

**COMMERCIAL RENT (CORONAVIRUS) ACT 2022**

.....LIMITED

**(APPLICANT)**

**And**

1. ....LIMITED and
2. .... LIMITED acting as nominees for
- 3..... LIMITED acting as general partner of
4. ....PROPERTIES L.P

**(RESPONDENTS)**

**UNITS** .....

**DEPTFORD**

**LONDON SE14**

**AWARD**

**By**

**ROBERT C H PRATT BSc FRICS FCI Arb**

**of RPC**

## BACKGROUND

1. The Applicant, .....Limited, is the tenant of commercial premises known as ..... London SE14. Each unit is held under a separate lease.
2. The Respondents, .....Limited and others are the landlords in both cases.
3. The Applicant submitted an application to the RICS for the appointment of an Arbitrator under the Commercial Rent (Coronavirus) Act 2022 (the Act) on 23<sup>rd</sup> September 2022, and I was duly appointed in that capacity on 6<sup>th</sup> December 2022.
4. The Applicant is represented by Mr .....of ..... Solicitors, and the Respondents are represented by Ms .....of ..... Solicitors.
5. The documents I have received from the RICS and the parties' representatives are as follows:-
  - Form DRS CRAA3 – reference to Arbitration submitted by Mr ..... for the Applicant Tenant.
  - Covering letter from Mr ..... (formal proposal).
  - Email exchanges between Mr ..... and Mr ..... of the respondent landlord.
  - Copy of the lease for Unit .....
  - A settlement proposal from Mr ..... dated 4<sup>th</sup> January 2023.
  - A further email from Mr ..... dated 23<sup>rd</sup> January 2023 attaching the applicant's accounts for the year ending 31<sup>st</sup> July 2021, with supporting background.
  - The Respondent's formal proposals – submitted separately for Units .....
  - Further responses from the parties' representatives to queries that I raised.
6. I confirm that I have exchanged copies of all the above documentation with the parties' representatives.

## THE LEGAL FRAMEWORK

7. 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.
8. 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.

9. 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.
10. Section 13 of the Act sets out the issues that the Arbitrator must decide, and the order in which they need to be decided.
11. 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?
12. 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.
13. 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**

14. The Respondents originally submitted to me that I should dismiss the reference to Arbitration on the following grounds:-
  - (i) That the Applicant had failed to provide a copy of its formal proposal to the other party.
  - (ii) The appointment of an Arbitrator was premature in relation to the provisions of the Act.
  - (iii) The formal proposal from the Applicant was not made under the provisions of the Act.
  - (iv) The Applicant failed to ensure that any written statement was supported by a Statement of Truth as required by the Act.
15. I noted the Respondents' concerns, but confirmed by email of 9<sup>th</sup> January 2023 that I was still prepared to proceed, primarily because Section 11(6) of the Act gave me the power to extend the time periods for the submission of formal proposals and formal counter-proposals.
16. The relief sought by the Applicant was set out in Mr .....’s email of 4<sup>th</sup> January 2023 which contended that there should be a 50% reduction of the protected rent arrears under both leases, and that the balance should be payable in twelve equal installments commencing from 1<sup>st</sup> February 2023.
17. In support of this claim, Mr ..... provided a copy of the Applicant’s accounts for the financial year-ending 31<sup>st</sup> July 2021.
18. Furthermore, he specifically drew my attention to the Applicant company’s turnover, which for the year to July 2020 was £713,454, but which for the following year to to July 2021, had fallen to £495,506.
19. He also highlighted that the profit for the year-ending July 2020 was £83,631, and that this dropped to £21,335 in the following year.
20. In Mr .....’s opinion these figures represented a massive decline in the turnover and profitability of the Applicant company, which demonstrated their financial position and the losses suffered.
21. Ms ....., on behalf of the Respondents, submitted separate formal proposals in respect of Units 30 and 31, in which it was claimed that the whole of the protected debt should be paid by the Applicant immediately, together with interest in accordance with Clause 4.12 of the subject lease. Such proposals were set out in Witness Statements from Mr ..... of Arch Company Properties Limited.
22. Mr ..... advised that the Respondents had already granted a three-month rent-free period to the Applicant, on a discretionary basis, in respect of both units, for the period 2<sup>nd</sup> May 2020 to 1<sup>st</sup> August 2020.

23. Mr ..... confirms that it is the Respondents' position that the Applicant has failed to establish its eligibility for relief under the Act, and in this connection, he notes that the agreed use of the subject units within the respective leases, is as follows:
- Unit 30:           A workshop and storage or such other use within Class B1 and B8 of the schedule to the Town and Country Planning (Use Classes) Order 1987.
- Unit 31:           A stone masons.
24. The Respondents provide photographs of the units that were taken in February 2021, noting that they are being used to create stone items, and that as far as the Respondents are aware, there is no public-facing use of the property such as retail, which would in any event be in breach of the lease.
25. The Respondents further contend that businesses who manufacture goods were not mandated to close during the pandemic, and that because the Applicant's business was not subject to a closure requirement as defined in the Act, the Applicant is ineligible for relief.
26. The Respondents claim that the Applicant's website refers to the use of the property as 'a warehouse and factory', and that even though there is mention of an 'office and showroom' at the property, it is clear there is no obvious public-facing use.
27. As for the financial position of the Applicant, the Respondents argue that their capital & reserves and assets were all higher for the year to July 2021 than for the previous year, and that whilst many businesses were negatively affected indirectly by the pandemic, this does not produce an automatic right for a rent reduction, as compliance with the Act is required. As an example, they suggest that a loss of profit could instead have been caused by rising material costs.
28. Regardless of the reduction in turnover, the Respondents note that the Applicants still made a profit for the years ending July 2020 and 2021, which if combined, would be sufficient to pay the outstanding protected debt. They additionally suggest that the accounts would have been prepared on the basis of incurred costs, and that the Applicant would therefore have made those profits after accounting for rent which was not paid.
29. The Respondents conclude from this that a business whose profit is sufficient to pay the rent in full, that has already been granted a three-month rent concession, does not merit a 50% write-off of rent which would be inconsistent with the principles of the Act.
30. The Respondents also refer to the Government's Code of Practice for Commercial Property Relationships following the Covid-19 pandemic, which states that the legal position remains that tenants are liable for covenants/payment obligations contracted under a lease, and that the expectation remains that those who are able to pay their rent debt in full should do so. They add that there are also significant non-ring-fenced arrears outstanding.
31. In conclusion, it is the Respondents' submission that the Applicant has failed to comply with the statutory requirements of the Act, has not provided evidence they are eligible for relief, has failed to give complete financial information, and has also failed to show evidence that its business is viable

