CIArb Cases: DAS 01407 ArbDB 2633 and DAS 01411 ArbDB 2634

IN THE MATTER OF THE ARBITRATION ACT 1996 ("The 1996 Act")

AS AMENDED BY, AND IN THE MATTER OF.

THE COMMERCIAL RENT (CORONOVIRUS) ACT 2022 ("The 2022 Act")

AND IN THE MATTER OF AN ARBITRATION BETWEEN

[redacted] **FIRST CLAIMANT**

AND

[redacted] **SECOND CLAIMANT**

AND

[redacted] **FIRST RESPONDENT**

and

[redacted] **SECOND RESPONDENT**

[redacted] **THIRD RESPONDENT**

[redacted] **FOURTH RESPONDENT**

And in the matter of property at [redacted]

FIRST AND FINAL AWARD ON THE RELIEF OF RENT TO BE GRANTED IN RESPECT OF THE PROTECTED RENT DUE UNDER THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

Of

PAUL ROSE LLM FRICS FCIArb ARBITRATOR **7 June 2024**

BACKGROUND

1. This award is on the amount of relief of rent to be granted that has arisen in an arbitration between the parties under The Commercial Rent (Coronavirus) Act 2022 ("the 2022 Act"). The subject property is a restaurant. The Claimants for this final award, as explained below, are [redacted] (First Claimant) and [redacted] (Second Claimant) who are the tenants of the premises in the heading above and which are operated as Restaurants. The Respondents are [redacted] (First Respondent), [redacted] (Second Respondent) who act as [redacted] (Third Respondent) and which acts as [redacted] (Fourth Respondent. The Respondents are the Landlords of each of the two Restaurants. Both of the Claimants, and the properties that they occupy, are part of a group of Restaurants.

2. The parties have been unable to agree on the appropriate relief concerning rental arrears arising under the Commercial Rent (Coronavirus) Act 2022; which shall hereinafter be referred to as the CRCA.

3. All references to sections herein shall refer to the CRCA unless the specific statute is noted.

4. In this reference the Claimant, is represented by [redacted] The Respondent is represented by [redacted].

5. Because there are two different first offers from each Claimant, albeit that their final offers are similar, I shall refer to the First Claimant as [redacted] or the first Claimant. I shall also refer to the Second Claimant as [redacted] or the second Claimant. For simplicity I shall refer to all four Respondents as the Respondents.

6. On 23 August 2022, through its representative, [redacted] and prior to my appointment, the Claimant gave the Respondents notices of their intention to apply for

arbitration under the Commercial Rent (Coronavirus) Act 2022 to the Respondent. These notices were in respect of properties 1 and 2 in the heading.

7. On 22 September 2022, the Claimant applied to the Dispute Appointments Service of the Chartered Institute of Arbitrators ("DAS") for the appointment of an arbitrator.

8. I was approached by DAS on 10 February 2023 to act as Arbitrator. After checking for conflicts, I advised DAS that I would be able to accept the appointment on 11 February 2023.

9. On 13 February 2023, I was appointed to act as Arbitrator by the Chartered Institute of Arbitrators, through their DAS.

STATUTE SEAT AND APPLICABLE LAW

10. This Arbitration is a statutory arbitration pursuant to Section 94 of the Arbitration Act 1996 as amended by the Commercial Rent (Coronavirus) Act 2022.

11. The seat of the Arbitration is England and Wales.

12. The applicable law is that of England and Wales.

CONDUCT

13. I contacted the parties on 24 February 2023 and following engagement in correspondence, the parties agreed to engaging in a case management conference. At this time there was a third Claimant called [redacted] who would be represented in the case management conference. Because there were three Claimants, I checked with the case officer of DAS who confirmed that there were three separate references. Accordingly, they remained as three separate cases. As three separate references, it was appropriate for me to seek the parties' power to consolidate all three cases under section 35 (1) of the Arbitration Act 1996. I duly obtained that power from both [redacted] and [redacted].

14. I arranged a case management conference ("CMC") for 10 March 2023 in which I consolidated proceedings. On the same day, I issued my Order number 1 on Consolidation of Proceedings.

15. On 27 March 2023 I convened a second CMC to discuss and incorporate procedures to be adopted in the reference. The parties agreed to adopt a procedure of documents only as more suited to the protected rent in dispute; and on 6 April 2023 I issued my Order for Directions No 2 – Preliminary Directions on Proceedings.

16. A number of important matters emerged from that second CMC worth noting here:

16.1 At item 6.0 I noted that the Respondent agreed that the parties agreed that the claims, now consolidated, were eligible. Therefore, I had jurisdiction to deal with them.

16.2 At item 6.1 I noted that the parties' proposals and counter proposals, being their first and second offers, had been served upon each other on or by 11 January 2023 and before I was appointed.

16.3 At item 6.2 and following close of the protocol within section 11 of the CRCA, I noted that, on January 25, 2023, the Claimant made a further submission in respect of both of the properties, with supporting documents, to which the Respondent objected. After consideration and in the interests of fairness, I permitted these further submissions and declared them to be admissible. I also gave the Respondent Liberty to Reply to the submissions of the 25th January 2023.

16.4 I also noted that in respect of the third property, to which the references DAS 01408 and ArbDB 2639 had been attributed, that this case had settled. That left only the properties cited above to be the subject of this, now consolidated arbitration.

ELIGIBILITY AND JURISDICTION ON PROTECTED RENTS

17. There is no issue that both of the claims are eligible.

18. In the Respondents' first proposal, they state that there is non protected rent debt applicable to each claim. For the [redacted], the non protected rent debt is £36,786.67. In the case of [redacted], the non protected rent debt is £10,803.29.

19. My jurisdiction under the CRCA extends only to the protected rent as defined in the statute in section 3. This is set out below.

20. My jurisdiction does not extend to cover any rent debt that falls outside these parameters; in other words, rent debt that is not statutorily defined as protected rent. My jurisdiction only concerns the protected rent debts.

THE PROTECTED RENT

(i) For definition of protected rent in the CRCA Section 3(i) is "protected rent is a debt under a business tenancy consisting of unpaid protected rent."

(ii) Rent paid during the protected rent period cannot be protected rent as it is not unpaid and is not a debt.

(iii) The parties agree what the rent should have been payable during the protected rent period of 21st March 2020 to and including 18th July 2021 (Section 4 of CRCA).

(iv) In the case of [redacted], the protected rent including insurance and service charge and VAT is £299,151.72.

(v) In the case of [redacted], the protected rent including insurance and service charge is £198,084.95

(vi) Under the terms of the CRCA, the amount on which I may give relief i.e., the protected rent, before considering any payments made, for both properties, is £497,236.67**.**

(vii) The Claimants have not paid any rent of either debt to be credited to their rent debt accounts.

MATTERS IN DISPUTE

21. Following the parties first and second offers, the principal issue is the amount of rent relief to be granted.

22. Costs. This is the second issue.

THE APPROPRIATE RELIEF FROM PAYMENT

THE OFFERS

The First and Second Claimants First Proposal and Statement of Claim

23. The First and Second Claimants have each made the same first proposal. That is that they pay £24,000 inclusive of VAT of each protected rent debt by instalments of £1,000 per month for 24 months.

24. In the case of [redacted], the First Claimant's proposal requires the Respondent to write off 91.98% of the protected rent debt which equates to £275,151.72.

25. In the case of [redacted], the Second Claimant's proposal requires the Respondent to write off 87.88% of the protected rent debt which equates to £174.084.95.

26. In each case, the First and Second Claimants base their argument on what they consider to be affordable in order that, from their perspective, their respective businesses may continue to operate with sufficient cash reserves to pay overheads during periods of reduced activity.

