

An Arbitration Award
Under The Commercial Rent (Coronavirus) Act 2022

BETWEEN

[REDACTED]
(As Applicant)

AND

[REDACTED]
(As Respondent)

Concerning

[REDACTED]

Published on 3 August 2023

by

D J Gilbert BSc Dip Arb FRICS MCI Arb RICS Accredited Mediator

In the Matter of an arbitration under the Commercial Rent (Coronavirus) Act 2022
between [REDACTED], as Applicant and [REDACTED], as Respondent, in
connection with premises known as [REDACTED].

BACKGROUND

1. The Applicant, [REDACTED] was the tenant of premises at [REDACTED].
2. The Respondent, [REDACTED], is the landlord.
3. The property was occupied by the Applicant by way of a 3 year lease (dated 24 May 2018), from 17 May 2018, expiring 16 May 2021, at a rent of £15,600 per annum.
4. The Applicant paid rent:
 - at £1,300 per month up to 18 March 2019,
 - a reduced amount of £10,221.71 (rather than the full amount of £15,600) for the period from 19 April 2019 to 18 March 2020 and
 - a reduced amount of £15,600 (rather than the full amount of £22,100) for the period from 19 April 2020 to 18 August 2021.

No payment information was provided for the period from 19 August 2021 to 11 May 2022.
The current arrears total £26,735.22.

5. The Applicant is representing himself and the Respondent is represented by [REDACTED] - the Parties.
6. The Applicant submitted an application (DRS CRAA 3) to the RICS for the appointment of an Arbitrator under Procedure D of the Commercial Rent (Coronavirus) Act 2022 ("the Act") on 25 August 2022 and I was duly appointed in that capacity on 26 September 2022.
7. I contacted the Parties on 26 September 2022 and informed them that the arbitration would commence under arbitration Procedure D, which requires an initial meeting to discuss how the arbitration should proceed and to agree my fees. I also asked the Parties to liaise, to agree on a mutually convenient time and date for the meeting. In the event this could not be agreed, I confirmed that I would arrange one.
8. A Teams meeting took place on 12 October 2022, following which I confirmed that the estimated expected total fee for conducting the arbitration by Procedure D, including time spent reading the papers and in the pre-arbitration discussion was £3,000, plus vat, based on 10 hours of time taken at £300 per hour.
9. On confirmation from the DRS Finance team that it had received payment from the Applicant, I proceeded with the arbitration Procedure D. The Respondent then suggested that the arbitration should proceed under RICS Arbitration Procedure A, rather than Procedure D but before this was agreed, the Respondent confirmed that there was a preliminary issue which need to be decided. The latter concerned whether the reference to arbitration should proceed, as it is claimed that the Applicant had not followed the correct process in accordance with the Commercial Rent (Coronavirus) Act 2022 and it was requested that I rule on my own substantive jurisdiction in the matter.
10. On 22 March 2023, I issued my Order No1 containing a timetable setting out how I proposed dealing with this preliminary issue. Mr [REDACTED] requested some amendments to the original timetable and on the same day, I issued my Order No2 adopting the amended timetable in accordance with Mr [REDACTED] request.
11. On 4 May 2023, I issued my Order No3 containing my decision whether I am to act as arbitrator in this matter and proceed with the Commercial Rent Arrears Arbitration under the Act; and having ruled on my own substantive jurisdiction I determined, as a preliminary issue,



that:

- I am able act as arbitrator in this matter; and
- I am to proceed with the Commercial Rent Arrears Arbitration under the Act.

I also:

