

# In The Matter of an Arbitration under the Commercial Rent (Coronavirus) Act 2022

Between

XXXXXX

(Applicant/ Tenant)

and

XXXXXX

(Respondent/ Landlord)

In respect of

XXXXXXXXXXXXXXXXXXXX

(Property)

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**AWARD**

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## INTRODUCTION

1. The Applicant is the tenant of the property known as xxxx (**'the Property'**) under a lease dated 21 June 2016 (**'the Lease'**) between (1) xxxx (**'Landlord'**) and (2) xxxx (**'Tenant'**).
2. The Respondent is the freehold owner of the Property and is the Applicant's landlord under the Lease.
3. The Applicant seeks relief from payment under the Commercial Rent (Coronavirus) Act 2022 (**'the Act'**). The Respondent seeks to waive the debt in return for the Applicant surrendering its lease.
4. The purpose of the Act is to limit the effect of the pandemic on commercial tenants and save viable businesses.
5. It is common ground between the parties that:
  - i) The Applicant occupies the premises for the purposes of a business trading as a xxxx
  - ii) The lease creates a business tenancy sufficient to satisfy the requirements of the Commercial Rent (Coronavirus) Act 2022.
  - iii) There is a 'protected rent debt' as defined by the Act.
  - iv) An agreement between the parties has not been reached.
6. The alleged protected rent debt during the relevant period amounts to £116,667 plus VAT (£140,000).

## PROCEDURAL BACKGROUND

7. This application was made under section 9 of the Act and is proceeding by agreement under Procedure C.
8. The reference was made under section 7 of the Act to the Royal Institution of Chartered Surveyors (RICS) dated 26 August 2022, an approved arbitration body for the purposes of the Act. I was appointed by the RICS as arbitrator on 20 December 2022.
9. The Applicant is represented by xxxx and the Respondent - xxxx I will refer to both as **'the Parties'**.
10. In accordance with section 10 of the Act, the Applicant notified the Respondent by letter dated 8 July 2022 of its intention to arbitrate under the Act and inviting a response within the required 14-day period. As required by section 11(3) of the Act the Applicant included supporting evidence which included a valuation report prepared xxxx a financial letter prepared by xxxx respectively) and various accounting reports.
11. Under section 11(2) the other party to the arbitration may put forward a formal proposal in response within 14 days of receipt or such revised proposal within 28 days again with supporting evidence. In respect of the time periods under section 11(6) such periods may be extended by agreement between the parties or extended at the discretion of the arbitrator.
12. By way of response the Respondent requested further financial information from the Applicant on 12 July 2022 which was not provided.
13. On the 1 September 2022 the Respondent sent a reply to the Applicants Notice of Intention to Arbitrate which stated it had not been possible to negotiate mediate or arbitrate and specified three grounds:
  - i) The Applicant had rent arrears amounting to £35,472.32 comprising unpaid rent for July, August and September 2022 (£10,000 each month) and £5,472.32 for unpaid insurance.
  - ii) The Respondent also referred to its previous request for various financial information from the Applicant and was therefore unable to form any financial opinion to be able to respond and consider the proposal made.

- iii) The Applicants failure to provide the required information was an abuse of process.
14. On 13 September 2022 the Applicant through its appointed solicitors responded advising that rent arrears did not preclude a claim to the arbitration scheme and in response to the request for financial information provided various documents to the Respondent. In that letter the Applicant also stated that its formal proposal was to make a payment of £50,000 by way of 25 monthly £2,000 payments beginning on 1 December 2022.
15. The Respondent replied dated 20 September 2022 advising that it believed the Applicants business was not viable being unable to pay its debts and had failed to submit satisfactory financial evidence thereby preventing proper consideration of its proposal. The Respondent stated the offer was therefore rejected but proposed that it would be prepared to write off the debt amounting to £116,667 plus interest and VAT on condition the lease is surrendered.
16. On the 23 September 2022 the Applicant made an application to the RICS for the appointment of an Arbitrator under the Commercial Rent (Coronavirus) Act 2022 and enclosed a copy of its formal proposal dated 23 September 2022.
17. I was appointed on 20 December 2022 and wrote to the parties on 9 January 2023 enclosing my appointment letter, providing an estimation of my fee, and requesting payment to the RICS, and asked the parties contact my secretary to arrange a preliminary meeting to discuss the procedure.
18. I received a response from the Respondent but not from the Applicant. I wrote to the Applicants solicitor - xxxx - requesting a reply and confirmation as to whether payment of my estimated fee had been made to the RICS and if the Applicant was still trading or solvent. I also advised the Applicant that unless payment was made within the next 7 days, I would have no option but to return the papers to the RICS and for the case to be closed. I was informed by xxxx that the reason for the delay was due to some confusion as to whether they were in fact appointed to act in the matter. This was eventually resolved, and the Applicant paid the estimated fee to the RICS in early June 2023.
19. I arranged a preliminary meeting on 20 June 2023 to discuss the proposed procedure. However, on 19 June 2023 my secretary was contacted by the Applicant - xxxx - who advised that he would not be able to attend the meeting due to other business commitments. The Respondent objected to the request, and I advised that as xxxx were appointed as xxxx representatives, they should still be able to attend in xxxx absence. I

