

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

**BETWEEN**

**MADEIRA PATISSERIE LIMITED  
(APPLICANT)**

**&**

**THE ARCH COMPANY PROPERTIES LIMITED  
(RESPONDENT)**

**IN RESPECT OF UNITS 1 & 2, 2 LINFORD STREET, BATTERSEA,  
LONDON SW8**

**FINAL AWARD  
BY  
BY SIMON S GOULDBOURN BSc MRICS ACIArb  
ARBITRATOR**

## **1.0** *Preliminaries*

- 1.1 The Applicant is Madeira Patisserie Limited, the tenant of premises known as Units 1 & 2, 2 Linford Street, Battersea, London SW8 4UN. The Applicant is represented by MR Antonio Luis (AL) of Madeira Patisserie Limited and Mr Amir Abbas (AA) of NR Legal.
- 1.2 The Respondent is The Arch Company Properties Limited the landlord of the aforementioned premises. The Respondent is represented by Mr D Clegg (DC) of Realty Law.
- 1.3 I have been provided with a copy of the lease dated 24th November 2016 and relating to these business premises subject to a claim for relief from full payment under the Commercial Rent (Coronavirus) Act 2022 (CRCA).
- 1.4 The Respondent raised a preliminary issue as to my jurisdiction to proceed under the CRCA, because it stated that the Applicant had failed to comply with s.11 and s.12 of the CRCA in making its claim for relief from payment of a protected rent debt.
- 1.5 If the Applicant had complied with s.11 and s.12 of the CRCA then the arbitrator is also to consider whether the premises were qualifying premises and adversely affected by coronavirus as prescribed by s.4 of the CRCA.
- 1.6 Provided those preliminary matters had been satisfied then I am to consider what, if any relief from payment should be granted to the Applicant on the evidence put forward by the parties.

## **2.0** *Procedural Background*

- 2.1 On 1<sup>st</sup> March 2023 I was appointed by the President of the Royal Institution of Chartered Surveyors (RICS) to act as an arbitrator under the CRCA.
- 2.2 In its application form dated 23<sup>rd</sup> September 2022, the Applicant requested the arbitration be conducted in accordance with the RICS arbitration procedure "D".
- 2.3 I convened a pre-arbitration meeting with the parties during which my fee basis was agreed together with a timetable for lodging Amended Proposals. It was agreed that I would consider all correspondence and then proceed to making an Award.
- 2.4 AA lodged an Amended Proposal on 21<sup>st</sup> June 2023.
- 2.5 Following a period of delay, I sought clarification from DC as to whether a final Amended Proposal would be forthcoming and which was subsequently received on 30<sup>th</sup> November 2023.

### 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 21<sup>st</sup> March 2020 to 18<sup>th</sup> 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 A qualify business tenancy is prescribed at s.4 of the CRCA as follows:

(1) *A business tenancy was “adversely affected by coronavirus” for the purpose of section 3(2)(a) if, for any relevant period -*

- (a) *the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or*
- (b) *the whole or part of those premises,*

*Was of a description subject to a closure requirement.*

(2) *For this purpose –*

- (a) *“closure requirement” means a requirement imposed by coronavirus regulations which is expressed as 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*

3.6 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.

3.7 S. 11(1) of the CRCA stipulates:

*“A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt.”*

S.11 (3) of the CRCA states:

*“A formal proposal under subsection (1) or (2) must be accompanied by supporting evidence”*

3.8 Accompanying any written statement to the arbitrator there must be a verified statement according to s.12 (2) of the CRCA.

3.9 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.

3.10 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.

3.11 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.

3.12 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.

## **4.0** *The Applicant's Proposal*

- 4.1 On 23<sup>rd</sup> September 2022, AA sent a letter of "Formal Proposal" stating that NR Legal Solicitors had been instructed by the Applicant.
- 4.2 The letter went on to state that a dispute had arisen under the CRCA and asked the RICS to appoint an arbitrator to resolve the dispute.

