IN THE MATTER OF
AN ARBITRATION PURSUANT TO THE PROVISIONS OF THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Between

(Applicant)

And

(Respondent)

GROUND FLOOR & BASEMENT,
,
LONDON W1

FIRST AWARD ON A PRELIMINARY ISSUE UNDER SECTION 13(2)(b)

By
Christopher J J Osmond
MA FRICS
Arbitrator

1. **INTRODUCTION**

1.1. This First Award relates to an application pursuant to the provisions of the Commercial Rent (Coronavirus) Act 2022 ("the Act") for the resolution of the matter of relief from payment of a protected rent debt due in respect of a tenancy on premises known as Ground Floor & Basement, , London W1 ("the subject premises").

1.2. The Applicant (tenant) is , represented by , and the Respondent (landlord) is , represented by .

1.3. This First Award deals with a preliminary issue which has arisen relating to the application of section 13(2)(b) of the Act. Section 13(2) reads as follows:

"13(2) If the arbitrator determines that –

(a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,
(b) the tenancy in question is not a business tenancy, or
(c) there is no protected rent debt,

the arbitrator must make an award dismissing the reference."

1.4. The parties are in dispute in relation to section 13(2)(b) as to whether or not the tenancy in question is a business tenancy in accordance with the purpose of the Act.

1.5. Both parties agreed to make written submissions, and submissions in reply, to me on the matter. In this respect I issued directions dated 23rd January 2023 and subsequently I have received the following documents:

(1) The Applicant's submissions on the preliminary issue dated 16th February 2023
(2) Submissions relating to the preliminary issue on behalf of the Respondent dated 17th February 2023
(3) The Applicant's submissions in reply dated 15th March 2023
(4) Counter submissions relating to the preliminary issue on behalf of the Respondent dated 17th March 2023.

1.6. The submissions on behalf of the Applicant were in fact made by , and for the Respondent by .

2. **BACKGROUND**

2.1. In providing the background to these proceedings, I have relied on the following two documents:

(1) Witness statement of of the Applicant company dated 23rd September 2022
(2) Statement of of the Respondent company dated 14th October 2022

2.2. The subject premises were previously held under a lease for a term of 15 years from 11th July 2006 ("the Former Lease"), the Applicant becoming the tenant under that lease by way of an assignment which completed on 17th December 2019.

2.3. The contractual term of the lease having expired on 11th July 2021, on 9th March 2022 the Respondent landlord served an unopposed notice pursuant to Section 25 of the Landlord and Tenant Act 1954, and shortly thereafter the Applicant tenant issued an application for a new lease.

2.4. On 7th April 2022, the Respondent landlord forfeited the lease for non-payment of unprotected rent arrears, although on 26th April 2022, the parties entered into a Tenancy at Will.

2.5. The parties subsequently agreed the terms of a new business tenancy ("the New Lease") which was completed on 20th May 2022 at which stage the Applicant tenant went back into occupation. The New Lease is for a term of 10 years from 20th May 2022.

2.6. The relevant arrears which form the protected rent debt under the Act, namely the rent arrears falling due between 21st March 2020 and 12th April 2021, were under the Former Lease.

2.7. It is the Applicant's contention that, despite the Former Lease having now expired, and the premises being held under the New Lease, the "tenancy in question", for the purposes of section 13(2)(b) of the Act, is the Former Lease, and therefore the reference should not be dismissed. The Respondent submits that there is no business tenancy for the purposes of section 13(2)(b) and therefore I should make an award dismissing the reference.

3. THE EVIDENCE OF THE APPLICANT

3.1. xxxx, on behalf of the Applicant, tells me that the purpose of the Act is to give relief from "protected rent debts" in order to preserve the viability of the tenant's business, and that it is clear for the purposes of section 13(2)(b) that "the tenancy in question" must be the one under which the protected rent debt in question arose, and it is that tenancy which must be a business tenancy.

