

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

BETWEEN

BANANA WHARF LIMITED (APPLICANT)

AND

MARINA DEVELOPMENTS LIMITED (RESPONDENT)

FINAL AWARD OF ANDREW LLOYD CREASE FRICS FCIARB

MARCH 2023

BACKGROUND

1. The Applicant is the tenant of Banana Wharf Hamble, The Marina Office Building, Port Hamble Marina, Satchell Lane, Southampton SO31 4QD.
2. The Respondent is the freeholder of the above property.
3. The parties have been unable to agree on the appropriate relief concerning rent arrears arising during the pandemic under The Commercial Rent (Coronavirus) Act 2022 (hereinafter referred to as CRCA).
4. Notice was given of an intention to arbitrate as required by the CRCA followed by an application for the appointment of an Arbitrator to the Dispute Resolution Service of the Royal Institution of Chartered Surveyors.
5. I was approached by the Royal Institution of Chartered Surveyors to act as Arbitrator under the CRCA in this matter. After checking for conflicts, I advised that I would be able to accept the appointment.
6. I was appointed to act as Arbitrator on 2nd December 2022. The appointment was made under Procedure B of the RICS scheme.
7. I exchanged emails with the parties' representatives and agreed a timetable for sequential written submissions.
8. I received and exchanged a submission from the Applicant, a counter-submission from the Respondent and a summing-up document from the Applicant.
9. Having considered the above, I hereby make my award this day in London, England.

PARTIES' REPRESENTATIVES

10. Mr Marsh represents the Applicant. Mr Welch represents the Respondent. Both have signed statements of truth as required by Section 12 CRCA.

MATTERS IN AGREEMENT

- i) The protected rent debt is agreed as £50,000.
- ii) From the submissions it is apparent that the eligibility criteria contemplated under the CRCA is accepted. My award, therefore, deals specifically with the third stage of the CRCA process which is the Arbitrator's assessment of the matter of relief from payment of the protected rent debt.

MATTERS IN DISPUTE

- i) The form of relief under the CRCA.
- ii) Costs.

i) The form of relief under the CRCA

The CRCA is prescriptive in how I must determine the issue of relief. Firstly I must consider the final offers that the parties have made. I must assess these offers against the principles contained within Section 15 of the CRCA which for ease of reference I quote below:

Section 15 - Arbitrator's Principles

- (1) The principles in this section are -
 - (a) That any award should be aimed at-
 - (i) preserving (in a case falling within Section 13(4)(a)), or

- (ii) restoring and preserving (in the case falling within Section 13(4)(b)), the viability of the business of the tenant, so far as it is consistent with preserving the landlord's solvency, and
- (b) That the tenant should so far as it is consistent with the principles in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay.
- (2) In considering the viability of the tenant's business and the landlord's solvency for the purposes of sub-section (1), the Arbitrator must disregard anything done by the tenant or the landlord with a view to manipulating their financial affairs as to improve their position in relation to an award to be made under Section 14 of the CRCA.
- (3) For the purpose of this Section the landlord is "solvent" unless the landlord is, or is likely to become, unable to pay their debts as they fall due.

In making my decision as to whether an offer is consistent with the CRCA I must have regard to matters under Section 16 of the CRCA if they are provided to me. For ease of reference I quote Section 16 below.

Arbitrator assessment of 'viability' and 'solvency'

- (1) In assessing the viability of the business of the tenant, the Arbitrator 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 other information relating to the financial position of the tenant that the Arbitrator considers appropriate.

THE FINAL OFFERS

11. I have received final offers from both parties which I summarise below.

The Applicant's Final Offer

- i) £34,081.36 of the protected rent is to be written off.
- ii) The remaining £15,918.64 is to be repaid over 24 months with interest payments waived i.e. £663.28 per month for 24 months.

The Respondent's Final Offer

- i) The full amount to be repaid over 24 months i.e. £2,083.33 per month.

The Evidence

12. Mr Marsh on behalf of the Applicant introduces the following evidence:

- A statement of truth from Mr Hughes.
- A Covid timeline.
- A copy of the bank account statements of the Applicant business showing an overdraft of £ [REDACTED] as at 19th March 2020.
- Evidence of the Coronavirus Bounce Bank Loan (CBIL) of £ [REDACTED] being granted on 15th June 2020.
- Further bank account statements showing the cashflow up to December 2022.
- Non-audited accounts showing net assets year ending: 11/18 of £ [REDACTED], 11/19 of £ [REDACTED], 11/20 of £ [REDACTED] and 11/21 of £678,770.
- Management accounts to November 2022 showing a business turnover of £ [REDACTED] with a gross profit of £ [REDACTED] and a net profit of £ [REDACTED]

- Ocean Village Banana Wharf 18/19 management accounts showing turnover of £ [REDACTED]. Gross profit of £ [REDACTED]. Costs of £ [REDACTED]. Loss of £ [REDACTED].
- Hamble Banana Wharf 18/19 figures showing turnover of £ [REDACTED]. Gross profit of £ [REDACTED]. Costs of £ [REDACTED] and profits of £ [REDACTED].
- A deed of surrender on the Poole branch.