## **5.0** *The Respondent's Proposal*

- 5.1 DC, on behalf of the Respondent, lodged a Formal Proposal on 23<sup>rd</sup> February 2023.
- 5.2 The Respondent requested that the Applicant discharges the whole of the debt owed from 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021 of £79,328.79 (excluding VAT).
- 5.3 It further requested that interest be applied to the debt owing at 4% above HSBC's base lending rate.
- 5.4 The Respondent stated that as a preliminary point it submits that the Applicant's Formal Proposal did not meet with the requirements of the CRCA. It submitted that there had been no Formal Proposal made and it had failed to verify its proposal with a Statement of Truth, as required by s.12 (2) of the CRCA.
- 5.5 DC added that the Applicant had also failed to serve any evidence supporting its claim.
- 5.6 DC stated that if it is accepted that the Applicant had made a Formal Proposal, then the Respondent is clear that the premises are ineligible for arbitration due to its use. DC maintained that the premises are used as a bakery, which was never mandated to close or had any other restrictions imposed upon it.
- 5.7 DC reiterated that no financial information in support of the Applicant's Proposal had been received and it is, therefore, not possible to determine whether the Applicant is unable to pay the protected rent debt.
- 5.8 DC advised that guidance from the CRCA placed the onus on the Applicant to demonstrate their inability to pay protected rent debt because it has the financial records needed to establish the position.
- 5.9 The Respondent's position is that the Applicant's use of the property as a bakery (with no public facing or retail use) is ineligible because the business was not subject to a closure requirement as defined in the CRCA.
- 5.10 DC stated that the business did not meet the definition of being "*adversely affected by coronavirus*" as described at s.4 (1) of the CRCA.
- 5.11 The Respondent highlighted that it had already granted a discretionary three month rent concession for the period 25<sup>th</sup> March 2020 to 23<sup>rd</sup> June 2020 and that sum had already been deducted when calculating the amount owed of £79,328.79.

- 5.12 DC highlighted the Applicant's lease has a permitted use of the property as a bakery, or for such other use within Use Class B1 of the Town & Country Planning (Use Classes) Order 1987.
- 5.13 DC stated that Use Class B1 did not permit retail use, with no part of the property having any public facing use, such as retail, which would have been in breach of the lease. The property had always been used as a bakery for food production in connection with the Applicant's business as a patisserie.
- 5.14 DC maintained that businesses that manufacture and store food were not subject to a Mandated Closure Order, so the Applicant's claim should be ineligible under the CRCA.
- 5.15 DC advised that the Applicant had provided no explanation as to why its food production business was compelled to cease operating or been subject to compulsory closure. The Applicant's retail premises are situated many miles away from the premises subject to this dispute, according to the Respondent.
- 5.16 The Respondent put the Applicant to strict proof of what parts of the business were ever mandated to close.
- 5.17 DC considered that, as no evidence had been put forward by the Applicant justifying its claim, then there was no material evidence available to the arbitrator to assist making a decision.
- 5.18 The Respondent advised that it had provided total rent relief of more than £11million across its estate of 1,500 tenants, which is a significant contribution. Generous support had been given to the Respondent by way of a discretionary three month rent free period at the outset and the Respondent should be due no further relief from payment.
- 5.19 It reiterated that the Applicant had provided insufficient information and that the business does not qualify for arbitral proceedings under the CRCA.
- 5.20 DC invited the arbitrator to make an Award that the Tenant shall be given no relief from payment of the debt accrued.

## **6.0 *The Applicant's Amended Proposal***

- 6.1 AL provided a response on behalf of the Applicant.
- 6.2 AL stated that DC had made a number of misleading assertions and stated there were several inaccuracies attached to the Respondent's Proposal.
- 6.3 AL stated that whilst financial statements had not been submitted with the Proposal, they had been previously made available to the Respondent, who had proceeded to scrutinise and ask questions regarding the financial information provided.
- 6.4 The Applicant stated that the Respondent promised relief on the condition certain criteria was met but then reneged upon fulfilment of the criteria.

