

An Arbitration Award
Under The Commercial Rent (Coronavirus) Act 2022

BETWEEN

[REDACTED]
[REDACTED]

(As Applicant)

AND

[REDACTED]

(As Respondent)

Concerning

[REDACTED]

Published on 16 July 2023

by

D J Gilbert BSc Dip Arb FRICS MCI Arb RICS Accredited Mediator

In the Matter of an arbitration under the Commercial Rent (Coronavirus) Act 2022 between [REDACTED], as Applicant and [REDACTED], as Respondent, in connection with premises known as [REDACTED].

BACKGROUND

1. The Applicant, [REDACTED] are the tenants of a café premises for selling sandwiches or other cold food at [REDACTED].
2. The Respondent, [REDACTED] is the landlord.
3. The property is occupied by the Applicant by way of a 12 year lease, excluded from sections 24-28 of the Landlord & Tenant Act 1954, from 1 April 2013 at an initial rent of £19,771.38 per annum, increasing to £28,470.78 per annum, with effect from 1 April 2019 to 31 March 2022.
The property is occupied by [REDACTED] subject to a Business Operating Agreement between [REDACTED] (business owner) and [REDACTED] (business operator) dated 25 May 2017.
4. The Applicant has been paying:
 - a reduced monthly rent of £1,977.08 (rather than the full amount of £2,372.50) for the period from 1 April 2019 to 31 March 2022 and
 - a reduced monthly rent of £1,800 (rather than the full amount of £2,847.10) for the period from 1 February to 30 April 2023.No payment information was provided for the period from 1 April 2022 to 31 January 2023. The current rent arrears total £17,376.24.
5. The Applicant is represented by [REDACTED] and the Respondent was initially represented by [REDACTED] who was replaced by [REDACTED] – the Parties.
6. The Applicant submitted a Notice of Intention to Arbitrate on 25 May 2022 and made its Reference to Arbitration application (DRS VCRAA 3) for the appointment under Procedure D for an Arbitrator under the Commercial Rent (Coronavirus) Act 2022 (“the Act”) to the RICS on 23 September 2022. I was duly appointed in that capacity on 3 December 2022.
7. I contacted the Parties on 4 December 2022 and informed them that the arbitration would commence under arbitration procedure D, which requires an initial meeting to discuss how the arbitration should proceed and to agree my fees. I also asked the Parties to liaise, to agree on a mutually convenient time and date for the meeting. In the event this cannot be agreed, I confirmed that I would arrange one.
8. On 19 December 2022, [REDACTED] confirmed that he was now representing the Respondent and requested an extension to the date by which the Respondent could make its Formal Proposal in Response, to 8 January 2023. On the same date, [REDACTED] confirmed his agreement to the extension [REDACTED] had requested.
On 20 December 2022, I confirmed my agreement to the extension [REDACTED] had requested and proposed that the pre-arbitration discussion be held via either Teams/Zoom on Tuesday, 17 January 2023 at 3pm.
9. On 4 January 2023, [REDACTED] informed me that the Parties had agreed that the arbitration would be undertaken under arbitration procedure A, rather than procedure D and that he was able to attend a Zoom meeting on Tuesday, 17 January 2023 at 3pm. On the same date, [REDACTED]



████████ confirmed that he too was able to attend that Zoom meeting.

After receiving confirmation from:

1. the Parties that the amount of protected rent debt in dispute was below £20,000;
2. DRS that it had issued the Applicant with an invoice for the arbitrator's fee of £750, plus vat; and
3. DRS that the Applicant had paid the invoice.

I issued my Order No1.

Following the agreement between the Parties that the arbitration is to proceed on the basis of Procedure A rather than D, I issued my Order No1 on 9 March 2023, confirming a timetable during which:

1. the Applicant was to make its formal proposal;
2. the Respondent was to make its Formal Proposal in Response; and
3. the Parties were able make any additional comment they would like to make on 1 and 2 above.

