

IN THE MATTER OF AN ARBITRATION IN ACORDANCE WITH THE, COMMERCIAL RENT (CORONAVIRUS) ACT 2022 AND THE ARBITRATION ACT 1996

RE: [REDACTED] (“the Premises”)

[REDACTED] LIMITED

Applicant/Tenant

-and-

[REDACTED] LIMITED

Respondent/Landlord

FINAL AWARD

Robert A Sliwinski

Arbitrator

ArbDB Chambers
International Dispute Resolution Centre
1 Paternoster Lane
St. Paul's
London
EC4M 7BQ

INTRODUCTION

1. The Applicant is [REDACTED] Limited, who are the tenant of the property, and were represented in these proceedings by [REDACTED] of the Applicant.
2. The Respondent is [REDACTED] Limited and they were represented in these proceedings by [REDACTED].
3. The lease of the property is dated [REDACTED] 2000 and was between [REDACTED]
[REDACTED] It was varied by a Deed of Variation [REDACTED] 2016 made between [REDACTED]
[REDACTED] and a second Deed of Variation dated [REDACTED] 2017 was made between [REDACTED]
[REDACTED]
[REDACTED]
4. The current Landlord is the [REDACTED] and the current tenant is [REDACTED]
5. The terms of the Commercial Rent (Coronavirus) Act 2022 (“CRCA”), at Part 2, includes express provision for the arbitration of disputes and provided that, upon the occurrence of a dispute, either party could apply to an approved arbitration body.
6. A dispute having arisen between the parties in respect of payment of a protected rent debt, the Applicant applied to the Chartered Institute of Arbitrators (ciarb) for the nomination of an arbitrator in accordance with the CRCA.

7. On 14 February 2023 I, Robert Andrew Sliwinski, was nominated by the ciarb as arbitrator in this matter. On 15 February 2023 I wrote to the parties confirming my nomination to which neither party has objected. I am satisfied that I possess the jurisdiction to proceed to arbitrate the dispute.
8. The seat of the arbitration is England.
9. This Award is made following an application under the Commercial Rent (Coronavirus) Act 2022 (CRCA) to apply for relief from payment of protected rent debts.

Procedural History

10. The Applicant applied to the ciarb on ■ September 2022 for the appointment of an arbitrator under the ciarb Commercial Rent Debt Arbitration Scheme.
11. The amount of rent in dispute is ■■■■■ (including VAT).
12. The application enclosed a copy of the Applicant's Section 10 Notice and their Section 11 formal proposal and supporting evidence.
13. The Application also noted that a written statement verified by a Statement of Truth had been prepared and which would be sent to the Arbitrator on his/her appointment.
14. The reasons for the delay between the Applicant's Application and my appointment as Arbitrator on 14 February 2023 is unknown to me.

15. In my letter of 15 February 2023 I encouraged the parties to agree directions for the continuance of this matter.
16. On 24 February 2023 the Respondent issued a set of draft directions. The Applicant agreed those directions save for some timings and provided comments.
17. On consideration of the draft directions and comments I provided my CRCA Arbitration Directions dated 27 February 2023.
18. By email dated 10 March 2023 the parties confirmed agreement of the protected rent debt in the sum of £ [REDACTED] (inclusive of VAT).
19. On 24 March 2023 the Applicant provided their Statement and accounts.
20. On 4 April 2023 the Respondent provided their submissions and revised proposal in accordance with Section 11(4) CRCA.
21. By email dated 11 April 2023 I provided revised directions to reflect the early submissions made by both parties.
22. By email dated 26 April 2023 I provided further directions following the Applicant's request to make further submissions and the Respondent's request to provide submissions in response.

23. The Applicant provided further submissions and accounts on 3 May 2023 and the Respondent provided further submissions on 9 May 2023.
24. The Applicant provided a new three year forecast on 16 May 2023 followed by a narrative on 21 May 2023.
25. The Respondent provided their submission in response to the Applicant's three year forecast and narrative on 26 May 2023.
26. By email dated 15 June 2023 I informed the parties that my Award would be provided on 19 June 2023.

