

FINAL AWARD

IN THE MATTER OF AN ARBITRATION

under the

COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Between

[REDACTED]

(applicant)

and

[REDACTED]

(respondent)

In respect of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Parties

1. I was appointed by the President of the Royal Institution of Chartered Surveyors ("RICS") in the capacity of Arbitrator to deal with this dispute. The date of my appointment is 25 November 2022.
2. This is an appointment under the provisions of the Commercial Rent (Coronavirus Act 2022) (CRCA).
3. The dispute relates to the question of whether or not the applicant is entitled to receive relief from the payment of a Protected Rent Debt ("PRD") under the provisions of the CRCA.
4. The applicant is [REDACTED] ("Applicant") who are the tenant of premises known as [REDACTED]. Their application was submitted to the RICS on 14 September 2022.
5. The respondent is [REDACTED] ("Respondent") who are noted to be wholly owned and a subsidiary of [REDACTED]. The Respondent is the Landlord of the property as noted above.
6. On a point of clarification, I note that the Applicant is also referred to as the [REDACTED], and I take these two company names as being one and the same, for the purpose of this Arbitration.
7. The applicant is represented by [REDACTED] of [REDACTED] of [REDACTED], whom I understand is connected directly to the applicant.
8. The Respondent is represented by [REDACTED] of [REDACTED] ("[REDACTED]") of [REDACTED]. [REDACTED] is a solicitor. I note however that, upon being appointed and writing to the parties' representatives as noted at the time, this was initially [REDACTED] of [REDACTED] of [REDACTED]. I was however subsequently advised by [REDACTED] of [REDACTED] that [REDACTED] of the same company would be acting in the capacity of the Respondent's representative.
9. Having clarified these matter, I wrote to [REDACTED] and [REDACTED] on 1 December 2022 setting out a number of matters relating to the procedure to be adopted.
10. I noted in that letter that the matter in dispute related to a PRD which is arrears of rent having fallen due within the Protected Rent Period ("PRP") and to be dealt with under the procedures within the CRCA. I noted further that I am required to make an Award in respect of the PRD. This is in pursuance of the provisions of Section 10 (4) of the CRCA.
11. I further noted that the procedure to be adopted was to follow the process set out in the RICS Guide for Users entitled Covid Rent Arrears Arbitration ("The Guide"). This is because the application to arbitrate was made to the RICS, an authorised body under the CRCA. Under this I noted that the Arbitration was to be conducted in accordance with the provisions of Arbitration B as set out in that guide. This is to be by way of a fixed fee of £1,500 plus VAT. I further note that I had been advised that this sum of money had been paid to the RICS.

12. Following exchanges of various e-mails, I issued my Draft Directions to the representatives on 12 January 2023. Those effectively became the Directions by which this Arbitration has been conducted.
13. I received an e-mail by way of response on 23 January 2023 from [REDACTED]. In that, confirmation of various matters was given to me. The question of the procedure to be adopted, under the RICS Guide was raised, and it was suggested that it should be in accordance with scheme procedure C.
14. By e-mail of the same date I received a response from [REDACTED]. In that he confirmed that he was happy to proceed in accordance with the Draft Directions sent to him. [REDACTED] also drew my attention to various relevant documents which had been submitted.
15. A delay then occurred, due to my annual holiday. I confirmed to the parties' representatives that I had reviewed all of the documentation which has been sent to me by them, and also from the RICS, and that both parties had received copies of those. Hence this Arbitration proceeded on the understanding that all parties have the same documentation to hand.
16. I was concerned at that point in establishing the appropriate procedure under the RICS Guide. It seemed appropriate to me that procedure C would be the most appropriate one to be adopted.
17. There then followed a series of exchanges of e-mails between the parties' representatives and myself, as to the appropriateness of this matter being dealt with under Procedure B or Procedure C. However, by e-mail of 21 April I received an e-mail from an associate of [REDACTED] confirming that they had now received appropriate financial statements from the applicant.
18. By response dated 24 March 2023 [REDACTED] in his e-mail indicated that he wished the matter to proceed under Procedure B.
19. In response thereto the Respondent stated that they wished to leave matters as they stood and proceed in it by way of Procedure B.
20. By the e-mail of 24 March from [REDACTED] I was asked to make an Order for Disclosure requiring the applicant to disclose all financial documents and the like.
21. I then received further correspondence by way of e-mail from [REDACTED], dated 9 May 2023, making various points in relation to what the Respondent had said.

Appropriate Matters to Be Dealt with Under CRCA

22. It is a requirement that any application for a dispute to be resolved under the CRCA it must be confirmed that there is a "business tenancy" in place.
23. On this point I have been supplied with a copy of the underlease which is dated 21 August 2017. This is noted to be by [REDACTED] as Landlord, although this interest has subsequently been vested in respondent to this case. The tenant in that underlease is noted to be [REDACTED].

