

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

BETWEEN

**[REDACTED] LTD
(THE APPLICANT/LANDLORD)**

AND

**[REDACTED] LTD
(THE TENANT/RESPONDENT)**

FINAL AWARD SAVE AS TO COSTS

OF

ANDREW L CREASE FRICS FCIARB

FEBRUARY 2023

BACKGROUND

█ The Applicant is the Landlord of █
█

█ The Respondent is the Tenant of █
█

3. The parties have been unable to agree the appropriate relief concerning rent arrears arising out of the Coronavirus pandemic.
4. Notice of intention to arbitrate was served by the Applicant on the Tenant followed by an application to the RICS for the appointment of an Arbitrator.
5. I was appointed to act under The Commercial Rent (Coronavirus) Act 2022 (henceforth referred to as the CRCA) and after conducting conflict checks I indicated that I would be able to accept the appointment.
6. I was appointed as Arbitrator in this matter by the Royal Institution of Chartered Surveyors Dispute Resolution Service on 15 August 2022.
7. I convened an initial meeting by Teams on 5 October 2022 and as a result of which I issued my Directions on 6 October 2022.
8. These Directions indicated provision for both parties making a further final offer and then contemplated concurrent Submissions and Counter Submissions.
9. I received and exchanged final offers.
10. I received a Submission from the Respondent but none from the Applicant.
11. I allowed the Applicant a chance to make a Counter Representation on the Respondent's Submission.

12. This is the Award of Andrew Lloyd Crease, final in all regards save as to costs, made this day in London, England.

MATTERS IN AGREEMENT

- i) The parties have agreed that the eligibility criteria are met.
- ii) The quantum of the protected rent debt is agreed as £17,896.58.
- iii) That I adopt Procedure B of the RICS scheme.

MATTERS IN DISPUTE

- i) The appropriate relief from payment
- ii) Costs
- i) The appropriate relief from payment**

13. The first matter I must consider are the final proposals.

The Applicant's Final Proposal

14. The protected rent debt of £12,496.58 should be repaid in totality over six quarterly payments of £2,082.76 plus VAT (over 18 months). During proceedings the Applicant has altered their position and in Counter Submissions has conceded that the protected rent debt is actually £17,896.58 as contended by the Respondent. In their Counters, they also agree to extending the payment period to a monthly repayment over 24 months at £745.69 per month.

The Tenant's Final Proposal

15. The Tenant proposes 50% of the protected rent debt is written off and that the remainder is repaid over 24 months at £372.85 per month.

16. At the initial meeting the parties agreed to extend the period for making final offers as they are entitled to do under Section 11(6)(a) of the CCRA.
17. The Applicant has in their Counter Submission made a further offer. On the face of it, if the Respondent accepted it would be more favourable to them on the basis that the amount of the protected rent debt is increased and therefore the amount ring fenced is increased and the time over which it is to be repaid and the frequency of repayment is also more favourable to the Respondent.
18. I note that under Section 11(6)(b) of the CCRA there is specific provision for the Arbitrator to extend the time for final offers and this discretion is to be used "*where the Arbitrator considers that it would be reasonable in all the circumstances.*" Given that the offer referred to agrees the protected rent in line with that proposed by the Respondent, and it extends the repayment period and puts the repayment onto a monthly rather than quarterly basis, I believe that the proposal is to the Respondent's advantage and therefore in all reasonable circumstances it is right for me to accept the revised offer in the Applicant's Counter Submission as their revised final offer.
19. I must now consider the two final offers against the Arbitrator's principles contained within Section 15 of the CRCA.
20. Both offers outline a 24 month repayment plan, the aim of which is clearly to preserve and restore the tenant's business viability.
21. The writing off of 50% of the protected rent debt (£8,948.29) is the only difference between the two offers.
22. An Award that granted a 50% relief can be seen to be aimed at restoring or preserving the business's viability.