10. On 17 March 2023, ██████████ requested that the timetable set in Order No1 be amended, as his client was unwell in hospital. On the same day, I issued my Order No2 dealing with the request and on 24 March 2023, I issued my Order No3 in which I confirmed my agreement to ██████████ request.
11. I have received the following documents from the Parties with the arbitration being conducted under Procedure A rather than D.
 1. A Notice of intention to arbitrate dated 25 May 2022.
 2. Form DRS CRAA3 – Reference to Arbitration form dated 23 September 2022.
 3. The Applicant's Formal Proposal and supporting documentation on 17 March 2023.
 4. A copy of the Business Operating Agreement between ██████████ and ██████████ dated 25 May 2017.
 5. A copy of a Witness Statement of ██████████ dated 3 April 2023.
 6. The Respondent's Formal Proposal in Response and supporting documentation on 17 April 2023.
 7. Additional comments made by the Applicant (dated 24 April 2023) and the Respondent (dated 27 April 2023).
12. I reviewed the documentation the Parties provided, issued my Order No4 on 22 May 2023. On 31 May 2023, I notified the Parties that it was apparent from their responses to my Order No4 that:
 1. the following was **not** agreed:
 - that the lease dated 1 April 2013 creates a business tenancy sufficient to satisfy the requirements of the Act;
 - that the Applicant's business was as a café for selling sandwiches or other cold food;
 - that the Applicant's business was subject to a 'closure requirement' (section 4(2)(a) of the Act);
 - that the relevant protected period is for the 485 days, being the period from 21 March 2020 to 18 July 2021 (section 4(2)(b) of the Act);
 - the amount, if any, of any service charge or insurance premium paid by the Applicant during the protected period applying to the tenancy.
 2. ██████████ has provided me with copies of the lease dated 1 April 2013 and the business operating agreement dated 25 May 2017 but **did not** provide me with, despite it being requested in my Order No4, the following:
 - confirmation that the Applicant (██████████)

- ██████████) were in occupation of the premises during the relevant protected period applying to the tenancy;
- evidence or details of supporting evidence to prove that the tenant's business is viable, or would be viable if rent relief were given, as set out in paragraphs 15 and 16 of the Respondent's Formal Proposal in Response, including any of the following:
 - a) the last 12 months' full bank account information, including but not limited to savings accounts, current accounts and loan accounts.
 - b) financial and management accounts for each financial year after March 2019.
 - c) full bank account information, including but not limited to savings accounts, current accounts and loan accounts for each financial year after March 2019.
 - d) net profit margin or gross profit margins for the business prior to the protected period, compared to those following closure requirements or specific restrictions ending.
 - e) profit forecasting.
 - f) evidence of any long-term contracts (including the value of those contracts).
 - g) gross and net profit margins, prior to the protected period, compared to after closure requirements or specific restrictions ended for the business in question
 - h) evidence as to working capital and whether it is sufficient to meet day-to-day demands.
 - i) evidence of any financial grants and/or loans obtained for each financial year from March 2019 onwards.
 - j) HMRC liabilities, including changes since March 2019.
 - k) any records to show the Applicant has a good track record of paying rent and has no substantial new debts.
3. ██████████ **did not** provide me with, despite it being requested in my Order No4, the following:
- a copy of the existing settlement agreement between the Parties in respect of relief from payment of the protected rent debt; and
 - details, if any, of any rental concessions in connection with the coronavirus epidemic that the Respondent has granted the tenants of other properties it also owns

I also confirmed that, as the Parties had been provided with ample opportunities to both advance their own arguments and then deal with those of the other Party, I would now proceed with making my award with reference to the information I have been provided with.

LEGAL FRAMEWORK

13. Section 1(1) of the Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration (if not resolved by agreement).
14. Section 3(1) of the Act provides that a "protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent.

Section 3(2) of the Act provides that rent due under the tenancy is "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.
15. Section 4(1) of the Act provides that a business tenancy was "adversely affected by coronavirus" for the purposes of:
 - Section 3(2)(a) if, for any relevant period
 - the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or
 - the whole or part of those premises



was of a description subject to a closure requirement.

Section 4(2) of the Act provides that for this purpose -

(a) "closure requirement" means a requirement imposed by coronavirus regulations - an obligation

(i) to close businesses, or parts of businesses, of a specified description, or

(ii) to close premises, or parts of premises, of a specified description, and

(b) "relevant period" means a period beginning at or after 2 p.m. on 21 March 2020 and ending at or before 11.55 p.m. for English business tenancies on 18 July 2021.