3.2. Whilst xxxxx anticipates that the use of the present tense ("***is*** *not a business tenancy*") in this section could be held to mean that the relevant tenancy should be a business tenancy now (from which it would also follow that it must exist, and not have ended), he argues it is necessary to have regard to the underlying purpose of the provision and to interpret it in the way which gives best effect to

that purpose. xxxxxx supports this approach by referring to several recent cases. In particular, I have noted a quote from the judgment in *Kostal UK Ltd v Dunkley (2021)* as follows:

> "*The modern approach to statutory interpretation requires the court to ascertain the meaning of the words in a statute in the light of their context and purpose"*

3.3. xxxxx goes on to point out that in order to target the appropriate class of tenants, the Act applies only to business tenancies to which Part 2 of the Landlord and Tenant Act 1954 applies, rather than, for example, residential or agricultural tenancies. Given this purpose, he argues that any interpretation of the Act which leaves outside of its scope any rent arrears accrued during the period of restrictions must be viewed with suspicion. Indeed, xxxxx poses the question that if a tenant was in occupation of a property for its business purposes during the protected period, then why should it make any difference to the availability of relief if the tenant happens to have subsequently renewed its tenancy, or if there was a brief hiatus (as in this case) following a forfeiture before a new tenancy at the same property was granted. He concludes that such an approach would frustrate, rather than satisfy, the purpose of the Act.

3.4. xxxxxx refers me to case law which suggests that an available reading of the present tense in section 13(2)(b), i.e. the use of the word "is" when referring to the business tenancy, could mean "was at the relevant time", and it is the nature of the tenancy during the protected period that is the focus of the Act. Because the business tenancy was such a tenancy at the relevant time, the protected rent debt remains a protected rent debt even after the end of the tenancy.

3.5. xxxxxxx concludes that, on this preliminary issue, I should make an award that the Former Tenancy is a business tenancy for the purposes of Section 13(2)(b) of the Act.

4. THE EVIDENCE OF THE RESPONDENT

4.1. xxxxxxx summaries the landlord's position by stating there is only one relevant business tenancy to which the provisions of the Act apply, and this is the business tenancy under which the protected rent debt arose. She considers this tenancy must be an existing business tenancy at the date when the reference is made, and at the point at which the arbitrator is considering the question of eligibility/relief.

4.2. xxxxxxx further argues that where this tenancy has ended, the Act does not continue to apply simply because a relationship of landlord and tenant continues to exist under some other business tenancy, and thus the relevant tenancy must continue at the time the arbitrator is making an award. She points out that in the subject case, the tenancy under which the protected rent debt is said to arise ended on 7th April 2022, and that there is now no longer any tenancy for the

purposes of section 13(2)(b). Therefore I must make an award dismissing the reference.

4.3. As far as the words "tenancy in question" is concerned, as specified in section 13(2)(b), xxxxx suggests there is one relevant tenancy to consider, and that the language of the Act points to that, logically, being the tenancy creating the debt which comprises the protected rent debt. She goes on to point out that the reference to the "tenant" and "landlord" in the Act are to the tenant and the landlord in their capacity as tenant and landlord under the relevant business tenancy, and cannot be the former landlord and former tenant under a former business tenancy.

4.4. xxxxxx goes on to reiterate that there can be no arbitration where the alleged protected rent debt fell due under a tenancy which is not subsisting at the date of the referral or at the time when I make my assessment as to eligibility. The language of the Act, she argues, is consistent with the requirement that there is an ongoing tenancy, and that the Act applies to a business tenancy not a former business tenancy. The parties to the arbitration, she tells me, are required to be in an ongoing relationship of landlord and tenant under that business tenancy (and not some other tenancy). Here, she confirms, the relevant tenancy had ceased to exist long before the referral was made to arbitration. xxxxxx confirms that if the Former Lease had continued there might have been a protected rent debt, but once that lease ended there was no longer a protected rent debt under the Act.

4.5. xxxxxx also points out that the provisions dealing with the effect of making an award are drafted in terms that envisage the relevant business tenancy to be ongoing. language in Section 14, for example, relating to relief from payment of a protected rent debt not altering the effect of the terms of a tenancy must be premised on the assumption that there is a continuing lease, the terms of which can be altered. One cannot, she argues, alter the terms of a contract which no longer exists.

