

**IN THE MATTER OF AN ARBITRATION UNDER THE
COMMERCIAL RENT (CORONAVIRUS) ACT 2022**

Case No: DAS-01380-N2XOS

BETWEEN:

XXXXXXXXXXXX LIMITED

Applicant

v.

XXXXXXXXXXXX LIMITED

Respondent

FINAL AWARD

Table of contents	Page
Introduction	3
Procedural matters	4
Legal Framework	9
Parties' final proposals	10
Issue between the parties	11
Matters to be determined by the tribunal	11
Findings and conclusions	12
The award	19

Introduction

1. The Applicant in this arbitration, xxxxxxxxxxxx Limited ('the Applicant'), is a single-purpose vehicle ('SPV') registered in xxxxxxxxx.
2. The Respondent, xxxxxxxxxxxx Limited ('the Respondent'), is the Applicant's landlord at premises known as xxxxxxxxxxxx ('the Lease'). The current rent, which was set in 2003, is £525,000.00 per annum (£131,250 per quarter), plus VAT amounting to £630,000.00 per annum (£157,500.00 per quarter).
3. The Applicant was represented throughout by Mr. xxxxxxxx a Director of the Applicant and the Respondent was represented by Hill Dickinson LLP.
4. The applicant states that, like many business tenants, it was unable to pay its rents due to the Covid-19 restrictions placed on businesses and individuals during the pandemic. While some landlords and tenants were able to agree on suitable terms for the tenants to continue trading after the restrictions were lifted, some landlords and tenants could not agree on how to proceed after the restrictions were lifted. This resulted in Parliament enacting the Commercial Rents (Coronavirus) Act 2022 ('the Act'), which provides for a landlord or a tenant who is unable to reach suitable agreements to resort to arbitration to determine whether the business tenant should receive any relief from its obligation to pay rents during the pandemic.
5. In this arbitration, the Applicant seeks relief from payment of a protected rent debt under the Act. The Applicant lodged an application pursuant to the provisions of section 10.4 of the Act, with the Chartered Institute of Arbitrators ('CI Arb'), which is an approved arbitration body for the purposes of section 7 of the Act, on or about 12 September 2022. In its application, the Applicant states that parties have failed to agree on relief from the payment of rent debt during the protected period. It also states that there are no other disputes between the parties.
6. The Applicant's case is set out in its letter to the Respondent dated 2 August 2022, in which it gave notice pursuant to section 10.1 of the Act. It states that "Our xxxxxx was closed and subject to restrictions for the period 21 March 2020 to 18 July 2021. That throughout this period, rent has fallen due and reimbursement for repairs and insurance has been demanded. These sums are protected by way of the Commercial Rent (Coronavirus) Act 2022". In its letter dated 12 September 2023, the applicant made its formal proposal to the Respondent, pursuant to Section 11(2) of the Act that "*You waive 229 days' rent. We pay the remaining rent, building repair and insurance costs due in respect of the protected period by way of 24 equal monthly instalments beginning one month after your acceptance. This proposal is made on the basis that no further sums will be due in respect of the protected period, no interest is charged on the late payment and the parties pay their own legal and professional fees arising, if any.*" It invites me to grant relief of about 50% of the protected rent debt and permit it to pay the remainder by instalments.

7. By its letter dated 23 September 2022, the Respondent rejected the Applicant's proposal, raised by way of a preliminary issue whether building repair in the sum of £183,789.45 is "protected rent debt" within the meaning of the Act. The Respondent's formal proposal pursuant to Section 11(2) of the Act was that "*all protected rent debt should be paid in full. However, our client is willing to agree to a repayment plan for you to pay all of the arrears over a period of 12 months, with protected rent debt being discharged by equal quarterly payments on this period*" The Respondent later revised its formal proposal slightly by extending the period of repayment from 12 to 18 months and reserving its right to claim interest if its proposal was not accepted.
8. I should point out that the Applicant's formal proposal is in its letter to the Respondent dated 12 September 2022, the same day the arbitration application was submitted to CI Arb.
9. On 28 February 2023, I was contacted and invited by the Dispute Appointment Service of CI Arb to act as an arbitrator in this matter. On 1 March 2023, I accepted the invitation, and on 7 March 2023, I was appointed as an arbitrator.

