

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

**BETWEEN**

**BURNING ISSUES AND CP HOLDINGS LIMITED  
(APPLICANT)**

**&**

**STR 49 LIMITED  
(RESPONDENT)**

**IN RESPECT OF 9 STATION APPROACH, LONDON, TW9 3QB**

**FINAL AWARD**

**BY**

**BY SIMON S GOULDBOURN BSc MRICS ACI Arb  
ARBITRATOR**

MEMBER OF  
THE INTERNATIONAL



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## 1.0 *Preliminaries*

- 1.1 The Applicant is Burning Issues and CP Holdings Limited, the Landlord of premises known as 9 Station Approach, London, TW9 3QB. The Landlord Applicant is represented by Mr Tom Kuhn of Burning Issues and CP Holdings Limited.
- 1.2 The Respondent is STR 49 Limited the Tenant of the aforementioned premises. The Tenant Respondent is represented by Mr Jason Wells of STR 49 Limited.
- 1.3 I have not been provided with a copy of the lease but the premises are described as a “*restaurant/delivery takeaway establishment*” within the case details provided by the Applicant. The case details were referred back to both parties for comment following my appointment and no comments were received.
- 1.4 The Respondent uses the premises as described in the case details. It is agreed by both parties that the lease creates a business tenancy which satisfies the requirements of the Commercial Rent (Coronavirus) Act 2022 (CRCA).

## 2.0 *Procedural Background*

- 2.1 On 2<sup>nd</sup> September 2022 I was appointed by the President of the Royal Institution of Chartered Surveyors (RICS) to act as an Arbitrator under the CRCA.
- 2.2 In its application form dated 3<sup>rd</sup> August 2022, the Applicant requested the arbitration be conducted in accordance with the RICS arbitration procedure “C”.
- 2.3 The Applicant had served “notice of intention to arbitrate” on 21<sup>st</sup> June 2022 proposing procedure “C”. The Respondent confirmed agreement to arbitration under procedure “C” on 2<sup>nd</sup> August 2022.
- 2.4 I sent my initial letter to the parties including case details on Monday 5<sup>th</sup> September 2022 and calling for a pre arbitration discussion.
- 2.5 There was a delayed response from the Respondent’s representative, Mr Wells, due to illness but a pre arbitration meeting was convened on Wednesday 21<sup>st</sup> September 2022 at my office.
- 2.6 At the pre arbitration meeting parties agreed my fee basis and the following timetable:
  - The Respondent to submit its proposal for resolution of the dispute by Friday 7<sup>th</sup> October 2022.

- Both parties to have a further 28 day period following receipt of the Respondent's proposal, to make amended proposals if they so wished.

- 2.7 It was further agreed that if both parties declare that they do not want to submit amended proposals then I would immediately proceed to considering the written evidence and delivering my Award.
- 2.8 On 7<sup>th</sup> October the Respondent forwarded an attachment containing a copy of a chain of e-mail correspondence between the parties which the Respondent wished to rely upon. I did not open the attached correspondence but requested clarification from the parties that there was no "without prejudice" commentary within that chain of correspondence.
- 2.9 On 10<sup>th</sup> October the Applicant confirmed that correspondence was not of a "without prejudice" nature. The Respondent, however, provided me with an additional Microsoft Word document on 10<sup>th</sup> October 2022 which I was asked to rely upon instead of the earlier proposal. The Respondent intimated that the initial proposal contained material of a "without prejudice" nature.
- 2.10 On 10<sup>th</sup> October I asked the Respondent to convert the proposal from a "Word" document to PDF and to clarify that it wanted to rely on this document only. I received no response.
- 2.11 On 11<sup>th</sup> October the Applicant then stated it wanted to see the Respondent's final proposal before declaring whether or not it wished to make further adjustment to its own proposal.
- 2.12 I directed that the Respondent confirm exactly what evidence it is relying upon by close of business on 12<sup>th</sup> October. I received no response.
- 2.13 In the meantime, the Applicant adjusted its proposal shortly before close of play on 12<sup>th</sup> October and asked me to proceed expeditiously to making my Award.
- 2.14 I converted the "Word" document referred to at 2.9 above to PDF format and returned it to both parties for any comment. I received no comment from either party relating to that document.
- 2.15 Following confirmation from the RICS on 21<sup>st</sup> October that my fee had been paid to them by the Applicant, I notified the parties that I would proceed to making my Award.
- 2.16 On 3<sup>rd</sup> November I reminded the parties that I had not heard further from the Respondent since the Applicant had made its own amend on 12<sup>th</sup> October. I further advised that I would not deliver my Award until after 9<sup>th</sup> November allowing the Respondent a 28 day period to respond to the amended proposal by the Applicant.

