



In the Matter of An Arbitration pursuant to

The Arbitration Act 1996 and The Commercial Rent (Coronavirus) Act 2022

And in the Matter of a Dispute

Between

Cine -UK Limited

Applicant

And

West Suffolk Council

Respondent

Arbitrator's Final Award

of 9 June 2023

The Applicant is Cine -UK Limited having its registered office at 8th Floor Vantage London, Great West Road, Brentford, London, TW8 9AG (hereinafter "Applicant", "Cine-UK" or "Tenant") and is a subsidiary of Cineworld Group Plc. (hereinafter "Cineworld Group") which is currently restructuring its business under the protection Chapter 11 in the United States of America.

The Respondent is West Suffolk Council, a local authority, having its principal office at West Suffolk House, Western Way, Bury St Edmunds, Suffolk, IP33 3YU (hereinafter "Respondent" or "Suffolk Council" or "Landlord").

The Arbitrator is James Bridgeman SC FCIArb CARb of 4-5 Gray's Inn Square, London WC1R 5AH (hereinafter the "Arbitrator").

Whereas

This Arbitration is carried on pursuant to the Coronavirus Commercial Rent Debt Arbitration Scheme established by the *Commercial Rent (Coronavirus) Act 2022* (hereinafter “CRCA2022”) and subject to the *Commercial Rent (Coronavirus) Act 2022 Guidance to arbitrators and approved arbitration bodies on the exercise of their functions in the Act* (hereinafter the “Guidance”).

The subject dispute relates to rent payable by the Applicant to the Respondent in respect of a premises being a cinema at Ehringshausen Way, Haverhill, Suffolk, (hereinafter the “Premises”) which is the subject of a lease made between (1) The Council of the Borough of St. Edmundsbury as Landlord, and (2) Cine-UK Limited, as Tenant on 3 July 2008 (hereinafter the “Lease”). The Respondent is the successor in title to the Landlord. The Lease is for a term of 25 years from and including 16 June 2008.

The disputed rent is for the “protected period” as defined by CRCA2022 sub-s. 5(1), which is a protected rent debt pursuant to CRCA2022 sub-s.5(2).

On 2 August 2022, pursuant to section 10(1)(a) of the Commercial Rent (Coronavirus) Act 2022, the Applicant served on the Respondent, by letter, a notice of its intention to refer to arbitration, the dispute that had arisen between the Parties in relation to the calculation of the protected rent debt

On 16 August 2022, the Respondent acknowledged receipt of the Applicant’s said notice.

On 12 September 2022 the Applicant made a request for the appointment of an Arbitrator under the Commercial Rent (Coronavirus) Act 2013 enclosing the notice served pursuant to s.10 of the Act and a Formal Proposal for the purposes of CRCA2022 section 11.

On 7 October 2022 the Applicant Respondent served a Formal Proposal for the purposes of CRCA2022 section 11.

On 18 March 2023 the Dispute Appointment Service (DAS) of the Chartered Institute of Arbitrators (CIArb) confirmed by letter to the Arbitrator and the Parties, that pursuant to the Applicant’s request, the President of the CIArb had appointed James Bridgeman SC FCIArb CARb, as Arbitrator to determine the dispute under the Coronavirus Commercial Rent Debt Arbitration Scheme.

On 22 March 2023 Arbitrator’s Order for Directions No 1 was issued to the Parties.

On 20 April 2023, the Arbitrator issued Order for Directions No. 2 *inter alia* requiring the Parties to notify the Arbitrator on or before 15 May 2023. if either wished to request an Oral Hearing .

Further in said Order for Directions No 2, having considered the documentation submitted by the Applicant; the submissions of the Respondent; the length of time that had elapsed between the Parties' initial proposals on 12 September 2022 and on 7 October 2022 respectively, and the appointment of the Arbitrator on 18 March 2023; the Arbitrator granted each of the Parties the opportunity to put forward a revised formal proposal accompanied by supporting evidence submissions in respect of same as permitted by CRCA2022 sub-s. S11(6).

On 26 April 2023 the Applicant, as tenant made a revised formal proposal.

On 3 May 2023 the Respondent as landlord made a revised formal proposal.

On 3 May 2023 the Arbitrator issued Order for Directions No. 3.

On 11 May 2023 the Arbitrator issued Order for Directions No. 4 *inter alia* affording the Parties the opportunity to fully state their respective positions, on or before Thursday 18 May 2023.

On 16 May 2023, the Applicant, uninvited, purported to submit certain additional information; following a request by the Arbitrator for submissions, the Respondent consented to the admission of said certain additional information; the Arbitrator respecting the principle of Party autonomy, admitted and considered the additional information in making this Award.

Neither Party timely requested an Oral Hearing.

Timely final submissions on the Parties respective positions were received from both Parties.

On 30 May 2023, the Arbitrator circulated a draft of this Award and invited the Parties to make submissions on whether, and, if so, to what extent the Award should be redacted to comply with the Arbitrator's obligation pursuant to CRCA2022 sub-ss 18(3)-(4); and how the Arbitrator should apportion the Arbitration fees and expenses in accordance with CRCA2022 s.20.

On 5 June 2023 the Respondent submitted that there is no requirement for any part of the award to be redacted and confirmed that the Respondent is amenable to paying a contribution toward those costs, up to a share of 50% of the Arbitrator's fees and expenses.

No further submissions were received from the Applicant.

1. Applicant's Position

1.1 The Applicant avers that its business is viable; that the business carried on by the Applicant at the Premises is viable; and that it is expected that its parent corporation Cineworld Group, will emerge from the Chapter 11 protection as a newly solvent and viable entity, with reduced debts of US \$ 1.5 billion down from US \$6 billion.

