

In the matter of an Arbitration under the Commercial Rent (Coronavirus) Act 2022

Between

[REDACTED] (Applicant)

and

[REDACTED] (Respondent)

Final Award

The Parties and the Premises

1. The Applicant, the [REDACTED], is the tenant of premises at [REDACTED] Loughborough, [REDACTED], (The Premises).
2. The Respondent, [REDACTED], is the freehold owner of the Premises and the Applicant's landlord.
3. I have been provided with a copy of the Lease and it is common ground: (i) that the Applicant occupies the Premises for the purposes of its travel agency business; (ii) that the Lease creates a business tenancy as defined by Part II of the Landlord and Tenant Act 1954; and (iii) that the current rent payable under the Lease is £35,000 per annum plus VAT. (iv) that there is a protected rent debt.

Procedural Background

4. On 22 May 2022 the Applicant [REDACTED] gave notice under Section 10(1)(a) of the Commercial Rent (Coronavirus) Act 2022 ("CRCA") of its intention to refer the matter of relief from payment of a protected rent debt arising under the Applicant's tenancy to arbitration ("the Reference"), the Reference being made pursuant to section 9 of the CRCA. The Reference was made to The Royal Institution of Chartered Surveyors ("the RICS"), an approved arbitration body for the purposes of section 7 of the CRCA.
5. On 31st May 2022, the Respondent issued a response proposing mediation or arbitration under the RICS Arbitration procedure proposed by the Applicant.
6. On 27th July 2022, the Applicant made an application the RICS for the appointment of an arbitrator, proposing Procedure B.
7. I was appointed as arbitrator by the President of the RICS on 22nd December 2022.

8. A pre-arbitration meeting was held by zoom on 10th January 2023, from which it was established that the arbitration would proceed under RICS Arbitration Procedure D as there was no agreement on an alternative basis, no need was anticipated for the appointment of other experts or legal advisors and no oral hearing was required.
9. It was agreed that the Applicant's tenancy was a business tenancy within the meaning of section 2 of the CRCA; the dispute had not already been resolved by agreement; the protected rent debt was not subject to a CVA, IVA or compromise; and the debt fell within the definition of "protected rent debt" for the purposes of the CRCA.
10. Subsequently, I received from the Applicant a copy of their formal proposal of 22/8/2022, (omitted in error from the papers forward to me previously), with a statement of truth and ■■■ management accounts for 2020, 2021 & to July 2022, ■■■ profit & loss account March 2020 to April 2021 and their rent account during the protected debt period.
11. Following the meeting I directed that the parties should provide additional information to establish the landlord's solvency and the viability of the tenant's business in accordance with Paragraph 6.6 of the Commercial Rent (Coronavirus) Act 2022 Guidance by 27th January 2023. It was also provided that each party might submit, if they wished, a formal proposal or in the Applicant's case one revised formal proposal by 10 February 2023.

Overview of the Legal Framework

12. Section 1(1) of the CRCA 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.
13. Section 3(1) of the CRCA provides that "a protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent.
14. By section 3(2) of the CRCA, rent due under the tenancy is only "protected rent" if:
 - (a) the tenancy was adversely affected by coronavirus; and
 - (b) the rent is attributable to a period of occupation by the tenant for, or a period within, the protected period applying to the tenancy.
15. As noted above, there is no dispute that the tenancy is a business tenancy. It is common ground that section 3(2) of the CRCA is satisfied. The Applicant was mandated to close the Premises by the Government as part of the Government's strategy for managing the coronavirus pandemic, and the mandated period for closure was from 21 March 2020 to 12 April 2021, such that this is the protected period.
16. Section 13 of the CRCA sets out the awards open to the arbitrator and provides so far as relevant as follows:
 - (2) If the arbitrator determines that:
 - (a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,
 - (b) the tenancy in question is not a business tenancy, or
 - (c) there is no protected rent debt, the arbitrator must make an award dismissing the reference.

- (3) If, after assessing the viability of the tenant's business, the arbitrator determines that at the time of the assessment) the business:
 - (a) is not viable, and
 - (b) would not be viable even if the tenant were to be given relief from payment of any kind, the arbitrator must make an award dismissing the reference.
- (4) Subsection (5) applies if, after making that assessment, the arbitrator determines that at the time of the assessment, the business:
 - (a) is viable, or
 - (b) would become viable if the tenant were to be given relief from payment of any kind.
- (5) In that case the arbitrator must resolve the matter of relief from payment of a protected rent debt by:
 - (a) considering whether the tenant should receive any relief from payment and, if so, what relief, and
 - (b) making an award in accordance with section 14.

17. Section 14 of the CRCA deals with the award on the matter of relief from payment, and I consider this further below, but before considering this matter I must first determine whether the dispute is eligible for the grant of relief, as required by section 13.