Procedural matters

10. On 20 March 2023, I issued my first procedural order in which, amongst other things, I directed the Applicant to respond to the Respondent's letter dated 23 September 2022 and, as part of its response, deal with the issue of whether the invoice dated 17 December 2020 for 'building repair' is a protected rent within the meaning of section 3 of the Act. I asked parties to attempt to agree on a list of issues and indicate if either of them wanted an oral hearing.
11. On 31 March 2023, the Applicant, pursuant to my first procedural order, sent a response to the Respondent's letter dated 23 September 2022, with me copied in. The Applicant attached a draft 2021 statutory account to its response and rejected the Respondent's formal proposal.
12. On the 14 April 2023, the Respondent responded to the Applicant's response to the said letter of the 23 September 2022 together with the enclosures. The Respondent applied for orders for the Applicant to "*(a) provide a response to the queries raised in this letter, verified by a statement of truth and (b) provide specific disclosure of specific documents, supported by a statement of truth, all within a timeframe that I deem fit. The documents requested were (i) Full and unredacted audited accounts for the Applicant xxxxxxxx Ltd for each financial year after March 2019, (ii) Full unredacted management accounts for the Applicant xxxxxxxx Ltd for each financial year after March 2019, (iii) For the Applicant, xxxxxxxx Limited, full and unredacted bank statements from March 2019, including savings, current and loan accounts; detailed financial records which should also identify amounts received from or paid to other Group Companies and the identities of those Group Companies, liquidity ratios, future profitability ratios and financial accounts as anticipated by the code, (iv) Evidence of profitability of the Applicant's business prior to the pandemic and on a forecast basis as well as other costs the Applicant incurred during the protected period; net of any assistance received, (v) Confirmation of and a detailed explanation*

of whether this cinema subsidises other properties within the group, or whether the cashflow goes towards serving debts at the group level, (vi) Confirmations required pursuant to paragraphs 3, 4 and 4 above. (vii) Any insurance that the Applicant had the benefit of and whether any relief was provided in that form”.

13. The Respondent also requested in its correspondence of 14 April 2023 an extension of time for parties to attempt to agree on a list of issues on or before 30 April 2023 and an extension of the time to file legal submissions, which was on or before 4 pm on 12 May 2023, by a sufficient period in anticipation of the above disclosure being ordered.
14. On 23 April 2023, I gave the Applicant the opportunity to comment on the Respondent's application for the orders as set out in paragraphs 12 and 13 above by 4 pm on 4 May 2023.
15. On the 4 May 2023, the Applicant responded the Respondent's letter of the 14 April 2023, stating that *“(i) the Applicant is a Single Purpose Vehicle company created by our predecessors and registered in Jersey. Copies of audited accounts for the years 2019, 2020 and 2021 are attached. The accounts for 2022 are not available at this time. (ii) Herewith our management accounts (actual and forecast) for the business at the premises for the years 2017 to 2023. Please note the dramatic collapse of the business in 2020 and 2021 as a result of the mandatory closures and coronavirus restrictions imposed on the business during the protected period. (iii) The Applicant does not have a bank account, nor a savings and loan account. The Applicant's place in the group's corporate structure is attached. There are no cross company payments or receipts. (iv) The attached management accounts demonstrate the profitability of the business at the premises before the pandemic struck. Our forecast for this year is +5% 2022 admissions. Please note the viability of the business going forward. (v) The Applicant is wholly owned by xxxxxxxxxx Ltd which operates 31 cinemas. All cinemas experience different fortunes at different times and therefore no one business subsidises another. Rather, xxxxxxxxxx Ltd and its subsidiaries makes a collective effort to make a return. (i) Please see above. (vii) The Applicant did not benefit from Business Interruption Insurance or similar cover.”*
16. On the 9 May 2023, I acknowledged receipt of Applicant's response and attachments.
17. On 17 May, I wrote to the parties, directing my query to the Applicant as the annual reports and financial statements attached to its response were unaudited, whereas it had stated in its response that the accounts were audited.
18. On 19 May 2023, the Applicant responded to my query and stated that the accounts were unaudited, apologising for the error.
19. On 21 May 2023, I issued a second procedural order.
20. On 1 June 2023, the Respondent applied for some variations to the order.

