

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

**BETWEEN**

**MASSIS RESTAURANT LIMITED  
(APPLICANT)**

**&**

**SCP ESTATE LIMITED  
(RESPONDENT)**

**IN RESPECT OF  
28 JAMES STREET, LONDON, W1U 1EU**

**FINAL AWARD  
BY  
BY SIMON S GOULDBOURN BSc MRICS ACI Arb  
ARBITRATOR**

MEMBER OF  
THE INTERNATIONAL



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## **1.0** *Preliminaries*

- 1.1 The Applicant is Massis Restaurant Limited, the tenant of premises at 28 James Street, London, W1U 1EU. The Applicant is represented by Mr Peter May (PM) of Michael May & Partners.
- 1.2 The Respondent is SCP Estate Limited, the landlord of the aforementioned premises. The Respondent was initially represented by Ms J Wilkes (JW) of Columbia Threadneedle Real Estate Partners LLP. The Respondent has latterly been represented by Ms P Gee-Merrett (PGM) of Davis Coffey Lyons.

## **2.0** *Procedural Background*

- 2.1 On 22<sup>nd</sup> December 2022 I was appointed by the President of the Royal Institution of Chartered Surveyors (RICS) to act as an arbitrator under the Commercial Rent (Coronavirus) Act 2022 (CRCA).
- 2.2 In its application form dated 23<sup>rd</sup> September 2022, the Applicant requested the arbitration be conducted in accordance with the RICS arbitration procedure "C".
- 2.3 Following my appointment, the parties both immediately asked that I do nothing further whilst they continued negotiations.
- 2.4 I received monthly requests to do nothing further until 20<sup>th</sup> July 2023, when PGM provided me with the Respondent's Formal Response to the Applicant's Proposal. PGM asked me to proceed to making an Award but I had just gone away on holiday when this request was made.
- 2.5 Following my return from holiday I advised both parties on 9<sup>th</sup> August that because I had been put on hold from the outset, no fee had been agreed or timetable for lodging of Proposals, extended to include Amended Proposals from each side in accord with the requirements of the CRCA.
- 2.6 I advised both parties of my fee basis and instructed the Applicant to lodge the fee with the RICS.
- 2.7 On 18<sup>th</sup> August 2023 it was brought to my attention by PM for the Applicant that parties were attempting to achieve a negotiated settlement. I encouraged the parties to reach an agreement and update me as to the status of the dispute by 5<sup>th</sup> September 2023.
- 2.8 PGM contacted me on 5<sup>th</sup> September 2023 advising that no resolution had been achieved and that parties were also engaged in legal discussions on lease and rent matters outside the jurisdiction of this arbitration.
- 2.9 PGM was also dismayed to learn that the Applicant had not lodged my fee with the RICS but nevertheless, requested me to proceed with the arbitration.

- 2.10 PM then immediately responded on the same day, believing a settlement was imminent and requesting a further 14 days to document the settlement outside of arbitration.
- 2.11 On 20<sup>th</sup> September 2023 I made it clear to the parties that responsibility lay with the Applicant to lodge my fee with the RICS in advance of the arbitration proceeding. The Respondent had previously requested a direction that the Applicant make payment of my fee within a specified period.
- 2.12 I reminded PM that the Applicant had brought a claim but was reticent to lodge my fee on account with the RICS. There had been a period of weeks for parties to reach agreement but PM had provided no additional information regarding settlement.
- 2.13 I advised on 20<sup>th</sup> September 2023 that if the Applicant had not lodged my fee with the RICS after a period of 21 days from 20<sup>th</sup> September 2023, then I would move to dismiss the reference under s.41(3) of the Arbitration Act 1996.
- 2.14 I heard nothing further until PM sent an email 10<sup>th</sup> October 2023, advising that the rental concession for the ring fenced period as set out in the Respondent's Formal Response to the Applicant's Proposal, had been agreed by the Applicant. PM went further to say that the Applicant was then willing to withdraw from the arbitration process.
- 2.15 I emailed both parties on 10<sup>th</sup> October 2023 asking PGM to confirm that the matter had been resolved and my services no longer required.
- 2.16 On 11<sup>th</sup> October 2023 PGM advised that no binding agreement had been reached and the Respondent could not withdraw on the basis put forward by the Applicant. PGM asked that the deadline for payment of the arbitration fee set out in email of 20<sup>th</sup> September 2023 must stand.
- 2.17 I sought clarification from the RICS that payment had been made. On 23<sup>rd</sup> October 2023 PM advised that the Applicant was the weaker party financially and sought to reduce the level of fee that I had directed be paid to the RICS.
- 2.18 PGM responded on 25<sup>th</sup> October 2023 and reaffirmed that no binding agreement had been reached. PGM advised that extensive without prejudice conversations had been ongoing regarding other rent arrears outside of the ring fenced sum, but they could not be progressed until the issue of the Covid ring fenced arrears had been resolved.
- 2.19 PGM advised that for these reasons, the Respondent could not withdraw from the arbitration process and requested they both proceed. PGM was frustrated that the Applicant's failure to pay the arbitration fee was thwarting progress. Given that the deadline imposed on the Applicant for payment of the arbitrator's fee to the RICS had passed some 12 days previously, PGM requested clarification of the status of the arbitration.

