

Preliminary Arbitration Award  
Commercial Rent (Coronavirus) Act 2022

[REDACTED] (Applicant and Tenant)

and

[REDACTED] (Respondent and Landlord)

[REDACTED]

## Introduction

1. The Commercial Rent (Coronavirus) Act 2022 (the Act) concerns possible relief arising in respect of 'protected rent debts' occurring within circumstances defined in the Act.
2. The Act envisages negotiations between the parties to agree the amount (if any) of the relief. In circumstances where negotiations are not successful section 10(4) of the Act provides for the matter to be determined by Arbitration.
3. The Royal Institution of Chartered Surveyors (RICS) is one of the bodies responsible for appointing arbitrators to determine the relief.
4. An application to the RICS to appointment an arbitrator was made by the Applicant on [REDACTED]. I was appointed by the RICS [REDACTED].
5. Initial correspondence and an online meeting between the parties' representatives and myself revealed that the Respondent was of the view that agreement had already been reached as to the question of relief from the protected rent debt, whereas the Applicant believed there to be no such agreement.
6. There is no agreement between the parties whether I should be able to seek legal advice and accordingly this award is made without such assistance.
7. This preliminary arbitration award sets out my finding to resolve this issue.

[REDACTED] The Applicant and Tenant of the property is [REDACTED] represented by [REDACTED].  
 [REDACTED] The Respondent and Landlord of the property is [REDACTED].  
 [REDACTED]

9. There is no dispute that my appointment arises under section 4.42 of the Act and I repeat the guidance issued by the Department for Business, Energy and Industrial Strategy to arbitrators as already set out in the position statement sent to me by [REDACTED].
10. *'If the parties have already reached an agreement on the matter of relief from payment of the protected rent debt before the reference to an arbitrator is made, the arbitrator must make an award dismissing the reference (see section 5 of this guidance). To avoid unnecessary reference to arbitration, the Code of Practice recommends the parties confirm any agreement reached, formally and in writing. The Act does not detail formalities for an agreement, as usual principals apply. If there is disagreement as to whether an agreement has been reached and one party makes a reference to arbitration, the arbitrator will assess whether there is an agreement, applying the usual tests for binding agreements.'*
11. There is disagreement as to whether the matter of relief from the protected rent debts was agreed prior to my appointment. This award will find whether or not the matter of relief is eligible for the next stage of arbitration by 'applying the usual tests' to decide if a binding agreement has previously been made.

## Issues in Dispute

12. The Applicant accepts that if the parties had reached 'a legally binding contract' in relation to the arrears, the arbitration (in respect of debt relief) should not proceed but, in the Applicant's view no such contract was reached and in support of her argument its representative [REDACTED] describes the key elements of a contract which must occur if it is to be binding. She describes the elements as follows:
  - a) offer;
  - b) acceptance;
  - c) consideration;
  - d) intention to create legal relations; and
  - e) certainty of terms.
13. Whilst I am not legally qualified I do have some judicial knowledge of contract law and shall weigh the evidence put to me by [REDACTED] relating to the above elements in the next section of this award.
14. The fundamentals of [REDACTED] position statement is that agreement was reached through the parties (and therefore this arbitration should not proceed) evidenced by the parties' exchange of emails (14 July 2022 and 16 August 2022), which he appends to his position statement ([REDACTED] denies that this exchange forms a binding contract).
15. [REDACTED] refers me to section 5 of the Arbitration Act 1996 which applies to arbitration agreements in writing. He contends that agreement can occur (and I summarise) whether or not it is signed by the parties, was made by exchange of communication in writing or evidenced in writing. The view of [REDACTED] is that this section of the Arbitration Act relates to how a binding arbitration agreement is made rather than any agreed settlement.
16. [REDACTED] compares this dispute with those found in rent review negotiations, where the revised rent is agreed through an exchange of emails. He compares those circumstances with the subject of this arbitration and concludes that a reference to 'documents to formerly agree this' in the Applicant's email of 16 August 2022 is unnecessary and does not impact on the validity of the agreement. [REDACTED] questions the relevance of comparing the subject of this arbitration to a rent review and quotes from the lease of the subject property requiring revised rents to be agreed in writing. She goes on to suggest that the emails merely constitute offer and counter offer between the parties.
17. My interpretation of the two position statements is that [REDACTED] has relied almost entirely on her application of common law principles to justify her client's position, whereas [REDACTED] has sought to apply areas of statute and an established procedure for rent reviews to support his view. Whilst their approach may be different there is some crossover in the source of evidence referred to by the representatives (particularly in dealing with the effect of the two emails).
18. My approach to this dispute is to firstly consider those areas of statute referred to by [REDACTED] and the response from [REDACTED] before making my findings on their effect, and secondly, in a similar way, to weigh the views of the representations under the various headings of contract law put forward by [REDACTED].