23. The Respondent points out that hospitality and retail sectors have arguably suffered the most during the pandemic which is a view I believe few could argue with.
24. They also make reference to the cost of living crisis adding to the challenge that they face whilst rebuilding their business.
25. The Respondent points out further that they are not seeking a 50% write off in the rent during the pandemic as they paid the sum of £10,745.61 (including VAT). As rent already paid, this does not qualify as a protected rent debt and therefore the amount of concession they say that they are seeking is only 31.2% of the rent during the pandemic period.
26. The Respondent is critical of the Applicant's approach and produces evidence of correspondence between the parties, an attempted re-letting and forfeiture proceedings.
27. Further I am supplied with the following financial information:
- 1) Rent payment history.
 - 2) Details of grants and Coronavirus loans.
 - 3) An Excel sheet summarising profit and loss and balance sheets for the years ending 31/03/20, 21 and 22 and the six months to 30 September 2022.
 - 4) Specific membership fee information and the abbreviated profit and loss for the actual property between January 2020 and October 2022. I have also been provided with a pie chart showing the overall trading performance of the business.
28. I am told by the Respondent that currently turnover is £[REDACTED] per calendar month and breakeven will be achieved by mid-2023 if this reaches £[REDACTED] per calendar month.

29. The Respondent points to their record of rent payment, not only at this site but at their other trading locations.
30. By looking at the Excel spreadsheet of the financials, I see that pre-Covid the year ending 31 March 2020 turnover was £[REDACTED] converting to a profit of £[REDACTED]. In 2021 the turnover dropped to £[REDACTED] but largely due to grants, profit remained at £[REDACTED]. By 31 March 2022, turnover had increased to £[REDACTED] but largely due to increased costs and expenses, this converted to a loss of -£[REDACTED].
31. The pattern of increasing turnover appears to have been maintained in the six months to 30 September 2022 but the pattern of increased costs also has continued so that in the six months to 30 September 2022, the accrued losses are -£[REDACTED].
32. I am also given a commentary on the trading in the spreadsheet with explanatory notes as to the increased costs, net assets and Coronavirus business interruption.
33. The Applicant does not find the evidence very compelling and draws my attention to the quantum of grants received by the Respondent.
34. Whilst the Applicant alludes to their obligations to their debt provider and the potential of non-payment leading to a breach of these obligations, no evidence to verify this is produced, nor is any impact suggested on the solvency of the Applicant.
35. My conclusion from the above evidence is the overall business of the Respondent has been dramatically affected by the pandemic and the numbers returning to face to face sessions whilst increasing, are not yet at levels to breakeven. Moreover, to attract the numbers back to live classes, membership fees have been cut whilst the cost has increased putting further pressure on margins.

36. The Respondent seems to be positive that the recent increases in numbers in attendance at live classes and the launch of new income streams online will eventually bring the company back to profit.
37. I conclude there is likely to be a return to viability by the middle of this year if what they say is to be believed.
38. Having considered both offers I conclude that both are aimed at restoring/preserving viability, and both involve payments towards the contractual debt. I therefore find both to be consistent with the principles of the Act.

FINDING

39. **I FIND THAT BOTH THE APPLICANT AND THE RESPONDENT'S FINAL OFFERS ARE CONSISTENT WITH SECTION 15 PRINCIPLES IN THE CRCA**
40. I must then make an Award under Section 14, 3 (a) as to which offer is the most consistent with the Act.
41. The starting point is therefore that the tenant should pay the full protected rent amount unless to do so would be inconsistent with the preserving or restoring of their business's viability.
42. The Respondent's business is currently trading at £[REDACTED] a month turnover on the basis of the figures and what has been said to me. The differences between the two proposals amount to an increase in costs to the business of £372.84 a month or less than 0 [REDACTED] % of turnover. Thus, I conclude to repay the full amount, bearing in mind the quantum of turnover of the Respondent's business, is consistent with Section 15(1)(a).

FINDING

43. I FIND THAT THE APPLICANT'S OFFER IS MORE CONSISTENT WITH THE CRCA S15 AND THEREFORE I AWARD ON THAT BASIS.

COSTS

44. Section 19(5) requires that I make an Award in relation to costs on the basis that the Respondent reimburses the Applicant half of my costs and half of the RICS application fee.
45. I have the power under Section 19(6) to make an alternative award but I have not received any pleadings or do I consider any circumstances that would lead me to do so.

AWARD

46. I hereby Award and Direct as follows:
- (i) The sum of the protected rent debt of £17,896.58 will be repaid by 24 monthly instalments of £745.69 starting one calendar month from the date of this Award.
 - (ii) The Respondent pays the Applicant half of my fees and one half of the RICS application fee on production of an invoice to those amounts and on the payment terms of that invoice.

PUBLICATION

47. Pursuant to the CRCA Section 18, 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 redactions within the next seven days.

SEAT

48. The seat of this arbitration is England and Wales.



Signed
Andrew L Crease FRICS FCI Arb

Dated: 17th February 2023.....