

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

**AND IN THE MATTER OF AN ARBITRATION CONDUCTED UNDER THE CHARTERED INSTITUTE OF
ARBITRATORS COMMERCIAL RENT DEBT ARBITRATION SCHEME**

BETWEEN:

[REDACTED]

Applicant

v

[REDACTED]
[REDACTED]

Respondents

FINAL AWARD

INTRODUCTION

1. I, Sean Sullivan Gibbs, the Arbitrator, was approached by the Chartered Institute of Arbitrators ('CIARB') to act as Arbitrator on the 10 March 2023.
2. I confirmed my availability on the 11 March 2023 to the CIARB.
3. I was appointed as Arbitrator by the President of the CIARB on the 14 March 2023.

4. The dispute referred to me concerns rents in respect of a cinema located at [REDACTED]
[REDACTED] London [REDACTED].
5. The Applicant seeks relief from payment of rent and service charge , in its letter of the 13 September 2022 that accompanied its application for the appointment of an Arbitrator it put forward its proposal to the Respondents :

Pursuant to section 11(1) of the Commercial Rent (Coronavirus) Act 2022, herewith our formal proposal for resolving the matter:

You waive 243 days rent (being one half of the protected period rent) and one half of your insurance demand for the year 24th June 2020 to 23rd June 2021. We pay the remaining rent and insurance costs due in respect of the protected period by way of 24 equal monthly instalments beginning one month after your acceptance.

This proposal is made on the basis that no further sums will be due in respect of the protected period, no interest is charged on the late payment and the parties pay their own legal and professional fees arising, if any.

The Commercial Rent (Coronavirus) Act 2022 will referred to as the ('CRCA').

THE PARTIES

6. The Applicant is [REDACTED]
[REDACTED].

7. The [REDACTED]
[REDACTED].

8. The Applicant was represented by Mr [REDACTED].

9. The Respondents were represented by Mr [REDACTED] of
[REDACTED] at different times during the arbitration.

BACKGROUND

10. The Applicant is a cinema operator and the Respondents its landlord. The parties agreed that the Applicant would rent the Respondents' premises by way of a lease.

11. Due to the Coronavirus pandemic the Applicant had to close its business and could not admit customers.

12. The Applicant applied to the CIARB on or around the 13 September 2022 for the appointment of an Arbitrator under the CIARB Commercial Rent Debt Arbitration Scheme on the standard application form.

13. The application form submitted to the CIARB stated that the amount of the rent in dispute was £16,484.14 (incl vat).

14. The application form was accompanied by two letters. The letter dated the 2 August 2022 confirms that it was a notice under section 10(1)(a) of the CRCA. The letter dated the 13th September 2022 set out the Applicant's proposal Pursuant to section 11(1) of the CRCA.
15. The proposal itself is set out above.
16. There was accompanying the letter dated the 13th September 2022 three pages of spreadsheets which comprised a calculation of the protected rent debt, together with a summary of [REDACTED] statutory accounts 2015 to 2021 and a summary of [REDACTED] management accounts 2017 to 2021.
17. I have been forwarded an email by the CIARB Dispute Appointment Service sent from [REDACTED] of [REDACTED] the email itself is dated the 10 March 2023 and is an email chain and has other emails dated the 6 January 2023 and 10 October 2022 within it. The email had six PDF attachments attached to it:
- i. Letter from [REDACTED] dated 7 September 2022
 - ii. Announcement from London Stock Exchange of Chapter 11 cases
 - iii. United States Bankruptcy Court Southern District of Texas notice of filing deadlines
 - iv. Letter from [REDACTED] dated 16 September 2022
 - v. United States Bankruptcy Court Southern District of Texas order 8 September 2022
 - vi. United States Bankruptcy Court Southern District of Texas order 8 September 2022

18. On the 21 March 2023 [REDACTED] a Property Director at [REDACTED] emailed me copies of:
 - a. CIARB application form and attachments (10 pages)
 - b. Section 10 notice (1 page)
 - c. Section 11 Proposal (4 pages)

19. On the 22 March 2023 [REDACTED] of [REDACTED] emailed me forwarding an email marked 'Without Prejudice'. As this is covered by privilege I have not considered its contents in making my deliberations.

20. Mr [REDACTED] of [REDACTED] asked me in his email of the 27 March 2023 to admit without Prejudice correspondence in my deliberations. I confirmed by email on the 27 March 2023 that I would only consider Without Prejudice communications where both parties had waived privilege in respect of the document.

