IN THE MATTER OF AN ARBITRATION UNDER THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

BETWEEN

PASLEY-TYLER & CO LIMITED
(APPLICANT)

&

BERKELEY SQUARE HOLDINGS LIMITED
(RESPONDENT)

IN RESPECT OF
42 BERKELEY SQUARE, LONDON, W1J 5AW

FIRST AWARD
BY
BY SIMON S GOULDBOURN BSc MRICS ACIArb
ARBITRATOR

MEMBER OF THE INTERNATIONAL RETAIL NETWORK Europe | America

33 Foley Street, London W1W 7TL
www.klm-re.com +44 (0) 20 7317 3700

1.0 *Preliminaries*

1.1 The Applicant is Pasley-Tyler & Co Limited, the Tenant of premises known as 42 Berkeley Square, London, W1J 5AW (The Premises). The Applicant is represented by Mr Robert Pasley-Tyler (RP) of Pasley-Tyler & Co Limited.

1.2 The Respondent is Berkeley Square Holdings Limited, the Landlord of the aforementioned Premises. The Respondent is represented by Mr Jason Pinkey (JP) and Ms Julianne Treacy (JT) both of Eversheds Sutherland Solicitors.

1.3 The Applicant has accrued arrears under the lease it holds at The Premises and is seeking relief from payment of some of those arrears under the Commercial Rent (Coronavirus) Act 2022 (CRCA).

1.4 The Applicant said that The Premises was subject to a Closure Order because it operated a hospitality function which was prohibited during the Covid period.

1.5 The Respondent's position is that The Premises are non-qualifying for the purposes of s.3 of the CRCA as the user is high class offices within B1 which were not subject to a closure period during the Covid pandemic.

1.6 Further, the Respondent submits that the Applicant has made a defective reference to arbitration as it did not comply with the statutory time limits provided under s.10 of the CRCA.

2.0 *Procedural Background*

2.1 In its application form to the RICS dated 22nd September 2022, the Applicant put forward a proposal to settle the protected rent debt arrears dispute and requested the arbitration be conducted in accordance with the RICS arbitration procedure "D".

2.2 On 5th October 2022 JP on behalf of the Respondent sent a proposal to the Applicant.

2.3 On 5th January 2023 I was appointed by the President of the Royal Institution of Chartered Surveyors (RICS) to act as an arbitrator under the CRCA.

2.4 I convened a pre-arbitration meeting on 23rd January 2023 during which my fee basis was agreed together with a timetable for lodging amended proposals.

2.5 The Applicant provided an amended proposal on 2nd February 2023 and the Respondent provided an amended proposal on 2nd March 2023.

2.6 The Applicant was given opportunity to make a further amended proposal which was lodged on 31st March 2023 and the Respondent submitted a further amended proposal on 17th April 2023.

2.7 There followed further email exchanges and commentary principally as a result of an arbitration award being released in relation to a rent review on 42 Berkeley

Square effective July 2019 which covered the protected rent period and affected calculations of any protected rent debt owed.

2.8 Both parties made further comment in connection with the rent review, all comments finally received on Friday 30th June 2023.

3.0 *Legal Framework*

3.1 The CRCA enables resolution by arbitration (if it cannot be resolved by agreement) of relief from payment of a protected rent debt due to be paid by the tenant to the landlord under a business tenancy.

3.2 The Applicant may apply for arbitration under s.10 of the CRCA as follows:

1. *s.10(1) before making a reference to arbitration*

   (a) *The tenant or landlord must notify the other party ('The Respondent') of their intention to make a reference, and*

   (b) *The Respondent may within 14 days of receipt of the notification under paragraph (a), submit a response.*

2. *A reference to arbitration must not be made before:*

   (a) *The end of the period of 14 days after the day on which the response under subsection (1) (b) is received, or*

   (b) *If no such response is received, the end of the period of 28 days, beginning with the day on which the notification under subsection (1)(a) is served.*

3.3 Any reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt as prescribed by s.11(1) of the CRCA.

3.4 A qualifying "protected rent debt" under s.3 (2) (a) applies to a business tenancy which has been adversely affected by coronavirus such that the whole or part of those business premises were subject to a closure requirement as prescribed by s.4 of the CRCA:

"(1) A business tenancy was "adversely affected by coronavirus" for the purposes of section 3(2)(a) if, for any relevant period –

(a) the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or

(b) the whole or part of those premises,

was of a description subject to a closure requirement.

