

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

**Case No. DAS-01394-Y1X7C**

**Before Nicole Smith, Arbitrator**

**BETWEEN**

**XXXXXXXXXXXXX  
Applicant**

**AND**

**XXXXXXXXXXXXX  
Respondent**

**Date of this Award:**

**3 July 2023**

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**FINAL AWARD**

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**Introduction**

1. The Applicant in these proceedings, [the Applicant], is the tenant at premises situated at XXXXXXXXXX (the premises).
2. The Respondent is the landlord of the premises.
3. The parties have not provided me with a copy of the Lease Agreement in relation to the premises. However, the statement of Mr F (for the Applicant - referred to further below) states that the Lease is dated 14 July 2015 and that the rent for the premises is set at £25,000.00 per annum. This has not been disputed by the Respondent.
4. The Applicant also leases the neighbouring premises at XXXXXXXXXX and operates the XXXXXXXXXX. The XXXXXXXXXX is one of 26 XXXXXXXXXX branded businesses, 16 of which are owned by THE APPLICANT. THE APPLICANT also provides head office and field support to the other 10 businesses.
5. The Applicant lodged an application pursuant to the provisions of the Commercial Rent (Coronavirus) Act 2022 (the "2022 Act") with the Chartered Institute of Arbitrators (CI Arb) pursuant to Section 10(4) of the 2022 Act on or about 14 September 2022. The application is with regards to a dispute between the Applicant and the Landlord of the premises in respect of rent arising from the Applicant's occupation of the premises in the period 21 March 2020 to 18 July 2021.

6. In the application to CIArb, the Applicant gave the Respondent's contact email address as XXXXXXXXX.
7. The Applicant is represented by XXXX Consultancy Limited of XXXXXXXXXXXX. The correspondence in these proceedings (on behalf of the Applicant) has been from XXXX.
8. The Applicant seeks relief from payment of a protected debt in relation to the premises, pursuant to the 2022 Act.
9. By letter of 7 October 2022, CIArb acknowledged receipt of the application for appointment of an Arbitrator pursuant to the 2022 Act and notified the parties of the intention to appoint an Arbitrator.
10. By letter dated 28 March 2023, the parties were informed that I had been appointed as the Arbitrator in these proceedings.

### **Procedural History**

11. The Application lodged by the Applicant on or about 14 September 2022 ("the Application") attached two letters from the Applicant to the Respondent.
12. The first letter, dated 4 August 2022, was the Applicant's notice to the Respondent pursuant to section 10(1)(a) of the 2022 Act, to refer the resolution of the issue of relief from payment of rent under the 2022 Act, to arbitration.
13. The second letter dated 14 September 2022 included the Applicant's formal proposal (pursuant to section 11(1) of the 2022 Act) for resolving the matter of relief from payment of the protected rent debt. The letter of 14 September 2022 attached:
  - a) The Applicant's calculation of the protected rent debt;
  - b) Statutory accounts for THE APPLICANT for the years ending 2018<sup>1</sup> to 2020; and
  - c) Management accounts for THE APPLICANT for the year ending 2021.
14. The letter noted that, pursuant to section 11(2) of the 2022 Act, the landlord could provide a formal proposal in response - within 14 days of receipt of the Applicant's formal proposal.
15. The Application also stated that the Applicant had prepared a written statement verified by a statement of truth, which would be sent to the Arbitrator on their appointment.
16. After my appointment on 28 March 2023, I wrote to the parties on or about 29 March 2023 asking the Applicant to provide me with a copy of the written statement referred to in the Application, so that we could plan the next steps in the proceedings.
17. Mr L replied on 30 March 2023, noting that he was going on leave and would provide the statement on 13 April 2023. Mr L provided a copy of the statement (from Mr F of THE APPLICANT) to me and to the Respondent at XXXXX on 13 April 2023.
18. On 18 April 2023, I wrote to the Respondent (copied to the Applicant) noting that THE APPLICANT had put forward a formal proposal for resolving the matter of relief from payment under section 11 of the 2022 Act (and attaching the proposal and the supporting documentation, including the

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<sup>1</sup> The 2018 accounts showed a comparison to the figures for 2017.

statement of Mr F). I directed the Respondent to provide its formal response, within 14 days of the date of my email. I also stated that if Ms T considered that she would need further time to respond, then she should advise how much further time she needed, so that I could consider whether it was reasonable to grant further time for the Respondent's response.

