

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

**BETWEEN**

**[REDACTED] LIMITED  
(APPLICANT/LANDLORD)**

**AND**

**[REDACTED] LIMITED  
(RESPONDENT/TENANT)**

**FINAL AWARD OF**

**ANDREW LLOYD CREASE FRICS FCIArb ARBITRATOR**

**DATED**

**FEBRUARY 2023**

## **BACKGROUND**

1. The Applicant is the Landlord of [REDACTED]  
[REDACTED]
2. The Respondent is the Tenant of the above property.
3. The parties have been unable to agree on the appropriate relief concerning rent arrears arising during the Coronavirus pandemic.
4. Notice of intention to arbitrate was served by the Applicant followed by an application to the Dispute Resolution Service of the RICS for the appointment of an Arbitrator.
5. I was approached by the RICS to act as Arbitrator under the Commercial Rent (Coronavirus) Act 2022. After conducting conflict checks I indicated I would be able to accept the appointment.
6. I was appointed as Arbitrator on this matter on 6 July 2022.
7. I convened an initial meeting by Teams on 12 July 2022.
8. The parties had a period of provisional discussions regarding the quantum of the protected rent and agreed an extension to make a further final proposal.
9. Both parties made Submissions regarding their proposals and Counter Submissions on their proposals which I exchanged by email.

10. **This is the Award of Andrew Lloyd Crease, final in all regard made this day in London, England.**

**MATTERS IN AGREEMENT**

1. Eligibility. The parties have agreed that the eligibility criteria are met.
2. The parties have agreed to adopt Procedure C under the RICS scheme.
3. The quantum of the protected rent debt is agreed as £111,063.

**MATTERS IN DISPUTE**

1. The appropriate relief from payment.
2. Costs

**1. The appropriate relief from payment**

**Final Proposals**

11. The Applicant/Landlord's current proposal is on the basis that all of the protected rent is repaid over a 24 month period with a rising monthly payment for the first six months of £2,313.81, for the second six months of £4,627.63 and for the final 12 months, monthly payments of £5,784.54.
12. The Respondent/Tenant's final proposal is that 50% of the protected rent that is written off, that there is a full release of the rent deposit with no further obligation to reinstate so £30,000 plus accrued interest and a repayment of the remainder of the protected rent over 24 months.

13. I must assess whether the above offers are consistent with Section 15 of the Act. For ease of reference I quote the section below.

*'Section 15 – Arbitrator's Principles*

*(1) The principles of this section are –*

*(1) That any Award should be aimed at –*

*(i) Preserving or*

*(ii) Restoring and preserving*

*(a) The viability of the business of the Tenant so far as this is consistent with preserving the Landlord's solvency and*

*(b) 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 to the payment of protected rent in full without delay.'*

14. Section 16 of the Act states that the Arbitrator must so far as is known have regard to the following matters which I set out below:

*(a) 'The assets and liabilities of the Tenant including any other tenancy 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.'*

15. Firstly considering the Applicant/Landlord's offer. This offer spreads out the repayment of the protected rent over the maximum period that I could award, i.e. 24 months.
16. Further it allows for lower payments in months 1 to 6 increasing in months 7 to 12 and again in months 13 to 24.
17. The extension of the payment period and reduction of the initial payments will assist the tenant's cashflow and therefore can be seen to be aimed at the preservation/restoration of the Tenant's viability.
18. Secondly the amount of rent payable under the proposal meets with the contractual amounts owed by the Tenant.
19. Finally, with regard to the Landlord's solvency, it is them that has made the offer and therefore I think it implicit that such an offer retains their solvency.

#### **FINDING**

20. **I THEREFORE FIND THAT THE APPLICANT/LANDLORD'S OFFER IS CONSISTENT WITH SECTION 15 OF THE ACT.**
21. Moving onto the Respondent's final offer.
22. The offer consists of writing off 50% of the protected rent debt and allowing a 24-month payment period for the remainder of the rent debt.

23. Both are items which are within the boundaries of what I may award and can be seen to be aimed at restoring/preserving the tenant's viability.
24. The final part of the offer which is to return the rent deposit of £30,000 is not as the Applicant/Landlord points out in their Counters something that I can award.
25. The definition of protected rent is very clear, and it does not include rent deposits. I have taken the view that the final offer I must consider is therefore only the relief issue that relates to 50% repayment of the protected rent over 24 months.
26. At this point it could be argued that the whole offer is inconsistent with section 15, but I have concluded that it is right to assess the parts of the offer over which I do have jurisdiction to produce an award.
27. In terms of the solvency of the Landlord, I note Section 15, subsection 3 of the Act *"For the purpose of this section the Landlord is solvent unless the Landlord is or is likely to become unable to pay their debts as they fall due"*.
28. The Applicant has provided some evidence of an arrangement whereby in May 2020 banking covenants were breached and waivers negotiated.
29. The Respondent is critical of this evidence, drawing my attention to the large size of the Applicant's portfolio and wider holdings.
30. I agree with the Respondent/Tenant on this issue. It is the Applicant's assertion that the solvency would be impacted by the final proposal therefore the burden of proof is theirs to show this. The Applicant was at liberty to produce evidence of their financial position but they chose not to. The evidence that has been provided by the Applicant does not convince

me that the solvency would be impacted by the grant of the Tenant's final proposal.