(2) For this purpose –

(a) "closure requirement" means a requirement imposed by coronavirus regulations which is expressed as an obligation-

(i) to close businesses, or parts of businesses, of a specified description, or

(ii) to close premises, or parts of premises, of a specified description; and

(c) "relevant period" means a period beginning at or after 2 p.m. on 21 March 2020 and ending at or before –

(i) 11.55 p.m. on 18 July 2021, for English business tenancies.

3.5 Under s.2 (1) of the CRCA, rent means an amount consisting of one or more of the following:

a) an amount payable by the tenant to the landlord under the tenancy for possession and use of the premises comprised in the tenancy (whether described as rent or otherwise);

b) an amount payable by the tenant to the landlord under the tenancy as a service charge;

c) interest on an unpaid amount within paragraph a) or b).

3.6 In my capacity as arbitrator under s.6 (2) of the CRCA I am to consider the matter of relief from payment of a protected rent debt, my remit to include any one or more of the following:

a) writing off the whole or any part of the debt;

b) giving time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments;

c) *reducing (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or any part of the debt.*

3.7 A key arbitrator's principle under s.15 (1) of the CRCA is aimed at preserving, or restoring and preserving, the viability of the tenant's business, so far as that it is also consistent with preserving the landlord's solvency.

3.8 In assessing the viability of the business of the tenant, the arbitrator is directed by s.16 (1) of the CRCA and must, so far as known, have regard to:

a) the 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 tenant to the landlord

c) the impact of coronavirus on the business of the tenant, and

d) any information relating to the financial position of the tenant that the arbitrator considers appropriate.

3.9 In assessing the solvency of the landlord, the arbitrator must, under s.16 (2) so far as known, have regard to:

a) *the assets and liabilities of the landlord, including any other tenancies to which the landlord is a party, and*

b) *any other information relating to the financial position of the landlord that the arbitrator* considers appropriate.

3.10 Whilst making an assessment of the tenant's viability and landlord's solvency, I am to disregard the possibility of the tenant or the landlord borrowing money or restructuring its business.

4.0 *The Applicant's Proposal*

4.1 The Applicant placed on record that due to a rent review applicable from July 2019 being outstanding (and subject to Arbitration) it was not possible to supply actual numbers within its proposal.

4.2 RP stated that the Respondent's hospitality operation at 42 Berkeley Square was closed during the Covid period and had been inspected by the police.

4.3 RP proposed a 50:50 split of the eventual sum determined following the Arbitration Award covering the protected rent debt period.

4.4 RP confirmed that the Respondent is not seeking relief from payment at its two contiguous buildings, 1 and 3 Hill Street, because it was legally possible for clients to enter those premises.

5.0 *The Respondent's Proposal*

5.1 The Respondent reaffirmed that the Applicant holds a lease from the Respondent dated 24th July 2014 for a term of years expiring on 24th July 2024.

5.2 The Respondent highlighted the user clause:

"Not to use the Premises other than as high quality offices within Class B1(a) of the Town and Country Planning (Use Classes) Order 1987."

5.3 The Respondent put the Applicant to proof that the premises were subject of a closure requirement as provided by s.3 of the CRCA.

5.4 The Respondent maintained the Applicant is in breach of the lease and in debt to the Respondent in the sum of £240,663.60 in respect of the "protected period".

5.5 The Respondent challenged the validity of procedure adopted by the Applicant pursuant to the CRCA.

5.6 The Respondent particularly highlighted that the Applicant had failed to serve a notice of intention to refer to arbitration required pursuant to s.10(1)(a) of the CRCA, in a timely manner.

5.7 The Respondent said that it received a Notice dated 22nd August 2022 but only having received it by email sent at 5:38pm on Friday 23rd September 2022.

