

IN THE MATTER OF THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

AND RELATING TO

[REDACTED]

IN THE MATTER OF AN ARBITRATION BETWEEN

[REDACTED]

APPLICANT

AND

[REDACTED]

RESPONDENT

FINAL AWARD



## **BACKGROUND**

1. The Applicant is [REDACTED] Limited represented by [REDACTED] of [REDACTED] [REDACTED] They are the landlord of premises known as [REDACTED] ('The Premises').
2. The Respondent is [REDACTED] Limited, the Applicant's tenant, represented by [REDACTED] a Director of [REDACTED] Limited advised by [REDACTED] of [REDACTED] [REDACTED]
3. The Respondents occupy The Premises under a lease dated 16 May 2012 for a term of 25 years commencing on 25 March 2012. The current rent reserved is £976,961.22 pa and is uplifted annually by 4% on 15th May.
4. The Respondents trade as a restaurant known as the [REDACTED]

## **PROCEEDINGS**

5. The Applicant submitted their application to the President of the RICS for the appointment of an Arbitrator under the Commercial Rent (Coronavirus) Act 2022 ('The Act') and I was duly appointed in that capacity on 6th July 2022.
6. The referral form was submitted by [REDACTED] of [REDACTED] Limited the Applicants Asset Managers. Attached to the referral form is a copy of the Applicant's Formal Proposal as requested by Section 11 and 12 of The Act.
7. The Respondent submitted their Response and Proposal to the Reference to Arbitration on the 8th July 2022.
8. Due to the parties' holiday commitments, there was a slight delay in arranging the preliminary hearing which took place via Zoom on 25th August 2022.



13 Having considered the parties' Revised Formal Proposals it became apparent they have agreed the following:

- Protected Rent Debt (PRD) £1,509,172.52 including VAT excluding interest.
- Interest £105,336.66 accruing at £179.65 per day.

14 I am grateful to the parties for narrowing the issues in dispute.

15 In accordance with the Act I have had regard to the parties' Revised Formal Proposals when making my award.

#### **PARTIES' REVISED FINAL PROPOSALS**

16 The Claimants propose that, in accordance with S15 (i)(b) of The Act, the Respondent should be granted no relief and the PRD should be paid in full. The Claimant will accept an award with the PRD to be paid in six equal quarterly payments over a period of 18 months. It is further proposed that the award provides for staged payments, the first of which are to be allocated to rent and service charge with the balance to replenish the rent deposit account.

17 In support of his Revised Formal Proposal [REDACTED] provides 17 appendices which I do not intend to summarise, suffice to say I have had regard to this information when making my award.

18 The Respondents propose that the rent deposit sum of £675,788 be applied towards the PRD which reduces as a result to £833,384.52. 75% of this reduced PRD is to be written off, leaving a balance due of £208,346.13. The Respondent propose that this is paid by equal quarterly instalments of £26,043.26 over the course of two years. The Applicant is to waive all interest payable in respect of the PRD.

19 The Respondent's Revised Formal Proposal is supported by two appendices. The first is draft company accounts for [REDACTED] for the year ending 28 February 2022. The other is a copy of a Management Agreement dated 4 February 2020, between [REDACTED]



Limited. I make specific reference to these documents when considering whether the Respondent should receive relief.

**RELEVANT PROVISIONS OF THE ACT**

20 I have considered the Claimant's and Respondent's Revised Final Proposals in the context of the relevant provisions of the Act.

21 The criteria for eligibility under the Act is as follows:

- a) the parties must not have resolved the matter of relief themselves before the reference.
- b) the tenancy must be a business tenancy namely a tenancy within Part II of the L&T Act 1954;
- c) there must be Protected Rent Debt;
- d) the tenant's business is viable or would be viable if relief from protected rent debt were given.

22 As documented in my Directions the parties have agreed that the criteria for eligibility under The Act has been met. It follows that I must now proceed to determine whether the Respondent should receive relief and, if so, what relief should be awarded.

23 Under Section 14 (6) of the Act I am permitted to make one of the following awards.

- a) give the tenant relief from payment of the debt as set out in my Award; or
- b) state that the tenant is to be given no relief from payment of the debt.

24 If I find in favour of providing the tenant with time to pay an amount the payment period must not exceed 24 months beginning with the day after the date on which this my Award is made.



- 25 I am to consider both parties' Final Revised Formal Proposals having regard to the Arbitrator's principles under Section 15 of the Act being:
- a) that any Award should be aimed at:
    - i. preserving (in the case falling within Section 13(4)(a)) or
    - ii. restoring and preserving (in the case of falling within Section 13(4)(b))  
the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency; and
  - b) that the tenant should, so far as it is consistent with the principle in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay.
- 26 Section 16 requires me to make this assessment having regard to the following as far as they are made known to me.
- 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 I consider appropriate.
- 27 I am to adopt a similar approach in assessing the solvency of the landlord and, where appropriate, will have regard to the assets and liabilities and any other information relating to its financial position so far as this has been submitted in evidence.