13. He sets out the background of how the Applicant's business developed and how the pandemic impacted upon the business because of the closures and the limited capacities during the periods that they were allowed to open.

14. He contrasts the Applicant's position of being closed for eight months with that of the Respondent who only had to close for a period of 51 days.

15. He describes the negotiations that went on between the parties regarding the rent debt. He indicates that the berth holders at the marina were given a 30% concession by the Respondent.

16. Mr Marsh speaks to the bank accounts and draws my attention to the opening overdraft of £ [REDACTED] as at 14th April 2020, the grant of the CBIL loan of £ [REDACTED] and the most up-to-date position showing an overdraft as at 20th November 2022 of £ [REDACTED].

17. He informs me of government grants received of £ [REDACTED] in 2020 and £ [REDACTED] in 2021.

18. He elaborates on the 4th August 2021 surrender of the Banana Wharf, Poole with the landlord waiving £ [REDACTED] of rent and service charge.

19. Mr Marsh informs me of the opening of a new Banana Wharf in April 2022 at Swanage. The trade from this unit forms part of the most recent management accounts which he has supplied.

20. Mr Marsh sets out a table showing Banana Wharf financials (the Applicant) alongside Marina Developments Limited (the Respondent).
21. He explains that the strong profit of the Applicant during 2021 was not sustainable because the lockdown months fell in the quietest months of the year where they would expect to make losses, i.e. the winter months of January, February and March. He predicts that the winter losses will potentially be bigger in the 2023/2024 years and this he puts down to increased costs. He also points out the £ [REDACTED] of Covid support receivable in 2021 which is not a recurring receipt.
22. He adds further explanation to the 2021 figures referencing the tenant's extending of the outside trading area.
23. He indicates that the Applicant directors and shareholders have not taken any salary or dividend since 2019.
24. He says that the Applicant has paid all rents demanded since July 2021 when the property re-opened after the last lockdown.
25. Mr Marsh puts forward as evidence the concessions granted by the Wellington Pub Co. to its tenants and accepted by 71% of the tenants. He further describes approximately 50 negotiations across his team in which the average concession agreed has been relief of one quarter's rent. In conclusion, he states that the relief sought will have little impact on the Respondent's finances but would have a significantly positive effect on the Applicant's business.
26. Mr Marsh points to an eventual recovery in the business of the Applicant but, because of the economic uncertainties and increasing costs on the immediate horizon, his conclusion is that if the Applicant were to have to repay the protected rent debt in full, or in part as a lump sum, or over a two year period, the initial burden on them would threaten the ongoing viability of the business.

27. In justification for the relief sought, Mr Marsh refers to the Respondent's rent concessions to berth holders on the Marina and refers to the MDL company accounts which refer to discounts/sharing the burden. He also refers to Section 15 of CRCA as directing a sharing of the financial impact of the Covid pandemic. He seeks to write off £34,081.36 with the remaining £15,918.64 payable over a 24 month period. In terms of costs, he asks that if I award the Applicant's proposal that I award costs in their favour and, in the alternative, that costs are borne 50% each.
28. In response, Mr Welch for the Respondent, reiterates the Respondent's rejection of the Applicant's final offer. He re-states the Respondent's final offer of no relief from payment, but a 24 month period for payment, with a waiver of the contractual interest which he says equates to a 42 month interest-free loan. Mr Welch says that all 480 tenancies on their 19 Marinas were offered deferred terms for rent payment and the ability to draw down on rent deposits to pay rent with no immediate need to replenish. Mr Welch indicates additional support that was forthcoming in the form of granting a licence for alteration as well as granting a tenancy at will for a catering van on the site at a peppercorn rent.
29. He draws my attention to the quantum of the CBIL loan at £ [REDACTED] compared to the protected rent debt of £50,000. He seeks to reference in the Hamble surrender, a payment of £72,000 that was made to the landlord by the tenant.
30. He further sees no relevance in the level of settlement on The Wellington Estate or Mr Marsh's colleagues' experiences in the market.
31. He disputes the analysis of the deals that Mr Marsh quotes with regard to the berth holders and says that the berths are clearly distinguishable from commercial business tenancies. Similarly he sees no relevance in MDL (the Respondent's) accounts which Mr Marsh quotes but he too includes them for good order.