5.8 The Respondent maintained that the reference to Arbitration did not comply with s.11(1) of the CRCA in that it did not have any accompanying supporting evidence. Nor did the Proposal clarify nor detail the amount of rent covering the "protected period".

5.9 The Respondent stated it consequently had difficulty in putting forward any formal proposal in response because it had insufficient information available. The Respondent reserved its right to submit a formal proposal should the Applicant provide further information.

5.10 The Respondent further stated it was unable to make any submissions as to whether the business of the Applicant was viable as it had not seen any requisite information.

5.11 The Respondent acknowledged that the question of the Respondent's solvency was not an issue to these proceedings.

5.12 Whilst reserving its position with regard to the validity of the reference, the Respondent felt it was unable to properly submit a proposal as to the protected rent that should be payable pursuant to the CRCA and which the Applicant could afford to pay.

5.13 The Respondent maintained that the Applicant had expressed a positive intent with regard to its continued occupation of the premises and the Respondent proposed there be no reduction or further delay in the payment of rent and that it should be paid in full.

5.14 The Respondent reserved the right to put forward an amended proposal or make further comment when full and proper disclosure of information had been provided by the Applicant.

5.15 The Respondent made a Statement of Truth at the end of its formal Proposal.

6.0 *The Applicant's Amended Proposal*

6.1 RP provided a commentary and amended proposal in response to the Respondent's proposal, dealing only with s.11 of the CRCA.

6.2 PR remained silent on provision of proof that the Notice of Intention to refer to arbitration required by s.10(1)(a) was given in time to the Respondent.

6.3 RP maintained the use of the building was as high class offices and meeting space for corporate bodies. The accommodation offered a wide range of services including temporary offices and related services with Board meetings, dinners and other corporate meetings being a vital part of the building's function.

6.4 RP stated that 42 Berkeley Square was subject to mandatory closures preventing the Respondent from operating its business during the Covid lockdowns. He reiterated that the police visited to check compliance.

6.5 Having been profitable for the previous 18 years, severe losses for years ending 2020 and 2021 followed.

6.6 RP attached financial records for the relevant years and made comparison with previous years to highlight the adverse effect on income as a result of the lockdown period. RP provided accounts showing that at financial year end 31st July 2019 profit for that year was £129,150 set against a profit of £14,540 for the year ending 31st July 2020.

6.7 RP stated that the Respondent was advised in March 2020 to withhold rent for 42 Berkeley Square due to enforced business closures and uncertainty at the start of the pandemic. RP did not state who provided that advice.

6.8 RP stated that the uncertainty was magnified by the Respondent triggering the July 2019 rent review in March 2020.

6.9 The Respondent paid one quarters rent in 2020 but paid no further rent until after July 2021.

6.10 RP maintained that the Applicant owed £290,663.60 for the period March 2020 – July 2021. The total rent payable under the lease for the lockdown period amounted to £480,000 excluding whatever additional rent might be payable following rent review.

6.11 The Applicant provided audited accounts together with a bar chart of meeting room bookings covering the period August 2019 – November 2021 with bank statements in support of its Proposal.

6.12 The Applicant made a Proposal of a 50:50 split in protected rent due from March 2020 – July 2021 extended to include any rent increase arising from the July 2019 rent review.

6.13 The Applicant stated that a stay in proceedings might suit pending the outcome of the rent review and made a Statement of Truth at the end of the amended proposal.

7.0 *Respondent's Amended Proposal*

7.1 The Respondent considered that there were three matters to which the Arbitrator must direct himself.

1. Whether the arrears in question are a protected rent debt within the meaning of s.3 of the CRCA;
2. whether the Applicant made a referral to Arbitration in accordance with the provisions of s.10 of the CRCA; and

3. assuming the Arbitrator is satisfied in relation to the first two issues, whether the Applicant should be entitled to any relief in accordance with s.13 of the CRCA.

7.2 JT on behalf of the Respondent submitted that the arrears in question do not constitute a protected rent debt.

7.3 JT highlighted s.4 of the CRCA:

"(1) A business tenancy was 'adversely affected by Coronavirus' for the purposes of s.3(2)(a) if, for any of the relevant period:

(a) the whole or part of the business carried on by the tenant at or from the Premises comprised in the tenancy, or

(b) the whole or part of the Premises, was of a description subject to a closure requirement.