21. On the 4 April 2023 [REDACTED] emailed me a Reply to the Respondent's submissions and documents forwarded on the 27 March 2023. This being a two page document.

22. On the 16 April 2023 Mr [REDACTED] emailed me asking if I would allow the arbitration to proceed after reading the documents and information about the solvency of the applicant.

23. On the 16 April 2023 I asked both parties if they required an oral hearing which they responded to saying they did not require an oral hearing.

24. On the 17 April 2023 I confirmed to the parties that they did not want an oral hearing and that I would consider all of the submissions, representations and documents submitted to me and issue my award.

THE LEGAL FRAMEWORK

25. The Arbitration Act 1996 ('AA') applies to this arbitration as modified by s.22 and Schedule 1 of the Commercial Rent (Coronavirus) Act 2022 ('CRCA').
26. Arbitration under the CRCA is a statutory arbitration for the purposes of AA: s.94 AA.
27. The CRCA is treated as the arbitration agreement, and the Applicant and Respondent are treated as parties to that agreement: s.95 AA.
28. Section 30(1) AA permits me to rule on my own substantive jurisdiction, including as to whether the CRCA applies to the dispute and as to what matters have been submitted to arbitration in accordance with the arbitration agreement (here, in accordance with the CRCA).
29. Section 34 AA provides that it shall be for the arbitrator to decide all procedural and evidential matters subject to the right of the parties to agree any matter.
30. Section 9 CRCA (so far as relevant) provides as follows:
 - (1) This section applies where the tenant and the landlord under a business tenancy are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt.*
 - (2) A reference to arbitration may be made by either the tenant or the landlord within the period of six months beginning with the day on which this Act is passed.*

31. Accordingly, no reference to arbitration may be made on or after 24 September 2022.

32. Section 11 CRCA provides as follows:

(1) A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt.

(2) The other party to the arbitration may put forward a formal proposal in response within the period of 14 days beginning with the day on which the proposal under subsection (1) is received.

(3) A formal proposal under subsection (1) or (2) must be accompanied by supporting evidence.

(4) Each party may put forward a revised formal proposal within the period of 28 days beginning with the day on which the party gives a formal proposal to the other party under subsection (1) or (2).

(5) A revised formal proposal must be accompanied by any further supporting evidence.

(6) The periods in subsections (2) and (4) may be extended—

(a) by agreement between the parties, or

(b) by the arbitrator where the arbitrator considers that it would be reasonable in all the circumstances.

(7) In this section "formal proposal" means a proposal which is—

(a) made on the assumption that the reference is not dismissed for a reason set out in section 13(2) or (3),

(b) expressed to be made for the purposes of this section, and

(c) given to the other party and the arbitrator.

33. Section 19 CRCA provides as follows:

(4) The applicant must pay arbitration fees (other than oral hearing fees) in advance of the arbitration taking place.

(5) When the arbitrator makes an award under section 13 or 14, the arbitrator must (subject to subsection (6)) also make an award requiring the other party to reimburse the applicant for half the arbitration fees paid under subsection (4).

(6) The general rule in subsection (5) does not apply if the arbitrator considers it more appropriate in the circumstances of the case to award a different proportion (which may be zero).

(7) Except as provided by subsection (5) and section 20(6), the parties must meet their own legal or other costs

JURISDICTIONAL CHALLENGES RELATING TO CHAPTER 11 AND INSOLVENCY PROVISIONS

34. The Respondent has raised jurisdictional challenges which I now deal with.

35. The Respondent has submitted that the claim should be dismissed as the Applicant and / or its parent and group of companies is in Chapter 11 insolvency proceedings in the United States and has produced various documentary evidence of this. Neither party has adduced legal opinion on the implications of this for the matters falling to be determined in this arbitration.

36. The CRCA provides that a reference may not be made to Arbitration under the CRCA where the tenant is subject to any of the following which relates to protected rent debt:

A company voluntary arrangement that has been approved under section 4 of the Insolvency Act 1986 ('CVA');

An individual voluntary arrangement that has been approved under section 258 of the Insolvency Act 1986 ('IVA'); or

A scheme of arrangement or restructuring plan that has been sanctioned under section 899 or 901F of the Companies Act 2006 ('compromise or arrangement').

37. It is clear that the Respondent is a limited company and as such the IVA does not apply.

38. I have no evidence before me that a CVA has been approved under section 4 of the Insolvency Act 1986 so do not find that this applies.