4.6. With regard to the policy of the Act, xxxxxx confirms that the Act makes it clear that it is concerned with preserving or restoring the ongoing business of the tenant, and the arbitrator's concern is to preserve the viability of an ongoing business. She argues that the published guidance relating to the Act ("the Guidance") supports her view that the Act is concerned with preserving an ongoing relationship between a landlord and tenant, and not a former relationship.

4.7. Xxxxx concedes that, in the current situation, the tenant could say that its business continues, albeit under a new business tenancy. However, she considers that this cannot makeany difference to her analysis as to how the Act operates, and that the language should apply consistently. She argues that the statutory language cannot assume one meaning and apply in one way where the relevant tenancy has ended, but apply differently where the relevant tenancy has ended and the tenant has vacated. She concludes that Parliament did not extend the statutory

arbitration scheme to situations where the relevant lease under which the relevant rent debt accrued has ended.

4.8. xxxxx therefore concludes that there is no business tenancy for the purposes of section 13(2)(b), and no protected rent debt for the purposes of Section 13(2)(c) such that I must therefore make an award dismissing the reference.

5. COMMENTS IN REPLIES

5.1. xxxxx has provided me with a submission in reply to the Respondent's submissions.

5.2. He first concludes that it is common ground between the parties that the section 13(2)(b) test refers back to the past since he notes that, at paragraph 10 of the Respondent's submissions, it is said that the relevant tenancy must be a business tenancy when the reference is made and when the arbitrator considers the question of eligibility/relief. He points out that the first of these dates is, of course, a past one and therefore, even according to the Respondent, the relevant section naturally points to a past time as being a relevant time for the business tenancy question to be answered. Once that possibility is admitted, he argues, then the tenancy in question can obviously be read as referring to another past time, namely the one which actually matters most, i.e. the time when the protected debt arose.

5.3. xxxxxx also points out that it is common ground that what matters is the "single" tenancy under which the protected debt arose, and that the parties are the landlord and tenant under the relevant tenancy, being the one under which the rent debt arose. He confirms this is precisely what the parties to this arbitration were.

5.4. xxxxx also points out that the definition of "protected rent debt" in section 3(2) of the Act refers to the past tense, i.e. that the tenant **was** adversely affected by coronavirus, and that the rent is attributable to that (now past) period of occupation.

5.5. xxxxxx also argues that the Respondent is wrong when suggesting that rent arrears might just vanish when leases end, and points out that a debt can still be contractually due under a tenancy which has ended, which is precisely the debt that is the subject matter of this arbitration.

5.6. xxxxxx agrees that the policy of the Act is to preserve the viability of ongoing businesses, but points out that a tenant can carry on its business under a succession of tenancies. He suggests there is no policy which leaves tenants "out in the cold" just because they happened to have renewed their tenancy in the meantime. The Guidance to which the Respondent refers makes the point that what matters is the continued viability of the tenant's business, not the continued occupation of its premises under a particular leasehold estate.

5.7. xxxxxx concludes his replies by pointing out the focus of the Act is on the preservation of the viability of businesses, and it should be interpreted in the light of that purpose.

5.8. xxxxxx also provides me with counter submissions relating to the subject preliminary issue, and argues that it is of limited assistance to me merely to consider the words used in section 13(2)(b), but that it is necessary to consider this section in the wider context of the Act.

5.9. xxxxxxx points out that I am being asked to re-write the language of the legislation by the Applicant by suggesting that the present tense in the relevant section should be interpreted such that the natural meaning of the word "is", becomes "was".

5.10. xxxxxx also considers that the Applicant ignores the fact that if the date of assessment of the protected rent debt is not the correct date to ask whether the tenancy is a business tenancy, why does it follow that the relevant time is when the arrears accrued. She also points out that the definition of a "business tenancy" in Section 2(5) of the Act uses the word "applies", rather than "applied", and that the use of these words is consistent with a requirement that the tenancy under which the rent is due not only continues, but continues to be one to which Part 2 of the Landlord and Tenant Act 1954 applies at that date. She also points out that the general provisions of the Act dealing with the effect of making an award are drafted in terms that envisage the relevant business tenancy to be ongoing.