32. He refers me to the fact that MDL themselves are lessees of the Crown Estate paying some £142,789 and that they have neither sought nor been given a concession by their landlord, the Crown. As far as the issue of costs is concerned, he is willing to accept the 50/50 default position set out in Section 19 of CRCA.
33. In conclusion, he says £2,083.33 per month for 24 months will not be detrimental to the Applicant's business viability. He points to the CBIL loan quantum next to this protected rent debt. He also refers to the Applicant's prioritisation of projects such as the pergola which they appear to prioritise above paying rental debt.
34. Finally, he states that the reason that businesses have bounced back so well in the MDL owned marinas is the conciliatory approach that the Respondent has taken.
35. Mr Marsh, in summing up, makes 22 points in reply to Mr Welch's submissions and, essentially, he disputes every point that Mr Welch makes.

REASONS

36. I have set out the basis on which I am to assess relief above namely the Arbitrator's principles set out in Section 15 of the Act. Further assistance is also given in Section 7.15 of the Statutory Guidance to Arbitrators and Arbitral bodies.

Section 7.15

'At stage 3 the question is, given the tenant is viable or would be viable, to what extent can they afford to pay a protected rent debt balancing, on one hand, the viability of the tenant's business, and on the other hand, the solvency of the landlord. This aims to strike a balance between the parties.'

37. In making the assessment I must, have regard to the evidence presented that is mentioned in Section 16. This is:

- The assets and liabilities of the tenant including any other tenancies to which the tenant is a party.
- Previous rental payments.
- The impact of Coronavirus on the business of the tenant.
- Any other information relating to the financial position of the tenant that I consider appropriate.

FINANCIAL INFORMATION

38. As stated above I have been provided with unaudited accounts which give me details of balance sheets for the year ending 11/2018, 2019, 2020 and 2021. I am told of the other tenancies operated by the tenant and can see their management accounts in total for the group to the year November 2022. I am given details of the bank accounts which I have had regard to. I have also been given management accounts for the year ending November 2019 on both the Ocean Village and Hamble units.

PREVIOUS RENTAL PAYMENTS

39. From the submissions, it appears to me that there is no history of non/late payment prior to the pandemic and Mr Marsh makes the unchallenged assertion that all payments have been made since July 2021.

THE IMPACTS OF CORONAVIRUS

40. I think it is accepted that the Banana Wharf unit at Hamble was made to close during the pandemic and suffered from a lower trading capacity than normal as restrictions were eased.

41. By Mr Marsh's own evidence, the unit was usually loss-making in January, February and March and, therefore, the pandemic actually was almost a positive in the winter months. I am, however, convinced that the

restrictions will have impacted severely in the summer months, upon which the business relies to make its profits. My conclusion is that the property, whilst affected by the pandemic, would have been affected in a very different way from the majority of businesses whose trade is all year (i.e. not seasonal).

ANY OTHER FACTORS RELATING TO THE FINANCIAL POSITION

42. I draw both parties' attention to the fact that I can only rely on the evidence before me and below I quote 7.18 of the guidance-

Section 7.18

'The issues in paragraph 7.17 and 7.19 will only be known to the Arbitrator if a party provides the evidence to them, including in response to a request from the Arbitrator. The Arbitrator is not required to seek out information.'

OTHER EVIDENCE PROVIDED TO ME

43. I do not find the evidence of settlement agreements on the berths, or of the various examples of public houses quoted by Mr Marsh, or the settlement on the rest of the MDL estate quoted by Mr Welch, of any help. The CRCA requires me to assess the viability of the business of the tenant.
44. This is largely unique to the tenant and, accordingly, can only really be assessed by examination of the terms listed in Section 16 of the CRCA. Similarly, in assessing the solvency of the landlord, it is accountancy information that is important, not the concessions reached with other of their tenants.

FINAL OFFERS

45. Looking firstly at the Applicant's final offer.

46. The aim of the offer is clearly to preserve/restore the viability of the business by waiving or writing off £34,081.36 (i.e. 68% of the protected rent debt) and repaying the remainder over the next 24 months.
47. Having reviewed the evidence and noting what the parties have said I do not believe that this final offer would impact on the landlord's solvency.
48. Looking at Section 15(b), the tenant should be paying as much of the contractual dues as is consistent with maintaining their viability. The Applicant seeks to have 68% of their rent debt waived and a period of 24 months to pay the remainder.
49. The figures before me show that the business has a turnover of £ [REDACTED] for the year ending November 2022, albeit with a net profit of £ [REDACTED]. The business has substantial net assets. For these reasons, I am not convinced that the repayment of a rent debt of £50,000 in full would damage the aim of preserving the business's viability. I therefore conclude that the tenant's offer in this instance is not consistent with the aims of Section 15.
50. Turning to the landlord's offer. Whilst I would normally acknowledge that an offer to extend the payment period to the full 24 months that I am allowed to award fulfils the criteria of Section 15(a) of the Act, I am in this instance not convinced that this is consistent with the Act.
51. There will, be undoubtedly, be cashflow strains on the business in making additional payments over and above the rent and, given the seasonal nature of the business, I think that requiring the same payment throughout the quieter winter months would be detrimental to the preservation of viability contemplated under Section 15 of the CRCA. I therefore conclude that the Respondent's offer is not consistent with the principles of Section 15 of the CRCA.

