

COMMERCIAL RENT (CORONAVIRUS) ACT 2022

XXX (1)
XXX (2)
XXX (3)

(APPLICANTS)

and

XXX (1)
XXX (2)

(RESPONDENTS)

XXXXXXXXXXXXXXXXXX

LONDON E2

AWARD

By

ROBERT C H PRATT BSc FRICS FCI Arb

of RPC

BACKGROUND

1. The Applicants, XX, XX and XXX are the landlords of retail/restaurant premises at XXXXXXXXXXXXX, London E2.
2. The Respondents, XX and XX, are the tenants.
3. The property was demised by way of a 15 year lease from 1st September 2019 at a rent of £28,800 per annum, subsequently reviewed to £31,200 per annum, effective 1st September 2022.
4. The Applicants submitted an application for the appointment of an Arbitrator under the Commercial Rent (Coronavirus) Act 2022 (the Act) to the RICS, and I was duly appointed in that capacity on 23 November 2022.
5. The Applicants are represented by Mr XX of XXX Solicitors, and the Respondents are represented by Mr XX of XXX Solicitors.
6. The documents I have received from the parties' representatives are as follows:-
 - Form DRS CRAA3 – request for the appointment of an arbitrator.
 - Form DRS CRAA2 – response to notice of intention to arbitrate.
 - Formal Proposal from the Applicants, including attached documentation.
 - Formal Proposal in response from the Respondents, including attached documentation.
 - Email responses from the parties to queries raised by me.
 - Open letter from the Respondents' accountants.
 - HM Revenue & Customs summary of income for Mr XX.
7. I confirm that I have exchanged copies of all the above documents with the parties' representatives.

THE LEGAL FRAMEWORK

8. Section 1(1) of the Act enables the matter of relief from payment of protected rent debts due from a tenant to a landlord, under a business tenancy, to be resolved by Arbitration.
9. Section 3(1) of the Act provides that a protected rent debt is a debt under a business tenancy consisting of unpaid protected rent. By section 3(2) of the Act, 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 or a period within, the protected period applying to the tenancy.

10. Section 4 of the Act provides that a business tenancy was adversely affected by Coronavirus if, for any relevant period, the whole or part of the business, or the whole or part of the premises, was subject to a closure requirement. For this purpose, 'a closure requirement' means a requirement imposed by Coronavirus Regulations which is expressed as an obligation to close businesses or premises, or parts thereof, every day at particular times.
11. Section 13 of the Act sets out the issues that the Arbitrator must decide, and the order in which they need to be decided.
12. In accordance with Section 13, the main questions for me to resolve are as follows:-
 - (i) Is the tenancy a business tenancy, and is there a protected rent debt as defined by the Act?
 - (ii) Is the tenant's business viable, or would it be viable if rent relief were given?
 - (i) If so, should the tenant be given relief and, if so, what form should it take?
13. I am required to consider the formal proposals set out by both parties' representatives individually, and decide which of them is more consistent with the principles set out in Section 15 of the Act. These principles are:-
 - The proposals should preserve or restore the viability of the tenant's business whilst safeguarding the landlord's solvency; and
 - The tenant should be required to pay as much of the rent debt with as little delay as these principles allow.
14. Section 16 of the Act sets out the issues I need to consider in dealing with the second and third questions raised in Section 13:-
 - (1) In assessing the viability of the business of the tenant, I must, as far as known, have regard to:-
 - The assets and liabilities of the tenant.
 - The previous rental payments made under the business tenancy.
 - The impact of Coronavirus on the business of the tenant.
 - Any other information related to the financial position of the tenant that is appropriate.
 - (2) In assessing the solvency of the landlord I must, as far as known, have regard to:-
 - The assets and liabilities of the landlord.
 - Any other information relating to the financial position of the landlord that I consider appropriate.
 - (3) In making an assessment above I must disregard the possibility of the tenant or the landlord borrowing money or restructuring its business.

THE SUBMISSIONS OF THE PARTIES

15. The Applicants (landlords) advise that the Respondents (tenants) initially kept up to date with rent payments, but that they fell behind after the first Coronavirus lockdown commenced in March 2020.
16. The Applicants submit that the total rent owing that falls within the protected rent period is £10,102.
17. The Applicants contend that through their solicitors they have been attempting to recover the outstanding rent, but in the end had no alternative but to commence arbitration proceedings.
18. It is the Applicants' submission that the Respondents have changed the use of the premises from restaurant to grocery store without landlord's consent. Furthermore, the Applicants submit that the Respondents did not suffer any losses during the pandemic as they were trading throughout the period, or at least through the majority of it.
19. In the course of seeking payment, the Applicants claim that they have requested copies of the Respondents' accounts and bank statements, together with evidence of the date on which they were forced to close and, were able to re-open. But, no response has been forthcoming.
20. In view of the absence of such a response, the Applicants have assumed that the Respondents do not wish to disclose such information as it will show no financial strain has been suffered.
21. The Applicants' Formal Proposal is that the outstanding rent plus interest should be paid in full within fourteen days of the date of my award, and that the Respondents should settle the Applicants' legal costs, and other fees associated with the arbitration, and in chasing rent arrears from the Respondents.
22. In their Formal Proposal in reply, the Respondents deny that the property changed into a grocery shop. They claim that the shop is continuing to be used as a café, but that ancillary goods and products were added to improve profitability and business income.
23. The Respondents also deny that the business was open during the Covid 19 period, and submit that they only added the ancillary goods and products in October 2021.
24. The Respondents claim that they do not have any accounts for the relevant period as no business was carried out at the property.
25. Furthermore, they contend that as the restaurant was closed, the Respondent, Mr XX, was forced to work elsewhere during the pandemic.
26. It is the Respondents' submission that the protected rent debt of £10,102, or part of it, should be written off, and the balance, if any, should be paid by monthly instalments.

