25 Notice was to the point. It was not: it was irrelevant: it was not the substantive question.

58. As regards the Second Issue, that was dealt with in the manner set out above, namely a finding that there had not been a rent assessment. The Arbitrator found that sending a non-compliant document at the time of the Section 25 Notice was not capable of amounting to a rent assessment. It therefore followed that the condition in Regulation 19(2)(a) applied, namely that there had not been a rent assessment which had ended in the five-year period ending with the date of the request.

59. If, contrary to the foregoing, there was a failure to deal with the issues that were put to him, that is not the end of the matter. It is first necessary to consider the legal test as to whether there will be substantial injustice had the irregularity not occurred. The legal test has recently been stated recently by the Privy Council in the case *of RAV Bahamas Ltd and another v Therapy Beach Club Incorporated* [2021] UKPC 8 in a judgment given by Lord Hamblen and Lord Burrows as follows:

"34. There will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different: see, for example, *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 All ER (Comm) 303 at para 90 (Colman J). It is not necessary to show that the outcome would "necessarily or even probably be different": *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm); [2006] TCLR 1, at para 102 (Langley J). As stated by Akenhead J in *Raytheon* at para 33(i):

> "(i) For the purposes of meeting the 'substantial injustice' test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it [is] necessary only for him to show that (i) his position was 'reasonably arguable', and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award …"

35. Some irregularities may be so serious that substantial justice is "inherently likely" or "likely in the very nature of things" to result. As Toulson J stated in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at pp 284F-285A:

> "Since the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed, than if the complaints go simply to procedural matters.
>
> …
>
> It is *inherently likely* to be a source of serious injustice if irregularities occurred of the kind to which I have referred. Since the purpose of arbitration is to determine central issues between the parties, if there has been a flaw in that this has not been done, that is *likely in the very nature of things* to be a matter of serious injustice." (Emphasis added)

36. In such cases substantial injustice may be inferred from the nature of the irregularity and that inference may be so strong that "it almost goes without saying": see *Raytheon* at para 61. In that case the arbitrators had failed to deal with "key issues" which may well have impacted on an award of some £126m.

> 37. In general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity - see, for example, *Raytheon* para 33 (last sub-paragraph)."

60. There is some artificiality here because it is obvious that the Arbitrator would have come to the same conclusion if he had provided fuller reasons. That is because the reasons given were sufficient for this Court to see the basis of his conclusion. However, for this purpose, the Court must assume that the Award did not set out or do enough to set out the basis of the conclusion of the Arbitrator. On that premise, this is a case where it can be shown that the result of the arbitration would have been the same regardless of the alleged irregularity.

61. In my judgment, the decision of the Arbitrator was correct. The Tenant was correct to submit that the request for an RAP is to be looked at separately from a request for an MRO. There was an entitlement to an RAP, bearing in mind the period of greater than 5 years since the last rent assessment. It is not an answer to this that that an RAP would then trigger a right to request an MRO. Neither the 2015 Act nor the Code stipulate that the only request for an MRO following a section 25 notice is under Regulation 27. There is not excluded a request for an MRO consequent upon an RAP. The reasoning in support of the First Point is not principled either by reference to tenets of statutory construction or authority, and imposes a serious constriction on the reading of the Code. In my judgment, it is noteworthy that the right to an RAP arises under Part 4 and not subsequent Parts of the Code. It is not limiting of the power to request an RAP in events falling within Regulation 19 that this might give rise to a right in respect of an MRO. The rights are to be construed severally. As the Tenant put it (as mentioned above), there was nothing within the Code to prevent a TPT exercising multiple rights and the Tenant pointed out that there was nothing in the scheme to prevent the service of a separate notice in line with a separate clause.