1. confirmed that as the amount of protected rent debt in dispute is below £20,000 (confirmed by the Parties) I now intended to commence the arbitration on the basis of Procedure A, rather than D and
2. set out my Directions and timetable during which:
 - a) the Applicant was to make its formal proposal;
 - b) the Respondent was to make its Formal Proposal in Response; and
 - c) the Parties were able make any additional comment they would like to make - on a) and b) above.
12. I have received the following documents from the Parties, with the arbitration being conducted under Procedure A rather than D.
 1. The Applicant's Formal Proposal and supporting documentation on 12 May 2023.
 2. The Respondent's Formal Proposal in Response and supporting documentation on 19 May 2023.
 3. Additional comments made by the Applicant (dated 24 May 2023) and the Respondent (dated 26 May 2023).
13. I reviewed the documentation the Parties provided and on 6 June 2023 requested that they both confirmed the following of the reasons for the disagreement, if it was not agreed:
 1. it is agreed that the Lease dated 24 May 2018 creates a business tenancy sufficient to satisfy the requirements of the Act;
 2. it is agreed that the Applicant was in occupation of the premises during the relevant protected period applying to the tenancy which ended the date the lease referred to in 1 above expired i.e. 16 May 2021;
 3. it is agreed that the Applicant's business was as a consumer electronics' shop (A1 retail use);
 4. it is agreed that the Applicant's business was subject to a 'closure requirement' (section 4(2)(a) of the Act) as the Applicant was to cease carrying on its business from the premises, as that business was included in Part 1 of Schedule 2 of The Health Protection (Coronavirus Restrictions) (England) Regulations 2020;
 5. it is agreed that the relevant protected period is for the 422 days, being the period from 21 March 2020 to 16 May 2021 - not 18 July 2021 as stated in section 4(2)(b) of the Act;

I also required:

1. that Mr [REDACTED] provide me with evidence or details of supporting evidence to prove that the tenant's business is viable, or would it be viable if rent relief were given, including any of the following:
 - a) the last 12 months' full bank account information, including but not limited to savings accounts, current accounts and loan accounts
 - b) financial and management accounts for each financial year after March 2019
 - c) full bank account information, including but not limited to savings accounts, current accounts and loan accounts for each financial year after March 2019
 - d) net profit margin or gross profit margin prior to the protected period, compared to after closure requirements or specific restrictions ended for the business in question

- e) profit forecasting
 - f) evidence of long-term contracts (including the value of those contracts)
 - g) gross and net profit margins, prior to the protected period, compared to after closure requirements or specific restrictions ended for the business in question
 - h) evidence as to working capital and whether it is sufficient to meet day-to-day demands
 - i) evidence of any financial grants and/or loans obtained for each financial year from March 2019 onwards
 - j) HMRC liabilities, including changes since March 2019
 - k) any records to show the tenant has a good track record of paying rent and has no substantial new debts.
2. that Mr [REDACTED] provide me with details of any grants or other assistance the Applicant has received in connection with the coronavirus epidemic.
3. that Mr [REDACTED] provide me with details, if any, of any rental concessions in connection with the coronavirus epidemic that the Respondent has granted the tenants of other properties it also owns.
14. Mr [REDACTED] provided me with his response on 21 June 2023 and Mr [REDACTED] provided me with his responses on 18 and 20 July 2023.
15. On 21 July 2023, I confirmed to the Parties, that as they had been provided with ample opportunities to both advance their own arguments and then deal with those of the other Party, I would now proceed with making my award with reference to the information I had been provided with.

LEGAL FRAMEWORK

16. Section 1(1) of the Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration (if not resolved by agreement).
17. Section 3(1) of the Act provides that a "protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent.
- Section 3(2) of the Act provides that rent due under the tenancy is "protected rent" if —
- (a) the tenancy was adversely affected by coronavirus; and
 - (b) the rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy.
18. Section 4(1) of the Act provides that a business tenancy was "adversely affected by coronavirus" for the purposes of:
- Section 3(2)(a) if, for any relevant period
 - the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or
 - the whole or part of those premiseswas of a description subject to a closure requirement.
- Section 4(2) of the Act provides that for this purpose -
- (a) "closure requirement" means a requirement imposed by coronavirus regulations - an obligation
 - (i) to close businesses, or parts of businesses, of a specified description, or
 - (ii) to close premises, or parts of premises, of a specified description, and
 - (b) "relevant period" means a period beginning at or after 2 p.m. on 21 March 2020 and ending

at or before 11.55 p.m. for English business tenancies on 18 July 2021.