2.17 The Respondent replied on 9<sup>th</sup> November with additional information in support of its claim and the Applicant promptly responded saying only that it had no further comment.

### 3.0 *Legal Framework*

3.1 The CRCA enables resolution by arbitration (if it cannot be resolved by agreement) of relief from payment of a protected rent debt due to be paid by the tenant to the landlord under a business tenancy.

3.2 A qualifying “protected rent debt” applies to a business tenancy which has been adversely affected by coronavirus such that the whole or part of those business premises were subject to a closure requirement.

3.3 The “protected period” for business tenancies adversely affect by coronavirus in England is the period 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021.

3.4 Under s.2 (1) of the CRCA, rent means an amount consisting of one or more of the following:

- a) *an amount payable by the tenant to the landlord under the tenancy for possession and use of the premises comprised in the tenancy (whether described as rent or otherwise);*
- b) *an amount payable by the tenant to the landlord under the tenancy as a service charge;*
- c) *interest on an unpaid amount within paragraph a) or b).*

3.5 In my capacity as arbitrator under s.6 (2) of the CRCA I am to consider the matter of relief from payment of a protected rent debt, my remit to include any one or more of the following:

- a) *writing off the whole or any part of the debt;*
- b) *giving time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments;*
- c) *reducing (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or any part of the debt.*

3.6 A key arbitrator’s principle under s.15 (1) of the CRCA is aimed at preserving, or restoring and preserving, the viability of the tenant’s business, so far as that it is also consistent with preserving the landlord’s solvency.

3.7 In assessing the viability of the business of the tenant, the arbitrator is directed by s.16 (1) of the CRCA and must, so far as known, have regard to:

- a) *the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party*

- b) *the previous rental payments made under the business tenancy from the tenant to the landlord*
- c) *the impact of coronavirus on the business of the tenant, and*
- d) *any information relating to the financial position of the tenant that the arbitrator considers appropriate.*

3.8 In assessing the solvency of the landlord, the arbitrator must, under s.16 (2) so far as known, have regard to:

- a) *the assets and liabilities of the landlord, including any other tenancies to which the landlord is a party, and*
- b) *any other information relating to the financial position of the landlord that the arbitrator considers appropriate.*

3.9 Whilst making an assessment of the tenant's viability and landlord's solvency, I am to disregard the possibility of the tenant or the landlord borrowing money or restructuring its business.

#### **4.0** *The Applicant's Proposal*

4.1 The Applicant states that the Respondent holds a lease for a term of 15 years commencing on 12<sup>th</sup> August 2019 and at an initial rent of £44,000 per annum.

4.2 On the 16<sup>th</sup> March 2020 the Applicant received an email from the Respondent asking for an immediate rent holiday and any future payments to be made monthly rather than quarterly.

4.3 The Applicant agreed to receiving monthly payments but informed the Respondent that it wanted to await details as to what support packages might be announced by the government before any further discussion could be had on rental discounts or suspension of payments.

4.4 The Applicant advises that no further rental payments were received after 16th March 2020 other than a single rental payment made on the 1st June to cover the month of April 2020 rent arrears.

4.5 The Applicant made repeated requests for additional financial information from the Respondent including details of any grants or support that they were able to access or had received. The Applicant says it made it clear to the Respondent that any requests for financial relief would only be considered if the Respondent was prepared to share actual financial information for their review, including trading data from when the Respondent was open during the protected rent debt period, including for takeaways and deliveries.

4.6 The Applicant says that other than the single payment on 1st June 2020 the Respondent ignored their request to engage on any of the other arrears, future payments or requests for information.

