

**In The Matter of an Arbitration
Under the terms of the
Commercial Rent (Coronavirus) Act 2022**

Between

(The Applicant/ Tenant)

****** Limited t/a ******

And

(The Respondent/ Landlord)

****** Limited**

In respect of

AWARD

The Parties and Premises

1. The Applicant is **** a tenant of premises at **** ('the Property') represented by ****.
2. The Respondent is ****, the landlord company represented by ****.
3. I have been provided with a copy of the lease.
4. It is common ground between the parties that:
 - i) The Applicant occupies the premises for the purposes of a business trading as ****.
 - ii) The lease creates a business tenancy sufficient to satisfy the requirements of the Commercial Rent (Coronavirus) Act 2022.

Procedural Background

5. This application was made by the Applicant - with agreement by the Respondent - under Commercial Rent (Coronavirus) Act 2022 ('the Act') - Procedure B.
6. I received a copy of the Applicants formal written proposal, together with the Respondents response from the RICS with confirmation of my appointment on 6 December 2022.
7. A preliminary meeting was held with the Parties representatives via Teams on 23 January 2023. At the meeting it was agreed that the Applicant would submit updated accounts by 3 February 2023 and the Respondent would provide any comments by way of a reply by 17 February 2023.
8. I have received the following documents from the parties:
 - i) financial information (accounts, bank statements, loan facilities) from the Applicant and Respondent to consider if the Applicants business remains solvent and to inform my decision on relief if any.
 - ii) confirmation from the Applicant of any government grants or other assistance received.
 - iii) confirmation of any other concessions the Applicant has received in respect of the other shops it operates.
 - iv) Supplemental evidence from the Applicant's representative and replies from the Respondent's representative.

The Claim

9. Pursuant to section 11 of the Act the Applicant has submitted a proposal accompanied by supporting evidence seeking relief under the Act.
10. Section 3 of the Act defines the Protected Rent Debt as unpaid protected rent including any interest. The protected rent is rent due under the tenancy if the tenancy was adversely affected by coronavirus during the protected period.
11. The Protected Debt is **£28,585.82** and the Applicant proposes that 50% of the Debt is waived by the Respondent. Further it is proposed that the amount (**£14,292.91**) would be paid by the Applicant in 12 monthly instalments beginning whenever the Arbitrator determines to be just.
12. The Respondent disputes the Applicants claim that full repayment would affect the overall viability of the Applicants business and considers the amount should be paid back in full without delay or over a period or to defer payment in full to a later date to allow the Applicants business further time to recover its cash flow position.
13. The figure of £28,585.82 is therefore is the Protected Rent Debt upon which I must decide whether to grant relief and if so in what form.

Legal Framework and Eligibility

14. In accordance with section 13 of the Act provides for relief from payment of Protected Rent Debt if:
 - i) the property is occupied under a business tenancy as defined by the Act.
 - ii) there is a protected rent debt consisting of unpaid protected rent.
 - iii) the tenant's business is viable or if not would be if granted relief.
15. I am satisfied that the tenancy qualified as a business tenancy under the Act.
16. I am satisfied that there is a Protected Rent Debt which on the facts is £28,585.82.
17. I am also satisfied from the information provided by the Applicant that their business was viable prior to the pandemic and remains so post pandemic if granted relief.

18. Under the principles set out under section 15 of the Act, I am to consider:
 - i) under the proposal the Award will preserve the viability of the Applicants business and does not affect the solvency of the Respondent; and
 - ii) the Applicants proposal, will so far as it is consistent with the first principle to do so, be required to meet its obligations as regards the payment of the Protected Debt in full and without delay.

