

IN THE MATTER OF AN ARBITRATION
UNDER THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Between

[REDACTED]

(APPLICANT TENANT)

and

[REDACTED]

(RESPONDENT LANDLORD)

In respect of

[REDACTED]

Award by
Robert Clifford MRICS
Newmark HDH Limited
84 Grosvenor Street
London
W1K 3JZ
United Kingdom

1. **PRELIMINARY**
2. The Applicant, [REDACTED], is a tenant of premises at [REDACTED] and is represented in this matter by [REDACTED].
3. The Respondent, [REDACTED], is the landlord of said premises and is represented by [REDACTED].
4. I have been provided with a copy of the lease together with other legal documents. Neither party has raised a dispute as to whether the tenant is a qualifying tenant under the terms of the Commercial Rent (Coronavirus) Act 2022 ("2022 Act").
5. The Applicants applied to the RICS for the appointment of an Arbitrator under the 2022 Act and I was duly appointed in this capacity on 2 December 2022. The application was made under procedure D.
6. I have received and considered a number of documents, including: -
 - a) A formal proposal from the Applicant
 - b) A formal response from the Respondent
 - c) An amended formal proposal from the Applicant
 - d) A large bundle of documents which accompanied the Applicant's formal proposal which includes:
 - i. title documents
 - ii. evidence of financial viability including unaudited financial statements for 2019, 2020, 2021 and draft management accounts
 - iii. evidence of withdrawals from rent deposit
 - iv. evidence of the effects of Covid-19
 - v. correspondence between the parties
 - vi. local market information
 - e) A further bundle of documents which accompanied the Respondent's formal proposal which includes:
 - i. a copy of the register of the leasehold title
 - ii. statement of account
 - iii. emails between the parties
 - iv. letters between the solicitors
 - v. forms SH01
 - f) A third bundle accompanying the Applicant's amended formal proposal which includes:

- i. Tomlin Order
 - ii. [REDACTED] Presentation
 - iii. updated Turnover
 - iv. emails between the parties
 - g) Notification of intention to make a reference to Arbitration
7. The above documents have been seen by both parties.

8. LEGAL FRAMEWORK

9. Section 1(1) of the 2022 Act provides that the 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".
10. Section 3(1) of the 2022 Act provides that "a protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent. There is no dispute that the tenancy of the premises in this case was a business tenancy at the relevant time (s.3(2)(b)).
11. Section 4 of the 2022 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.
12. Section 13 of the 2022 Act sets out the main issues which the Arbitrator must decide, as follows: -
- Is the tenancy a business tenancy, and is there a protected rent debt as defined by the 2022 Act?
 - Is the tenant's business viable, or would it be viable if rent relief were given?
 - 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 the parties and decide which is more consistent with the principles set out in section 15 of the Act. If I consider that neither proposal is consistent, then I must make an award that I consider appropriate.
14. The principles set out in section 15 are as follows; -
- The award should preserve (or restore and preserve) the viability of the tenant's business, whilst also preserving the landlord's solvency.
 - The tenant should meet its obligations as regards payment in full and without delay.
15. Section 16 of the 2022 Act provides for the arbitrator's assessment of the viability of the business of the tenant and the solvency of the landlord.

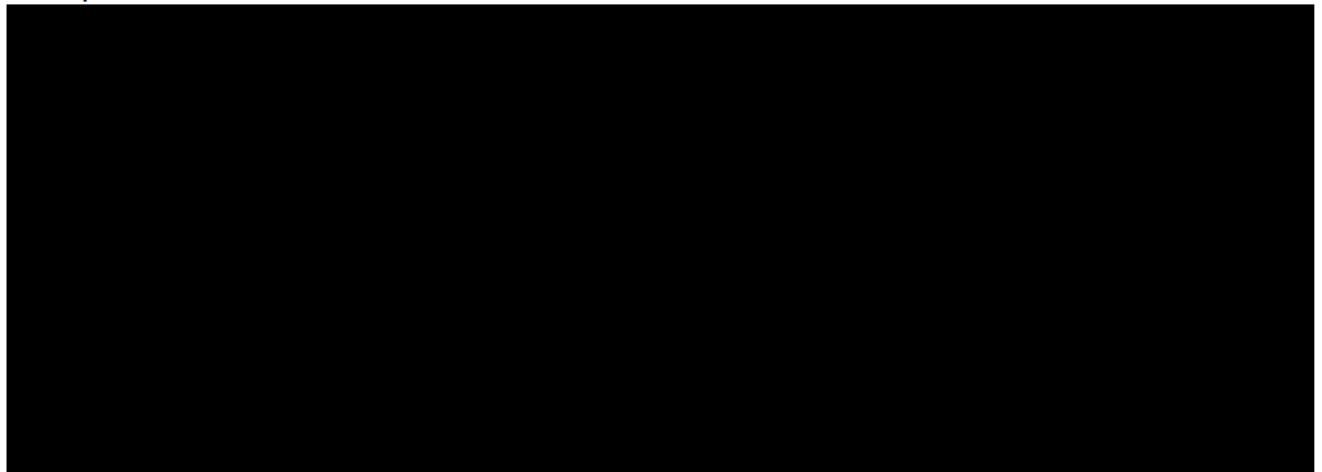
16. SUBMISSIONS OF THE PARTIES

17. Formal Proposal from the Applicant

18. This provides a brief history of the tenant's occupation prior to the pandemic and states that they believe the protected rent debt is [REDACTED] and is made up of rent deposit top up monies of [REDACTED] (equating to 15 months' rent plus VAT), rent for the period 24 June 2021 – 18 July 2021 in the sum of [REDACTED] including VAT) and interest on protected rent debt.

