

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

RE: Premises at [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 24 January 2002 between [REDACTED] PLC, [REDACTED] Limited and [REDACTED] Limited. On 2 October 2018 [REDACTED] Limited brought the leasehold interest.
4. The current Landlord is [REDACTED] Limited and the current tenant is [REDACTED] Limited.
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 7 March 2023 I, Robert Andrew Sliwinski, was nominated by the ciarb as arbitrator in this matter. On 9 March 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 to apply for relief from payment of a Protected Rent Debt.

Procedural History

10. The Applicant applied to the ciarb on 22 September 2022 for the appointment of an arbitrator under the ciarb Commercial Rent Debt Arbitration Scheme.
11. The amount of rent in dispute is £ [REDACTED] (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 7 March 2023 are unknown to me.
15. In my letter of 9 March 2023 I encouraged the parties to agree directions for the continuance of this matter.

16. By email dated 13 March 2023 I was informed that [REDACTED] [REDACTED] would be acting for the Applicant in this matter.
17. On 16 March 2023 the Applicant and Respondent both issued submissions and a set of draft directions.
18. On consideration of those submissions and draft directions I provided my CRCA Arbitration Directions dated 17 March 2023.
19. On 31 March 2023 the Applicant and the Respondent both provided their calculations of the Protected Rent Debt. The Applicant's calculation resulted in a sum of £ [REDACTED] whilst the Respondent's calculation resulted in a sum of £ [REDACTED].
20. Following my consideration of each parties' calculations, I requested by email dated 5 April 2023 for short submissions on the differences that I had found in the details provided to me by both parties as based on that information and noted the differences could not be reconciled.
21. On 6 April 2023 both parties provided further submissions. By email dated 7 April 2023 I again noted that the information provided by both parties could not be fully reconciled and save for any further submissions made by the Applicant I would accept the Respondent's lower Protected Rent Debt sum.
22. On 17 April 2023 the Applicant provided further submissions noting that queries were

raised to the Respondent's agents in relation to the allocation of rent and no response had been forthcoming. On consideration of these submissions, I asked the Respondent to provide clear answers to the queries raised following which I would provide a final answer to the Protected Rent Debt.

23. By email dated 19 April 2023 the Respondent confirmed agreement of the Protected Rent Debt in the sum of £ [REDACTED] (inclusive of VAT).
24. By email dated 25 April 2023 [REDACTED] withdrew from representing the Applicant conforming that the Applicant would continue and represent themselves in this matter.
25. On 28 April 2023 the Applicant provided their written statement dated 22 September 2022, draft statutory accounts for year ending 31 December 2021 and revised section 11 proposal. On 3 May 2023 the Applicant provided their summary management accounts for 2022 and in-house forecasts for 2023 and 2024.
26. On 12 May 2023 the Respondent provided their submissions and provided a revised proposal in accordance with Section 11(4) CRCA. The Respondent additionally confirmed that they did not require an oral hearing and that no further directions were required at that stage.
27. On 16 May 2023 the Applicant shared a recently generated three year forecast up to 2025.

28. By email dated 17 May 2023 the Respondent requested until 26 May 2023 to respond to the new forecast provided by the Applicant. By email of the same date I agreed to the Respondent's request.
29. On 26 May 2023 the Respondent provided their response to the Applicant's forecast figures.
30. By email dated 22 June 2023 the Applicant notified me that they wished to accept the Respondent's revised formal proposal dated 12 May 2023. The Respondent requested until 27 June 2023 to respond, I agreed to this request.
31. By email dated 27 June 2023 the Respondent stated that the Applicant's request to accept the revised proposal dated 12 May 2023 was not capable of acceptance and invited me to continue with drafting my Award.
32. By email of the same date I informed the parties that my Award would be provided by the end of the week (30 June 2023).

Background

33. The Applicant runs a number of [REDACTED] in the UK including the subject premises in this arbitration. The premises are known as [REDACTED]
[REDACTED]
34. 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.

35. During the lockdown periods the cinema 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.

36. In addition to the restrictions and closures, the Applicant was impeded by the lack of [REDACTED]
[REDACTED].

37. The Applicant's [REDACTED] saw [REDACTED] from 2017 to 2021 reduced from a high of 268,069 in 2017 to a low of 51,697 in 2020 and 67,167 in 2021. It is clear that the Applicant suffered substantial losses to its business during the years of the COVID restrictions.

38. A summary of the Applicant's statutory accounts for 2015 through to 2021 has been provided showing profits after tax of £16.1 million prior to COVID and a loss of £114 million in 2020 and a loss of £6.9 million in 2021.

39. The Applicant served notice upon the Respondent in accordance with Section 10(1)(a) of the CRCA on 2 August 2022.

40. 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 21 March 2020 and ending on 18 July 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.
41. The Applicant and the Respondent have agreed that arrears of £ [REDACTED] (inclusive of VAT) relate to the COVID protected rent period.
42. The Applicant by way of its letter dated 22 September 2022 provided its proposal that the Respondent waive 296 days of rent with the Applicant paying the remaining service charge and insurance costs due in respect of the protected period by way of 24 equal monthly installments beginning one month after the parties entered into a binding agreement.
43. The Respondent, by letter dated 30 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.