5.11. In general terms, xxxxxxx points out that the aim of the Act is to preserve ongoing relationships between landlords and tenants, and to support continuing businesses. The Act, she says, does not require that the arbitrator should consider only the position of the tenant, but also that of the landlord. She further points out that the Act is not concerned with a business which has ended, or a historical relationship with landlord and tenant. One would not expect the Act to apply where a tenant has ended its tenancy and shut its business before any referral to arbitration had been made.

5.12. In conclusion, xxxxx confirms that the language of the Act compels the conclusion that Parliament did not extend the statutory arbitration scheme to situations where the relevant lease under which the relevant rent debt accrued has ended. She reiterates that there is no business tenancy for the purposes of section 13(2)(b) and therefore no protected rent debt.

6. **THE ARBITRATOR'S DECISION**

6.1. As first sight the intention and purpose of the Act seems quite clear. Section 1(1) states as follows:

> *"This Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration"*

6.2. Thus, the purpose of the Act is to set up an arbitration process to resolve any problems resulting from an impasse between landlords and tenants regarding the non-payment of rent during the Covid pandemic. By implication, it would not be consistent with this aim if the Act set up unreasonable hurdles or problems to stop such cases proceeding to arbitration, if no agreement could be reached.

6.3. With that in mind, it would be surprising if the Act were to be interpreted in a way which allowed a reference to be dismissed by the arbitrator without him or her even considering whether any relief should be afforded to a viable tenant who had built up a rental debt under a business lease due to the pandemic. This is indeed a point made by the Applicant in paragraphs 14 and 16 of its submissions.

6.4. We then come to the precise wording of section 13(2)(b), where there is a dispute between the parties as to the meaning of "*the tenancy in question*". It again seems abundantly clear that this must be the tenancy which was in existence at the time the rental debts were accrued. In the subject case, this is the Former Lease, which wholly covered the period during which the rent debt accumulated, but which, of course, had expired by the time the application was made under the Act. Any other interpretation, such as that it refers to the tenancy in existence at the date of assessment by the arbitrator, but not the one in existence when the non-payment of rent occurred (if that earlier lease had expired), seems absurd when the purpose of the Act is considered.

6.5. It therefore follows that the use of the present tense, i.e. the word "*is*" in the wording of section 13(2)(b), ie "*the tenancy in question **is** not a business tenancy*", is not really an issue. If it is clear that the "tenancy in question" is the lease under which the subject premises were held when the rent debt occurred (and it must be), then use of the word "is" or "was" or even "was at the time", cannot change the tenancy which is referred to. It might have been clearer to adopt the past tense, but the sentence anyway makes perfect sense whichever tense is used, and that tense does not change the fact that the only tenancy in question must be, in this case, the Former Lease. It cannot possibly mean the New Lease in this case, since the rent debt was not incurred under the New Lease.

6.6. This point is reinforced by the fact that the Act received Royal Assent on 24th March 2022, and that the "protected period" under Section 5 is from 21st March 2020 to 18th July 2021 in England. By definition, the Act is therefore backward looking to the tenancy which was in place during that protected period. Many business leases in England will have expired in the period between 18th July 2021

and 24th March 2022, and if the Act had intended to exclude such leases from arbitration, it would surely have said so.

6.7. However, to ensure that the tenant does not receive some future benefit to which it should not be entitled because its financial circumstances have changed since the rent debt was incurred, section 13(3) also requires that the viability of the tenant's business should be assessed "*at the time of the assessment*". This is when the arbitrator makes any award and in the current case is still some date in the future. I must dismiss the reference if the tenant's business, at the time of my assessment, is not viable, and would not be viable even if the tenant were to be given relief from payment of any kind. Thus, the Act is asking me to check that the tenancy which was in place when the rent debt occurred was a business tenancy, and also that, bringing matters up to the current day, the tenant still has a viable business. That seems an entirely logical and consistent approach which conforms with the purpose of the Act.

