

In The Matter of an Arbitration under the Commercial Rent (Coronavirus) Act 2022

Between

XXXX

(Applicant/ Tenant)

and

XXXX

(Respondent/ Landlord)

In respect of

XXXX

(Property)

AWARD

Introduction

1. The Applicant is the tenant of the property known as XXXX (**'the Property'**) under a lease dated XXXX (**'the Lease'**) between (1) XXXX (**'Landlord'**) and (2) XXXX (**'Tenant'**).
2. The Respondent is the freehold owner of the Property and is the Applicants landlord under the Lease.
3. The Applicant is represented by XXXX and the Respondent by XXXX.
4. It is common ground between the parties that:
 - i) The Applicant occupies the premises for the purposes of a business trading as a restaurant and bar operating in the hospitality sector.
 - ii) The lease creates a business tenancy sufficient to satisfy the requirements of the Commercial Rent (Coronavirus) Act 2022.
 - iii) There is a 'protected rent debt' as defined by the Act.
 - iv) An agreement between the parties has not been reached.
5. Under the Lease the rent payable is £65,000 per annum (plus VAT).
6. The Applicant seeks relief from payment under the Commercial Rent (Coronavirus) Act 2022 in relation to an alleged protected rent debt during the relevant period.

Procedural Background

7. This application was made under Commercial Rent (Coronavirus) Act 2022 (**'the Act'**) and is proceeding by agreement under Procedure B.

8. The reference was made to the Royal Institution of Chartered Surveyors (RICS), an approved arbitration body for the purposes of the Act, and I was appointed by the RICS as arbitrator.

9. It was agreed to dispense with the need for a preliminary meeting with the initial matters of eligibility being dealt with in the Applicants Updated Formal Proposal.

10. I have received the following main documents:
 - i) Applicant's formal written proposal dated 22 September 2022;
 - ii) Applicant's updated formal proposal dated 31 October 2022;
 - iii) Respondent's response dated 21 October 2022;
 - iv) Email dated 31 October 2022 from the Applicant;
 - v) Emails dated 22 November 2022 from the Respondent;
 - vi) Email dated 22 November 2022 from the Applicant;
 - vii) Respondent's mortgage statement;
 - viii) Respondent's statement of account;
 - ix) Copy lease and Deed of Variation;
 - x) Applicant's financial statements for year ended 2020 & 2021;
 - xi) Applicant's profit & loss for year ended 2021 & 2022;
 - xii) Applicant's default interest document
 - xiii) Applicant's business overview;
 - xiv) Applicant's company structure; and
 - xv) Applicant's business manifesto for Covid-19

11. Neither party requested a hearing and the matter proceeds by way of written documents only. I have considered all the materials and evidence put forward by the parties although I have not referred to every single matter in this Award.

12. The Applicant notified the Respondent of its intention to go to arbitration by way of an email dated 4 August 2022 in the event the Applicant's Proposal was not acceptable. The Respondent did not reply within the required 28-day period and consequently the Applicant submitted its application to have the matter decided by arbitration.

13. Under section 11(2) of the Act a Respondent is permitted to put forward a formal proposal in response to a proposal made by an Applicant within 14 days of receipt. It is understood that the Applicant's formal proposal was sent to the Respondent on 22 September 2022. The 14-day period therefore expired on 5 October 2022. The Respondent's formal response was not submitted until 21 October and the Applicant claims the Respondent is out of time in the absence of any extension to the timescales being extended.

14. In accordance with s.11(6)(b) I have the power to decide whether to extend the time periods set out in subsections (2) and (4) if I consider it would be reasonable to do so in all circumstances. I am satisfied that it is just and equitable to do so and therefore allow the Respondent's proposal.

The Claim

15. Pursuant to section 11 of the Act the Applicant has submitted a proposal accompanied by supporting evidence seeking relief under the Act.