- 4.7 On 19th August 2020 and 28th January 2021, the Applicant drew down on part of the Respondent's deposit, after legal notices had been served to cover some of the outstanding arrears. The deposit money drawn down on totalled £32,000. The Applicant says it made it clear to the Respondent that the deposit needed to be replenished. The debt amount needed to be settled and the deposit account to be reinstated in full.
- 4.8 The Applicant contends that it continued to request information regarding the Respondent's finances and any business support received from the government.
- 4.9 The Applicant confirms that on 23<sup>rd</sup> July 2021 he received the excel spreadsheet attached to its proposal form which provided a summary of support received together with a list of outgoings.
- 4.10 The excel spreadsheet provided by the Respondent to the Applicant showed 8 items of tenant expenses totalling £138,108. The expenses related to payroll "top up", pension contributions, National Insurance, insurance, electricity, alarm/security, re-opening expenses and IT/phone line.
- 4.11 The excel spreadsheet stated that the Respondent received government grants totalling £50,572. No further financial information was provided by the Respondent.
- 4.12 The Applicant explained to the Respondent that what they had provided was insufficient and no trading revenue had been provided. The Applicant received no further information or response from the Respondent.
- 4.13 In the absence of hearing anything further from the Respondent, the Applicant issued a claim in the County Court on 9<sup>th</sup> August 2021 for recovery of part of the outstanding monies due. The Applicant was granted a hearing date of 23<sup>rd</sup> June 2022.
- 4.14 The Respondent next made contact with the Applicant on 1<sup>st</sup> September 2021 advising that it would start paying rent monthly in advance together with an offer to pay 50% of the outstanding arrears in full and final settlement.
- 4.15 The Applicant was not prepared to discuss terms unless the Respondent shared financial information including details of support received by the business and the group as a whole. Without that information, the Applicant was only prepared to offer a deferred payment plan to repay the outstanding amount over a 12 or 24 month period.
- 4.16 The Respondent contacted the Applicant on 17<sup>th</sup> June 2022 requesting the matter proceed to arbitration. The Applicant agreed and initiated the process on 22<sup>nd</sup> June 2022.
- 4.17 At the same time the Applicant suggested mediation, which took place on 29<sup>th</sup> July 2022, but agreement could not be reached.

- 4.18 The Applicant advises that at the mediation the Respondent was unwilling to provide evidence justifying the requests for relief hence the move to arbitration.
- 4.19 The Applicant states that whilst STR 49 Limited holds the Lease, STR 48 Limited seem to operate as the trading business. It says that there are a network of companies namely STR 44 Limited – STR 53 Limited but no further information has been provided by the Respondent as to whether any relate to the location of these premises or to other operations within their portfolio.
- 4.20 The Applicant acknowledges that the total claim made of £67,011.72 (net of interest) goes beyond the protected rent debt period as set out by the CRCA.
- 4.21 The total claim including interest made by the Applicant is £80,510.79.
- 4.22 The Applicant maintains that it has tried to act fairly and reasonably and was always prepared to reach an agreement as to a discount or payment plan but only conditional upon the Respondent providing details of their financial position including the health of the business in 2019 in the run up to the pandemic, during and after the pandemic.
- 4.23 At mediation the Applicant says that it offered to settle the dispute via the following three options:
1. *“80% of the outstanding debt i.e. (£53,600) paid immediately and we will reinstate the deposit in full and call an end to the process.*
  2. *100% of the debt paid over 12 months i.e. £5,583 paid monthly from the 1<sup>st</sup> September 2022 plus interest in full and a fair portion of the costs*
  3. *50% of the debt paid immediately i.e. £33,500 plus the other £33,500 paid monthly over 24 months i.e. £1,395 from the first September 2022 plus interest and a fair portion of the costs”.*
- 4.24 The Applicant has now withdrawn option 1 for the purposes of this arbitration, prepared to proceed on the basis of options 2 or 3 above.
- 4.25 The Applicant reasons that having had no choice but to undertake mediation and the arbitration process with still no visibility of detailed financial information from the Respondent, it wishes to pursue all outstanding debt plus interest.
- 4.26 It is also reliant on the *Stratford City Shopping Centre v Newspoint (Stratford) Limited* CRCA Arbitration award as further justification for their claim for the full debt plus interest to be paid.