19. On 9 May 2023, Ms T sent an email (which was only addressed to me and not Mr L) apologising and stating that "I have only retrieved this from my junk mail could you please advise on my next steps."
20. I replied to Ms T on 9 May 2023 (including Mr L on the chain of communications) noting that Ms T should ensure that Mr L was included on all correspondence sent to me. I queried whether Ms T had received the communications from the CIArb advising the parties of my appointment (the email and letter dated 28 March 2023). I also noted that the process to be adopted in these arbitration proceedings is set out in the 2022 Act. I advised that, as stated in my previous communications, Mr L had provided a formal proposal pursuant to section 11 of the 2022 Act as to the relief from payment in relation to the protected rent debt that the Applicant considered was appropriate. I stated that I would give Ms T a **further** 14 days, from the date of my email, to provide a response.
21. Ms T replied by email on 17 May 2023 (once again, she failed to copy Mr L in on her email). She stated that her email should be taken as her formal response. Ms T did not provide any documentation in support of her formal response and she did not provide a witness statement.
22. I responded to the parties on 18 May 2023 (and included a copy of Ms T's formal response). I noted to Mr L that, in accordance with section 11(4) of the 2022 Act, the Applicant could put forward a revised formal proposal within 28 days of my email, accompanied by any further supporting evidence.
23. Ms T sent a further email on 14 June 2023 (copied to Mr L) noting that there did not appear to be any progress as she had not heard from Mr L. She stated "could I please have update before I go ahead and litigate".
24. Mr L provide a response on 15 June 2023 (which, as noted by Mr L, was 28 days after my email of 18 May 2023). He noted that the Applicant had carefully considered the Respondent's Response. Mr L attached the Management Accounts for the XXXXX for 2022, with forecast results for 2023. Mr L also provided a signed (but undated) statement from the Applicant's Finance Director with further financial information showing a summary of information from the Applicant's statutory accounts and a forecast through to 2025. In his cover email, Mr L also included some further information about the lease at the premises. Mr L stated that the Applicant wished to continue to rely on its original proposal (and the further financial information provided in support of that proposal) as being the fairest for both parties.

### **The Legal Framework**

25. The Act enables the matter of relief from payment of protected rent debts, due from a tenant to a landlord (under a business tenancy) to be resolved by Arbitration (section 1(1)).
26. 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; and
  - b) The rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy.
27. 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.<sup>2</sup>
28. The protected period is defined in section 5 as beginning on 21 March 2020 and ending on the earlier of 18 July 2021 or the last day on which the business was subject to a closure requirement or a specific coronavirus restriction.<sup>3</sup>
29. Section 13 of the Act sets out the issues that the Arbitrator must decide, and the order in which they need to be decided.
30. In accordance with Section 13, the main questions for me to resolve are as follows:-
- a) Is the tenancy a business tenancy?
  - b) Is there a protected rent debt as defined by the Act?
  - c) Is the tenant's business viable, or would it be viable if rent relief were given?
  - d) If so, should the tenant be given relief and, if so, what form should it take?
31. I am required to consider the formal proposals put forward by the parties and to decide which of them is more consistent with the principles set out in section 15 of the Act. In summary, those principles are:
- a) That any award should be aimed at preserving or restoring the viability of the tenant's business, so far as that is consistent with preserving the landlord's solvency; and
  - b) The tenant should (so far as consistent with principle (a)) be required to meet its obligation to pay the rent in full and without delay.
32. Section 16 of the Act sets out the issues I need to consider in dealing with the assessment of the viability of the business of the tenant and the solvency of the landlord.
- a) In assessing the viability of the business of the tenant, I must, as far as known, have regard to:
    - i. The assets and liabilities of the tenant (including any other tenancies to which the tenant is a party).
    - ii. The previous rental payments made under the business tenancy.
    - iii. The impact of coronavirus on the business of the tenant.
    - iv. Any other information related to the financial position of the tenant that is appropriate.
  - b) In assessing the solvency of the landlord I must, as far as known, have regard to:
    - i. The assets and liabilities of the landlord (including any other tenancies to which the landlord is a party).