39. Turning to the matter of a compromise or arrangement sanctioned under section 899 or 901F of the Companies Act 2006, both sections deals with a Court sanction for a compromise or arrangement, this being the Court of England and Wales and not a court within the United States as such I find it can not apply.

40. Having considered the submissions and evidence I find that the tenant is not subject to one of the three matters identified above and as such I must proceed to determine the dispute as I have jurisdiction to do so.

41. The Respondent has raised further arguments relying on the London Trocadero (2015) LLP (Landlord) v Picturehouse Cinemas Limited (Tenant), Gallery Cinemas Limited (Guarantor) and Cineworld Cinemas Limited (Guarantor) case as evidence of the conduct of the Applicant's parent company to support its argument I should strikeout the Application by the Applicant for an arbitration utilising the Act.

42. I do not agree that I can strike out the Application as there is no legal basis for me to do this.

CONFIDENTIALITY

43. The Respondent submitted on the 27 March 2023 that:

This Report has been prepared for the purposes of assisting the appointed Arbitrator, Sean Gibbs Esq to determine the rent payable by the Tenant/Applicant under the terms of the Commercial Rent (Coronavirus) Act 2022, (the Act) in respect of their premises at [REDACTED]

The contents of this submission and subsequent determination unless the Respondent agrees otherwise, are to be confidential and are not to be divulged to third parties, nor reproduced in whole or part without the express permission of the author.

44. The CRCA requires the award, which must be in writing and signed by the arbitrator, to be published together with the reasons for making it. The parties are not free to agree on the form of an award or to waive the statutory requirement to publish an award. The published award must, however, exclude confidential information, unless the person to whom that information relates consents to its publication.

45. Confidential information means:

Commercial information relating to a party or any other person which, if disclosed, would or might significantly harm the legitimate business interests of that person; or
Information concerning an individual's private affairs whose disclosure would or might significantly harm that individual's interests.

46. I acknowledge the Respondent's submission and will be redacting the award for publication as required under the CRCA.

BUSINESS TENANCY

47. A business tenancy is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (the '1954 Act') applies. That is, a tenancy comprised of property which is or includes premises that are occupied by the tenant for business purposes, or business and other purposes (section 23 of the 1954 Act).

48. The Respondent supplied me with copies of the lease made in 1937 and also a deed of variation to the lease dated 2015.

49. The Respondent has submitted that the Premises comprise a small ground floor kiosk of c500sq ft plus a basement. These Premises are within a mixed-use building fronting and forming the north west part of [REDACTED], London. [REDACTED] is globally recognised as London's centre for tourism and leisure activities. The rest of [REDACTED] [REDACTED] comprises 4 retail (E class use) units, and the upper floors provide a 95-bedroom hotel that trades as [REDACTED] Hotel [REDACTED].

50. Both parties agree that the premises were used for a business, that is a cinema.

51. I find that the lease for the cinema premises is a business tenancy.

PROTECTED RENT DEBT

52. The rent that can be protected comprises of an amount payable in consideration for possession and use of the premises to which the tenancy relates, an amount payable as a service charge, interest due on any of the preceding unpaid amounts and also VAT chargeable on any of the preceding amounts.

53. Unpaid rent due under a business tenancy will only be a 'protected rent debt' for the purposes of the Act if the business tenancy under which it became payable was 'adversely affected by coronavirus' and the subject rent is attributable to occupation of the premises during a 'protected period'.

54. I find that the relief for rent sought comprises of an amount payable in consideration for possession and use of the premises to which the tenancy relates, an amount payable as a service charge (for insurance), and also VAT chargeable on the preceding amounts.

55. I find that the use and occupation was 'adversely affected by coronavirus' and the subject rent is attributable to occupation of the premises during a 'protected period'.

56. The parties have made submissions to me on the amount of the protected rent debt. The Applicant has said that it is £16,484.14 inclusive of VAT in its application for the arbitration. The Respondent has said it is £16,413.98 in its submission of the 27 March 2023. There is a difference of £70.16.

57. The Applicant confirmed in its submission to me on the 4 April 2023 that it accepted the Respondent's protected rent debt figure of £16,413.98.

58. The protected rent debt is £16,413.98 inclusive of VAT.

OTHER ARBITRATION AWARDS

59. The Respondent has provided me with a table of nine arbitration awards made under the CRCA. I have not been provided with copies of the cases.