24. As I note above, the latter is the applicant in this case. I am therefore satisfied that a business tenancy exists.
25. I must also consider the PRD. This is in the context of the matter of relief thereof, from payment.
26. The protected rent is subject to two matters: -
 - a. The tenancy was adversely affected by Coronavirus; and
 - b. That the rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy.
27. The protected period is effectively a timescale beginning 21 March 2020 and ending on 18 July 2021, or an earlier date. This is as is provided for under Section 3 (2) of the CRCA.
28. The applicant is claiming relief for the period from 25 March 2020 up to 23 June 2021. Within that period the claim is in respect of the closure dates, which are noted to be 21 March 2020 to 12 July 2020 and then subsequently 5 November 2020 to 16 May 2021. This is noted to be in the total sum of £62,950.38, less arrears which have actually been paid, leaving a balance of £41, 200.38.
29. Accordingly therefore the PRD falls within the protected period of 21 March 2020 and ending on 18 July 2021.
30. There is the question of whether or not the tenancy was adversely affected due to the existence of the Coronavirus Pandemic. Therefore, was it affected by virtue of being subject to a closure requirement? In this context it is noted that the premises were in fact closed during the period noted in the point above, which falls within the relevant period.
31. Therefore it follows that the operation of the business was adversely affected.
32. Thereby the Protected Rent Debt and the rent attributable for the period of occupation for a period within the above timescales does fall into the category of being protected.
33. The PRD which is claimed by the applicant is in the sum of £41,200.38.
34. I have to consider whether or not the parties reached any agreement in relation to the matter. On this point they have clearly failed to do so, hence this matter has been referred to Arbitration.

Viability

35. It is also necessary to consider the viability of the business. There is no direct guidance within the CRCA on this point.
36. However, whether or not a business is viable largely revolves around its future trading prospects, and whether or not it is still effectively capable of generating a profit. If the answer to the latter point is in the positive, then clearly it is still viable.
37. There are two points which I take into account in regard to this test.

38. First, the business has in fact continued to trade since the restrictions on opening have been lifted. There is nothing which has been brought to my attention which indicates that the business is doing anything other than continuing to operate normally.
39. Secondly, the accounts for the year ended June 2022 contains a statement to the effect that "the directors have a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future. It further goes on to say that since the Covid 19 restrictions were removed ... " the company has returned to a profitable position". The directors expect "profits to continue, enabling the company to return to favourable results".
40. Therefore, by virtue of the fact that the [REDACTED] is still continuing to trade, and taking into account the above two points, it is clear that the business has continued to be viable.
41. Therefore, the test of viability is passed.
42. It is also relevant to consider whether or not the business was viable before the Pandemic. On this point the trading and financial information which has been supplied clearly indicates that the [REDACTED] was trading satisfactorily, and indeed profitably. Thereby I conclude that the [REDACTED] was certainly a viable proposition prior to the Pandemic.
43. This further reinforces the test of viability has been passed.
44. I cannot come to any other conclusion that the business is viable.

Relief

45. In considering how any relief from payment a PRD is concerned, section 14 of the CRCA applies, when this is read in conjunction with sections 13 (5) of the CRCA.
46. When taken together these also ask that the Arbitrator considers any financial proposal put forward by either party, as under section 7 of the CRCA.
47. In this context documentation has been put before me by both applicant and respondent, showing that attempts to reach a settlement were made.
48. However of course the parties have failed to reach an agreement in this context, hence the matter has been referred to Arbitration for it to be decided.
49. There have however clearly been some attempts to resolve the issue of the rent arrears, in the context of the PRD. I have had various letters and e-mails put before me which indicate this, but clearly no form of compromise has been reached in order to settle the matter.
50. Within these exchanges of letters, largely between [REDACTED] and [REDACTED] (solicitors acting on behalf of the applicant) various suggestions were made. I note in particular the letters of 30 June from [REDACTED] to [REDACTED], and the latter's response of 19 July 2022.
51. These letters largely revolve about the question as to whether or not any "offers" have been made between the parties. I find that there clearly have been some attempts, but all unsuccessful.
52. There are two points within these exchanges of letters which I will deal with at this point. These relate to first, the enquiry about purchasing the freehold of the property in an e-mail of 16 September 2020

sent by the applicant. Secondly a press release of April 2022 setting out the proposals which the [REDACTED] has for the future.