## 5.0 *The Respondent's Proposal*

- 5.1 The Respondent proposal submitted on 10<sup>th</sup> October 2022 was reliant on three emails sent between the Respondent and the Applicant on 1<sup>st</sup> and 2<sup>nd</sup> August 2022.
- 5.2 In the email of 1<sup>st</sup> August 2022, the Respondent explains to the Applicant that from a cashflow perspective it needs to be cautious over any agreement made for the next 12 months. The Respondent argues particular difficulty in finding staff being a problem.
- 5.3 The Respondent tells the Applicant it is agreeable to option 3 (at 4.23 above) but varied as follows:
- *“The rent deposit is utilised to furnish the initial 50% payment and we will make up any shortfall*
  - *The remaining 50% balance is agreed to be paid via monthly payments over a 24 month period, commencing 1<sup>st</sup> September 2022.”*
- 5.4 The Respondent further states that from 1st September 2023 it would meet with the Applicant to discuss the potential of replacing the rent deposit in full. The Respondent states by adopting this approach it protects the Respondent from over committing to a repayment plan impacting their cash flow.
- 5.5 The Respondent also states that if their staff issues improve over the next 12 months, in addition to turnover, it would approach the Applicant to bring the payment plan forward.
- 5.6 The Applicant responded on the same day to advise only that the Respondent's proposal was unacceptable and could *“only agree to option 3 as we proposed on Friday”*.
- 5.7 On 2<sup>nd</sup> August 2022 the Respondent emailed the applicant advising that option 3 as proposed by the Applicant was not acceptable.
- 5.8 The Respondent's reasoning is the costs burden when considered against sales via the covid lockdown period prohibits a lump sum payment to the Applicant.
- 5.9 The Respondent is unhappy with the Applicant's proposed option 3 and said to the Applicant:
- “In this scenario, there quite clearly is no discount and in the spirit of the Act we will now apply to the courts to have the matter arbitrated and present accounts. This will hopefully lead to a 50/50 agreement.”*
- 5.10 The Respondent further complained that the Applicant will no longer draw down on the remaining rent deposit of £35,000 despite having previously used rent deposit monies to service the rent debt.



- 5.11 The Respondent provided additional information in support of its proposal during these proceedings on 9<sup>th</sup> November 2022 via email with 2 attachments. The information included the excel spreadsheet referred to at 4.9 - 4.11 of this Award and an email dated 13<sup>th</sup> July 2021 in which the Respondent agreed the balance outstanding at that point was £62,333.34 including the June 2021 quarter.
- 5.12 That email dated 13<sup>th</sup> July 2021 from the Respondent went on to say that due to the difficulties over the last 18 months and government imposed national lockdowns, per their discussions, they could offer the following:
- *“100% rent paid for periods when we were open and able to trade without any Government restrictions*
  - *60%/40% split for periods where we were open but Government restrictions were in place*
  - *50%/50% split for periods where we were closed due to the Government lockdowns”*
- 5.13 The Respondent then set out a breakdown of monies owed based on the formula it had devised at 5.12 above, producing a figure of £35,962.74.
- 5.14 In that email of 13<sup>th</sup> July 2021 the Respondent offered to make a lump sum payment of £35,962.74 with monthly payments in advance for the remainder of 2021.
- 5.15 The Respondent says in its covering email of 9<sup>th</sup> November that the attachments to that email were additional support to its proposal.

## **6.0** *Relief from Payment*

- 6.1 The Applicant’s proposal contains various references to repeated requests for financial information from the Respondent so as to assess what level of discount or payment plan could be provided.
- 6.2 The additional information requested by the Applicant included trading data from when the Respondent’s business was open during the pandemic. It further wanted and an overview of the company’s health prior to, during and after the pandemic.
- 6.3 No turnover information or any accounts have been provided by the Respondent.
- 6.4 The Applicant also states that no financial information was provided by the Respondent during the failed mediation process.
- 6.5 The Respondent made it clear within its proposal that presenting accounts via arbitration would hopefully lead to a 50/50 agreement.