27. The First and Second Claimants have provided various financial statements and documents in support of their claims.

28. In the case of [redacted], the First Claimant has provided

a. Their Financial Statement for the year ended 31 October 2019
b. Their Financial Statement for the year ended 31 October 2018 although this is listed as their Financial Statement for the previous year end of 31 October 2017
c. Their Financial Statement for the year ended 31 October 2021 showing losses in 2020 and 2021 due to closure of the Restaurant.
d. Cashflows for 2019, 2020,2021 and 2022 with forecasts to December 2023
e. A Financial Statement for the Respondent for the year ended 31 March 2021
f. Admissions of:
    i. No court judgments

ii. No creditor recovery action
iii. No overdraft
iv. All trade creditors paid as debts fall due
v. Payment plan for outstanding PAYE
vi. VAT payments up to date.
vii. No distributions or remuneration to members since March 2020
viii. Redundancies in March 2021; but none since and staff recruitment in the 3 – 4 months prior to September 22, 2022.
ix. Receiving Government assistance for staff salaries; and finally
x. An Injection of funds through intercompany loans to fund payment towards non protected rent and running costs.

29. In the case of [redacted] the Second Claimant has provided

a. Their Financial Statement for the year ended 31 October 2017
b. Their Financial Statement for the year ended 31 October 2019
c. Their Financial Statement for the year ended 31 October 2021 showing losses in 2020 and 2021 due to closure of the Restaurant.
d. Cashflows for 2019, 2020, 2021 and 2022 with forecasts to December 2023
e. A Financial Statement for the Respondent for the year ended 31 March 2021
f. Admissions of:
    i. No court judgments
    ii. No creditor recovery action
    iii. No overdraft
    iv. All trade creditors paid as debts fall due
    v. Payment plan for outstanding PAYE
    vi. VAT payments up to date.
    vii. No distributions or remuneration to members since March 2020
    viii. Redundancies in March 2021; but none since and staff recruitment in the three to four months prior to September 22, 2022.
    ix. Receiving Government assistance for staff salaries; and finally
    x. An Injection of funds through intercompany loans to fund payment towards non protected rent and running costs.

30. In each case, the first offer made was on the basis that the shareholders needed to maintain working capital. Since profits are seasonal, the shareholders required a working capital buffer to ensure overheads could be paid in quieter months.

The Respondent's first proposal

31. In the case of [redacted], as above, the Respondents state that the protected rent debt is £299,151.72 inclusive of VAT. However, the First Claimants offer to settle is rejected as being insufficient.

32. The Respondents proposal is that the First Claimant shall pay £240,000 inclusive of VAT spread over 24 months at the rate of £10,033.31 per month. This represents a 19.51% reduction of the protected rent debt.

33. Although this does not fall within my jurisdiction, the Respondents refer to the existence of a non protected rent debt amounting to £36,786.67. Within this first offer, the Respondents have agreed to defer repayment of the non-protected rent debt until month 25 i.e. the month following repayment of the principle protected rent debt.

34. The Respondents also state that they will not take action in respect of the non protected debt, provided that all ongoing payment are made in full as they fall due. Furthermore, the Respondents offer that, should I accept the Respondents' proposal, no interest will be charged on the instalments.

35. In respect of the Second Claimant, [redacted], the Respondents agree that the protected rent debt is £198,084

36. However, the Second Claimants offer to settle is rejected as being insufficient.

37. The Respondents proposal is that the Second Claimant shall pay £159,470.66 inclusive of VAT spread over 24 months at the rate of £6,644.61 per month. This represents a 19.49% reduction of the protected rent debt.

38. Although this does not fall within my jurisdiction, the Respondents refer to the existence of a non protected rent debt amounting to £10,803.29 plus a further £18,000 of rent deposit drawn down to discharge further arrears. Within their first offer, the Respondents have agreed to defer repayment of the non-protected rent debt until month 25 i.e. the month following repayment of the principle protected rent debt.

39. The Respondents also state that they will not take action in respect of the non protected debt, provided that all ongoing payment are made in full as they fall due. Furthermore, the Respondents offer that, should I accept the Respondents' proposal, no interest will be charged on the instalments.

The First and Second Claimants Second and Final Proposal

40. In the case of [redacted], the First Claimant acknowledges the Respondent's formal proposal and the agreement of the amount of protected rent in the sum of £299,151.72.

41. The First Claimant is unable to agree the non - protected rent debt because of the failure of the Respondents to provide a statement of account. However, my jurisdiction does not cover any non-protected rent debt.

42. The Claimant emphasises the principles in the 2022 Act. I refer to these in my paragraph 162.

43. The First Claimant accepts that the Landlord's solvency will not be affected by a write off of the entire rent debt.

44. The key issue for the First Claimant is the amount that they can afford to pay. Their argument is based upon affordability and they direct me to address how affordability is assessed where future earnings cannot be calculated with any degree of certainty.

45. The First Claimants argue that any proposal that is not affordable does not meet the Award criteria and should be rejected. On this argument, the First Claimant requires me to make an assessment of affordability to ensure that the payments have a sufficient

margin to allow management of any downturn in trade. The First Claimant argues that if future cashflows are insufficient to pay any award in full and on time, enforcement of the debt could potentially result in either winding up the First Claimant or the forfeiture of its lease; both actions leading to ending the business.

46. The First Claimant argues for prudent forecasts and disputes the Respondents' analysis of their forecasts and assumptions. The First Claimants point to a decline of the economy on their sales, with a significant drop in October 2022. Moreover, they argue that having compared the First Claimants' actual takings to forecast takings for the period February to July 2022, the Respondents' forecast for the remainder of the forecast period is flawed. The First Claimants argue that their own forecasts factor in a percentage increase in sales.

47. The First Claimant argues that their forecasts account for anticipated consumer demand; but that the Respondents did not apply any increase to anticipated overheads such as wage costs and credit card charges; and that their forecasts are unrealistic. In support, the First Claimants have submitted:

- a summary of cashflow takings and service charges inclusive of VAT that reveal the 2019/2020 actual takings,
- the 2022/2023 First Claimant's forecasts as a percentage of 2019,
- the 2022/2023 Respondents forecasts as a percentage of 2019, and based upon their forecast 22% increase;
- the actual figures for 2022/2023.

48. I note that of those months (February 2022 – October 2022), only the actual figures for February and October are less than forecast by the First Claimant. All of the others exceed the First Claimant's forecasts.

49. The First Claimant has also provided a table with an analysis of income and expenditure for the period February 2022 to October 2022. This shows an increase in takings of 13.8 %; and in costs, of 13.7%.

50. The First Claimant further argues that servicing a CBILS bank loan from [redacted] must be taken into account, since it is secured on the lease and was in place prior to closure of the business on 20 March 2020. As to this loan, the First Claimant refute the Respondents indication in their offer that they need not make loan repayments. The First Claimant also states that any refinance would not be under the CBILS Scheme and therefore not attract the 80% government guarantee.

51. The First Claimant also argues that it would be contrary to the principles in the 2022 Act to prioritise debt repayments before other obligations and that the legislation was enacted to provide a discount on protected rent arrears; not a discount on loan commitments.

52. The First Claimant refutes the Respondents' argument that the inter- company cash outflow, which includes loan funding and payment of management charge, should be ignored.

53. The First Claimant also refutes the Respondents' reference to rent reviews, as there is no outstanding rent review in the case of [redacted].

54. The First Claimant concludes with a cash flow for the business which includes actual figures to 31 October 2022 and forecasts to 31 December 2024. They note that the highest forecast bank balance is now £373,795 at 28 February 2024 but that this would include VAT collected on sales in November 2023 – January 2024 and service charge income collected on behalf of employees in February; and would have to be sufficient to pay for trade creditors for December 2023.

55. The First Claimant also notes that the balance reduces to £30,883 in September 2024 and concludes that there are no excess funds to pay protected rent arrears. Consequently, their final offer to settle is nil.

56. In the case of [redacted], the Second Claimant adopts the same argument on affordability, as has the First Claimant. The Second Claimant also disputes that their

forecasts are understated. The Second Claimant also makes similar comments to the First Claimant as economic indicators.

57. The Second Claimant also refutes the Respondents' adoption of a 17% increase to the Second Claimants forecasts for August 2023 to December 2023 on similar grounds, as above, with the Archduke and that the Second Claimants forecasts account for increases based on 2019 figures. Furthermore, the Second Claimants confirm that they factored in expectations of consumer demand.

58. Similarly to the First Claimant, the Second Claimant states that the Respondents have not applied an increase to wage costs or credit card charges; and therefore do not reflect reality.

59. Again, similar to the First Claimant, the Second Claimant has also supplied a cashflow summary of takings and service charges including VAT for February to October inclusive. In each month the actual figures exceeded those forecast by the Second Claimant.