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<sup>2</sup> See section 4(2), this means a requirement imposed by coronavirus regulations to close businesses or premises, or parts thereof during the relevant period of 21 March 2020 to 18 July 2021 (for English business tenancies) and includes an obligation to close during the relevant period every day at particular times.

<sup>3</sup> See section 5(3), a coronavirus restriction means a restriction or requirement other than a closure requirement which regulated the way a business was to be carried on or the way premises were to be used.

- ii. Any other information relating to the financial position of the landlord that I consider appropriate.

33. In assessing the viability of the business of the tenant and the solvency of the landlord, I must disregard the possibility of the tenant or the landlord borrowing money or restructuring its business (section 16(3)).

### **The Submissions of the Parties**

#### **Position of the Applicant**

34. The letter of 14 September 2022 from the Applicant to the Respondent, includes the Applicant's formal proposal pursuant to section 11(1) of the 2022 Act *for resolving the matter of relief from payment of a protected rent debt* as follows:

1. That 100% of the Protected Rent Debt for the periods where the business was subject to a full closure requirement (ie where there was no ability to trade) is waived. This is a total of **£19,083.29 excluding VAT**.
2. That 75% of the Protected Rent Debt for the periods where the business was required to close every day at particular times is waived. This is a total of **£1,939.66 excluding VAT**.
3. That the balance of the outstanding rent for the Protected Period is settled in 24 monthly instalments the first of which payments will be made on the 1st of the month following determination of this arbitration. This is a total of **£11,837.87 excluding VAT** repaid at a rate of **£493.24 excluding VAT** per month.
4. Our client will not seek any relief from payment of any insurance during the Protected Period.
5. No interest is to be charged on late payment of that rent and each party pays their own legal and professional fees arising.

35. The Applicant attached a "Payment History" and its calculation of the Protected Rent Debt (a total of £32,860.82), together with its supporting evidence comprising the statutory accounts for the Applicant for the years ending 2018<sup>4</sup> to 2020 and management accounts for the year ending 2021.

36. The statement of Mr F, property director for the Applicant, was signed and provided on 13 April 2023. Mr F's statement sets out how the application meets the relevant criteria under the 2022 Act, including how the tenancy is a business tenancy, why the amount in respect of which relief is sought is a protected rent debt and information about the ongoing business viability of the Applicant. In addition to the financial statements provided with the application, Mr F attaches the statutory accounts for the Applicant for 2017 (showing a comparison to 2016).

37. The statutory and management accounts provided by the Applicant<sup>5</sup> show that the following revenues and profits were achieved by the Applicant for the years ended 31 December 2016 - 2021:

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<sup>4</sup> The 2018 accounts showed a comparison to the figures for 2017.

<sup>5</sup> As attachments to the statement of Mr F.

	Turnover	Operating profit/(loss)
2016	28,618,826	-3,561,760
2017	36,735,532	7,869,319
2018	36,294,108	2,915,949
2019	38,092,814	1,840,739
2020	10,995,422	-31,250,524
2021	14,620,000	-129,000

### **Business Tenancy**

38. Mr F states that the lease of the premises by the Applicant from the Respondent is a business tenancy (under the 2022 Act) as it is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies (see section 2(5) of the 2022 Act defining a “business tenancy”). This is on the basis that the Applicant occupies the premises for the purpose of carrying on a business (the operation of the business business).<sup>6</sup>

### **Protected Rent Debt**

39. He also states that the Applicant is seeking relief from payment of a protected rent debt as that term is defined in sections 3, 4 and 5 of the 2022 Act. In particular, Mr F states that “the tenancy was *adversely affected by coronavirus* (section 4 of the 2022 Act) and the rent is *attributable to a period of occupation by the tenant for, or for a period within, the protected rent period* (section 5).

40. It was *adversely affected by coronavirus* as it was subject to closure requirements described as follows:

*The business was the subject of three national lockdown closure requirements throughout this protected period.<sup>7</sup> There was also a Hospitality sector (which includes Business) specific closure requirement and two periods where the tenant was required to close at specific times.*

41. The business subject to the lease with the Respondent is located in XXXX and was therefore, in addition to being subject to the closure and lockdown orders applying nationally, subject to the closure and lockdown requirements applying to XXX.