Applicant's Position on the Threshold Question of Viability of the Applicant

Viability Test

1.3 Addressing the threshold provision in CRCA2022 sub-s.13(3), as to whether its business is viable, the Applicant submits that while the legislation places an obligation on the Arbitrator to assess the viability of the Tenant's business, "viability" is not a defined term in the legislation.

1.4 The Applicant states that the statutory provisions are supplemented by the Guidance at paragraph 6.3, which states that the absence of definition is deliberate because of the '*vast array of different business models*'. The Concise Oxford Dictionary and the Oxford Dictionary of English defines viability as "*capable of working successfully, feasible*". The Cambridge English Dictionary defines it as "*able to exist, perform as intended, or succeed*".

1.5 The Guidance, at paragraph 6.3, goes on to state that "*[i]n 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.*"

1.6 The Applicant submits that the protected rent debt must therefore be left out of account in assessing viability.

1.7 The Applicant adds that CRCA2022 subs.16(1) imposes obligation on the Arbitrator, so far as is known, to have regard to the assets and liabilities of the Tenant, including any other tenancies to which the Tenant is a party. Accordingly, it is the Tenant's business as a whole that must be viable, not just the business conducted at the Premises. The Tenant's business is the operation of 72 cinemas throughout the UK held by way of a similar number of tenancies. (The Arbitrator notes that elsewhere the number of cinemas is stated to be 80).

1.8 Viability is to be considered as at the time of the assessment per CRCA2022 sub-s. 13(3)(a), however it is submitted that both common sense and paragraph 6.3 in the Code tell us that viability is not a single point in time but requires a forecast of future revenue and costs.

1.9 The Applicant submits that the maximum period over which the protected rent debt may be spread or deferred if relief is granted is 24 months, and it would be in the spirit of the Act to take this as the future period over which viability is considered.

Applicant's Financial Position at Present

1.10 In late, additional submissions, which were admitted with the consent of the Respondent, the Applicant adduced in evidence, a document described as the “*annual statutory accounts, actuals and forecast, for Cine-UK Ltd for the years 2015 to 2025*” which consists of only the following table (hereinafter referred to as “Applicants Table 1” and two brief notes¹ :

Applicant's Table 1

CINE-UK Ltd - Summary of statutory accounts 2015 to 2021 actual, 2022 to 2025 forecast											
£000s	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
T/o	224,887	239,172	253,149	259,080	257,476	61,576	130,291	194,869	262,835	301,345	311,281
Gross Profit	65,367	68,969	63,483	55,683	87,407	5,094	29,442	42,631	73,858	92,950	96,574
Operating Profit	45,134	32,011	26,289	10,138	2,978	(87,450)	22,047	341	32,173	46,622	49,520
Adjusted EBITDA	56,173	44,672	40,138	32,101	43,356	(1,117)	20,289	40,414	71,105	89,915	93,447
Profit after Tax	40,722	26,471	23,143	6,987	(16,733)	(114,574)	(6,823)	(23,479)	8,353	22,802	25,700
Operating lease rent/finance costs	26,641	26,641	27,613	31,564	23,721	27,220	28,546	23,820	23,820	23,820	23,820
Net assets	46,439	43,044	66,303	104,373	51,951	(62,623)	(69,444)	(98,377)	21,167	22,225	22,356

1.11 The document forecasts that in the year 2023, the Tenant will make an operating profit, based on admissions climbing to 70% of the pre-Covid level in 2019, up from 61% last year when fewer movies were released. Inflation is assumed at 5% per annum. The document further notes that net assets are returning to half the pre-Covid level.

1.12 The Tenant avers that therefore its business will have the means and ability to meet its obligations and continue trading this year and its business is viable.

Applicant's Business at the Premises

1.13 The Tenant further submits that CRCA2022 sub-s.16(1) requires the Arbitrator, so far as is known, to have regard to any other information relating to the financial position of the Tenant that the Arbitrator considers appropriate and in this regard provides information relating to the business being carried on at the Premises.

1.14 In this regard the Applicant refers to a “*summary of our in house management accounts, actuals and forecast, for the Haverhill cinema for the years 2017 to 2024*” and submits that in 2023, the business at the Premises will generate the earnings to pay the rent due on the subject property

¹ “1. Cineworld Group Plc, the ultimate parent company, filed for Chapter 11 bankruptcy in the United States on 7th September 2022. As part of Chapter 11, Cineworld is looking to re-negotiate its debt with external lenders, with the aim of reducing the overall liability of the Group. The process is still on-going and subject to material change; however, Management have forecasted for this in 2023, resulting in a positive net asset position of the above entity by the end of 2023.

2. Management estimate Cine-UK Limited will be loss making in 2022 because of a difficult trading environment post-pandemic and accounting implications because of chapter 11 filings (additional impairments and high cost of interest). Trading is forecasted to return to pre-pandemic levels in 2024 resulting in a return to profitability.”

and post a profit. This forecast is based on admissions climbing to 67% of the pre-Covid level in 2019, up from 58% last year when fewer movies were released.

1.15 The Applicant argues that these forecasts prove that the business at the Premises has the means and ability to meet its obligations and to continue trading this year and going forward; is viable; and has the means and ability to pay part of the protected rent debt over 24 months.

Impact of the Pandemic on the Applicant

2.1 The Applicant submits that it has been seriously impacted by the pandemic as reflected in the drop in its customer admission numbers. The decline over a six year period was as follows 2017 (163,589), 2018 (164,553), 2019 (158,193), 2020 (34,439), 2021 (59,500), 2022 (92,329).

