

FINAL AWARD

IN THE MATTER OF AN ARBITRATION

under the

COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Between

[REDACTED]

(applicant)

and

[REDACTED]

(respondent)

In respect of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Parties

1. The applicant is [REDACTED] who are the tenant of the premises known as [REDACTED]
[REDACTED]
2. The respondent is [REDACTED] of [REDACTED]
[REDACTED].
3. The applicant is represented by [REDACTED] who is the [REDACTED] of the tenant company.
4. The respondent is represented by [REDACTED] of [REDACTED]
5. This Arbitration relates to an application made by the applicant to the Dispute Resolution Service of the Royal Institution of Chartered Surveyors ("RICS") as a duly authorised body for the purpose of appointing an Arbitrator to deal with the matter of relief from payment of a Protected Rent Debt ("PRD"). This is in pursuance of the provision of Section 10 (4) of the Commercial Rent (Coronavirus) Act ("CRCA").
6. I was appointed by the President of the RICS in the capacity of Arbitrator to deal with this matter, on 23 November 2022.
7. The dispute relates to the question of whether or not the applicant is entitled to receive relief from the payment of a PRD, which is claimed to be in the sum of [REDACTED]

Procedural Background

8. The applicant served a Notice of Intention to Arbitrate on the respondent dated 19 April 2022 which was signed by [REDACTED]
9. The applicant made a Reference to Arbitration to the RICS dated 16 September 2022 which was signed by [REDACTED]. The RICS is an approved Arbitration body for the purposes of Section 7 of the CRCA.
10. This reference in relation to relief from payment of a protected rent debt arising out of the applicant's tenancy is made pursuant to Section 9 of the CRCA.
11. The reference form made reference to an e-mail dated 19 April 2022 sent to the applicant. I was sent a copy of the reference together with its attachments by the RICS upon my appointment as Arbitrator.
12. The respondent has submitted a Witness Statement by [REDACTED] who is [REDACTED] of the respondent.
13. This statement sets out a number of matters relating to the dispute, and includes as an appendix document, noted to be [REDACTED], copies of leases governing the subject premises, as well as threads of e-mails.
14. I will come back to the documentation submitted to me later.

15. Following my appointment I wrote to the parties on 1 December 2022 advising them that I would be conducting this Dispute as Arbitrator. There were no objections or comments made by either party to my appointment.
16. The procedure adopted by way of the RICS route is such that the formality of the Arbitration does not proceed until such time as the Arbitrator's fees have been paid in full. This is as required by Section 19 (4) of CRCA.
17. Secondly the means by which this matter proceeds is to be adopted under the RICS scheme known as "Route D". That sets out the basis of the Arbitrator's fees and other matters as to how the Arbitration is to be progressed.
18. Following that element of the process I conducted a "Zoom" meeting with the applicant and respondent in order to clarify a number of issues. The key element of this however was to serve the purpose of agreeing what my fees might be, such that they could be advised to the RICS and thereby collected.
19. That procedure was adopted, and subsequently it was confirmed to me that those fees had been paid and were being held by the RICS.
20. Following that confirmation I was able to commence the Arbitration. At this point I then considered the documentation which had been put to me. This comprises documents which the applicant and respondent had themselves sent directly to the RICS. These had then been copied onwards to me upon being appointed.
21. By e-mail dated 3 February 2023 I wrote to the representatives confirming that I was moving the matter forward, and giving details of the documents which had been supplied to me. I asked for confirmation from the parties that this was a correct record.
22. I also asked if the parties wished to submit any other documentation, and asked that that be done within five working days.
23. I have not received any further documents, either by way of additional proposals put forward by the parties as an attempt to settle this dispute, or other relevant papers.
24. I have therefore proceeded to deal with the Arbitration on the basis of the documents I note under 20 above.
25. I have not issued any Directions in this case because no further documentation or proposals have been placed before me, and the parties confirmed that I may rely upon the documentation which the RICS forwarded to me, and which they had sent to the RICS.

Appropriate Matters to be dealt with under the CRCA

26. It is a fundamental requirement that any application for a dispute to be resolved under the CRCA must first establish whether or not there is a "tenancy".

