



Neutral Citation Number: [2020] EWHC 1376 (Ch)

Claim No: BL-2019-001160

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL

Date: 1 June 2020

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

IN THE MATTER OF AN ARBITRATION CLAIM BETWEEN:

PUNCH PARTNERSHIPS (PTL) LIMITED **First Claimant**

STAR PUBS & BARS LIMITED **Second**
Claimant

- and -

JONALT LIMITED **Defendant**

Catherine Callaghan QC and Peter Stevenson (instructed by **DLA Piper UK LLP**) for the
Claimants

The **Defendant** was not represented and did not appear

Hearing date: 20 May 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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KELYN BACON QC

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 1 June 2020, 10.30 a.m.

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a challenge to an award dated 21 May 2019 made by Mr Anthony Connerty, who was appointed by the Pubs Code Adjudicator (“PCA”) to act as arbitrator in a statutory arbitration commenced by the Defendant (“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”). The tenant is the tied pub tenant of the Prince of Wales public house in Kilburn, London. The first Claimant, “PTL”, is the landlord of the pub, and the second Claimant, “Star”, is the “pub-owning business”, as defined under s. 69 of the 2015 Act, for the Prince of Wales public house. Both Claimants are wholly-owned subsidiaries of Heineken UK Limited.
2. The disputed award concerns a single issue: whether a term in a “market rent only” or “MRO” lease proposed by Star, requiring the tenant to ensure that at least 60% of the keg taps at the Prince of Wales public house dispensed drinks produced by companies associated with Star, was unreasonable so as to render the lease non-MRO compliant under the 2015 Act and the Pubs Code. The arbitrator held that the 60% keg stocking requirement was unreasonable, and ordered Star to offer a new MRO lease containing, instead, a 20% keg stocking requirement.
3. Both the finding of unreasonableness and the order to offer a 20% keg stocking requirement are challenged on the grounds of serious irregularity under s. 68 of the Arbitration Act 1996 (“the 1996 Act”). In short, the Claimants’ objections are that:
 - i) In relation to the finding of unreasonableness, the arbitrator proceeded on the basis that it was for Star to prove the reasonableness of the keg stocking requirement, rather than it being for the tenant (the claimant in the arbitration) to establish the unreasonableness of the disputed requirement. The reversal of the normal burden of proof had not, however, been proposed by either party, nor had the arbitrator invited submissions on the point.
 - ii) The order that Star offer an MRO lease with a 20% keg stocking requirement was in any event outside the arbitrator’s powers under the 2015 Act and/or the Pubs Code.
4. The Claimants were represented at the hearing by Ms Callaghan QC and Mr Stevenson. The tenant was not represented and did not appear at the hearing, nor did it make any submissions or provide evidence in relation to the challenge. Indeed the Claimants emphasised that they did not criticise the tenant or its conduct of the arbitration in any way, their challenge being directed solely to the decision of the arbitrator.
5. Neither the arbitrator himself nor the PCA were represented at the hearing, nor did they make any submissions to the Court. However, in another similar challenge brought by the Claimants in relation to an award of the Deputy Pubs

Code Adjudicator (“DPCA”) in arbitration proceedings concerning the proposed MRO lease at a different public house, the Court had before it not only observations submitted by the Government Legal Department on behalf of the DPCA, but also written and oral submissions from counsel for the Office of the Pubs Code Adjudicator. The judgment of Murray Rosen QC (sitting as a deputy judge) in that case, *Punch Partnerships and Star Pubs v The Highwayman Hotel* [2020] EWHC 714 (Ch) is relevant to several of the points that arise in this case, and I will refer to it below.

6. At the conclusion of the hearing I indicated that I accepted both of the Claimants’ objections. These are the reasons for that decision. I have also taken into account further written and submissions and brief oral submissions by the Claimants, following the hearing, regarding the appropriate form of remedy.