28 A landlord is solvent unless the landlord is, or is likely to become, unable to pay their debts as they fall due.

**RELIEF FROM PAYMENT**

29 In this case the Applicant has not addressed their own solvency. They do make reference to their payment obligations to their debt provider, [REDACTED]. Non-payment of the rent by the Respondent causes the Applicant to be in breach of their debt payment requirements which has resulted in a penal rate of interest being charged as well as repayment plans being implemented. The Respondents refer to documentation submitted by [REDACTED] which mentions that the parent company [REDACTED] Limited has the contractual obligation with [REDACTED] to meet their debt repayment. There is no evidence provided to demonstrate a link between [REDACTED] Limited and the Applicant. In fact the Respondents contend that the Applicants have failed to provide all the necessary information required under the Act to assess the solvency of the Applicant.

30 There is no evidence to suggest that these additional charges would cause the Applicants to become insolvent. As such I proceed on the basis that this is not a case where relief from payment would present a risk to the Applicant's solvency.

31 In considering the viability of the Respondent's business The Act does not define the concept of viability. It is to be determined specifically for the purposes of the Act and is not intended to have broader application. The test of viability is distinct from an assessment as to whether the business is solvent.

32 I am required to consider whether relief from the PRD would preserve the viability of the business. in a holistic and common sense way considering the circumstances of the business. The assessment is to be made at the date of this award and any evidence relating to the business prior to, or during the Coronavirus pandemic, is only relevant insofar as it speaks to its current viability. This is subject to taking account of any seasonal variations in the business. Therefore, I am required, when considering substantive relief to look at the Respondent's financial position now and for the foreseeable future rather than retrospectively.

33 Having regard to the above I now address the various matters I am required to consider under Section (16)(1).

**IMPACT OF CORONAVIRUS ON THE RESPONDENT.**

34 Given that the Respondent's business is that of a restaurant it is inevitable that the pandemic had a detrimental effect on their trade.

35 The Respondents confirm that they were closed for a period of 15 months from the 26th March 2020 to 18th July 2021 due to the restrictions imposed by the Health Protection (Coronavirus Restrictions) (England) Regulations 2020. The decision was made not to offer a takeaway service as it was felt that this would not reflect the memorable dining experience which they believe the restaurant offers through music and stunning interior enjoyed by their customers. The Respondents also make reference to their inability to offer a takeaway service due to restrictions imposed by the lease. [REDACTED], on behalf of the Applicants, disagrees and provides me with an extract from the lease to demonstrate there is no specific exclusion on takeaway use. He also refers me to the Respondent's website to demonstrate that they are now offering a takeaway facility. Given the evidence before me I am satisfied that the Respondents could have mitigated some of their losses by offering a takeaway service during the pandemic.

36 The Respondents advise me that they would struggle to pay the PRD in its entirety as it is taking longer to re-establish the business, post pandemic, than initially thought. They attribute this to soaring energy costs, increased cost of living and the looming recession to hit the UK. The decline in tourism has also had an adverse effect on the business.

37 The relevant concern for me, as Arbitrator, is to decide whether the Respondents, as far as it is consistent with the principles set out in Section 15 of the Act, are able to meet their obligations as regards to payment of Protected Rent Debt in full and without delay.

38 In so doing, and in accordance with the Act, I have considered the Respondents Assets and Liabilities as they have been presented to me. I have also acknowledged that the parties have addressed 16 (1) (b) of the Act in agreeing that the Respondent has a good payment record





and setting aside the PRD is fully up to date with the rental and service charge obligations under the lease.

39 The parties agree that the Respondents have no other business tenancies.

#### **ASSETS AND LIABILITIES OF THE RESPONDENT**

40 In their initial response to the Applicant's proposal, the Respondents provided me with Micro entity accounts for [REDACTED] Limited for the years ending

- i. 28<sup>th</sup> February 2019
- ii. 29<sup>th</sup> February 2020
- iii. 28<sup>th</sup> February 2021

41 The Respondents have provided me with company accounts for [REDACTED] Limited for the year ending 28<sup>th</sup> February 2022 signed by [REDACTED] as company Director although not by the companies new accountants.

42 I have considered the accounts for 2019 to 2021 as, although they are referred to in the Respondents Formal Proposal, they are referred to by [REDACTED] in his Revised Formal Proposal. He raises detailed concerns over inconsistencies in these accounts compared with the accounts lodged with Companies House. Reference is also made to the Respondents rather unusual accountancy practices which Mr Nash believes are also apparent in the accounts for the year ending February 2022. As a result [REDACTED] finds it impossible to establish the true financial position of the Respondents company either before, during or after the Covid period.