6.5 AL stated that the Respondent had manipulated the protected rent figure by way of offsetting payments against it and subsequently sent a bailiff, which he considered to be in contravention of the CRCA and written agreement.

6.6 AL confirmed that the business involves production and distribution of cakes, breads and fresh pastry goods.

6.7 The Applicant caters for a large number of restaurants and coffee shops, supplied by their fleet of vehicles from the premises.

6.8 Due to their inability to deliver beyond a certain radius in the London area, AL stated that a large proportion of its customers visit the premises physically to inspect and collect stock.

6.9 AL maintained that the pandemic affected many of its customers, causing a closure of their premises and a move towards delivery-only operations.

6.10 AL said that, in turn, it impacted their operations as they were unable to deliver products to their customers' premises.

6.11 As a consequence, their customers were more disposed to collect items for onward delivery and so the proportion of customers visiting the premises was considerably higher than usual.

6.12 AL said it was encouraged by the Government to establish an online presence during the pandemic, which it did, offering delivery and collection options. It was an essential modification to their existing business model to ensure continued trade and compensating for the closure of other businesses.

6.13 AL said though that those parts of the premises designated for collection of goods by face to face customers had to be temporarily closed due to the risk of a coronavirus outbreak.

6.14 The premises were modified to remain operational but AL stated that, on occasion, local council officers advised closure due to the high numbers of public visiting the premises.

6.15 A critical issue determining mandatory closure of the premises was the sale of goods to visiting members of the public.

6.16 Those operations formed the business core during the pandemic and have been maintained ever since.

6.17 AL attached confirmation from the Applicant's regular customers of regular visits to their premises from customers.

6.18 AL stated that they had to frequently close the property due to the threat of a Covid outbreak, which would cause loss to their business.

6.19 AL went on to contest the protected rent debt figure provided by DC, who had calculated £79,328.79 exclusive of VAT.

6.20 AL referred me to a wider agreement reached between the parties that would put the Applicant on a payment plan to clear substantial rent arrears that had accumulated across various premises.

6.21 AL explained that the Respondent had taken arrears money set against their other leases at Goding Street but used £154,735 to offset against the protected rent owing at the subject premises in Linford Street.

6.22 AL felt this was an underhand measure to minimise the Respondent's exposure to the arbitration process.

6.23 AL believed the correct amount of protected rent debt subject to this dispute to be £208,274 exclusive of VAT.

6.24 AL complained that the Respondent's allocation of the sum of £154,735 led them to declare other periods of rent being outstanding and subject to immediate enforcement measures which were undertaken via bailiff services.

6.25 AL provided email correspondence which he said confirmed that the aforementioned sum of £154,735 received had been used to offset arrears at the subject premises.

6.26 AL admitted that no financial documents had previously been provided to the arbitrator, although explained that the Respondent had had sight of that information, which led to certain rent concessions.

6.27 Additional financial information was provided by AL within the Amended Proposal.

6.28 AL referred to emails of 14 January and 31<sup>st</sup> January 2022 attached to the Amended Proposal.

6.29 I did not read either email or attach any "hearsay" weight to AL's commentary regarding these emails mentioned at 6.28 above because those letters were marked "without prejudice", such material ineligible for use in these proceedings.

6.30 AL made an Amended Proposal on behalf of the Applicant as follows:

- (a) The Respondent grants 3 months' rent concession, equivalent to a sum of £72,677.26 inclusive of VAT; and
- (b) The Respondent discharges any other late payment fees, interest or other charges associated with the above.

## **7.0 Respondent's Amended Proposal**

- 7.1 In response to the Applicant's amended proposal, DC stated that the Applicant had failed to provide any evidence confirming that any part of the premises was mandated to close. He stated that if the Applicant chose to voluntarily close following guidance received from the Local Authority, then that was entirely a matter for the Applicant and outside of the coronavirus legislation.
- 7.2 DC pointed out that the Applicant had included correspondence which was marked "Without Prejudice" which is privileged and should not have been referred to the arbitrator.
- 7.3 DC considered that the remainder of the Applicant's Witness Statement was irrelevant because the premises were ineligible for coronavirus relief. The Respondent relied upon the Respondent's Formal Proposal and asked that I consider these matters when making my Award.