The statutory framework

7. The Prince of Wales public house at issue in these proceedings is one of around 12,000 “tied pubs” in England and Wales. Under the tied pub model the tenant pays a lower rent to the pub-owning business than they might otherwise pay, in return for an obligation to purchase some or all of the alcohol sold at the premises from the landlord (or associated company), often at above market prices. The present dispute arises out of the changes to the tied pub model that were introduced by the 2015 Act.
8. S. 43 of the 2015 Act provides for the Pubs Code to require certain defined pub-owning businesses (which include Star) to offer their tied pub tenants a market rent only (or MRO) option in specified circumstances. An MRO option is the option for the tenant to occupy the tied pub under an “MRO-compliant” tenancy, at an agreed rent or (failing agreement) the market rent.
9. Under Regulation 27 of the Pubs Code, a rent assessment proposal sent by the pub-owning business is one of the trigger events that will entitle the tenant to send an MRO notice. Regulation 29 provides that where the pub-owning business agrees that there is such a trigger event, it must send the tenant a statement confirming its agreement, and must also then send the tenant a proposed tenancy that is MRO-compliant. This response is referred to in Regulation 29(5) as a “full response”.
10. An MRO-compliant tenancy is defined in s. 43(4) of the 2015 Act as being one which among other things does not contain any “product or service tie” other than one in respect of insurance in connection with the tied pub (s. 43(4)(a)(ii), and does not contain any “unreasonable terms or conditions” (s. 43(4)(a)(iii)).
11. A “product tie” is defined in s. 72 of the 2015 Act as meaning a contractual obligation “other than a stocking requirement” requiring that a product to be sold at the tied pub must be supplied by the landlord of the tied pub or associated company, or a person nominated by the landlord or associated company. A “stocking requirement” is in turn defined in s. 68(7) as follows:

“The contractual obligation is a stocking requirement if –

- (a) it relates only to beer or cider (or both) produced by the landlord or by a person who is a group undertaking in relation to the landlord,
 - (b) it does not require the tied pub tenant to procure the beer or cider from any particular supplier, and
 - (c) it does not prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such sales).”
12. The effect of these provisions is that a stocking requirement is specifically excluded from the type of provision that is prohibited as constituting a product tie. Such a requirement is therefore in principle permissible in an MRO-compliant tenancy. The particular stocking requirement in a given case might, however, nevertheless be found to be unreasonable within the meaning of s. 43(4)(a)(iii).
13. Regulation 31(2) of the Pubs Code sets out various terms that are regarded as unreasonable for the purposes of s. 43(4) of the 2015 Act. While those terms do not include stocking requirements, the Claimants accept that the examples given in Regulation 31(2) are illustrative rather than exhaustive.
14. Ss. 44 and 45 of the 2015 Act provide for the Pubs Code to make provision for procedures for determining disputes between pub-owning businesses and their tied tenants. In particular, for present purposes, s. 45 empowers the Secretary of State to confer functions on the PCA to resolve disputes as to whether a proposed tenancy is MRO-compliant.
15. Those provisions are implemented by Regulations 32 and 33 of the Pubs Code. Regulation 32(2)(b) enables the tenant to refer a matter to the PCA for arbitration if it considers that the MRO proposal of the pub-owning business does not comply with the requirements of Regulation 29. In such a case, the effect of Regulation 33 is that the PCA (or a person appointed by the PCA) may do one of two things: either it may rule that there is no failure to comply with the relevant requirements; or it may require the pub-owning business to provide a revised MRO-compliant response to the tenant.
16. Regulation 58(3) of the Pubs Code provides that any such arbitration must be conducted in accordance with the Chartered Institute of Arbitrators’ Rules (the “CI Arb Rules”), or the rules of another dispute resolution body nominated by the arbitrator. In this case the CI Arb Rules were applied.

The reference to arbitration in this case

17. On 25 May 2018 Star sent the tenant of the Prince of Wales public house a rent assessment proposal. In response, on 30 May 2018, the tenant served an MRO notice on Star requesting an MRO offer. Star’s full response was provided on 27 June 2018.