2.2 In a note within draft Annual Report and Financial Statements for the year ended 31 December 2021, which has been submitted by the Applicant, the Directors explain: *“All of the Group’s cinemas were closed on 17 March 2020 in response to the first wave of COVID-19. The estate was reopened on 31 July 2020 but on 8 October 2020, as a result of continued limitations to content and further changes to the expected film release schedule for 2020, the Company’s investments temporary closed their cinema operations. The Company’s investments reopened their cinema operations in May 2021. Whilst Coronavirus has had a significant negative impact on the short term operations of the Company during 2020, the Directors believe the Company can continue as a going concern as outlined within note 1.”*

2.3 A summary of the 2015 to 2021 statutory accounts for the Applicant, attached in an appendix to the submissions show that profit after tax averaged £16.1 million before the pandemic, but the government’s closure requirements and coronavirus restrictions all but destroyed the Tenant’s 2020 business in 2020 and 2021. In 2020, it slumped to a £114 million loss and it is expected that the accounts for 2021 will show another loss of £6.9 million.

2.3 Before coronavirus, the Tenant’s business carried on at the Premises held steady and consistent. The closure requirements and coronavirus restrictions all but destroyed the 2020 and 2021 business.

2.4 In this regard the Applicant refers to a summary of the 2017 to 2021 management accounts for its business at the Premises, and states that *“full management accounts (excluding head office G&A) for 2022 are attached in annexes to the submissions”*.

2.5 The Applicant submits that the EBITDA for its business at the Premises averaged £58,000 before the pandemic. In 2020 and 2021, it slumped to losses of £364,000 and £143,000, respectively. In 2022, the Applicant made a small recovery.

2.6 The management statements for the worst affected half years 2020H1, 2020H2, and 2021H1 make particularly bleak reading posting EBITDA losses of £123k, £240k and £149k.

2.7 The Tenant avers that its net asset and liabilities position since 2015 is as follows:

Year	£000
2015	46,439
2016	43,044
2017	66,303
2018	104,373
2019	51,951
2020	(62,623)
2021	(69,097)

3. Submissions in Support of the Applicant's Proposal

3.1 In support of its formal proposal as revised, the Applicant argues that before coronavirus, the Tenant's financial position was steady and consistent and provided customers return to cinemas, it ought to recover in the very long run, but that its recovery will be held back and put into jeopardy if the Respondent and other Landlords insist on full payment of the rent and other rent sums arising during the protected period. Specifically addressing the protected rent at the Premises, which is the subject of this Arbitration, the Applicant avers that recovery will be held back and put into jeopardy if full payment of the protected debt arising during the protected period is awarded.

3.2 The Applicant further argues that it is also imperative that it should return to pre pandemic profits as quickly as possible so that "it can re-start its capex programme", abandoned since the start of the pandemic. (The Arbitrator notes that "its capex programme" is not explained in the submissions.)

3.3 The Applicant's final proposal is to pay £134,580.91 (i.e. £270,830.01 less £136,249.10) paid over 24 months.

3.4 The Respondent final proposal is to accept £228,823.55 (i.e. £270,830.01 less £42,002.46) paid over 12 months.

3.5 The Applicant refers to a forecast of its management accounts for the year for 2023 and 2024. The protected rent debt is excluded and the Applicant argues that the recovery is ongoing, but the business going forward will be able to meet its debts provided it is not held back by protected rent debt payments.

3.6 The Applicant argues that the Respondent's formal proposal will hold back the Applicant's recovery and push the business back into the red at a time when it requires support to restore its viability which is contrary to the Arbitrator's principles set out in clause 15 of the Act.

3.7 By contrast, it is argued that the Applicant's formal proposal enables the business to break even in line with the Arbitrator's principles set out in clause 15 of the Act.

3.8 The Applicants forecasts for its business at the Premises, are set out in a table (hereinafter "Table 2") as follows:

Applicant's Table 2

Cineworld Haverhill MAs	2017	2018	2019	2020	2021	2022	2023	2024
	Actual	Actual	Actual	Actual	Actual	Actual	Fcast	Fcast
Box Office - Total	927	965	959	215	435	621	750	827
Concession	359	368	374	76	198	278	336	370
Total Advertising	76	71	78	18	24	56	59	62
Other Income	63	71	112	22	59	66	80	88
Revenue	1,426	1,476	1,523	331	717	1,021	1,224	1,346
Total Film Rental	393	408	410	84	168	251	303	334
Total Royalty cost	11	13	12	(5)	4	5	6	7
Total Concession/Retail	78	78	76	15	39	54	65	72
Ticket, Credit card & Unlimited	19	22	22	8	11	20	24	27
Total Cost of sale	501	521	520	102	222	330	398	439
Operating Gross Profit	925	954	1,003	229	494	691	826	907
Labour	312	287	296	138	200	339	356	374
Repairs & Maintenance	65	58	61	48	3	37	39	41
Utilities	56	63	65	35	48	76	84	88
Marketing	19	20	29	11	12	18	19	20
Other Operational Expenses	73	85	91	35	44	82	86	90
Rates and Service Charge	45	40	35	11	14	29	30	32
TOTAL CONTROLLABLE EXPENDITURE	569	552	577	278	322	581	614	645
EBITDAR	356	402	426	(50)	172	110	212	263
Rent	148	158	185	185	185	185	179	190
Protected rent debt								
EBITDA	207	244	242	(234)	(12)	(75)	33	73
Attendance	163,589	164,553	158,193	34,439	59,500	92,329	106,178	111,487

3.9 In support of its arguments the Applicant provides a further table (hereinafter “Table 3”) in which it sets out its forecast of how the Parties respective proposals for rent due for the Premises would impact on the business carried out at the Premises:

Applicant’s Table 3

Cineworld Haverhill MAs	2023	2024	2023	2024
	Fcast	Fcast	Fcast	Fcast
	Respondent's proposal		Applicant's proposal	
Box Office - Total	750	827	750	827
Concession	336	370	336	370
Total Advertising	59	62	59	62
Other Income	80	88	80	88
Revenue	1,224	1,346	1,224	1,346
Total Film Rental	303	334	303	334
Total Royalty cost	6	7	6	7
Total Concession/Retail	65	72	65	72
Ticket, Credit card & Unlimited	24	27	24	27
	0	0	0	0
Total Cost of sale	398	439	398	439
Operating Gross Profit	826	907	826	907
Labour	356	374	356	374
Repairs & Maintenance	39	41	39	41
Utilities	84	88	84	88
Marketing	19	20	19	20
Other Operational Expenses	86	90	86	90
Rates and Service Charge	30	32	30	32
TOTAL CONTROLLABLE EXPENDITURE	614	645	614	645
EBITDAR	212	263	212	263
Rent	179	190	179	190
Protected rent debt	114	114	34	67
EBITDA	-82	-42	-1	5
Attendance	106,178	111,487	106,178	111,487

3.10 The EBITDA if the Applicant’s proposal were to be accepted for the years 2023 and 2024 would break even approximately whereas if the Respondent’s proposal were accepted the EBITDA for those years would be (-£82,000) and (-£42,000) respectively.

4. The Respondent's Position

Threshold Question on Viability of the Applicant

- 4.1 In submissions on 11 April 2023, the Respondent confirmed that, excepting the rent due during the Protected Period, all rent due for the Premises has been paid and there are no other arrears owed.
- 4.2 The Respondent asked the Arbitrator to consider the following matters in deciding whether, for the purposes of s.13(3) of the Act, the Tenant's business is currently viable or would become viable if the Tenant were to be given relief in relation to the protected debt.
- 4.3 The Respondent argues that the date for determining the viability of the Tenant's business is now. The information provided by the Tenant showing the net asset and liabilities is historic, and does not include any information since 2021. Therefore, it is not possible to use this information to determine viability as at the date of assessment. The burden for so doing rests with the Tenant.
- 4.4 At paragraph 2 4(i), the Tenant's submission states, *"Provided customers return to this cinema, the business ought to recover in 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"* (emphasis added).
- 4.5 This statement is speculative at best and is not itself evidence of the viability of the Tenant's business at this time. Indeed, no evidence has been submitted that the debt due to the Respondent alone will prevent the business being viable.
- 4.6 The Respondent submits that the viability to be determined is that of the Tenant's whole business, not the viability of the business at the Premises in isolation.
- 4.7 The Tenant refers to the company's recovery being held back and put into jeopardy if the Landlord and other landlords insist on full payment of the rent. The Tenant has provided no information relating to other arbitrations or negotiations taking place.
- 4.8 Without details of the rent debts outstanding in respect of the other leaseholds and, in particular, any which are subject to arbitration and/or negotiations for rental arrears discounts, the Arbitrator cannot sensibly determine that the Tenant's business is viable or will be. Indeed, the statement makes it plain that the Tenant's business will not be

viable even if relief is given in respect of the protected rent debt for this site unless it is also given in respect of other sites too. That cannot be assumed.

4.9 Noting that the first stage of this process is the determination of whether the business in question is viable, at page 16 of the draft annual report and financial statements for the year ended 31 December 2021, reference is made to the Tenant being “reliant on financial and other support from a parent entity in order to meet its obligations.”

4.10 The Arbitrator may consider this financial support to be (or likely to be) a loan and therefore it must be disregarded for the purpose of determining viability: s.16(3)(a) of the Act. Even if not a loan, a business which is wholly reliant upon its parent company for cash injections (to which it is not otherwise contractually entitled) is not a viable business in its own right.

4.11 Further, it is stated at page 16 that the directors acknowledge the inherent uncertainties that may cast significant doubt on the Company's ability to continue as a going concern. As such, the business should be deemed to be unviable in its own right on its own evidence and this case should be dismissed under section 13(3) of the Act.

4.12 The Respondent refers to the Final Award decision in an arbitration pursuant to the CRCA2022 between *Commerz Real Investmentgesellschaft mbH (Applicant) and RHL Realisations 2022 Limited (formerly Rush Hair Limited) (in creditors' voluntary liquidation)*², in which it submits the arbitrator considered the tenant respondent's viability and an appropriate approach to the question is set out from paragraph 57 of the decision, including as to when, as here, it appears that the protected debt in question is a mere “drop in the ocean” of the tenant's business' debt and liabilities; almost £70m net liabilities in 2021.

4.13 Therefore, the Landlord invites the Arbitrator to find that the Tenant has provided insufficient information to demonstrate the current viability of its business or that any relief granted (in this arbitration alone) will be sufficient to make the business viable. In those circumstances the reference ought to be dismissed pursuant to s.13(3) of the Act and the full rent debt will remain payable.

4.14 On 23 May 2023 the Respondent added its final submission further to the Arbitrator's letter of 19 May 2023, and supplemental to the Landlord's submission of 11

² [https://www.falcon-chambersarbitration.com/images/uploads/news/CRCA_Final_Award_\(Signed\)_18.7.22.pdf](https://www.falcon-chambersarbitration.com/images/uploads/news/CRCA_Final_Award_(Signed)_18.7.22.pdf)

April 2023, in which it confirmed that its submissions set out in its submission of 11 April 2023 remain an accurate representation of the Landlord's position.

