

COMMERCIAL RENT (CORONAVIRUS) ACT 2022

XXX LIMITED (APPLICANT)

and

YYY LIMITED (RESPONDENT)

SEVEN KINGS

ILFORD

ESSEX

AWARD

By

ROBERT C H PRATT BSc FRICS FCI Arb

of RPC

ACTING AS ARBITRATOR

BACKGROUND

1. The Applicant, XXX Limited, is the tenant of retail premises at Seven Kings, Ilford.
2. The Respondent, YYY Limited, is the landlord.
3. The Applicant submitted an application for the appointment of an Arbitrator under the Commercial Rent (Coronavirus) Act 2022 (the Act) to the RICS, and I was duly appointed in that capacity on 23 November 2022.
4. The Applicant is represented by Mr XXX of YYYY Solicitors, and the Respondent is represented by Mr XXX of YYY Solicitors.
5. The documents I have received from the parties' representatives are as follows:-
 - Form DRS CRAA3 – reference to Arbitration submitted by Mr for the Applicant Tenant.
 - Covering letter from Mr
 - The Applicant's Statement.
 - Supporting letter from the Applicant's accountants.
 - Applicant's accounts to September 2021.
 - Form DRS CRAA2 – Response to Notice of Intention to Arbitrate.
 - The Respondent's Statement.
 - Further response from the Applicant's representative upon queries raised.
 - Further comments from the Respondent's representative.
6. I confirm that I have exchanged copies of all the above documentation with the parties' representatives.

THE LEGAL FRAMEWORK

7. Section 1(1) of the Act enables the matter of relief from payment of protected rent debts due from a tenant to a landlord, under a business tenancy, to be resolved by Arbitration.
8. Section 3(1) of the Act provides that a protected rent debt is a debt under a business tenancy consisting of unpaid protected rent. By section 3(2) of the Act, rent due under the tenancy is only protected rent if:
 - (a) The tenancy was adversely affected by Coronavirus; and
 - (b) The rent is attributable to a period of occupation by the tenant or a period within, the protected period applying to the tenancy.

9. Section 4 of the Act provides that a business tenancy was adversely affected by Coronavirus if, for any relevant period, the whole or part of the business, or the whole or part of the premises, was subject to a closure requirement. For this purpose, 'a closure requirement' means a requirement imposed by Coronavirus Regulations which is expressed as an obligation to close businesses or premises, or parts thereof, every day at particular times.
10. Section 13 of the Act sets out the issues that the Arbitrator must decide, and the order in which they need to be decided.
11. In accordance with Section 13, the main questions for me to resolve are as follows:-
 - (i) Is the tenancy a business tenancy, and is there a protected rent debt as defined by the Act?
 - (ii) Is the tenant's business viable, or would it be viable if rent relief were given?
 - (i) If so, should the tenant be given relief and, if so, what form should it take?
12. I am required to consider the formal proposals set out by both parties' representatives individually, and decide which of them is more consistent with the principles set out in Section 15 of the Act. These principles are:-
 - The proposals should preserve or restore the viability of the tenant's business whilst safeguarding the landlord's solvency; and
 - The tenant should be required to pay as much of the rent debt with as little delay as these principles allow.
13. Section 16 of the Act sets out the issues I need to consider in dealing with the second and third questions raised in Section 13:-
 - (1) In assessing the viability of the business of the tenant, I must, as far as known, have regard to:-
 - The assets and liabilities of the tenant.
 - The previous rental payments made under the business tenancy.
 - The impact of Coronavirus on the business of the tenant.
 - Any other information related to the financial position of the tenant that is appropriate.
 - (2) In assessing the solvency of the landlord I must, as far as known, have regard to:-
 - The assets and liabilities of the landlord.
 - Any other information relating to the financial position of the landlord that I consider appropriate.
 - (3) In making an assessment above I must disregard the possibility of the tenant or the landlord borrowing money or restructuring its business.

THE SUBMISSIONS OF THE PARTIES

14. The Applicant tenant originally operated a travel business from the premises, specialising in flights.
15. The Applicant submits that this business was one of the sectors that suffered most from the pandemic, its turnover falling from circa £333,000 for the year ending 30th September 2019, to just over £76,000 some two years later.
16. Notwithstanding these challenges, the Applicant forecasts that it will make a small profit in the current financial year.
17. The Applicant confirms that according to its calculations, the protected rent debt is £17,538.16.
18. The relief sought by the Applicant is for the outstanding protected rent debt to be waived in its entirety.
19. In support of its application, the Applicant has provided accounts for the year ending September 2021, and a letter from its accountants.
20. This letter sets out a summary of trading results for the Applicant company for the years ending September 2018, 2019, 2020 and 2021, together with details of remuneration, grants and loans.
21. The Respondent notes that the Applicant has stated in its application that by 2019 there was already a sharp drop in profitability as a result of the growth of the Internet.
22. The Respondent queries why the grant and loan payments secured by the Applicant were not used to pay rent, and also claims that the director of the Applicant company and his wife, who are personal guarantors under the lease, live in a substantial property which it is claimed is worth approximately £1m.
23. On the question of closure, the Respondent submits that the subject premises remained open throughout the lockdowns, and that there was a cash machine installed in the shop front.
24. The Respondent further contends that the viability of the Applicant's business had been adversely impacted by events prior to the pandemic, and that this arbitration procedure is being used as a means of avoiding the payment of debts which the Applicant agreed to pay.
25. It is the Respondent's view that everyone suffered during the course of the coronavirus pandemic, and that no relief from the protected rent debt should be granted.

