

Arbitration Award

Commercial Rent (Coronavirus) Act 2022

[REDACTED] (Tenant and Applicant)

and

[REDACTED] (Landlord and Respondent)

[REDACTED]
[REDACTED]
[REDACTED]

Introduction

1. The Commercial Rent (Coronavirus) Act 2022 (the 'Act') concerns possible relief from payment arising in respect of 'protected rent debts' occurring within closed periods under circumstances defined by the Act and for businesses adversely affected by the pandemic.
2. The Act envisages negotiations and mediation between the parties to agree the amount (if any) of the relief. In circumstances where negotiations are not successful section 10(4) of the Act provides for the matter to be determined by arbitration.
3. The Royal Institution of Chartered Surveyors (RICS) is one of the bodies approved by the Government, responsible for appointing arbitrators to determine the relief.
4. An application to the RICS to appoint an arbitrator was made by the Applicant on 21 September 2022. I was notified by Mr Mushtaq Ahmed, Senior Appointment Specialist at the RICS of their intention to appoint me as arbitrator under the Commercial Rent (Coronavirus) Act 2022 and that the matter should proceed under procedure D (one of four arbitration procedures set down by the RICS). I responded and was notified on 6 December 2022 of my appointment and contacted representatives of the parties the following day.
5. I have been provided with the parties' proposals to settle the matter. Initial correspondence and an online meeting between the parties' representatives and myself revealed the differences between the parties and their views on the strength of the case of their opposite number.
6. This dispute centres around the Applicant's ability to pay the protected rent debt ,whilst at the same time protecting the viability of its (the Tenant's) business. In other words I am to make a finding on the amount of relief from the debt (if any). In addition to the issue of viability the Respondent contends that the Applicant's statement does not constitute a valid 'formal proposal' for the purpose of section 11 of the Act, because it does not expressly state that it is made for the purpose of that section.
7. There is no agreement between the parties whether I should be able to seek legal advice and accordingly this award is made without such assistance.
8. At the online meeting it was agreed that, due to the amount of the protected rent debt, this matter should be conducted under the less involved procedure B. There is no dispute that the protected rent debt, exclusive of interest, is £45,184, however the Respondent is also claiming £1,098.45 as interest on the outstanding debt.
9. The Applicant and tenant is [REDACTED] represented by [REDACTED] as director of the applicant company and the Respondent is [REDACTED] Limited represented by [REDACTED] as director of the company. The commercial property to which the debt applies operates as a licensed bar/restaurant.
10. The Applicant's proposal is that it should pay £8,531.20 to the Respondent landlord whereas the proposal from the Respondent is that its Tenant should pay a lump sum of £25,000 within 28 days of my decision with the remaining balance of £21,282.45 to be paid in equal monthly instalments of £1,182.35 on the first day of each calendar month over the next 18 months (amounting to the full amount of the debt).

11. Section 15.(1).(a) of the Act requires that my award be consistent with preserving the Landlord's solvency. There is no dispute that the Landlord will remain solvent regardless the outcome of this arbitration and accordingly there is no need for me to make a finding in this regard.

Legal Framework and Eligibility

12. The Act provides for relief on payment of protected rent debt provided:
- i) The property is occupied under a business tenancy as defined by the Act;
 - ii) There is a protected rent debt consistent of unpaid protected rent;
 - iii) The Tenant's business is viable or, if not, would be if granted relief.
13. I am satisfied that the tenancy qualifies as a business tenancy under the Act and that there is a protected rent debt £45,184 excluding interest as shown in [REDACTED] calculation. The business trades as a town centre bar/restaurant.
14. It remains that I must determine whether the application by the Tenant was properly constituted and whether its business is viable or if not, would be if granted relief.

Proposals of the Applicant and Respondent

15. [REDACTED] proposal and submission commences by describing the contractual rent at £52,990 per annum plus VAT payable monthly. He states that up until the first lockdown rent had always been paid on time and in full. Subsequently, no agreement was reached as to payment of rent during the closed period, neither did the parties seek a solution through mediation. As a result [REDACTED] made an application for the matter to be determined by arbitration.
16. [REDACTED] describes how the business was affected during and after the closed period, particularly during spring time when the business, under normal circumstances experiences an increase in trade. He describes the fall in sales from £692,000 in 2019/2020 to £295,000 in 2020/21. There is no doubt in my mind that this business has been affected by the pandemic. The business received staff furlough payments, but otherwise government grants were not available until subsequent Bounce Back Loans were made available. In the view of [REDACTED] this loan helped to keep the business 'afloat'. He also advises me of the detrimental effect of inflation and rising costs leading to his profit/loss forecast and cashflow. With the aim to safeguarding the future health of the company and viability his offer to settle the debt is £8,531.05 payable over two years.
17. Mr [REDACTED] profit and loss projection can be summarised as follows:

	Year Ended 30-Jun-23	Year Ended 30-Jun-24
Sales	£539,825	£553,321
Gross Profit	£345,488	£354,125
Staff	£156,975	£160,899
Rent	£51,990	£51,990
Other	£109,762	£131,659
Profit Before Tax	£26,761	£9,577

18. I have excluded depreciation from the above projections which is an accounting item rather than an actual payment made by the Applicant. [REDACTED] informs me that sales for January to March 2023 were approximately 9% down on his forecast.