Eligibility

18. For the dispute to be eligible for the grant of relief the parties must not have resolved the matter of relief themselves before the reference; the tenancy must be a business tenancy (namely, a tenancy within Part II of the Landlord and Tenant Act 1954 (CRCA section 2(5)); there must be a protected rent debt; and it must be shown that the tenant's business is viable or would be viable if relief from the protected rent debt were given: section 13(2) & (3). If any one of these conditions is not met, the case fails on the grounds of eligibility and the reference must be dismissed.
19. As stated above, it is common ground that parties have not resolved the matter of relief themselves before the reference, the tenancy is a business tenancy and that there is a protected rent debt and therefore the reference does not fall to be dismissed.
20. The Applicant in their formal proposal calculates rent from March 2020 to April 2021 at £49,000, but says a payment was made of £3,500 on 1/3/2020 and £3,500 on 1 November 2020 as the 2nd lockdown started. Hence, the net rent debt is £42,000. However, the Applicant asks for relief for rent during the full protected rent debt period, calculated at £45,770.97.
21. The Act clearly defines the protected rent debt as the unpaid rent. The Respondent has not disputed the Applicant's figures and has not disputed receipt of the 2 rent payments mentioned by the Applicant. Accordingly, I make my Award on the basis that the protected rent debt which is the subject of this arbitration is £42,000, which the parties have confirmed as the amount of unpaid rent.

22. The final eligibility criterion is viability: section 13(3). I have to be satisfied that the Applicant's business is viable or would become viable if it were to be given one of the permitted forms of relief from payment of the protected rent debt: "the Viability Condition".
23. Viability is not defined in the CRAR but as the DBEIS Commercial Rent (Coronavirus) Act 2022 Guidance (issued under section 21 of the CRAR) states at paragraph 6.3: "*In making the assessment of viability a key question is whether protected rent debt aside, the tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.*"

The Evidence relating to Viability

24. The main evidence I have been provided with in connection with the financial position of the Applicant company comprises its filed accounts for the years ending 31st October 2019, 2020 & 2021. The Applicant advises they have 15 outlets, employing 90 people by March 2020. Turnover for the year ending October 2019 was £2,543,840 with an operating profit of £316,496. Turnover in 2020 is shown as £562,636 with an operating loss of £1,010,177. Turnover in 2021 was £319,939 with an operating loss of £394,531. Filed accounts for 2022 are not yet available, not being due until 31st July 2023. Management accounts for the group for the calendar year ending 31st December 2022 show a turnover of £3,333,614, a gross profit of £362,734 and a net loss of £101,212.
25. For the purposes of section 13(3), the assessment as to the Respondent's viability is to be made at the time of the assessment – i.e. now. As such, evidence relating to viability at the current time is key and for this reason I will have regard to the most recent accounts provided, rather than those of 2019 & 2020, as shown in the accounts for the period ending on 31 October 2021 and management accounts for 2022 to July 2022 and to December 2022, being the latest made available to me.
26. The accounts for 2021 state: *The directors have considered the impact of COVID-19 in relation to their assessment of going concern and in their opinion have taken all reasonable steps to mitigate these factors. Despite these steps the company has reported an overall loss for the year ended 31 October 2021 of £360,806 (2020: £825,069) and had net liabilities at the balance sheet date of £922,141 (2020: £561,335). As at the point of authorising the accounts, and for the foreseeable future, the directors consider the going concern assumption to be appropriate on the basis of support for the business being made available through government-backed loan schemes. The directors acknowledge that given the currently rapidly changing environment as a result of COVID-19, there are likely to be unknown factors which still may present themselves.*
27. The Applicant states they have not been refused credit, funding or lending with Barclays "as they concluded we were a viable business" and provided a £650k CBILS loan and £250k recovery loan. The Applicant has also provided letters from its bank, Barclays Bank, showing funds in its accounts as at October year ends, 2019-2022, as well as the aforementioned loans.

28. The Respondent points out the independent auditors concluded the going concern basis was appropriate in signing off the 2021 accounts and hence the auditors were satisfied the company could carry on trading normally and meet its obligations over the 12 months from October 2021.
29. The Applicant has also provided a profit forecast for the year ending October 2023, which shows an estimated gross profit of around £250k. The Respondent observes that the Applicant's forecasts for 2023 show a return to profit in 2023 and suggests the business is able to trade out of its post pandemic difficulties with an expected gross profit for 2023 of some £250,000.
30. Thus, it seems to be common ground between the parties that the Respondent's business is viable for the purposes of section 13(3).
31. Hence, in the circumstances, I am satisfied that at the time of assessment the Applicant's business is viable for the purposes of section 13(3).
32. Having determined that the relevant eligibility conditions are met and the Applicant's business is viable, I must now proceed to determine whether the applicant should receive relief and, if so, what relief should be awarded.