16. Section 3 of the Act defines the Protected Rent Debt as unpaid protected rent including any interest. The protected rent is rent due under the tenancy if the tenancy was adversely affected by coronavirus during the protected period.
17. The Applicant's updated formal proposal, verified by a statement of truth, claims the Protected Debt is £62,483.70 plus interest of £7,235.68 and proposes that 50% of the Debt is waived by the Respondent. Further it is proposed that the amount £69,719.38 should be paid by the Applicant in 12 monthly instalments beginning whenever the Arbitrator determines to be just.
18. The Respondent's formal response, made without any reference to a statement of truth, claims the Protected Debt is £83,050.10 including interest; The difference being the Respondent has included the rent in respect of the Office space which is held under a separate lease agreement. The Respondent also disputes the Applicant's claim that full repayment would affect the overall viability of the Applicant's business and therefore considers the amount should be paid back in full without delay.
19. It is accepted and acknowledged that the Office space which extends to the third floor in the building is held by way of a separate lease agreement to that of the Property. The rent falling due under the office lease is therefore unprotected rent. The Office lease is not therefore eligible for the arbitration scheme and does not form part of the claim.
20. Section 5(1)(a) of the Act defines the relevant period for calculating the Protected Rent Debt for English business tenancies as the period beginning 21 March 2020 and ending 18 July 2021. This is 485 days.
21. The figure of £62,483.70 plus interest of £7,235.68 is therefore is the total Protected Rent Debt - excluding the rent in respect of the Office space - upon which I must decide whether to grant relief and if so in what form.

Legal Framework and Eligibility

22. Section 13 of the Act provides for relief from payment of Protected Rent Debt if:

- i) the property is occupied under a business tenancy as defined by the Act.
- ii) there is a protected rent debt consisting of unpaid protected rent.
- iii) the tenant's business is viable or if not would be if granted relief.

23. If I am not satisfied, I must dismiss the reference under s.13(2) & (3).

24. I am satisfied that the tenancy qualified as a business tenancy under the Act.

25. I am satisfied that there is a Protected Rent Debt which on the facts is £62,483.70 plus interest of £7,235.68.

26. I am also satisfied from the information provided by the Applicant that their business was viable prior to the pandemic and remains so post pandemic if granted relief.

27. Under the principles set out under section 15 of the Act, I am to consider:

- i) under the proposal the Award will preserve the viability of the Applicants business and does not affect the solvency of the Respondent; and

- ii) the Applicants proposal, will so far as it is consistent with the first principle to do so, be required to meet its obligations as regards the payment of the Protected Debt in full and without delay.

Relief from payment

28.I must decide if the Applicant should be given any relief from payment of the Protected Debt and in doing so the award which I am permitted to make under section 14(6) may comprise:

- i) Relief from payment by either writing off all or part of the debt including interest or giving the tenant time to pay the whole or part of the debt or a combination of these relief measures.
- ii) Alternatively, I may determine that the Applicant is given no relief from payment.

29.In making my award I must consider the proposals put forward to me by the parties and any Award should preserve or restore the viability of the business tenant insofar that it is consistent with preserving the Landlords solvency. Equally the tenant should as far as it is consistent with the above principle be required to meet its obligations regarding the payment of protected rent in full and without delay.

30.Section 16 of the Act requires me to make my assessment having regard to:

- i) The assets and liabilities of the tenant
- ii) The previous rental payments made under the business tenancy from the tenant to the Landlord
- iii) The impact of coronavirus on the business of the tenant

- iv) Any other information relating to the financial position of the Tenant I consider appropriate
- v) The financial position of the landlord

Relief from Payment - Decision

31. The Applicant set up XXXX in 2010. The Applicant and XXXX now form part of the same group of companies as XXXX ('XXX').
32. XXX operates eight bars and restaurants in XXXX. Six of those leases are held by XXXX and the other two are held by the Applicant which are the subject of this claim and trade as XXXX. The two businesses - XXXX - are both operated by XXX and under the terms of the lease the Applicant is permitted to share occupation with any company that is a member of the same group.
33. It is understood that the varied nature of the different trading formats provides opportunities for cross-marketing and the ability to manage seasonal changes when necessary.
34. On 21 March 2020 all non-essential retail businesses - including restaurants, cafés, bars and public houses - were forced to close and such closures were enforceable by law in England and Wales due to the threat to public health. A business operating in contravention of the Health Protection (Coronavirus, Business Closures) Regulations 2020 would therefore be committing an offence.
35. The Applicant runs a bar and restaurant from the Property and was therefore forced to close its business as this was classified as non-essential retail.