42. The relevant lockdown, closure and limitation restrictions imposed on the business and on the XXXXXXXXXX were as follows:<sup>8</sup>

- a) The first period is described as 21 March 2020 to 3 July 2020 – National Lockdown 1.
- b) The second period is 14 October 2020 to 4 November 2020 – Tier 1 Closure Restrictions requiring hospitality businesses to close from 10pm. By 17 October 2020, restrictions had moved to Tier 3, which included the requirement not to meet with anybody outside their household or in any support bubble in any indoor seating..’
- c) The third period is 5 November 2020 to 2 December 2020 – National Lockdown 2.

<sup>6</sup> I note that the claim that this is a business tenancy has not been challenged by the Respondent.

<sup>7</sup> See section 5 of the Act, the relevant protected period is 21 March 2020 to 18 July 2021 (at the latest).

<sup>8</sup> See section 2.2(a) of Mr F’s Statement.

- d) The fourth period is 3 December 2020 to 20 December 2020 – Tier 2 Closure Restrictions, requiring hospitality businesses to close after 11pm and for people not to meet those not part of their support bubble.
  - e) The fifth period is 21 December 2020 to 5 January 2021 – Tier 4 Closure Restrictions – requiring hospitality businesses to close.
  - f) The sixth period is 6 January 2021 to 16 May 2021 – National Lockdown 3, with steps leading to gradual reopening of businesses, with businesss being allowed to open on 17 May 2021.
43. Mr F also notes that outside of the above periods there were further specific coronavirus restrictions that affected the operational costs of the business and limited the number of customers able (or willing) to attend businesss including social distancing requirements and limitations on gathering sizes.
44. Mr F relies on Annex A to the Commercial rent code of practice following the COVID-19 Pandemic (Published 7 April 2022) to align with the 2022 Act,<sup>9</sup> which shows that the *protected period* for businesss based in England is from 21 March 2020 to 18 July 2021.
45. The total rent due for the period 21 March 2020 to 18 July 2021 is £33,135.55 (with £274.73 having been paid by the Applicant).

### ***Business Viability***

46. Mr F explains that the XXXXXX business, based at the premises leased from the Respondent (and XXXXXX, leased from another party), is one of 16 included in the tenant company, the Applicant. The Applicant also provides the head office and field support for a further 10 businesses of the business. (I note that Mr F does not provide any information as to the costs and revenues associated with providing that head office and field support for the 10 business that are not part of the Applicant.)
47. Extracts from the accounts for the Applicant for the years ended 2016 to 2021 were included with Mr F’s statement.<sup>10</sup> The accounts for 2017 to end of 2020 are audited. The 2021 accounts are yet to be audited. The 2022 accounts are not included. There is no reference to whether they have been prepared (even in draft).
48. The signed but undated statement of Mr K includes figures for 2022. He states that “management estimate [the Applicant] will be loss making in 2022”. This appears to be a reference to the estimated after tax profit (-£653,000) as the figures show a before tax profit for 2022 of £345,000.
49. The accounts provided show an operating loss of approximately £3.6m in 2016, a profit of close to £8 million in 2017, £3 million in 2018 and £2 million in 2019. The losses for 2020 are shown to be approximately £31 million (with £25.6 million of that loss said to be attributable to impairment of fixed assets) and in 2021 (based on Management Accounts rather than audited accounts) the losses are shown to be £129,000.<sup>11</sup>

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<sup>9</sup> [Commercial rent code of practice following the COVID-19 pandemic - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/106222/commercial-rent-code-of-practice-following-the-covid-19-pandemic.pdf)

<sup>10</sup> Also, the figures for the 2015 year were included with Mr K’s statement attached to Mr L’s email of 15 June 2023.

<sup>11</sup> I note that Mr K’s figures show a before tax loss of approximately £3m in 2021.

