

## Arbitration Award

Published under the Provisions of the Commercial Rent (Coronavirus) Act 2022

### Parties

..... (Applicant and Landlord)

and

..... (Respondent and Tenant)

Property:

## **Introduction**

1. The Applicant is .....Landlord company and is represented by .....
2. The Respondent Tenant is .....

## **Procedural Background**

3. I received notification from the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS) of my appointment as arbitrator on 23 November 2022, arising under the Commercial Rent (Coronavirus ) Act 2022 (The Act). I am required, to determine the amount of relief (if any) from the 'protected rent debt' (as defined in the Act) incurred by the Respondent. The RICS is recognised by the government as an appropriate body for nominating arbitrators to resolve disputes arising under the Act.
4. I received copies of the parties' proposals and convened an online 'Teams' meeting between myself and the representatives on 12 January to discuss procedure and cost. The RICS provides four separate procedures to resolve such disputes (A, B, C and D) and initially procedure D was sought by the Applicant, although after the online meeting, the parties agreed that the less involved (and less expensive) procedure B should be adopted.
5. There is no dispute that the property is occupied under a business tenancy, sufficient to satisfy the requirements of the Act and further, that it was adversely affected by the pandemic and subject to closure requirements/operational restrictions.
6. The dispute largely relates to differences between the parties as to the viability of the club, particularly in relation to payment of the protected rent debt.
7. The Respondent has paid part of the contractual rent arising during the statutory period (2.00pm on 21 March 2020 and 11.55pm on 18 July 2021) and there remains an agreed protected rent debt in the sum of £83,305. The difference between the parties is clear. The Applicant believes that the outstanding debt should be paid in full (but does not propose to charge interest), whereas the Respondent is of the view that I should grant full relief of the outstanding debt.
8. One of the requirements of the Act is that my award be consistent with preserving the Landlord's solvency. There is no dispute that the Applicant will remain solvent

regardless of the outcome of this arbitration and accordingly there is no need for me to make a finding in this regard.

9. It remains that I must determine whether the Tenant's business is viable or if not would be if granted relief.
10. My reading of the parties' submissions is that the Applicant believes the Tenant's business to be viable even if the debt was settled in full whilst the Respondent claims that the club can only remain viable if relief is granted. I must therefore make a finding on viability and in doing so have regard to:
  - a) The assets and liabilities of the Tenant, including any other tenancies to which the Tenant is a party (I am not aware of any other tenancies);
  - b) The previous rental payments made under the business tenancy from 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.
11. It is acknowledged that I must disregard the possibility of any new borrowing by the ..... Club or subsequent restructuring of the club. Neither is there any dispute that my award should be aimed at preserving/restoring the viability of the business and, in so far as it is consistent with this principle the Tenant should be required to meet its obligations regarding the protected rent debt in full.
12. After assessing whether the Tenant's business is viable (or would be viable if given relief) I must decide the extent to which it can afford to pay the protected rent debt.
13. In deciding these matters I set out below the final proposals from each party and the extent to which the submissions are rebutted by the opposing party.

## **Applicant (Landlord) Submission**

14. The submission is prepared by ..... and commences by providing me with a background to the .....charity and its position in the community. He reiterates the position of the Trust, that the respondent tenant should pay the protected rent debt in full over a period of six months, although it is not seeking an interest payment.
15. ..... has considered the extent of any relief from payment detailed in section 6 of the Act. He is of the view that information provided by the Tenant shows the ..... Club to be viable particularly when considering that the cash held at the bank at the end of May 2021 at £44,520. being an improvement on the previous year. He also notes an increase in total assets minus liabilities and, he claims, an improved position during the pandemic. ..... is critical of the lack of more recent accounting information and refers me back to 2018 and 2019 when the cash held in bank was £54,512 and £42,283 respectively. He concludes that as we are now in 'normal times' it is fair to assume the current cash position to be similar.
16. ...., in his reply, has sought to explain the delay in making more recent accounts available and states the Club's accountants are working toward accounts for the year ended May 2022. .... points to the income generated through the furlough scheme of £88,345 as well as the grants of £61,543 during the 2020/21 period and because of their status as grants were included in the profit/loss figures. However the 'Bounce Back' loan referred to by ..... (and shown in the accounts) is as ..... points out a commercial arrangement and will need to be repaid. Because of this I accept the view of ..... that the net assets of the club fell during the 2020/21 period to £3,273 and did not increase as suggested by .....
17. During the year ended 31 May 2020 the club was restructured (unconnected with the pandemic) which, ..... suggests was a benefit, although ..... claims that he (.....) omitted to refer to the negative impacts on financial performance post-pandemic, largely relating to the delay in return to normal operations after restrictions were lifted.
18. ..... makes reference to ..... letter of 1 February 2023 (of which I have a copy) in relation to the continuing positive balance sheet but ..... clarifies the position by stating that the cash injection was via the loan which the club is required to repay.