- 2.20 PGM further reminded me on 30<sup>th</sup> October 2023 that I had previously stated I had a duty to proceed, the Applicant had been given a deadline to pay the RICS fee and ultimately failure to do so would be for me to move to dismiss the arbitration under s.41(3) of the Arbitration Act 1996. I was again asked to confirm the status of the arbitration.
- 2.21 On 10<sup>th</sup> November 2023 I set out a lengthy email recapping events and ultimately directing the Applicant to lodge my fee with the RICS by close of business on Friday 17<sup>th</sup> November 2023. I further warned the Applicant that if no payment was made, and in the absence of any confirmation to me that the dispute is settled, then I would make an Award dismissing the claim under s.41(3) of the Arbitration Act 1996. I reminded the parties that the cost of making such an Award would be met by the parties as I direct in the Award but they are jointly and severally liable for my fee.
- 2.22 I advised the parties that the Applicant must have made its Amended Proposal to the Respondent's Proposal by close of business on Friday 24<sup>th</sup> November 2023. I explained that the Applicant had already had a period some way beyond the 28 day period to submit an Amended Proposal and that I was not resetting the 28 day timetable for a response.
- 2.23 The Respondent would subsequently be given a period of up to 28 days to submit its final Amended Proposal in response to the Applicant.
- 2.24 On 10<sup>th</sup> November 2023 PM advised that the Applicant had paid my fee into the RICS and confirmed that the Applicant accepted the terms offered by the Respondent as contained in the Respondent's Formal Response to the Applicant's Proposal. PM asked whether this was sufficient confirmation to settle the dispute.
- 2.25 I immediately sought clarity from PGM as to whether closure of the matter could be made in light of PM's statement regarding the dispute. PGM responded on 20<sup>th</sup> November 2023 explaining that due to the delays and lack of commitment in the past, the Respondent would likely wish to keep the arbitration open until the agreement was documented. PGM further sought clarification that the Applicant accepted all terms stated within the Respondent's Formal Response, including the rent sums due and the repayment method.
- 2.26 I emailed the parties on 23<sup>rd</sup> November 2023 reminding PM that PGM had requested the Applicant confirm that all terms stated within the Respondent's formal response, including the rent sums due and repayment method, were agreed.
- 2.27 On 29<sup>th</sup> November 2023 I emailed the parties explaining that I had found it extraordinary that the Applicant had failed to respond to myself or PGM as to whether a dispute remained. The Applicant had not confirmed that it accepted all terms set out in the Respondent's Formal Response, despite repeated requests for an answer on this point.

- 2.28 I advised that the deadline for the Respondent to make an Amended Proposal had expired and as I was not extending the timetable further, I would proceed to making an Award based on the Proposals received. I further advised that this would incur additional costs to be apportioned as I see fit.
- 2.29 On 29<sup>th</sup> November 2023 PM confirmed that he had been seeking urgent instructions from the Applicant on his return from holiday. He advised that the Applicant had accepted all the terms set out in the Respondent's Formal Response.
- 2.30 PGM responded on the same day confirming that solicitors were in without prejudice discussions regarding arrears and the Applicant's prospective application for relief from forfeiture at the property. The Respondent requested the arbitrator to resolve the dispute by issuing an Award.