16. Section 13 of the Act sets out the issues that the Arbitrator is to determine, make an assessment on and resolve, the order in which they need to be decided and the awards open for the arbitrator to make i.e.
1. Is the tenancy a business tenancy? (section 13(2)(b) of the Act)
 2. Is there a protected rent debt as defined by the Act? (section 3 of the Act)
 3. Is the tenant's business viable, or would it be viable if rent relief were given? (section 13(3) and 13(4) of the Act)
 4. If the tenant's business is viable, should the tenant be given relief and, if so, what form should it take? (section 13(5) of the Act)
 5. Section 13(2) of the Act states that the arbitrator must make an award dismissing the reference if it determines:
 - (a) the tenancy in question is not a business tenancy, or
 - (b) there is no protected rent debt.
 6. Section 13(3) of the Act states that the arbitrator must make an award dismissing the reference if, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business:
 - (a) is not viable, and
 - (b) would not be viable, even if the tenant were to be given relief from payment of any kind.
17. I am required to consider the formal proposals set out by both Parties individually and decide which of them is more consistent with the principles set out in section 15 of the Act. These principles are:
1. The proposals should preserve or restore the viability of the tenant's business whilst safeguarding the landlord's solvency; and
 2. The tenant should be required to pay as much of the rent debt with as little delay as these principles allow.
18. Section 16 of the Act sets out the issues I need to consider in dealing with the issues raised in section 13, set out in paragraph 16 above i.e.
- Section 16(1) of the Act provides that in assessing the viability of the business of the tenant, I must, as far as known, have regard to:-
- a) the assets and liabilities of the tenant, including any other tenancies 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.

MATTERS TO BE DETERMINED, ASSESSED AND RESOLVED

19. Section 13 of the Act sets out the issues that the Arbitrator is to determine, make an

assessment on and resolve, the order in which they need to be decided and the awards open for the arbitrator to make i.e.

1. Is the tenancy a business tenancy? (section 13(2)(b) of the Act)
 2. Is there a protected rent debt as defined by the Act? (section 3 of the Act)
 3. Is the tenant's business viable, or would it be viable if rent relief were given? (section 13(3) and 13(4) of the Act)
 4. If the tenant's business is viable, should the tenant be given relief and, if so, what form should it take? (section 13(5) of the Act)
20. Section 13(2) of the Act states that the arbitrator must make an award dismissing the reference if it determines:
- (a) the tenancy in question is not a business tenancy, or
 - (b) there is no protected rent debt,

Section 13(3) of the Act states that the arbitrator must make an award dismissing the reference if, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—

- (a) is not viable, and
- (b) would not be viable even if the tenant were to be given relief from payment of any kind.

I will now consider each of the above issues in turn.

IS THE TENANCY BY WHICH THE PREMISES ARE OCCUPIED A BUSINESS TENANCY?

21. The parties have been unable to agree whether the Applicant's occupancy creates a business tenancy sufficient to satisfy the requirements of the Act and it therefore falls to me to determine the issue.

22. The Submissions of The Parties

23. [REDACTED] has advised that:

- the Applicant did not sub-let the Property as alleged;
- the Respondent was aware of the Applicant's business arrangement with [REDACTED] and therefore the Applicant's occupancy does create a business tenancy sufficient to satisfy the requirements of the Act as on 25 May 2017, the Applicant did not sublet the premises but signed a Business Management Agreement with [REDACTED] for a term of 2 years
- the Respondent was aware of the above mentioned Business Management Agreement and never raised objections
- the Applicant never relinquished their ownership, as they did not sublease or sublet the Property to [REDACTED]. Furthermore, the Applicant continued with [REDACTED] under the Agreement because of the negotiations between all the concerned parties.
- the Applicant was in occupation of the premises during the relevant protected period applying to the tenancy, as they were running the business under the above mentioned Business Management Agreement.

In his witness statement dated 3 April 2023, [REDACTED] states that:

- the Applicant was responsible for paying rent to the Respondent and received the management fee from [REDACTED]
- the Applicant informed the Respondent that they were ready to surrender the lease and [REDACTED] was interested in taking either an assignment or new lease on the premises
- the Applicant could not register the lease with the His Majesty's Land Registry because the Respondent did not provide them with the necessary documents to do so

- the Applicant's inability to register the lease meant that the Applicant was unable to assign the lease
- the Applicant was in dispute with [REDACTED] and instructed Bailiffs to gain access to obtain possession of the property on 30 March 2023, as he refused to vacate the shop
- the Applicant received 48,000 Euros to purchase items necessary to start the [REDACTED] business
- on reopening, the business started to progress but the outgoings of the business are currently more than its income
- the Applicant was in negotiations with the Respondent to clear all the outstanding rent arrears
- the Applicant has, as at 3 April 2023, been paying rent to the Respondent regularly with some arrears
- he believes the business is viable and hopes it will be profitable once all of the non-business issues have been resolved