60. The Second Claimant also forecasts against the potential of the rent, payable as at 2022 at the rate of £123,500 plus VAT being increased to £220,000 plus VAT. The Second Claimant forecasts that if the rent is settled at £220,00 they would owe £42,513 in rent at 30 November 2022. However, if the rent is settled at £148,000 plus VAT the rent debt would reduce to £10,793 at 30 November 2022.

61. The Second Claimant addresses the issue of intercompany transfers in its final proposal and admits that the group has a CBILS loan from [redacted] The Second Claimant also states that the only income available to service the loan comprises the funds created by the business, and that servicing the loan is necessary to preserve the business.

62. Similarly to the First Claimant, the Second Claimant argues that if the bank loan is not serviced, then the bank would seize their security and this would end their business.

Moreover, any refinancing would not be under CBILS and would not attract the 80% Government guarantee.

63. The Second Claimant also argues that the legislation was enacted to provide a discount on protected rent arrears and not a discount on loan commitments.

64. In response to the Respondents sensitivity analysis, the Second Claimant reinforces its arguments above and alleges that the Respondents have delayed the rent review on the property to inflate the Second Claimant's cash position and distort their affordability calculations. The Second Claimant also rejects the Respondents' assertion that rent review arrears should be treated in month 25. The second Claimant argues that rent should be paid from income from the trading period to which it relates. The Second Claimant argues that including such amounts in month 25 significantly increases the cash available to service the protected rent arrears and the business will not make sufficient profits in month 25 to discharge the accumulated debt.

65. In their conclusion, the Second Claimant admits that they have transferred £171,000 to other group companies over and above the management charge due from April 2022 to October 2022, and the loan repayment contribution due from March to October 2022.

66. Thus the Second Claimant's highest bank forecast was £302,695 at 30 November 2022 assuming that the rent on review was £148,000 plus VAT; and £295,495 if the rent was £220,000 plus VAT. The lowest bank balance forecast is £144,039 at 30 September 2024 with the rent review settled at £148,000 plus VAT. However, if the rent is settled at £220,000 plus VAT, the Second Claimant will be £28,803 overdrawn.

67. It is at this lowest forecast that the Second Claimant concludes that there will be no excess funds to permit payments towards protected rent arrears. Consequently, their final offer to settle is nil.

The Respondents Second and Final Proposal to the First and Second Claimants

68. In the case of [redacted], the Respondents state that the protected rent has been agreed at £299,151.72. The Respondents confirm that the unprotected rent debt is £36, 786.67; but, as above, dealing with this unprotected rent debt does not lie within my jurisdiction.

69. The Respondents reiterate that the issue is the affordability of the Claimants' payments toward the protected rent debt. In support, the Respondents remind me of the of the Claimants original proposal of 24 monthly payments of £1,000 to avoid arbitration. From this, the Respondents consider that the Claimants final proposal of nil, on the basis of no excess funds to permit payments toward the protected rent arrears, is disingenuous.

70. The Respondents also rebut the Claimants statement that any proposal put forward that is affordable meets the award criteria; which the Respondents consider is not made in the spirit of section 15 (1) (a) and (b) of the Coronavirus Ac i.e. to ensure that obligations are met whilst maintain the viability of the tenant.

71. The Respondents do not accept the Claimants' assertion that the Respondents are not qualified to challenge the Claimants' financial information, or that the Claimants' forecasts should be accepted, given the Claimants' incentive to be prudent. In support, the Respondents note that their portfolio of properties exceeds 3,500 small and medium businesses, including others within the hospitality sector.

72. The Respondents remind me of my duty to disregard anything done by either party to manipulate their financial affairs to improve their position in relation to my award.

73. The Respondents refer to their original analysis of the cash flows provided and the three key elements of the Claimants forecasts being:

- the future trading assumption
- the intercompany transfers and the outstanding rent reviews due on two of the leases within the Claimant's Group of companies

The Respondents note that the Claimants have addressed these in their second and final offer. The Respondents have done likewise.

74. As to future trading forecasts, the Respondents note that the Claimants challenge the Respondents' comparison of average monthly forecast takings for the period August 2022 - December 2023 to the average monthly pre pandemic actual takings for the period April 2019 to February 2020. The Respondents comparison showed that forecast takings were 9% lower each month than the average achieved during the pre-pandemic period. The Claimants' challenge highlights the seasonality of their business and that the periods do not cover like for like months. The Respondents do not understand their opponent's challenge because the forecast for August 2022 to December 2023 included two Christmas periods where the Claimants state that December is the month of their best trading performance. Because the pre-pandemic period (April 2019 – February 2020) includes only one Christmas, then, accounting for seasonality, the Respondents would have expected the average monthly forecast takings to be higher, compared to the pre-pandemic period, rather than lower, as the Claimants forecast.

75. The Respondents agree with the Claimants statement that inflation has risen since the pre-pandemic period. Consequently, the Respondents query the Claimants' forecasts which show 2022/2023 takings averaging below pre pandemic forecasts despite inflation. The Respondents noted the Claimants statement in their final proposal, that, with inflation running between 8-10 %, they had increased their menu prices twice. On this statement, the Respondents questioned the lack of the effect of these increased menu prices in the forecast takings, in comparison to the pre-pandemic period actual takings.

76. The Respondents also do not understand that despite the Claimant updating their forecasts from November 2022 to December 2024, that these have remained on average very similar to the Claimants' first formal proposal ending in December 2023. Yet this is notwithstanding the forecast period containing three Christmas periods, the inflation referred above, and the increase in menu prices.

77. The Respondents also refer to the comparison between forecast and actual takings. The Respondents state that for the period February 2022 to July 2022, using the Claimants' original forecasts with updates, takings were, on average, 22% higher than forecasted.

78. The Respondents note that none of the forecast takings figures in the original forecast differed from the version supplied with the Claimants proposal. The Respondent states that presenting information prepared by the Claimant could not be in breach of the principle in section 15 (2) of the CRCA.

79. Furthermore, the Respondents' view is that comparing recent trading actual figures to previous forecasts for the equivalent months is a sound approach to assessing the accuracy of future forecasts.

80. The Respondents have compared the forecast against actual takings for the period February 2022 to October 2022 and found that sales exceeded forecasts by an average monthly variance of £25,481 or 13.8% higher than forecast.

81. The Respondents refer to the Claimants statement that operating costs have also exceeded forecasts. The Respondents have produced to me a table of variances between the operating costs excluding rent and including rent for the months February 2022 to October 2022. The Respondents note that the table that includes rent also includes the one-off backdated amounts paid by the Claimant during this period totalling £167,000. The Respondent notes that the variance between the forecasts and actual figures for operating costs excluding rental payments represents an increase in actual costs of 4.6%, as opposed to the 13.7% increase in the Claimants final proposal.

82. The Respondents conclude that it would be inappropriate for the Claimant to use one off back dated rent payments made in relation to historic rental debt due, to claim that operating costs significantly exceed the original forecasts for the period under review. The Respondents add that by adding back these one off back dated rent payments to the actual net cash movement as calculated by the Claimant, this would improve the net cash movement from £88,361 to £269,265. Moreover, the Respondents note that the Claimant has already made non protected back dated rent payments within the period

February 2022 to October 2022 which demonstrates the capacity for the Claimant to continue doing this in respect of the protected rent debt.

83. The Respondents state that the under forecasting of income still exceeds the forecast costs with a net monthly variance of £18,433. The Respondents highlight that this sum exceeds the Respondents proposal of £10,833 per month for the protected rent debt.

84. The Respondents also address the question of intercompany transfers. They state that their understanding is that the net intercompany outflows forecast relate to payment of a loan facility held by another entity within the Black and Blue Group. The Respondents have set out the monthly payments for the First Claimant, the Second Claimant, and [redacted], the latter being the subject of a previously settled arbitration in which I was the arbitrator.

85. In the case of the First Claimant, the monthly payment is £25,000, split between £9,000 of management charges and £16,000 to service the loan.

86. The Respondents note the advice of the Claimants of all three entities that management charges were not paid in the quarter August to October 2022, and that a net intercompany outflow, as provided by the Claimants of £144,000 relates to servicing the loan.

