

**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 copies of two leases. 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 14 December 2022. It has been agreed that the application will be dealt with under procedure C.
6. A Preliminary Meeting with the parties was held on 11 January 2023.
7. I have received and considered the following: -
  - a) A bundle of documents, which includes:
    - i. A Formal Proposal from the Applicant
    - ii. Notice of Intention to Arbitrate
    - iii. Two leases
    - iv. Offer Correspondence
    - v. Rent Arrears Schedule
    - vi. Financial Forecast to Year End 31.07.2023
    - vii. Filled Accounts Year End 31.05.2018
    - viii. Group Profit and Loss YTD May 2019, 2020, 2021 and 2022
    - ix. Balance Sheet to May 2022
    - x. Transactional Trial Balance
    - xi. Transactional Profit & Loss July 2022
    - xii. Management Accounts 01.01.2022 – 31.07.2022
    - xiii. Signed Financial Statements YE 2019, 2020 and 2021
  - b) The Respondent's Response, in two forms
  - c) Email correspondence from the parties, in particular, [REDACTED] email of 13 February and [REDACTED] reply of the same date
8. The above documents have been copied to both parties.

## 9. LEGAL FRAMEWORK

10. 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”.
11. 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)).
12. 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.
13. Section 13 of the 2022 Act sets out the main issues which the Arbitrator must decide, as follows: -
  - a. Is the tenancy a business tenancy, and is there a protected rent debt as defined by the 2022 Act?
  - b. Is the tenant’s business viable, or would it be viable if rent relief were given?
  - c. If so, should the tenant be given relief and, if so, what form should it take?
14. 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.
15. The principles set out in section 15 are as follows; -
  - a. The award should preserve (or restore and preserve) the viability of the tenant’s business, whilst also preserving the landlord’s solvency.
  - b. The tenant should meet its obligations as regards payment in full and without delay.
16. 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.

## 17. SUBMISSIONS OF THE PARTIES

18. The Applicant, [REDACTED], has provided a Formal Proposal. He makes reference to the history of the business, and his relationship with the landlord, [REDACTED]. He contrasts the landlord’s response to the pandemic to other landlords of properties within the business.
19. He states that the business is a viable business, in the sense that it has cash in the bank (fluctuating between £150,000 and £450,000), has no bank debts and trades at a moderate profit. However, should it have to pay all the rent arrears it would not be viable.

20. The Applicant further states that immediately prior to lockdown, sales were considerably improved from the preceding year.
21. He calculates the current rent arrears at £194,452.
22. Finally he proposes that the rent is decreased by 50% for the days they were mandated to close or only allowed to trade outdoors. He calculates this to be £62,465 of relief. He also requests relief from interest. This therefore leaves a balance of £131,987 which he wishes to pay in 2 instalments, 14 days from the date of the Award and 3 months thereafter.
23. In the Respondent's Response, [REDACTED] has taken advice from [REDACTED]. He states that [REDACTED] has good liquidity and its profitability has improved during 2021 even allowing for provision of paying the full rent for the premises. Furthermore the company has received "adequate government support of ca £700,000" whereas the landlord did not receive any, and "The company could afford to pay the rent on time however they have decided not to ..... but to make a claim to pay a reduced rent even though they don't qualify for the Commercial Rent (Coronavirus) Act 2022."
24. In the analysis of the accounts, it is suggested that for the period up to 31 May 2021:
- the accounts were prepared on a "going concern" basis even though the company was insolvent on paper
  - turnover has increased and the net loss has decreased
  - the cash and bank balance has increased
  - the company has good liquidity if the related party loan is excluded
  - [REDACTED] has good profit before depreciation and amortisation
  - the company made loss and it appears that they have made full provision for the rent
25. Accordingly the Respondent asserts that the Applicant does not qualify for a rent discount under the 2022 Act.
26. [REDACTED] provided a reply by email on 13 February to [REDACTED] Response, providing information regarding the related party loan, and stating that [REDACTED] has sufficient funds to continue to trade but not to make full repayment of the protected debt. Furthermore I should disregard the possibility of the Applicant borrowing money, and the Act has no grounds for ignoring depreciation and amortisation.