19. The Applicant operates a single restaurant, [REDACTED], and states that since taking the lease from January 2018 until the pandemic paid all rental sums due on time with one exception.

20. Following the governments imposed restrictions, from 21 March 2020 to 18 July 2021, the Applicant was forced to close the property for 9.5 months and operate under restrictions for the remaining 6.5 months. The effects on sales and forecasts is illustrated in the table reproduced below:



21. Due to the Covid closures/restrictions and consequent loss of income, the Applicant was unable to pay any subsequent rent. The details of negotiations between the tenant and the landlord on the rent is set out in the proposal, together with copies of emails and correspondence in the various bundles. The parties appear to have reached, or had been very close to reaching, agreement on this issue on various occasions, but for reasons mentioned in the proposal or set out in the correspondence, the agreement was not finalised.

22. The Applicant claims the business is viable and points to a substantial investment by [REDACTED] [REDACTED] as evidence of this. However, although business has improved in London in recent months, the Applicant is not seeing anywhere near the pre-pandemic levels of trade, and refers to the current cost of living crisis which, together with increased energy prices, they believe will continue to affect trade.

23. The Applicant states that if they were required to top up the rent deposit, it is likely that, due to the significant debts that have built up during the pandemic and based on current cashflow forecasts, the Applicant's business would fail without further investment.
24. Reference is made to the Respondent's rental obligations to the freeholder, and that they have benefitted from not having to pay a licence fee during the period that the property was mandated to close. The Applicant understands that the Respondent has drawn down the whole of the rental deposit against the protected debt.
25. The Applicant makes the following formal proposal:
- the Respondent repays the equivalent of 9 months' rent plus VAT (i.e. [REDACTED]) to the rent deposit account; and
 - the Applicant is relieved from any obligation to top up the rent deposit; and
 - the Applicant is relieved from any obligation to pay interest on any unprotected rent debt.
26. The rental deposit above is reduced from 15 months to 9 months, as the current industry norm is 6 months.
27. Formal Response from the Respondent
28. The Respondent is the head leaseholder of the whole building, [REDACTED]. This is the Respondent's only asset, and the Applicant's restaurant comprises one third of the total income.
29. The Respondent claims that in the last financial year it made a profit of circa [REDACTED] and had it not drawn down the rental deposit it would have made a loss of circa [REDACTED].
30. The respondent agrees that the protected rent debt totals [REDACTED], as set out in 18 above.
31. The Respondent makes brief reference to the negotiations regarding the rent debt, which failed to result in an agreement, and to the investment by [REDACTED]. They have requested further information from the Applicants, including detailed financial information provided to [REDACTED], and profit and loss accounts for 2019, 2020, 2021 and 2022.
32. The Respondent goes on to suggest that the Applicant is seeking to use the relief claimed to grow its business rather than to preserve its viability. The Respondent concedes that the Applicant is viable.
33. In the Respondent's formal proposal, they state that as the Applicant has not provided the necessary financial information, I cannot find that the relief sought is needed to preserve the viability of the business. Furthermore they state I do not have jurisdiction to make an Award

that the landlord pays money into the rent deposit account. Finally, the Respondent puts forward the following proposal:

- The immediate topping up by the Applicant of the rent deposit in the sum of [REDACTED] and thereafter staged payments until such time as the full deposit of [REDACTED] has been reached. The Respondent will accept quarterly payments over 2 years commencing March 2023.
- Interest to be paid in full.
- The Applicant must also pay in full the outstanding rent of [REDACTED] for the period 24 June 2021 to 18 July 2021.

34. Amended Formal Proposal from the Applicant

35. The Applicants have provided an amended formal proposal, within which, amongst other matters, they refer to the fact that they have not provided copies of the full management accounts as they do not consider that they are relevant or necessary in addition to the detailed information already provided, in particular they state that the filed accounts are sufficient for the Respondent's purposes.

36. The Applicants also state that if they were to immediately top up the rent deposit by

[REDACTED] the business would no longer be viable. They then provide a revised proposal:

- the Applicant is relieved from any obligation to top up the rent deposit;
- the Applicant is relieved from any obligation to pay interest on any unprotected rent debt, and
- the Applicant is relieved from any obligation to pay the outstanding rent arrears of [REDACTED].

37. They state that the present proposal is one which the Applicant believes is necessary to help the business survive based on current forecasts [40-41] and which best balances the interests of the Respondent and the Applicant.