19. Section 13 of the Act sets out the issues that the Arbitrator is to determine, make an assessment on and resolve, the order in which they need to be decided and the awards open for the arbitrator to make i.e.
1. Is the tenancy a business tenancy? (section 13(2)(b) of the Act)
 2. Is there a protected rent debt as defined by the Act? (section 3 of the Act)
 3. Is the tenant's business viable, or would it be viable if rent relief were given? (section 13(3) and 13(4) of the Act)
 4. If the tenant's business is viable, should the tenant be given relief and, if so, what form should it take? (section 13(5) of the Act)
 5. Section 13(2) of the Act states that the arbitrator must make an award dismissing the reference if it determines:
 - (a) the tenancy in question is not a business tenancy, or
 - (b) there is no protected rent debt.
 6. Section 13(3) of the Act states that the arbitrator must make an award dismissing the reference if, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business:
 - (a) is not viable, and
 - (b) would not be viable, even if the tenant were to be given relief from payment of any kind.
20. I am required to consider the formal proposals set out by both Parties individually and decide which of them is more consistent with the principles set out in section 15 of the Act. These principles are:
1. The proposals should preserve or restore the viability of the tenant's business whilst safeguarding the landlord's solvency; and
 2. The tenant should be required to pay as much of the rent debt with as little delay as these principles allow.
21. Section 16 of the Act sets out the issues I need to consider in dealing with the issues raised in section 13, set out in paragraph 19 above i.e.
- Section 16(1) of the Act provides that in assessing the viability of the business of the tenant, I must, as 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.

MATTERS TO BE DETERMINED, ASSESSED AND RESOLVED

22. Section 13 of the Act sets out the issues that the Arbitrator is to determine, make an assessment on and resolve, the order in which they need to be decided and the awards open for the arbitrator to make i.e.
1. Is the tenancy a business tenancy? (section 13(2)(b) of the Act)
 2. Is there a protected rent debt as defined by the Act? (section 3 of the Act)
 3. Is the tenant's business viable, or would it be viable if rent relief were given? (section 13(3) and 13(4) of the Act)
 4. If the tenant's business is viable, should the tenant be given relief and, if so, what form should it take? (section 13(5) of the Act)

23. Section 13(2) of the Act states that the arbitrator must make an award dismissing the reference if it determines:

- (a) the tenancy in question is not a business tenancy, or
- (b) there is no protected rent debt,

Section 13(3) of the Act states that the arbitrator must make an award dismissing the reference if, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—

- (a) is not viable, and
- (b) would not be viable even if the tenant were to be given relief from payment of any kind.

I will now consider each of the above issues in turn.

IS THE TENANCY BY WHICH THE PREMISES ARE OCCUPIED A BUSINESS TENANCY?

24. ***Findings**, the Parties have agreed that the subject lease dated 24 May 2018 constitutes a business tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies and therefore sufficient to satisfy requirements (section 2(5) and 13(2)(b)) of the Act.*

25. After having regard to the findings set out in 24 above, I therefore **FIND** that the Applicant occupies the premises sufficient to satisfy the requirements of section 2(5) of the Act.

IS THERE A PROTECTED RENT DEBT AS DEFINED BY THE ACT?

26. **Common Ground**

27. The Parties agree that:

- 1. the Applicant's business was as retail premises for the sale of consumer electronics' i.e. A1 retail use;
- 2. the Lease dated 24 May 2018 creates a business tenancy sufficient to satisfy the requirements of the Act;
- 3. the Applicant's business was subject to a 'closure requirement' (section 4(2)(a) of the Act) as the Applicant was to cease carrying on its business from the premises, as that business was included in Part 1 of Schedule 2 of The Health Protection (Coronavirus Restrictions) (England) Regulations 2020; and
- 4. the rent payable during the relevant protected period was £15,600 per annum.

28. **The Submissions of The Parties**

29. Mr [REDACTED] (Applicant) has advised that there is a protected rent debt as defined by the Act, although he did not specify the amount of protected rent debt he believes to have been accrued and invited me to award the Applicant relief of 100% of the outstanding rent debt of £8,615.14, as:

- 1. such a decision aligns with the principles set out in Section 15 of the Arbitration Act, emphasising tenant business viability and the solvency of the landlord;
- 2. it is essential to recognise the disproportionate impact enforcing the full debt would have on an individual in his vulnerable financial and health condition; and
- 3. granting such absolution is only fair and just;
- 4. given Mr [REDACTED]'s considerable wealth, it is reasonable to question the necessity of pursuing the Applicant for the full amount of the rent debt who is in a vulnerable financial position;
- 5. the relevant protected period is for the 422 days, being the period from 21 March 2020 to 16 May 2021, when the Lease expired – not 18 July 2021 (section 4(2)(b) of the Act);
- 6. the Applicant has engaged in negotiations with the Respondent for a period of 13 months but the Respondent has consistently refused any form of resolution, despite the Applicant

making repeated offers to pay the debt or propose viable payment plans;

7. the Applicant's declining health would not have been so greatly diminished rendering him unable to pay, had the Respondent engaged in the Applicant's attempts to resolve the issue; and
8. the rent debt would have been paid by now, had the Respondent engaged in the Applicant's attempts to resolve the issue.