87. The Respondent also notes the details of the loan statement provided by the First Claimants and that repayments were made during the period March 2022 to November 2022. However, the Respondent notes that the balance paid has consistently fallen below the net intercompany outflow of £48,000 forecast for each month within the three group entities holding protected rent debt. The Respondent also notes that the variance between the loan repayment amount of £45,000 and the forecast amount, is £3,000, which, if maintained throughout the forecast period of from November 2022 to December 2024, would produce an additional £78,000 for application to clearing protected rent arrears.

88. The Respondents also note that the loan is not held within any of the entities in paragraph 84. The Respondents state that they do not understand why the loan was first obtained, but because the loan advance is referred to as 'loan advance (refinance) for share purposes, the Respondents view is that the loan was obtained prior to the pandemic for ownership restructuring. The Respondents note that the repayment of the loan is being given preference over payment of the First Claimants historic rental commitments. The Respondents continue that the First Claimant has forecast that the entirety of the loan commitment will be met by the entities with which the Respondents hold protected rent debt. The Respondents claim that this has the effect of maximising cash flow outflows forecasted. The Respondents allege that this artificially manipulates the figures providing advantage to the First Claimant contrary to the CRCA.

89. With regard to the management charges the Respondent refutes the First Claimant's statement that because the charge has remained level since November 2018, and has been disclosed in prior year accounts, that there has been no manipulation.

90. In the actual net intercompany cash flows between all three entities in paragraph 83 above, for the periods April 2019 – March 2020; April 2020 - July 2022; and August 2022 – October 2022, the Respondents see no evidence of these charges. This applies to the period for which actual figures have been provided, namely August 2022 – October 2022.

91. Consequently, the Respondents take the view that the First and Second Claimants have sought to manipulate the forecasts by including management charge payments within both entities, as a means to reduce the cash available to clear the protected rent debt.

92. The Respondents confirm that all intercompany inflows and outflows have been included and have been adjusted within the revised forecasts.

93. The Respondents note that the First Claimant has a lease renewal for December 2023 and that the Second Claimant had a rent review due in July 2022. In respect of the Second Claimant, the Respondents refute the Second Claimant's assertion that delaying the rent review was a tactic to manipulate the tenant's position.

94. In their second and final proposal, the Respondents consider that the rent for the renewal due in December 2023 affecting the First Claimants, as forecast by quarterly payments, to be £404,276 per annum. They confirm having used this figure in their updated forecasts and sensitivity analysis.

95. In their second and final proposal, the Respondents consider that the rent for the review for July 2022 affecting the Second Claimants should be £264,000 per annum as forecast by the Second Claimant. The Respondents confirm having used this figure in their updated forecasts and sensitivity analysis.

96. In their second and final proposal, the Respondents have updated their amended forecast to December 2024. These figures are noted above. The Respondents also state that the rental payments that will become due for the First Claimants' property, have been included as above in paragraph 93. The Respondents also state that protected rent payments of £10,033.31 have been included throughout the forecast period.

97. Consequently, the Respondents state that in respect of the First Claimants, the revised adjustments result in a forecast closing cash balance of £790,000 in December 2024 and a low cash balance of £258,000 as forecast in November 2022. The Respondents conclude that these figures demonstrate the First Claimants capacity to meet the proposed monthly arrears payments of £10,033.31 inclusive of VAT.

98. The parties also dispute their opponents' sensitivity analysis methodology. The Respondents argue that their original approach had been to adjust the level of protected rent on the revised assumptions. The Respondents consider that the First Claimants cash flows are not sensitive to the level of protected rent debt payments when the other elements in the cash flow have been adjusted.

99. The Respondents also argue that having prepared a second forecast, they consider a situation where turnover exceeds the Respondent's forecast by only 4% with all other parameters remaining as argued above, (operating costs increasing by 4.6%; intercompany recharges reduced by £10,000 each month by removal of the £9,000

management charge and £1,000 loan servicing adjustment; and protected rent payments as given in paragraph 96). In that scenario, the Respondents argue that there will be sufficient working capital within the business to maintain viability. These assumptions result in a forecast closing cash balance of £117,000 in December 2024 and a low cash balance of £65,000 in September 2024.

100. The Respondents clarify that they made the necessary VAT adjustment to the forecast figures to allow for comparison to the turnover in accordance with the Claimants financial statements.

101. The Respondents conclude that the First Claimant has presented overly pessimistic forecasts of their future performance to obtain 100% relief of the protected rent debt. The Respondents further clarify and support their conclusion by referring to:

a. A comparison of takings to historic actual figures and recent actual figures that exceed those forecast.
b. The payment of non - protected back dated rent payments within the last 6 months of delivery to me of their second and final proposal.
c. The comments, as noted above, of the inter-company transfers.
d. The Respondents noted position of the rent review in respect of the Second Claimant.

102. The Respondents conclude that their proposal of repayment of £10,033.31 per month over 24 months is appropriate and affordable. This would equate to a write off of £58,352.17 worth of rent debt which is effectively equivalent to just over one quarter's rent due. To reinforce the context, the Respondents also state that the proposed monthly repayment is also equivalent to 3.5% of the average monthly income figure achieved pre pandemic i.e. April 2019 to February 2020.

103. This is a consolidated arbitration and thus a consolidated award. In the case of the Second Claimant, the arguments, put forward by the Respondents as to trading forecasts and affordability, but save as to particular figures, are the same as those for

the First Claimant. Where those arguments are the same, for precis, I do not repeat them.

104. The Respondents state that the protected rent has been agreed at £198,084.95. The Respondents confirm that the unprotected rent debt is £10,862.71; but as above, dealing with this unprotected rent debt does not lie within my jurisdiction.

105. The Respondents remind me of the of the Claimants original proposal of 24 monthly payments of £1,000 to avoid arbitration. From this, the Respondents consider that the Claimants final proposal of nil on the basis of no excess funds to permit payments toward the protected rent arrears, is disingenuous.

106. The Respondents also rebut the Claimants statement that any proposal put forward that is affordable meets the award criteria. The Respondents repeat their argument in paragraph 70. Likewise, the Respondents arguments in paragraphs 71 – 72 above apply to the Second Claimant.

107. The Respondents refer to their original analysis of the cash flows provided as in paragraph 73 above with the same three key elements of the Claimants forecasts.

108. As to future trading forecasts the same arguments contained in my paragraph 74 above apply save that forecast takings for the same periods in my paragraph 73 were 11% lower each month than the average achieved during the pre-pandemic period. My remaining material applies.

109. As to the arguments on inflation and the Claimants updated forecasts, my commentary in my paragraphs 75 – 76 above, apply.

110. The Respondents also refer to the comparison between forecast and actual takings. The Respondents state that for the period February 2022 to July 2022, using the Claimants' original forecasts with updates, takings were, on average, 17% higher than forecasted. Aside from this figure, the Respondents repeat what I have commented upon in my paragraphs 77 – 79 inclusive, above.

111. The Respondents have compared the forecast against actual takings for the period February 2022 to October 2022 and found that sales exceeded forecasts by an average monthly variance of £22,863 or 13.7% higher than forecast.

112. As to the Claimants statement that operating costs have also exceeded forecasts, the Respondents have produced to me a table of variances similar in form, if not actual figures, to my narrative in my paragraph 81 above. The Respondent notes that for the same period in paragraph 81, the variance between the forecasts and actual figures for operating costs, including rent payments is an increase of £22,598 representing an increase in actual costs of 1.7% against the Second Claimants forecast. The Respondents state that under forecasting of income far exceeds costs, with the net average monthly variance of £20,352 in excess of £6,645 that the Respondents have proposed for monthly payment of the protected rent

113. The Respondents also address the question of intercompany transfers. They provide me with a table similar in format to that provided in the case of the First Claimant.

114. Otherwise, the Respondents reiterate their statement to which I refer in my narrative in paragraph 84 above. As to management and loan charges, the Respondents state that in the case of the Second Claimant, the monthly payments of £22,000 are split between £6,000 of management charges, and £16,000 loan servicing. In addition, my narrative in paragraph 85 above, applies.

115. The Respondent also notes the details of the loan statement provided by the Second Claimant and the Respondents position is similar to my narrative into my paragraphs 87 - 88.