did not receive a reply from either and unfortunately, neither xxxx or xxxx attended the meeting, nor was I given any reason prior for xxxx failure to attend.

20. The meeting was rearranged on 31 July 2023 which I am pleased to confirm both parties attended. At that meeting the Applicant and Respondent reaffirmed their proposal positions and raised the following issues:
  - i) Viability of the Tenant's business;
  - ii) Confirmation as the Applicants/ Respondents Proposal; and
  - iii) Uncorroborated accounts submitted by Tenant.
  
21. These issues centred on the Applicants contention that the Respondents proposal was not valid as it is conditional and from the Respondents perspective that the Applicants business was not viable and to date has only supplied inadequate financial information.
  
22. I issued further Directions in this respect requesting the parties submit additional information by no later than 18 August 2023 and upon exchange any replies/ comments by no later than 25 August 2023. I received a statement from both parties and a reply from the Respondent only.
  
23. I have therefore received the following documents from the parties:

#### Applicant

- i) Letter from xxxx dated 8 July 2022 inviting proposal from Respondent.
- ii) Formal written proposal dated 23 September 2022.
- iii) Annual Accounts - Nov 20 & Nov 21.
- iv) Management Accounts – Nov 20 & Nov 21.
- v) Nominal Ledgers – FY20, FY21, FY22.
- vi) VAT Calculations – 2020, 2021 and first quarters of 2022.
- vii) Draft Management Accounts for 9 months to August 2022.
- viii) Profit & Loss to YE Nov 2020, Nov 2021.
- ix) Aged Creditors Analysis to Nov 2021.
- x) Valuation Report prepared by xxxx dated 6 June 2022.
- xi) Further submissions following the preliminary meeting.

#### Respondent

- i) Formal written response of Notice of Intention to Arbitrate.

dated 1 September 2022.

- ii) Further submissions following the preliminary meeting.
- iii) Replies in respect of the Applicants further submissions.

24. Neither party requested a hearing and so the matter proceeds by way of written documents only.
25. I have considered all the documents and evidence submitted by the parties and although I have not referred to every single matter made by the parties in this Award, I have addressed the main issues in dispute.

## **THE CLAIM**

26. Pursuant to section 11 of the Act the Applicant submitted a proposal accompanied by supporting evidence seeking relief under the Act.
27. Section 3 of the Act defines the Protected Rent Debt as unpaid protected rent including any interest. The protected rent is rent due under the tenancy if the tenancy was adversely affected by coronavirus during the protected period.
28. Section 5(1)(a) of the Act defines the relevant period for calculating the Protected Rent Debt for English business tenancies as the period beginning 21 March 2020 and ending 18 July 2021. This is 485 days.
29. The Applicant claims that they are unable to pay back the entire arrears and if forced to do so it would result in significant financial hardship and likely to make the business unviable.
30. The Applicant's formal proposal claims the Protected Debt during the relevant period is £116,667 plus VAT (£140,000) and proposes that it will pay £50,000 and that the amount should be paid by the Applicant by way of 25 monthly £2,000 payments beginning within 60 days. The Applicant also advises that if forced to immediately pay the full amount it is likely it would be insolvent.