Relief from Payment: the Principles

33. In accordance with section 13(5)(a) of the CRCA I must decide whether the Applicant should be given any relief from payment of the protected rent debt and, if so, what relief.
34. The awards which I am permitted to make under section 14(6) are either:
 - (1) To give the tenant relief from payment by means of any one or more of the following:
 - (i) writing off all or any part of the debt; (ii) giving time to pay the whole or part of the debt (including by instalments); (iii) reducing (including to zero) any interest otherwise payable by the tenant (section 6(2)); or
 - (2) To determine that the Applicant is to be given no relief from payment.
35. In the event that any award I make gives the Respondent more time to pay, the payment date must be within the period of 24 months beginning with the day after the date of the award: section 14(7).
36. In deciding whether the tenant should receive any relief from payment and, if so, what, I must consider the final proposals put forward by the parties: section 14(2).
37. In this case the Applicant's final proposal is that they be granted full relief from payment of rent for the protected debt period of £45,770.97 including vat and seeks relief from payment of interest of £4,336.86 for the period from 21/3/2020 to 28/9/2021.
38. The Respondent's final proposal is that as the tenant is currently in a financial position to meet all its obligations, the landlord opposes the grant of any relief and proposes the tenant should pay all of the protected rent debt of £42,000 plus interest due under the lease within 14 days. Alternatively, the Respondent proposes that if, having regard to the CRCA, it is considered the tenant should be given more time to pay, the landlord is willing to accept payment over a reasonable period of time, plus interest, calculated at £4,821.29 to 10/2/2023.

39. The arbitrator's principles to be applied when considering the matter of relief are that:
- a.) Any award should be aimed at preserving or, as the case may be, restoring and preserving the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency ("the First Principle"); and
 - b.) The tenant should, so far as it is consistent with the first principle, be required to meet its obligations as regards the payment of protected rent in full and without delay ("the Second Principle").
40. Section 16 requires me to make this assessment having 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 other information relating to the financial position of the tenant that I consider appropriate.
41. In assessing the solvency of the landlord, I am similarly required to have regard to the assets and liabilities of the landlord and any other information relating to its financial position: section 16(2). A landlord is solvent unless the landlord is, or is likely to become, unable to pay their debts as they fall due. The only information provided to me regarding the assets and liabilities of the landlord is a portfolio valuation for the Respondent's 2 properties showing a market value of some £1.5235m. as at January 2023. I have no information on any landlord debts. The Respondent's representative has not claimed that any relief given would jeopardise the landlord's solvency and hence I must conclude in the absence of any evidence to the contrary, this is not a case where relief from payment would pose a risk to the landlord's solvency.
42. In accordance with the Second Principle, the Award is to preserve or restore and preserve the viability of the Applicant's business, whilst being required to pay the protected debt in full and without delay. In doing so, I may look beyond the landlord and tenant relationship between the parties and consider the impact of the tenant's other debts and its wider financial situation. I am required to approach this matter disregarding the possibility of the Applicant borrowing money or restructuring its business: s.16(3).
43. I understand that previous rental payments due under the Lease have been met as have the rent and other payments due under the lease since March 2021 up to the present date. The only unpaid amount due in respect of this property is the protected rent debt of £42,000.
44. The Applicant advises that due to the severity of the Covid 19 pandemic, overnight the travel industry completely closed down. International flights, hotels, cruises, & tours around the world had to cease operating. "Leicestershire was one of the worst hit areas in the UK, which forced us to close for longer periods. Not only could we not sell anything to any part of the world, we also had to refund all of our clients who could not travel on their holidays or business trips. This meant that all of our earnings were refunded for all bookings we had made in 2019 for departures after 21st March 2020. When re-opening in August 2020, it became a stop start industry with business trading at 10% of normal trade. We limped through the summer 2020, until we once again went into lockdown on November 5th 2020 and we didn't start to trade again until shops re-opened on 12th April 2021.

From the re-opening after the 3rd lockdown, cancellations continued and more UK and International restrictions were put in place with different border rules and the traffic light system introduced by the Government made it very difficult to make any travel plans. The Furlough Scheme and the retail grants were not enough for our business to survive. CBILS and RLS loans had to be applied for which were granted by Barclays Bank. Covid hit, we saw significant losses of £973,000 in 2020 and £411,000 in 2021. It came as a huge shock to see our business decimated in this Worldwide pandemic”.