4.15 Having considered the additional information presented by the Applicant on 6 May 2023, the Respondent's view is that the additional information does not adequately address the Applicant's assertion that Cine-UK is a viable company or that any relief granted (in this arbitration alone) will be sufficient to make the business viable.

4.16 The additional information is provided by the Applicant described as a "*summary of statutory accounts 2015 to 2021 actual, 2022 to 2025 forecast.*" However, there is no information provided to indicate what the figures are based on, nor is there any evidence of external verification of those figures.

4.17 If the Arbitrator accepts the additional information as a positive indication as to the Applicant's viability, the Respondent is of the view that this document does not assist the Arbitrator in determining whether the Applicant's final formal proposal is necessary to ensure its viability. The amount of rent outstanding for the relevant period is a small fraction of the sums cited in the additional information, and it is difficult to see what impact any rent relief for the site in question will have on the financial circumstances of the Applicant's wider business.

5. The Law and Interpretation

5.1 This Arbitration is governed by Arbitration Act 1996 and CRRA2022. The Arbitrator is also obliged to proceed in accordance with Guidance and in particular Part 1 thereof which is statutory guidance issued under section 21(1)(a) of the CRCA2022 to guide arbitrators in relation to the exercise of their functions under Part 2 of the Act. The legislation is also supplemented by the Code.

5.2 The governing law sets out the procedure to be followed, the steps to be taken by the Arbitrator, the thresholds to be met, as well as the principles to be applied in reaching the decision and making the Award.

5.3 CRCA2022 s. 13 sets out the awards open to the Arbitrator.

Procedural Requirements

5.4 CRCA2022 ss. 9, 10, 11, and 12 prescribe the procedure to be followed by the Parties in making a reference to arbitration where the tenant and the landlord under a business

tenancy are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt.

5.5 The provisions govern the time for making the reference (sub-s. 9(2)), the requirements for making the reference (s. 10), and the obligation to include a formal proposal for resolving the matter in a reference to arbitration.

5.6 The Parties have complied with these provisions. Neither Party has raised any procedural objection. There is no need to quote the legislative provisions extensively here, and where relevant they are mentioned elsewhere in this Award.

5.7 It is helpful at this point however to note that the procedure requires the reference to Arbitration to be accompanied by a formal proposal for resolving the matter of relief from payment of the protected rent debt in issue (sub-s. 11(1)); the “other party to the arbitration” may then put forward a formal proposal in response; and subsequently each party may put forward a revised proposal.

5.8 CRCA2022, sub-s.14 (2) requires the Arbitrator to consider any final proposal put forward to it by a party under section 11 before making an award.

5.9 The Arbitrator has afforded both Parties the opportunity to reconsider their original proposals, and furnish revised proposals, as permitted by CRCA2022 sub-s. S11(6). The Parties have availed of the opportunity and the Arbitrator has considered their respective final formal proposals in making this Award.

Determination of Threshold Issues

5.10 CRCA2022, sub-ss 13(2) sets a number of threshold issues to be considered and determined before the Arbitrator may proceed to determine the substantive issues in dispute. The Arbitrator may not proceed to make a determination on the substantive issues if “(a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made, (b) the tenancy in question is not a business tenancy, or (c) there is no protected rent debt, the arbitrator must make an award dismissing the reference.” Nothing arises out of the provisions of CRCA2022, sub-ss 13(2) in this Arbitration.

5.11 However of core relevance is, CRCA2022, sub-ss 13(3) which provides that “*[i]f, after assessing the viability of the tenant’s business, the arbitrator determines that (at the time of the assessment) the business - (a) is not viable, and (b) would not be viable even*

if the tenant were to be given relief from payment of any kind, the arbitrator must make an award dismissing the reference.”

5.12 If, after making that assessment, the arbitrator determines that at the time of the assessment the business- (a) is viable, or (b) would become viable if the tenant were to be given relief from payment of any kind, CRCA2022 sub-ss(4)-(5) provide that the arbitrator must resolve the matter of relief from payment of the protected debt in issue, by (a) considering whether the tenant should receive any relief from payment and, if so, what relief, and (b) making an award in accordance with section 14.

Principles to be Applied in Determination of Substantive Issues

5.13 CRCA2022, sub-s 15 (1) sets out the principles which govern this Arbitration and provide that any award should be aimed at

- i. preserving (in a case falling within section 13(4)(a)), (i.e. is viable) or
- ii. restoring and preserving (in a case falling within section 13(4)(b) (i.e. would become viable if relief were given),

the viability of the business of the tenant, so far as that is consistent with preserving, the landlord’s solvency, and

- iii. 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.

5.14 In considering the viability of the tenant’s business and the landlord’s solvency for the purposes of subsection (1), the arbitrator must disregard anything done by the tenant or the landlord with a view to manipulating their financial affairs so as to improve their position in relation to an award to be made under section 14.

5.15 Where, as in this case, both Parties have pursuant to CRCA2022 ss.11, made formal proposals for resolving the matter of relief from payment of a protected rent debt, the arbitrator is required to consider any final proposal made by the Parties and (a) if the arbitrator considers that both proposals are consistent with the principles in section 15, the arbitrator must make the award set out in whichever of them the arbitrator considers to be the most consistent; (b) if the arbitrator considers that one proposal is consistent with the principles in section 15 but the other is not, the arbitrator must make the award set out in the proposal that is consistent.