21. On 2 June 2023, I asked the Applicant for its comments on the request for a variation by 5 June 2023.
22. On 5 June 2023, having not received any comments from the Applicant, I granted the Respondent's application and varied the second procedural order.
23. On the same day, 5 June 2023, in compliance with paragraph 3 of the first procedural order, the Applicant sent to the Respondent, copying me, a document titled "*profit and loss account and other comprehensive income for the year end 31 December 2021*" and a Balance Sheet at 31 December 2021.
24. On the same day, 5 June 2023, both the Applicant and the Respondent sent to me, copying each other, their lists of issues, having not been able to agree on a single list of issues.
25. The Applicant's suggested issues were "*(i) Whether or not the building repairs invoice dated 17th December 2020 is a protected rent debt cost for the purposes of section 2(2)(c) of the Act. (ii) Calculation of the Protected Rent Debt. (iii) What if any further information the Arbitrator requires from either party. (iv) Confirmation from you whether or not your client is or is likely to become unable to pay their debts as they fall due per sec 15(3) of the Act. (v) The award*".
26. The Respondent's suggested list of issues "*(i) what is the protected Rent Debt? Is it £890,347.14 or £885,679.79? (ii) Is the Applicant's business viable (or would it be viable if the Applicant were to be given relief from payment of the Protected Rent Debt of any kind)? (iii) Is the Applicant's final proposal (as defined in CRCA s.14(11)) consistent with the principles in CRCA s. 15? (v) Is the Respondent's final proposal (as defined in CRCA s.14(11)) consistent with the principles in CRCA s.15? (v) If both parties' final proposals are consistent with the principles in CRCA s.15, which is the most consistent? (vi) What relief from payment of the Protected Rent Debt, if any, should be given to the Applicant, taking into account the parties' final proposals and the principles in CRCA s.15? (vii) what award should be made in respect of the arbitration fees and expenses under CRCA s. 19?*".
27. On 8 June 2023, I sent out to the parties the revised procedural order number 2.
28. On 30 June 2023, pursuant to paragraph 4b of the revised second procedural order, the Respondent served on the Applicant, copying me its Revised Formal Proposal in which it asked for the Protected Rent Debt to be paid in full and offered the opportunity for the Applicant to make the payment by way of instalments.
29. On 7 July 2023, in accordance with paragraph 4c of the revised second procedural order the Respondent sent to the Applicant and to me a copy of an agreed bundle.
30. On 21 July 2023, in accordance with paragraph 4d of the revised second procedural order the Respondent sent to the Applicant and I, its legal submissions and on the same day, the Applicant sent to the Respondent and I its legal submissions. The

Applicant's legal submissions referred to a document which had not been previously disclosed to the Respondent. A copy of the document, titled "xxxxxxxxx ltd 3 year forecast" for the period 2023 to 2025 was attached to the submissions.

31. On 28 July 2023, the Respondent challenged the introduction of new evidence by the Applicant, stating that it had not seen it before, that the document is provided after the deadline for disclosure and so the document was inadmissible.
32. On 1 August 2023 I wrote to parties on the issue of new evidence, offering the Applicant an opportunity to make an application for the new evidence to be admitted if he wanted to rely on it. This was because the Applicant adduced the document without the consent of the Respondent or the permission from me. I gave the Applicant till 4pm on the 7 August 2023.
33. On the 2 August 2023, the Applicant made an application for the new document to be admitted. It said "*Pursuant to your 1st August direction, please accept this email as the Applicant's application to serve as evidence the very latest management forecasts for the Applicants business at the premises 2023 to 2025, copy attached. My grounds for doing so are as follows:*

The Arbitrator will be aware that the Applicant is ultimately owned by xxxxxxxx Group plc which filed for chapter 11 bankruptcy on 7th September 2022. Several Landlords here in the UK were party to a winding up order. Others sued for non-payment of rent during covid. This perfect storm created unprecedented demands for information from the small in-house team which barely managed to cope at a time when the business was close to collapse. You will recall stepping in to assist the Respondent collect their evidence. Now that the group has emerged from chapter 11 and the endless demands from all parties have come to an end, the management team is now in a position to run the business again and produce the forecasts attached to the Applicant's submission.

It was not clear (at least to me being a lay person) that the bundle prepared by the Respondent's solicitor was a final call for evidence. I had assumed it was a folder containing the relevant correspondence and documents up to that date. After all, the Act requires the Arbitrator to consider the viability of the Applicant at the time of the award. Therefore, by definition, it makes sense for you to consider the very latest forecasts available. Similarly, the Act provides for repayment over 24 months. Therefore, the next two year's forecasts are relevant too.

I note the Respondent's complaint that the management accounts delivered on 4th May 2023 excluded the Applicant's 4DX business in the adjacent building at nos 1, 2, 3 4 and 8 Leicester Square. However, it was clear in the letter that the accounts were for the business at the premises. The premises in the subject lease do not include the adjacent demise.

I accept that it is of course up to you. You have of course reserved the right in your Procedural order 8th June 2023 to determine the admissibility of any evidence offered."

34. On 7 August 2023, I gave the Respondent the opportunity to comment on the Applicant's application within 7 days, and on 14 August 2023, the Respondent sent

me, copying the Applicant, its comments on the Applicant's application to adduce fresh evidence. The Respondent opposed the application and objected to the new evidence being admitted. Among other things, the Respondent stated that it would be unfair for the new document to be admitted now, as the Applicant had ample opportunity to adduce any documents it wanted pursuant to directions and before submissions were exchanged.