Background

27. The Applicant runs a number of [REDACTED] in the UK including the subject premises in this arbitration. The premises are known as [REDACTED].
28. The Applicant's business was interrupted by three national lockdowns which caused a collapse in [REDACTED]. The last lockdown ended on 29 March 2021 however, [REDACTED] were not allowed to reopen until 17 May 2021.
29. During the lockdown periods the [REDACTED] experienced a variety of restrictions which seriously impacted [REDACTED] and for part of that time resulted in the [REDACTED] being closed completely. I do not set out the specific time periods and restrictions in this my Award but note that they are set out in detail within the Applicant's written

statement.

30. In addition to the restrictions and closures, the Applicant was impeded by the lack of

██
██

31. The Applicant's ██████████ saw ██████████ from 2017 to 2021 reduced from a high of ██████████ in 2017 to a low of ██████████ 2020 and ██████████ 2021.

It is clear that the Applicant suffered substantial losses to its business during the years of the COVID restrictions.

32. A summary of the Applicant's statutory accounts for 2015 through to 2021 has been provided showing profits after tax of £██████████ prior to COVID and a loss of £██████████ ██████████ in 2020 and a loss of £██████████ in 2021.

33. The Applicant served notice upon the Respondent in accordance with Section 10(1)(a) of the CRCA on █ August 2022.

34. Rent is defined as an amount payable for the possession and use of premises plus a service charge plus interest on the unpaid amount. Protected rent occurs during a period in which the tenancy was adversely affected by coronavirus and was subject to a closure requirement beginning on ██████████ 2020 and ending on ██████████ 2021. The relief available under the Act may encompass writing off the whole or any part of the debt, giving time to pay the whole or any part of the debt by instalments and reducing the interest otherwise payable under the terms of the tenancy in relation to

the whole or part of the protected rent debt. Part 3 of the CRCA Section 23 gives a temporary moratorium on the enforcement of protected rent debts and the conclusion of an arbitration.

35. I note that the Applicant's parent company [REDACTED] having used up its revolving credit facilities filed for Chapter 11 Bankruptcy on [REDACTED] 2022. The Group is said to be entering into a court approved restructuring support agreement so that it can emerge from Chapter 11 Bankruptcy with a reduced debt which, the Applicant says, is maintainable as otherwise the whole Chapter 11 restructuring exercise would have been pointless. I have no evidence before me that shows that the Group has yet emerged from Chapter 11 Bankruptcy.
36. The Applicant and the Respondent have agreed that arrears of £ [REDACTED] (inclusive of VAT) relates to the COVID protected rent period.
37. The Respondent, by letter dated [REDACTED] September 2022, rejected the Applicant's proposal as not being acceptable to the Respondent and provided their own proposal to accept a Concessionary Rent of 70% of the protected rent debt within 28 days of acceptance. This proposal was not accepted by the Applicant.
38. Within its written statement the Applicant has again proposed, in accordance with Section 11(7)(b) of the CRCA, that the protected rent debt be shared by way of a 15% : 85% split which equated to 437 days rent free at the prevailing rate. The 15% balance is proposed to be paid by 24 monthly installments.

39. Within its Submission dated [REDACTED] 2023 the Respondent has provided a further proposal that 30% of the protected rent be written off and the remaining 70% to be paid in equal monthly installments over a 24 month period.

Is the Respondent viable as a going concern?

40. The Respondent is accepted as solvent by the Applicant and it is not claimed by the Respondent that its solvency will be affected by the making of an Award in this Arbitration and has not provided any evidence as to its financial position.

Is the Applicant viable as a going concern?

41. The matter of the Applicant's viability as a going concern was dealt with in the 31 December 2021 Draft Accounts at page 6 with an explanation at Note 1 of the accounts which says:

"The Directors of the Company have prepared the financial statements on a going concern basis which assumes the Company will be able to meet its future obligations as they fall due and the Company will settle all payments within the agreed terms.

The Company is reliant on financial and other support from a parent entity in order to meet its obligations and the Directors have received written confirmation from [REDACTED] the parent undertaking of the smallest group to consolidate the Company's financial statement of its intention to support the Company with financial and other resources as necessary such that the Company can meet its financial obligations as they fall due. Furthermore, the parent undertaking has confirmed that it will not seek the repayment of amounts advanced to the Company by the parent undertaking and/or other members of the parent undertaking's group unless

adequate financing has been secured by the company. This written support is available for at least the next twelve months from the date of approval of these financial statements.