### Arbitration Act 1996

19. In support of this contention that agreement has previously been reached (and as such, I should dismiss the reference) [REDACTED] refers me to section 5 of the Arbitration Act 1996 which applies to arbitration agreements in writing and being binding on the parties. [REDACTED] [REDACTED] is of the view that [REDACTED] incorrectly applies these provisions to this situation. Her reasoning is that section 5 of the Arbitration Act describes how a binding arbitration agreement is made; that is an agreement between two parties to arbitrate disputed matters. Section 5 of the Arbitration Act 1996 does not set down rules for determining whether or not the parties have reached agreement to settle their dispute. Instead and in simple terms, it describes the circumstances where a party to a dispute can proceed to arbitration.
20. I accept the view of [REDACTED] interpretation of section 5 of the Arbitration Act 1996 is incorrect and should not be applied to this dispute.

### Commercial Rent (Coronavirus) Act 2022

21. [REDACTED] refers to the desirability for parties to reach agreement on relief to protected rent debt (indeed this option is still available to them) and the parameters defined within the Act of anything from £0 to total relief. As the amount suggested by [REDACTED] (he contends is the agreed figure) falls within that parameter, it is wrong, (he claims) for [REDACTED] [REDACTED] to suggest the agreement is not valid. [REDACTED] counters this argument by claiming that the Act does not seek to rewrite the principles of contract law.
22. Whether or not the exchanges between the parties constitute an enforceable agreement/contract, I shall consider further below, but I agree with [REDACTED] that merely because the figures referred to in the emails fall within parameters envisaged by the Act, it does not necessarily follow that an enforceable agreement was reached at that time.

### The Emails

23. [REDACTED] has relied on the exchange of emails to support his contention that I should dismiss the arbitration and whilst these indicate to me that the parties were of one mind to resolve the dispute, [REDACTED] has analysed the documents and relationship between the parties prior to this arbitration which I shall consider and make finding on below, in light of the replies from [REDACTED].

### Common Law Approach

24. [REDACTED] has referred to sections in the Arbitration Act 1996, the Commercial Rent (Coronavirus) Act 2022 as well as rent review procedures to support his view that agreement was reached in respect of the amount of the protected rent debt, yet to be paid. I have found in favour of the Applicant that these are not appropriate to be applied to resolve the specific point in this dispute. I now turn to the application of common law (or contract law) as means by which [REDACTED] claims this dispute should be resolved.
25. I agree with [REDACTED] that the Act does not prevent the application of contract law to determine whether agreement was reached 'in the usual way' before my appointment. Her conclusion that no contract was formed is considered under five headings which I shall weigh in light of her position statement, legal references and response from [REDACTED] [REDACTED]. As a general comment [REDACTED] believes the reference and analysis on the basis of general contract law to be academic and of little assistance to resolve this dispute.

I find that the answer as to whether an enforceable agreement was reached lies in the application of the law of contract under the following headings:

### **Offer**

26. There is little doubt or dispute that the offer from the Respondent to settle was specific, certain, complete, and made with the intention of being ratified by acceptance from the Claimant.