30. Mr [REDACTED] has advised that:

1. there is a protected rent debt as defined by section 3 of the Act;
2. the relevant protected period is for the 485 days, being the period from 21 March 2020 to 18 July 2021 (section 4(2)(b) of the Act);
3. the amount of protected rent debt is £13,215.14;
4. in its Formal Proposal the Applicant included references to:
 - [REDACTED] (and himself) in a personal capacity, both of which are separate legal entities to Khosla Investments Limited (the Respondent);
 - privileged correspondence was included. The Applicant's Formal Proposal also does not appear to comply with Section 12 of the Act;

[REDACTED] invited me to make an award under section 13(3), dismissing the Applicant's reference as the proposal failed to establish protected rent debt or alternatively proposed that the Applicant be required to pay the protected rent debt of £13,215.14 in 3 payments over the next 3 months, given:

- the sections of the Applicant's formal response (dated 12 May 2023) dealing with Registered Disability and Financial Hardship, Benefits Claimant and Lack of Assets and Health Decline shows that the Applicant has no intention to restore and preserve the viability of the business he traded
- the quantum of accrued rent arrears
- the Applicant has failed to demonstrate that its business is viable
- the Applicant's business ceased on 2 April 2019 as its trading company, Steam Syndicate Limited, was dissolved at that date
- the Lease was never disclaimed by the Tenant Company's (Steam Syndicate Limited) liquidator
- following the forfeiture of the Applicant's lease on 11 May 2022, the Applicant accrued a total rent arrears of £26,735.22 including Court costs up to and including the repossession date of 11 May 2022
- the dilapidations' claim prepared and served on the Applicant on 29 June 2022 for £46,526.16, to which the Applicant has failed to respond
- the Demised Premises from which the business traded have been repossessed and re-let
- the Applicant's business is not viable and would not be viable even if the Applicant were to be given relief from payment of any kind

Mr [REDACTED] also made the following points:

1. the Respondent did not receive the Applicant's letter dated 26 January 2022;
2. at no point did the Applicant hand back possession of the premises;
3. the Applicant did not attempt to send back the keys of the Property 3 days before 17 May 2021 and therefore the Respondent did not refuse to accept them;
4. the Applicant has not provided any proof of such attempt being made;
5. the Respondent repossessed the Property on 11 May 2022;

6. the Applicant held over its occupation of the Property, in accordance with the Landlord & Tenant Act 1954, continuing to remain in possession of the Property and accruing rent arrears until the repossession date of 11 May 2022;
 7. the Applicant continued paying rent past 17 May 2021, making a payment of 2 months' rent of £2,600 on 28 June 2021, as per the protected rent debt statement provided;
 8. the Respondent served a Section 25 Notice on 25 October 2021, terminating the lease on 28 April 2022;
 9. at no time during the Arbitration process has he not shown ethics or a lack of morality as asserted by the Applicant and these comments, along with those are therefore factually incorrect; and
 10. whilst it is regretted that the Applicant is experiencing severe financial and health circumstances, the Respondent's Formal Proposal in Response to the Applicant's Formal Proposal was based upon the legislation of the Act to which this Arbitration is subject i.e. whether the Applicant is to be awarded any relief in respect of the amount of protected rent debt arrears; and
 11. the Respondent was not time barred from seeking a dilapidation claim as the Dilapidations and Quantified Demand was as served within 56 days of the end of the lease:
 - the Lease was forfeited on 11 May 2022; and
 - the Dilapidations' Claim was served on the Applicant's solicitor by e-mail on 29 June 2022.
 12. Khosla Investments Limited did not grant any of its tenants covid rental concessions
31. **Findings**, from the contents of paragraph 27 and information provided by the Parties I found that:
1. the Applicant's business was as retail premises for the sale of consumer electronics' i.e. A1 retail use;
 2. the Lease dated 24 May 2018 creates a business tenancy sufficient to satisfy the requirements of the Act;
 3. the Applicant's business was subject to a 'closure requirement' (section 4(2)(a) of the Act) as the Applicant was to cease carrying on its business from the premises, as that business was included in Part 1 of Schedule 2 of The Health Protection (Coronavirus Restrictions) (England) Regulations 2020;
 4. the tenancy was therefore adversely affected by coronavirus, as the business was subject to a "closure requirement";
 5. the rent payable during the relevant protected period was £15,600 per annum; and
 6. the rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy.
32. After giving full consideration to the findings set out in 31 above I therefore **FIND** that there is a protected rent debt, as:
1. the tenancy was adversely affected by coronavirus;
 2. the rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy.
- IS THE TENANT'S BUSINESS VIABLE, OR WOULD IT BE VIABLE IF RENT RELIEF WERE GIVEN IN ACCORDANCE WITH THE ACT?**
33. Section 13 of the Act sets out the awards open to the arbitrator, section 13(3) of the Act provides that the arbitrator must make an award dismissing the reference if he determines, after assessing the viability of the tenant's business, that (at the time of the assessment) the business:
- (a) is not viable, and