Relief from payment

19. I must decide if the Applicant should be given any relief from payment of the Protected Debt and in doing so the award which I am permitted to make under section 14 (6) may comprise:
 - i) Relief from payment by either writing off all or part of the debt including interest or giving the tenant time to pay the whole or part of the debt or a combination of these relief measures
 - ii) Alternatively, I may determine that the Applicant is given no relief from payment
20. In making my award I must consider the proposals put forward to me by the parties and any Award should preserve or restore the viability of the business tenant insofar that it is consistent with preserving the Landlords solvency. Equally the tenant should as far as it is consistent with the above principle be required to meet its obligations regarding the payment of protected rent in full and without delay.
21. Section 16 of the Act requires me to make my assessment having regard to:
 - i) The assets and liabilities of the tenant
 - ii) The previous rental payments made under the business tenancy from the tenant to the Landlord
 - iii) The impact of coronavirus on the business of the tenant
 - iv) Any other information relating to the financial position of the Tenant I consider appropriate
 - v) The financial position of the landlord

Relief from Payment - Decision

22. On 21 March 2020 all non-essential retail businesses were forced to close and such closures were enforceable by law in England and Wales due to the threat to public health. A business operating in contravention of the Health Protection (Coronavirus, Business Closures) Regulations 2020 would therefore be committing an offence.
23. The Applicant was therefore forced to close its business as this was classified as non-essential retail.
24. The Applicant has operated a bakery from the Property since 1999 and was trading profitably in 2019 until the beginning of the pandemic. The Applicants accounts (up to and including 2019) show that in each year from 2015 the Property provided a relatively consistent gross profit and in the years 2018 made an overall operating profit of £188,049 (£92,518 - net of taxes) and in 2019 an operating profit of £43,921 (loss of £40,676 - net of taxes - due to exceptional operational costs of opening two new sites).
25. The Applicant was able to carry out a small amount of home delivery and takeaway orders but this was an insignificant amount compared to its pre-pandemic takings. Further the Applicant did pay the Respondent 10% increasing to 25% of its takings as well as 100% of the service charge and insurance rent during the period.
26. The Applicant accumulated approximately £100,000 of rent arrears but a large proportion of this has been paid including £50,000 of arrears which has already been settled outside of this dispute.
27. The Applicant also runs **** in various nearby towns and the Applicants representative advise that settlements have been reached with the respective landlords of each on similar terms to those being proposed here.

28. During the pandemic the Applicant made a total loss of £655,643 however, the accounts for 2021 show the Applicant has returned to profit with £240,285 although expects a reduced further projected profit for 2022 of £128,000.
29. The Applicant has a debt facility with HSBC which has been breached however the bank has not withdrawn this facility in order to allow the Applicant time to rebuild its financial position. In addition, the Applicant has a Coronavirus Business Interruption Loan Scheme (CBILS) debt totalling £1.1m which is being repaid in monthly instalments.
30. The Applicant has always paid its business taxes and rates on time however due to the pandemic has had to defer the payment of its PAYE liabilities which HMRC has accepted via a monthly payment plan. At present the Applicant is paying its HMRC liabilities in full in addition to the arrears owed which amount to significant sums for 2020, 2021 and 2022.
31. The Directors have not increased their remuneration and in fact receive a reduced salary compared to their 2019 levels which demonstrates a sharing of the burden in order to reduce the debt levels.
32. The Respondent has come to a mutual agreement in respect of much of the debt it is owed. In the view of the Applicant, as the Respondent has not shown that its viability will be compromised in any way by accepting the Applicants proposal and having satisfied the two statutory objectives set out in section 15 of the Act, the offer made should therefore be accepted.
33. The Respondent claims that the Applicant now has sufficient funds to settle the remainder of its debt owed. In particular, the Respondent refers to the 2021 accounts which show a net profit of £240,285 which they consider is sufficient to service the Applicants loans and debt. The Applicant advises that if forced to do so it would threaten its viability given the total debt burden it is repaying. The fact the Applicant has returned to profitability is clearly good news although the projected profit for 2022 is significantly less at £128,000.
34. The Respondent also refers to the Applicant having significant assets which they claim are undervalued due to being depreciated in the accounts and may therefore have greater value than their balance sheet value suggests. However, these are leasehold assets which are

depreciated in-line with accounting principles and therefore are of limited value.