35. On 16 August 2023, I informed the parties by email that, after careful consideration of the Applicant's application to rely on the new evidence and the Respondent's objection, I have decided to grant the application and admit the fresh evidence. I stated in the email that I will give my reasons in my final award, which I now do. Although I do not accept the Applicant's point by its representative that, being a lay person, it was not clear that the bundle prepared by the Respondent's Solicitor was a final call for evidence, I accept that xxxxxxxx Group, the ultimate owner of the Applicant, went through a difficult period to the point of filing for Chapter 11 bankruptcy on 7 September 2022, which was capable of having a knock-on effect on other members of the group, including the Applicant, and so it might have had difficulty adducing all relevant documents in a timely manner.
36. I granted permission for the Respondent to file and serve a supplemental submission by 4 pm on 23 August 2023, dealing with any points raised by the new evidence. On the same day, the Respondent requested an extension of time to file and serve the supplemental submissions until 4 pm on 30 August 2023, as its Counsel was not available until that date.
37. On the same date, 16 August 2023, I gave the Applicant the opportunity to comment on the Respondent's request for an extension of time by 4 pm on 18 August 2023. Having not received any comments from the Applicant by the said deadline, I granted the Respondent's application and extended the time for the Respondent to file and serve supplemental submissions to 4 pm on 30 August 2023.
38. On 30 August 2023, the Respondent filed and served its supplemental submissions and requested permission to rely on an official copy of the register of title number xxxxxxxx about the property. The Respondent, in its application, states that the evidence is self-contained, hardly disputable, a matter of public record, and only submitted because the Applicant is now claiming CaPEX (Capital Expenditure) Reserve.
39. On the same day, 30 August 2023, I invited the Applicant to comment on the Respondent's request to rely on the official copy of registered number xxxxxxxx by 4 pm on 4 September 2023.
40. On 8 September, having not received any comments from the Applicant, I granted the Respondent's request, as I accepted the reasons provided by the Respondent for making the request to rely on the official copy as set out in paragraph 37 above. The need for reliance on the document only arose because of the new evidence adduced by the Applicant.

41. On the same day, 8 September 2023, I closed pleadings.
42. I had requested the parties to indicate whether they wished this matter to be determined following an oral hearing. Neither party indicated that they wished the matter to be determined following an oral hearing. Therefore, I make this award following consideration of papers only.

Legal Framework

43. The starting point is section 1(1) of the Act, which enables the matter of relief from payment of protected rent debts due from the tenant to the landlord, under a business tenancy, to be resolved by arbitration.
44. Section 2 of the Act provides that 'rent' includes both (a) rent in the lay sense (a payment for possession and use of the premises) and (b) an amount payable by way of service charge. For the purposes of the Act, 'service' means an amount payable (directly or indirectly) for repairs, etc.
45. Section 3(1) of the Act provides that a protected rent debt is a debt under a business tenancy consisting of unpaid protected rent. By section 3(2) of the Act, rent due under the tenancy is only protected rent if:
 - (a) The tenancy was adversely affected by coronavirus;
 - (b) The rent is attributable to a period of occupation by the tenant or a period within, the protected period applying to the tenancy.
46. Section 4 of the Act provides that a business tenancy was adversely affected by Coronavirus if, for any relevant period, the whole or part of the business, or the whole or part of the premises, was subject to a closure requirement. For this purpose, "a closure requirement" means a requirement imposed by Coronavirus Regulations which is expressed as an obligation to close businesses or premises, or parts thereof, every day at particular times.
47. Section 6(1) of the Act provides that "references to the matter of relief from payment of a protected rent debt are to all issues relating to the questions (a) whether there is a protected rent debt of any amount....".
48. Section 13 of the Act sets out the issues that the arbitrator must decide, and the order in which they need to be decided. The main questions for me under this section are as follows:-
 - (i) Is the tenancy a business tenancy, and is there a protected rent debt as defined by the Act?
 - (ii) Is the tenant's business viable, or would it be viable if rent relief were given?

- (iii) If so, should the tenant be given relief and, if so, what form should it take?
49. I am required to consider the formal proposals set out by both parties individually and decide which of them is more consistent with the principles set out in section 15 of the Act, which are as follows:-
- Section 15(1)
- (a) That any award should be aimed at –
- (i) Preserving (in a case falling within section 13(4)(a)), or
 - (ii) Restoring and preserving (in a case falling within section 13(4)(b)), the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency, and
- (b) That the tenant should, so far as it is consistent with the principle in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay.
50. Section 16 of the Act sets out the issues I need to consider in dealing with the second and third questions raised in section 13, namely: -

(1) In assessing viability of the business of the tenant, I must, as far as known, have regard to:-

- (a) The assets and liabilities of the tenant.
- (b) The previous rental payments made under the business tenancy.
- (c) The impact of coronavirus on the business of the tenant.
- (d) Any other information related to the financial position of the tenant that is appropriate.

