

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

BETWEEN

**FFM PASTA CO LIMITED TRADING AS PASTIFICIO AL DENTE
(APPLICANT / TENANT)**

AND

**AIK IMMOBILIEN-INVESTMENTGESELLSCHAFT MBH
(RESPONDENT / LANDLORD)**

FINAL AWARD

OF

ANDREW L CREASE FRICS FCIARB

MARCH 2023

BACKGROUND

1. The Applicant is the Tenant of the ground floor retail unit, 16 and 18 Monument Street and 38 Fish Street Hill, London.
2. The Respondent is the freeholder of the above premises.
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 [Respondent] 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 23/11/2022.
7. I convened an initial meeting via Teams on 1/12/2022 and as a result issued my directions.
8. The parties made one further round of final offers and were keen to rely on the documentation already provided.

THIS IS THE AWARD OF ANDREW LLOYD CREASE FINAL IN ALL REGARDS MADE THIS DAY IN LONDON, ENGLAND. MATTERS IN AGREEMENT

- i) The protected rent debt is agreed as £56,244.23.

- ii) The issue of eligibility is agreed.
- iii) The parties agreed to adopt Procedure B of the RICS scheme.

MATTERS IN DISPUTE

- i) The appropriate relief from payment.

THE APPROPRATE RELIEF FROM PAYMENT

- 9. I received formal proposals from both parties. The Applicant's formal proposal is repayment of 33% of the protected rent debt over a period of 24 months.
- 10. The Respondent's formal proposal is no waiver of any of the protected rent debt and a repayment period of 14 months to repay all amounts.

THE APPLICANT'S EVIDENCE

- 11. The Applicant's evidence consists of financial statements covering the period 2019 to 2022, management accounts spanning the period December 2021 to February 2022, the March, April, May 2022 management accounts and June 2022 management accounts.
- 12. The December 2021 to February 2022 management accounts show a business with a turnover of £[REDACTED] in that quarter. Of this turnover, approximately four-fifths of the turnover is accounted for by delivery sales.
- 13. The figures are similar to the 12/2020 to November 2021 figures and show approximately £[REDACTED] turnover with just over 17% as a proportion of restaurant sales with the rest via delivery sales.
- 14. The year ending 2019 statutory accounts provided are so heavily redacted as to render them of no real use.

15. The June 2022 figures appear to show a turnover of £[REDACTED] with just over 25% of sales relating to the restaurant, with the remaining 75% being delivery sales.
16. The December 2021 to May 2022 figures show a turnover of £[REDACTED] with approximately 22.8% of sales being accounted for in the restaurant, the remainder being delivery sales. All of the figures show losses apart from the June 2022 figures.
17. The pre-Covid figures show turnover of £[REDACTED] for the year ending 11/2020 and £[REDACTED] for the year ending 2019 with a loss in 2019 of £[REDACTED] and a profit of £[REDACTED] in 2020.
18. The year-end figure for 11/2021 showed a turnover of £[REDACTED]m with a profit of £[REDACTED].
19. I am given details that the Tenant has two other properties in Goodge Street and in Hackney.
20. I am given details of the grant income received by the Applicant.
21. It appears that the only overdue invoices are for the protected rent debt with no current appears of rent.

THE RESPONDENT'S EVIDENCE

22. The Respondent's evidence confirms the protected rent debt amount.
23. The unprotected rent debt of £[REDACTED] was paid in full on the issue of court proceedings in July 2022.
24. The Respondent states that the Applicant's business was loss-making prior to the pandemic, as evidenced by the November 2018 and 2019 years, but has become profitable through the 2020 and 2021 years.

25. Loans from directors/shareholders within the Applicant company pre-date the pandemic according to the Respondent.
26. The Respondent concludes that the Applicant company has reasonable cash reserves and should be in a position to settle the protected rent debt immediately.
27. The Respondent observes that there is no justification for the amount of protected rent debt which the Applicant is prepared to pay, i.e. £ [REDACTED].
28. The CRCA requires me to assess these formal offers against the Arbitrators' principles contained within s.15 of the CRCA. These are:
- i) *The principles in this section are:*
- (a) *that any award should be aimed at –*
- (i) *preserving (in a case falling within s.13(4)(a)) or*
- (ii) *restoring and preserving (in a case falling within s.13(4)(b)), the viability of the business of the tenant, so far that it is consistent with preserving the landlord's solvency, and*
- (b) *that the tenant should, so far as 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.*
- ii) *In considering the viability of the tenant's business and the landlord's solvency for the purposes of sub-section (i) 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 s.14.*
29. For the purposes 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. Neither

party suggests that the Landlord's solvency would be impacted were I to award the Applicant's formal proposal.

30. Section 16 of the Act requires me to look at the various financial elements of the Applicant's business, if turnover they are provided to me, specifically the assets and liabilities of the business, rental payments made under the business tenancy from the Tenant to the Landlord, the impact of Coronavirus on the business of the Tenant and, any other information relating to the financial position of the Tenant the Arbitrator considers appropriate.
31. Taking each of these in turn, it appears that the Applicant has a healthy balance sheet and has paid its outstanding unprotected rent debt. The accounting information provided to me tells the story of a business which was not in profit prior to the pandemic and is now trading at much higher levels and is in profit.
32. The Applicant's proposal is consistent with s.15(a) of the CRCA but in my view not consistent with s.15(b).
33. The proposal does not meet with the contractual duties to pay the sums due under the terms of the lease. This would not stop the offer being consistent with s 15 of the CRCA were the viability of the Applicant's business to be threatened by repaying the protected rent debt, however I can find nothing in the evidence that leads me to the conclusion that the payment of the protected rent debt in full would put the preservation of viability at risk.
34. The Applicant has paid all outstanding debts to date and has on the presentation of court action paid the non-protected rent arrears in one sum.
35. I agree with the Respondent that the Applicant's business appears to have grown and become profitable over/after the pandemic. I therefore find that overall, the Applicant's proposal is not consistent with s.15's principles.

36. Turning to the Respondent's final proposal, this requires the payment of the rent debt in full and allows a period of 14 months for the repayments to be made.
37. Having found above that there is no compelling evidence that the repayment in full would threaten the viability of the Applicant's business going forward, I find that not waiving any of the rent is consistent with s.15.
38. The 14-month payment period is aimed at preserving the viability of the Applicant and is therefore also consistent with s.15.
39. I therefore conclude that the Respondent's final proposal is consistent with the principles of s.15 of the CRCA.
40. Having determined that I have only one proposal consistent with s.15 of the CRCA, I must, under s.14(3)(b) make my award in terms of the consistent proposal.

FINDING

41. **I FIND THAT THE ONLY CONSISTENT FINAL PROPOSAL BEFORE ME IS THE RESPONDENT'S. I THEREFORE MAKE MY AWARD IN TERMS OF THAT PROPOSAL.**

COSTS

42. Section 19(5) requires that I make an award in relation to costs on the basis that the Respondent reimburses the Applicant of half my costs and half of the RICS application fee.
43. I have the power under s.19(6) to make an alternative award, but I have not received any pleadings compelling me to do so nor do I consider it appropriate to do so.

44. Accordingly, I make a Costs Award as per Section 19(5) awarding the reimbursement of half of the application fee and half of my fees.

AWARD

45. I hereby award and direct as follows:

- i) The Applicant is to repay £56,244.23 in 14 monthly instalments 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 PURSUANT TO THE CRCA, s18

46. 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 7 days.

SEAT

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

Signed



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Andrew L Crease FRICS FCI Arb

Date: ...28/04/2023.....