(b) would not be viable even if the tenant were to be given relief from payment of any kind.

34. Viability is not defined in the Act. Guidance to arbitrators on this point is that in making the assessment of viability, a key question is whether protected rent debt aside, the tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.

In making the assessment of viability, the arbitrator:

1. can consider the immediate landlord and occupying tenant relationship, the impact of the tenant's other debts and their wider financial situation.
2. is to assess the viability of the tenant's business in a holistic and common-sense way, considering the circumstances of that business at the time of the assessment. On that basis, evidence relating to the business prior to or during the coronavirus pandemic would only be relevant insofar as it speaks to current viability, although the arbitrator is to take into account seasonal variations in business.

A small business should not be expected to supply a large volume of documentation or complex financial analysis. At the very minimum, the tenant should provide at least the last 12 months' full bank account information, including savings accounts, current accounts and loan accounts.

Where the tenant's business is not incorporated, it may be necessary to provide personal bank account information. Where these (and/or other records) show the tenant has a good track record of paying rent, and has no substantial new debts, that is likely to be strong evidence that the tenant's business is viable.

Other information where available will also be generally useful to the arbitrator, such as financial and/or management accounts for each financial month/year after March 2019.

However, audited accounts are not required under the Act and some businesses are not required to have audited or comprehensive financial accounts. Where that is the case, the arbitrator may want to look at bank account information including any saving accounts, loan accounts and current accounts for each financial year after March 2019.

35. **The Submissions of The Parties**

36. Mr [REDACTED] (Applicant) has advised that:

1. he is a self-employed individual and has been so since 2020;
2. his self-employed business involves the resale/wholesale of vaping devices and sale of CBD consumption products across the UK;
3. he is a registered disabled individual suffering from a severe autoimmune disease;
4. this condition has:
 - severely impaired his ability to work for nearly 3 years; and
 - has led to an alarming decline in his health and financial stability.
5. despite his situation, he has not received any assistance from the government's self-employment scheme during covid, rendering him reliant on minimal benefits and experiencing significant financial hardship.
6. as a disabled person he is unable to work and receives universal credit and personal independence payments;
7. as a severely disabled person, self-employment is the only option he has to try and make a living
8. he was a director of [REDACTED] and is of the opinion that once this company dissolved (2 April 2019), the property returned to the crown and that his liability as a guarantor ended on 16 May 2021, when the lease expired;
9. after this dissolution, no new agreements were signed or entered into by himself;

10. no terms were offered or agreed other than to cover the payments under the lease until the end of the term;
11. he (Applicant) informed Mr [REDACTED] (Respondent) that he:
 - is a registered disabled;
 - has been stricken with a sickness during the course of the lease term; and
 - was unable to meet the same rental payment commitments as he once could.
12. he (Applicant) has engaged in negotiations with the Mr [REDACTED] (Respondent) for a period of 13 months but that Mr [REDACTED] (Respondent) has consistently refused any form of resolution, despite the Applicant making repeated offers to pay the debt or propose viable payment plans;
13. his (Applicant) declining health would not have been so greatly diminished rendering him unable to pay, had Mr [REDACTED] (Respondent) engaged in the Applicant's attempts to resolve the issue;
14. he (Applicant):
 - has no assets;
 - has no debt other than the £10,615.14 owed to Mr [REDACTED] (Respondent) under the terms of the lease; and
 - considers it is wiser for a solution to be found than for him to enter into bankruptcy.