45. The Applicant advises they reached agreement with other landlords, including rent free periods of between 6 months and 18 months, deferred payments on rent of up to 18 months with payment plans, lease renegotiations, increasing the lease term, etc. and says all these options were offered to the Respondent, but refused.
46. The Respondent has not disputed the impact of coronavirus on the business of the tenant, which is clear from the significant drop in turnover experienced by this company according to their management accounts from £3.035m. for the 12 months ending December 2019 to just £82,711 for the 2020 calendar year, recovering to £1.196m for the 2021 calendar year. Gross profits for 2019 are shown as £306,922, falling to £35,299 for 2020 and £114,534 for 2021.
47. The assets and liabilities of the tenant, as shown in the audited accounts, include all of the other properties occupied by the tenant and whilst the accounts of 2020 and 2021 show net asset value going from plus £401,704 in 2019 to minus £561,335 in 2020 and to minus £922,141 in 2021. The Applicant advises that they are projecting a return to a positive balance sheet by October 2026. The latest management accounts for the 12 months ending December 2022 show a group loss of circa £101,000.

Relief from Payment: Decision

48. Both parties have put forward proposals in accordance with section 11. When considering these proposals by reference to the Arbitrator’s Principles, if I consider that both proposals are consistent with the principles in section 15, then I must make the award set out in whichever of them I consider to be the most consistent: section 14(3)(a). If I consider one proposal is consistent and the other is not, I must make the award set out in the proposal that is consistent: section 14(3)(b). Where neither is consistent with the section 15 principles, I must make whatever award I consider appropriate: section 14(5).
49. The proposals put forward by the parties are diametrically opposed with the Applicant seeking total relief from the protected rent debt and interest thereon, whilst the Respondent is proposing no relief be given for the protected rent debt, nor the interest accruing thereon.

50. I do not regard the Applicant's formal proposal that the entire debt, together with accrued interest, be written off as consistent with the principles in section.15. It appears to me to be unrealistic for the Applicant, in predicting a return to profitability by 2023, with a forecast profit of some £250k, should expect to pay no part of those profits to the Respondent in respect of the protected rent debt of £42k. In my view, the Applicant is likely to be able to afford to pay some part of the protected rent debt within the next two years consistent with and while preserving the viability of its business. In the circumstances, I conclude the Applicant's proposal that the whole of the debt should be written off is not consistent with the Second Principle.
51. However, and in the light of the same factors, nor do I regard the Respondent's formal proposal as consistent with the section 15 principles. On the basis that I am required to disregard the availability of loans, it is clear that the Applicant's business was severely affected by the lockdowns, and I do not consider that the Applicant is in a position to pay all of the protected rent debt of £42,000 plus interest due under the lease within 14 days, as proposed by the Respondent is consistent with preserving the viability of its business, particularly when the management accounts for this property for the year 2021/22 to July 2022 show a net profit of only circa £12,000, inclusive of grant funding of £2,000. I also note that the projected 2023 management accounts for the Loughborough property show a net loss for November/December 2022 and an expected loss in 2 of the first 3 months of 2023 and the Group's projected profits for 2023 are generally expected to emerge later in 2023, generally from April onwards.
52. To require the Applicant to make payment as the Respondent proposes would not, in my view, be in accordance with the First Principle.
53. In the circumstances, I conclude neither proposal is wholly consistent with the Section 15 principles and hence I must make whatever award I consider appropriate. I must now consider and determine what amount, if any, of the protected rent debt the Applicant can afford to pay, and how quickly, while preserving its viability.

The Award

54. This Award is made by me, Andrew J Kilpatrick, having considered the parties' submissions and the evidence provided to me, I hereby award and direct as follows:
- (1) The Applicant is to pay to the Respondent the protected rent debt of £42,000 in 12 equal monthly instalments from 1 May 2023;
 - (2) No interest will be payable by the Applicant on the protected rent debt as long as the aforementioned monthly instalments are met on time.

Arbitration Fees and Costs

55. Section 19(7) of the CRCA provides that each party must pay its own legal and other costs of the arbitration, so this is not an issue for me to determine, although I note that The Respondent seeks recovery of the landlord's costs incurred in this arbitration as they say it is a contractual obligation under the lease. This is excluded under S.19(8) of the CRCA and so this is inappropriate.
56. In accordance with section 19(5) of the CRCA, when an award is made under section 13 the arbitrator must also make an award requiring the respondent to reimburse the applicant half of the arbitration fees paid by the applicant, unless it is considered more appropriate to award a different proportion under section 19(6).
57. Having regard to all the circumstances and as I have found that neither parties' formal proposal is consistent with the section 15 principles, I do not consider it would be appropriate to make an award which differs from the default position of each party paying half of the arbitrator's fees. Hence, I direct that the Respondent must reimburse the Applicant for 50% of the arbitration fees paid by the Applicant, including the RICS appointment application fee.

Publication

58. In accordance with section 18 of the CRCA this Award is to be published, which will be done on the RICS website which is required to be in an anonymised form.
59. The seat of this Arbitration is England and Wales.

Signed:



Andrew J. Kilpatrick BSc FRICS ACI Arb IRRV
Arbitrator

Date: 19 April 2023.