19. In formulating his offer of £8,531.05, [REDACTED] has suggested that rent payments should be reduced to 45% and 70% for nine and seven months respectively, less the amount of £38,000 already paid.

Landlord's Proposal

20. After introducing the background to this matter [REDACTED] describes the location of this business property in 'a cosmopolitan hive for independent shops, bars and restaurants and remains one of the primary destinations for drinking and socialising in Hull'. He advises me that the rent passing at the time of his proposal was £51,990 plus VAT and that the rent reviews of 2012, 2017 and 2022 as provided for in the lease were not actioned. Although time may not be of the essence in respect of the reviews I have no evidence as to whether the passing rent is above or below the market level.
21. [REDACTED] reminds me of the government's policy to preserve otherwise viable businesses and the jobs that they support. He also states that '*tenants who can pay their rent in full should do so*'. I shall refer to this later.
22. As stated above, there is no dispute that this was a non-essential business subject to a closure requirement and giving rise to protected rent debt falling within the protected period. I accept that the protected rent debt is £45,184. To include interest, this has been calculated by [REDACTED] to an amount totalling £46,282.45.
23. Section 15(1) of the Act requires that I have regard to the following two principles when determining whether to grant relief and how much:
- (1) Where the tenant's business is viable, or will become viable if the tenant were to be given relief from payment of any kind, any award should be aimed at preserving, or restoring and preserving, the viability of the tenant's business, so far as that is consistent with preserving the landlord's solvency.
 - (2) So far as it is consistent with the first principle, tenant's should be required to pay protected rent debt in full and without delay .
24. Section 16 of the Act requires me to consider the following when assessing viability so far as known:
- a) *The assets and liabilities of the tenant, including any other tenancy to which the tenant is a party;*
 - b) *The previous rental payments made under the business tenancy for 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.*
25. The principal argument put forward by [REDACTED] in rejecting the Tenant's proposal is that the Tenant's statement does not constitute a valid 'formal proposal' as detailed by section 11 (7)(b) of the Act which requires the proposal to expressly state that it is made for the purpose of section 11. That is, the proposal should be clear that it is made in regard to protected debt relief and nothing else. [REDACTED] refers me to an arbitration decision *KXCNA Limited v 60 SA Limited* (11 July 2022). I have carefully read the submissions made by [REDACTED] and it is clear to me that his proposal relates to the closed period and settlement of the protected rent debt, rather than any other debt which may or may not be owed to the Landlord.

26. There is a difference of opinion between the representatives as to the parties' willingness (or otherwise) to negotiate a settlement prior to this arbitration. In particular [REDACTED] points out that the financial accounts provided as part of the discussions are unaudited, short format, unsigned and for a relatively limited period. However I note that the accounts for the year ended 31 March 2019 also incorporate the accounts for the previous year ended 31 March 2018.
27. [REDACTED] has reviewed the accounts and points out the amount of cash at bank at 31 March 2021 at £95,545 and £121,774 forecast as at 31 October 2022. It is also important that I have regard to the additional debtors and stock as well as the significant amount of creditors in the balance sheet when weighing the effect of this document. [REDACTED] also points out the Tenant's projected cash reserves of over £120,000 throughout the two forecast periods. More recently Mr Armstrong has advised me that sales are down on the forecast figures and as a result cash reserves might be less. [REDACTED] claims that even after provision for the Bounce Bank Loan the Tenant will have sufficient funds to discharge the protected rent debt in full.
28. Turning to the history of sales at [REDACTED] states that the business has 'a strong pre-pandemic history of turnover for the two years ended 31 March 2018 (£684,820 and £725,189 respectively)'.
29. He reiterates the viability of the Tenant's business by repeating the Tenant's forecast for the two years to June 2023 at £539,825 and £553,321. [REDACTED] also notes that the cashflow projections submitted by the Tenant show a significant increase in overheads which might 'artificially depress the profitability of the business' and yet the forecast continues to show a profit and viability of the business. Forecasts are difficult to make with accuracy, however I do accept [REDACTED] view that inflation has caused costs to increase between the period of the actual [REDACTED]. I note that the balance sheet forecasts show total assets less liabilities at £56,181 and £52,822 for the two years. In each case the value of the plant/machinery has been depreciated by approximately £250,000 to relatively modest figures of £10,243 and £7,303 respectively.
30. The continuing dispute as to the condition of the property, referred to by the representatives, and liability for any repair works is outside the scope of this award.
31. In conclusion [REDACTED] believes that the Tenant is able to pay the protected rent debt in full and should be required to do so without delay although he proposes this be settled by instalments being a lump sum of £25,000 paid within 28 days of my decision plus monthly payments of £1,182.35 (to a total of £46,282.45).

Arbitration Award

32. This business has been adversely affected by the pandemic but despite this, the financial information available to me, indicates that the business remains viable, even after payment of the protected rent debt. In this regard the proposal made by the Respondent meets the requirement of the Act.
33. Accordingly I find and direct that the Applicant pays to the Respondent the sum of £24,200 within 28 days of this award (£25,000 less half the cost of this referral), and £1,182.35 on the first day of each of the following 18 calendar months.
34. The seat of this arbitration is England and Wales.

Lepton Pitten

3 July 2023

Signature..... Date