24. [REDACTED] has advised that the Applicant was not in occupation of the premises during any protected period and therefore invited me to make an award under s13(2) dismissing the reference, as the Applicant's occupancy does not create a business tenancy sufficient to satisfy the requirements of the Act as:

- the Applicant has been subletting the premises to [REDACTED]
- [REDACTED] is not an employee
- the Business Operating Agreement refers to [REDACTED] as being 'Leased Premises'
- the Business Operating Agreement is a lease in all but name
- the Applicant was not in occupation of the premises during any protected period – a point understood by the Applicant as their legal representative has completed a relief from forfeiture form with High Court Enforcement Officers against [REDACTED] – as the Applicant has clearly been subletting the premises to [REDACTED]
- section 1(2)(b) of the Act provides for statutory arbitration between the landlord and the tenant under a business tenancy
- section 2(5) of the Act states that a business tenancy means a tenancy to which Part II of the Landlord and Tenant Act 1954 applies and
- the requirement that the Landlord and Tenant Act 1954 applies appears to mean that:
 - a) the tenant must fall within the definition of a business tenancy within section 23 of the Landlord and Tenant Act 1954 (including excluded leases);
 - b) if there is a sublease, the subtenant is almost certainly the person in occupation with reference to *Graysim Holdings v P&O Holdings* [1996] AC 329;
 - c) tenants who have wholly sublet cannot take advantage of the scheme.

25. Findings

1. [REDACTED], in their letter of 12 November 2020 confirmed that:
 - the Respondent is aware that the rent is being paid by [REDACTED] as he is the occupier having possession of the property;
 - the Applicant has been acting as a go-between, between the two parties with the rent from [REDACTED] being collected by the Applicant and passing it on to the Respondent without any deduction whatsoever;
 - the Applicant has no material or financial interest in carrying on with this relationship and thus require a clear way out of this as soon as possible;
 - the Applicant has spent great sums to ensure both parties adhere to the lease covenants;
 - it has been proposed that as [REDACTED] is the person in occupation, with full knowledge and implied consent of the Respondent, that it would be in the best

interests of all parties that a direct relationship is now established between the occupier and the ultimate landlord of the premises with the Applicant surrendering its interest in the lease and the Respondent granting a new lease directly to [REDACTED] direct or agreeing to assign the lease to [REDACTED].

2. [REDACTED], in their letter of 16 February 2021, confirmed that:
 - the Claimant's lease, dated 1 April 2013, was for 12 years from 1 April 2013 expiring 31 March 2025;
 - the Respondent had not registered the leasehold title; and
 - the failure by the Respondent to register the lease left with Applicant with no alternative but to enter into a Business Management agreement with [REDACTED] on 25 May 2017, for 2 years.
 3. the Business Management agreement confirms that:
 - the Business Owner is the lawful owner of the said business and has good right to give the Business Operator on operation lease (this agreement); and.
 - the Business Owner is the 100% stakeholder in the said business and his rights and ownership in the said business has no encumbrance or a lien has been created on the said business as on the date of signing of this agreement.
 - the Business Owner shall provide the Business Operator full co-operation in the smooth functioning of the said business during the currency of this agreement.
 - the Business Owner will ensure that rent for the premises is paid to the Landlord as and when it is due so that the Business Operator is in a position to continue to operate the business without any hindrance. This is subject to the Business Operator regularly paying compensation under this agreement to the Business Owner in terms of this agreement.
 4. section 1(1) of the Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration (if not resolved by agreement).
 5. section 2(5) of the Act states that a business tenancy means a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
 6. as a matter of principle, a tenant under a business tenancy cannot sub-let part of the property to a business sub-tenant and at the same time continue to occupy a "holding" comprising all the property contained in the demise to him;
 7. the definition of a "holding" in section 23(3) of the Landlord and Tenant Act 1954 excludes property not occupied by the tenant and this indicates that two persons (other than when acting jointly) cannot be in occupation for the purposes of the Act at the same time.
 8. subsection 23(3) of the Landlord and Tenant Act 1954 states that in the following provisions of this Part of this Act, the expression "the holding", in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies.
 9. each case will be decided on its own specific circumstances, so it is difficult to rely solely on the outcome of Graysim Holdings v P&O Holdings, as the circumstances of that case were not on 'all fours' with that of this case; and
 10. from Cafeteria (Keighley) Ltd v Harrison (1956), a tenant may occupy the premises without being physically present. In deciding the point, a court would be wary of the agreement to occupy through the person of a manager being an agreement without substance.
26. After giving full consideration to the findings set out in 25 above, I therefore on balance, **FIND**, that the Applicant, as a consequence of the Business Management Agreement relating to the

premises dated 8 August 2011, has not sublet the premises to [REDACTED] and occupies the premises sufficient to satisfy the requirements of section 2(5) of the Act.