31. The Respondent states that as the Applicants solicitor failed to submit the necessary financial information for its consideration was unable to form a view as to the validity of the Applicant's situation.
32. The Respondent considers that the Applicants business is not viable as it has struggled to pay its debts on time and therefore offers to write off the full amount of arrears (£116,667 plus interest and VAT) on condition that the Applicants forfeits the lease.
33. The figure of £116,667 plus VAT (£140,000) is therefore the total Protected Rent Debt upon which I must decide whether to grant relief and if so in what form.

## **LEGAL FRAMEWORK AND ELIGIBILITY**

34. Section 13 sets out the awards that may be made.
35. Section 13(2) of the Act provides that, if:
  - (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 is not a business tenancy, or
  - (c) there is no protected rent debt consisting of unpaid protected rent.
36. The arbitrator must make an award dismissing the reference.
37. Section 13(3) provides that if after assessing the viability of the tenant's business the arbitrator determines that the business:
  - (a) is not viable, and
  - (b) would not be viable even if event the tenant was to be given relief from payment of any kind.
38. The arbitrator must make an award dismissing the reference.
39. Section 13(4) provides that if after making that assessment, the arbitrator determines that the business:
  - (a) is viable, or

- (b) would become viable if the tenant were to be given relief from payment of any kind.

40. Section 13(5) provides that in that case the arbitrator must consider whether the tenant should receive any relief from payment and if so what relief and make an award in accordance with section 14 of the Act.

## **RELIEF FROM PAYMENT**

41. Section 14 of the Act deals with the award on the matter of relief from payment as required by section 13(5).

42. I must decide if the Applicant should be given any relief from payment of the Protected Debt and in doing so the award which I am permitted to make under section 14(6) may comprise:

- i) Relief from payment by either writing off all or part of the debt including interest or giving the tenant time to pay the whole or part of the debt or a combination of these relief measures.
- ii) Alternatively, I may determine that the Applicant is given no relief from payment.

43. Where an award is given permitting the tenant time to pay the debt the payment must be within the period of 24 months beginning with the day after the day on which the award is made.

44. The award must be consistent with the principles set out in section 15 to:

- i) Preserve/ restore the viability of the tenant's business and not affect the solvency of the landlord; and
- ii) So far as it is consistent with the first principle, the tenant should be required to meet its obligations as regards the payment of the Protected Debt in full and without delay.

45. In assessing the 'viability' and 'solvency' of the tenant, Section 16 of the Act requires the arbitrator to have regard to:

- i) The assets and liabilities of the tenant and landlord,



- ii) The previous rental payments made under the business tenancy from the tenant to the landlord,
- iii) The impact of coronavirus on the business of the tenant,
- iv) Any other information relating to the financial position of the Tenant I consider appropriate,
- (d) The financial position of the landlord,
- (e) Disregard the possibility of the tenant or landlord borrowing money or restructuring its business.

## **ELIGIBILITY**

46. For this dispute to be eligible for the grant of relief, the preconditions set out in section 13(2) of the Act must be satisfied.
47. There is no dispute as to the existence of a protected rent debt, there is no dispute that the Applicants tenancy is a business tenancy and there has been no agreement on the matter of relief from payment of the protected rent debt.
48. Based on the evidence before me, I am satisfied that the conditions in section 13(2) of the Act are met namely:
- i) The Tenancy qualified as a business tenancy under the Act.
  - ii) There is a Protected Rent Debt which on the facts is £116,667 plus VAT (£140,000).
  - iii) There is no agreement.
49. I am therefore satisfied that the Applicant's are eligible under this reference.

## **VIABILITY**

50. The final pre-condition set out in section 13(3) is viability. It must be shown that the tenant's business is viable or would be viable if relief is given. If it is not, the reference must be dismissed.

