

ARBITRATION AWARD NO.2

(Inclusive of a correction in accordance with Section 57(3)(a) of the Arbitration Act 1996)

**COMMERCIAL RENT ARREARS REFERENCE TO ARBITRATION AND THE
COMMERCIAL RENT (CORONAVIRUS) ACT 2022**

Applicant/Claimant/Tenant:

[REDACTED]

Represented by:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent/Landlord:

[REDACTED]

Represented by:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

THE RELEVANT PROPERTY

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

FINAL AWARD

OF

**DAVID GOODERHAM MRICS
ARBITRATOR**

Section 1

Preamble

- 1.1 This Arbitration arises as a consequence of the Applicant's (also referred to as the Claimant and Tenant) application to the Dispute Resolution Service ("DRS") of the Royal Institution of Chartered Surveyors ("RICS"), an approved arbitration body. The RICS are able to appoint arbitrator dispute resolvers in respect of applications made under the Commercial Rent (Coronavirus) Act 2022 ("CRCA") in respect of resolution of parties non agreement regarding the matter of relief from payment of a protected rent debt.
- 1.2 Following my appointment and engagement with the parties, the Respondent (also referred to as the Landlord) raised the contention that this Arbitration was not appropriately constituted. I addressed this matter by way of my Award No.1, dated the 9th June 2023.
- 1.3 As a consequence of my Award No.1, it is appropriate that I proceed to make my Final Award (Award No.2) in connection with relief from payment of the protected rent debt.
- 1.4 I thank the Applicant for making a further payment to the RICS in respect of funds to be held by them, to cover the Arbitrator's charges, receipt by the RICS being confirmed to me on the 22nd September 2023.

Section 2

Matters in Agreement/Not in Dispute

- 2.1 Procedure D of the RICS Scheme is to be utilised.
- 2.2 Having dealt with the matter addressed in my Award No.1, this dispute is eligible for arbitration.
- 2.3 The solvency of the Respondent.
- 2.4 The viability of the Applicant's business.

Section 3

Matters in Dispute

- A. The protected rent debt.
- B. The appropriate relief from payment.
- C. Costs

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A. The Protected Rent Debt

- 3.1 The definition of protected rent in the CRCA Section 3(i) is, “A *protected rent debt is a debt under a business tenancy consisting of unpaid protected rent*”.
- 3.2 Rent paid during the protected rent period cannot be protected as it is not unpaid and is not a debt.
- 3.3 The Applicant assesses the amount of rent owing during the protected period as being £352,124.55. It is pointed out by the Respondent that this sum does not include the service charge payment due during this period and including this sum, which I calculate to be £5,315.60, the amount due is £357,440.15. I am adopting the Respondent’s sum as Section 2(2)(c) of CRCA is clear that service charge is included in what is defined as protected rent debt and it is only the Respondent who has presented evidence in this respect.
- 3.4 The parties agree the Tenant paid £151,395.83 during the protected period.
- 3.5 Under the terms of the CRCA the amount on which I may give relief, i.e. the protected rent, I calculate to be £357,440.15 less £151,395.83, resulting in the sum of £206,044.32.
- 3.6 Accordingly, I find the protected rent debt to be £206,044.32.

B. The Appropriate Relief From Payment

- 3.7 For the Applicant it is pointed out that the tenancy giving rise to the claim for relief from payment of protected rent debt, is in use as a restaurant. The impact of the Coronavirus Pandemic restrictions on trade/operation are summarised.
- 3.8 The Applicant’s representative provides, in addition to the written statement, accounting data, at both a unit and group/company level, along with a summary of rent concession arrangements agreed at █████ of the Applicant’s other sites. Also, copies of exchanges with a director of the Respondent company.
- 3.9 The formal proposal made by the Applicant is that the funds drawn from the rent deposit by the Landlord are replenished by the Respondent, this is a sum of £181,474.51. In addition, that no further rent payments are made beyond those that were paid during the relevant period, of £151,395.83.
- 3.10 For the Respondent the formal proposal put forward is that the protected rent debt sum of £206,044.32 is reimbursed by the Applicant in 24 monthly instalments, with no interest applying.
- 3.11 In the Respondent’s representative’s written statement in which their formal proposal is set out, observations are passed upon the Applicant’s supporting evidence including drawing attention to the (pre Pandemic) level of profitability of the operation carried out under the tenancy in question. I do not see that the final sentence of paragraph 14.1(i) is entirely accurate/helpful: “*This means that the actual figures should be at least £200,000 higher*”, as rent is an outgoing the tenant is to bear; it is also highlighted that the Applicant opened a new branch in