### **My Decision**

## **8.0 Was the "Formal Proposal" from the Applicant sufficient for the purposes of Section 11 of the CRCA**

- 8.1 S.11(1) of the CRCA is unambiguous and specific as to what is required of the Applicant when making a reference to arbitration:

*"Reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt."*
- 8.2 S.11(3) also provides that any formal proposal *"must be accompanied by supporting evidence"*.
- 8.3 The "Formal Proposal" letter dated 23<sup>rd</sup> September 2022 (the deadline day for making any application for relief from payment under the CRCA) accompanied the application to the RICS for the appointment of an arbitrator, the application form also dated 23<sup>rd</sup> September 2022.
- 8.4 The "Formal Proposal" letter from NR Legal Solicitors to the Head of DRS Operations at RICS, simply confirmed that NR Legal Solicitors were instructed on behalf of the Applicant.
- 8.5 The stated "Formal Proposal" was written as follows:

*"Moreover, our formal proposal for the resolution of this dispute under the auspices of RICS are as under:*

*Our client is the Tenant under the Lease granted by the Landlord for Units 1-2, Linford Street, London (Premises).*

*We kindly inform you that this matter could not be settled between the parties. Furthermore, the Tenant and the Landlord could not agree for the appointment*

*of the arbitrator too. Therefore, we request RICS to commence the arbitration process and appoint an arbitrator under the Act and resolve the issue of disputed Protected Rent Debt between the parties.”*

- 8.6 Whilst the “Formal Proposal” letter makes reference to a Formal Proposal, no Formal Proposal was made by the Applicant for resolving the matter of relief from payment of a protected rent debt.
- 8.7 No substantive Formal Proposal has been made and no supporting evidence supplied, which is in contravention of s.11 (1) and s.11 (3) of the CRCA.
- 8.8 As a consequence, the Applicant’s “Formal Proposal” letter is invalid and I have no jurisdiction to proceed with this dispute.

## **9.0** *Were the Premises qualifying Business Premises for the purposes of Section 4 of the CRCA?*

- 9.1 In finding that the Applicant has failed to serve a valid Formal Proposal for the purposes of these proceedings, there is no requirement for me to consider whether the Applicant occupies qualifying business premises under s.4 of the CRCA.

## **10.0** *Arbitration Costs*

- 10.1 Under s.19 (6) of the CRCA I have discretion as to the apportionment of my own costs.
- 10.2 Both parties have participated in these proceedings to enable me to deliver my Award.
- 10.3 I have given due consideration to these facts when considering apportionment of my costs.

## **11.0** *Publication*

- 11.1 I am directed by s.18 (2) of the CRCA to publish my Award.
- 11.2 The Award will be published on the website of the RICS.
- 11.3 I do not consider there is commercial information which must be excluded under s.18 (3) of the CRCA.
- 11.4 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 Monday 19<sup>th</sup> February 2024.

## 12.0 Award

12.1 I, Simon Stuart Gouldbourn, Award and Direct as follows:

- (a) The Applicant has not served a valid Formal Proposal under s.11 of the CRCA.
- (b) I have no jurisdiction to proceed under the CRCA and dismiss the Applicant's referral to arbitration.
- (c) My costs are £2,000 plus VAT to be split equally between the parties and so the Respondent must reimburse the Applicant 50% of the fee, which has been lodged with the RICS.

12.2 The seat of this Arbitration is England and Wales.

Signed:

A handwritten signature in black ink, appearing to read "Simon S Gouldbourn".

**Simon S Gouldbourn BSc MRICS ACIArb**

Date: 22<sup>nd</sup> January 2024