51. Viability is not defined in the Act. However, it is provided in the Commercial Rent (Coronavirus) 2022 Act Guidance which suggests the key question in making the assessment of viability 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 continue trading'.
52. The fact the Applicants business is here and presently trading affirms the basis of this requirement to a certain degree although the Respondents wider comments in this respect are also noted.
53. The landlord claims the tenant is consistently late with its rental payments and is not viable. The Tenant advises that since May 2021 it has paid rent every month and is evidence that the business remains viable and solvent. The tenant also refers to the valuation report prepared by xxxx which determines that the market rent during the relevant period was nil, and the landlord would not have been in a better position had the tenant surrendered the lease. The tenant accepts that not all rent payments have been on time however states this has been due to cash flow issues and the cost-of-living crisis which has seen operating costs increase. However, the tenant does advise that if forced to pay the amount in full it is likely it would become insolvent.
54. In respect of the Applicants assets and liabilities xxxx set out in its submission dated 18 August 2023 the following details:
- Excel spreadsheet – 5-year historic Profit & Loss Performance Summary (Years ended November 2019 – 2022)
  - Management Accounts to June 2023
  - Excel spreadsheet – 5-year historic Balance Sheet Summary (Years ended November 2019 – 2022)
  - Excel spreadsheet – Forecasts for remaining 5 months of year to November 2023 and 2024
55. In respect of the P&L the EBITDA was positive for 2019, 2020 and 2021 and only turned negative in 2022 although remained negative in the first half of 2023 primarily due to hot weather conditions but since which time trading has started to improve.
56. The Balance Sheet summary shows that the Applicants third party debt has reduced from £295,000 in 2019 to £37,000 in 2023 and is expected to be cleared by 2024. In part this has been funded through investment from connected businesses although

understand that there are no immediate requirements for this to be repaid by the Applicant.

57. The forecasts for 2023 and 2024 are expected to show an EBITDA profit to offset the loss to date and the Applicant is expecting to return to 2019 profit levels in 2024 due to a reduction in operating costs and an uplift in sales in part from taking back operation of the xxxx and as a result of investment in new xxxx. As a consequence of the above the Applicant fully expects to be able to meet all its obligations (excluding the outstanding Covid rent arrears). The Applicant has also been paying all its rent since May 2021 although accepts that payments have not necessarily been made on time due to cash flow issues.
58. In contrast the Respondent's submission dated 15 August 2023 considers the Applicants business is not viable and was not viable either pre or post pandemic.
59. In support, the Respondent states the original tenant - xxxx trading as 'xxxx - collapsed with debts of £890,000 in November 2018. The lease was then assigned to the Applicant – xxxx on 15 November 2018. The new company was set up by some of the former Directors of the original tenant. Prior to the collapse of the original tenant the business was also in rent arrears and as part of the request for consent to assign the rent would be increased to cover the arrears owed which the Respondent accepted.
60. Following the assignment, the Respondent says the Applicant has struggled to pay its rent on time and the Respondent has submitted details of the Applicants payment history in support of this.
61. As regard the Applicants assets and Liabilities the Respondent states that according to the accounts (30 November 2021) these show a deficit of funds amounting to £43,906, a shortfall of net current assets of £63,193 and loans amounting to £178,178.
62. The Respondent also considers that the impact of Covid was beneficial to the Applicant. The suggested reason being the company received grants and financial support from the government whereby the previous year's losses (30 November 2021) reduced from £53,029 to £4,451, cash held increased from £22,098 to £48,292 and long-term liabilities reduced from £257,850 to £178,178.
63. The Respondent suggests that the tenant has used the available grants and funding to mask its trading difficulties, and which have kept it afloat. The Respondent also suggests that the tenant should have used these funds to pay its operating expenses first. The

Respondent therefore considers the Applicant has benefitted from several government measures assisting their business and has failed to pay its operating expenses first and has consistently been late in paying its rent both before, during and after the pandemic.

64. The Respondents reply concludes that the Applicants viability would not be jeopardised as it is not a viable business in the first place.
65. I have had regard to the evidence submitted by the parties. The Applicant considers it has demonstrated its viability which the Respondent rejects. I note that the previous tenant's business had failed in late 2018 but the landlord agreed to an assignment whereby the 'new' tenant had agreed to 'roll-up' the rent arrears thereby increasing the rent to £100,000 per annum.
66. In determining the tenant's viability, I must also disregard the possibility of the tenant borrowing money or restructuring its business.
67. I am satisfied that the tenant's business was affected by the coronavirus pandemic and its trading performance both prior, during and post the pandemic satisfies the criteria required under section 16 of the Act. I have also had regard to the possible effect this decision would have on the landlord's solvency and am also satisfied that the required criteria are met.
68. For these reasons, I am satisfied that the tenant's business is viable and have considered further the tenant's businesses viability in the context of the question of relief.