43 As I am considering the viability of the Respondent's business as at the date of this award I have considered the latest set of accounts for the year ending 28th February 2022. They are signed by the sole company Director being [REDACTED] and are dated 15<sup>th</sup> December 2022, the day before they were submitted to me in evidence. They have not been completed as they are yet to be signed by the accountants [REDACTED] Limited.

44 The Respondents need to demonstrate to me that they need relief from payment to preserve the viability of their business. They have decided to rely on their financial accounts and I agree with [REDACTED] that they do not provide a clear insight into their current financial position. The Respondents have made little attempt to relate these accounts to their ability to pay all, or part of the PRD, being the underlying principle in section 15 (1) (b) of the Act. More specifically I would comment as follows on the information submitted to me by the Respondents.

- i. The Respondents recognise in their Final Revised Proposal that the 2019 to 2021 accounts include numerous errors. They also admit that they were unaware of the discrepancies between the accounts accompanying their Response to the Applicants Reference and those lodged with Companies House. I deem this to be unreliable evidence which precludes me from obtaining any guidance on the net and gross profit margins prior to the protected period compared to after the mandatory closures and restrictions were lifted.
- ii. The 2022 accounts are not signed by the recently appointed accountants and follow the same accountancy practices as in previous years. There is no explanation as to why the income is offset entirely by the cost of sales, which are inexplicably referred to as 'bad debts written off'. These accounts do not provide persuasive evidence in support of the Respondents Revised Formal Proposal.
- iii. The Respondents previously engaged [REDACTED] Limited to manage and operate the restaurant and bar business and I have been provided with a copy of the Management Agreement. They have since gone into Administration. They have the same accountants as [REDACTED] Limited and the Respondents acknowledge that the accounts contain the same errors that appear in the accounts for [REDACTED] Ltd. This has prevented the Respondents from providing any accounts for [REDACTED] Limited. Although I am



considering the validity of the Respondent's business, the accounts for [REDACTED] Limited may well have gone some way to enabling me to understand the Respondent's accountancy practices.

- iv. The Respondents confirm that they received a grant from the Government Job Retention Scheme as it had to furlough most of its staff. Details of the grant are not available as the application was made by the Respondent's previous accountant who has not provided the relevant information. It follows that this grant is not reflected in the accounts that I have received from the Respondent. On the information before me I can only conclude that I do not have accurate financial information on which to consider relief.
- v. In the absence of reliable financial accounts it would have been helpful if the Respondents had provided full bank account information. The email dated the 16<sup>th</sup> December 2022 from [REDACTED] of [REDACTED] Limited, who prepared the 2022 year end accounts, makes reference to incomplete bank data. I am advised that [REDACTED] Bank were unable to address this issue on three separate occasions over the previous three months. There is no explanation provided as to why this is proving problematic.
- vi. Although the Respondents makes reference to external pressures on the business going forward, this is not quantified by any financial forecasting. This would have provided an indication of the Respondents ability, or otherwise, to meet their obligations as to pay the PRD in full and without delay.

45 The Applicant and Respondents are responsible for providing the evidence to enable me to assess whether relief from payment is required to preserve the validity of the Respondents business. Neither party has sought to secure information from the other by way of an Order for Disclosure neither am I required to seek out additional information.

46 Based on the information before me I make the following award.



## AWARD

- 47 The relevant concern for me is to consider whether relief from payment of Protected Rent Debt (PRD) is required to preserve the viability of the Respondents business in accordance with the principles set out in Section 15 of the Act
- 48 The Respondents have relied on their financial accounts, which I have found to be unreliable and insufficient for me to determine whether relief from PDR would preserve the validity of the Respondents business.
- 49 Accordingly, I find in favour of the Claimants Revised Formal Proposal.
- 50 I hereby award and direct as follows.
- 51 The Respondent is to be given no relief from payment of the Protected Rent Debt which will be subject to the repayment plan proposed by the Applicants.
- i. The sum of £1,257,643.77 plus VAT of £251,528.75.
  - ii. Interest which as at the 14<sup>th</sup> November 2022, being the date of the Applicants Revised Formal Proposal, was £105,336.66. with additional interest accruing in the agreed amount of £179.65 from that date until the PRD is paid.
  - iii. Payment is to be made over 18 months in six quarterly instalments.
- 52 In proposing a repayment period the Applicant has requested that my Award should state that payment of the PRD should be first allocated to the rent and service charge account and then to replenish the rent deposit. My jurisdiction does not extend to allocating the payment of PRD and I make no award to this effect.

**Costs**

- 53 Section 19 (7) of The Act provides that each party must pay its own costs so this is not an issue for me to determine .
- 54 I hereby award that the Respondents are to reimburse the Applicant 50% of my fee as Arbitrator of [REDACTED] exclusive of VAT.
- 55 This is my Final Award on all matters.

Signed..

A handwritten signature in black ink, appearing to be 'D J Lillie', written over a dotted line.

Dated 3 February 2023

.....

D J Lillie Bsc FRICS

Arbitrator