116. With regard to the management charges, my narrative in my paragraphs 89 - 92 inclusive apply.

117. With regard to the rent review due for the Claimant's subject property, the narrative in my paragraph 93 above, applies. Furthermore, the narrative in my paragraph 95 applies.

118. As to the sensitivity analysis, the narrative in my paragraph 96 applies. The Respondents In their second and final proposal have updated their amended forecast to December 2024. These figures are noted above. The Respondents also state that the rental payments that will become due for the Second Claimant's property have been included as above in paragraph 95. The Respondents also state that protected rent payments of £6,644.61 have been included throughout the forecast period.

119. Consequently, the Respondents state that for the Second Claimant's property, the revised adjustments result in a forecast closing cash balance of £589,000 in December 2024 and a low cash balance of £272,000 as forecast in November 2022. The Respondents conclude that these figures demonstrate the Second Claimant's capacity to meet the proposed monthly arrears payments of £6,644.61 inclusive of VAT.

120. As to the sensitivity analysis methodology, my narrative in my paragraph 98 applies save that this applies to the Respondents' view of the Second Claimant's cash flows.

121. With regard to the Respondents' second forecast, they consider a situation where turnover exceeds the Respondent's forecast by only 4% with all other parameters remaining as argued above. These are operating costs increasing by 1.7%; intercompany recharges reduced by £7,000 each month by removal of the £6,000 management charge and £1,000 loan servicing adjustment; and protected rent monthly payments of £6.600 (believed to be actually £6,644.61). In that scenario, the Respondents argue that there will be sufficient working capital within the business to maintain viability. These assumptions result in a forecast closing cash balance of £117,000 in December 2024 and a low cash balance of £68,000 in September 2024. Further, the Respondents clarify that they made the necessary VAT adjustment to the forecast figures to allow for comparison to the turnover in accordance with the Claimants' financial statements.

122. The Respondents maintain that the Second Claimant has also presented overly pessimistic forecasts of their future performance to obtain 100% relief of the protected

rent debt; and further clarify and support their conclusion by referring to the same parameters that I have cited in my paragraph 101, above.

123. The Respondents conclude that their proposal of repayment of £6,644.61 per month over 24 months is appropriate and affordable. This would equate to a write off of £38,614.17 worth of rent debt which is effectively equivalent to just over one quarter's rent due. To reinforce the context, the Respondents also state that the proposed monthly repayment is also equivalent to 3.2% of the average monthly income figure achieved pre pandemic i.e. April 2019 to February 2020.

The Claimants additional submission of 25th January 2023

124. The First and Second Claimants have also made additional submissions of 25th January 2023 to which I gave permission in my Order for Directions No 2. As both further submissions are to a significant extent relatively identical, albeit save as to individual figures, I deal with them both together and state the relevant differences.

125. Both Claimants have invited me to ask additional questions to assess their affordability. The Claimants repeat their allegations that the Respondents base their forecasts on assumptions which ignore the Claimants' trading performances, with a view to increasing the rent award beyond an affordable figure.

126. Both Claimants state that, notwithstanding that they were not obliged to inject funds into the company, they were willing to do so to obtain early settlement. The Claimants refer to the guidance and presumably this is under section 16 (3) (a) and 6.9 of the Guidance Note.

127. Both the Claimants reiterate that they have set out cashflow forecasts to demonstrate that they cannot afford to pay additional amounts towards the arrears. Both Claimants reiterate that they have explained why the Respondents' cashflows, submitted with their first proposal, were unreliable. Both Claimants also state that the sales forecast in the Respondents' revised cashflows, submitted with their second and final proposal, were also unreliable as to the methodology used. Both Claimants state that committing to a payment plan that is unaffordable, results in their businesses not being viable.

128. Both Claimants reiterate their criticism of the Respondents' approach of using average takings as a measure of performance and a forecasting tool. The Claimants reiterate that forecasting earnings cannot be done by comparing different months of the year; and support this referring to their previously provided monthly analysis of sales showing variance due to seasonality.

129. Both Claimants reject the Respondents assertion that with inflation running at 10% that forecasted sales would be higher. The Claimants refer to their submission dated 6 December 2022 and the statement in the Office of National Statistics report of 10 November 2022 that UK seated diners had fallen by 11% against the equivalent week in 2019. For [redacted], this could be compared to the forecast decrease on 2019 of 8%. For [redacted], the forecast decrease was the same 11%. For both businesses, both Claimants state that increase in menu prices were offset by increases in costs. Both Claimants state that the drop in sales is due to a reduction of diners as a consequence of changed working patterns and discretionary household spending.

130. Both Claimants criticise the Respondents assertions that, in the case of [redacted], this would give 30% spare capacity in December 2019; and in the case of [redacted], 27% spare capacity in the same month, and capable of generating, respectively, £110,867 for [redacted]; and £62,188 for [redacted], as very inaccurate predictions.

131. Both Claimants deny the appropriateness of the Respondents' extrapolation of the percentage increase in actual sales for February 2022 to October 2022 compared to forecast sales on the basis that the forecasts already include an upward trend compared to the 2019 sales. Both Claimants state that despite the Respondents' calculations showing the convergence between the actual figures to the forecast figures, the Respondents ignore this, and repeat the error in their revised forecast submitted on January 11, 2023. In the case of [redacted], the First Claimant criticises the Respondents application of the sales excess over forecast by 13.8% over the nine months to October 2022, to the remaining months. The First Claimant contrasts this with the Respondents previous increase for the six months to July 2022 of 22.1% and confirm

that the rate of increase is declining due to their forecasts taking into account the upward trend toward the 2019 figures. In the case of [redacted], the Second Claimant adopts the same criticism, the differences being that, for the same period, sales exceeding forecast was 13.7%; which the Second Claimant contrasts with the Respondents' previous increase for the six months to July 2022 of 17%; and concluding the same decline in the rate of increase. In both cases, the Claimants criticise the Respondents applying a much higher percentage than the Claimants consider appropriate to the remaining months of 2022 - 2024 while still agreeing the Claimants calculations. In both cases, the Claimants state that estimating sales in the first few months of opening i.e. February to July 2022 was difficult.

132. In the case of [redacted], the First Claimant counters the assertion that payment of back rent indicates affordability to pay rent arrears because the shareholders injected funds for this purpose. There is no mention of how back rent is capable of being paid in the case of [redacted]. The First Claimant states that the funds were not generated from business cash flows, so do not demonstrate that the business can afford additional payments.

133. In both cases, the Claimants refute the Respondents comments on the increase in operating expenses. In the case of [redacted], the First Claimant rejects the increase as being 4.6% exclusive of rent, due to late payment of trade creditors; so that the operating costs to 31 October 2022 excluding rent would be 8.3% as opposed to 4.6%.

134. In the case of [redacted], the Second Claimant rejects the Respondents' application of a 1.7% increase in operating expenses to the remaining forecast months, while increasing takings by 13.7%, on the basis that the relationship between takings and operating costs is more complex. The Second Claimant insists that the only way to obtain an accurate forecast is to consider the relationship month by month.

135. As to [redacted], the First Claimant argues likewise, and refers to applying 4.6% in operating expenses and increasing takings by 13.8%. In both cases the respective Claimants give an example and conclude that, in the case of [redacted], to make the additional sales would require serving an additional 365 people requiring kitchen and

serving staff paid at £10.42 per hour as from 1st April 2023. In the case of [redacted] the additional customers would need to be 363 people. Consequently, the Claimants argue that it is unrealistic to expect an increase in sales of 13.8% for [redacted] and 13.7% for [redacted] while increasing operating costs by 4.6% for [redacted] and 1.7% for [redacted] respectively.

136. Both Claimants also criticise the Respondents allegation that that there is a margin between the respective companies' loan payments and forecast loan payments. However, with rate increases forecast, the Claimants state that the additional funds, claimed by the Respondents will not be there. With a base rate rise to 4.8% in the third quarter of 2023 and reducing to 4.5% in the same quarter of 2024, then the £16,000 allocated to servicing the loan will be insufficient.

137. The Claimants also state that the only income generating companies within the group are the three companies with tenancies with the Respondents. The Claimants make clear that [redacted] would not be responsible for servicing the loan; and his personal guarantee would only be enforceable upon sale of the restaurant leases. By then, the businesses would not be viable.