(2) For this purpose:

(a) 'Closure requirement' means a requirement imposed by Coronavirus regulations which is expressed as an obligation:

(i) to close businesses, or parts of businesses, of a specified description, or

(ii) to close premises, or parts of premises of a specified description"

7.4 The User Clause is *"High quality offices within Class B1(a) of the Town and Country Planning (Use Classes) Order 1987"*.

7.5 JT maintained at no point were high class offices or offices of any kind subject to a mandatory Closure Order.

7.6 JT maintained that the Applicant had not identified the Statutory Instrument pursuant to which it considered it was subject to a mandatory Closure Order. Further, JT stated that RP had provided no evidence of the police attending the premises and nor can it be inferred that any police attendance at the premises meant that a Closure Order applied.

7.7 JT insisted that the Applicant be put to strict proof in respect of the relevant Statutory Instrument requiring it to close.

7.8 JT referred to an arbitration under the CRCA between *(1) Signet Trading Limited and (2) Fprop Offices (Nominee) 4 Limited and (3) Fprop Offices (Nominee) 4 Limited 5 Limited*. In this award the arbitrator decided that offices were not subject to formal closure requirements under the CRCA.

7.9 JT contended that in the absence of evidence, the Applicant was either operating from the premises in breach of the lease or ceased operations voluntarily (or for commercial reasons) but not due to a mandatory Closure Order or other statutory regulation.

7.10 JT maintained if closure is not required by law then the Applicant is not entitled to relief under the CRCA.

7.11 JT concluded that the outstanding arrears are not a protected rent debt within the meaning of the CRCA and the arbitrator has no jurisdiction to make any award for relief from payment. The Applicant's referral to arbitration should be dismissed.

7.12 JT went on to deal with the actual referral to arbitration and set out the relevant paragraphs of s.10 of the CRCA.

7.13 JT highlighted that the CRCA was passed on 24th March 2022 and any reference to arbitration needed to have been made on or before 23rd September 2022, i.e. six months after the passing of the CRCA.

7.14 The Applicant must have consequently formally notified the Respondent of its intention to refer to arbitration on or before 26th August 2022 according to JT.

7.15 JT reiterated that whilst the notice of intention to refer to arbitration was dated 22nd August 2022, the notice was only received by email timed at 5:38pm on Friday 23rd September 2022 (a copy of which was supplied with the amended formal proposal).

7.16 JT attached what she considered to be an issue of a formal proposal dated 2nd September 2022 under cover of an email dated 5th September 2022. JT contended that this proposal was made out of time.

7.17 JT maintained that the Applicant provided no evidence it had complied with s.10 of the CRCA and demanded that it be put to strict proof in this regard.

7.18 I am referred to an arbitration award of 15th December 2022 *Hanbury Print.com Limited, t/a The Print Team v Serge & Vivienne Primack.*

7.19 This award highlighted the importance of following strict procedures for referral to arbitration set out in the CRCA. The Respondent maintained that unless the Applicant can demonstrate that s.10 of the CRCA was complied with, then it has failed to make a compliant referral and the arbitrator has no jurisdiction to proceed.

7.20 With regard to outstanding arrears, JT again clarified that submissions regarding arrears were to be made without prejudice to the Respondent's primary position that those arrears are not protected and that the referral to arbitration did not conform with the requirements of the CRCA.

7.21 JT queried the arrears statement of £290,663.60 and asked that the Applicant provide details of the relevant figures.

7.22 JT did not want a stay of proceedings pending the outcome of the 25 July 2019 rent review at the premises.

7.23 JT maintained that if I find I have jurisdiction to make an award, then I could do so notwithstanding that arrears would not crystallise until the award on the outstanding rent review was published.

7.24 JT maintained that the Applicant has a viable business and there is no basis upon which it should be entitled to relief.

7.25 JT highlighted the principles in s.15 of the CRCA, where the arbitrator's award should be aimed at preserving the viability of the business of the tenant, so far as that it is consistent with preserving the landlord's solvency.