50. Mr F’s position is that before coronavirus, the Applicant’s financial position was steady and consistent. He states that customers are now returning to the business, post coronavirus restrictions and with XXXXXXXXXXXXXXXX, the business will be viable going forward.
51. In relation to previous rental payments he notes that the tenant has paid all the rents, service charges and insurance sums due up to the beginning of the protected period, and all sums demanded since. This includes rental payments up to 23 June 2022.<sup>12</sup> The statement notes that it is anticipated that attendances for the year ending 2022 will reach 70% to 75% of the 2019 year end levels and he is optimistic that there will be further improvements in 2023.
52. With regard to the impact of coronavirus on the Applicant, Mr F explains that the revenues during the periods that it was required to close were nil. During the periods of coronavirus restrictions, sales were limited as a direct result of the government’s mandatory social distancing requirements. Mr F provides evidence in support of this, being the admission numbers at the XXXXXXXXX and the total admission numbers for the XXXXXXXXX Business. The admission numbers are as follows:

	XXXXXXX	XXXXXXXXXXXXXX
2021	58,950	863,287
2020	45,394	810,144
2019	155,044	2,454,712
2018	174,873	2,399,986
2017	179,971	2,494,068

53. In relation to any other information that may be considered appropriate (to assess business viability), Mr F notes that THE APPLICANT’s ultimate parent (XXX plc) has increased its borrowing and issued new convertible bonds to survive the pandemic and has not paid any dividend to its shareholders since the start of the pandemic. XXX plc is also going through a process of restructuring its business and lending and has filed for Chapter 11 bankruptcy in the US on XXX 2022. I have not been provided with an update on the progress of that process.
54. The Applicant’s position is that, in accordance with section 16(3)(a) and (b) of the 2022 Act, I am required to disregard these emergency borrowings and the Chapter 11 restructuring.
55. Mr F’s position in relation to restoring and preserving the viability of the business is that the Applicant is a viable business and is anticipated to return to pre pandemic profit levels. However, this will take some time. He notes that the available funds to reinvest in the business were used up during the pandemic and: “Any support will be important in enabling such investment to continue and thus assist the future viability of the business”.

**Amount of Relief**

56. The Formal Proposal of the Applicant was set out in the letter of 14 September 2022 to the Respondent (attached to the Application lodged with CI Arb) and is described above. Mr F states that a waiver of a substantial part (or all) of the Protected Rent Debt has been requested from all of the landlords of the Applicant’s premises and that the vast majority have agreed to such a waiver. The Applicant’s position is that the waiver requested in this application is necessary to restore and preserve the viability of the tenant and the business being carried on at the premises.

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<sup>12</sup> While the statement of Mr F was signed on 13 April 2023, it appears it was prepared at some point in the second-half of 2022 and has not been updated.



### **Position of the Respondent**

57. Ms T provided a formal response for the Respondent, by email, on 17 May 2023.
58. Ms T did not provide a statement or any supporting evidence with her response.
59. She stated that the Applicant had a long history of not paying its rent at all, or on time and of being in breach of its lease. She stated that she was a small independent landlord who has had nothing but problems from this mega company worth billions. She stated that she was not able to waive 50% of the rent owed and considered this proposal was out of thin air. She referred to the Applicant having a £100 million loan to help its company and that it was absurd that the Applicant would withhold paying what was owed.
60. She stated that because of the Applicant not paying their rent “the bank called to repossess my property and recalled the loan in”. Ms T’s position for the Respondent was that it would like to receive payment owed in full and that the Respondent was open to a payment plan.

### **Revised Proposal of the Applicant**

61. In an email dated 15 June 2023, Mr L stated that he had carefully considered the Respondent’s formal response.
62. He noted Ms T’s statement that her bank had called to ‘repossess the property and recall the loan’ and referred to the Landlord’s solvency being one of the key tests set out by the Act (with the other being the viability of the Tenant’s business).
63. Mr L rejected the claim that the Applicant was a “mega company worth billions” and referred to the financial information that had been provided. He also noted that the scale of the Applicant’s business should not be a bar to relief as this would suggest that it should not be entitled to relief in relation to the leases for any of its businesses.
64. Mr L provided further financial information in relation to the operations of the XXXXXXX based at the premises leased from the Respondent. He noted that the XXXX leased two premises, one from Ms T for £25,000.00 per annum (No. XXX) and the other being leased for £72,014.21 per annum (No. XXX).
65. The attendance figures for the 2022 year for the XXXXX showed an increase to 108,543, as compared with 58,950 for the 2021 year. The attendance figures for 2023 are forecast to be 114,086.
66. Mr L also attaches a statement from Mr K, Finance Director on behalf of XXXXX. The statement is signed but undated. It includes a statement of truth. Mr K includes information extracted from the Applicant’s accounts (including additional information as to 2015, showing an operating loss of £5.385 million) and as noted above, an operation loss for 2021 of approximately £3m and operating profits for 2022 of £345,000<sup>13</sup> and projected figures for 2023 of £3.8m and £5.2m for 2024 and £5.6m for 2025.
67. In his cover email, Mr L submits that the further financial information provided shows a gradual improvement in turnover and profits, showing the signs of a recovering business market. He