REASONING

27. In view of the amount of the protected rent debt, I have agreed to deal with this Arbitration under Procedure A.
28. With regard to the relevant criteria under the Act, I am satisfied that the tenancy qualifies as a business tenancy.
29. Both parties have referenced a protected rent debt of £10,102, and so I am proceeding on the basis that this is the correct figure.
30. There is clearly some disagreement between the parties as to whether the premises were the subject of a Closure Requirement, and indeed during what period the premises remained closed.
31. In an email from the parties' representatives on 7th December 2022 I sought clarification on these points.
32. Mr XX, for the Applicants, replied to me on 8th December 2022, stating that no evidence had been provided by the Respondents that the premises remained as a café/restaurant, and that in any event it would appear that that the premises are operating as a convenience store.
33. Mr XX, for the Respondents, replied to me on 15th December 2022, and included a letter from the Respondents' accountants, XX Accountants Ltd, which confirmed that the business had been closed due to the Covid 19 lockdown between the dates of 17th March 2020 and 18th October 2021, resulting in 19 months of lost income.
34. Mr XX also provided a copy of a taxable income summary from HM Revenue & Customs for Mr XX, confirming that he was employed between April 2020 and November 2021, with XYZ Retail Ltd.
35. He also confirmed that the Respondents received grants amounting to around £50,000 such funds being used for rent payments, utilities etc.
36. Based upon the written confirmation from the Respondents' accountants, I am satisfied that the business of the Respondents was the subject of a Closure Requirement, and that the outstanding rent of £10,102 is a protected rent debt.
37. However, as no accounts have been provided, it is difficult for me to reach a definitive conclusion as to whether the Respondents' business is viable.
38. In support of the viability argument, the Respondents have demonstrated that Mr XX was employed elsewhere during the relevant period. The Respondents have also submitted that in the last few months they have undertaken major works to the property at a cost of circa £50,000.

39. In addition, I have noted that rent owed of £6,000, that was not protected, was paid by the Respondents in May 2022.
40. Whilst this evidence is not conclusive, I have on balance concluded that the Respondents' business remains viable, and so I can now consider whether they should be given relief, and if so, what form this should take.
41. In reaching my decision I am required to safeguard the Applicants' solvency, but the Applicants have not made any reference to this matter, nor has it been claimed that the amount of the protected rent debt will have an influence thereon.
42. In accordance with Section 14 of the Act, I am permitted to either write off all or part of the debt, including interest, or give the Respondents time to pay the whole or part of the debt, or a combination of these measures. Alternatively, I may determine that the Respondents are given no relief from payment.
43. Having decided that the Respondents' business was adversely affected by Coronavirus, I am minded to grant them some relief.
44. However, the Respondents have received financial assistance from the Local Authority which will have mitigated their losses.
45. The parties will also appreciate that I have been provided with very limited information as to either the Applicants' or the Respondents' financial position – no Accounts have been provided, nor details of the actual losses incurred.
46. As a result, it is difficult for me to make an informed decision as to precisely what proportion of the debt it would be appropriate to grant relief from payment of.
47. I have in the end concluded that an appropriate Award, which would be consistent with the principles set out in Section 15 of the Act, would be to effectively apportion the amount in dispute equally between the parties.
48. I therefore propose to grant to the Respondents relief from payment of 50% of the protected rent debt.
49. The outstanding sum to be paid by the Respondents will therefore be £5,051 (50% of the protected rent debt of £10,102).

AWARD

50. I hereby Award and Direct that the Respondents are to be granted relief from payment of 50% of the protected rent debt, and that the outstanding amount to be paid to the Applicants will be £5,051 (no interest to be applied).
51. This amount is to be paid to the Applicants in three monthly instalments commencing 1st February 2023.

COSTS

52. Section 19 of the Act provides that each party must pay its own costs and half of the Arbitrator's fees paid by the Applicants.
53. I therefore additionally Award that the Respondents are to reimburse the Applicants, by 1st February 2023, 50% of the Arbitration fee of £750 plus VAT.
54. The seat of this Arbitration is England and Wales.
55. This Final Award is made and published this Sixteenth Day of January 2023.

Signed: *Robert C H Pratt*

Robert C H Pratt BSc FRICS FCI Arb
(Arbitrator)

Date: *16th January 2023*