36. The Protected Debt concerns the rent payable by the Applicant during the Protected Period in respect of the Property only. As referred above the Applicant holds an office premises lease from the Respondent within the same building which it uses as its registered office. However, as this space was not required to close none of the rent falling due under this lease is subject to the claim made and has therefore been excluded.
37. The Applicant calculates that the Protected Rent Period is 485 days equating to £103,644.50 based on the rent of £65,000 per annum. During this period the Applicant paid a total rent of £57,903 which comprised rent in respect of the subject Property and office premises. Excluding the office rent totalling £16,742.20 the total Protected Rent Debt for the period is £62,483.70 excluding default interest. It is also noted that the Applicant has paid and the Respondent has received approximately 40% of the Protected Rent Debt.
38. In addition, the Applicant has included default interest (as provided in the lease) on the amount calculated based on 4% above the HSBC base rate totalling £7,235.68.
39. The Applicant claims its business is viable if given relief from payment of the debt. Prior to lock-down XXX, as the operational company, was trading well with the accounts for the year ended March 2020 showing an EBITDA profit of approximately £100,000. However, the subsequent accounts for the period ending March 21 show the Applicant making a loss of £43,808 and XXX loss at £260,808.
40. The Applicant has adapted its business model to include offering takeaway food, outside trading and restricting the number of table service customers once trading was permitted. These changes are set out in the company's manifesto and the measures implemented by the company appear to have helped cashflow and ensured the company's near-term viability.

- 41.XXX has also received a Coronavirus Business Interruption Loan (CBIL) amounting to £230,000 which is being repaid at a monthly amount of £3,833. In addition, XXX has deferred its VAT payments which are being paid over a period of 24 months at a monthly amount of £13,014.
- 42.The business has also used an insurance payment of £202,217.21 from a fire at premises in XXXX to aid cashflow although a large proportion of the payment has been used to fit-out alternative premises.
- 43.The Applicant also advises that landlords of their other premises have all been supportive and agreed rent concessions during the period in order to support and assist the businesses recovery. However, despite all the financial support and assistance, XXX still posted a loss of £67,000 for the year ended March 2022.
- 44.Since the restrictions have been lifted the Applicant claims that trade has not returned to previous levels due to the change in working habits. However, it is suggested that despite this the accounts show that the losses (2021 - £180,494.99 and 2022 - £98,525.97) are reducing and the Applicant therefore expects both businesses to return to profit, with XXXX already having done so.
- 45.The changes the Applicant made to its business model as a result of the effects of the pandemic and shut down will therefore hopefully improve its long-term prospects and profitability; These changes being rebranding the restaurant and nightclub as well as providing an outside trading area at a total cost of around £80,000 as well as savings made under the business rates relief totalling £51,535.

46. The Applicant also advises that as soon as both businesses were able to reopen and begin trading again rent was paid to the Respondent amounting to £41,160.80 and to date approximately 40% of the Protected Rent Debt has been paid. Furthermore, since 18 July 2021 onwards all the rent due under the lease has been paid in full in addition to the rent due on the office lease.

47. However, the Applicants also advise that their business has been hit by the subsequent cost of living crisis resulting from increasing energy costs and rising inflation which has particularly affected the hospitality sector. Therefore, the Applicant is seeking time to repay the Protected Rent Debt to enable its recovery to take hold.

48. I have also had regard to the fact that prior to the Pandemic the Applicant's overall business was growing with increasing year end profits and a push to manage costs and develop the various business formats further.

49. In summary, the Applicant is therefore seeking to pay 50% of the debt owed amounting to £34,859.69 which they propose to pay over a period of 12 months in 12 equal payments.

50. As regard costs the Applicant also seeks that the Respondent shall pay the Applicant 50% of the costs of the referral fee or such amount as I shall decide in the circumstances.