38. ELIGIBILITY OF THE CLAIM

39. At the pre-arbitration stage it is necessary for the parties to follow certain requirements set down in the 2022 Act. I have received the documents referred to in section 6 of this Award which appear to comply with the requirements.

40. There is no dispute that this referral relates to a business tenancy.

41. "Protected rent debt" is defined in S.3 of the 2022 Act, which states that the rent will be "protected rent" if –

- a) The tenancy was adversely affected by coronavirus, and

- b) The rent relates to a protected period.
42. Issue (a) is dealt with in S.4 of the 2022 Act and I accept that the business carried on at the property was impacted by the restrictions imposed due to the covid pandemic.
43. Issue (b) the protected period, is defined as from 21 March 2020 to 18 July 2021.
44. The protected debt is agreed between the parties at [REDACTED] as set out in paragraph 18 above.
45. Both parties have made final offers, and these are summarised in paragraphs 33 and 36 of this Award.
46. The 2022 Act sets out the principles I must consider when looking at the final offers in Section 15, which I would summarise as:
- i. they should aim to restore/preserve the viability of the tenant's business
 - ii. the tenant should meet their obligations under the contractual terms of the lease to pay rent as far as is consistent with above.
47. Section 16 of the 2022 Act indicates that which I must have regard to when assessing the viability, if they are brought to my attention:-
- a. assets and liabilities of the tenants, including any other tenancies to which the tenants are party;
 - b. the previous rental payments made under the business tenancy from the tenants to the landlord;
 - c. the impact of Coronavirus on the business of the tenant; and
 - d. any other information relating to the financial position of the tenant the Arbitrator considers appropriate.
48. The Applicant has provided unaudited financial statements for three years up to 31 March 2021. They have not provided any profit and loss account or audited/comprehensive financial accounts.
49. I have also been provided with correspondence regarding various invoices from [REDACTED]
[REDACTED]
[REDACTED] and a bank balance dated 16 August 2022. Most of this correspondence relates to periods after the protected period and whilst that does not necessarily make them irrelevant, as they are not backed up with accounts for the corresponding period, it is difficult for me to interpret these with any great weight to support the Applicant's assertion that the business is unviable without the rent relief claimed.
50. It is the responsibility of the parties to ensure that the supporting evidence accompanying a formal proposal is sufficient. In that regard I would expect to see more comprehensive

information to support this from the Applicant, such as last 12 months' full bank account information, profit and loss accounts for all the periods including 2022, management accounts for each financial month/year after March 2019, net profit margin or gross profit margin prior to the protected period, compared to after closure requirements or specific restrictions ended, etc.

51. RELIEF FROM PAYMENT

52. On the evidence put to me, I am of the opinion that neither offer is consistent with Section 15 of the 2022 Act. The Applicant has not provided sufficient supporting evidence to show that paying the protected rent debt would make the business unviable and that they could not meet the rental obligations. The Respondent's proposal of immediate payments of [REDACTED] towards the rent deposit top up and [REDACTED] outstanding rent would, in my view, affect the viability of the business based on the limited accounts information available to me.
53. I am therefore required to make an Award applying the principles of Section 15.
54. The Respondent's offer repays more of the protected rent debt and therefore comes closer to the Applicant meeting their contractual obligations. However the Applicant should be given time to do this.
55. Apart from the outstanding rent of [REDACTED] for the period 24 June 2021 to 18 July 2021, the Applicant should be allowed to replenish the rent deposit account over 2 years by equal quarterly instalments.

56. COSTS

57. Section 19 of the 2022 Act relates to the arbitration fees and expenses.
58. The Arbitration fees are defined as the Arbitrator's fees and expenses and the fees and expenses of any approved arbitration body. Under procedure D, the arbitrators fees are £7,000 (plus VAT). This was assessed at 20 hours work. I have slightly exceeded this, but given the delays I will cap the fee at this level.
59. I have received no proposals regarding the Arbitration fees and expenses and have therefore followed the guidance of the 2022 Act that each party should bear equal responsibility for these costs.

60. AWARD

61. I hereby Award and Direct as follows; -

- a) The Applicant must pay in full the outstanding rent of [REDACTED] for the period 24 June 2021 to 18 July 2021 within 28 days of the date of this Award.
- b) The Applicant tops up the rent deposit in the sum of [REDACTED] by way of equal quarterly instalments beginning within 28 days of the date of this Award, and thereafter payments over 2 years until such time as the full deposit has been reached.
- c) Interest to be paid in full.
- d) The Respondent pays the Applicant half of my fees within 28 days of this Award.

62. An anonymised copy of this Award will be published by the RICS.

63. The seat of this Arbitration is England and Wales.

64. This Final Award is made and published this 14th day of April 2023.



Robert Clifford MRICS

ARBITRATOR

Dated 14 April 2023

This award is solely for the use of the parties to this dispute, and no responsibility is accepted to any third parties for the whole or any part of its contents. Neither the whole nor any part thereof may be reproduced without the approval of the parties and the Arbitrator.