35. The Respondent states that the Applicant has spent £333,867 on fixtures and fittings in 2021 and therefore clearly has sufficient funds. The Applicant advises that this was spent because of a flood at their premises in **** and was vital as this site is their **** and **** and failing to do so would have put them in breach of their lease covenants and in any event the money was received from the insurance claim and the additional repair costs amounting to £361,552 were needed to resolve various dilapidation liabilities.
36. The Respondent believes that the Directors remuneration has increased however the accounts show that in 2019 the total payments were £274,000, £109,044 in 2020 and £196,000 in 2021. In addition, the Directors have extended their personal guarantees to HSBC to £235,000 in order to protect the long-term viability of the business.
37. The Applicants representative submitted additional evidence as an addendum to the initial Proposal. This additional evidence provides updated management information and a detailed forecast of profit & loss, cashflow and balance sheet for 2023. In particular, the cashflow shows a negative balance of £194,000 cash at bank and the need to obtain HSBC's consent. Further the business is struggling with cash flow at present given the debt burden but maintains that given its longer-term forecasting and previous trading record is viable with the necessary support from the parties concerned. The business has also been affected by a drop in consumer demand, rising energy costs and the effects of the costs of living crisis through rising inflationary pressures and therefore needs support in the short term.
38. The Respondents reply advises that the Applicants viability would not be jeopardised in any way by having to pay the Protected Rent Debt and in support disputes the accuracy in the management information provided which shows a cash flow prediction significantly different to that originally provided. The Respondent therefore has concerns as to the reliability and accuracy of the figures provided and the lack of an explanation as to the reasons for the differences. It is the view of the Respondent that full settlement of the Protected Rent Debt would not therefore adversely affect the Applicants cash balance as there is sufficient funds to do so.

39. I understand the viability of the Respondent is not at risk and having regard to the evidence adduced I am satisfied having regard to both parties' circumstances that it is just and equitable to Award that the Applicant shall be granted relief having regard to the principles set out in section 15 of the Act.
40. I am also satisfied that the Applicant has made all efforts to ensure no further accrual of rent, service charge and insurance has occurred and will be able to meet a payment plan. I am satisfied the Applicant has a viable business but is now facing various challenges arising from the after effects of the pandemic and the current economic pressures resulting from rising prices, changes in consumer behaviour and cost of energy increases.
41. I therefore find that the Applicants request for half of the Protected Rent Debt to be waived - £28,585.82 - to be reasonable under the provisions of the Act.
42. I also find it would be just and equitable for the Applicant to settle the rent due over a 6 months period as opposed to its request for a 12-month period.

Arbitration Costs

43. Section 19(7) of the Act provides that each party must pay its own costs, though I must also make an Award requiring the Respondent to reimburse half of the arbitrator's fees paid by the Applicant unless it is considered more appropriate to offer a different proportion.
44. Section 19(8) provides that each party shall pay their own legal and other costs.
45. As to my arbitration fees in making this Award, I find no reason or circumstances to not follow the general rule as provided under section 19(5) of the Act that the Respondent shall reimburse the Applicant for half of the arbitration fees paid under subsection (4).

Award

46. I, Nicholas James Paul Wint, having carefully considered the submissions of the parties and the evidence provided make my Award as follows:

Protected Rent Debt

- i) The Applicant will be granted relief of **£14,292.91**.
- ii) The Applicant is to pay to the Respondent the sum of **£14,292.91**.
- iii) This sum is to be repaid in monthly instalments (representing 5 instalments of £2,382.15 and 1 instalment of £2,382.16) over a period of **6 months** commencing on the **15th May 2023**.
- iv) **No interest** on the Protected Rent Debt is to be paid by the Applicant.

Costs

- i) The Respondent must reimburse the Applicant **50%** of the Arbitration fee of **£750** plus VAT paid by the Applicant.
 - ii) This sum is to be paid by the **15th May 2023**.
47. The Seat of the Arbitration is England & Wales.
48. This award will be published by the RICS in an anonymised form.



Signed:

NICHOLAS WINT FRICS - ARBITRATOR

Dated: 21 April 2023