53. I consider that the offer to purchase the freehold was made as part of the round of discussions to try to settle the dispute, additionally that such approaches had been made on several occasions prior to the Pandemic. Furthermore that it is suggested by [REDACTED] that any purchase would be funded by bank borrowings.
54. Secondly, the press release of April 2022 occurred a good deal after the Pandemic events and lockdowns, and clearly is a reflection of the groups (as opposed to [REDACTED]) future intentions.
55. I dismiss both of these points as being irrelevant in relation to this Arbitration and will not therefore take them into account in my Award.
56. I now turn to the ability of the applicant to pay the arrears of rent. On this point it is clear that [REDACTED] [REDACTED] has been able to rebuild its business since the ending of the Pandemic, and the evidence before me indicates that it has returned to trading levels, similar to what was the case pre-pandemic. It is also noted that it appears to now have notable cash deposits.
57. Equally however it is very clear that during the lock-down periods, cashflow reduced very significantly, effectively to no income whatsoever for lengthy periods of time. The only income noted to have been received is that from various Government grants. I assume that some of these relate to direct grant, but others to "furlough" payments. Clearly without any of those inputs the business could have been severely prejudiced as to its ability to survive.
58. I thereby find that the applicant suffered financial loss during the period in question, and would not during the normal course of events have been in a position to pay the full amounts of rent due.
59. The respondent argues that the applicant could have discharged all of its liabilities to itself, by calling upon assistance from its parent group, [REDACTED]. Thereby they argue that there should be no relief for the PRD.
60. However, under the CRCA we have to deal with individual businesses. There is no requirement to consider the possibility of the business being capable of being "propped up" by a parent group.
61. Further the argument made by the respondent that that should apply as a principle here, does not fit in with the problem. This is for the simple reason that the respondent company itself is part of a very much larger group, [REDACTED]. Thereby the same argument put forward by the respondent could equally apply to them.
62. In any event in making an assessment under Subsection (1) or (2) of Section 16 of the CRCA the Arbitrator must disregard the possibility of the tenant borrowing money.
63. Thereby I do not take any account of the ability or otherwise of either the applicant or the respondent being able to call upon support from their parent group.

64. From the documentation which has been put before me, the applicant is offering to compromise the matter by way of the payment of the sum of £41,200.38. This is as contained in their Rent Proposal Settlement.
65. The calculations as to how that has been reached has clearly been set out in that document.
66. There is no provision for the payment of any interest on this sum.
67. The respondent has rejected the applicant's proposal to settle the matter in the above sum.
68. The respondent is claiming the PRD in the sum of £76,401.24 plus interest.
69. I find that the PRD is in the sum of £76,401.24 as that is the unpaid rent which built up during the PRP. That is the sum (plus interest) which the applicant is seeking to be paid, in full.
70. There is no doubt in my mind that the business suffered financial loss during the PRP. The business was clearly viable before then and has returned to viability since restrictions were lifted.
71. Looking at the rent, I know that public houses are assessed on the basis of the profitability. I know that this is done by way of a "Profits Method" of valuation. It follows therefore that if a business is generating no profit then hypothetically it could not afford to pay any rent.
72. That point however stretches the imagination somewhat. The premises in question would still retain some value or benefit to the tenant, despite not generating any income.
73. Accordingly I come to the conclusion that in such circumstances it is unreasonable to expect the tenant to pay the full amount of rent due under his lease to the landlord.
74. I find thereby that the pain of the loss should be shared between landlord and tenant.
75. Having established that the PRD is £76,401.24, a sum claimed by the respondent, then an equal share of that sum is £38,200.62.
76. The applicant has proposed a settlement of the dispute in the sum of £41,200.38. This to be paid in four equal quarterly amounts.
77. Under the protocol of dealing with disputes by Arbitration the Arbitrator must make his Award between the sums argued for by the parties.
78. Therefore I Award that the Protected Rent Debt is in the sum of £41,200.38 and that is the sum for which I award relief. I make no provision for any interest to be levied on this sum. This amount to be paid in four equal amounts on a quarterly basis starting on 1st August.

Arbitration Costs

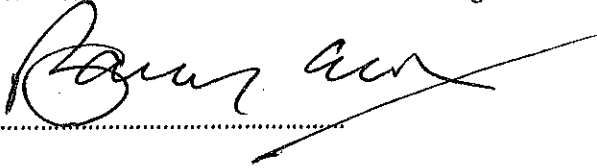
79. Under Section 19 (7) of the CRCA each party must pay its own costs. I am required to make an Award requiring the Respondent to reimburse half of the Arbitrator's fees. These have been paid by the Applicant and lodged with the RICS.

Publication of the Award

80. Pursuant to Section 18 (2) I am required to publish this Award.
81. This will be published by the RICS and is to be in an anonymised format.

Seat of the Arbitration

82. The seat of this Arbitration is in England and Wales

A handwritten signature in black ink, appearing to read 'Barry G Crux', is written over a horizontal dotted line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Barry G Crux FRICS ACI Arb

Dated 17 July 2023