138. Both the Claimants refute the Respondents' assertions that the management charges are an attempt to manipulate the cash position. Both the Claimants state that the historical management charge rates are included in their forecasts. Both the Claimants state that the management charges are valid expenses, without which the business could not operate. Such charges include bookkeeping, VAT returns, payroll processing, Human Resources, operations management, equipment repair, website hosting, and head office expenses. The Claimants also criticise the Respondents commentary on the inter-company movements, as irrelevant on the basis that each tenant services its own costs as they fall due.

139. The First Claimant concludes that when management charges are included, the bank balance forecast by the Respondent ends up overdrawn in June 2024. Furthermore, the original forecasts remain closer to actual trading results than those proposed by the Respondents.

140. The Second Claimant concludes that their original forecasts are much closer to actual trading results than those proposed by the Respondents.

141. Both Claimants also enclosed the EPOS report for December 2022 that showed takings below their forecast and considerably below the Respondents forecasts.

The Respondent's response to the Claimants' additional submission of 25th January 2023

142. The Respondents' responses to both the First and Second Claimants additional submissions are, save as to some figures which I note, helpfully, similar.

143. The Respondents commence by repeating the first and second proposals to settle from both sides. It is worth repeating these proposals in a table to place them in perspective.

Party	**Protected Rent Debt**	**First Proposal**	**Writing Off**	**Second and Final Proposal**
First Claimant	£299,151.72	£24,000 payable in 24 equal monthly payments of £1,000, interest free or 8.02% of the debt	£275,151.72 representing 91.98% of the debt	Nil representing 100% of the debt
Respondents	£299,151.721	£240,799.44 payable as 24 equal monthly payments of £10,033.31 interest free or 80.49% of the debt	£58,352.28 representing 19.51% of the debt	Same as first proposal.
Second Claimant	£198,084.95	£24,000 payable in 24 monthly payments of £1,000, interest	£174,084.95 representing 87.88% of the debt	Nil representing 100% of the debt

		free or 12.12% of the debt		
Respondents	£198,084.95	£159,470.64 payable as 24 equal monthly payments of £6,644.61 interest free	£38,614.31 representing 19.49% of the debt	Same as first proposal.

144. The Respondents state that both of their final proposals are commensurate with the support that they have offered and which have been accepted by over 1,400 tenants affected by COVID, within their portfolio.

145. The Respondents' responses are essentially divided into two principal points. The first comprises the cash flow forecasts, upon which the Claimants rely to support their claim that they have insufficient funds available to pay towards the protected rent debt. The second point concerns the volume, rather than the validity, of the Claimants' intercompany cash outflows.

146. Turning to the Claimants cashflow forecasts, the Respondents point out that, in both Claimants' further submissions of 25 January 2023, the Claimants make no change to their original forecasts. The Respondents consider these forecasts to be overly pessimistic. The Respondents further consider that the difference between the parties is the preparation of their respective forecasts. Whereas the Respondents have submitted reviewed forecasts, and based upon trading information supplied by the Claimant, they note that the Claimants have not changed their original trading forecasts to December 2023 despite providing these to the Respondent in March 2022; even where the actual figures have shown deviations. The Respondents have concluded that the Claimant prepared forecasts to avoid rental commitments in contravention of section 15 (1) (b) of the CRCA.

147. The Respondents second theme is that they question the value of the forecasted recharges because they result in considerable net cash outflows. The Respondents do

not question their validity, which they distinguish from volume, and recognise the need to contribute to head office expenses.

148. The Respondents remind me that they had included a table in their final (revised) proposal which showed the movement of cash between the three restaurants that were the subject of the arbitrations before me. Included was the Claimant in case 01408 the arbitration of which has been settled by my Consent Order dated 4th July 2023.

149. The Respondents point out to me that in the period April 2019 to March 2020, this table showed a net nil movement of cash between the three companies. However, this could compare to the Claimants' forecast for November 2022 to December 2024 where the forecast net cash outflow between all three entities amounts to £1,077,000. The Respondent contrasts this disparity between the two figures by referring to paragraph 13 of the Claimants statement in their January 25, 2023, additional submission that management recharges were "payable at the same rate as included in the forecasts".

150. On the same point that the Respondents make of the inference of inconsistency in the Claimants argument, the Respondents also point to two sets of forecast data in respect of each of the Claimants. In the case of [redacted], the First Claimant's forecast of monthly management charge outflows is £25,000 for the period November 2022 to December 2024 amounting to £650,000 for 26 months. The Respondents compare this to the management accounts for the year end of 31st October 2019 wherein the annual management recharge was £108,000, thus considerably lower than the intercompany outflow, now in the later forecasts.

151. Similarly, for the Second Claimant, the forecast monthly outflow for the same period is £22,000 partially offset by a £149,000 inflow for November 2022; thus totalling £401,000 over the 26 month period. This can be compared to the management accounts submitted for the year end 31 October 2019 where the annual management recharge was £72,000; which is considerably lower than the intercompany outflow in the forecasts.

152. The Respondent presents the argument in paragraph 149 -151 above to support their view that the Claimant regards the inter-company forecasts as manipulation of expected

future performance in order to reduce the cash available to pay the protected rent debt arrears. They conclude that the forecast management charge outflows are over £1,000,000 during the forecast period November 2022 to December 2024, which could be used to help clear the protected rent debt.

153. The Respondent also draws attention to the loan facility held by [redacted] which, though not a party to this consolidated arbitration, is part of the Claimants' group of entities. The Respondent arguers that the repayment of this loan facility accounts for a significant portion of the outflows forecast within each trading entity and that the loan comprises a non-trading commitment held by a separate legal entity which does not hold any leases or rent arrears. The Respondents argue that the Claimant has included the expected repayments within their forecasts to reduce available cash. In considering why the loan repayment has been included in the forecasts, the Respondent questions why the Claimant has not provided any detail concerning the origin of the loan of £2,350,000. The Respondents also note that the original loan facility, against which £2,050,000 has been drawn, appears to have been held by [redacted] for several years, with draw down preceding the pandemic. The Respondent also notes that this entity has held the loan for several years.

154. However, the Respondent draws a distinction concerning the documents provided that relate to the £300,000 element extended to the Claimants under the Government backed CBILS loan scheme. The Respondent accepts that repayment of this £300,000 CBILS facility represents a genuine cash flow requirement of the Claimants trading entities. However, the Respondents do not accept repayment of the additional £2,050,000 loan facility in paragraph 153 above as a valid cash flow for inclusion in each of the trading entities.

155. In addition, the Respondents further note that, in the Claimants cash flow for the consolidated [redacted] and [redacted] there is loan of £500,000 received in March 2020 which was immediately transferred out of the group as 'Funds withdrawn to purchase shares from [redacted] by [redacted]. The Respondents consider that this loan was substantially increased just prior to the start of the protected rent period to support financing activity conducted elsewhere; and that these funds drawn were

immediately transferred out of the group. The Respondents position is that repayment of this loan should not prejudice the ability of trading entities to pay towards the protected rent arrears.

156. The remainder of the Respondents response to the additional submission deals with some general points, the first of which is the Claimants assertion that the Respondent has not sought to enter into any meaningful discussions to resolve this dispute; and that the Respondent would use enforcement options should the Claimant default on any Award that I might make.

157. The Respondent refutes the Claimants' assertion of lack of discourse and refers to the settlement entered into with [redacted] which is the subject of my Consent Award under CIArb Case DAS 01408 ArbDB 2639 dated 4th July 2023.

158. The Respondent notes that the Claimant had included an estimated settlement of £294,000 which is well in excess of the final figure agreed; and which should provide an additional £200;000 over the next 24 months with which to pay towards the rent arrears. In fact, the difference is £104,700. This agreement was concluded at a value lower than the Claimant's forecast settlement figure, which the Respondent feels demonstrates the Claimants are being overly prudent in their forecasts.

159. The Respondent also refutes the Claimants' accusation of purposely delaying the negotiation of rent reviews to inflate the cash available to manipulate the amount of an Award that I may make. The Respondent makes the point that the agreement that was reached was for a figure considerably lower than that forecast, so therefore allowing for significant additional working capital to be available to meet the protected rent arrears.