## ARBITRATOR'S FINDINGS

32. The Application for the appointment for an Arbitrator was made under Procedure D, but having regard to the amount of the protected rent debt, I have agreed to proceed on the basis of a fixed fee in line with Procedure B.
33. The parties' representatives have agreed that the amount of protected rent debt (if any) is as follows:-
- Unit 30: £27,689.38 (excluding VAT).  
Unit 31: £27,789.57 (excluding VAT).
34. Having regard to the relevant criteria under the Act, I am satisfied that the tenancy qualifies as a business tenancy.
35. As to the viability of the Applicant's business, I have noted that although turnover and profit levels were lower for year-ending July 2021 than in the previous year, the company remained profitable. I have also noted that capital and reserves of £133,687 were higher for year-ending July 2021.
36. The financial information that has been submitted to me is fairly limited, and it would have been useful to have been provided with accounts for previous and subsequent years as well.
37. However, based upon the information to hand, I am unable to conclude, as the Respondents have suggested, that the Applicant's business is not viable.
38. The Respondents have also contended that the Applicant is ineligible for Arbitration due to the use of the property, and I consider that this is the key issue in this reference. In other words, is there a protected rent debt as defined in the Act?
39. As I mentioned earlier in this Award (see paragraph 9), in order to qualify for relief from payment of rent, the tenant's business must have been adversely affected by coronavirus, as defined in the Act.

Clause 4(1) of the Act states as follows:-

*"A business tenancy was 'adversely affected by coronavirus' for the purposes of Section 3(2)(a) if, for any relevant period –*

*(a) the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or*

*(b) the whole or part of those premises,*

*was of a description subject to a closure requirement."*

40. The Act goes on to say that for this purpose a closure requirement is a requirement imposed by Coronavirus Regulations which is expressed as an obligation to close businesses or premises during the relevant period.
41. in his email to me of 23<sup>rd</sup> March 2023, Mr ..... claims that, according to his client, the premises were the subject of a closure requirement due to the pandemic, as there was a risk for the public whilst entering those premises for shopping purposes.
42. He has not however provided any evidence of a closure requirement, or any explanation as to why a stone mason should be treated primarily as a retail use.
43. Furthermore, as Mr ..... has pointed out, the permitted uses for both units under the provisions of the respective leases do not include retail.
44. Whilst I have noted that the word 'showroom', in reference to the subject premises, does appear on the Applicant company's website, this is clearly not the primary use of the premises, either in accordance with the terms of the subject leases, or as I understand it, in practice.
45. Non-essential retail businesses that were the subject of closure requirements were generally defined in the Coronavirus Regulations as businesses that were used mainly, or wholly, for the purposes of the retail sale or hire of goods or services by the public, where the primary purposes of products or services provided were not necessary to the health and wellbeing of the public.
46. It is also worth emphasising here that businesses offering goods for sale were still permitted to trade, if those goods were delivered following a postal, telephone, or on-line order. Consequently, the Applicant company would still have been able to transact business in this way during the pandemic.
47. It is clear to me therefore that as the subject business is not primarily a retail use (and would not in any event be permitted to be so under the subject leases), it does not qualify as a non-essential retail business, and would not therefore have been subject to a closure requirement.
48. As a closure requirement is a pre-requisite of a protected rent debt as defined in Section 3 of the Act, it follows that there is no protected rent debt in this case
49. I have therefore concluded that the Applicant's business does not qualify as a business tenancy that was 'adversely affected by coronavirus', as defined in Clause 4(1) of the Act.
50. Under such circumstances Section 13(2) of the Act requires me to make an Award dismissing this reference.

**AWARD**

51. I hereby Award and Direct that in accordance with Section 13(2) of the Commercial Rent (Coronavirus) Act 2022, there is no protected rent debt in this case, as the business tenancy in question was not the subject of a closure requirement.
52. This reference is therefore dismissed.

**COSTS**

53. Section 19(7) of the Act stipulates that the parties must meet their own legal and other costs.
54. Section 19(5) of the Act provides that each party should pay half of the Arbitrator's fees.
55. In this case the Arbitrator's fees have been paid to the RICS by the Respondents, and so I additionally Award that the Applicant is to reimburse the Respondents 50% thereof.
56. The seat of this Arbitration is England and Wales.
57. This Final Award is made published this Twenty-sixth Day of June 2023.

Signed: *Robert C H Pratt*

Robert C H Pratt BSc FRICS FCI Arb  
(Arbitrator)

Date: *26<sup>th</sup> June 2023*