REASONING

26. Having regard to the amount of protected rent debt, I have agreed to deal with this Arbitration under Procedure A.
27. With regard to the relevant criteria under the Act, I am satisfied that the tenancy qualifies as a business tenancy.
28. The Applicant has claimed that the amount of protected rent debt is £17,538.16, and this has not been disputed by the Respondent. I am therefore proceeding on the basis that this is the correct figure.
29. As to whether the business or premises were the subject of a closure requirement, it has been suggested by the Respondent that the shop remained open throughout the lockdown, but this has subsequently been disputed by the Applicant.
30. In a letter to me dated 23rd December 2022 the Applicant's representative has confirmed that the Applicant, XXX Ltd, was non-essential retail and was required to close, in common with all travel agencies.
31. I understand that a cash machine installed by the Applicant on the exterior of the premises in 2015 remained available during the pandemic, with the premises themselves only being used on an occasional basis for pre-arranged meetings with clients, and for the sale of fireworks on a 'telephone and collect' basis for a few weeks each year.
32. On this basis, I am satisfied that the tenancy was adversely affected by Coronavirus and that the rent due under the tenancy is a protected rent.
33. As for the viability of the Applicant's business, I have noted that the company returned positive net profits for years ending 30th September 2018, 2019 and 2020.
34. A net loss was then declared for year ending 30th September 2021 of just over £13,700, but both the Applicant and its accountants have confirmed that the business is expected to return to profitability for year ending 30th September 2022.
35. The Applicant's accountants have submitted that the company's turnover is forecast to improve to circa £120,000 for the year to 30th September 2022 which should result in a gross profit of approximately £20,000 and a net profit of around £2,000. This reflects reduced overheads following the forfeiture of the subject lease in April 2022.
36. In summary therefore, based upon the information provided to me, the Applicant company would appear to operate a viable business, in that it has returned (and is expected to return) a profit in four of the last five trading years.
37. As I am satisfied that the tenant's business is viable, I can now move on to the question as to whether the Applicant tenant should be given relief, and if so, what form it should take.

38. As I have indicated above, the principles I am required to adopt are that in preserving the viability of the tenant's business, I also need to safeguard the landlord's solvency, and ensure that the tenant is required to pay as much of the rent debt with as little delay as these principles allow.
39. The Respondent landlord has made no reference as to its solvency, nor has it claimed that the amount of the protected rent debt will have an influence thereon.
40. In accordance with Section 14 of the Act, I am permitted to either write off all or part of the debt including interest, or give the tenant time to pay the whole or part of the debt or a combination of these measures. Alternatively, I may determine that the Applicant is given no relief from payment.
41. I have considered all the financial information provided by the Applicant including accounts for the year to September 2021, and a summary of the Applicant's financial position as provided by their accountants.
42. The net profits of the Applicant company for years ending 30th September 2019 and 30th September 2020 were £5,533 and £2,760 respectively. There was therefore less than £3,000 difference in the level of profits during these 2 years, and I consider it is difficult to conclude from this that the company suffered adversely during the initial phase of the pandemic.
43. I do not therefore consider it appropriate to grant relief from payment of rent during the period to 30th September 2020.
44. However, the Applicant company did suffer a further decline in turnover in the following year, and a loss of £13,723 was incurred for the year-ending 30th September 2021.
45. I have noted that during this period, the Applicant received a Local Council grant of £12,765, and a further £4,105 from the Job Retention scheme. Notwithstanding these receipts, the loss was still incurred.
46. Applying the principles in Section 15 of the Act, I have in the end concluded that the applicant tenant's business was primarily impacted by the coronavirus pandemic during its financial year ending 30th September 2021.
47. I therefore find that some relief should be granted to the Applicant during this period.
48. However, as the Respondent has pointed out, the Applicant has been the beneficiary of external financial assistance, which has mitigated its losses, and I am not persuaded that it would be equitable to waive the entire debt during this period.
49. I have therefore concluded that an appropriate Award, which would be consistent with the principles set out in Section 15 of the Act, would be to waive 50% of the protected rent debt that fell due during the year to 30th September 2021.
50. I have calculated that out of the total protected rent debt of £17,538.16, the amount to be allocated to the year to 30th September 2021 (as a proportion of the whole) is £10,537.24. The amount of relief to be granted to the Applicant is therefore 50% of this sum ie £5,268.62.

51. The outstanding sum to be paid by the Applicant will therefore be as follows:

Protected rent debt:	£17,538.16
<u>Less:</u>	
Amount of relief granted:	<u>(£ 5,268.62)</u>
Balance	£12,269.54

AWARD

52. I hereby Award and Direct that the Applicant is to be granted relief of £5,268.62, and that the outstanding amount to be paid to the Respondents will be £12,269.54. (No interest is to be paid).
53. This amount is to be paid to the Respondents in 4 monthly instalments commencing 1st February 2023.

COSTS

54. Section 19 of the Act provides that each party must pay its own costs and half of the Arbitrator's fees paid by the Applicant.
55. I therefore additionally Award that the Respondent is to reimburse the Applicant, by 1st February 2023, 50% of the Arbitration fee of £750 plus VAT.
56. The seat of this Arbitration is England and Wales.
57. This Final Award is made and published this Ninth Day of January 2023.

Signed: *Robert C H Pratt*

Robert C H Pratt BSc FRICS FCI Arb
(Arbitrator)

Date: *9th January 2023*