IS THERE A PROTECTED RENT DEBT AS DEFINED BY THE ACT?

27. **The Submissions of The Parties**

[REDACTED] has advised that there is a protected rent debt as defined by the Act (section 13(2)(c) of the Act). He made no comment on the amount of service charge or insurance premium paid by the Applicant during the protected period applicable to the tenancy and invited me to award the Applicant relief of 50% of the protected rent debt totalling £6,326.72, with an amount of £3,163.36 being paid to the Respondent in 12 equal instalments starting from 1 May 2023, as:

1. the Respondent was well aware of the Applicant's business as they had visited the shop;
2. the Applicant's business was a café for selling sandwiches or other cold food;
3. the Applicant's business was closed during the relevant period for the protected debt;
4. the Applicant's business was subject to a 'closure requirement' (section 4(2)(a) of the Act) as the Applicant was to cease carrying on its business from the premises, as that business was included in Part 1 of Schedule 2 of The Health Protection (Coronavirus Restrictions) (England) Regulations 2020;
5. the relevant protected period is for the 485 days, being the period from 21 March 2020 to 18 July 2021 (section 4(2)(b) of the Act); and
6. the rent paid during the relevant protected period was £28,470 per annum, plus vat

28. [REDACTED] has advised that there is not a protected rent debt as defined by the Act (section 13(2)(c) of the Act) and invited me to make an award under section 13(2) dismissing the reference as the proposal failed to establish protected rent debt as:

1. the Applicant was not adversely affected by coronavirus;
2. in order for the Applicant to seek relief under the Commercial Rent (Coronavirus) Act 2022, it is necessary for them to demonstrate that the pandemic has had a significant impact on the Applicant's business - which they have failed to do;
3. the Respondent has no knowledge of what business was being run from the premises;
4. the Applicant did not carry on any business listed on schedule 2 of The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020;
5. the Applicant has provided no evidence to demonstrate that the premises were subject to a closure order and were required to close as a result of the pandemic;
6. if the Applicant was operating the premises as a café, then the relevant protected period would be for the 104 days for the period from 21 March 2020 to 3 July 2020; and
7. there was no service charge or insurance premium paid by the Applicant during the protected period and the rent paid during the relevant protected period was £28,470.78 per annum – VAT not applicable.

29. **Findings**

1. the Applicant's business was (as shown by the photographic evidence provided) as a café for selling sandwiches or other cold food;
2. the Applicant's business was subject to a "closure requirement", as cafes and restaurants were included in Part 1 of Schedule 2 of The Health Protection (Coronavirus Restrictions) (England) Regulations 2020 as businesses which were subject to restrictions or closure;
3. the tenancy was therefore adversely affected by coronavirus as the business was subject to a "closure requirement"; and
4. 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.

30. After giving full consideration to the findings set out in 29 above I therefore **FIND** that there is a protected rent debt, as:

1. the tenancy was adversely affected by coronavirus;

2. 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.

IS THE TENANT'S BUSINESS VIABLE, OR WOULD IT BE VIABLE IF RENT RELIEF WERE GIVEN IN ACCORDANCE WITH THE ACT?

31. Section 13 of the Act sets out the awards open to the arbitrator, section 13(2) of the Act provides that the arbitrator must make an award dismissing the reference if he determines, after assessing the viability of the tenant's business, that (at the time of the assessment) the business:

- (a) is not viable, and
- (b) would not be viable even if the tenant were to be given relief from payment of any kind.

32. Viability is not defined in the Act. Guidance to arbitrators on this point is that in making the assessment of viability, a key question is whether protected rent debt aside, the tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.

In making the assessment of viability, the arbitrator:

1. can consider the immediate landlord and occupying tenant relationship, the impact of the tenant's other debts and their wider financial situation.
2. is to assess the viability of the tenant's business in a holistic and common-sense way, considering the circumstances of that business at the time of the assessment. On that basis, evidence relating to the business prior to or during the coronavirus pandemic would only be relevant insofar as it speaks to current viability, although the arbitrator is to take into account seasonal variations in business.