### **Acceptance**

27. Similarly, the email of 16 August 2022 indicates that the terms as offered by the Respondent were broadly acceptable to the Applicant.

### **Consideration**

28. I have carefully read the judgement in *Tweddle v Atkinson* (1861). I am not convinced that this is an issue between the parties as the law does not dictate what amount of consideration is required to meet this requirement of the law.

### **Certainty of Terms**

29. The email exchange between the parties points to this being a straightforward financial arrangement which I find is certain in its terms and cannot be misunderstood.

### **Intention to Create Legal Relations**

30. It is the effect of this doctrine which separates the parties. [REDACTED] believes that the exchange of emails creates the legally enforceable relationship between the parties, whereas [REDACTED] is of the view that the binding relationship was to be created in the future when [REDACTED] contacted the Respondent with documents to 'formerly agree this'. In other words the requirement to have this formally documented by a solicitor (and future exchange with signatures) amounted, as [REDACTED] says, to a counter offer.
31. The Respondents are aware that the Applicant's response of 16 August 2022 stated:
- 'our solicitors [REDACTED] will be in contact with you before the end of tomorrow with documents to formerly agree this'.*
32. In response to a draft of the settlement agreement from [REDACTED] and the Respondent replied:
- 'I can confirm that we have our solicitor [REDACTED] look at this matter.'*
33. The Respondent's solicitor was of the view that a contract had already been created through exchange of the emails between the parties but they did say that payment of the first instalment of £[REDACTED] should be made within the next seven days which differs from the term '*immediately*' as stated in the email of 16 July 2022. The view of [REDACTED] is that this also constitutes a further counteroffer and therefore the earlier exchange of emails did not create a binding agreement.

34. In simple terms, the fact that both parties wished the matter to be handled by their solicitor to document / review the settlement indicates that the exchange of emails between the parties was not the final say in the matter.
35. The Applicant did not make the initial 'immediate' payment of £105,000 although, of course, this alone does not suggest there was no binding agreement since some might argue the Applicant was in default.
36. It is clear to me that this dispute centres around whether or not both parties intended to create a binding legal relationship through the two emails. [REDACTED] contends that the Respondent had no intention of entering into a binding arrangement until a settlement agreement had been completed. Her client did not make the immediate payment and it was only towards the end of the following month in August when the Respondent's solicitor required payment within seven days thus, she contends, varying the terms of the offer. Her view is that because of the earlier behaviour of the Respondent in relation to rental payments during the pandemic period any agreement was conditional upon it being in writing.

#### **Preliminary Award on Eligibility for Arbitration**

37. I have found that the requirement under the Act for me to determine whether an agreement was reached on the basis of the 'usual way' is not governed by the references to the statutes or to usual rent review procedure described by [REDACTED], but instead I must look to the law of contract. Several requirements of contract law are met such as offer, consideration and certainty, but there is sufficient doubt as to whether the email exchange created a binding contract at that time as the matter was to be formalised by solicitors.
38. There is much in the July/August exchange of emails that expresses their intention to settle but the Applicant's expressed assertion that their solicitor would contact the Respondent with '*documents to formerly agree this*' leads me to conclude that the email of 16 August 2022 was not the conclusion of the contract and thus there was no formal binding contract of agreement.

#### **Arbitration Award**

39. I hereby award:
  - a) there is no binding agreement between the parties in relation to relief from the protected rent debt; and
  - b) I have jurisdiction to continue to make an award in respect of any relief from the protected rent debt.
40. I reserve from my award costs of the reference until either I make a final award determining the amount of any relief from the protected rent debt or, at the request of either party having reached an agreed settlement as to the relief (if any) from the debt.
41. The receipt of this arbitration is England and Wales.

A handwritten signature in black ink, appearing to read "Neptun Pitter". The signature is written in a cursive style with a prominent vertical line on the left side and a horizontal line at the bottom.

Signed

Date : 30 March 2023