(2) In assessing the solvency of the landlord, I must, as far as known, have regard to:-

- (a) The assets and liabilities of the landlord.
- (b) Any other information relating to the financial position of the landlord that I consider appropriate.

(3) In making any of the above assessment I must disregard the possibility of the tenant or landlord borrowing money or restructuring its business.

Parties' formal final proposals

51. Both the Applicant and Respondent made final proposals under section 11 of the Act.
52. The Applicant made a formal proposal for resolving the matter of relief when it made the reference to arbitration on the 12 September 2022. The Respondent made a formal proposal in response to the Applicant's proposal on the 23 September 2022. I gave both parties further time to submit any revised formal proposal. The Applicant did not submit a revised formal proposal, but the Respondent did submit a revised formal proposal dated 30 June 2023.

53. The Applicant's formal proposal is as follows:-

“You waive 229 days’ rent. We pay the remaining rent, building repair and insurance costs due in respect of the protected period by way of 24 equal monthly instalments beginning one month after your acceptance.

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

54. The Respondent's revised formal proposal is as follows:-

“...all protected rent debt should be paid in full. However, the Respondent is willing to agree a repayment plan for the Applicant to pay all of the arrears over a period of 18 months, with protected rent debt being discharged by equal monthly payment over this period. The Respondent is also willing to waive any interest on the arrears provided the arrears are repaid in accordance with this proposal. If the arrears are not repaid in accordance with this proposal, then the Respondent reserves the right to claim interest thereon.”

The issues between the parties

55. I directed parties to try and agree on a list of issues to be determined by me; failing that, each party should send me its list of issues. The parties could not agree on a single list, so each party sent its list to me, as set out in paragraphs 24 and 25 above.

56. The following facts are not disputed: (i) There is a protected rent debt. (ii) The protected period under section 5 of the Act is from 21 March 2020 to 18 July 2021. (iii) The Applicant served notice to the Respondent pursuant to section 10 of the Act. (iv) The Applicant made its application to arbitration within 6 months of the passing of the Act, pursuant to section 9 of the Act, namely on 12 September 2022. (v) The Applicant's business is viable. (vi) The Respondent is solvent and will not be affected by whatever award I make.

Matters to be determined by the tribunal.

57. I have considered the lists of issues submitted by the parties and from both lists, the issues between the parties which fall to me to determine are as follows: -

- (i) What the protected rent debt is, whether it is £890,347.14 or £885,679.79.
- (ii) Whether the Applicant's business will continue to be viable if part of the protected rent debt is not written off.

- (iii) Is the Applicant's proposal consistent with the section 15 principles?
- (iv) Is the Respondent's formal revised proposal consistent with the section 15 principles?
- (v) If both parties' final proposals are consistent with the section 15 principles, which is the most consistent?
- (vi) What relief from payment of the protected rent debt, if any should be given to the Applicant, taking into account the parties' final proposals and the section 15 principle?
- (vii) What award should be made in respect of the arbitration fees and expenses under section 19 of the Act.

Findings and conclusions

Issue 1: What the protected rent debt is, whether it is £890,347.14 or £885,679.79?

58. There is a difference between the parties as to the exact amount of the protected rent debt. The Applicant sets out on a document titled 'xxxxxxxxxxx -Protected Rent Debt,' attached to its letter dated 12 September 2022, that the protected rent debt is £890,347.14. The Respondent states in its letter to the Applicant dated 14 April 2023 that the protected rent debt is £885,679.79. There is therefore a difference of £4,667.35.
59. The Applicant's case is that the protected rent debt is £890,347.14 inclusive of VAT. It sets out at paragraph 5 of its submissions dated 21 July 2023 how it arrived at this sum, which takes into account an invoice for building repairs dated 17/12/2020, for the sum of £183,789.42. The Applicant refers to section 2(2)(c) of the Act, which basically defines what service charge should include.
60. The Respondent's case is that although the invoice dated 17.12.2020 referred to by the Applicant has that date on it, it relates to building repairs work which was carried out prior to the protected period. This was explained by the Respondent at paragraph 9 of its letter dated 14 April 2023 to the Applicant. The Respondent explained that building repairs work took place before the protected period. Referred to two invoices from the contractor who carried out the repairs, amounting to £9,334.71 (£2,400 and £6,934.71), which were paid by the Respondent on 31 October 2019 and 29 November 2019.
61. By clause 2(b) of the lease, the Applicant is liable to pay, by way of further rent, a sum equal to one-half of all expenditure incurred by the landlord in complying with its covenants in clauses 6(4) and 6(5), being covenants for external repairs and decoration.
62. The total amount for the repairs work done in 2019 is £9,334.71, 50% of which is the liability of the Applicant. 50% of £9,334.71 is £4,667.35.

