

PRELIMINARY ARBITRATION AWARD MADE UNDER THE PROVISIONS OF THE  
COMMERCIAL RENT (CORONAVIRUS) ACT 2022

between

[REDACTED]

and

[REDACTED]

In respect of

[REDACTED]

[REDACTED]

## Introduction

1. I have been appointed by the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS) to act as Arbitrator under the provisions of the Commercial Rent (Coronavirus) Act 2022 (The Act) to determine the amount (if any) of relief from any protected rent debt.
2. The Applicant is [REDACTED] as Tenant of the [REDACTED]. During my correspondence and online meeting, the Applicant was represented by [REDACTED] with his formal position statement (and response to the Respondent's statement) signed by [REDACTED].
3. The Respondent is [REDACTED] (Landlord in the case of both leases) and is represented by [REDACTED] in both our correspondence and online meeting. The Respondent's written submission (and response to the Applicant's submission) is signed by [REDACTED] with an accompanying statement of truth signed by [REDACTED] as director for and on behalf of the Respondent company.

## Procedural Background

4. I received copies of the proposals in relation to the protected rent debt and at a 'Teams' meeting on 13 January 2023 it became clear that [REDACTED] was of the view that the debt was not eligible to be resolved through this arbitration process whereas [REDACTED] took the opposite view. I shall weigh and make a finding on the views of the parties below but in summary, the Respondent's view is that the Applicant did not follow the correct procedure nor was it detrimentally affected by the pandemic. It was agreed that I should make a preliminary finding on eligibility prior to determining the amount (if any) of the protected rent debt.
5. The following directions were agreed and sent to the parties representatives on 26 January 2023. I set out the directions below which describes the extent to which this preliminary award will make a finding.

*'These Directions concern only the determination of the preliminary issue as to whether (and if so to what extent) given the Reference to Arbitration and/or the Response thereto the Applicant is eligible for the granting of relief pursuant to the provisions of the Commercial Rent (Coronavirus) Act 2022 ('Act') and whether (and if so to what extent) the consequences as set out in section 14(4) of the Act apply:*

1. *Each party is to file/serve their position statement (with authorities/documentation in support) by 4.00pm on 24 February 2023.*
2. *Each party is to file/serve any Responsive Position Statement (with authorities/documentation in support) (if so advised) by 4.00pm on 24 March 2023.*

3. *Subject to the following Interim Award on the preliminary issue the matter is to be subject to further Directions in relation to the issue of the granting of relief and/or costs.'*

6. In order for the dispute to be eligible for arbitration:

1. The tenancy must be a 'business tenancy';
2. The rent debt in dispute must be a 'protected rent debt'
3. The parties must not have reached an agreement on the matter of relief from payment of the 'protected rent debt'; and
4. It must be the case that the tenant's business is viable or would be viable if given relief from payment of the 'protected rent debt'.

7. There is no dispute that the occupation relates to a business tenancy ( [REDACTED] ) although the club was not operating during the relevant period (24 March 2020 to 19 July 2021). It is also the case that no prior agreement has been reached in relation to relief from the protected rent debt.

8. A protected rent debt is a debt for unpaid rent under a business tenancy which was 'adversely affected by coronavirus' and where that rent is attributable to occupation during a 'protected period'. It is this requirement that has given rise to the second issue between the parties.

9. The requirements placed on the parties during the pre-arbitration stage have also lead to a difference of view between the representatives with the Respondent Landlord claiming that I should make an award dismissing the application because the Applicant Tenant did not follow the correct procedure.

#### **Applicant's Submission / Position Statement**

10. [REDACTED] describes two points that he suggests I am to resolve within this preliminary award.

11. The first being the viability of the business under section 13 of the Act. Should I decide the business is viable (as he contends) I should go on to make an award in accordance with section 14(4) of the Act and confirm payment of the applicant's offer as contribution to the protected rent debt of £30,000, although I understand the actual protected rent debt has not been formally agreed. Under the title of '*Parties' common ground*' [REDACTED] confirms details of the Applicant's occupation and use of the premises. He states that the first floor was required to close during the relevant statutory period and subsequently also the second floor, although the Respondent makes it clear that the premises were closed before 21 March 2020 (start of the statutory closure period) and, as a result (in its view), were not adversely affected by coronavirus (a condition for relief required by the Act).

12. [REDACTED] refers to section 13(3) of the Act, whereby, if I determine that the Tenant's business is not viable or would not be viable even if the Tenant were to be given relief on payment of any kind, then I should dismiss the reference. [REDACTED] clearly believes that the Applicant / Tenant company is viable. I shall refer to the issues in this regard later in this award when I also consider the Respondent's submissions and detail.

13. In support of the Applicant / Tenant's settlement offer totalling £30,000 for the first and second floor covering the relevant period, a counter proposal from the Respondent landlord offered a reduction in the contractual rent for both leases (covering the same statutory period) of 25%, requiring the Tenant to pay considerably more than the £30,000 offered. The Respondent's offer was not made within the requisite 14 day period and as such [REDACTED] claims I should find in favour of the Applicant and award the payment of £20,000 for the first floor and £10,000 for the second floor (total £30,000) as the Applicant's contribution toward the protected rent debt.
14. If I am to make an award on the substantive issue of relief as described in section 14 of the Act, [REDACTED] view is that the Applicant's offer is most consistent with its terms.
15. I must first make a finding on the question of eligibility.