18. The tenant disputed various terms of Star’s MRO proposal, and on 9 July 2018 the tenant referred the matter to the PCA for arbitration pursuant to Regulation 32 of the Pubs Code. By the time the arbitrator adopted his decision Star had provided a revised proposal, in consequence of which the only remaining dispute concerned the 60% keg stocking requirement, set out in the revised proposal as follows:

“The Tenant may in its absolute discretion stock and offer for sale at the Property any Keg Brands which it deems appropriate from time to time throughout the Term provided that the Tenant shall ensure ... that as soon as reasonably practicable from the date of this lease (and in any case from and including [one year from the start of the Term]) until the end of the Term, at least sixty per cent (60%) of the Keg taps or other items of equipment from which Keg Brands are dispensed from time to time shall dispense Landlord Keg Brands.”

19. “Landlord Keg Brands” were defined as “any brands or denominations of Keg Brands which are produced by the Landlord or a Group Undertaking of the Landlord from time to time during the Term”.

20. On 20 December 2018 the PCA provided the parties with directions for the arbitration. These directed the tenant to provide a Scott Schedule setting out:

“Each alleged breach of the Pubs Code, with reasons. In respect of each alleged breach of regulation 29, setting out each term of the MRO response which the Claimant alleges to be unreasonable with reasons ... You may not succeed in your challenge if you do not provide proper reasons.”

21. Star was directed to provide its response in the same Schedule, “setting out why each term alleged to be unreasonable is not”. There was no specific direction for evidence to be filed, save that if any evidence was submitted it was required to be included in the bundle of documents that was to be provided to the arbitrator. The directions noted finally that:

“The Arbitrator will reach a decision on consideration of the documents only and without an oral hearing. The parties may request an oral hearing. This request must be made to the Arbitrator in writing, giving reasons.”

22. The tenant duly filed its Scott Schedule. Under the issue described as “Whether the keg stocking requirement is reasonable” the tenant set out its position as follows:

“We do not believe the requirement to stock all Heineken brands is reasonable, and therefore contrary to regulation 43(4)(a)(iii) SBEEA.

Currently the site offers for sale only 2 Heineken branded products.

The site recently transferred from Punch Taverns ownership and therefore has no historical tie whatsoever to the Heineken product portfolio.

Remedy sought: reduce the proposed keg stocking requirement to 20% of products.”

23. In response, Star provided detailed submissions as to why it considered that the stocking requirement was reasonable. At the outset, Star noted that its position was that the tenant had to stock only 60% Landlord Keg Brands. Star went on to refer, in particular, to the fact that Heineken has over 250 beer and cider brands, giving the tenant access to a wide range of products. Star also explained that in drafting the proposed stocking requirement it had taken into account the products that were currently on sale at the premises, and it considered that the stocking requirement would not lead to any loss of sales. It also pointed out that the tenant had a period of a year to comply with the requirement.
24. Under Regulation 58(2) of the Pubs Code the PCA may appoint another person to arbitrate the dispute. Pursuant to that provision, the PCA appointed Mr Connerty as the arbitrator. He wrote to the parties asking whether the tenant wished to serve a reply to Star’s submissions. He also asked whether the parties wished to serve expert evidence, and indicated that it might be convenient to proceed by way of a hearing. The tenant’s response was that it did not intend to serve a reply or expert evidence, and that it considered that the existing arguments were sufficient, but the tenant indicated that it would consider a hearing if the arbitrator thought this was appropriate. Star replied giving a preference for the matter to proceed on paper, and suggesting that it could respond in writing to any questions as to its position.
25. On 12 April 2019 the arbitrator issued an order noting that the parties did not require a hearing and giving directions for the parties to serve further written submissions if they wished. Star served further submissions on 26 April 2019. The tenant sent an email maintaining that “the keg stocking requirement remains unreasonable” but said that it did not wish to make any further submissions.