51. The Respondents reply advises that the Applicants viability would not be jeopardised in any way by having to pay the Protected Rent Debt in full. XXXX advises that the Respondent has a mortgage of approximately £1.2m and is their only investment property and is under some financial pressure to repay the loan. However, no further details are provided concerning the Respondents financial affairs or circumstances except the provision of a bank statement from the Bank of Ireland detailing the payments being made and the balance owed.

52. XXXX considers the Applicant has benefitted from several government measures assisting their business whereas the Respondent has had no support whatsoever. Furthermore, XXXX considers that the Applicant has other businesses that can support one another during difficult times and rather than pay the rent owed has chosen to divert any cash resources into other new businesses.
53. The Respondent also considers that the rent for the Office premises lease should also be included on the basis that although there are two separate leases for the building the rent is demanded on the same rent account.
54. Further, XXXX disputes the Applicants calculation of the Protected Rent Period being 485 days given the fact the Applicant was able to do deliveries and take aways as well as out-door dining and in-door dining albeit limited to the rule of 6 persons only. I have already dealt with both these matters above.
55. The Respondent also has concerns as to the reliability and accuracy of the figures provided and the possibility of manipulation of various charges and salaries in order to reduce the profitability and therefore suggests it would be unwise and wrong to place too much reliance on the figures supplied. XXXX refers to the Applicants gross turnover of £6.3m in the year 2018/19 and for the year ended March 2020 a net turnover of £4,802,854 for XXX. This may be the case but I must consider the impact of lock-down on the Applicants business as well as the effect on the Respondents during this period in granting any rent relief.
56. XXXX concludes the rent debt to be £83,050.10 which includes rent in respect of the office lease and interest provided under the terms of the subject Property lease. XXXX also concludes that full settlement of the Protected Rent Debt would not therefore adversely affect the Applicants cash balance as there is sufficient funds to do so.

57. I have had regard to the submissions of the parties and I am satisfied given both parties' circumstances that in granting relief it will preserve the viability of the Applicants business and will not affect the solvency of the Respondent.

58. I find that in granting relief I have had regard to section 16 of the Act and considered both party's circumstances and consider it just and equitable to Award that the Applicant shall be granted relief having regard to the principles set out in section 15 of the Act.

59. It is apparent that the Applicant's business has suffered as a result of the pandemic which has affected its financial resources and the award it proposes is necessary and appropriate to preserve the viability of its business whereas the Respondents position requiring payment in full and immediately may threaten and compromise the Applicants viability. There is also no suggestion that the Respondents solvency is at risk, and by s.15(3) solvency is effectively presumed unless there is evidence that the landlord is, or is likely to become, unable to pay its debts as they fall due which is not the case here.

60. The Respondent contends that the Applicant has sufficient resources to pay the protected rent debt and the business is viable and does not need the grant of relief or a payment plan to preserve its viability. The Respondent disputes the reliability of the Applicants accounts and believes the Applicant has a large and extensive business to support any losses in other parts of its business.

61. In summary therefore, the dispute is that the Applicant believes it should be given relief and the Respondent not.

62. So far as the financial and other evidence before me is concerned I am satisfied that the Applicants business at the Property was doing well before the pandemic and forecast a profit in the year ended March 2020. The accounts for year ended March 2021 show a loss for the Applicant and

a greater loss for XXX which for the year ended March 2022 has reduced. The loss sustained at the Property at the end of the 2021 financial year was £180,494.99 but by the end of 2022 financial year the losses had reduced to £98,525.97. I understand that the businesses profits are expected to improve again and will eventually both return to profit despite the economic headwinds of inflation and the general cost of living increases.

63. I am satisfied that the Applicant has made all efforts to ensure no further accrual of rent has occurred and will be able to meet a payment plan. I am satisfied the Applicant has a viable business that was materially affected by the pandemic and is now facing various challenges arising from the after effects as well as the current economic pressures resulting from rising prices, changes in consumer behaviour and cost of energy increases.

64. The Applicant has continued to operate as a going concern despite these difficulties and proved it can bear some financial losses albeit in the short to medium term given the portfolio of other formats it operates elsewhere. It is unclear whether the Applicant can pay the full amount or the amount it proposes but I assume it is able to do so given the offer made.

