

**In The Matter of Arbitration under the terms of the Commercial Rent  
(Coronavirus) Act 2022 (The “Act”)**

**Between**

**(The Applicant)**

**XXXX**

**And**

**(The Respondent)**

**YYYY**

**In respect of**

**ZZZZ (the “Property”)**

1. **The Parties and Premises**

2. The Applicant is XXXX, the tenant of premises at ZZZZ represented by AAAA of that company.

3. The Respondent is YYYY, the landlord company represented by BBBB

4. **Procedural Background**

5. I was approached by the RICS on 14 September 2022 to act in this matter. I responded advising of involvement with the landlord which I did not consider constituted conflict but should be notified to the parties.

6. My appointment was duly confirmed. I requested copies of the parties' submissions which were received on 21 November.

7. I contacted AAAA and BBBB and arranged a Zoom call to take place on 2 December 2022.

8. It was agreed at the meeting that Procedure C would be adopted.

9. It was also agreed that I would not commence work until the new year. Unfortunately, illness on my part delayed this further. I issued Directions on 20 January 2022.

10. Having read the respective parties' submissions, I raised queries and requested further documents on 1 February 2023 which were duly answered and received.

11. **Qualifying criteria**

12. The Act sets out a requirement for the arbitrator to determine whether the dispute is eligible. S74 states that the arbitrator is required to dismiss a reference to arbitration where:

13. a) the tenancy is not a business tenancy

14. I have been provided with a copy of the lease dated 20 May 2014

i. The term of the lease is from 2014 to 30 November 2021. The tenant has remained in occupation, and I understand that discussions are in place in respect of a new lease.

ii. The Authorised Use is defined as that permitted by the headlease. I have not had sight of the headlease; however, there is no suggestion by either party that the current use is unauthorised.

15. I find that the lease creates a business tenancy sufficient to satisfy the requirements of "the Act".

16. b) There is no protected rent debt.

17. The Parties agree that there is a protected rent debt.

18. The amount of the protected rent debt is not agreed by the parties, and I deal with this later if necessary.

19. c) The parties have reached an agreement to resolve the matter of relief before the reference to arbitration was made.

20. It is evident that there was no agreement to resolve the matter.

21. The Act states at S76 "...as part of the consideration as to whether the dispute is eligible for arbitration, the arbitrator is to assess the viability of the tenant's business. The arbitrator is required to dismiss the

reference to arbitration if they determine that (at the time of the assessment) the tenant's business is not viable and would not be viable and also would not be viable even if the tenant were given relief from payment of any kind."

22. I consider the viability of the tenant's business.
23. The business was generating a profit prior to the measures taken as a consequence of coronavirus.
24. BBB on behalf of XXXX has set out in detail various factors affecting the viability of the business. Given the importance of this and the effect it has on the eligibility of the referral to arbitration, I set these out below:
25. "Notwithstanding this, XXXX agrees it has not provided sufficient evidence in relation to business viability in its first letter dated 8th September 2022. As suggested by YYYY in Section 20, the original letter did highlight YYYY's solvency which is clearly a factor to consider in this arbitration as per the provisions of the Act, but business viability was not sufficiently explored. To that end:
  - Appendix C shows the Management PnL figures for the period running from 1st August 2021 to 17th July 2022. The figures show a net loss of £13,725 for the period;
  - Appendix D shows the Management PnL figures for the period starting on 18th July 2022 to 11th September 2022. The figures show a net loss of £27,766 for the period, almost exclusively attributable to high energy costs – an effect well documented in the media;
  - The PDF attachment to this letter shows the dilapidation list which the superior landlord is currently expecting to be actioned before offering a new lease for the property.