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<sup>13</sup> It is not clear whether this is a projected or actual figure as the statement is not dated.

notes that in order to preserve its viability, the Applicant is required to regularly reinvest part of its profits back into the business to ensure the quality of product meets the customers' expectations (in terms of technology improvements or business refurbishment for example).

68. Mr. L states that he remains of the view that the Formal Proposal put forward on 14 September 2022 is the fairest to both parties and is in keeping with the principles set out in the 2022 Act. Accordingly, his revised proposal is to confirm the original proposal and to support that proposal with the further and better supporting evidence attached to the email of 15 June 2023.
69. Mr L also raises the issue of a potential outstanding rent review under the Lease of the premises, that was scheduled for 13 July 2018. Mr L suggests that this potential rent review ought to be taken into account in my Award. He states:

The Applicant does not anticipate there being any justification for an increase in rent but would like to address the unlikely prospect that there is one should the landlord ever progress the rent review.

### **Analysis**

70. With regard to the relevant criteria under the 2022 Act, I am satisfied that the tenancy qualifies as a business tenancy.
71. The amount that the Applicant submits is unpaid rent (£32,860.83) is set out in the Formal Proposal of 14 September 2022. The Respondent has not provided any comment or challenge as to the calculation of the unpaid amount, as stated by the Applicant. I accept that that is the amount of unpaid rent to be considered in this Arbitration.
72. I accept that the sum of £32,860.83 is a protected rent debt as that term is defined in sections 3, 4 and 5 of the 2022 Act as the tenancy was *adversely affected by coronavirus* as it was subject to multiple closure requirements and other restrictions and that period ran from 21 March 2020 to 18 July 2021 (as set out in Annex A to the Commercial rent code of practice following the COVID-19 Pandemic<sup>14</sup> which shows that the *protected period* for business based in England was from 21 March 2020 to 18 July 2021).
73. As to the question of whether the business of the Applicant is viable, I note that this has not been seriously challenged by the Respondent. While it is clear that the business of the Applicant was seriously affected by the closure requirements and other restrictions, it does appear to be recovering, based on the statement provided by Mr F and the attendance information provided by Mr K.
74. I consider that it would have been helpful if the Applicant had dated the statement of Mr. Kaufman so that I could assess what financial information was based on the Applicant's actual performance and what information was a projection. Also, it would have been helpful to have an explanation as to the inconsistency between the loss figure for 2021 put forward by Mr F (£129,000 in the unaudited Management Accounts for the Applicant) and the loss figure put forward by Mr K for 2021 of approximately £3m.
75. Those limitations on the financial information provided aside, I consider that the financial information provided shows an improving situation for the Applicant, particularly in relation to

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<sup>14</sup> [Commercial rent code of practice following the COVID-19 pandemic - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/101421/commercial-rent-code-of-practice-following-the-covid-19-pandemic.pdf)

attendance numbers. For the XXX, the attendance numbers for 2022 have increased to 108,653 (from 58,950 in 2021).<sup>15</sup>