160. The Respondents final point refers to their own Small Business Charter and the praise from the National Chair of the Federation of Small Businesses on the Respondents record of assisting tenants. The Respondents supplied an appendix (Appendix 1 to their response) with a news item concerning the Respondents' Tenants Charter report citing that 1,550 tenants affected by COVID in the Respondents' portfolio received assistance from the Respondents £11 million hardship fund. The Respondents

state that such support has included long term interest free payment plans to 200 of its tenants.

161. The Respondents reiterate their willingness to write off £58,352.28 in the case of the First Claimant's protected rent debt; and £38,614.31 in the case the Second Claimant.

My Decision

162. I commence by setting out the principles which I must apply to this reference. These are in section 15 (1) of the Commercial Rents Coronavirus Act ("CRCA"). These principles can be *summarised* (my italics) as:

(a) They should aim to restore/preserve the viability of the tenant's business; and

(b) The tenant should meet their obligations under the contractual terms of the lease to pay rent as far as is consistent with (a) above.

In paragraph 178 below, I cite the actual wording as part of my reasoning.

163. Section 16 of the CRCA indicates that to which I must have regard when assessing viability. Essentially this section states that I must have regard to those matters when assessing viability if they are brought to my attention. They include

(a) assets and liabilities of the tenant including any other tenancies to which the tenants are party

(b) the previous rental payments made by the tenant to the landlord under the business tenancy

(c) the impact of Coronavirus on the business of the tenant; and

d) any other information relating to the financial position of the tenant that the Arbitrator considers appropriate.

164. It is not in issue that both of the Claimants have argued their cases similarly, although, save as to some figures relating to each restaurant. Otherwise, their cases are

founded on forecasted figures and on the basis that each restaurant had to be effectively self-sufficient.

165. Rather than repeat the settlement offers, I refer to my paragraph 143 above, which sets out in tabular format the Claimants' proposals in both monetary and relative percentage terms. The table shows that the First Claimant initially requires a write - off of 91.98% of the debt, and then resiles from that proposal to writing off the whole debt in their second proposal. Likewise, the Second Claimant initially requires a write - off of 87.88% of the debt, and then resiles from that proposal to writing off the whole debt in their second proposal.

166. The Claimants have presented me with a comparison of forecast figures to actual trading figures and, essentially have argued that their forecasted figures leave them with insufficient funds with which to pay their protected rent debts. Consequently, their final offers are nil. On the face of these final proposals, the Respondents argue that these final offers are disingenuous, each having first offered £24,000 albeit spread evenly at the rate of £1,000 per month over 24 months.

167. Both Claimants' arguments to support nil settlement offers are based on their cash flow forecasts that they consider show that they are not able to afford to pay any protected rent arrears and have financial reserves to weather any downturn in their businesses.

168. I also note that in neither case have both Claimants considered that their businesses are not viable. As agreed at the CMC of 6th April 2023, viability, and thus eligibility, is not an issue. On this point, in their additional submissions of 25th January 2023, both Claimants have invited me to ask additional questions to assess their affordability. At paragraph 107 of the Commercial rent code of practice following the COVID-19 pandemic, the parties are asked to note that I am not required to seek out information from them, although I have the power to do so under section 34 of the Arbitration Act 1996. I have not done so because the parties have taken the opportunity to present me with both offers and responses; and a third submission from each. Although not in issue,

in my view, both parties have had ample opportunity to put forward their respective cases and present material with which to enable me to assess their respective cases.

169. Considering the offers made, an offer of nil contribution to the protected rent arrears might suggest that both businesses are not viable, notwithstanding that the Claimants have not argued this. As above in paragraph 168, viability is not an issue.

170. In their supplemental submissions of 25 January 2023, the Claimants have argued that committing to a payment plan that is unaffordable would place them in a position where the business is not viable. They also fear the consequences of not meeting any repayment plan which include forfeiture of the lease. They also state that the Respondents have not entered into any meaningful discussions to resolve this dispute.

171. The Respondents have countered the Claimants' fears, expressed in my preceding paragraph, by pointing to the settlement with [redacted] case DAS 01408 where a rent of £189,300 inclusive of rent was agreed between the parties. As previously stated, I recorded this in my Consent Award dated 4 July 2023. It may well be that the Claimants statements refer to each of the two cases in this consolidated award. However, the Claimants have not presented me with any evidence to justify their statements.

172. On the question of the Claimants fears of possible enforcement action, the Respondents have ended their supplemental submissions in response to the Claimants' supplemental submissions of 25 January 2023, by referring to the [redacted] and the praise given by the National Chair of the Federation of Small Businesses. The argument and evidence presented to me is in my paragraph 160 above. I find this evidence sufficiently compelling to counter the Claimants' fears.

173. The Respondents take the view that the businesses are viable and can afford contributing to the protected rent debt on the basis that the Claimants cash flow forecasts are overly pessimistic; and that the volume of the Claimants' intercompany cash outflows are questionable.

174. The Respondents reject the Claimants' final offers as they resile from the original proposals reversing to nothing. The first offers may well have been to reach an agreement outside of arbitration but, nonetheless, were made. If the Claimants had enough funds to honour their initial proposals in the first instance, then it is clear to me that their proposal had to carry weight; and the Claimants could afford £1,000 per month for each property payable in equal instalments for 24 months.

175. The Claimants have provided cash flow forecasts which, unlike the Respondents forecasts, they have not revised. I refer to this in my paragraph 146 above. Therefore, at the very least, the Claimants must have known that they could afford their first proposals.

176. Furthermore, the First Claimant's argument, at my paragraphs 54 – 55, notes a surplus balance. The Second Claimant's argument, at my paragraph 60, points to the potential of a deficit balance of £42,513. Both arguments are based on forecasts only that have not been revised; and neither argument alters their position that the businesses remain viable. The forecasts are in dispute.

177. The Respondents have argued that the Claimants' final proposals are disingenuous. For the reasons given in my paragraphs 174 and 175 above, along with the undisputed position that the Claimants figures are based on forecasts, on balance, I agree with the Respondents. I, too, find the Claimants final proposals to be disingenuous.

178. Section 15 (1) of the statute is clear. My award (a) "should be aimed at preserving the viability of the business so far as that is consistent with preserving the landlords solvency" if I find that the business is viable, under section 13 (4) (a) "*and"* (my italics) (b) "that the tenant should, so far as it is consistent to do so, be required to meet its obligation as regards the payment of protected rent in full and without delay". The landlords solvency is not an issue.

179. In applying the principles in section 15 of the CRCA, as above, it is plain that my award must take into account both sections 15 (1) (a) and 15 (1) (b). These principles are joined together. Therefore, I must conclude that a proposal of nil is not consistent

with the requirement of the Claimants to meet their obligations as regards the payment of protected rent in full and without delay.

180. Consequently, I cannot find for the Claimants on their final proposals and I shall not award the Claimants the 100% write-off of debt, for which they argue.

181. Nonetheless, there remains the need for compliance with section 15 (1) (a) which is stated in my paragraph 161 above and whether the Respondents' proposals are consistent with this principle.

182. The Commercial rent code of practice following the COVID-19 pandemic published 7 April 2022 on page 11, sets out a table where I reproduce the relevant sections because both parties submitted proposals:

Situation	Consistency of proposals with the principles	Award made on relief from payment
Both parties submit final proposals	Both proposals are consistent	Award made in terms of the most consistent proposal
Both parties submit final proposals	Only one proposal is consistent	Award made in terms of that consistent proposal
Both parties submit final proposals	Neither final proposal is consistent	Whatever award the arbitrator considers appropriate applying the principles

183. As I have determined that the Claimants proposal, howsoever argued, is not consistent with the principle of section 15 (1) (b) the question before me is whether the Respondents' final proposals are consistent with the principle of section 15(1) (a). In the above table, I have two choices left. The first is to consider whether the Respondents proposal is consistent with the principles in section 15 of the CRCA in which case I have to find for the Respondent's final proposal. The alternative is the third choice, namely that I find that neither final proposal is consistent with section 15. In that case I must

consider and make an award that I consider appropriate in the circumstances and application of the principles.