44. By letter dated 28 April 2023, accompanying its written statement, the Applicant has proposed, in accordance with Section 11(7)(b) of the CRCA, the costs arising during the protected period amount to £[REDACTED]. The Respondent waive one half of the costs amounting to £[REDACTED]. The Applicant to pay the other half, less the £[REDACTED] already paid, and that the revised proposal is made on the basis that no further sums will be due in respect of the protected period, and the parties pay their own legal and professional fees arising, if any.
45. By its letter dated 12 May 2023 the Respondent has provided a revised proposal that the agreed Protected Rent Debt owed to them is £[REDACTED], that the Respondent would be willing to offer the Applicant 40% relief on this sum in exchange for the Applicant paying the remaining 60% of the Protected Rent Debt, which totals £[REDACTED] over 24 monthly instalments. This revised proposal was made in conjunction with its alternative arguments as set out at paragraphs 11 to 15 of the Respondent's written submissions also of 12 May 2023. Accordingly, this revised proposal only comes into play in the event that I find that the Applicant is a going concern and may be afforded relief from payment of part or all of the Protected Rent Debt.

Is the Respondent viable as a going concern?

46. 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?

47. Item 5 of the Applicant's written statement says:

"Item 5. Impact on tenant

████████████████████. Before coronavirus, the tenant's financial position was steady and consistent. The closure requirements and coronavirus restrictions all but destroyed the tenant's 2020 and 2021 business.

A summary of the 2015 to 2020 statutory accounts is attached in Appendix B. Profit after tax averaged £████████ before the pandemic. In 2020, it slumped to a £████████ loss. 2021 will show another loss of £████████.

Provided customers return ██████████, the tenant company ought to recover on the very long run. However, the company's recovery will be held back and put into jeopardy if this and other Landlords insist on full payment of the rent and other rent sums arising during the protected period.

It is also imperative that the tenant company returns to pre pandemic profits as quickly as possible so that it can re-start its ██████████, abandoned since the start of the pandemic.

██

██

████████████████████. Without this spend, which requires a profit-making environment, the ██████████ will lose their competitive edge."

48. Within the Applicant's Annual Report for the year ending 31 December 2020, as provided by the Respondent, its states at note 1:

“Going concern

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] Plc, (the 'ultimate parent undertaking') that it will 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 ultimate parent undertaking has confirmed that it will not seek the repayment of amounts advanced to the Company by the ultimate parent undertaking and/or other members of the ultimate parent undertaking's group unless sufficient financing to meet its obligations as they fall due 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 the ultimate parent, in its published Interim Financial Statements for the six-month period ended 30 June 2021, recognised the uncertainty around the continued recovery of the [REDACTED] industry 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 over a period up to and including December 2022 are included in Note 1 to the Interim Financial Statements which are publicly available [REDACTED]

Subsequent to the approval of the Interim Financial Statements of [REDACTED] Plc for the six-month period ended 30 June 2021 ("the Interim Financial Statements"), the Group announced that it had reached an agreement with the dissenting shareholders of [REDACTED] Group with respect to the payment of the judgement on their outstanding consideration. Under this agreement, the Group paid \$[REDACTED] of the judgement to the dissenting shareholders and \$[REDACTED] has been placed into an escrow account to be available to the Group as additional liquidity under certain circumstances. The funds in the escrow account will be paid to the dissenting shareholders no later than March 2022. The Directors assessment at 30 June 2021 considered full payment of the balance and this did not result in any liquidity issues in the going concern period.

The Directors have not updated their assessment of going concern to reflect this additional liquidity up to March 2022. Having considered the basis of preparation of the [REDACTED] Plc Interim 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 above and in Note 1 of the ultimate parent's Interim Financial Statements represent material uncertainties that may cast 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.”

49. I have reviewed the accounts and financial summaries provided by the Applicant and note that the accounts show an insolvent position. No useful notes have been provided with the summary accounts and accordingly the basis of the summary accounts has not been explained. I also note from the 2020 Annual Report that the continuing support of the parent company, who are themselves in Chapter 11 Bankruptcy, is essential for the continued trading of the Applicant.
50. The forecasts provided for 2023 through to 2025 show an improving position with a return to profitability of the Applicant's [REDACTED] in 2023. No explanation of how these forecasts have been calculated or what they are based upon is given. The notes in the forecast state that [REDACTED] Plc is the ultimate parent company and that having filed for Chapter 11 Bankruptcy in the United States on [REDACTED] 2022 they are looking to re-negotiate the debt with external lenders and that the process is still ongoing. As at the date of this Award no further information has been provided by the Applicant in support of its financial position or the basis of its forecast for profitability in 2023 through to 2025.
51. 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.”

52. The Applicant’s viability is to be decided 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 2025. Whilst the basis of the forecast is unclear, it is the case that the Applicant’s business is improving as more customers return [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 the [REDACTED] itself. The actual figures for the [REDACTED] in 2022 show a loss once rent is taken into account with a forecast improvement of approximately 35% for turnover in 2023 and approximately 15% in 2024 and approximately 10% in 2025. As already noted there is no explanation of the increase or why these increase per annum are reasonable.

53. 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 2021 were 26% of pre-COVID admissions (2019) and the forecasts for 2022 through 2025

show a continued improvement in turnover to match pre-covid levels albeit without a real explanation.

54. 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 2021 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] PLC. 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.

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

Costs

56. 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.

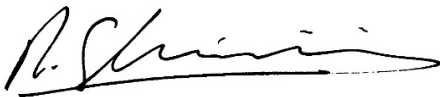
57. In accordance with Section 19(7) of CRCA the parties are to meet their own costs.

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 England

Dated: 29 June 2023