- 6.6 The Respondent has been given opportunity to present more detailed financial information regarding its business during the covid period, the mediation process and at these arbitral proceedings.
- 6.7 The Respondent has only provided very basic information in the excel spreadsheet discussed at 4.9 – 4.11 above.
- 6.8 It is not unreasonable for the Applicant to require more detailed financial information before considering any form of discount or repayment plan.
- 6.9 On the information supplied to these proceedings, the Respondent has repeatedly refrained from providing detailed financial information in support of its claim for relief from payment.
- 6.10 I am provided with no means by which to assess the viability of the business of the Tenant Respondent as directed by section 16 (1) of the CRCA.
- 6.11 An assessment of the Applicant’s solvency under section 16 (2) of the CRCA is not possible on the information provided but its proposal presents a willingness to offer a payment plan and so can accommodate a structured repayment plan.
- 6.12 The business of the Respondent is a restaurant/delivery and takeaway. It would have been of considerable assistance to these proceedings to have visibility of accounts/ trading data prior to the coronavirus lockdown period and also during the protected rent debt period as the Respondent could open for business during the wider lockdown period.
- 6.13 The Respondent has supplied insufficient evidence in support of its proposal.
- 6.14 I dismiss the Respondent’s proposal.
- 6.15 The Applicant has offered the Respondent relief from immediate full payment on either of the following two bases:
1. 100% of the debt paid over 12 months i.e. £5,583 paid monthly from the 1<sup>st</sup> September 2022 plus interest in full and a fair portion of the cost; or
  2. 50% of the debt paid immediately i.e. £33,500 plus the other £33,500 paid monthly over 24 months i.e. £1,395 from the 1<sup>st</sup> September 2022 plus interest and a fair portion of the costs.
- 6.16 The Respondent has expressed a desire to proceed in accord with option 2 at 6.15 above, albeit on varied terms discussed at 5.3 above.
- 6.17 The total amount claimed by the Applicant goes beyond the protected rent debt period of 21<sup>st</sup> March 2020 – 18<sup>th</sup> July 2021.
- 6.18 My calculation of the protected rent debt is as follows:

Period 25 <sup>th</sup> March 2020 – 24 <sup>th</sup> March 2021	£44,000
Period 25 <sup>th</sup> March 2021 – 23 <sup>rd</sup> June 2021	£11,000
Period 24 <sup>th</sup> June 2021 – 18 <sup>th</sup> July 2021	£3,013.75
Sub total	£58,013.75
Less April 2020 Rent	(£ 3,366.67)
<b>Total Protected Rent debt payable</b>	<b>£54,647.08</b>

6.19 The Respondent will be granted relief only in so far as it will be granted additional time to pay the full protected rent debt owed of £54,647.08 together with interest in accordance with the terms of the lease.

## **7.0** *Arbitration Costs*

- 7.1 Under s.19 (6) of the CRCA I have discretion as to the apportionment of my own costs.
- 7.2 The Applicant has requested a payment of a fair proportion of my costs for the work involved.
- 7.3 Whilst the Applicant's case is not particularly detailed, it describes a chain of events over a sustained period, none of which has been refuted or contradicted by the Respondent.
- 7.4 That chain of events includes repeated requests from the Applicant for more detailed financial information from the Respondent so as to consider what form of arrangement it would be willing to discuss regarding the protected rent debt owed.
- 7.5 The Respondent has provided no financial visibility of its business to advance its proposal throughout these proceedings despite stating it would do so by way of provision of accounts.
- 7.6 I have given due consideration to these facts when considering apportionment of my costs.

## **8.0** *Publication*

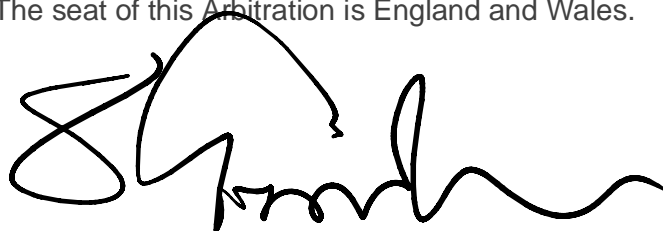
- 8.1 I am directed by s.18 (2) of the CRCA to publish my Award.
- 8.2 The Award will be published on the website of the RICS and the KLM Real Estate website.

- 8.3 I do not consider there is commercial information which must be excluded under s.18 (3) of the CRCA.
- 8.4 I intend to publish the Award in full on the RICS and KLM Real Estate websites unless either party makes representations to the contrary by 5:30 PM on Thursday 24<sup>th</sup> November 2022. If any representations are made I will give due consideration to them before publishing the Award.

## **9.0** *Award*

- 9.1 I, Simon Stuart Gouldbourn, Award and direct as follows:
- (a) The Respondent will pay 50% of the protected rent debt immediately. The 50% sum to be paid is £27,323.54.
  - (b) The Respondent will pay the remaining 50% over 24 months i.e. £1,138.48 per month from 1<sup>st</sup> December 2022 plus interest calculated in accordance with the terms of the Lease.
  - (c) My costs are £4,000 plus VAT for dealing with this Arbitration. I apportion costs proportionately against the Respondent who must reimburse the Applicant the sum of £3,000 plus VAT.
- 9.2 The seat of this Arbitration is England and Wales.

Signed:



**Simon S Gouldbourn BSc MRICS ACI Arb**

Date: 16<sup>th</sup> November 2022