

COMMERCIAL RENT (CORONAVIRUS) ACT 2022

XXXXXXXXXX

(APPLICANT)

and

YYYYYYYYY
(RESPONDENT)

..... BAR

HIGH HOLBORN

LONDON WC1

AWARD

By

ROBERT C H PRATT BSc FRICS FCIArb

of RPC

ACTING AS ARBITRATOR

RPC, 42 Brook Street, London W1K 5DB

020 7060 6700

rpclondon.com

BACKGROUND

1. The Applicant, XXXXXX, is the tenant of licensed premises atHigh Holborn, London WC1.
2. The Respondent, YYYYYYYYYYYYYY, is the landlord.
3. The property was demised by way of a 15 year lease from 19th December 2011, and the current rent passing is £xxxxxxx per annum.
4. 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.
5. The Applicant is represented by Mr xxxxx of xxxxx & Co, and the Respondent is represented by Mr yyyyy of yyyyy Ltd.
6. Following my appointment, I initially received various documentation from the parties' representatives, but I subsequently agreed to allow both parties the opportunity to submit revised final proposals. I will therefore primarily rely on the following documents:
 - The Applicant's Revised Proposal dated 25th March 2023, together with accompanying Accounts and those previously supplied.
 - The Respondent's Revised Formal Proposal dated 14th April 2023 together with supporting evidence.
7. I confirm that I have exchanged copies of the above documents with the parties' representatives.

THE LEGAL FRAMEWORK

8. Section1(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.
9. 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.

10. 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.
11. Section 13 of the Act sets out the issues that the Arbitrator must decide, and the order in which they need to be decided.
12. 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?
13. 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.
14. 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

15. Mr xxxxx submits that the Applicant is an experienced operator who had a profitable business prior to the pandemic. He cites a turnover for year-ending April 2020 of over £251,000, with a net profit in excess of £32,000.
16. More recently, he has extrapolated figures for December 2022 to February 2023 which suggest a projected annual turnover of circa £202,000 and a profit of around £43,000.
17. It is the Applicant's submission that whilst trading days have decreased with City and Mid-town workers being reluctant to return to a five-day working week, and costs have risen, the business still remains one that is viable.
18. In this respect Mr xxxxx also refers to the Respondent's Response to the final offer which states that the Applicant's business is viable for the purposes of the Act.
19. Mr xxxxx refers to a discrepancy between the Applicant and the Respondent on the amount of the protected rent, but this has subsequently been agreed.
20. The Applicant's final offer is that all the outstanding protected rent debt is waived, and Mr xxxxx compares this with the Respondent's offer of a mix of rental concessions in return for a lease extension. However, I understand that the latter offer has subsequently been withdrawn and I will therefore have no regard to it.
21. Mr xxxxx refers to the Commercial Rent Code of Practice which he claims has, at its centre, the theme of sharing the burden. In this regard he draws my attention to the fact that the Applicant, unlike many, paid their March 2020 rent in advance.
22. He also draws my attention to Section 15(b) of the Act which requires a tenant to, as far as possible, comply with the contractual duties as far as is consistent with the first aim of Section 15. He notes that this should not be at the expense of the landlord's solvency, but there is no suggestion by either party that the landlord's solvency is at risk.
23. Mr xxxxx goes on to consider the Respondent's previous offer, which has subsequently been withdrawn.
24. He concludes that the only offer that is in consistent with the Act is that of the Applicant, and he asks that I waive the protected rent debt in full.
25. Mr yyyyy, for the Respondent, initially puts forward an alternative protected rent debt figure, but as I have indicated above, this has subsequently been agreed.
26. Mr yyyyy contends that demand in Central London is now back to pre-pandemic levels, and that it is the situation now, and not during the pandemic, upon which I should make my Award.