## **RELIEF FROM PAYMENT – Section 14 & 15**

69. In accordance with section 13(5)(a) I am now required to consider whether the Applicant should be given any relief from payment of the protected rent debt, and if so, what relief.
70. Section 14(6) provides that my award may give the tenant relief from payment of the debt or state that the tenant is to be given no relief from payment. As set out in section 6(2), relief from payment may be given by:
  - (a) Writing off the whole or any part of the debt,

- (b) Giving time to pay the whole or any part of the debt including allowing for payment by instalments; and/ or
  - (c) Reducing any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or part of the debt
71. As stated earlier, in granting a tenant more time to pay, the payment date must be within the period of 24 months beginning with the day after the day on which the award is made: section 14(7) of the Act.
72. There is no suggestion that if the award provides for the protected debt to be written off entirely, it will impact the Respondents solvency. Accordingly, my concern under the principles contained in section 15(1)(a) of the Act is to preserve the viability of the Applicants business.
73. The Terms of section 15(1)(b) set out that the tenant should be required to meet its obligations as regard payment so far as this is consistent with the First Principle. It is clear from the terms of section 15 that the tenant's obligation to make payment of the protected rent is qualified by the consideration of the tenant's viability. The Guidance requires the tenant's viability to be preserved (as well as the landlord's solvency if at risk) in determining how much the tenant can afford to pay and how quickly. Subject to this consideration the Applicant should be required to meet its obligations as regard payment of the protected rent in full and without delay.
74. In reaching my award I am also required under section 14(2) of the Act to consider the parties final proposals. If I consider both proposals are consistent with the principles in section 15 then I must make an award that is the most consistent with those principles: section 14(3)(a). If I consider one proposal is consistent with these principles and the other not, I must make the award set out in the proposal that is consistent: section 14(3)(b). If I conclude that neither is consistent with the section 15 principles, I must make whatever award is appropriate: section 14(5).

## **Formal Proposals**

75. The Applicant's claims the Protected Debt during the relevant period is £116,667 plus VAT (£140,000) and proposes that it will pay £50,000 and that the amount should be paid by the Applicant by way of 25 monthly £2,000 payments beginning within 60 days.
76. The Respondent proposal offers to write off the full amount of arrears (£116,667 plus interest and VAT) on condition that the Applicants forfeits the lease.
77. Both parties contend that their proposals are consistent with section 15 of the Act.

## **Relief**

78. On 21 March 2020 all non-essential retail businesses were forced to close and such closures were enforceable by law in England and Wales due to the threat to public health. A business operating in contravention of the Health Protection (Coronavirus, Business Closures) Regulations 2020 would therefore be committing an offence.
79. The Applicant runs a xxxx from the Property and was therefore forced to close its business as this was classified as non-essential retail.
80. The Protected Debt concerns the rent payable by the Applicant during the Protected Period in respect of the Property only.
81. The Applicant advises that it was unable to trade for most of the period during March 2020 and May 2021 due to the Covid restrictions and advises that the park closed on 20 March 2020.
82. According to the management accounts for the year ended Nov 2020 the March 2020 revenue decreased by 61% compared to the previous month and revenue for April 2020 to July 2020 was approximately 5 to 8% of the February income. The reason for the limited income was because of some membership income being received. However, income between Aug 2020 and Oct 2020 increased due to the advent of school holidays albeit was still subject to certain operating restrictions. Income between Oct 2020 and Nov 2020 was then affected by a further lock-down (between 23 October and 9 November 2020) which covered the half term school holiday period. Following the reopening on 10 November until 4 December 2020 revenue was down again due to certain restrictions remaining in place during this period. Between 5 Dec 2020 and 18

May 2021 income was ‘...modest...’ from membership income only as the xxxx remained closed during this period.