The arbitrator’s Award

26. The arbitrator issued his award on 21 May 2019. He first recorded the submissions filed by both parties in the Scott Schedule, and noted that neither party had taken the opportunity to serve expert evidence, and the fact that both parties had declined the invitation to make further submissions at a hearing. The arbitrator then set out his discussion and conclusions regarding the keg stocking requirement in two short paragraphs as follows:

“33. The short point is therefore that there is no evidence – factual or expert – to support the Respondent’s 60% keg stocking requirement. And, whilst there is no evidence – factual or expert – submitted by the Claimant in rebuttal of the 60% requirement, yet nevertheless the Claimant must be taken to have accepted that a 20% requirement is ‘reasonable’ for the purposes of section 43(4)(a)(iii).

34. In all the circumstances the Arbitrator is satisfied that a 20% keg stocking requirement is reasonable for the purposes of section 43(4)(a)(iii) of the [2015] Act.”

27. §42(1)–(3) of the award set out the arbitrator’s conclusions, which were then replicated in the final points of the award as follows:

“1. The Arbitrator declares that the 60% keg stocking requirement proposed by the Respondent is unreasonable for the purposes of 43(4)(a)(iii) of the Small Business, Enterprise and Employment Act 2015.

2. The Arbitrator declares that the 20% reduction of the keg stocking requirement proposed by the Claimant is reasonable for the purposes of 43(4)(a)(iii) of the Small Business, Enterprise and Employment Act 2015.

3. The Respondent is ordered to provide the Claimant with a revised response which includes a proposed tenancy which is MRO compliant and which therefore must contain a provision for a 20% keg stocking requirement, such revised response to be served within 21 days of the date of this Award or within such further period as is agreed by the Arbitrator in consultation with the Claimant.”

28. Star was concerned that the arbitrator had not provided any reasons for his conclusions that a 60% stocking requirement was unreasonable and that a 20% stocking requirement was reasonable, and on 5 June 2019 its solicitors wrote to the arbitrator inviting him to provide those reasons in a clarification of the award, pursuant to s. 57 of the 1996 Act.

29. On 20 June 2019 the arbitrator responded by way of a Procedural Order. Having set out the relevant parts of the Award, the arbitrator stated as follows:

“12. The Respondent cannot blow hot and cold. The Respondent cannot reject the opportunity to provide an arbitral tribunal with evidence (factual and or expert) and additionally reject the opportunity to make submissions to the tribunal, and then complain that the reasons relied upon by the tribunal in its award do not include evidence and submissions which the Respondent has chosen not to provide to the tribunal.

Or, to put the matter another way: a party cannot rely upon its own wrong: *ex turpi causa non oritur actio*.”

30. There followed a recitation of various cases indicating that arbitrators are not required to provide an explanation for each step by which they reach their conclusions, at the end of which the arbitrator stated that:

“18. In this case, the Respondent chose not to avail itself of the opportunity to provide the Tribunal with factual or expert

evidence and rejected the opportunity to make submissions to the Tribunal at a hearing. Instead the Respondent relied on the reasons set out in its Defence ... Those are the reasons set out in the Scott Schedule ...

19. How is the 60% arrived at? Or to be precise, “at least 60%” ... Whatever its basis, it is a figure rejected by the Claimant, who conceded a stocking requirement of 20%. The Tribunal accepted that concession as the basis of its award, there being no specific evidence or submissions advanced by the Respondent to support the 60% requirement or to challenge the Claimant’s concession of 20%.

Conclusions on Reasons

20. The Tribunal therefore rejects the Respondent’s invitation to provide reasons by way of a clarification of the Award pursuant to the provisions of sections 52 and 57 of the Arbitration Act 1996 ...”

31. It should also be noted that at three places in the Procedural Order the arbitrator drew attention to Article 34(2) of the CIArb Rules. This provides that:

“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.”