## 27. ELIGIBILITY OF THE CLAIM

28. 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.
29. There is no dispute that this referral relates to a business tenancy.
30. "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.
31. 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.
32. Issue (b) the protected period, is defined as from 21 March 2020 to 18 July 2021.
33. Both parties have made final offers, and these are summarised in paragraphs 22 and 25 of this Award.
34. The 2022 Act sets out the principles I must consider when looking at the final offers in Section 15, which I would summarise as:
- a. they should aim to restore/preserve the viability of the tenant's business
  - b. the tenant should meet their obligations under the contractual terms of the lease to pay rent as far as is consistent with above.
35. 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 that I consider appropriate.
36. In assessing the viability of the tenant, I have considered the financial information provided by the Applicant. The accounts for the years ending 31 May 2019, 2020 and 2021 illustrate to me that, whilst covid clearly impacted the business, it is a viable company.
37. The landlord has not raised the issue of his solvency.

**38. RELIEF FROM PAYMENT**

39. In the case of the subject property, I have accepted the “protected rent debt” for the period 21 March 2020 to 18 July 2021 equates to £194,452.
40. On the evidence put to me, I am of the opinion that both offers appear consistent with the first part of Section 15 of the 2022 Act, i.e. the aim of the offer is to restore or preserve viability.
41. Having found both offers consistent with the principles in section 15 I must, under the terms of section 14 (3) (a), decide which offer is the most consistent with the principles of section 15 and award that offer.
42. It is evident that the Applicant’s business has been severely and adversely affected by the pandemic. [REDACTED] has made the case that the business is currently viable, but should it have to pay all the rent arrears it would not be viable. I find this persuasive.
43. The Respondent’s analysis of the accounts are not conclusive to the findings that the Applicant does not qualify for a rent discount under the 2022 Act. Dealing with the points from paragraph 24 above:
- a. it is unclear how this relates to the tenant’s ability to pay the protected rent debt
  - b. the company is still making a loss
  - c. the net liabilities have increased substantially on the balance sheet
  - d. there are no grounds for ignoring the related party loan and the 2022 Act excludes borrowing further money or restructuring the business
  - e. I am not convinced that one should exclude depreciation and amortisation
  - f. as with a above, I am unclear how this relates to the tenant’s ability to pay the protected rent debt
44. Accordingly I find the Respondent’s argument less persuasive.
45. In accordance with section 14 (3) (a) of the 2022 Act I find that the Applicant’s proposal is most consistent with Section 15. I am therefore required to make an Award in terms of the Applicant’s proposal.

**46. COSTS**

47. Section 19 of the 2022 Act relates to the Arbitration fees and expenses.
48. The Arbitration fees are defined as the Arbitrator’s fees and expenses and the fees and expenses of any approved arbitration body. The parties have agreed the Arbitrator’s fee is £6,000 (plus VAT).

49. I have received no proposals regarding the Arbitration fees and expenses other than the Applicant's comments with regard to the Respondent not consenting to Procedure C, which has since been resolved. I have therefore followed the guidance of the 2022 Act that each party should bear equal responsibility for these costs.

#### 50. AWARD

51. I hereby Award and Direct as follows; -

- a) The Applicant will be granted relief for the "protected rent debt" of £62,465.
- b) The remaining balance of £131,987 be paid in two equal instalments, the first due 14 days from the date of this Award, the second due 30 days thereafter.
- c) No interest is due on the outstanding debt.
- d) The Respondent pays the Applicant half of my fees within 28 days of this Award.

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

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

54. This Final Award is made and published this 19th day of May 2023.



Robert Clifford MRICS

ARBITRATOR

Dated 19 May 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.