83. The Applicant received furlough monies for staff salaries and received the benefit of £43,000 debt write down by one lender. However, despite this the Applicant reported a net loss of £53,000 in the year to Nov 2020 and a further net loss of £42,000 in the year to Nov 2021. These losses are after accruing for the cost of the rent which was due.
84. Since reopening in mid-May 2021, the Applicant has paid all its rent (£10,000 per month) and cleared its property insurance arrears for the previous two years.
85. The Applicant also took out a £50,000 bounce back loan and entered into arrangements with its existing lenders to defer its debt repayments in respect of xxxx (19 payments of £5,698) and xxxx (writing off £42,000) and seeking to agree a payment plan for the balance.
86. The Applicant states that it has faced difficult trading conditions due to the general economic concerns and as a result has struggled to break-even each month. The Applicant has no spare cash or access to borrowings and its Directors/ Owners do not take a salary or dividends out of the company.
87. The Applicant therefore claims it will be extremely difficult to pay the rent owed during the lock-down period and if required to do so would be unable to meet its other obligations and would face insolvency.
88. The Applicant also states it is also investing additional funds into the business to refresh certain offerings and have tried to improve its marketing position and reduce costs to ensure the businesses survival.
89. The Applicant has submitted a Valuation Report prepared by xxxx of xxxx with its stated purpose being for this arbitration. The report sets out the various caveats and conditions and the basis of valuation as well as the valuation date being 6 June 2022. In the report it describes the location of the property as well as the construction, accommodation and floor areas amongst other matters including a summary of the economic conditions, the effect on the industrial/ logistics and leisure sectors and a timeline of the pandemic. The report concludes that the market rent is £70,000 per annum however at the time of the lock-down states the rental value would have in fact been nil.

90. It is apparent that the Applicant has struggled financially because of the pandemic and during the time it was forced to close under the government-imposed restrictions. This has had a significant impact on the Applicants business and despite the return to 'normal' trading conditions the business is still recovering.
91. The Applicant also advises that further investment will be made into the business which will increase working capital which will address the more recently accrued arrears as well as provide further investment for new activity equipment.
92. However, the Applicants also advise that their business has been hit by the subsequent cost of living crisis resulting from increasing energy costs and rising inflation which has particularly affected the hospitality sector. Therefore, the Applicant is seeking time to repay the Protected Rent Debt to enable its recovery to take hold.
93. I have considered the fact that prior to the Pandemic the Applicant's overall business was growing with increasing year end profits and a push to manage costs and develop the various business formats further.
94. The Respondent has concerns as to the reliability and accuracy of the figures provided and the possibility of manipulation of various charges and salaries to reduce the profitability and therefore suggests it would be unwise and wrong to place too much reliance on the figures supplied. The Respondent refers to the Applicants accounts and lack of information provided. This may be the case, but I must consider the impact of lock-down on the Applicants business as well as the effect on the Respondents during this period in granting any rent relief.
95. I have had careful regard to the submissions of the parties, and I am satisfied given both parties' circumstances that in granting relief it will preserve the viability of the Applicants business and will not affect the solvency of the Respondent.
96. I find that in granting relief I have had regard to section 16 of the Act and considered both party's circumstances and consider it just and equitable to Award that the Applicant shall be granted relief having regard to the principles set out in section 15 of the Act.



97. It is apparent that the Applicant's business has suffered because of the pandemic which has affected its financial resources and the award it proposes is necessary and appropriate to preserve the viability of its business.
98. There is also no suggestion that the Respondents solvency is at risk, and by s.15(3) solvency is effectively presumed unless there is evidence that the landlord is, or is likely to become, unable to pay its debts as they fall due which is not the case here.
99. So far as the financial and other evidence before me is concerned I am satisfied that the Applicants business can meet its rental liabilities and other obligations and is seeking to improve and develop the business through investment into new equipment and through a possible new investor. It is hoped that this will enable the business to move to profit and alleviate the financial difficulties it has suffered to date.
100. I am satisfied that the Applicant has made all efforts to ensure no further accrual of rent has occurred and will be able to meet a payment plan. I am satisfied the Applicant has a viable business that was materially affected by the pandemic and is now facing various challenges arising from the aftereffects as well as the current economic pressures resulting from rising prices, changes in consumer behaviour and cost of energy increases.
101. The Applicant has continued to operate as a going concern despite these difficulties and proved it can bear some financial losses albeit in the short to medium term. It is unclear whether the Applicant can pay the full amount or the amount it proposes but I assume it is able to make a substantial payment given the offer made.
102. In considering the Applicants viability I must have regard to s.16 of the Act and in particular s.16(1)(b) and the fact that the Applicant paid rent to the Respondent as soon as the businesses were able to trade from the Property.
103. I consider the Applicants business is viable and its viability would not be undermined if it is required to pay the debt in full, at least if, a payment plan is implemented. There is no reason to suspect the Applicants business should not return to full profitability in the near term despite the economic difficulties and given the business has continued as a going concern and the Applicants confidence in the future of its businesses.