### **3.0** *Legal Framework*

- 3.1 The CRCA enables resolution by arbitration (if it cannot be resolved by agreement) of relief from payment of a protected rent debt due to be paid by the tenant to the landlord under a business tenancy.
- 3.2 A qualifying "protected rent debt" applies to a business tenancy which has been adversely affected by coronavirus such that the whole or part of those business premises were subject to a closure requirement.
- 3.3 The "protected period" for business tenancies adversely affect by coronavirus in England is the period 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021.
- 3.4 Under s.2 (1) of the CRCA, rent means an amount consisting of one or more of the following:
- a) *an amount payable by the tenant to the landlord under the tenancy for possession and use of the premises comprised in the tenancy (whether described as rent or otherwise);*
  - b) *an amount payable by the tenant to the landlord under the tenancy as a service charge;*
  - c) *interest on an unpaid amount within paragraph a) or b).*
- 3.5 In my capacity as arbitrator under s.6 (2) of the CRCA I am to consider the matter of relief from payment of a protected rent debt, my remit to include any one or more of the following:
- a) *writing off the whole or any part of the debt;*
  - b) *giving time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments;*

- c) *reducing (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or any part of the debt.*
- 3.6 A key arbitrator's principle under s.15 (1) of the CRCA is aimed at preserving, or restoring and preserving, the viability of the tenant's business, so far as that it is also consistent with preserving the landlord's solvency.
- 3.7 In assessing the viability of the business of the tenant, the arbitrator is directed by s.16 (1) of the CRCA and must, so 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 information relating to the financial position of the tenant that the arbitrator considers appropriate.*
- 3.8 In assessing the solvency of the landlord, the arbitrator must, under s.16 (2) so far as known, have regard to:
  - a) *the assets and liabilities of the landlord, including any other tenancies to which the landlord is a party, and*
  - b) *any other information relating to the financial position of the landlord that the arbitrator considers appropriate.*
- 3.9 Whilst making an assessment of the tenant's viability and landlord's solvency, I am to disregard the possibility of the tenant or the landlord borrowing money or restructuring its business.

#### **4.0** *The Applicant's Proposal*

- 4.1 The Applicant supplied unaudited accounts relating to Massis Restaurant Limited and a management company, Ariel Management Limited. The management company is the source of income from which the tenant company could meet its lease obligations, according to the Applicant.
- 4.2 The Applicant sought full relief from payment of all protected rent debts payable to the landlord under the CRCA.
- 4.3 The Applicant calculated a total protected rent debt owing, including rent, service charges and insurance, amounting to £78,258.34.
- 4.4 The protected period claimed was 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021 as provided for in the CRCA.

- 4.5 The Applicant sought the writing off of the entirety of the debt, extended to include reducing any interest that may have been applied, to zero. The Applicant maintained that trading conditions remained difficult for the foreseeable future due to the “cost of living crisis”, inflationary pressures and well publicised national and international travel disruption.
- 4.6 The Applicant’s objective in seeking this relief was to restore and preserve the viability of the business, a key consideration for the arbitrator as prescribed by s.15 of the CRCA. The Applicant maintained it had seen no evidence to suggest this would be inconsistent with preserving the landlord’s solvency.