63. I have carefully considered the parties' arguments and invoices of the repairs of 2019. It is not disputed that the invoice of 17.12.2020 was for building repairs work carried out in 2019, well before the protected period. It is equally not disputed that the Respondent paid the contractors the sum of £9,334.71, of which the Applicant is liable for 50% of the same pursuant to clause 2(b) of the lease.
64. Section 3(2)(b) stipulates that rent is protected only if it 'is attributable to a period of occupation by the tenant for, or for a period within the protected period applying to the tenancy.' The undisputed protected period is 21 March 2020 to 18 July 2021. It is therefore clear, and I so find, that building repairs work was undertaken and paid for by the Respondent outside the protected period, in 2019. The fact that the invoice for the Applicant's 50% was issued and sent to it in December 2020 does not make that 50% protected rent.
65. Accordingly, I find that the sum of £4,667.35 is not part of the protected rent debt as it is not rent that can reasonably be attributed to the protected period. It follows that the protected rent debt which I shall determine, and what, if any relief payment is to be given, is **£885,679.79**.

Issue 2: Is the Applicant's business viable (or would be viable if the Applicant were to be given relief from payment of the protected rent debt of any kind)?

66. Viability is not defined in the Act but the statutory guidelines I must follow. The guidance sets out at paragraph 6.3 that "*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, have the means and ability to meet its obligations and to continue trading*".
67. To assess viability, I am required to consider the provisions of section 16(1) of the Act. I see no need to go through these provisions as viability of the Applicant's business is not disputed.
68. At paragraph of its submissions dated 21 July 2023, the Applicant states that "*In any case, the actual and forecast accounts for the Applicant xxxxxxxxx 2 Ltd show a business that has the means and ability to meet its obligations and to continue trading*". Also, at paragraph 9 the Applicant accepts that its business is viable in accordance with section 13(4) of the Act. The Respondent at paragraph 34(3) of its submissions dated 18 July 2023, accepts that the Applicant's business is viable.
69. I am therefore mainly concerned with whether the Applicant's business will be preserved if it is not granted relief.
70. The Applicant submits that, to preserve its viability, the business will need to set aside some money to reinvest back into the xxxxxxxxx to ensure the quality of the product meets customers' ever more demanding expectations, whether through technology improvements or refurbishment, for example. To preserve the viability of

the business, I am required to make an adjustment to the annual EBITDA (Earnings before interest, taxes, depreciation, and amortization) to allow for this projected and necessary future spend. The Applicant states that refurbishments are expensive, with capital spending in the range of £5m to £7m being commonplace. Improvements in technology, such as digital projectors, 4DX, and Screen X auditoria, and reclining seats, all regularly cost £1m or more. Finally, setting aside £1.5m a year for such expenditure to ensure the cinema experience remains competitive in what is the most competitive theatre location in the world is a realistic allowance.

71. The Respondent expressed concerns about the quality and limitations of the evidence supplied by the Applicant in relation to its real financial situation. The Respondent states that the Applicant's financial information can only be supplied by the Applicant. There are evident inconsistencies in the information supplied by the Applicant, which cast doubt on the reliability of some aspects of the data and evidence presented by the Applicant. The data in neither set of the management accounts provided by the Applicant accords with that in the Applicant's statutory accounts. The Respondent expresses concerns over the Applicant's assertion that it has no bank account but fails to explain how it operates without a bank account. Having confirmed that it was a standalone enterprise, isolated from the other group companies, the Applicant's statutory accounts show that it was owed the sum of £5.761m by group undertakings at 31.12.2021, and the Applicant owed £420K to group undertakings.
72. The Respondent referred me to the Applicant's financial reports (actuals) for the period 31.12.2018 to 31.12.2022, as well as the Declared forecasts for the period 3.12.2023 to 31.12.2025. The Respondent submits that the reports show that the Applicant's business has made a sizeable profit every year, except for 2020, in which it made a modest loss. Based on the five full actual years to date (2018 to 2022), including the loss-making 2020, the Applicant's aggregate profit over that period has been £4.259m. The Applicant's forecasted profits for this year and the next two years total a further £16.262m, with its performance scheduled to improve further. In terms of the Applicant's assets, the Respondent states that at the last reported date (31.12.2022), it had total net assets of £17.353m. Over the years, the Applicant's net assets have never been less than £15m and are projected to rise to £33m.
73. The Respondent submits, finally on this point, that the Applicant's business at the xxxxxxxx, xxxxxxxxxx, is viable and, moreover, would be viable, even if no relief from payment were granted to the Applicant. Further, the viability of the Applicant's business will be preserved, and will not be adversely affected, even if the Applicant is required to pay the protected rent debt in full.
74. I have carefully considered submissions by the parties on the issue of viability and its preservation and considered the documents before me.
75. Section 16 of the Act requires me to make my assessment having regard to the assets and liabilities of the tenant, previous rental payments made under the business tenancy from the tenant to the landlord, the impact of coronavirus on the business of

the tenant, any other information relating to the financial position of the tenant I consider appropriate, and the financial position of the landlord.