Assessment of “viability” and “solvency”

5.16 The approach that the arbitrator is required to adopt when assessing the “viability” of the tenant and the “solvency” of the landlord are set out in CRCA2022 s.16:

- (1) In assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to—
 - (a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party,
 - (b) the previous rental payments made under the business tenancy from the tenant to the landlord,
 - (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.
- (2) In assessing the solvency of the landlord, the arbitrator must, so far as known, have regard to—
 - (a) the assets and liabilities of the landlord, including any other tenancies to which the landlord is a party, and
 - (b) any other information relating to the financial position of the landlord that the arbitrator considers appropriate.
- (3) In making an assessment under subsection (1) or (2), the arbitrator must disregard the possibility of the tenant or the landlord (as the case may be)—
 - (a) borrowing money, or
 - (b) restructuring its business.

6. Arbitrator’s Reasons

The Applicant’s Viability and the Statutory Threshold

6.1 This dispute relates to only one of approximately 72 to 80 premises where the Applicant operates its cinema business. The Respondent has reasonably argued that the rent which

is the subject of this dispute is only a drop in the ocean in the context of the Applicant's enterprise.

- 6.2 The Applicant is the only Party with knowledge of its arrangements in respect of other tenancies. It was open to the Applicant to provide an expert report on how the present dispute fits within the financial circumstances of the Applicant. Where disputes continue to exist in relation to other tenancies it was open to the Applicant to apply to consolidate any arbitral proceedings. The Code at paragraph 71 states: "*Consolidation of arbitration proceedings: there may be situations in which the tenant and landlord are in dispute in relation to protected rent debts for multiple business tenancies. Our recommendation would be for the applicant (or respondent) to indicate to the approved arbitration body that there are multiple eligible disputes which could be consolidated into a single set of arbitration proceedings. This is because there may be significant advantages to consolidating proceedings, including a reduction in the cost of arbitration, an increase in the speed of resolution and a reduction in inconsistent arbitration awards.*"
- 6.3 The Applicant has however decided to exercise its right to make its claim in respect of a single premises against a single landlord in this Arbitration. In doing so however it bears the burden of proving, not only that its business is viable, but also that its formal proposal fits within the criteria and principles mandated by CRCA2022.
- 6.4 While the arbitration procedure established by CRCA2022 has unique characteristics, it is nonetheless an evidence-based procedure, and the scope of the Arbitrator's jurisdiction is circumscribed by the legislation.
- 6.5 The Applicant has provided financial information only in the form of summaries and a draft report. As the Respondent has correctly observed there is no supporting information. (The Arbitrator notes that there is no expert evidence/report either.)
- 6.6 Nonetheless the CRCA2022 s.12 expressly provides that "*any written statement provided to the arbitrator by a party (whether made by the party or another person) which relates to a matter relevant to the arbitration...must be verified by a statement of truth.*"
- 6.7 This requirement, which has been observed by the Parties in this procedure, elevates the statements submitted by the Applicant, above the level of a mere assertion, to the status of evidence of fact. The information provided in Table 1 above stating that the Applicant is viable has been verified by the Finance Director of the Applicant. While in the absence of an expert report or any supporting evidence, the statement does not constitute strong

evidence, it nonetheless presents a prima facie case. The Respondent has pointed to the weakness of the evidence but has not availed of the opportunity to test it at an Oral Hearing or otherwise.

6.8 The paucity of evidence adduced by the Applicant is lamentable. In particular, the fact that the only document resembling a financial report was a mere draft report for 2021.

6.9 Nonetheless, while the statement made by the Finance Director of the Applicant on 13 May 2023 as illustrated in Table 1 above, that the Applicant's "[t]rading is forecasted to return to pre-pandemic levels in 2024 resulting in a return to profitability" has been criticised as inadequate, it has not been tested by the Applicant in an Oral Hearing or otherwise.

6.10 The statement of truth is sufficient establishes a weak *prima facie* case that the Applicant's business is viable for the purposes of CRCA13(4)(a).

6.11 The Finance Director has averred that the forecast is based in estimations that admissions to the cinema will climb to 70% of the pre-Covid level in 2019, up from 61% last year when fewer movies were released, and inflation is assumed at 5% per annum. Neither of these assumptions are unreasonable.

6.12 The Applicant has made out a *prima facie* case, that as stated in the Guidance at paragraph 6.3, "*the 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.*" Cinema is a cash business, the Applicant has paid all rent due to date, and there is no suggestion that it will be unable to continue so to do.

6.13 The Arbitrator therefore must find that the Applicant has met the threshold of viability as required by the CRCA2022 and the Guidance.

6.14 The Arbitrator is therefore obliged by CRCA13(5) to proceed to resolve the matter of relief from payment of a protected rent debt by—(a) considering whether the tenant should receive any relief from payment and, if so, what relief, and (b) making an award in accordance with section 14.

The Protected Debt

6.15 The Applicant also bears the evidential burden of proving that it is entitled to relief.

6.16 It is a fact that the Applicant's parent corporation is in the process of restructuring its business and has availed of Chapter 11 court protection in the United States of America.

While the financial circumstances of the parent corporation are not entirely irrelevant, it is trite to say that the Applicant is a separate entity and exists as an asset of the parent corporation,

6.17 The Applicant has argued its entitlement to relief under the statute with a focus on the business carried out at the Premises. This is notwithstanding that the Applicant is well aware that it is its entire business that is relevant. The Applicant has in fact argued that CRCA2022 subs.16(1) imposes obligation on the Arbitrator, so far as is known, to have regard to the assets and liabilities of the Tenant, including any other tenancies to which the Tenant is a party, and accordingly, it is the Tenant's business as a whole that has to be viable, not just the business conducted at the Premises. The Tenant's business is the operation of 72 cinemas throughout the UK held by way of a similar number of tenancies.