76. I also note that, since the closure requirements and the restrictions ended, the Applicant states it has paid the rent as it fell due and this has not been challenged by the Respondent (apart from a general allegation of the Applicant being “continuously in breach of their lease”).
77. In accordance with the principles in the Act, any award I make should be aimed at preserving or restoring the viability of the tenant’s business, so far as that is consistent with preserving the landlord's solvency. While Ms T states that the bank has called to repossess her property and to recall the loan, because of the Applicant not paying their rent, I note that she has not provided any evidence to support those claims. She has not provided any information on the size of the loan, the extent of her repayment obligations, or the communications from her bank.
78. Ms T’s Formal Proposal is that I should not waive any part of the protected rent debt. However, she states she is open to the concept of a payment plan.
79. In accordance with section 14 of the 2022 Act, I must consider the final proposals put forward by the parties. If I consider that both proposals are consistent with the principles in section 15, I must make the award at set out in whichever of them I consider to be the most consistent with those principles. However, if I consider that one proposal is consistent with the principles and the other is not, I must make the award set out in the proposal that is consistent.
80. I do not consider that the proposal put forward by the landlord in this case, takes into account the principle of preserving the viability of the tenant’s business. While it is correct that the premises in question are a small part of the operations of THE APPLICANT, I consider that it is appropriate to consider the claim on its merits as to whether a business that was subject to extensive closure obligations and loss of revenues, should be entitled to a measure of rent relief.
81. Nor do I consider that I have been provided with sufficient information about the solvency of the landlord to consider that it is a factor that should outweigh provision of any relief to the tenant in this case.
82. I therefore consider that, in accordance with section 14 of the 2022 Act, the Formal Proposal put forward by the Applicant on 14 September 2022, is the most consistent with the principles in section 15 of the 2022 Act and I should make the Award in those terms.
83. I note that in the email of 15 June 2023, Mr L refers to the fact that there is an outstanding rent review under the Lease that was scheduled for 13 July 2018. He notes that the Respondent is yet to take any steps to progress this, as provided for within the Lease. Mr L asks that I take this into consideration in my Award *as the Act provides for cost arising in respect of the protected period, so that any relief is applied proportionately to any increase in rent for the Protected Period as a consequence of the review.*
84. I do not consider that the 2022 Act allows me to grant relief against rent that has not actually been claimed by the landlord as such rent is not unpaid rent that could fall within the definition

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<sup>15</sup> I have not been provided with the increase in attendance number for THE APPLICANT across all businesses.

of a Protected Rent Debt. I decline to consider the issue of a potential rent review and its impact on rent due for the protected period, on that basis.<sup>16</sup>

### **Costs**

85. I did not receive any submission on the question of costs from either party.

86. In accordance with section 19(7) of the 2022 Act, each party is required to bear their own costs. However, in accordance with section 19(5) of the 2022 Act, I may make an Award requiring the Respondent to reimburse the Applicant for half of the arbitration fees unless I consider it more appropriate to award a different proportion (section 19(6)).

87. I consider it appropriate in this case for each party to pay 50% of the arbitration fees, i.e., the sum of £1,050.00 each (including VAT). As the Applicant has paid the full sum of £2,100.00 to CIArb, I direct that the Respondent is required to pay the sum of £1,050.00 to the Applicant.

### **Award**

88. I award and declare as follows:

1. That 100% of the Protected Rent Debt for the periods where the business was subject to a full closure requirement (ie where there was no ability to trade) is waived. This is a total of **£19,083.29 excluding VAT**.
2. That 75% of the Protected Rent Debt for the periods where the business was required to close every day at particular times is waived. This is a total of **£1,939.66 excluding VAT**.
3. That the balance of the outstanding rent for the Protected Period is settled in 24 monthly instalments the first of which payments will be made on the 1st of the month following determination of this arbitration. This is a total of **£11,837.87 excluding VAT** repaid at a rate of **£493.24 excluding VAT** per month.
4. The Applicant (tenant) is not entitled to any relief from payment of any insurance during the Protected Period of 21 March 2020 to 18 July 2021.
5. No interest is to be charged on late payment of the rent referred to above and each party pays their own legal and professional fees arising.
6. The Respondent is to pay the Applicant the sum of **£1,050.00 (including VAT)** in respect of the costs of this Arbitration on or before 1 August 2023.

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<sup>16</sup> I also note that, as this issue was raised in the final email by the Applicant, that would have prevented the landlord from having an opportunity to comment on the issue and that would have been a further reason for declining to take the issue of the potential rent review into account when assessing the parties' proposals.

**Seat of the Arbitration**

89. The seat of this arbitration is London, England

**Date of the Award**

90. This Award is made by me, Ms Nicole Smith, FCI Arb, this 3rd day of July 2023.

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Nicole L Smith  
Arbitrator, FCI Arb