A small business should not be expected to supply a large volume of documentation or complex financial analysis. At the very minimum, the tenant should provide at least the last 12 months' full bank account information, including savings accounts, current accounts and loan accounts.

Where the tenant's business is not incorporated, it may be necessary to provide personal bank account information. Where these (and/or other records) show the tenant has a good track record of paying rent, and has no substantial new debts, that is likely to be strong evidence that the tenant's business is viable.

Other information where available will also be generally useful to the arbitrator, such as financial and/or management accounts for each financial month/year after March 2019.

However, audited accounts are not required under the Act and some businesses are not required to have audited or comprehensive financial accounts. Where that is the case, the arbitrator may want to look at bank account information including any saving accounts, loan accounts and current accounts for each financial year after March 2019.

33. **The Submissions of The Parties**

34. [REDACTED] has advised that the Applicant:

1. submits, pursuant to section 16(1) of the Act, that in assessing the viability of their business regard is to be had to factors referred in clauses (a)-(d) i.e.
 - a) the assets and liabilities of the tenant, including any other tenancies 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,
 - d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.
2. received a covid grant of £25,000 but redirected it to Mr Silva as a goodwill gesture to

- assist with negotiations for the transfer of lease, which never took place.
3. contents that its business is viable, however currently it is not performing well due to:
 - a) the on-going dispute with [REDACTED].
 - b) the personal circumstances of the Applicants, including health issues
 - c) strikes;
 - d) a decrease in customer footfall/passing trade;
 4. its business will be profitable in foreseeable future.
 5. are behind in paying rents, which is just a small amount;
 6. has been paying the rent regularly to the Respondent and their business has also been progressing after the post-covid period.
 7. has agreed for the full payment of the outstanding rents; and
 8. was unable to pay the full rent in March 2023, so paid rent of £1,800 instead of the full amount of £2,847.10 per month due to the ongoing crisis and lack of business.

In his witness statement dated 3 April 2023, [REDACTED] states that:

1. the Applicant received 48,000 Euros to purchase items necessary to start the [REDACTED] business;
2. the Applicant was in negotiations with the Respondent to clear all the outstanding rent arrears;
3. the Applicant has, as at 3 April 2023, been paying rent to the Respondent regularly with some arrears;
4. he considers that the current rent should be reduced from £2,847.10 to £1,200/£1,300 per month;
5. on reopening, the business started to progress but currently the outgoings of the business are more than its income due to:
 - a) strikes; and
 - b) financial crises in the country
6. he believes the business is viable and hopes it will be profitable once all of the non-business issues have been resolved.

The Applicant submits that all the eligibility conditions have been satisfied and that I render an award in their favour by granting relief of 50% of the protected rent debt totalling £6,326.72, with an amount of £3,163.36 being paid to the Respondent in 12 equal instalments. In addition, the Applicant requests the Arbitrator to award the full legal costs which they incurred for these proceedings or in the alternative to award reimbursement half of the Applicant's legal costs.

35. [REDACTED] has advised that the Applicant:
 1. alleges a loss but provides no evidence/further details or supporting evidence to substantiate its claim.
 2. has to demonstrate that their business is viable, or would be viable if given relief from payment, but that they cannot pay in full.

[REDACTED] contents that:

1. the Code and the government's statutory guidance both include non-exhaustive lists of documents which should be taken into account when considering the viability of a tenant's business. These include:
 - a. financial and management accounts from March 2019
 - b. gross and net profit margins, before and after restrictions were in place
 - c. liquidity, gearing and current ratios
 - d. dividend payments to shareholders
 - e. overdue invoices or tax demands
 - f. unpaid or returned cheques or electronic payments