65. In considering the Applicants viability I must have regard to s.16 of the Act and in particular s.16(1)(b) and the fact that the Applicant paid rent to the Respondent as soon as the businesses were able to trade from the Property. In fact, the Applicant has paid £41,160.80 towards the rent debt to reflect the limited takeaway operations that it undertook.

66. Therefore, I consider the Applicants business is viable and its viability would not be undermined if it is required to pay the debt in full, at least if, a payment plan is implemented. There is no reason to suspect the Applicants business will not return to profitability in the near term despite the economic difficulties; the businesses have continued as going concerns and the Applicants confidence in the future of its businesses is clear.

67.I therefore find that the Applicants request for relief from payment of half of the Protected Rent Debt - £34,859.69 (including interest) - be refused because:

- (i) It is not consistent with principles set out in s.15 of the Act.
- (ii) Payment of the protected rent debt in full (over time) would not jeopardise the viability of the Applicants business
- (iii) Relief from payment of the sum of £34,859.69 is not necessary to preserve such viability
- (iv) In the circumstances the grant of such relief would conflict with the principle in s.15(1)(b) that the Applicant should meet its obligations as regard the payment of protected rent in full, where (as here) that is not inconsistent with the preservation of its viability

68.I find the Respondents proposal for repayment of the whole amount is consistent with the s.15 principles. However, I find the Respondents proposal for payment in full (without a payment plan) may cause the Applicant additional financial burden which may affect the viability of its business.

69.The Applicant seeks to repay 50% of the protected rent debt over a period of 12 months which equates to approximately £2,904.97 per month. The Applicant believes that its business can sustain a payment of this amount without undermining its viability. Based on the submissions and evidence before me I find there is no basis on which to conclude that payment of the whole amount over 12 monthly instalments amounting to approximately £5,809.95 would affect the Applicants viability either.

70.I therefore find it would be just and equitable for the Applicant to settle the whole protected rent due over a 12 months period.

Arbitration Fees

71. Section 19(5) provides that when an Award is made the arbitrator must also make an award requiring the other party to reimburse the applicant for half of the arbitration fees paid unless the arbitrator considers it more appropriate in the circumstances to award a different proportion.

72. The arbitration fees are set out in section 19(1) which are the arbitrators fees and expenses in addition to the expenses in respect of the application fee made to the arbitration body concerned.

73. In accordance with section 19(7) each party must pay its own legal or other costs and as provided by section 19(8) are not recoverable by any term of the tenancy concerned.

74. As to the arbitration fees under section 19(1), I find no reason or circumstances to not follow the general rule as provided under section 19(5) of the Act that the Respondent shall reimburse the Applicant for half of the arbitration fees paid under section 19(4).

Award

75. I, Nicholas James Paul Wint, having carefully considered the submissions of the parties and the evidence provided make my Award under the provisions of the Act s.14 which gives relief to the Applicant from payment of the protected rent debt in the following manner and on the following terms:

Protected Rent Debt

- i) The Applicant shall pay the Respondent the full amount of £69,719.38.
- ii) The Applicant shall be given time to pay the above debt which shall be paid to the Respondent by 12 instalments as follows:

- £5,809.94 shall be paid on 1 September 2023
- £5,809.94 shall be paid on the first day of each month from 1 October 2023 to 1 July 2023 (10 instalments)
- £5,810.04 shall be paid on 1 August 2024

Costs

- i) The Applicant and Respondent shall each bear half of my arbitration fees and expenses.
- ii) The Applicant and Respondent shall each bear half of the arbitration application fee.
- iii) Accordingly, the Respondent shall reimburse the Applicant for one half of those fees.
- iv) This sum is to be paid by within 28 days of this Award.

76.The Seat of the Arbitration is England & Wales.

77.This award will be published by the RICS in an anonymised form.

A handwritten signature in blue ink, appearing to read 'N. Wint Frics', is written over a faint rectangular stamp.

Signed:

NICHOLAS WINT FRICS - ARBITRATOR

Dated:

15 August 2023