

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

BETWEEN

**JAMES STREET CATERING LIMITED
(APPLICANT)**

&

**SCP ESTATE LIMITED
(RESPONDENT)**

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

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

MEMBER OF
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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 2nd 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 23rd 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 20th 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 9th 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 18th August 2023 it was brought to my attention by PM for the Applicant that parties were attempting to achieve a negotiated settlement. He advised that the Applicant was putting a proposal to the Respondent the following week offering to document an agreement outside of arbitration.
- 2.8 I encouraged the parties to reach an agreement and update me as to the status of the dispute by 5th September 2023.
- 2.9 PM contacted me on 5th September 2023 advising that the Applicant had accepted the Landlord's Proposal to settle the Covid arrears such that the amount to pay was not disputed. PM requested a further 14 day period to document the agreement outside of arbitration.

- 2.10 On 13th September PGM advised that no further progress had been made on resolving the dispute outside of arbitration. PGM asked what the next steps would be given that the Applicant had not submitted the arbitrator's fee to the RICS as I had requested.
- 2.11 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.
- 2.12 On 20th 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.
- 2.13 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.
- 2.14 I advised on 20th September 2023 that if the Applicant had not lodged my fee with the RICS after a period of 21 days from 20th September 2023, then I would move to dismiss the reference under s.41(3) of the Arbitration Act 1996.
- 2.15 I heard nothing further until PM sent an email 10th 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.
- 2.16 I emailed both parties on 10th October 2023 asking PGM to confirm that the matter had been resolved and my services no longer required.
- 2.17 On 11th 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 20th September 2023 must stand.
- 2.18 On 17th October 2023 PGM said there had been a lack of progress and the Respondent was not prepared to withdraw from the arbitration process. PGM reminded me that the arbitrator's fee was to be paid by 12th October 2023, failing which I would move to dismiss the reference under s.41(3) of the Arbitration Act 1996. I sought clarification from the RICS that payment had been made.
- 2.19 On 23rd October 2023 PGM again requested confirmation as to whether my fee had been lodged with the RICS. If no payment had been made then status clarification was requested of the arbitration particularly bearing in mind I had said I would move to dismiss the reference if payment was not received by 12th October 2023.

- 2.20 On 23rd 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.
- 2.21 PGM responded on 25th 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.
- 2.22 PGM advised that for these reasons, the Respondent could not withdraw from the arbitration process and requested that it 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 on the status of the arbitration.
- 2.23 PGM further reminded me on 30th 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.
- 2.24 On 10th 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 17th 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 directed in the Award but they are jointly and severally liable for my fee.
- 2.25 I advised the parties that the Applicant must have made its Amended Proposal to the Respondent's Proposal by close of business on Friday 24th 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.
- 2.26 The Respondent would subsequently be given a period of up to 28 days to submit its final Amended Proposal in response to the Applicant.
- 2.27 On 21st November 2023 PGM advised that the Applicant had not received any further notification as to whether my fee had been paid into the RICS. PGM asked that if no payment had been made could I issue an Award dismissing the reference under s.41(3) of the Arbitration Act 1996.
- 2.28 On 23rd November 2023 I advised that my fee had not been lodged with the RICS and it was my intention to issue an Award dismissing the reference under

- s.41(3) of the Arbitration Act 1996 unless the Applicant can simply confirm a dispute no longer remains.
- 2.29 On 24th November 2023 PGM confirmed there had been no further discussions but the matter remained outstanding.
- 2.30 On 28th November PGM asked that in the absence of hearing anything further from the Applicant, could I confirm when my Award would be ready dismissing the reference.
- 2.31 On 29th 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 paid no monies to the RICS but would not formally confirm to the Respondent or arbitrator that the matter was closed.
- 2.32 I advised that I would proceed to making an Award dismissing the claim under s.41(3) of the Arbitration Act 1996.
- 2.33 On 29th 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. PM asked if the arbitrator could close the file to avoid incurring additional costs.
- 2.34 PGM responded on the same day confirming that the matter had not been closed, nor had it formally been agreed. Further, the Applicant had made no attempt to document the matter nor engage with the Respondent regarding ring fenced arrears or other arrears which had accrued outside of the Covid period.

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 21st March 2020 to 18th 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.
- 3.10 The CRCA does not remove the arbitrator's ability to dismiss a reference under s.41(3) of the Arbitration Act 1996.

4.0 *My Decision*

- 4.1 Since my appointment as arbitrator in December 2022, the Applicant has had considerable opportunity to reach an agreement with the Respondent or pursue arbitration.
- 4.2 Following a substantial period of ongoing negotiations the Respondent ultimately required resolution by way of an Award because no formal agreement could be reached between the parties.
- 4.3 The Applicant was advised on three occasions that I would proceed to issuing an Award dismissing the reference under s.41(3) of the Arbitration Act 1996 unless certain criteria were met.
- 4.4 On 29th November 2023 the Applicant confirmed that it agreed with all of the terms of the Respondent's Proposal but asked that I close my file to avoid further expense.
- 4.5 The Applicant has not paid my fee to the RICS in respect of this matter and this is in breach of s.19(4) of the CRCA.
- 4.6 The Respondent has stated there has been no resolution and asked the arbitrator to dismiss the reference.
- 4.7 Having instigated a referral to arbitration under the CRCA, the Applicant has failed to resolve matters amicably with the Respondent and will not participate in arbitral proceedings.
- 4.8 I have recourse in case of a party's default by reference to s.41(3) of the Arbitration Act 1996:
"If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay –
(a) Gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or
(b) Has caused, or is likely to cause, serious prejudice to the respondent,
The tribunal may make an award dismissing the claim."
- 4.9 I am satisfied that the Applicant's conduct is sufficient to satisfy the requirements of s.41(3) of the Arbitration Act 1996 because the Respondent has been unable to resolve the dispute, through no fault of its own, which could cause serious prejudice to its position.
- 4.10 I dismiss the Applicant's reference to Arbitration under s.41(3) of the Arbitration Act 1996.

5.0 *Arbitration Costs*

- 5.1 Under s.19 (6) of the CRCA I have discretion as to the apportionment of my own costs.
- 5.2 The Applicant has delayed matters and failed to participate fully in trying to resolve the dispute. The Respondent had previously sought a binding agreement to rely upon which I consider had not happened due to continued delay and inaction from the Applicant. Latterly, the Applicant insisted on dismissal of the Applicant's claim to which I have sympathy.
- 5.3 I have given due consideration to these facts when considering apportionment of my costs.

6.0 *Publication*

- 6.1 I am directed by s.18 (2) of the CRCA to publish my Award.
- 6.2 The Award will be published on the website of the RICS.
- 6.3 I do not consider there is commercial information which must be excluded under s.18 (3) of the CRCA.
- 6.4 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 12th January 2024.

7.0 *Award*

- 7.1 I, Simon Stuart Gouldbourn, Award and Direct as follows:
- (a) The Applicant's claim is dismissed under s.41(3) of the Arbitration Act 1996.
 - (b) My fee for resolving this dispute is £1,000 plus VAT for which the Applicant is liable.
- 7.2 The seat of this Arbitration is England and Wales.

Signed:



Simon S Gouldbourn BSc MRICS ACI Arb

Date: 15th December 2023