The present claim

32. The present claim was initially filed prior to the provision of the 20 June 2019 Procedural Order, and was amended after that Order with the permission of the Court. The claim was originally brought on the basis of both ss. 68 and 69 of the 1996 Act. In orders dated 8 July 2019 and 22 October 2019, Fancourt J refused permission to appeal under s. 69, but noted that this did not affect the claims under s. 68.

33. On the basis of the Claimants’ amended grounds of claim and the arguments as developed in the skeleton argument and at the hearing, two issues arise for determination:

- i) Whether the arbitrator’s finding that the 60% keg stocking requirement was unreasonable was affected by a serious irregularity within the meaning of s. 68 of the 1996 Act, by reversing the normal burden of proof without inviting submissions on the point from the parties. This is referred to as the “burden of proof challenge”.
- ii) Whether the order that Star offer an MRO lease with a 20% stocking requirement was likewise affected by a serious irregularity, on the

grounds that it was outside the arbitrator's powers under the 2015 Act and/or the Pubs Code. This is referred to as the "excess of powers challenge".

34. The Claimants originally also objected that the arbitrator had failed to give reasons for his findings that the 60% keg stocking requirement was unreasonable. At the hearing, however, Ms Callaghan did not pursue that point, preferring to rest that part of her case on the submission that the reasons that were given by the arbitrator disclosed a serious irregularity, as set out above.
35. Before addressing these points, I should first comment on the jurisdiction of this court, in light of the arbitrator's repeated references in his 20 June 2019 Procedural Order to the waiver of appeal rights under Article 34(2) of the CIArb Rules.
36. The Claimants' challenges are advanced under s. 68 of the 1996 Act. S. 4(1) of that Act provides that the mandatory provisions of Part I of the Act, as listed in Schedule 1 to the Act, "have effect notwithstanding any agreement to the contrary". S. 68 is one of the provisions listed in Schedule 1. It follows that a challenge may properly be brought under s. 68 notwithstanding the provisions of Article 34(2) of the CIArb Rules. I note that this was also the position taken in the *Highwayman Hotel* judgment at §35.

The burden of proof challenge

37. Under s. 68(1) of the 1996 Act, a party to arbitral proceedings may challenge an award in those proceedings on the ground of "serious irregularity affecting the tribunal, the proceedings or the award". "Serious irregularity" is defined in s. 68(2), in material part, as follows:

"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);

..."

38. The section proceeds to set out further instances of serious irregularities that are not relevant for present purposes.
39. S. 33 in turn provides:

"(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.”
- 40. The serious irregularity test thus requires two conditions to be established. First, there must be a serious irregularity of one of the kinds set out in s. 68(2). Secondly, that must have caused or will cause “substantial injustice” to the applicant.
- 41. In the present case, the Claimant says that in deciding that the 60% keg stocking requirement was unreasonable the arbitrator failed to comply with his duty under s. 33 to act fairly and impartially as between the parties. Specifically, the Claimants say, he decided this point on the basis that Star had failed to adduce evidence in support of this requirement, and the tenant had likewise adduced no evidence. Implicitly, therefore, the arbitrator must have decided that it was for Star to establish the reasonableness of the stocking requirement, rather than for the tenant to establish its unreasonableness. That reversed the normal burden of proof without that reversal having been the subject of any submissions by the parties, nor had the arbitrator invited any comments on this point.
- 42. I note at the outset the caution expressed in the case-law regarding the approach to interpretation of arbitral awards. In particular, the cases have emphasised that the court should read an award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults: see *Flaux J in Pimera Maritime (Hellas) v Jiangsu Eastern Heavy Industry* [2013] EWHC 3066 (Comm) §30, with further references. Even with that note of caution in mind it is quite clear in this case that the reasons given by the arbitrator must be taken as turning upon an assumption that it was for Star to prove the reasonableness of the 60% keg stocking requirement. The sole reason given by the arbitrator for that finding, in §33 of the Award, was that there was no evidence on either side to support or rebut the reasonableness of that requirement. The further comments made in the Procedural Order also stated that Star had not provided any specific evidence or submissions to support the 60% requirement. Those comments could only have led the arbitrator to conclude that the requirement proposed by Star was unreasonable if he had concluded that the burden of proof was on Star to establish the reasonableness of the requirement, rather than on the tenant to establish that it was unreasonable.
- 43. The usual rule, however, is that the burden of proof lies upon the party who asserts the affirmative of an issue. According to *Phipson on Evidence* (19th ed) §6-06, “If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. This is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