62. As regards the Second Point, the construction of the Arbitrator was that the document sent with the Section 25 Notice could not be construed as a rent assessment and thus the alleged assessment in 2019 could not be construed as an assessment within the 5 years prior to the request made in this case: see the Award at paras. 66 - 68. The Tenant's arguments went further, namely that the assessment did not conclude with the information provided with the Section 25 Notice. It was subject to the right of the tenant to argue the amount of the rent. Either this would be fixed by agreement or by the Court. Neither had occurred in this case, and so the end of the assessment had not taken place. In either event, the Second Point was answered correctly. The new lease was not itself a rent assessment for the purposes of the Code.

63. Further, the fact that for the purposes of s.43(6) of the 2015 Act, a protected 1954 Act tenancy is renewed on the day on which the TPT receives the POB's notice pursuant to s.25 of the 1954 Act does not lead to the rent assessment being concluded on the date of the new lease. As stated correctly by the Landlord (as recorded in the Award at para. 33.10), the rent payable under the new lease falls to be either agreed between the parties or determined by the court. That had not occurred at the time of the request for RAP on 19 May 2020. Until that concluded, the assessment had not been concluded. Contrary to the Landlord's argument, it is not irrelevant to whether the assessment has

ended that the rent assessment under the new lease had not yet taken place. The date from which the rent assessment will take effect is separate from when and whether it has been made. It follows that the Arbitrator was correct to conclude that no assessment had been concluded in the five-year period prior to 20 May 2020.

64. In my judgment, if, which I do not find, there has been an irregularity, it follows that the outcome of the arbitration would have been the same regardless of the irregularity. Thus, no substantial injustice has been or will be caused to the Landlord because the outcome of the arbitration would have been the same regardless of the irregularity. It is apparent that even if the Arbitrator did not express himself adequately, he would or ought to have reached the same decision.

X Section 69

65. In view of the above, the discussion in respect of section 69 can be stated shortly. The application for permission to appeal on a point of law is refused. The Landlord has failed to satisfy the limb under Section 69(3)(c)(i) that the decision is "obviously wrong". This is a very high hurdle, and permission is rarely given. The threshold was described by Akenhead J in as a "major intellectual aberration": see *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC); [2008] 2 All E.R. (Comm) 493. If the argument to the contrary of the Landlord had been correct, it would involve a departure from the wording of the Code, something which at lowest is not obvious. The Landlord's argument has some complexity to depart from that more literal reading. At lowest, the Landlord has not made out an argument that the view of the Arbitrator is obviously wrong and therefore the first limb under section 63(3)(c)(i) is not satisfied. In fact, separately from the permission application, on analysis for the purpose of section 68, in my judgment, the decision of the Arbitrator on analysis was not wrong.

66. As for the second limb, namely section 69(3)(c)(ii), in my judgment, the Landlord has failed to establish a question of law of general public importance. A case can be of importance where it raises the construction of a standard form contract or where the facts are commonly encountered. To the latter end, the Landlord relies on evidence of Mr John Kittle, a solicitor in the firm acting for the Landlord who said the following in support at paras. 19 – 21:

> "19. The claimants, and other POBs, will frequently be in the position of serving notices pursuant to section 25 of the 1954 Act on tenants whose tenancies are protected by the 1954 Act. Where a tenant in that positon fails to avail itself of the window of opportunity provided to seek an MRO lease pursuant to Regulations 26 and 23 of the Code, the question will frequently arise whether that tenant can have another bite of the cherry, as it were, by reason of requesting a rent assessment proposal pursuant to Regulation 19, which would then entitle the tenant to seek an MRO lease by another means, notwithstanding having failed to comply with the time limit provided pursuant to regulation 26 and Regulation 23 of the Code.