6.18 Notwithstanding its position that regard must be had to its entire business, the Applicant's arguments are based on financial figures related solely to its business at the Premises in isolation, as illustrated in Table 2 and Table 3 above. While this information is also not entirely irrelevant, it is the financial position of the Applicant's entire business with up to 80 cinemas that must form the basis of the assessment on whether relief from rent is required. The concern must be that if the business at a single tenancy fails a tenant may still be able to pay its debts, but even if the business in one tenancy is profitable, and the subject of a claim for relief under CRCA2022, it will afford no protection to the landlord if the overall business fails.

6.19 The Applicant has been given three opportunities in this Arbitration to provide evidence of its overall financial position. It has only provided the summaries as illustrated in Table 1 above, supported only by the averment of its Financial Director, which has been accepted in assessing the viability of the Applicant. It has also produced a draft report for the year 2021 which has little evidential value and the Applicant has acknowledged that it contains errors.

6.20 The figures presented by the Applicant's Financial Director forecast:

- an Operating Profit of £32,173,000 in 2023 and £49,520,000 in 2024 and £49,520,000 in 2025;
- An Adjusted Earnings before interest, taxes, and amortization (EBITA) of £71,105,000 in 2023 and £89,915,000 in 2024 and £93,447,000 in 2025;

- A Profit after Tax of £8,353,000 in 2023, and £22,802,000 in 2024 and £25,700,000 in 2025.

6.21 While these figures for 2023 and 2024 are merely forecasts as the Respondent has pointed out, and in fairness may be optimistic, the figures presented by the Financial Director for the years 2020, 2021 and 2022 are historical and do not rely on prescience.

6.22 In those years the Adjusted EBITDA was £43,356,000 in 2020, a loss of (-£1,117,000) in 2021, and back in positive territory at £20,289,000 in 2022.

Application of the CRCA2022 s. 5 Principles

6.23 CRCA2022 sub-s.15(1) provides that where as in this case the Arbitrator has found that the Applicant is viable pursuant to CRCA2022 sub-s. 13(4)(a)) the Arbitrator is obliged to make an award *“(a)...aimed at...preserving ...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.”*

6.24 The Landlord is a District Council, and no question of its solvency arises.

6.25 The Applicant has addressed how the rent relief it seeks in its formal proposal is required to maintain the viability of the business at the Premises and has provided evidence in the form of averments supporting the figures in Table 2 and Table 3 above. These forecast summaries are not supported however by any expert report or underlying documentation.

6.26 More importantly however the Applicant has not addressed how the impacts of the respective formal proposals of the Parties fit into the overall viability of the Tenant. There is no information about the cinemas in the group other than that they are predominantly leasehold. The information provided is conclusory and without any breakdown or analysis.

6.27 On the other hand, in Table 1, the Applicant presents and summarises its overall financial position as being a viable, profitable company that has had an undoubted setback due to the restrictions imposed by the pandemic.

6.28 The Applicant has argued that the Respondent’s formal proposal will hold back the Applicant’s recovery, and push the business back into the red at a time when it requires

support to restore its viability which is contrary to the Arbitrator's principles set out in clause 15 of the Act. This argument is understandably based on forecasts, but the underlying data on which the summaries are made have not been provided.

6.29 Furthermore and equally importantly the argument relates to the preservation and profitability of Applicant's business at the Premises and not its entire business.

6.30 The Applicant has failed therefore to prove that it requires the rent relief in the sum it proposes in order to preserve the viability of its corporate business, as distinct from the profitability of the business carried on at the Premises.

6.31 CRCA2022 sub-s. 15(b) requires the Applicant to meet its obligations to pay the rent due for the protected period, albeit subject to the section 15 Principles.

6.32 The Respondent similarly has not explained how it has calculated the formal offer that it has made. Instead, it has put a focus entirely on the viability of the Applicant.

6.33 It understandably argues that the debt owed to the Respondent is merely "a drop in the ocean".

6.34 Its proposal is made "*on the basis that Cine-UK Limited undoubtedly suffered a severe reduction in trading during the relevant period, West Suffolk Council is prepared to make the following formal proposal...*"

6.35 The offer includes a requirement for 12-month repayment plan, requested due to the concern regarding the bankruptcy proceedings being undertaken in respect of Cineworld Group. For reasons given above, the fate of the Applicant's parent corporation Cineworld Group is of marginal relevance in this dispute, however it is a factor which has influenced the Respondent in calculating its offer and the terms upon which it is made.

6.36 For the reasons given above, this Arbitrator cannot make a finding that either Party's proposal meets the statutory criteria.

6.37 Therefore, this Arbitrator is required by CRCA2022 sub-s.14(5) "*to make whatever award the arbitrator considers (applying the principles in section 15)*".

6.38 It is common case that the Applicant suffered a severe negative impact as a result of the statutory closure and the Arbitrator has found that it is viable at present applying the test that: "*the 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.”

- 6.39 The Respondent acknowledges that the Applicant should be supported in preserving its viability.
- 6.40 Regardless of the outcome of this Arbitration there is no threat to the solvency of the Respondent.
- 6.41 CRCA2022 sub-s 15(1)(b) requires that the Tenant should, so far as it is consistent with the preservation of its viability, be required to meet its obligations as regards the payment of protected rent in full
- 6.42 Therefore applying the Principles in CRCA2022 s15, in making an award pursuant to CRCA2022 sub-s.14(5), this Arbitrator finds that the appropriate award is in terms of the offer made by the Respondent, however allowing the Applicant a full 24 months to pay the debt in accordance with CRCA sub-s. 14(7), and Directs accordingly.
- 6.43 In reaching this decision the Arbitrator has considered that:
- i. The Applicant has averred that it is viable at present and has forecast that it will be in profit in the coming years;
 - ii. The Applicant forecasts that in the year 2023, it will make an operating profit, based on admissions climbing to 70% of the pre-Covid level in 2019, up from 61% last year when fewer movies were released. Inflation is assumed at 5% per annum. While the increase in admissions and estimation of inflation do not appear unreasonable, the Applicant is not yet in positive territory. On the balance of probabilities the Applicant requires support to preserve its viability in the short term, and the offer made by the Respondent will contribute to the preservation of its viability.
 - iii. The Respondent’s offer is in keeping with the principles of the legislation, and the Guidance. The Code which has been published as guidance to landlords and tenants states that *“landlords and tenants have a mutual interest in business continuity that reaches far beyond the extent of this pandemic. They are economic partners, not opponents. Therefore, in all dealings with each other, in relation to this Code and the COVID-19 pandemic, they should act reasonably, transparently and in good faith.”*