The directors of [REDACTED], the ultimate parent company and the ultimate parent undertaking to consolidate the Company's financial statements, in the published results for the year ended 31 December 2021 recognised the uncertainty around the recovery of the [REDACTED] following the impact of COVID-19, and the potential risks that remain, which represent uncertainties with respect to the Group's ability to continue as a going concern, and as such any support from the ultimate parent may not be forthcoming in the event it is required.

Further details of the base case and severe but plausible scenarios are included in Note 1 to the Financial Statements which are publicly available

[REDACTED]

The Directors have not updated their assessment of going concern to reflect these additional matters. However, having considered the basis of preparation of the [REDACTED] Financial Statements, the Directors are satisfied that it remains appropriate to prepare the Company financial statements on a going concern basis. However, the inherent uncertainties outlined in the above represent material uncertainties that may cause significant doubt on the Company's ability to continue as a going concern and, therefore, to continue realising their assets and discharging their liabilities in the normal course of business. These financial statements do not contain any adjustments that would arise if the financial statements were not drawn

up on a going concern basis.”

42. I have reviewed the accounts and financial summaries provided by the Applicant and note that the accounts show an insolvent position. I also note that the continuing support of the parent company, who are themselves in Chapter 11 Bankruptcy although I note that it is expected that they will emerge from Chapter 11 Bankruptcy soon, is essential for the continued trading of the Applicant.

43. The forecasts provided for 2023 and 2024 show an improving position with a return to profitability of the Applicant's [REDACTED] in 2024. No explanation of how these forecasts have been calculated or what they are based upon is given.

44. Section 13(3) of the CRCA requires me to assess the viability of the Applicant company in order to grant any relief. Where Applicant is not viable and would not be viable should any relief be granted then the reference should be dismissed. The CRCA does not give any guidance as to viability however, as referred to by the Respondent, the Department for Business, Energy and Industrial Strategy Commercial Rent (Coronavirus) Act 2022 Guidance (“the Guidance”) dated April 2022 states at paragraph 6.3:

“In making the assessment of viability a key question is whether protected rent debt aside, the tenant’s business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.”

45. The Applicant’s viability is to be made at the time of the assessment being undertaken in this arbitration. In the initial statement the Applicant provided draft

accounts up to 2021 and has subsequently provided forecast accounts to the end of 2024. Whilst the basis of the forecast is unclear, it is the case that the Applicant's business is improving as more customers [REDACTED] as is borne out by the improved position shown from 2020 to 2021 in relation to the Applicant's overall business, albeit it still showing a significant loss, and the individual forecasts for [REDACTED]. The actual figures for the [REDACTED] [REDACTED] in 2022 show a loss once rent is taken into account with a forecast improvement of 15% for attendances each year thereafter. As already noted there is no explanation of the increase or why a 15% increase per annum is reasonable.

46. I must make my assessment of the Applicant's viability as at the date of this my Award. Currently the accounts, albeit in draft, show the Applicant to be trading at a loss and technically insolvent. It is clear that without the parent company's support the Applicant would not be able to survive. I accept that [REDACTED] are likely to improve with the information before me showing that [REDACTED] in 2022 have improved to 64% of pre-COVID [REDACTED] (2019) and the forecasts for 2023 and 2024 show a continued improvement albeit without a real explanation.

47. I can however come to no other conclusion than that the Applicant is not currently trading profitably as its Balance Sheet is showing a negative net worth of £[REDACTED] as at 31 December 2020 and it was therefore insolvent at that time. It is clear that the Applicant has survived only by the support of its parent company, [REDACTED]. I accept that the Applicant may eventually survive and become viable again but on the information before me and following my obligation under Section 13(3) of the Commercial Rent (Coronavirus) Act 2022 I do not find that the

Applicant has provided evidence that satisfies me that its business is viable even if the application for relief from the protected rent were to be granted.

48. On the basis on the information before me the Applicant is not viable and cannot be considered to be a going concern.

Costs

49. The Applicant has paid the arbitration costs in advance. As the Applicant has been unsuccessful in its application for relief I find that the Applicant should bear those costs.

50. In accordance with Section 19(7) of CRCA the parties are to meet their own costs.

I FIND AND DIRECT:

- i) The Application for relief under the Commercial Rent (Coronavirus) Act 2022 is dismissed.

- ii) Each party shall bear their own costs.

- iii) The Applicant shall bear the fixed costs (as paid in advance by the Applicant) of this arbitration.

Robert A Sliwinski
Arbitrator

The seat of this Arbitration is London

Dated: 19 June 2023