## **FINDING**

31. **I THEREFORE CONCLUDE THAT THE RESPONDENT'S FINAL OFFER SAVE FOR THE REQUEST FOR THE DEPOSIT REFUND WHICH IS OUTSIDE OF MY JURISDICTION IS CONSISTENT WITH THE PROVISIONS OF SECTION 15.**
32. Having found that both final offers are consistent with the Act, I must determine which is the most consistent. The Respondent has produced various evidence regarding the financial position of which I summarise as follows.
33. A statement in the Submission that the Respondent company made a loss of £ [REDACTED] in 2021 and [REDACTED] in 2020, a document headed Request for Funding [REDACTED] Ltd which shows actual membership levels across the three branches in May 2022 with projections on a monthly basis to December 2024. Financial information in this document is limited to projected membership levels from June 2022 to December 2024, projected revenues, projected operating profit and debt repayments.
34. At this point I think it useful to refer back to Schedule 16 where the CRCA contemplates the type of information that should be presented, and an Arbitrator must have regard to.
- A) The assets and liabilities of the Tenant including any other tenancy to which the Tenant is a party.

- B) The previous rental payments made under the business tenancy from the Tenants of 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 the Arbitrator considers appropriate.
35. I am given no financial background by the Respondent/Tenant as to pre-Covid trading levels at any of the branches. I am given no audited accounts to show the pre-Covid, during Covid or post-Covid trading position of the business. I reiterate that I directed both parties to Section 16 of the Act in the initial meeting and in my Directions and indicated that I can only have regard to these matters if they were actually presented to me.
36. I also mentioned to the parties that if there were any doubts, they should look at the Commercial Rent (Coronavirus) Act 2022 Guidance to Arbitrators and Approved Arbitration Bodies and the exercise of their function in the Act and below I set out what Section 7.19 of this document states:
- “The items set out in paragraph 7.17 and 7.18 will only be known to the Arbitrator if a party provides evidence of them, including in response to a request for the Arbitrator. The Arbitrator is not required to seek out information. The Tenant and the Landlord are responsible for providing the evidence to enable viability and solvency, respectively to be assessed.”*
37. From the evidence that has been provided to me, I comment on the issues put forward by the Respondent.



38. I accept the position that the Tenant/Respondent was put in with the enforced closure of their businesses and the restrictions that continued post reopening.
39. I appreciate the restrictions and the impact that they had on the ability of a gymnasium to trade.
40. I comprehend the argument that the Tenant suggests in terms of an equitable sharing of the protected rent debt but for the purposes of the Act under which I must determine this, there is no reference to a requirement for equitable sharing of the protected rent debt.
41. In terms of the rent deposit I have, as mentioned above, no jurisdiction over the rent deposit.
42. The key difference between the two final offers in front of me are that one meets the requirement that the Tenant as far as possible fulfil their contractual obligations to pay the rent that was due. The other requests that a substantial amount of the protected rent is written off.
43. I must consider whether that writing off of rent is merited in the aim of restoring /preserving tenant viability.
44. The only actual figures in front of me are the May 2022 figures which are insufficient to convince me that the writing off 50% of the rent debt is more consistent with section 15.
45. I find I can place very little weight on the forecast evidence as there is no backing information as to where those forecasts come from. I understand

- fully that membership numbers are being projected and I would have expected to have seen some backing information as to the underpinnings of the projected memberships.
46. I would also have expected to have seen from historic analysis what income streams those membership numbers will have translated into, there is no detail provided of gross profit or detailed breakdown of any of the cost side of the operation.
47. I am used to looking at accounts in my everyday work and there is simply not enough information provided within the data provided for me to conclude that the additional £50,532 write off would be capable of restoring or preserving viability.
48. It is on this basis that I conclude that the Landlord/Applicant's offer is the more consistent with the Act.

### **FINDING**

49. **I FIND THAT THE LANDLORD'S FINAL OFFER IS MORE CONSISTENT AND THEREFORE AWARD RELIEF ON THAT BASIS AS PER SECTION 14, 3(a) OF THE CRCA.**

### **COSTS**

50. Section 19 (5) of the Act sets out default provisions that I must make an Award requesting the Respondent to reimburse the Applicant half of my fees. This is unless under Section 6 I consider it appropriate to Award a different proportion.

51. The Applicant pleaded for a 50/50 split of the Arbitrator's fees, and I received no pleadings in this regard from the Respondent. I accordingly see no reason to deviate from the default position in Section 19 (5) of the Act and order that the Respondent pays the Applicant 50% of my fees and 50% of the RICS application fee.

### **AWARD**

52. I hereby Award and Direct as follows:

- 1) The Respondent pays the Applicant the protected rent debt of £111,063 in accordance with the timings below:

Six monthly payments starting one calendar month from the date of this Award of £2,313.81 followed by six monthly payments continuing on from the above of £4,627.63 per calendar month, followed on by 12 monthly payments carrying on from the above at £5,784.54 per calendar month.

- 2) To repay the Applicant 50% of my fees and 50% of the RICS application fee within 14 days of the Applicant providing an invoice for such amounts.

### **PUBLICATION PURSUANT TO THE CRCA SECTION 18**

53. This Award must be published. I intend to publish it on the RICS website. I attach a redacted copy of the Award which I will send to the RICS for publication unless I hear back from either of you that you require further redactions within the next seven days.

**SEAT**

54. The seat of this Arbitration is England and Wales.



Signed ..... Andrew L Crease FRICS FCI Arb

Dated 17/02/2023.