- iv. The reduction in rent due will contribute to the work of Applicant in preserving its viability.
- v. The Respondent has argued that the rent on the Premises is merely a “*drop in the ocean*” in the overall financial circumstances of the Applicant and any reduction would have negligible impact. That argument should not be a bar to relief. Brought to its logical conclusion it is not sustainable, because it would mean that the Applicant would not be entitled to any support for any of its up to 80 cinemas. Such an interpretation would mean that enterprises such as the Applicant would be unfairly prejudiced and denied necessary support.
- vi. The Applicant’s offer was approximately a proposal that the Parties should bear the impact of the pandemic equally. However, while the Applicant’s proposal has the charm of appearing equitable on its face, particularly in this dispute where the Landlord is well resourced, and is representative of the community which benefits greatly from having a cinema as a social resource, the CRCA2022 Principles impose a different test. The legislation does not require the Landlord and Tenant to bear the burden of the pandemic losses equally but instead requires that the Tenant “*should, so far as it is consistent with the principle (of preserving its viability) be required to meet its obligations as regards the payment of protected rent in full and without delay.*”
- vii. The Applicant’s evidence is that it is returning to profitability. It does not follow that the Applicant does not require continuing support. However, the legislation imposes on the Applicant an obligation to pay as much as it can to meet its obligations, while preserving its viability. In the circumstances outlined above, based on the evidence adduced, the lower of the two proposals, as proposed by the Respondent, is the more appropriate.
- viii. Also the evidence adduced does not suggest that there is any risk of default in payment by the Applicant. Therefore, the Respondent will not be unduly prejudiced by an extended period of 24-months for payment of the instalments. The additional time will ease financial strains on the Applicant, which has based its forecasts on repayment over a 24-month period, and help to sustain its viability.

Publication and Redaction of the Award

7.1 The Parties were provided with a draft of this award and invited to make submission as to whether this award should be redacted in any way to comply with the Arbitrator's obligation pursuant to CRRA2022 sub-s 18(3) to exclude any confidential information from the published award. On 5 June 2023 the Respondent has stated that there is no requirement for redaction and the Applicant has failed to make any timely submissions, This Arbitrator therefore decides that there is no information included in this Award which is meets the definition of "confidential information" in CRRA sub-s 19(4), such as to necessitate any redaction in the published Award.

7.2 In accordance with CRRA2022 sub-s 18(2) the Arbitrator shall publish this Award on the website of the Chartered Institute of Arbitrators.

Arbitration Fees and Expenses.

8.1 On 5 June 2023 the Respondent submitted that it is amenable to paying a contribution toward those costs, up to a share of 50% of the Arbitrator's fees and expenses. No further submissions were received from the Applicant.

8.2 Considering the manner in which both Parties have met this case, the Arbitrator can find no reason why he should deviate from the general rule stated in CRRA2022 sub-s 19(5) that the Respondent should reimburse the Applicant for half the arbitration fees paid under CRRA2022 sub-s (4). It cannot be said that the Applicant succeeded in this reference because its proposal was rejected and the Respondent has offered to pay half of the fees paid by the Respondent.

Decision and Award

Having regard to the Commercial Rent (Coronavirus) Act 2022, the Commercial Rent (Coronavirus) Act 2022 Guidance and in particular the statutory guidance is issued under section 21(1)(a) of said Commercial Rent (Coronavirus) Act 2022, Commercial rent code of practice following the COVID-19 pandemic, and HAVING CONSIDERED the statements and submissions of the Parties, and the respective proposals for resolving the matter of relief from payment of a protected rent debt put forward by the Parties, and for the reasons given above, **THIS ARBITRATOR DECIDES AND AWARDS** as follows:

- I. West Suffolk Council shall waive three (3) months of rent for the Premises in respect of the protected period, amounting to a reduction of £40,002.47 (net of Value Added Tax).
- II. Cine-UK Limited will repay the balance of rent and service charges due, including the Value Added Tax due thereon) in respect of the protected period by 24 equal monthly instalments; the first said monthly instalment to be paid on the date on the first day of July 2023 and the second and subsequent monthly installment is to be paid on the first day of each subsequent month until the final payment is made.
- III. No further sums will be due in respect of the protected period, no interest will be charged on the late payment and the Parties shall each bear their own legal and other costs, if any.
- IV. The Parties shall each be equally responsible for the arbitration fees paid in accordance with CRRA2022 sub-s 19(4), and to this end the Respondent shall forthwith reimburse the Applicant shall forthwith reimburse the Applicant for half the arbitration fees paid under said CRRA2022 sub-s 19(4).

This Award is made this 9 day of June 2023 at the Seat of this Arbitration being

4-5 Gray's Inn Square, London, WC1R 5AH and signed by me

James Bridgeman SC

Arbitrator

Signed in two original counterparts.