### **Respondent's Submission**

16. [REDACTED] commences his submission by summarising the two leases and describing [REDACTED] personal financial interest in the Applicant company.
17. At the outset, the submission acknowledges the commercial / business nature of the premises and the existence of arrears of rent in respect of both leases.
18. [REDACTED] refers to a letter from [REDACTED] (sent on behalf of the Applicant) dated 3 August 2020 claiming the business to be unviable without income because of its closure and that money from third parties was to be borrowed for the refurbishment. The question of viability of the business is one of the principal issues to be determined in this arbitration, since if it is unviable (even with relief) I must dismiss the reference.
19. [REDACTED] quotes from a further letter from [REDACTED] of 9 August 2022, describing their intention to apply for arbitration for relief of the Protected Rent Debt under the Act. The letter also described the Applicant Tenant's offer of rent during the protected period of £20,000 and £10,000 respectively for the first and second floors (as referred to above).
20. The Respondent does not accept that the Applicant's business has been prevented from trading or reopening as a result of the pandemic. [REDACTED] submission points out that the business was closed before the start of the relevant period for the purpose of refitting which had already commenced, despite the Tenant not having received formal approval from the Landlord Respondent. Accordingly he believes that the business was not adversely affected by the pandemic.
21. The second key issue raised by [REDACTED] is validity of the Tenant's application to the RICS which, he claims, was defective.
22. Both these issues raised by the Respondent are denied by the Applicant as affecting their ability to apply for relief .
23. In summary, the Respondent denies that the regulations are the cause of the business not reopening and for that reason I should dismiss the referral.



24. [REDACTED] describes various sections of the Act which the Respondent believes to be relevant and, I repeat those matters which he believes to be of particular relevance.
25. Section 3
- (1) A 'protected rent debt' is a debt under a business tenancy consisting of unpaid protected rent.
  - (2) Rent due under the tenancy is 'protected rent' if:
    - a. The tenancy was adversely affected by coronavirus.
26. Section 4 of the Act describes a business as being 'adversely affected by coronavirus' where the business carried on by the Tenant was of a description subject to a closure requirement.
27. Section 4(2) defines a 'closure requirement' as a requirement imposed by coronavirus regulations to close:
- (i) Businesses; or
  - (ii) Premises of a specified description
28. The Respondent also emphasises section 11 which under subparagraph (1) requires the Applicant to include a formal proposal with the reference to arbitration and under (3) must be accompanied by supporting evidence.
29. In its submission the Respondent includes those extracts from the Act which describes the various arbitration decisions available to me, which I shall refer to when making my findings.
30. I, like the Respondent, am aware of the published guidance accompanying the Act and, in particular, the guidance that a reference to arbitration must be accompanied by a formal proposal for resolving the dispute with supporting evidence.
31. After setting out the law and guidance surrounding this preliminary award the Respondent acknowledges that the premises are occupied by the Applicant under a business tenancy and that no agreement has been reached in regard to the arrears of rent. It claims that the reference to arbitration on 20 September 2022 was not valid.
32. The key aspects of the Respondent's position is set out under 3 headings being: Validity of Referral, Business Viability and Protected Rent Debt.

### **Validity of Referral**

33. The Respondent contends that a formal written proposal with supporting evidence verified by statement of truth was not forthcoming and as a result, believes that I should dismiss the reference.
34. In its reply the Applicant rebuts this contention through section 11(7) of the Act which defines a 'formal proposal' as a proposal which is:

- a) made on the assumption that the reference is not dismissed for a reason set out in 13(2) or (3);
- b) expressed to be for the purposes of this section; and
- c) given to the other party and the arbitrator.

35. The Applicant states that the Respondent has confused a 'formal proposal' with a written statement which does require a statement of truth. The reply states that the party's relative positions are set out in full in the correspondence which I have read and I find that the referral to arbitration should not be dismissed on the grounds of validity of referral described by the Respondent.

### **Business Viability**

36. In his submission [REDACTED] contends that by its admission ([REDACTED] letter dated 3 August 2022) the Applicant's business is not viable without income, particularly since closure of the business occurred at the end of 2019 (before the start of the statutory period). The letter also refers to borrowing to complete the refurbishment which, [REDACTED] claims is sufficient cause for me to dismiss the referral because I am required to disregard additional borrowing (clause 6.9) to support viability of the business.
37. The Respondent also refers me to the accounts (accessed via the Companies House) showing liabilities of [REDACTED] and a history of losses since March 2013. [REDACTED] believes that, with the additional cost of refurbishment placed at approximately £300,000, borrowing for the Applicant company (along with other items) will amount to some £573,995, plus any outstanding rent.
38. The response from the Applicant describes the business as having been trading for many years until suspension in December 2019 in order to carry out necessary building works. The Applicant goes on to state that the [REDACTED] venue licence is very valuable and had this not been the case, the Applicant would not have embarked upon works to repair the premises.
39. The Applicant has provided no further evidence to prove the market value of the licence in support of its contention that the business is viable. Similarly, the lack of proven profit adds nothing to the case put by the Applicant in this regard. I am to disregard additional borrowing in support of a claim for business viability, but in this case the evidence is unclear as to whether the business would be viable without such borrowing.
40. The Respondent's argument that this business is not viable (even if it were given 100% relief on payment of rent) carries more weight than the argument put forward by the Applicant, however my initial task is to decide whether or not I should dismiss the application and I can only make this decision with reasonable certainty after considering the final issue raised by the Respondent being:

### **Protected Rent Debt**

41. Under this heading the Respondent reminds me of section 3(2) and section 4 of the Act whereby if protection is to be granted the tenancy must be '*adversely affected by coronavirus... if, for any relevant period the business carried on... was a description subject to a closure requirement.*' A closure requirement is defined as an obligation '*to close businesses... or to close premises*'.

42. It is accepted that the business was subject to a closure requirement but it is disputed between the parties that a business must be carried on and trading during the relevant period. Because the business was not trading at the time, the Respondent claims that the Act does not apply, whereas the Applicant is of the view that the word 'closure' must be used in the context of the Coronavirus Regulations and does not require the business or premises to be open at the moment the Regulations were applied.
43. I agree with the Applicant that merely because the premises were not trading (due to repairs being undertaken) this, alone, does not preclude the Applicant from protection under the Act. But, the question of timing and duration of the works are also important considerations.
44. In addition to the Respondent's claim that the phrase 'Closure Requirement' should be interpreted literally at the time the requirements came into being (i.e. the business needed to be operating at that date in order to qualify for relief), the Respondent states that at the time of their submission to this arbitration, the draft licence to alter had not been approved by the Tenant and was dependent upon the submission by the Tenant of plans. On the 3 August 2022 (over a year after the expiry of the relevant period) funds were awaited to enable the completion of the refurbishment. The Respondent rejects the suggestion that the Tenant would have been in a position to reopen the business during the relevant period. Accordingly, it is suggested by the Respondent that the Applicant tenant was not adversely affected by coronavirus.
45. In its response the Applicant turns to the Landlord and Tenant Act 1954 Part 2 and the case of *Morrisons Holdings Limited v Manders Property (Wolverhampton) Limited* (1976) 1WLR533. The effect of this case is, as the Applicant claims, that suspension of the activities of a business does not end the Tenant's protection enjoyed pursuant to the 1954 Act. Clearly, the Act which is the subject of this arbitration and the Landlord and Tenant Act 1954 Part 2 were passed as legislation for different reasons and there is no need for me to provide a detailed finding on the Applicant's detailed analysis of the case law.
46. Protection under the Act is designed to provide rent relief (in certain circumstances) for a specific period in time, arising from a statutory requirement to close, unlike the Landlord and Tenant Act 1954 Part 2 which (in part at least) gives business tenants a statutory right (in certain circumstances) to a new lease of their premises, for the protection of their business.
47. I do not accept the assertion, that because actual physical closure (albeit temporary) does not preclude lease renewal protection under the Landlord and Tenant Act 1954 Part 2, that the same should necessarily apply to the circumstances in this case (although it might seem reasonable to do so) as governed by Commercial Rent (Coronavirus) Act 2022.
48. However, this connection between the two statutes is not the whole story. Of far greater importance (as witnessed by the correspondence from the Applicant) is the fact that the business was closed before the restrictions came into being (and before the serious effects of the pandemic were generally understood) and continued to be closed long after they were lifted. At that later date, doubts remained as to financing of the



refurbishment cost and permission for the works, all of which could reasonably have been progressed either before or after the lifting of restrictions.

### Arbitrator Findings

49. The Act requires a number of conditions to be in place if a tenant is to qualify for relief from a protected rent debt. There is no dispute that this is a business which, in normal circumstances, would be required to close during the statutory closure period.
50. The assertion that the application process followed by the Applicant Tenant is unproven. The question as to whether the Tenant's business is viable (or would be with 100% relief) is difficult for me to make a finding although some of the Respondent's arguments are strong.
51. Of prime concern to me as arbitrator, and where the evidence is strong, is the timing of the Applicant Tenant's behaviour. It closed the business before the effects of the pandemic were felt (albeit for justifiable reasons of refurbishment) and the business remained closed long after the statutory closure period ended, during which time neither formal landlord approval nor funding were in place.
52. Accordingly, I find that the rent debt is not a 'protected rent debt' as defined under Section 3. of the Act.
53. In accordance with s 13 (2) (c) of the Commercial Rent (Coronavirus) Act 2022 I dismiss this reference (there being no protected rent debt), and (in accordance with s 19 (4) direct that the Respondent landlord pays the sum of (£900), being half of the fee paid to the RICS to the Applicant tenant within 30 days from the date of this arbitration.



Signed .....

Stephen Hattley  
Arbitrator

Date.....4 June 2023