27. On this point I have been supplied with a copy of the lease and the previous lease governing the occupation of these premises, from which it is clear that such occupation comprised a businesses tenancy. That therefore covers off the question of eligibility under the CRCA.
28. I must also consider the Protected Rent Debt. This relates to the matter of relief thereof from payment.
29. The protected rent is subject to two matters:-
 - a. that the tenancy was adversely affected by coronavirus; and
 - b. the rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy.
30. The protected period is effectively a timescale beginning on 21 March 2020 and ending on 18 July 2021 or an earlier date. This is as per Section 3 (2) of the CRCA.
31. Therefore the Relevant Period for the purpose of a protected rent falls within the Protected Period.
32. The question of the tenancy being adversely affected relates to the existence of the pandemic of coronavirus and therefore by virtue of it being subject to a closure requirement. In this context the premises were required to be closed during the relevant period, and therefore the operation of the business was adversely affected by the coronavirus pandemic.
33. Turning to the question of Protected Rent then the rent attributable to the period of occupation for a period within the above timescale would fall into the category of being protected. However, I am advised that during the relevant period there was no rent which was withheld from payment by the tenant to the landlord. It follows therefore that there can not be any protected rent in that context.
34. Therefore there is no "Protected Rent Debt" which applies in this case.
35. Therefore I must find that the applicant does not have a case for relief against any protected rent debt, since none was accrued during the relevant period.
36. I must also consider whether or not the parties reached an agreement. On this point they have failed to resolve the matter and hence this has been referred to Arbitration.
37. It is also relevant to consider the viability of the business. There is no direct guidance within the CRCA on this point.
38. However, the matter of viability of a business largely revolves around its future trading prospects, and whether or not it is still capable of generating a profit. If the answer to the latter is in the positive, then clearly the business is still viable.
39. However, when looking at future levels of sales which a business might realistically expect to achieve, one has to look at past performance, and what might be expected going forward. In this context it is clear to me that, since the businesses continued trading in some form or another during the coronavirus Pandemic, and is currently trading, it seems to be that the answer to the future trading prospects is also positive.
40. In conclusion therefore I find that this business is viable.

41. In considering how any relief from payment of a protected rent debt is concerned Section 14 of the CRCA applies, when read in conjunction with Section 13 (5) of the CRCA.
42. Taken together these also demand that the Arbitrator considers any final proposal put forward by either party, under Section 11 of the CRCA.
43. In this context no further proposals have been put forward by either party, and therefore there is nothing further to consider in this context.
44. Finally I must take into account the requirements of Section 15 of the CRCA. This requires that any Award to be made should be aimed at preserving and/or restoring and preserving the viability of the tenant's business, and be consistent with preserving the Landlord's solvency. The business is viable and the Landlord is solvent as far as I am aware.
45. This section also requires that the Arbitrator establishes that the tenant be required to meet its obligations as regards the payment of the protected rent debt. Of course if there is no PRD then there is nothing to be paid.
46. I find that the tenant's business is viable as noted above, and therefore it is appropriate that the Award takes account of the above points.

Findings

47. The CRCA requires that relief from payment of a Protected Rent Debt should be granted on the proviso that :-
 - a. the property is occupied under a business tenancy;
 - b. there is protected rent debt consisting of un-paid protected rents; and
 - c. the tenant's business is viable or if not would be viable if granted relief.
48. I am satisfied that the tenancy qualifies as a business tenancy under the Act.
49. I am not satisfied that there is a protected rent debt, for the reasons being that there was no rent held back by the tenant from payment during the protected period.
50. I am satisfied from the information to hand that the tenant's business is viable.

Relief From Payment

51. As the tests set out above are not all satisfied by virtue of the fact that there can be no "Protected Rent Debt" it follows that the applicant should not be given any relief from payment of same. Put simply, there is no protected rent debt for which any relief can be given.

Decision

52. I find that there is no grounds upon which the appellant should be given any relief for any protected rent debt.
53. It follows therefore that there is no financial Award which I am to make in favour of the appellant.

Costs

54. Section 19 (7) of the CRCA provides that each party pays its own costs in the Arbitration. However I must also make an Award requiring that the Respondent reimburse half of the Arbitrator's fees which have been paid by the Applicant.
55. However I am also empowered to make an Award as to Costs in the case, taking account of the conduct of the parties.
56. On this point I find that as there is no protected rent debt which should be the subject of an Arbitration the applicant has erroneously progressed such a claim.
57. The parties failed to reach an agreement on the question of any protected rent debt, hence the requirement for Arbitration. However, the applicant opted to follow the RICS route for Arbitration in this case. There are four schemes within the RICS protocol, and it is up to the parties to decide which route to take.
58. Having failed to reach any kind of agreement as to which course of action to take under this guidance, by default it had to be dealt with under Arbitration Option D. This effectively means that the Arbitrator's fees are to be paid in essence on an hourly rate basis, rather than being a fixed fee as would be the case for a process under Route A or B.
59. Therefore I find that there have been costs incurred in dealing with this matter which otherwise might have been avoided.
60. However, it is also incumbent upon the parties to endeavour to reach an agreement upon which course of Arbitration to take. Having failed to do so, I find that both parties must bear some of the responsibility for this.
61. I also consider proportionality. It is clear that the respondent is a somewhat larger company than the appellant, and thereby has significantly more resource available.
62. Therefore I find that the respondent shall meet its own costs in this matter.
63. The respondent shall therefore reimburse the applicant 50% of the costs of this Arbitration.
64. The applicant paid the sum of [REDACTED] to the RICS who hold the money in order to discharge my fees.
65. My fees are based upon my time incurred, at the hourly rate of [REDACTED] plus VAT. I have incurred 4 hours 30 minutes which totals [REDACTED] plus VAT, being [REDACTED]. Total [REDACTED].

Publication of the Award

66. Pursuant to Section 18 (2) I am required to publish this Award.
67. This will be published by the RICS and is to be in an anonymised format.

Seat of the Arbitration

68. The Seat of this Arbitration is in England and Wales.

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Barry G Crux FRICS ACI Arb

Dated 10 February 2023