52. Section 14(5) of CRCA states that when neither party has made a final offer consistent with Section 15 of the Act, the Arbitrator must make an award which he considers appropriate (applying the principles in Section 15).
53. On the evidence before me, I am convinced that the business of the Applicant suffered detriment due to the pandemic. I am, however, of the view that the detriment was in part mitigated by the fact that the Applicant, by his own admission, did better by being closed in the winter months than the losses that they would have incurred in there busier months.
54. The code offers some guidance but the CRCA demands that I look at the issue of relief on a case specific basis with particular reference to the individual business where the relief is being sought.
55. It would have been useful if I had been provided with site specific profit and loss figures for the pre-pandemic and post-pandemic period and similarly so for the business as a whole.
56. I see that the group, in their accounts, made a profit of £ [REDACTED] for the year ending November 2022.
57. On the face of it, repaying the whole debt over the next 24 months could lead to a further burden of £25,000 a year. The Applicant says that there is a repayment of £ [REDACTED] of the CBIL loan, and the expectation/threat of rising costs, both of which will impact on bottom line.
58. It is clear that the Applicant was trading with the benefit of a £ [REDACTED] overdraft facility prior to the pandemic. On the most recent bank statement this facility is still in place, albeit that the overdraft has fallen significantly. I consider this to be a debt already in place before the pandemic and therefore not one that I have to disregard under Section 16(3).

59. The reducing amount of overdraft, albeit balanced against future repayments of the CBIL loan which will become due, show that the business is on the correct trajectory.
60. I do take note of the assertion made by the Respondent that the Applicant is spending capital sums on improving their existing unit and I understand their concern that the rental payments are not being prioritised before such expenditure.
61. From the evidence, I conclude that a seasonal business such as the applicant's has been impacted in an atypical way.
62. By the applicant's own admission, the winter months were actually more profitable during the pandemic. The business during the summer months, that generate the excess to support the business through the rest of the year, was impacted.
63. On the evidence before me, I see no compelling argument for the waiving of the protected rent debt.
64. Having concluded that the protected rent debt should be repaid in full, I am left to determine the repayment schedule. The CRCA allows me to determine instalments up to 24 months from the date of my Award but is not prescriptive on the frequency and size of such instalments.
65. My concern in this instance is that the seasonality of this business impacts cashflow and therefore I have varied the size and frequency of the instalments.
66. The first £16,000 of the protected rent debt is to be paid in the first 12 months in whatever sized monthly payments the tenant prefers. Specifically, in the winter months, they may make payments as low as zero as long as they repay £16,000 (within the first 12 months).

67. Secondly, the remaining £34,000 is to be paid by the end of 24 months. Again, I give the tenant flexibility to pay this in monthly payments to suit itself and give specific permission that in the winter months of January, February and March it may make zero payment if it feels that this is necessary reflecting its cashflow.

FINDINGS

68. NEITHER FORMAL OFFER IS CONSISTENT WITH CRCA SECTION 15.

69. I DETERMINE THE PROTECTED RENT DEBT OF £50,000 SHOULD BE REPAYED IN FULL OVER 24 MONTHS, £16,000 BY THE END OF 12 MONTHS AND THE FURTHER £34,000 BY THE END OF 24 MONTHS.

COSTS

70. I find, having not found for the Applicant that it is pleading is that costs are split on a 50/50 basis. The Respondent has also asked that costs are split on a 50/50 basis. Therefore, I make an award under Section 19(5) that the Respondent is to repay 50% of the application cost to the Applicant.

AWARD

71. I hereby award and direct as follows:

(i) The sum of £16,000 is to be paid by monthly instalments to the Respondent over the next 12 months (these instalments may vary in amount specifically the instalments in January, February and March may be zero). The Applicant will pay a further £34,000 within 24 months of the date of this award. Again, the payments will be on monthly instalments with the ability of the tenant to alter the monthly instalments to reflect seasonal trading variation.

(ii) The Respondent is to pay the Applicant half of my fees and one-half of the RICS application fee on production of invoices to those amounts and on the payment terms of those invoices.

PUBLICATION

72. Pursuant to the CRCA Section 18, this award must be published. I intend to publish it on the RICS website. I attach a redacted copy of the award which I will send to the RICS for publication unless I hear back from either of you that you require further redactions to be made in the next 7 days.

SEAT

73. The seat of this arbitration is England and Wales.

Signed



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Andrew L Crease FRICS FCIArb

Date: 31st March 2023