- g. exceeding overdraft limits
 - h. creditor demands
 - i. money judgments
 - j. evidence of prior refusal of further credit, funding or lending
 - k. long term contracts, and their value
2. the Code and statutory guidance suggest that:
 - a) at the very minimum the tenant should provide at least the previous year's full bank account information, including savings accounts, current accounts and loan accounts.
 - b) where the tenant's business is not incorporated, it may be necessary to provide personal bank account information.
 - c) where these (and/or other records) show the tenant has a good track record of paying rent, and has no substantial new debts, that is likely to be strong evidence that the tenant is viable.
 - d) other information where available will also be generally useful to the arbitrator, such as financial accounts for each financial year after March 2019 or management accounts for each financial month/year after March 2019.
 3. it is the tenant's responsibility to provide evidence to support their proposal and to enable the arbitrator to determine the viability of the tenant's business.
 4. in assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to the following:
 - a) the assets and liabilities of the tenant, including any other tenancies 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.
 5. the Applicant's submission that they have been paying the rent regularly is one that does not line up with reality. The rent statement clearly demonstrates that the Applicant is failing to pay rent and have failed to do so regularly.
 6. the current rent arrears total £17,376.42, a figure which far exceeds the protected rent debt of £6,326.72.
 7. the Applicant has not provided any financial information to satisfy the arbitrator that its business is viable.
 8. the Applicant has a poor track record of rent payment; and that
 9. the current rent arrears and the Applicant's inability to comply with its rent payment obligations under the lease is not indicative of a viable business.

The Respondent submits that the Applicant's:

- a) financial woes resulted from the dispute with [REDACTED]
- b) are attempting to mitigate the incurred financial loss by attempting to shift it onto the Respondent while an alternate company benefits. The Coronavirus rent relief is not for such purpose.
- c) has not provided any management accounts, financial statements or any explanation as to why its business is viable or would be if granted relief, or any documents within its proposal which permits the arbitrator to make an assessment under section 16 of the Act.
- d) are blaming factors outside of the pandemic for their business woes.
- e) its submission that its business is viable and will be profitable in the foreseeable future is unrealistic, especially as they have already fallen behind on their rent payments by almost a year. This failure to comply with the payment obligations under the lease does not support a position that the business is viable. On the contrary, it indicates that this is a business that is clearly unable to meet its principal debt, the rent.
- f) has provided no documentary evidence, or disclosed a single bank statement



demonstrating their circumstances, nor assets to support their claim that their business is viable. If that were the case, they would have paid the undisputed rent promptly, which they did not do. As such, an adverse inference should be drawn and he invites me to make an award dismissing the reference by determining that (at the time of the assessment) the business —

- a) is not viable, and
- b) would not be viable even if the tenant were to be given relief from payment of any kind.

36. **Findings** - In making the assessment of viability, the arbitrator:

1. can consider the immediate landlord and occupying tenant relationship, the impact of the tenant's other debts and their wider financial situation.
2. is to assess the viability of the tenant's business in a holistic and common-sense way, considering the circumstances of that business at the time of the assessment.
3. the Applicant is not expected to supply a large volume of documentation or complex financial analysis but should, to demonstrate that the tenant's business is viable, provide:
 - a) records which show the tenant has a good track record of paying rent;
 - b) at least the last 12 months' full bank account information, including savings accounts, current accounts and loan accounts;
 - c) personal bank account information;
 - d) demonstrate that it has no substantial new debts; and
 - e) any other information, where available, such as financial accounts for each financial and/or management accounts for each financial month/year after March 2019.

██████████ made the point that pursuant to section 16(1) of the Act, the Applicant, in assessing the viability of their business, must have regard to factors referred in clauses (a)-(d) i.e.

- a) the assets and liabilities of the tenant, including any other tenancies 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,
- d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

Despite making the point in connection with section 16 (1) above, and repeated requests from myself, ██████████ was only able to provide the following financial information:

1. untranslated financial information in an unknown currency, in relation to an unknown bank account, indicating that the unknown entity had the following amounts in its bank account:
 - 57,508.74 as at 30 June 2022
 - 50,430.71 as at 31 August 2022
 - 199.87 as at 30 September 2022
 - 44,114.07 as at 31 October 2022
2. payment slips showing:
 - ██████████ taking a salary of £800 per month (March 2023) as an employee of ██████████
 - ██████████ taking a salary of £823.37 per month (March 2023) as an employee of ██████████
3. bills from its suppliers showing:
 - ██████████ - £1,044.08 (Varina Limited) for the period from 3 to 23 March 2023
 - ██████████ £660.90 - (Alentejano Bakery Limited - £85.34, JJM Trading Limited - £244.46, Madeira Patisserie - £159.17 and Portugalia Wines (UK) Limited –