The Applicant contends that Mr [REDACTED]'s (Respondent) introduction of the claim for dilapidations at this stage is a crude attempt at derailing the arbitration process, as he is aware that:

1. the enforcement of this debt would have a disproportionate impact on him (as shown by the rent arrears schedule) being a person in a severe financial situation and with a health condition;
2. Mr [REDACTED] is time barred from seeking a dilapidation claim, as he failed to issue a schedule of Dilapidations and Quantified Demand within 56 days of the end of the lease;
3. Mr [REDACTED] provided no schedule of condition upon entry of the property; and
4. in any event, a dilapidation claim was never served.

Mr [REDACTED] (Applicant) has provided me with:

1. a copy of the business rate grant received from [REDACTED] Council on 2 February 2021 of £6,477;
2. a copy of a profit and loss account for [REDACTED] (of which Mr [REDACTED] is a Director) for the period from 2 April 2022 to 18 July 2023 showing:
 - sales of £59,011.34;
 - an annual turnover of £69,498.37;
 - a gross profit of £32,123.87
 - administrative costs of £33,896.07
 - a negative operating profit of £1,772.20
3. an order from [REDACTED], dated 7 January 2023, of £32,362;
4. copies of [REDACTED] bank statements showing an overdraft of £13.90 (for the period from 1 to 28 February 2023) and a nil balance for the period from 1 to 31 March 2023;
5. a copy of a [REDACTED] personal account statement (for the period from 19 December 2022 to 17 July 2023) showing a credit of £5 at the beginning of the period and a nil balance at the end of the period;
6. a copy of a [REDACTED] personal account statement (for the period from 17 July 2022 to 4 July 2023) showing a credit of £6,181.12 at the beginning of the period and a nil balance at the end of the period;

7. a rent arrears statement showing rent arrears of £14,515.14, for the period up to 19 May 2021; and
8. an annual cash flow showing:
 - an increase in annual sales from £600 per month in November to £60,000 per month, the following October;
 - an increase in annual costs from £1,694.99 per month in November to £11,130 per month, the following October;
 - rent of £1,300 per month - £15,600 per annum; and
 - a cash flow which shows a negative position of £994.99 in November and a positive position of £49,870 following October;

Mr [REDACTED] (Applicant) concluded that:

1. he has made several attempts to honour the contractual agreement and fulfil his financial obligations under the lease but that each offer has been rejected by Mr [REDACTED], leaving him without any viable means to settle the debt;
2. had Mr [REDACTED] engaged in the Applicant's attempts to resolve the issue and accepted the offers made, then the debt would have been cleared by now;
3. his declining health would not have been diminished so greatly rendering him unable to pay;
4. times are tough right now but nobody has the right to tell him that his self-employment is not viable
5. he is able to prove the viability of his self-employment; and
6. by granting him relief against the debt of £8,615.14 is not only fair and just, but it also upholds the principles outlined in Section 15 of the Arbitration Act, safeguarding tenant business viability and considering the solvency of the landlord.

37. The Respondent submits that the Applicant:

1. has experienced financial difficulties as a result of a serious non-covid related matters i.e. Mr [REDACTED]'s poor health, demonstrated by his company [REDACTED] being dissolved on 2 April 2019;
2. is looking to mitigate the incurred financial loss by attempting to shift it onto the Respondent. The Coronavirus rent relief is not for such purpose.
3. does not currently have a business which is viable, as the business which operated from the Demised Premises to which the protected rent debt is subject is not viable as it ceased trading over a year ago and its contention that it will be profitable in the foreseeable future is unrealistic, especially as they have rent arrears of £26,735.22 and a dilapidations' claim for £46,526.16;
4. has failed to comply with the payment obligations under the Lease and this breach of obligations does not support a position that the business is viable. If the business was viable, then the Applicant would have paid the protected rent promptly, which they did not do. This lack of payment indicates that this business is not viable and unable to meet its current debts;
5. has not provided any explanation as to why its business is viable or would be, if granted relief, under section 16 of the Act.
6. does not deny, in its Formal Proposal dated 12 May 2023, that:
 - Mr [REDACTED] now has no viable means to settle the debt.
 - Mr [REDACTED]'s health has severely impaired his ability to work for nearly 3 years;
 - by being disabled means Mr [REDACTED] he is unable to work and is reliant on universal

credit and personal independence payments;