184. In reviewing the Respondents' arguments, I also have regard to the provisions of section 16 (3) of the CRCA, wherein I must disregard the possibility of the tenant s16 (3) (a) borrowing money *or* (my italics) (b) restructuring its business.

185. I consider the Claimants further submissions of 25 January 2023 and the First Claimants admission that to pay the back rent, that the shareholders had injected funds for this purpose.

186. I do not regard shareholders injection of funds where there is no mention of dilution of equity, as borrowing money or restructuring the business. Rather, I regard injection of shareholders funds as a means to avoid borrowing and to overcome cash flow problems.

187. The Respondents further responses to the Claimants further submissions helpfully highlights two principal issues which I have set out at my paragraph 145 above. The fact that the Claimants had not revised their original forecasts, notwithstanding that their original forecasts remain much closer to actual trading results than those proposed by the Respondents, does not detract from them still remaining forecasts. Moreover, the Respondents have based their revisions on updated trading information supplied by the Claimants. Of particular note, is that the forecasts have included the contentious item of forecast intercompany payments.

188. I refer to my paragraphs commencing at 147 and ending at my paragraph 155. The Respondent has pointed out that, from the material presented by the Claimants, the net intercompany movement of cash for the period April 2019 to March 2020 was nil and which contrasts with the Claimants forecast of net cash outflows for the period November 2022 to December 2024, totalling £1,077,000. Yet at paragraph 13 of the First Claimant's further submission of 25 January 2023; and paragraph 12 of the Second Claimant's further submission, the Claimants stated that …"the historical management charges payable at the same rate as included in the forecasts" i.e. the management re – charges

were payable at the same rate. The Claimants statement conflicts with the figures presented.

189. I also note the inconsistency in the Claimants forecasts of monthly management charges with the management accounts for the year end 31st October 2019.

190. The Respondents agree that management charges are a legitimate expense. Their complaint is the volume of management re-charges and the conflict that I state above and set out in my paragraph 188. This inconsistency suggests that the Claimants forecasts in respect of the management re-charges are insufficiently reliable for me to be persuaded that the Respondents conclusions are misplaced. This is regardless of the Claimants forecasts of sales and costs.

191. In my paragraphs 152 to 155 inclusive, I refer to the Respondents' comments on various loans. These loans are complex. One of them is for £2,350,000 (my paragraph 153 refers) against which £2,050,000 has been drawn down and is held by [redacted] which is not a party to this arbitration. While it is a financial commitment, that commitment appears to belong to [redacted] which would bear responsibility for that loan. The Respondents question why that loan repayment is in the forecasts.

192. I cannot see why this loan should adversely affect the Claimants cash flow and therefore the Claimants' affordability to contribute to the protected rent debt because the loan belongs to [redacted], which is a separate legal entity.

193. For completeness, in my paragraph 154, I have noted that the Respondents accept that repayment of the government backed CBILS loan of £300,000 is a genuine cash flow expense. I agree with the Respondents on this point because it was granted to assist with COVID affected tenants' outgoings.

194. However, in my paragraph 155, I also refer to the Respondents' comments on the cash flow for the consolidated [redacted] and [redacted], neither of which entities are parties to this arbitration. The Respondents state that there is a loan

in that cash flow of £500,000 which, following reception in March 2020 was transferred out of the group for the purpose of buying shares. That loan appears in the Claimants' cash flows to adversely impact upon affordability for both the Claimants. Yet, like the loan in my paragraphs 191 and 192, this loan appears to have nothing to do with them.

195. Therefore, for the above reasons I conclude that the cash flow forecasts contain significant payback of loans that do not concern the Claimants and therefore ought not to impact upon the Claimants affordability of repayment of the protected rent debt.

196. From all of the information provided to me and given my reasons above, I find that the Respondents final proposals to each Claimant which, to repeat from my table in my paragraph 143, comprise of

Claimant	Protected Rent Debt Respondents' proposal	Writing Off Debt of
First Claimant	£10,033.31 payable as 24 equal monthly instalments interest free	£58,352.28
Second Claimant	£6,644.61 payable as 24 equal monthly instalments interest free	£38,614.31

to be consistent with the principles that I must apply in section 15 (1) of the CRCA

197. From all of the material supplied to me, I find that the Claimants have not proved their case for rent relief. I can see under the terms of section 15 (1) of the CRCA, that both of the formal offers are aimed at restoring/preserving viability. The cash flow forecasts go a considerable distance towards this from the Claimants perspective. From the Respondents perspective, while their final offer repeats their initial offer, they too have aimed at complying with section 15 (1) (a).

198. On the evidence put to me, I can see that both offers appear consistent with section 15 (1) (a) namely that both offers appear consistent with the first part of section 15 i.e. the aim of the offer is to restore or preserve viability. However, I have found that the Claimants final offer is not consistent with the principles in section 15 (1) (b) of the CRCA.

199. Consequently, under section 14 (3) (b) I must make the award set out in the proposal that I do find consistent.

200. The Respondents' offer repays more of the protected rent debt and therefore comes closer to the tenant meeting their contractual obligations in accordance with section 15 (1) (b).

THE APPROPRIATE RELIEF FROM PAYMENT

201. Only the Respondents offer is consistent with section 15 (1). Therefore, under section 14 (3) (b) I award that the Respondent's offer is the most consistent.

202. I award that the First Claimant shall be provided with relief from the full protected rent debt of £299,151.72 with relief of £58,352.28, by paying 24 equal monthly instalments of £10,033.31 free of interest.

And

203. I award that the Second Claimant shall be provided with relief from the full protected rent debt of £198,084.95 with relief of £38,614.31, by paying 24 equal monthly instalments of £6,644.61 free of interest.

COSTS

204. Section 19 (5) requires me to make and award on the costs that reimburses the Applicant(s) (the Claimants) for the application fee and my costs, unless, under section 19 (6) I consider it more appropriate to award alternatively.

205. I have not received any pleadings from the parties as regards costs. Both parties have cooperated fully with me in the proceedings. Consequently, there is no reason for me to depart from the default position.

206. Therefore, under Section 19 (5) of the CRCA I shall Award that the Respondent shall pay half of my fee by reimbursing to the Claimant applicant the fee already paid to the Chartered Institute of Arbitrators together with half of the application fee.

INTEREST

207. In the Guidance note to the CRCA, interest can form part of the unpaid rent due. Although I have found for the Respondents in this reference, and notwithstanding section 49 of the Arbitration Act 1996, the relief offered by the Respondents, are equal monthly payments interest free.

208. Consequently, I do not award interest on the sums due.

209. In reaching my decision, I have taken account of all matters addressed to me in writing. I have not found anything that outweighs my conclusions All other matters have been considered in this arbitration and do not affect this award on the principle, costs, or interest.

NOW I, PAUL ROSE, DECLARE, DIRECT, ORDER AND AWARD:

The Claimants as stated below, shall pay to the Respondents the following sums of money:

- The First Claimant shall pay to the Respondents the sum of £10,033.31, per month, free of any interest, for the next 24 months exclusive of VAT where applicable, commencing from 1st July 2024, in full and final settlement of the claim as to rent due during the protected rent period namely 21 March 2020 to 18 July 2021.

- The Second Claimant shall pay to the Respondents the sum of £6,644.61, per month, free of any interest, for the next 24 months exclusive of VAT where applicable, commencing from the 1st July 2024, in full and final settlement of the claim as to rent due during the protected rent period namely 21 March 2020 to 18 July 2021.

- In addition, I award that the Claimant and Respondent shall each bear their own costs. Furthermore, the Respondent shall pay to the Claimants, one half of my fixed arbitral costs of both references in the sum of £11,000 plus VAT (£2,200) totalling £13,200; and one half of the application fee already paid to the Chartered Institute of Arbitrators by the Claimant.

- That should it be established in law that the Claimant is liable in law to HM Revenue and Customs for Value Added Tax on the whole, or any part of the amount so awarded, the Respondent shall further pay to the Claimant one half of such additional sum (if any) as might be properly chargeable and payable as VAT under the VAT regulations of HM Revenue and Customs.

Made this 7th June 2024 in London, England.

PAUL ROSE LLM FRICS FCIArb Chartered Arbitrator.