7.26 JT confirmed that the Respondent Landlord is solvent and that this dispute falls within s.13(4)(a) of the CRCA meaning that I would consider the Applicant to have a viable business.

7.27 JT stated that the Applicant had provided insufficient information to evidence its position and sought to reserve the right to comment upon any additional supporting information supplied by the Applicant.

7.28 JT recognised the drop in profit experienced by the Applicant during the "protected period", particularly in 2021 where the Applicant recorded a loss of £391,792.

7.29 JT went on to state that the Respondent had no information as to how the Applicant's business had recovered in 2022 or as to its financial projections for 2023.

7.30 The Respondent had also noted that the Applicant's "cash in hand" had remained constant at approximately £1.4 million since 2019.

7.31 Dealing specifically with the bank statements supplied by RP, two had balances of £162,508.05 and £1.08 million as at 30 September 2022. The other statement showed a decreasing balance, but with no details of any withdrawals having been provided.

7.32 JT highlighted that monthly income had reached pre-pandemic levels at approximately £10,000 and that the following income element remained steady throughout the Protected Period:

- Membership subscriptions
- Professional services income
- Rental income
- Admin secretarial services income
- Sundry income
- Licence income at No. 1 Hill Street and No. 3 Hill Street.

7.33 JT noted that the Applicant had recorded a constant gross profit of approximately £100,000 - £150,000 for each month during the period March 2020 - July 2021. JT concluded that the business was viable, even at the height of the pandemic, and that the Applicant should now be in a position to make payment of all arrears in full.

7.34 JT acknowledged that the Respondent accepts that the Applicant experienced difficulties throughout the Protected Period, but it has not demonstrated that an award for relief of the arrears is appropriate or would be consistent with the principles set out at s.15 of the CRCA.

7.35 JT contended that if the Applicant qualified for relief under the CRCA then there is no reason why the Applicant could not pay arrears in full immediately with any necessary adjustments made once the outstanding rent review had been published.

7.36 In reaching a conclusion, JT contended that:

- The Applicant's business was not subject to a mandatory Closure Order and consequently the arrears are not protected under the CRCA.
- If it is found the premises were subject to a Closure Order, then the Applicant failed to make a referral to Arbitration in accordance with s.10 of the CRCA.
- If the Arbitrator considers that the premises were subject to a Closure Order, and an application had been made in accord with the provisions of the CRCA, then the Applicant's Proposal is inconsistent with the provisions in the Act and no relief should be awarded to the Applicant.

8.0 *Applicant's Further Amended Proposal*

8.1 In response to JT's Amended Proposal, RP explained that 42 Berkeley Square has a hybrid nature, providing a variety of corporate hosting services on an exclusive membership basis and so different to standard office buildings.

8.2 According to RP the Applicant company is 'generally defined' as a member's business house required to close under Schedule 2 of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020.

8.3 RP maintained that there has been 26 years of occupation during which time the Respondent had never interpreted their use as being in breach of the lease and were aware that there has been serving of limited food and drink to its clients within a business environment.

8.4 RP stated that s.4 (i), 4(ii) of Schedule 2 of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 required the closure of any premises selling food and drink for consumption on the premises.

8.5 RP makes mention of Use Class B1 now being incorporated within Class E under Schedule 2 Part A of the Town and Country Planning (Use Classes) (Amendment), (England) Regulations 2020 which he considers is more inclusive, but does not explain how it applies to the premises.

8.6 RP draws my attention to para 4.17 of the Guidance to CRCA:

"If businesses that were required to close their business or premises were still allowed by the regulations to do certain activities, these activities should be disregarded when determining whether a tenancy was adversely affected by Coronavirus and therefore within the scope of arbitration."

RP stated that I am consequently to disregard the fact that 1-3 Hill Street was permitted to remain open when determining, in his view, the closure requirements at 42 Berkeley Square.

8.7 RP referred again to the police visiting the premises and said that was to ensure the Applicant was not receiving any clients during the second mandatory lockdown period.

8.8 RP confirmed that the RICS application on the DRS CRAA 1 form contained a typographical error in that it should have been dated 22 September 2022 and not 22 August 2022.