- Mr [REDACTED] possess no significant assets or wealth.
- 7. has itself demonstrated, with reference to the [REDACTED] Bank statements submitted with its Formal Proposal, that the business which operated from the Demised Premises is not viable and that it had absolutely nothing to do with Mr [REDACTED]'s disability;
- 8. states he can prove the viability of his self-employment but apart from submitting bank statements with nil balances as evidence, no proof of the viability of the business which operated from the premises to which the protected rent debt arrears are subject has been provided, as required section 13 of the Act.

The Respondent accepts that relief should be awarded if the business to which the protected rent debt is subject is considered viable but does not accept that relief should be awarded to the Applicant as it has:

1. failed to demonstrate any viability of the business of the tenant;
2. failed to demonstrate how any relief would preserve the viability of the business of the tenant;
3. not provided any documentary evidence, or disclosed a single bank statement demonstrating their circumstances, nor assets to support their claim that their business is viable.

The Respondent:

1. argues that:
 - a) there is no evidence in the Applicant's Formal Proposal to support that its business is viable or would become viable if any relief of the protected rent debt was given; and
 - b) therefore the reference to Arbitration should be dismissed in accordance with the legislation to which the Act is subject.
2. therefore invites me to make an award in accordance with section 13(3) of the Act to dismiss the reference as the tenant's business:
 - (a) is not viable, and
 - (b) would not be viable even if the tenant were to be given relief from payment of any kind.

38. **Findings, in making the assessment of viability, the arbitrator:**

1. *can consider the immediate landlord and occupying tenant relationship, the impact of the tenant's other debts and their wider financial situation.*
2. *is to assess the viability of the tenant's business in a holistic and common-sense way, considering the circumstances of that business at the time of the assessment.*
3. *the Applicant is not expected to supply a large volume of documentation or complex financial analysis but should, to demonstrate that the tenant's business is viable, provide:*
 - a) *records which show the tenant has a good track record of paying rent;*
 - b) *at least the last 12 months' full bank account information, including savings accounts, current accounts and loan accounts;*
 - c) *personal bank account information;*
 - d) *demonstrate that it has no substantial new debts; and*
 - e) *any other information, where available, such as financial accounts for each financial and/or management accounts for each financial month/year after March 2019.*

The Applicant has been able to provide the following financial information:

1. a copy of the business rate grant received from [REDACTED] Council on 2 February 2021 of

£6,477;

2. a copy of a profit and loss account for [REDACTED] (of which Mr [REDACTED] is a Director), for the period from 2 April 2022 to 18 July 2023 showing:
 - sales of £59,011.34;
 - an annual turnover of £69,498.37;
 - a gross profit of £32,123.87
 - administrative costs of £33,896.07
 - a negative operating profit of £1,772.20
3. an order from [REDACTED], dated 7 January 2023, of £32,362
4. copies of [REDACTED] bank statements showing an overdraft of £13.90 (for the period from 1 to 28 February 2023) and a nil balance for the period from 1 to 31 March 2023;
5. a copy of a [REDACTED] personal account statement of [REDACTED] (for the period from 19 December 2022 to 17 July 2023) showing a credit of £5 at the beginning of the period and a nil balance at the end of the period;
6. a copy of a [REDACTED] personal account statement of [REDACTED] (for the period from 17 July 2022 to 4 July 2023) showing a credit of £6,181.12 at the beginning of the period and a nil balance at the end of the period;
7. a rent arrears statement showing rent arrears of £14,515.14, for the period up to 19 May 2021; and
8. an annual cash flow showing:
 - an increase in annual sales from £600 per month in November to £60,000 per month, in the following October;
 - an increase in annual costs from £1,694.99 per month in November to £11,130 per month, in the following October;
 - rent of £1,300 per month - £15,600 per annum; and
 - a cash flow which shows a negative position of £994.99 in November to a positive position of £49,870 in the following October;

I have also found, after a careful consideration of all of the material presented to me by the Parties that:

1. The Applicant's business, [REDACTED], dissolved on 2 April 2019;
 2. The Applicant paid rent at £1,300 per month up to 18 March 2019, a reduced amount of £10,221.71 (rather than the full amount of £15,600) for the period from 19 April 2019 to 18 March 2020 and a reduced amount of £15,600 (rather than the full amount of £22,100) for the period from 19 April 2020 to 18 August 2021;
 3. No payment information was provided for the period from 19 August 2021 to 11 May 2022;
 4. The Applicant is a registered disabled individual suffering from a severe autoimmune disease, a condition which has severely impaired his ability to work for nearly 3 years and has led to a decline in his health and financial stability;
 5. The Applicant, as a disabled person, is unable to work and receives universal credit and personal independence payments, so has been unable to meet the same rental payment commitments as he once could;
 6. The Applicant possess no significant assets or wealth;
 7. The Applicant currently owes rent arrears of £26,735.22, and
 8. The Applicant has a potential liability from a dilapidations claim for £46,526.16.
39. Section 16(1) of the Act, states that in assessing the viability of their business regard is to be had to factors referred in sub-sections clauses (a)-(d) i.e.
- (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,

(d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

With reference to the above, the Applicant:

1. experienced difficulty in paying the full amount of rent from 19 March 2019 in the run up to [REDACTED] being dissolved on 2 April 2019 and paid no rent/rent arrears after 28 June 2021;
2. has confirmed that 'times are tough right now';
3. has confirmed that he possess no significant assets or wealth;
4. currently owes rent arrears of £26,735.22 and has a potential liability from a dilapidations' claim for £46,526.16;
5. has failed to comply with the payment obligations under the lease and this breach of obligations does not support a position that its business is viable;
6. despite the information in 2 and 3 above, states he can prove the viability of his self-employment but apart from submitting bank statements with nil balances, an order from [REDACTED], dated 7 January 2023, for £32,362 and an optimistic cash flow, as evidence, I have found that no proof has been provided of the viability of the Applicant's business to which the protected rent debt arrears are subject, as required under section 13 of the Act,
7. has not provided me with any information that enables me to make an award on the matter of relief from payment in accordance with section 14, adopting the principles set out in section 15 of the Act.

I have drawn the conclusion that the Applicant's contention that its business is or will in the foreseeable future be profitable is unrealistic, based on the financial information provided and the Applicant's continuing deteriorating health, together with the sum of the rent arrears of £26,735.22 and a dilapidations' claim for £46,526.16.

Based on my findings in 38 above and the information provided, after assessing the viability of the tenant's business (as required by section 13(3) of the Act), **I FIND**, that at the time of the assessment, the business was not viable and would not be viable even if the Applicant were to be given the relief from payment it had claimed of £8,615.14.

AWARD

40. In accordance with section 13(3) of the Act **I HEREBY MAKE AN AWARD AND DIRECT THAT** the Applicant's reference is dismissed.

COSTS

41. Section 19(4) of the Act provides that the Applicant must pay arbitration fees in advance of the arbitration taking place.

Section 19(1) of the Act states that fees are to include:

- (a) the arbitrator's fees and expenses; and
- (b) the fees and expenses of any approved arbitration body concerned.

The Applicant requested that I award the full legal costs which they incurred for these proceedings against the Respondent.



The Act provides, within section 19(5), that I am to make an Award on my costs and the application fee to the arbitral body, requiring the Respondent to reimburse the Applicant for half the arbitration fees, unless in the circumstances (section 19(6)) I consider it more appropriate to make an Award on a different basis.

After a careful consideration of the vast amount of documentation put to me, I cannot see a reason why I should depart from the principal set out within section 19(5). Therefore, each party must pay its own costs and half of the fees paid by the Applicant totalling £3,100 i.e. the RICS application fee under Procedure A of £100 (despite the Applicant having paid the RICS application fee under Procedure D of £450) and the arbitrator's fee of £3,000 plus vat.

42. I therefore additionally Award that the Respondent is to reimburse the Applicant the amount of £1,550 plus vat, which is 50% of the fees paid by the Applicant for the Arbitration, within 14 days of the Applicant providing an invoice for such an amount.
43. The seat of this arbitration is England and Wales.
44. This Final Award is made and published this 3 August 2023.
45. This Final Award will be published by the RICS on its website in an anonymised format.

Signed

Dated: 3 August 2023

D J Gilbert BSc FRICS Dip Arb FCI Arb RICS Accredited Mediator
As Arbitrator