44. In *Robins v National Trust* [1927] AC 515, cited by *Phipson*, Viscount Dunedin delivering the judgment of the Privy Council observed at p. 520 that:

“Onus is always on a person who asserts a proposition or fact which is not self-evident. ... Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is so often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter.”

45. In the present case, the arbitration was initiated by the tenant under Regulation 32 of the Pubs Code on the basis of a contention that the proposed tenancy was not MRO-compliant. The specific disputed issue (by the time the arbitrator reached his decision) was the reasonableness of the keg stocking requirement. On that point the tenant’s claim was that the requirement was unreasonable. The tenant therefore alleged a breach of Regulation 29 of the Pubs Code and s. 43(4)(a)(iii) of the 2015 Act.

46. In principle, therefore, on the normal rules of the burden of proof, the onus lay on the tenant to establish the breach alleged. Nothing in the statutory framework set out in the 2015 Act and the Pubs Code suggests a reversal of that burden of proof. In those circumstances if the arbitrator considered that the burden of proof should be reversed, that should have been raised with the parties for their comment.

47. As Bingham J observed in *Zermalt Holdings v Nu Life Upholstery Repairs* [1985] EGLR 14 at p. 15:

“the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. ... It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance ...”

48. This comment was cited with approval by Colman J in *Vee Networks v Econet Wireless* [2005] 1 Lloyd’s Rep 192 at 208, finding that by advancing a point of construction that had never been argued the arbitrator had neither acted fairly

nor given each party a reasonable opportunity of putting its case, and had therefore failed to comply with s. 33 of the 1996 Act.

49. I consider that the same is true in this case. No suggestion was made by the arbitrator, at any point during the arbitral proceedings, that he considered that it was for Star to establish the reasonableness of the keg stocking requirement rather than for the tenant (the claimant in the arbitration) to establish that the requirement was unreasonable.
50. While the arbitrator's comments in the Procedural Order of 20 June 2019 note that the parties were given the opportunity to provide further submissions at a hearing, which they did not take up, that does not resolve the burden of proof issue. Star had set out, in the Scott Schedule, a full response to the tenant's contentions on unreasonableness. The tenant had expressly declined to make any further submissions in reply; the parties had not been specifically directed to file any evidence; and the PCA's directions expressly stated that the arbitration would reach a decision on the papers and without an oral hearing unless the parties requested otherwise. Since neither party requested an oral hearing, the arbitrator was required to determine the matter on the submissions before him, on the basis of the normal rules of the burden of proof unless he considered – following submissions from the parties – that a different rule should apply in this case. By failing to invite submissions on that point the arbitrator failed to comply with s. 33 of the 1996 Act; there was therefore a serious irregularity under s. 68(2)(a) of that Act.
51. As for the requirement for a substantial injustice to the Claimants, the test is as set out in Merkin, *Arbitration Law* at §20.8 as follows:

“If the result would most likely have been the same despite the irregularity there is no basis for overturning an award. However, in determining whether there has been substantial injustice, the court is not required to attempt to determine for itself exactly what result the arbitrator would have come to but for the alleged irregularity, as this process would in effect amount to a rehearing of the arbitration. Instead, if the court is satisfied that the applicant had not been deprived of his opportunity to present his case properly, and that he would have acted in the same way with or without the alleged irregularity, then the award will be upheld. By contrast, if it is realistically possible that the arbitrator could have reached the opposite conclusion had he acted properly in that the argument was better than hopeless, there is potentially substantial injustice. The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure cause the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable.”
52. That test has been cited with approval in a number of cases, including recently by Cockerill J in *ZCCM Investments Holdings v Kansanshi Holdings* [2019] 2 Lloyd's Rep 29, §61.