60. I am aware that there are significantly more awards that have been rendered under the government created schemes than have been provided to me.

61. The Applicant has made submissions that I should make my award based on the Act and no comparable should be considered which I presume are the awards relied upon by the Respondent.

62. The awards are not binding on me and as each turns on its own particular facts have been of little use to me in reaching a decision in this matter. I have read each award and have decided not to follow them as they are not binding on me.

APPLICANT'S PROPOSAL

63. The Applicant proposed to the Respondent that:

You waive 243 days rent (being one half of the protected period rent) and one half of your insurance demand for the year 24th June 2020 to 23rd June 2021. We pay the remaining rent and insurance costs due in respect of the protected period by way of 24 equal monthly instalments beginning one month after your acceptance.

This proposal is made on the basis that no further sums will be due in respect of the protected period, no interest is charged on the late payment and the parties pay their own legal and professional fees arising, if any.

64. The Respondent submitted on the 27 March 2023 that:

The Applicant in their letter dated 13th September 2022 has proposed that the Respondent waive 50% of the rent for the Protected Period plus half of the insurance demand for the year ending 23rd June 2021.

This Offer is not compliant with the terms of the Act, as the Act does not cover terms which include money due and payable outside the Protected Rent Period.

RESPONDENTS TWO PROPOSALS

65. The Respondent made two proposals in its submission of the 27 March 2023 which had been communicated to the Applicant previously on the 28 September 2022:

Offer 1 - That the Tenant to pay the full amount of £16,413.98 in 2 equal instalments, the first instalment in 5 working days of accepting this offer, the second, 90 days after the first and with no interest charged.

Offer 2 - For the Protected and current unprotected Rent Arrears to December 2022 Quarter day, the Landlord is willing to take a surrender of the lease to the Premises with vacant possession.

The Respondent considers Offer 1 to be compliant with the Act, whereas Offer 2 may not be but remains available to the Applicant and Arbitrator.

66. I do not have the power to order surrender of the lease and as such the second proposal is not compliant with the CRCA as I only have power to make an award giving relief from payment.

VIABILITY OF THE TENANT'S BUSINESS

67. Under the CRCA Section 13 (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.

68. The Commercial Rent (Coronavirus) Act 2022 Guidance provides that:

6.8. In assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to the following:-

6.8.1. the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party;