> 20. Given this question has the potential to arise in respect of a number of leased and tenanted pub premises (the number being significant in relation to the Claimants' portfolio alone), it is clearly a matter of general public importance that the question be determined definitively; *a fortiori* when no decision made in a statutory arbitration convened pursuant to the Code is binding on any other arbitration, regardless of whether that decision is published or not. This leads to the prospect that different arbitrators could make inconsistent determinations on the same issue, making it impossible for POBs and tenants alike to be certain as to the correct answer to this question of law. Indeed, it has already been decided by a different arbitrator in a different arbitration that a lease renewal arising pursuant to the service of a Section 25 Notice is a rent assessment within the meaning of the Code, as the Claimants have contended in the Arbitration. This decision is directly contrary to the decision made by the Arbitrator in this case.
>
> 21. The Claimants and, it is to be inferred, all tied pub tenants will find it if not impossible then inconvenient to regulate their affairs in the light of such uncertainty. Accordingly it is a matter of general public importance that the question be decided in a manner which binds future arbitrations pursuant to the Code."

67. In my judgment, this does not establish a question of general public importance. In this case, it is suggested that the facts would be of public importance in that they would be commonly encountered. At para. 20 of Mr Kittle's witness statement, it was said that there was another case where an arbitrator reached the opposite conclusion from the one of the Arbitrator in this case. Although the case was not in the public domain, it was said that attempts were being made to obtain consent to publish the same. Between the first day of the hearing of this case and the second day, there was published a redacted version of the case. It then became apparent that the other case was not a case with the same facts as the instant case. There had been an agreed lease in that case, which is not the case here. Although one paragraph referred to a section 25 notice, that was not the ratio of the case. It follows that that case does not assist in identifying a case of general public importance. There was some misunderstanding which had led to reliance on this case (at some point in the reasoning, there was reference to a section 25 notice, but that was not the ratio of the decision). The Landlord no longer relies upon the case as an instance of a like problem previously encountered. To its credit, the Landlord has been profuse in apologising for the misunderstanding.

68. Absent evidence of a significant number of such other cases, there is no basis to infer the same. If a tenant wanted to have an MRO upon receiving a section 25 notice, in the ordinary course it would be expected to make the application under Regulation 23 within 21 days of receipt of the Section 25 Notice in accordance with Regulation 23(2). That is presumably what would happen in most cases. It did not happen in the instant case, on the Tenant's case, because of deeming provisions relating to the time of the

receipt of the Section 25 Notice. That does not inform about the point of construction referred to above, but it seems unlikely that the facts of this case would occur often.

69. It is said that the fact that the Code is relatively new and there are few decisions of the High Court about it gives rise to general public importance. That is not sufficient. It may be the case that there are many decisions in arbitration under the Code, but that does not give rise to a particular question of general public importance. The question is as to the ability of a tenant who has missed the time to apply for an MRO Lease consequent upon a section 25 notice and to request an RAP pending agreement as to rent under the new lease or an order of the Court fixing the same. As to this, there is no evidence or reason to infer that the questions raised in this case are of common occurrence.

70. If it had been the case that the case had given rise to a question of general public importance, the Court would have come to the conclusion that the decision of the Arbitrator was not open to serious doubt in view of the analysis set out above.

71. For these reasons, the Court refuses permission to appeal under section 69. There is another requirement that the Court must be satisfied that it is just and proper to determine the appeal. It is not clear what this would add to this case, and it is not necessary to make a decision as to whether this element has been satisfied. I have found above that the decision was not wrong in the context of the analysis about section 68, and in my judgment this is not open to serious doubt.

XI Conclusion

72. For all of the above reasons, the application fails under section 68 because no serious irregularity has been established. If the Court were wrong in this regard, the serious irregularity has not caused or will not cause any substantial injustice to the Landlord in that the decision was not wrong. Under section 69, permission to appeal on a point of law is refused because the Landlord has failed to satisfy the Court in respect of either of the limits under section 69(3) of the 1996 Act, namely that the decision of the tribunal was obviously wrong or that the question of law was of general public importance and the decision of the tribunal was at least open to serious doubt.

73. The parties are asked to seek to agree an order to reflect this judgment. In the event that consequential matters cannot be agreed the Court will make such rulings as are appropriate. It remains to thank Counsel for the high quality of their written and oral submissions and for their skill and expertise.