53. I consider that this test is undoubtedly met in the present case. Had the arbitrator indicated that he was considering departing from the usual rule as to the burden of proof, and had he invited submissions on this point, he might well have been persuaded by Star to apply the usual rule. In that case, given the arbitrator's finding that the tenant had provided no evidence (factual or expert) to rebut the 60% keg stocking requirement, it is at the very least strongly arguable that the tenant's allegation of unreasonableness would have failed. I therefore find in favour of the Claimants in relation to their objection that the arbitrator failed to comply with s. 33 of the 1996 Act in respect of the burden of proof issue, giving rise to a serious irregularity under s. 68 of the 1996 Act.

The excess of powers challenge

54. I also consider that the Claimants are right to say that the inclusion in the arbitrator's order of a requirement to provide a 20% keg stocking requirement was outside the arbitrator's powers and therefore also contrary to s. 68 of the 1996 Act.
55. This point can be dealt with shortly, because it was the subject of lengthy discussion in the *Highwayman Hotel* case, which as noted above was also a challenge by the present Claimants. In that case the disputed award had ordered Star to offer a new MRO lease for a minimum period of five years from the date of grant – which was at least two years longer than the lease that it had proposed. The deputy judge found that:
- i) Clear language is required to displace the presumption against state interference with a person's property rights or other economic interests (§85).
 - ii) S. 3 of the Human Rights Act 1998 also requires that, in so far as possible to do so, primary and subordinate legislation should be interpreted in a way that is compatible with Convention rights, including 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 (§§86–87).
 - iii) There is no clear language in either the 2015 Act or the Pubs Code permitting the arbitrator to interfere in the commercial negotiations between the tenant and the landlord by requiring the landlord to offer specific terms in its revised response. General 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 (§§88–93, 99 and 102).
 - iv) It could not have been intended in the statutory framework, without clear and express wording, that the arbitrator would have the power unilaterally to change one term in the MRO offer, given that any MRO offer represents a commercially balanced package of terms that are inter-dependent (§101).

- v) The arbitrator's award therefore exercised a power that she did not have under the relevant legislation, which was a serious irregularity under s. 68(2)(b) of the 1996 Act, which met the test of substantial injustice since on a correct reading of the arbitrator's powers the disputed requirement could not have been ordered in the award (§§108–111).
56. For the same reasons the arbitrator's order in the present case that Star should offer a lease with a 20% keg stocking requirement exercised a power that the arbitrator did not have. That part of the order was therefore a serious irregularity under s. 68(2)(b) of the 1996 Act. The test of substantial injustice is clearly met, since on a correct reading of the arbitrator's powers that requirement could not have been included in the award.

Conclusion: remedy

57. S.68(3) of the 1996 Act provides that if there is shown to be a serious irregularity affecting the tribunal, the proceedings or the award, the court may remit the award to the tribunal (in whole or in part) for reconsideration, set the award aside (in whole or in part), or declare the award to be of no effect (in whole or in part). The powers to set aside or declare an award to be of no effect are not, however, to be exercised by the court "unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration".
58. It follows from my conclusions on the excess of powers challenge that the requirement in §42(3) and final point 3 of the Award for the proposed tenancy to offer a provision for a 20% keg stocking requirement must be set aside. Given my findings of excess of powers, there is no basis for remitting that issue to the arbitrator.
59. The remainder of §42(3) and final point 3 of the Award, and the entirety of §§42(1)–(2) and final points 1 and 2 of the Award, turn on the arbitrator's findings of unreasonableness, which in turn rest on the burden of proof issue that was not put to the parties, as I have found above. Those parts of the Award, and the supporting reasoning at §§33–34 of the Award, should be remitted to the arbitrator for him to reconsider the matter in light of this judgment, the material already before him, and any submissions the arbitrator may invite on the question of which party bears the burden of proof.