104. I therefore find that the Applicants request for relief from part payment of the Protected Rent Debt - £116,667 plus VAT – and a payment plan over 25 months be refused because:

- (i) It is not consistent with principles set out in s.15 of the Act,
- (ii) Payment of the protected rent debt in full (over time) would not jeopardise the viability of the Applicant's business,
- (iii) Relief from payment of the sum of £116,667 plus VAT is not necessary to preserve such viability,
- (iv) A period of 25 months is contrary to section 14(7) of the Act,
- (v) In the circumstances the grant of such relief would conflict with the principle in s.15(1)(b) that the Applicant should meet its obligations as regard the payment of protected rent in full, where (as here) that is not inconsistent with the preservation of its viability.

105. I find the Respondents proposal to waive the debt in full in return for the Applicant surrendering its lease also refused. I found the business viable and to make an award on this basis would not be consistent with the principles set out under section 15 of the Act.

106. Under section 14(7) any payment plan may not be any longer than 24 months and so the request for a period of 25 months is refused. However, having regard to the Applicants request for a payment plan I find it would be just and equitable for the Applicant to settle the whole protected rent due over a 24-month period.

107. I therefore find that the Applicant shall pay the Respondent the full amount of the protected rent debt over a period of 24 months in equal instalments.

## **ARBITRATION FEES**

108. Section 19(5) provides that when an Award is made the arbitrator must also make an award requiring the other party to reimburse the applicant for half of the arbitration fees paid unless the arbitrator considers it more appropriate in the circumstances to award a different proportion.

109. The arbitration fees are set out in section 19(1) which are the arbitrators fees and expenses in addition to the expenses in respect of the application fee made to the arbitration body concerned.

110. In accordance with section 19(7) each party must pay its own legal or other costs and as provided by section 19(8) are not recoverable by any term of the tenancy concerned.
111. As regard costs neither party has addressed the issue of costs in their claim and as such, I shall decide this having regard to the circumstances and the principles set out under the Arbitration Act 1996.
112. As to the arbitration fees under section 19(1), I find no reason or circumstances to not follow the general rule as provided under section 19(5) of the Act that the Respondent shall reimburse the Applicant for half of the arbitration fees – section 19(1)(a) and (b) paid under section 19(4).
113. In its submissions the Applicant proposed it should not be required to pay to the Respondent all the protected rent debt and this should be limited to £50,000 paid in 25 equal instalments. The Respondent proposed that it was prepared to write the debt off in return for the lease being surrendered.
114. In the circumstances, given that my award found the Applicants claim eligible and its business viable and found that neither party's formal proposal is consistent with the section 15 principles and found that the Applicant shall pay all the protected rent debt albeit over a period of 24 months in equal instalments I consider it would be appropriate to make an award that reflects the default position, that each party should bear half of the arbitration fees and expenses.

## **AWARD**

75. I, Nicholas James Paul Wint, having carefully considered the submissions of the parties and the evidence provided make my Award under the provisions of the Act s.14 which gives relief to the Applicant from payment of the protected rent debt in the following manner and on the following terms:

### **Protected Rent Debt**

- i) The Applicant shall pay the Respondent the full amount of £116,667 plus VAT.

- ii) The Applicant shall be given time to pay the above debt which shall be paid to the Respondent by 24 instalments as follows:
  - £4,861 plus VAT shall be paid on the first day of each month from 1 Dec 2023 to 1 October 2025 (23 instalments)
  - £4,864 plus VAT shall be paid on 1 November 2025 (1 instalments)

**Costs**

- i) The Applicant and Respondent shall each bear half of my arbitration fees and expenses.
- ii) The Applicant and Respondent shall each bear half of the arbitration application fee.
- iii) Accordingly, the Respondent shall reimburse the Applicant for one half of those fees.
- iv) This sum is to be paid by within 28 days of this Award.

76. The Seat of the Arbitration is England & Wales.

77. This award will be published by the RICS in an anonymised form.



**Signed:**

**NICHOLAS WINT FRICS - ARBITRATOR**

**Dated:** 31 October 2023