27. He further notes that the xxxxxx Bar currently trades five days a week – Tuesday through to Saturday, choosing to close on Sunday and Monday when other adjacent pubs and bars are open and trading.
28. It is the Respondent’s position that the Applicant has not provided any bank account information to substantiate and prove their current and previous cash position.
29. Mr yyyyy confirms that the offer to which Mr xxxxx refers (made for the second time on 23rd August 2022) was not accepted and has subsequently been withdrawn.
30. As for Mr xxxxx’s reference to the theme of ‘sharing the burden’, Mr yyyyy submits that neither the Act, the CRCA Guidance nor the Code of Practice refer to this.
31. Mr yyyyy refutes that the Applicant has provided details of the grant income they have received, and he also contends that the Applicant has not provided accounts (either managed or audited) for 2022. As a result, the Respondent contends that the financial information provided makes it difficult to accurately assess the financial health of the business in 2023.
32. Mr yyyyy further draws to my attention Section 15(b) of the Act that requires the tenant to meet its obligations with regard to the payment of protected rent debt in full and without delay.
33. It is the Respondent’s case that the notwithstanding the lack of financial information provided by the Applicant, relief from payment should be in the form of time to pay over 24 months, which is consistent with the principles of Section 14 of the Act and Section 7 of the Guidance for Arbitrators.

ARBITRATOR’S FINDINGS

34. Following receipt of the Respondent’s Revised Formal Proposal in April 2023, the parties were unable to reach an agreement as to the amount of the protected rent debt.
35. This amount was eventually agreed towards the end of November 2023 at £40,209.74.
36. In view of the amount of the protected rent debt, I have agreed to deal with this Arbitration under Procedure B.
37. I have noted Mr yyyyy’s observations regarding the limited financial information provided on behalf of the Applicant, but I consider that the financial accounts for years ending 30th April 2018, 2019, 2020, 2021, and the monthly Profit & Loss Reports for December 2022, January 2023 and February 2023 are sufficient for me to take an overview on the viability of the Applicant’s business.
38. In this respect, I am in agreement with Mr xxxxx that the business remains profitable, albeit at a lower level of turnover.

39. I also note that notwithstanding Mr yyyyy's comments, neither party has contended that the Applicant's business is not viable.
40. I am therefore satisfied that for the purposes of the Act this is a viable business tenancy.
41. 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.
42. 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.
43. The final claims of the parties lie at the extreme ends of the spectrum available to me, in other words the Applicant is requesting full relief from the protected rent debt, whilst the Respondent proposes that the only relief to be granted should be in the form of time to pay the full amount over 24 months.
44. Mr yyyyy has contended that demand in Central London is back to pre-pandemic levels, citing a Propel News briefing in March 2023, and comments made by the Chief Executive of Tortilla.
45. However, I find Mr xxxxx's observations regarding the general reluctance to return to a 5-day office working week are more reflective of the current situation post-Pandemic. This in turn has clearly impacted on bars and pubs in Central London.
46. But, I have also noted that whilst the Applicant's business has suffered from declining turnover, some grant income has been received.
47. Having considered the offers submitted by both parties, I have concluded that neither is consistent with the aims of Section 15 of the Act.
48. Section 15 requires the Applicant to meet its contractual obligations as far as possible, as long as viability is not impacted, and based upon the financial information provided, I consider that the business is capable of paying towards the protected rent debt.
49. However, I consider that the repayment of the protected rent debt in full would be inconsistent with preserving the viability of the tenant's business following the decline in turnover during and post the pandemic.
50. In this respect I am in agreement with Mr xxxx that any further significant monthly outlay or capital repayment could impact on viability going forward.
51. I have in the end concluded that an appropriate Award, which would be consistent with the principles set out in Section 15, would be to split the protected rent debt equally between the parties, giving the Applicant a reasonable amount of time to pay.
52. I therefore propose to grant the Applicant relief from payment of 50% of the protected rent debt.

53. The outstanding sum to be paid by the Applicant will consequently be £20,104.87 (50% of the protected rent debt of £40,209.74).
54. Furthermore, taking account of current turnover levels at the Applicant's business, I find that the Applicant should be given a period of 24 months to pay this sum.

AWARD

55. I hereby Award and Direct that the Applicant is to be granted relief from payment of 50% of the protected rent debt, and that the outstanding amount to be paid to the Respondent will be £20,104.87.
56. This amount is to be paid by the Applicant in twenty-four equal monthly instalments commencing seven days from the date of this Award, and on the same day of the month thereafter.

COSTS

57. 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.
58. I therefore additionally Award that the Respondent is to reimburse the Applicant accordingly, within fourteen days of the Applicant providing an appropriate invoice.
59. The seat of this Arbitration is England and Wales.
60. This Final Award is made and published this 19th day of December 2023.

Signed: *Robert C H Pratt*

Robert C H Pratt BSc FRICS FCI Arb
(Arbitrator)

Date: *19th December 2023*