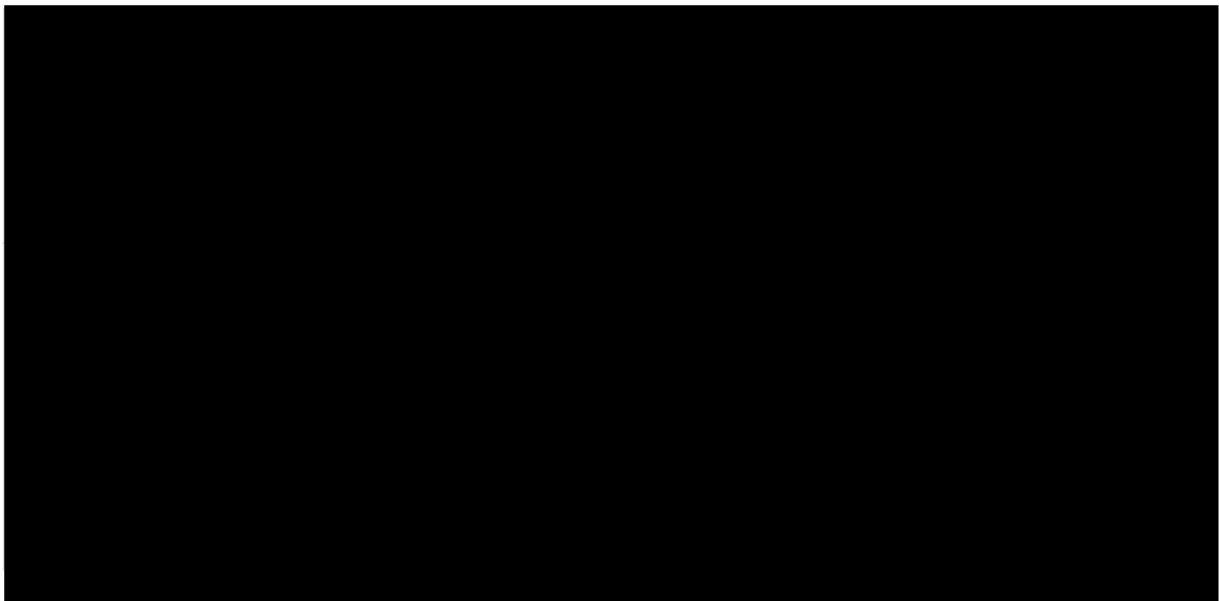
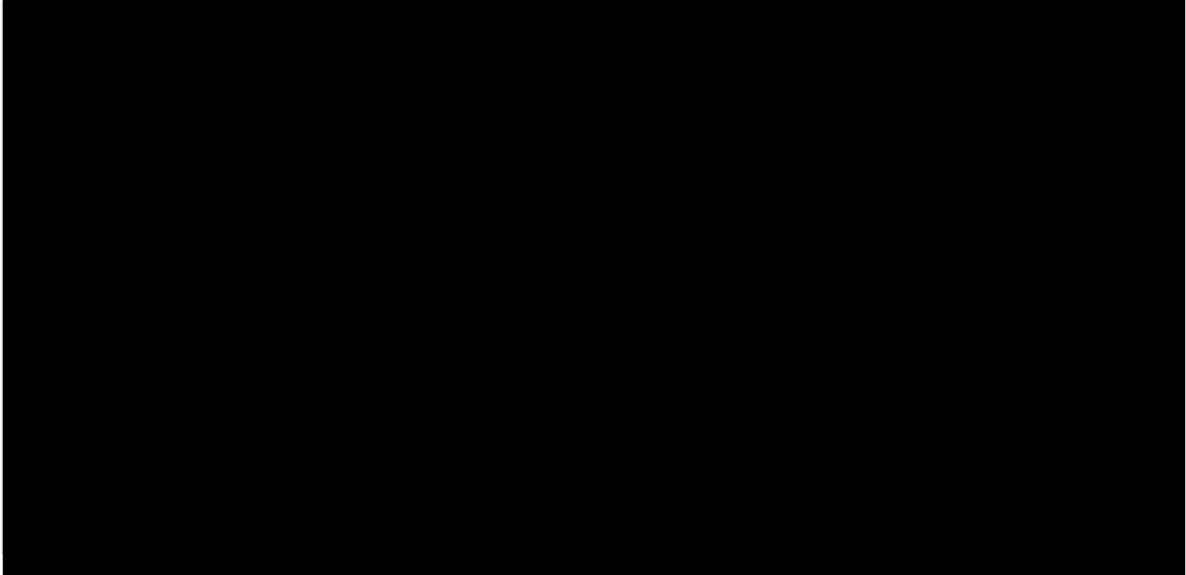
6.8.2. the previous rental payments made under the business tenancy from the tenant to the landlord;