76. The Respondent is solvent and will not be affected by whatever award I make, so all the financial information I needed should have been provided by the Applicant.
77. I have been provided with financial information by the Applicant, including accounts filed for the period 31.12.2018 to 31.12.2022. In this period, I note that in 2018, revenue/turnover was £6.472m, in 2019 it was £7.669m, in 2020 it was £1.560m, in 2021 it was £4.952m, and in 2022 it was £7.306m. Profit and loss for the same period were £632,806 in 2018, £963,854 in 2019, £977,815 in 2020, £1.342m in 2021, and £2.298m in 2022. The net current assets for the same period were £648,413 in 2018, £2.397m in 2019, £2.078m in 2020, £4.218m in 2021, and £4.902m in 2022. Finally, the net assets for the same period were £15.722m in 2018, £16.686m in 2019, £15.708m in 2020, £17.050m in 2021, and £17.353m in 2022.
78. The Applicant also provided me with Declared forecasts for the periods years ended 31.12.2023 to 31.12.2025. I note from the same that the Revenue/Turnover for 2023 is £9.841m, £11.254m in 2024, and £11.612m in 2025. The profit and loss for the same period are £4.770m for 2023, £5.649m in 2024, and £5.843m in 2025. The net current assets for the same period are £10.000m in 2023, £15.897m in 2024, £22.189m in 2025. The net assets for the same period are £22.124m in 2023, £27.773m in 2024, and £33.616m in 2025.
79. Both the actual accounts and forecasts provided by the Applicant show that its business has made a substantial profit every year except for the year 2020 when it made a modest loss in the overall scheme of things. The aggregate profit is significant, which can be explained by the fact that prior to COVID, the Applicant's business was making fairly large profits, and immediately after 2020, profits steadily rose, and the forecasts show even further rise in profit. The same applies to assets, with both actual net current assets reported and Declared forecasts showing a significantly improved and impressive financial position.
80. The Applicant states that its business does not have a bank account and gives no explanation as to how a business of its size and turnover operates without a bank account.
81. Having carefully assessed the financial position of the Applicant from the information provided to me, it shows that the business remained in profit throughout the pandemic with a modest loss in 2020. Had the full rental payment been made during the pandemic, the Applicant would still have remained in profit.
82. I am not persuaded by the Applicant's request for relief of 229 days' rent, which amounts to £395,260.27, being almost half of the protected rent debt. In fact, the Applicant's financial information shows a business that needs no relief whatsoever.

83. I have already made a finding that the protected rent debt is £885,679.79. I am satisfied that the Applicant can fund this amount of money in full and continue to run its business profitably.
84. It follows, therefore, that I am satisfied that the Applicant's business is viable and shall continue to be viable without the relief sought. I should add that relief is not for every business. Businesses that can afford to pay the rents and stay viable must pay their rents.

Issue 3: Is the Applicant's proposal consistent with the section 15 principles?

85. Having found that the Applicant is not entitled to the relief sought for the reasons already discussed above, it follows that its proposal is not consistent with the section 15 principles. The Applicant can easily afford to pay the protected rent debt and requires no relief.

Issue 4: Is the Respondent's formal revised proposal consistent with the section 15 principles?

86. I have found that the Applicant's financial position makes it possible for it to pay the protected rent debt in full without putting its business through financial stress. The Respondent has proposed that the Applicant be given an 18-month period to pay the full protected rent debt by instalments and has also offered that if the instalments are paid on a timely manner, it will waive any interest on the protected rent debt.
87. I find that the Respondent's formal revised proposal is consistent with the section 15 principles. This proposal will not compromise the viability of the Applicant's business, which will be preserved. It will also ensure that the protected rent debt is paid over a period.

Issue 5: If both parties' final proposals are consistent with the section 15 principles, which is the most consistent?

88. I have already made a finding that the Applicant's formal proposal is not consistent with the section 15 principles, and only the Respondent's revised proposal is consistent with the section 15 principles. There is, therefore, no need for me to choose between the parties' final proposals.

Issue 6: What relief from payment of the protected rent debt, if any should be given to the Applicant, taking into account the parties' final proposals and the section 15 principle?