- November 2021 and that from May 2021 the Applicant's company's sales started to return to pre-Pandemic levels.
- 3.12 I note that the Applicant company achieved its highest level of company sales, in March 2022 and in the same month, the subject unit, achieved sales within approximately 12.4% of the highest monthly sales figure of the data entered in evidence. I also note that the EBITDA performance, both at a unit and on a group basis, were materially lower than pre-Pandemic.
- 3.13 The CRCA sets out the principles I must consider when making an award on the matter of relief from payment. These are set out in Section 15 and I summarise as follows:
- a) They should aim to preserve, or restore and preserve, the viability of the tenant's business so far as that is consistent with preserving the landlord's solvency.
 - b) The tenant should meet its obligations under the contractual terms of the lease to pay rent as far as is consistent with (i) above.
- 3.14 Section 6 CRCA defines "Relief from payment" of a protected rent debt as any one or more of:
- a) Writing off the whole or any part of the debt.
 - b) Giving time to pay the whole or any part of the debt.
 - c) Reducing (including to zero) any interest payable in relation to the whole or any part of the debt.
- 3.15 Section 16 of the CRCA sets out the matters I must have regard of when assessing viability. Essentially, this section states that I must have regard to these matters when assessing viability if they are brought to my attention:-
- a) Assets and liabilities of the tenant, including any other tenancies to which the tenant is a party;
 - b) The previous rental payments made under the business tenancy from the tenants to the landlord;
 - c) The impact of Coronavirus on the business of the tenant; and
 - d) Any other information relating to the financial position of the tenant the Arbitrator considers appropriate.
- 3.16 Section 13 CRCA details the awards that an arbitrator may make. As there is common ground that the circumstances meeting Section 13 (4) of CRCA prevail, I am to consider whether the tenant should receive any relief and if so, make an award in accordance with Section 14.

- 3.17 Section 14 (2) CRCA requires that I consider the formal proposal put forward by each party. Where both parties have put forward final proposals that are consistent with the principles set out at Section 15, then the award is to be in line with whichever proposal I consider to be the most consistent. If I consider that only one of the two proposals is consistent with the Section 15 principles, then I am to award in line with that proposal. Otherwise, I must make the award I consider appropriate, applying the Section 15 principles.
- 3.18 If I do not proceed in accordance with Section 14(3)(a) or (b) then any award I make may include/cover the below matters, which I summarise from Section 14 as:
- a) To give the tenant relief from payment of the protected rent debt, in all or part.
 - b) To state that the tenant is to be given no relief from payment.
 - c) Giving time to pay the whole or part of the debt, including by instalments, and if so over a period not exceeding 24 months.
- 3.19 The proposal made by the Applicant is that they receive relief from the payment of any rent due during the protected period other than the sum paid of £151,395.83 during the protected rent debt period and that the Respondent be responsible for reinstating/replenishing the sum draw down by them from the rent deposit. I note from page 127 of the Applicant's representative's evidence bundle that the amount drawn from the deposit is £181,474.51, representing the entirety of the rent deposit. At paragraphs 3.14 and 3.18 hereof I summarise the matters I may include in my award. It is apparent to me that I do not have the jurisdictional powers to determine/order the Respondent to restore/replenish the rent deposit. Whilst this element of the Applicant's final proposal is not necessarily inconsistent with Section 15 principles, I see it as inconsistent with my legislative power.
- 3.20 Whilst I acknowledge that the effects of the Pandemic/Covid trade restrictions were undoubtedly very difficult and would have caused undeniable financial stress and deep concern over the future prospects for the Applicant's business, I do not see the actions of them opening a new site in [REDACTED] in November 2021 (evidence entered by the Respondent) as consistent with the actions of a business seeking to preserve its liquidity as a consequence of being in a precarious position.
- 3.21 Having regard of the core principles applying (Section 15 CRCA) and following the statutory guidance at Section 14 (3)(a), I consider the Respondent's formal proposal the most consistent and accordingly, award in accordance therewith.

Costs (C)

- 3.22 Section 19(5) CRCA requires me to make an award of costs that reimburses the Applicant for the application fee and my fees, unless under Section 19(6) I consider it more appropriate to award alternatively.
- 3.23 The Respondent, in accordance with Section 19(6) of CRCA, in their formal proposal, proposes they have no responsibility for costs.



3.24 Due to my findings in relation to the protected rent debt I see that costs should follow the event and award accordingly.

Section 4

Award

4.1 I hereby Award and Direct as follows:-

- a) The Applicant is to pay the Respondent monthly instalments of £8,585.18, the payment programme commencing with the day following the date hereof and concluding no later than 24 months thereafter. No interest is to apply.
- b) The Respondent is to have no responsibility for costs in connection with this Award No.2. The costs position set out in my Award No.1 remains unaltered.

Section 5

Publication

- 5.1 This award must be published. I intend to publish it on the RICS website.
- 5.2 I attach a redacted copy of the award which I will send to the RICS for publication unless I bear back from you that you require further redactions to be made, within the next seven days.

Section 6

Seat

- 6.1 The seat of this Arbitration is England and Wales.
- 6.2 This is my Final Award, including the matter of costs.

Signed


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David Gooderham MRICS
Arbitrator

Date 8th March 2024