6.8.3. the impact of coronavirus on the business of the tenant; and

6.8.4. any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

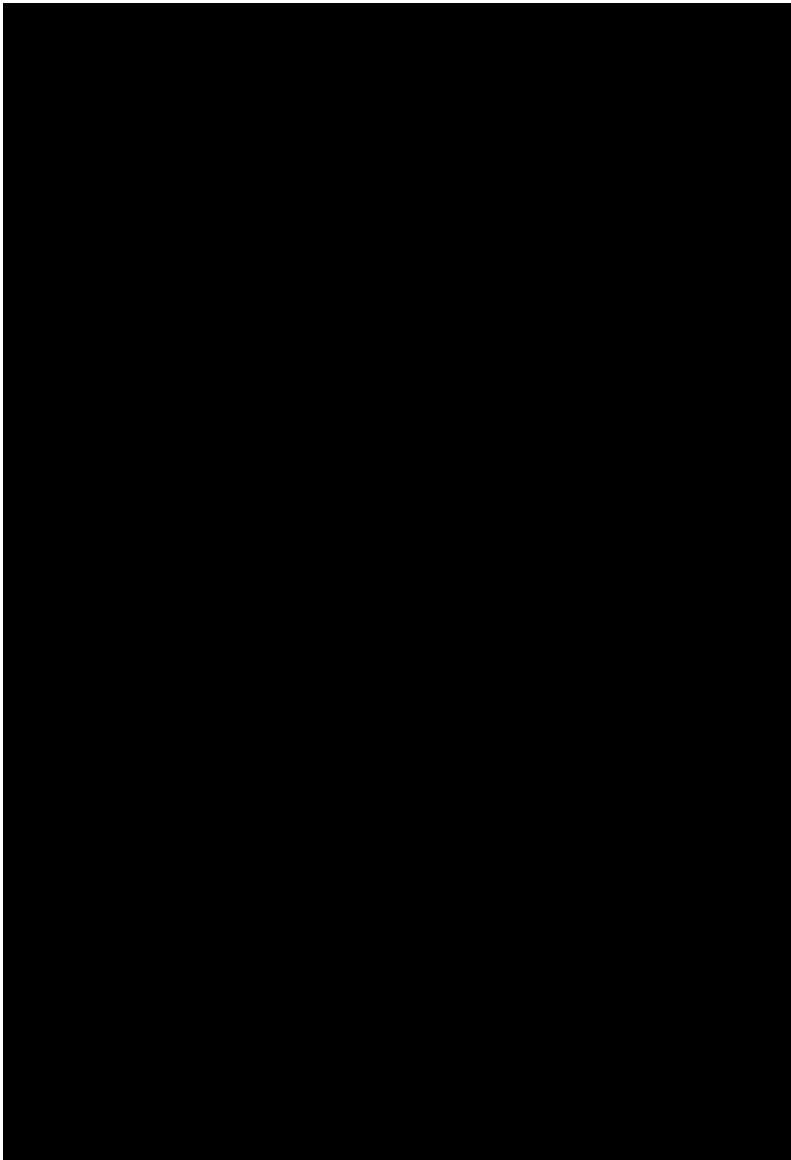
6.9. In making this assessment, the arbitrator must disregard the possibility of the tenant borrowing money or restructuring their business. If a business took on more debt to become viable for the purposes of arbitration under the Act, they would likely be delaying the problem and risking their long-term viability.

69. The parties have not supplied me with audited accounts, the Applicant has provided figures taken from what I presume are Excel spreadsheets.



70. The accounts show a business making losses with no net assets. Prior to 2020 the business was profitable with assets. I have not been supplied with information as to any other tenancies to which the tenant is a party.

71. The previous rental payments made under the business tenancy from the tenant to the landlord and later payments have been provided to me:



72. The impact of coronavirus on the business of the Applicant is that its sales fell and it became unprofitable, This arose firstly as the customers could not be admitted and the premises closed and since then the number of attendees has not increased to the same levels of attendance before Coronavirus.
73. I have been supplied with detailed information that the parent group is being restructured in the United States but it is clear that the arbitrator must disregard the possibility of the tenant borrowing money or restructuring their business in determining viability.
74. I did consider the Applicant's replies, *'Audiences are returning but numbers are well short of pre-covid levels. Changed customer habits, new streaming platforms and reduced exhibition windows are here to stay. Provided customers return to this cinema, the business ought to recover in the very long run. However, its recovery will be held back if full payment of the protected debt is awarded.'* I do not agree that the statements made support the assessment of the viability of the business.
75. The burden to prove viability lay with the Applicant, having looked at the accounts information provided I do not consider that the business is viable. The Applicant could have supplied me with a wide variety of banking and accounting information as well as future projections to help prove its viability but has not done so.
76. Even if I was to grant the relief sought for the protected rent debt the business would not be viable. The protected rent debt is tiny in comparison to the huge losses the Applicant is making and is likely to continue making in the future.

77. Having assessed the viability of the tenant's business, I have determined that the business is not viable, and would not be viable even if the tenant were to be given relief from payment of any kind, and must make an award dismissing the reference as required under section 13.3 of the CRCA.

ARBITRATION FEES

78. The Applicant has paid arbitration fees in advance of the arbitration taking place.

79. The Applicant has been unsuccessful in its application for relief as such I consider it more appropriate in the circumstances of the case to award nothing in respect of these, the Applicant should bear these.

DISPOSITION

80. I hereby award and order that:

a) The application for relief under the Commercial Rent (Coronavirus) Act 2022 by the Applicant is dismissed. The Applicant is to be given no relief from payment.

b) Each Party shall bear their own costs.

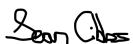
SEAT OF THE ARBITRATION

81. The seat of this arbitration is in England and Wales: s.95(2) AA.

DATE OF THE AWARD

82. This Award is made by me, Sean Sullivan Gibbs, on 23 April 2023 at Eagle Tower, Montpellier Drive, Cheltenham, GL50 1TA, England.

SIGNATURE



Sean Sullivan Gibbs

ARBITRATOR