In particular, the reason why XXXX consider the dilapidations list as relevant to the arbitration is that without a new lease the entire business would cease to exist, and therefore the crystallisation of this liability needs to be factored into the business viability assessment. YYYY notes in Section 24 that "*the Tenant was at one point engaging with the superior landlord to negotiate a new contract implying that the Tenant considered its business was viable enough to justify a new lease*". That statement is entirely correct: XXXX is indeed negotiating a new contract with the superior landlord to preserve the business, but an agreement cannot be reached until the dilapidation and rent arrear positions have been agreed upon. Without a reduction on the rent arrears, XXXX will not be in a position to pay for the dilapidations and a new lease will not be granted, and the business will cease immediately.

Furthermore, we would like to note that the assessment of business viability would change dramatically should the business be saddled with extra debt. To that end XXXX has entertained discussions with its bank in the past to consolidate its debt position (including the rent arrear) and the bank's own assessment was that the business would not be viable (on grounds of debt serviceability ratios) if it had to repay the entirety of the rent arrears amount. This was made clear to YYYY several times, including in the email in Appendix B."

26. It is evident from XXXX's submission that the business was not viable between 1 August 2021 and 11 September 2022.
27. I have given AAAA the opportunity to provide further detail in respect of the viability of his business. He states:

"I enclose a copy of our unaudited management accounts up to 1st Jan 2023, which show that in the last 3 4-week periods (i.e. from 10th October to 1st Jan) we have generated an EBITDA of £15.7k. Although our year to date is still negative, we are seeing signs of our measures working. This is the result of various cost-saving initiatives as well as a modest price increase across our product spectrum which hasn't affected volumes. And of course, the holiday season is generally a profitable period for the industry.

I would also like to add that the figures include the elevated energy prices - we have signed new supply contracts in the summer at higher levels than before due to the well documented circumstances. Wholesale energy prices \*appear\* to be coming down and we are therefore optimistic

that when the current supply contracts expire we will be able to maintain a viable business throughout the entire financial year. "

28. It is evident that whilst the 6 periods to 1 January 2023 show a small loss, the losses were made in the first 3 periods and the business has returned to profit in periods 4 to 6. I find that on the basis of its ability to generate a profit, the business is currently viable.
29. I then consider the question of dilapidations.
30. XXXX state that "Without a reduction on the rent arrears, XXX will not be in a position to pay for the dilapidations and a new lease will not be granted and the business will cease immediately."
31. In response to my request for further clarification on the matter, AAAA responded:

"The cost of the dilapidations can be split roughly as follows:

  - £150k of immediate repairs. This is to be funded by a bank loan which has been pre-approved;
  - £100k of long term repairs. These will be carried out over the lifetime of the lease (the parties have agreed to a term of 25 years for the new lease) and will be financed through profits in the coming years. Some of these repairs (e.g. new windows) open up the possibility for a change of use of some parts of the property so could also be financed with a loan against the increased revenue;
  - £50k of repairs are currently being challenged as we argue that they form part of ongoing building maintenance (such as painting the property, leaky taps, electrical testing etc) and are already accounted for in our financial planning. By way of example we have already spent £8k since August 1st on items that were highlighted in the dilapidations report. The landlord has agreed for these to be waived off the immediate repair list. "
32. S84 of the Act states under the heading of "Requirements in the Act for assessing viability", "In making the assessment, the arbitrator must disregard the possibility of the tenant borrowing money or restructuring their business."
33. XXXX have stated that without a reduction in rent arrears, XXXX will not be in a position to pay for the dilapidations and a new lease will not be granted and the business will cease immediately.
34. It follows that the waiver of rent arrears is in effect to pay for dilapidations for which XXXX have now arranged a £150,000 bank loan.
35. I find that this breaches the requirements of S84 of the Act.
36. Accordingly, I find that the business is unviable, and I am therefore required under S76 to dismiss the reference to arbitration.
37. The Seat of the Arbitration is England & Wales.
38. This award is final save as to costs which I will deal with if requested by the parties.

Signed

17 February 2023

**P H Taylor FRICS DipArb FCIArb**