8.9 RP confirmed that the Applicant's late submission of a reference to arbitration on 23 September 2022 was in contravention of the provisions of s.10 of the CRCA.

8.10 RP cited the lack of receipt of the arbitration award at the premises as being the principal reason for the delay in making an arbitration reference under the CRCA because it could not make a definitive proposal based on actual figures resulting from that rent review arbitration.

8.11 RP disputed the amount of protected rent debt and applied a figure of £340,183.60 which he said would be subject to further reconciliation following the publication of the arbitration award on the outstanding rent review at these premises.

8.12 RP goes on to state that the Applicant's viability cannot be fully assessed until the rent review had concluded, following which both parties could reassess their position with more accurate figures.

8.13 RP is firmly of the view that its business model requires sufficient operating cash to retain their high class client base and to move the business forward over the next decade.

8.14 Payment of the full amount of protected rent debt will substantially reduce the Applicant's cash reserves and leave it vulnerable according to RP.

8.15 RP mentioned an arbitration award under CRCA at 124 Kingsland Road, where the tenant was awarded 50% relief from payment due to a closure requirement having been satisfied at that time by the arbitrator.

8.16 RP supplied further financial information and advised that the Applicant's cash reserves had reduced from £1.4 million to £1.2 million.

8.17 RP offered to provide additional financial information wherever necessary.

8.18 RP referred back to the arbitration award at 124 Kingsland Road as being helpful in that a 50:50 apportionment was made by the arbitrator, notwithstanding that no accounts were provided or details of actual losses incurred.

8.19 RP maintained that a 50:50 split of the protected rent debt should be applicable.

8.20 RP complained that the Respondent called on the Applicant's rent bank guarantee of £100,000 and applied that sum to the protected rent debt. He contended that this is in contravention of s. 23 of the CRCA.

8.21 RP stated s.4.31 of the CRCA permitted an arbitrator to offer the tenant relief from making good any shortfall resulting from the landlord drawing down on a deposit before the CRCA was passed.

8.22 RP requested that the rent bank guarantee be returned and that the actual protected rent debt is £549,229.50.

8.23 The Applicant contended that under the principles of the CRCA it should be awarded 50% relief from the rent due for the period March 2020-July 2021.

9.0 *Applicant's Amended Proposal following publication of the July 2019 Rent Review at 42 Berkeley Square, London W1*

9.1 On 9th June 2023, RP confirmed that the July 2019 rent review at 42 Berkeley Square, London, W1 had been published.

9.2 The rent increased and as a consequence, RP confirmed that the Applicant owed the Respondent the sum of £509,513 plus VAT for the period 21st March 2020 - 18th July 2021, the protected period.

9.3 RP then provided the figures showing the increase in rent payable as a consequence of the rent review both pre and post-pandemic up to 23rd June 2023.

9.4 RP explained that without relief for the protected rent period, the total debt owing was in excess of £1,590,605 plus VAT. Repaying the entirety of that sum would strip the Applicant of its cash reserves.

9.5 RP argued that such a loss of cash reserve would severely threaten the viability of the Applicant's business, but with relief for the amount owing for the protected rent period, the Applicant's business would remain viable.

9.6 RP requested that the arbitrator reflect on the difficulties caused by the delayed rent review, which caused the Applicant difficulty in submitting a '*correct and meaningful application within the time constraints set out in the Act'.*

9.7 The Applicant maintained that the premises were qualifying for the purposes of the Act and mentioned other premises also subject to forced closure during the pandemic, namely the Institute of Directors and Dartmouth House.

10.0 *Respondent's response to Applicant's Statement of 9th June 2023*

10.1 JT began by reiterating the Respondent's position that the Applicant's premises were non-qualifying for the purposes of the CRCA and that the Applicant failed to make a referral to arbitration in accordance with the provisions of s.10 of the CRCA.

10.2 The Respondent advised that the protected rent debt amounts to £521,040.25 plus VAT, as per a statement enclosed by JT.

10.3 JT said it was not entirely clear from RP's latest statement whether the Applicant was seeking full relief from the entirety of the outstanding protected debt.