89. I have found that the Applicant's proposal is not consistent with the section 15 principles and that the Respondent's revised formal proposal is consistent with section 15 principles. I must, therefore, make an award in the terms of the Respondent's revised formal proposal.

Issue 7: What award should be made in respect of the arbitration fees and expenses under section 19 of the Act.

90. Section 19(7) provides that, save in relation to the arbitrator's fees, the parties must meet their own legal costs.
91. As regards the arbitrator's costs, sections 19(5) and 19(6) require me to make an award requiring the Respondent to reimburse the Applicant half of the arbitration fee unless the circumstances of the case make another award more appropriate. This means I could award different proportions.
92. In its submissions as to costs, the Applicant refers me to the provision of section 19(5). It states further that it paid the arbitration fees in full to CI Arb and that parties must meet their own legal or other costs.
93. The Respondent submits that I should depart from the starting point, which is to make an award requiring it to reimburse half of the arbitration fee paid by the Applicant to an award with a different proportion, which may be zero.
93. The Respondent states that the Applicant has:
- (i) Unreasonably and unrealistically prosecuted this claim for relief from payment (in the form of a write-off of £395k of the protected rent debt), despite it being obvious that it was always highly profitable, except in 2020, with no debts, and possessing substantial assets and reserves which dwarf the protected rent debt.
 - (ii) Fundamentally mis-portrayed matters and the relevant state of affairs by initially presenting the accounts of a different entity, (xxxxxxx Ltd) maintaining that the business experienced a loss of £125m, which was not the case.
 - (iii) Put forward limited and selective figures which are mutually inconsistent (with assorted discrepancies unexplained), together with seemingly contradictory information (again unexplained).
 - (iv) Failed to engage meaningfully, e.g., by serving a revised (and more reasonable) formal proposal despite being given the clear opportunity to do so by the Respondent and arbitrator.
94. The Respondent submits, finally, that it would be wrong and unreasonable for the Respondent to have to bear any part of the arbitration fees and expenses which have been generated solely as a result of the Applicant's unreasonable and inappropriate stance and conduct and invites me to exercise my discretion to award that no part of the arbitration fees and expenses is to be reimbursed by the Respondent to the Applicant.

95. I have carefully considered the submissions of the parties on the issue of costs. While doing so, I reminded myself that I am required to disregard anything done by a party with a view to manipulating their financial affairs to improve their position.
96. I note, as I mentioned earlier, that the Applicant's first formal proposal is dated 12 September 2023. There is no evidence of a meaningful attempt to resolve this dispute before submitting it to Arbitration as the last resort. This concern is raised by the Respondent in its letter of 23 September 2023 to the Applicant.
97. I should note that the Respondent's letter mentioned above requested important financial information from the Applicant to assist the Respondent in formulating a revised proposal. However, the Applicant did not respond to the letter, nor did it provide the requested information until it was directed to do so by the first procedural order issued in March 2023. The Applicant did not give reasons for the delay which took about five months. This clearly points towards a reluctance on the part of the Applicant to seek an early resolution of this dispute, which is a relevant factor to consider when assessing the conduct of the parties during this arbitration for costs purposes.
98. The Applicant's conduct in terms of disclosure and providing its financial information has been unsatisfactory.
99. The Applicant states that its business has not got a bank account. However, the Applicant does not explain how a multi-million-pound business operates without a bank account, which is not only required for the safety of money that comes into the business but helps track cash balances of the business.
100. I am persuaded by the submissions of the Respondent in this regard, and I exercise my discretion to award that no part of the arbitration fees and expenses is to be reimbursed by the Respondent to the Applicant.

AWARD

94. After carefully reading and considering the pleadings of the parties, contractual documents and all the exhibits thereto, filed and served, and the correspondence, email exchanges between the Applicant and the Respondent, and the written legal submissions, and for reasons already set out above, I have decided that the Applicant's proposal is not consistent with section 15 principles and the Respondent's proposal is consistent with the section 15 principles so in full and final resolution of the claim I must make an award in terms set out in the Respondent's proposal as follows:

i) The Relief sought by the Applicant is Denied.

ii) The Applicant shall pay to the Respondent the full sum of the protected rent debt, which is £885,679.79, by way of 18 monthly instalments of £49,204.43, starting from the date of this award.

iii) No interest on the protected rent debt if paid in full within 18 months.

iv) The Respondent shall not reimburse the Applicant for the arbitration fee.

v) Each party shall bear its costs.

95. This award shall be published by the Chartered Institute of Arbitrators in an anonymized form.

MADE AND PUBLISHED by me, JULIUS NKAFU at LONDON, UNITED KINGDOM, the seat of this arbitration, on 2 November 2023.

Signed: Julius Nkafu, FCI Arb.
(Arbitrator)