6.8. I therefore conclude that the whole policy of the Act, and the clear intention of Section 13, is that the particular lease on the subject premises which was running during the protected period when the rental debt accrued, does not need to be in existence at the date of assessment.

6.9. I now consider some specific issues raised by the parties' representatives in their submissions to me, and start with a reference to section 2(5) where the Respondent argues that the use of the present tense when defining a business tenancy supports the view that the tenancy must still be ongoing at the assessment date. This is purely a definition paragraph, and I find the use of the present tense in words such as "means" and "applies" has no relevance. It is another example where if the use of the present tense meant the Act excluded expired leases it would have said so.

6.10. The Respondent also refers me to section 14(9) which says that if I provide an award which gives the tenant relief from the payment of a protected rent debt, then this is to be taken as altering the effect of the terms of the tenancy in relation to the protected rent constituting the debt. The point is made by the Respondent that for this to make sense the tenancy must still be running at the date of assessment, but I agree with the Applicant that no such implication can be assumed. The Applicant points out disputes under the terms of a lease do not simply go away when the lease expires, and I can see there are many issues which can, and could, still be litigated after a lease expires. This section does therefore not imply that the tenancy in question must still be running at the date of assessment.

6.11. I also highlight section 15(1) which sets out the principles of the arbitration award, and in particular that any award should be aimed at preserving the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency. It confirms that the whole policy of the Act is aimed at preserving the business of the tenant, and there is no mention in this section of any tenancy arrangements. We see the Act again not being prescriptive regarding the tenancy

details, so long as there was a business tenancy running at the time the rent debt was accrued.

6.12. Under section 16(1)(a) I am to have regard to the assets and liabilities of the tenant when assessing the viability of its business, "*including any other tenancies to which the tenant is a party*". This reference is to any other properties which the tenant occupies under a leasehold interest, and is not intended to make any reference to the tenancy under which the tenant may or may not hold on the subject premises at the date of assessment. There is also, in section 16(1)(b), reference to previous rental payments made under the business tenancy from the tenant to the landlord, and this must refer to the lease of the subject premises. However, again this requirement when assessing the viability of the tenant does not imply that the tenancy must still be running at the date of assessment. It merely refers to an issue to which I must have regard when assessing tenant viability.

6.13. In conclusion, whilst acknowledging that the Act could have been more specific regarding the nature of the business tenancy under which the rent debt accrued, it is clear from a careful consideration of the evidence placed before me, and a careful reading of the Act itself, that the tenant can potentially obtain relief for the period when it was the tenant under the lease it held during the protected period, and that any lease event thereafter does not preclude it from doing so, so long as the tenant's business remains viable at the date of assessment. My award reflecting this conclusion is in Section 8 below.

7. COSTS OF THIS AWARD

7.1. Section 19(5) of the Act states that, when I make an award under Section 13 or 14, as here, I must also make an award requiring the Respondent to reimburse the Applicant for half the arbitration fees already paid, although section 19(6) states that general rule does not apply if I consider it more appropriate in the circumstances of the case to award a different proportion (which may be zero).

7.2. Section 19(7) states that the parties must meet their own legal or other costs.

7.3. I have found entirely for the Applicant in this matter, and therefore I award under section 19(6) that the Respondent should pay my costs in full for the preparation of this award.

8. ACCORDINGLY, I, CHRISTOPHER JOHN JAMES OSMOND, DO HEREBY AWARD AND DIRECT THAT:

8.1 **I find for the Applicant that the tenancy in question under section 13(2)(b) is a business tenancy, and that there are no grounds for me to make an award dismissing the reference under that section.**

8.2 **This is my First Award in this matter.**

8.3 **The seat of the arbitration is London, England.**

8.4 **The proceedings have followed English law.**

8.5 **Made and published this the 20th April 2023.**

Signed……Chris Osmond**…… Date…20th April 2023……**

CJJ OSMOND
ARBITRATOR