10.4 JT makes reference to No's 1 and 3 Hill Street, and states that the Applicant is not a party to the tenancies at those premises and so I am not entitled to consider any obligations of a separate corporate entity when considering the award for relief requested by RP.

10.5 JT takes issue with the Applicant's position on viability. JT maintains that RP had provided no evidence supporting its position on viability, namely citing the lack of up to date accounts/management accounts or evidence of other liabilities.

10.6 JT referred to projections put forward by RP in his previous statement regarding sales predictions, the direct expenses claimed or the overheads which appeared to be fixed for the remainder of 2023.

10.7 JT's position is that the purpose of the CRCA is to provide relief for tenants suffering hardships caused by the Coronavirus pandemic and not as a result of an outstanding rent review award.

10.8 JT further maintained that, contrary to the Applicant's statement, it has proved resilient and made a steady recovery following the pandemic.

10.9 JT accepted that the outcome of the rent review has increased the level of protected rent debt but is of the opinion that that should have come as no surprise to the Applicant.

10.10 The Applicant had made several mentions of the outstanding rent review potentially affecting the level of debt and was in full knowledge of the range of potential outcomes of the rent review.

10.11 There was consequently nothing to prevent the Applicant from modelling a financial position based on the varying outcomes and providing these to the Respondent and arbitrator.

10.12 The Respondent is of the view that the Applicant should not be granted any relief as it has a profitable business with considerable cash in hand.

10.13 JT confirmed that the Respondent would be willing to allow payment of the protected rent debt over a period of six months, together with interest.

10.14 The Respondent considered that is a very reasonable final proposal under s.11 of the CRCA.

11.0 *Applicant's Response to Respondent's Comments of 21st June 2023*

11.1 On 29th June 2023, the Applicant claimed there were factual inaccuracies to the Respondent's comments made on 21st June 2023.

11.2 RP maintained that the Respondent cannot take the rent guarantee as it is in contravention of s.23(1) of the CRCA.

11.3 The Applicant accepted that the total amount in dispute for the protected rent period is £712,453.36. RP explained that it had made two payments of £50,000 towards rent arrears at 1 Hill Street and had paid the second quarter's rent in 2020, but included this amount in dispute in accordance with s.5 of the CRCA.

11.4 RP advised that 1 and 3 Hill Street are not separate entities, being held in the name of Pasley-Tyler Holdings Limited, which owns 100% of Pasley-Tyler and Company Limited. RP maintained that 42 Berkeley Square and 1-3 Hill Street are treated as one entity regarding costs, revenues and liabilities.

11.5 RP included a full set of accounts for the year ending July 2022, which show a loss of £217,000 and a loss of £391,000 for the previous year.

11.6 RP also attached a bank statement showing it held £1.1 million. RP advised that the statement fluctuates, but it is not the £1.4 million cash reserves that the Respondent had mentioned.

11.7 RP reiterated that the outcome of the rent review had had a significant impact on the viability of the Applicant's business. RP considered it unrealistic to expect the Applicant to settle the protected rent debt in a period of six months.

My Decision

12.0 *Was the Applicant's Notice Letter dated 22nd August 2022 valid?*

12.1 The Respondent has stated that I have no jurisdiction to proceed with this arbitration because it contends that:

1. The arrears do not constitute a protected rent debt within the meaning of s.3 of the CRCA; and
2. The Applicant has failed to make a valid referral to arbitration in accordance with the provisions set out within s.10 of the CRCA.

12.2 S.30 of the Arbitration Act 1996 as modified by Schedule 1(j) of the CRCA, makes provision that I can rule on my own jurisdiction.

12.3 The Respondent mentioned the possibility of a legal assessor being used to determine my jurisdiction but the Applicant saw no need for the appointment of a legal assessor on this point.

12.4 I consider it appropriate to deal firstly with the Applicant's referral to arbitration because sequentially the reference to arbitration is made first.

12.5 To re-cap s.10 sets out the requirements for making a reference to arbitration as follows:

(1) Before making a reference to arbitration:

(a) The tenant or landlord must notify the other party ('The Respondent') of their intention to make a reference, and

(b) The Respondent may within 14 days of receipt of the notification under paragraph (a), submit a response.