19. .... concluding remarks on the viability of the ..... club is that it is a business with viability and solvency. Payment of the protected debt would not involve it losing its solvency, particularly if it were given time to make the payment over a six month period. He acknowledges there is no threat to the solvency of the ..... Trust from non-payment, but he does underline the effect non-payment might have on the charity's ability to fulfil its objectives. .... does not provide comment on the ..... Trust's future objectives and indeed there is no doubt that threat to its solvency is not an issue in this arbitration.

### **Respondent (Tenant) Submission**

20. .... commences his submission to this arbitration by confirming the agreed protected rent debt at £83,305 (after paying an amount of £15,888 toward the contractual amount for the relevant period). He describes the financial aim of the ..... Club as a 'balanced budget business', with an overall attempt to break even annually, after an adjustment for the increase in rent to £62,500 per annum from 2018. Such balancing would involve adjustment of the Club membership fees and the price of other products / sources of income. During the closed periods of the pandemic the drawdown of club reserves, he claims, were balanced with furlough receipts and bounce back loans to maintain the club.

21. The reply, on behalf of the ..... Trust has been made by ..... who reminds me of the requirement of section 15 of the Act seeking preservation of the viability of the Tenant against the principal that it should be required to pay protected rent debt in full. She is of the view that the Respondent has not shown that it is unable to make full payment to the Applicant and comments again on the lack of up to date financial information. She describes the ..... club as a well-run organisation with healthy reserves of cash. Her view is that I am '*entitled to find that what has come before (a good strong financial performance) has continued afterwards*'. .

22. .... describes the assistance The Club provides to local disability groups as an Asset of Community Value and in this way fairness should be part of the resolution. .... comments that such an appeal to me for fairness is outside the scope for consideration on viability, although I note that the Applicant has also described its roll and support to the community.

23. .... compares the effect on turnover during the pandemic period for both the .... Club and the .... Trust, whereby the effect on turnover for the Applicant was significantly less than that on the .... club. .... responds that such comparison has nothing to do with the assessment of viability. Similarly, her claim that a reduction in rental income to the housing trust will have a direct impact on the amount invested in local communities is a fact that will not affect my award.
24. .... makes the argument that payment of the full protected rent debt will prevent the club from being a 'balanced budget business'. This is disputed by .... because of the favourable position (she claims) of the balance sheet.
25. She also claims that no additional borrowing by the .... Club would be required to meet the debt although she does acknowledge that there is little evidence in this regard.
26. .... states that the rent paid during the relevant period equated to 16% of the contractual rent which was similar to the percentage of turnover compared to the previous unaffected year. Costs, he claims, were higher during limited opening periods.
27. I agree with .... when she dismisses the comparison between turnover and the amount of rent paid as a recognised basis for assessing viability (or indeed fairness). She concludes that she is unable to justify any reduction in the protected rent debt on the grounds of viability.

### **Award**

28. I agree with .... explanation that the Bounce Back Loan will need to be repaid and that this reduces the net assets of the Club to a small amount as summarised below.

Year Ended 31 May	2018 £	2019 £	2020 £	2021 £
Grants	738	-	25,500	36,043
Furlough	-	-	12,586	75,759
Other Income (net of bar and catering staff cost)	187,925		121,410	-38,137
Total Income	188,663	181,915	159,496	73,665
Expenditure	169,809	201,585	174,677	91,029
Operating Deficit/ Surplus excluding depreciation	<b>18,854</b>	<b>-19,670</b>	<b>-15,181</b>	<b>-17,364</b>
Net Assets	51,526	36,456	23,720	3,273
Cash at bank in hand	54,512	42,283	25,169	44,520

29. Whilst the result of the operating surplus/loss for the two years ended 31 may 2019 is approximately break-even (with losses during the following two years), there is no reasonable expectation that the current financial performance (post Covid) of the ..... Club will have improved to any significant degree. Clearly there may be an increase in the subscriptions, bar prices and green fees as a result of inflation, but the long term effect on income is uncertain. In any event there is little doubt that costs will also have increased compared to 2019. The well documented 'cost of living crisis' might have a detrimental effect on such discretionary spending of some members and guests/customers at the Club.

30. It is clear to me that whilst the Club will have sufficient funds to repay the Bounce Back Loan, over time, the additional liability of a requirement to pay the protected rent debt would make the Club unviable and possibly insolvent.

31. Both parties have put forward final proposals under section 11 and accordingly my award must meet the requirements of s 14 (3) of the Act which states :

- (a) *if the arbitrator considers that both proposals are consistent with the principles in section 15, the arbitrator must make the award set out in whichever of them the arbitrator considers to be the most consistent;*
- (b) *if the arbitrator considers that one proposal is consistent with the principles in section 15. but the other is not, the arbitrator must make the award set out in the proposal that is consistent.*

32. I find that the proposal put forward by the Applicant is not consistent with s 15 of the Act. If there were either a significant fall in the level of trading activity at the Club, or it was required to pay the agreed protected rent debt the Club would be unviable and possibly insolvent. Accordingly the Respondent tenant is granted full relief from payment of the protected rent debt but must pay half of the cost of this referral paid by Applicant to the RICS within the next four weeks.

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

A handwritten signature in black ink, appearing to read "Stephen Hattley".

15 July 2023

Signature..... Date .....

Stephen Hattley Dip Arb FRICS  
Arbitrator