## **5.0** *The Respondent’s Proposal*

- 5.1 In response to the Applicant’s Proposal, PGM stated that the correct amount of rent, service charge and insurance for the ring fenced Covid period amounted to £91,088.88 inclusive of VAT.
- 5.2 PGM confirmed that the Applicant had agreed to this figure in an email of 16<sup>th</sup> February 2023, a copy of which was supplied.
- 5.3 PGM stated that parties had been negotiating a Covid arrears settlement since May 2021 but no formal agreement had been reached.
- 5.4 PGM advised that the Respondent had amicably agreed Covid rent concessions with all Food & Beverage tenants at St Christopher’s Place Estate, with the exception of the Applicant.
- 5.5 All settlements related to rent concessions only with the other tenants paying all service charge and insurance monies due throughout the ring fenced period.
- 5.6 PGM highlighted that the profit and loss accounts for Massis Restaurant Limited were unaudited and dismissed the accounts of Ariel Management Limited as it was unknown to the Respondent and it had no direct relationship with that company.
- 5.7 PGM also highlighted that Ariel Management Limited’s accounts were not only unaudited but consolidated, showing purported trading and operating information for two restaurants.
- 5.8 PGM advised that the Applicant had not said that it cannot meet its obligations under the lease and had failed to explain why it needed to have 100% of the Covid arrears written off in order to remain viable.
- 5.9 PGM highlighted the fact that the Massis Restaurant Limited accounts showed that the Applicant had remained in profit throughout the pandemic.
- 5.10 PGM stated that the purpose of the CRCA is not to compensate tenants at the expense of landlords.

- 5.11 PGM advised that the Respondent had previously offered to write off the equivalent of eight months' rent and for the Applicant to pay the remaining outstanding sums immediately.
- 5.12 The Respondent had calculated the total monies owed by the Applicant for the ring fenced period to amount to £91,088.88 inclusive of VAT. An eight month rental concession would amount to writing off £42,800 inclusive of VAT.
- 5.13 The Respondent's Proposal equated to the Applicant owing a total figure of £48,288.88 inclusive of VAT, for which the Respondent required immediate payment from the Applicant.

## **6.0** *The Applicant's Amended Proposal*

- 6.1 On 29<sup>th</sup> November 2023 PM confirmed via email to myself and PGM that the Applicant accepts the terms of the Respondent's Proposal dated 20<sup>th</sup> July 2023.

## **7.0** *Relief from Payment*

- 7.1 The Applicant has agreed to the Respondent's Proposal.
- 7.2 The Applicant will be given relief from the payment of £42,800 inclusive of VAT.

## **8.0** *Arbitration Costs*

- 8.1 Under s.19 (6) of the CRCA I have discretion as to the apportionment of my own costs.
- 8.2 It is disappointing that a binding agreement was not reached earlier and that costs have accrued. The Respondent sought a binding agreement to rely upon which I consider had not happened largely due to continued delay and inaction from the Applicant.
- 8.3 I have given due consideration to these facts when considering apportionment of my costs.

## **9.0** *Publication*

- 9.1 I am directed by s.18 (2) of the CRCA to publish my Award.
- 9.2 The Award will be published on the website of the RICS.
- 9.3 I do not consider there is commercial information which must be excluded under s.18 (3) of the CRCA.
- 9.4 I intend to publish the Award in full on the RICS website unless either party makes representations to the contrary by 5:30 PM on Friday 12<sup>th</sup> January 2024.



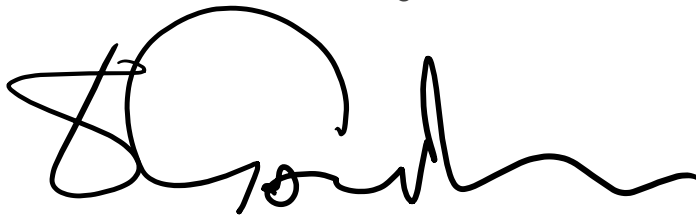
## 10.0 *Award*

10.1 I, Simon Stuart Gouldbourn, Award and Direct as follows:

- (a) The Applicant will pay to the Respondent the protected rent debt of £48,288.88 by no later than Friday 22<sup>nd</sup> December 2023.
- (b) My fee for resolving this dispute is £1,500 plus VAT. The Applicant will be liable for £1,000 plus VAT and the Respondent liable for £500 plus VAT. The Respondent must consequently reimburse the Applicant the sum of £500 plus VAT.

10.2 The seat of this Arbitration is England and Wales.

Signed:

A handwritten signature in black ink, appearing to read 'Simon S Gouldbourn', written in a cursive style.

**Simon S Gouldbourn BSc MRICS ACI Arb**

Date: 15<sup>th</sup> December 2023