(2) A reference to arbitration must not be made before:

(a) The end of the period of 14 days after the day on which the response under subsection (1) (b) is received, or

(b) If no such response is received, the end of the period of 28 days, beginning with the day on which the notification under subsection (1)(a) is served.

12.6 Any reference to arbitration is to be made within six months beginning with the day on which the CRCA was passed:

s.9 (2) A reference to arbitration may be made by either the tenant or the landlord within the period of 6 months beginning with the day on which this Act is passed

12.7 The CRCA was passed on 24th March 2022, and so any reference to arbitration needed to have been made by 23rd September 2022.

12.8 The Respondent drew my attention to the Applicant's notice of intention to refer to arbitration, which was dated 22nd August 2022. It had been sent to the Respondent's former asset managers, Astrea Asset Management, but the notification by email was timed at 5:38pm on Friday 23rd September 2022.

12.9 The Respondent put the Applicant to proof that the notice of Intention to refer to arbitration required by s.10(1)(a) was given in time to the Respondent.

12.10 Within its response to the Respondent's amended formal proposal dated 31st March 2023, the Applicant confirmed that the notice of intention to refer to arbitration should have been dated 22nd September and *"accepts that their late submission of a reference to arbitration on 23rd September was in contravention of the provisions of Section 10 of the Act."*

12.11 It is an agreed fact between the parties that the notice of intention to refer to arbitration was served on 23rd September 2022. Both parties to this dispute have confirmed the same and the Applicant has further confirmed it contravened the notice provisions set out in the CRCA.

12.12 The service of notice of intention to refer arbitration has left insufficient time for the Respondent to reply (14 days); or where no response is received (28 days) before making an application prior to the statutory deadline of 23rd September 2022.

12.13 The Applicant's notice letter which should have been dated 22nd September 2022 was invalid because the subsequent time limits prescribed under s.10 of the CRCA meant that any referral would beyond the six month statutory time limit set out at s.9(2) of the CRCA.

12.14 In finding that the Applicant has failed to serve a valid notice for the purposes of these proceedings, I have no jurisdiction to proceed.

12.15 There is consequently no requirement for me to consider whether the Applicant had been occupying qualifying premises as prescribed by s.3 of the CRCA and, if so, whether the Applicant should be entitled to any relief as prescribed by s.13 of the CRCA.

13.0 *Arbitration Costs*

13.1 Under s.19(6) of the CRCA, I have discretion as to the apportionment of my own costs.

13.2 Both parties have participated in these proceedings to enable me to deliver my Award.

13.3 I have given due consideration to these facts when considering apportionment of my costs.

14.0 *Publication*

14.1 I am directed by s.18(2) of the CRCA to publish my Award.

14.2 The Award will be published on the website of the RICS.

14.3 If parties consider there is commercial information which should be excluded under s.18(3) of the CRCA, then I shall supply a redacted version of my Award to the RICS. I intend to publish the Award on the RICS website and if a redacted version is requested, then this request must be made by no later than 5:30pm on Wednesday 25th October 2023.

15.0 *Award*

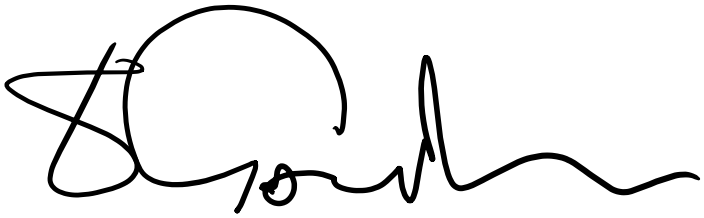
15.1 I, Simon Stuart Gouldbourn, Award and Direct as follows:

(a) The Applicant has not served a valid notice on the Respondent of its intention to proceed to arbitration under s.10 of the CRCA.

(b) I have no jurisdiction to proceed under the CRCA and dismiss the Applicant's referral to arbitration.

(c) I have apportioned costs on a 50/50 basis and the Respondent must reimburse the Applicant the sum of £2,500 plus VAT.

15.2 The seat of this Arbitration is England and Wales.

Signed: 

Simon S Gouldbourn BSc MRICS ACIArb

Date: 27th September 2023