£171.93) for the period from 5 to 26 March 2023

4. a petrol receipt (dated 23 March 2023) for £92.50;
5. a blank receipt (dated 29 March 2023) for £147.23;
6. a direct debit of £67.30 per month in respect of a security system from Verisure Services (UK) Limited dated 1 March 2023
7. an slip showing that [REDACTED] had not complied with the payments plan agreed with HM Revenue and Customs and, on 13 March 2023, were being chased for a payment of £401.26
8. a water and wastewater bill to [REDACTED] had (dated 21 April 2022 for the period from 1 April 2022 to 31 March 2023) showing a credit of £180.77
9. an electricity bill to [REDACTED] (dated 8 March 2023 for the period from 2 February 2023 to 1 March 2023 April 2022 to 31 March 2023) of £461.08.
10. a rates bill (for the period from 1 April 2022 to 31 March 2023) of £3,150.22

It is also noted that:

1. [REDACTED] is the Director of a company called [REDACTED], incorporated on 29 April 2022.
2. [REDACTED] is the Director of a company called [REDACTED], incorporated on 12 October 2015.
3. neither of these 2 companies is either the Applicant or tenant in this matter.

The Applicant states that the business:

1. will be profitable in foreseeable future;
2. is viable but not currently performing well due to:
 - the on-going dispute with [REDACTED]
 - the personal circumstances of the Applicant, including health issues
 - strikes
 - a decrease in customer footfall/passing trade
3. on reopening, the business started to progress but currently the outgoings of the business are more than its income
4. received 48,000 Euros to purchase items necessary to start the [REDACTED] business; but
5. provided no evidence to support its statement that the business was viable.

The arrears statement provided by [REDACTED] confirms that the Applicant is not making full rent payments regularly and that current rent arrears total £17,376.42, a figure which exceeds the protected rent debt of £6,326.72.

37. Section 16(1) of the Act, states that in assessing the viability of their business regard is to be had to factors referred in sub-sections clauses (a)-(d) i.e.
- (a) the assets and liabilities of the tenant, including any other tenancies 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,
 - (d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

Despite a number of requests for them to do so, the Applicant has not provided me with any information that enables me to make an award on the matter of relief from payment in accordance with section 14, adopting the principles set out in section 15 of the Act.



Indeed, in his witness statement, [REDACTED] confirms that the outgoings of the business are currently more than its income and in accordance with section 16 (3) of the Act, the tenant's viability is to be assessed ignoring the loan of 48,000 Euros [REDACTED] received from his sister. On this basis, the Applicant had 199.87 in its bank account as at 30 September 2022; a figure of -3,888.93 as at 31 October 2022 and rent arrears totalling £17,376.42 as at 1 April 2023.

Based on my findings in 36 above and the information provided, after assessing the viability of the tenant's business (as required by section 13(3) of the Act), I **FIND**, that at the time of the assessment the business is not viable and would not be viable even if the tenant were to be given relief from payment it had claimed of £3,163.36.

AWARD

38. Under section 13(3) of the Act I **HEREBY MAKE AN AWARD AND DIRECT THAT** the Applicant's reference is dismissed.

COSTS

39. Section 19(4) of the Act provides that the Applicant must pay arbitration fees in advance of the arbitration taking place.

Section 19(1) of the Act states that fees are to include:

- (a) the arbitrator's fees and expenses; and
- (b) the fees and expenses of any approved arbitration body concerned.

The Applicant requested that I award the full legal costs which they incurred for these proceedings against the Respondent or in the alternative to award reimbursement half of the Applicants' legal costs.

The Act provides, within section 19(5), that I am to make an Award on my costs and the application fee to the arbitral body, requiring the Respondent to reimburse the Applicant for half the arbitration fees, unless in the circumstances (section 19(6)) I consider it more appropriate to make an Award on a different basis.

[REDACTED] has reserved the right to present correspondence on the question of costs following the publication of my award but after a careful consideration of the vast amount of documentation put to me, I cannot see a reason why I should depart from the principal set out within section 19(5). Therefore, each party must pay its own costs and half of the fees paid by the Applicant totalling £850 i.e. the RICS application fee under Procedure A of £100 (despite the Applicant having paid the RICS application fee under Procedure D of £450) and the arbitrator's fee under Procedure A of £750 plus vat.

40. I therefore additionally Award that the Respondent is to reimburse the Applicant, by 18 August 2023, £510, which is 50% of the fees paid by the Applicant for the Arbitration under Procedure A, totalling £850, plus VAT.
41. The seat of this arbitration is England and Wales.
42. This Final Award is made and published this 16 July 2023.
43. This Final Award will be published by the RICS on its website in an anonymised format.

Signed

Dated: 16 July 2023

D J Gilbert BSc FRICS Dip Arb FCI Arb RICS Accredited Mediator
As Arbitrator