

IN THE MATTER OF THE ARBITRATION ACT 1996 (“The 1996 Act”)
AS AMENDED BY, AND IN THE MATTER OF.
THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022 (“The 2022 Act”)

AND IN THE MATTER OF AN ARBITRATION BETWEEN

(REDACTED) LIMITED

CLAIMANT

AND

(REDACTED) LIMITED

RESPONDENT

And in the matter of (REDACTED) trading as ‘(REDACTED) (“The Hotel”)

FIRST AND FINAL AWARD ON THE RELIEF OF RENT TO BE GRANTED IN RESPECT
OF THE PROTECTED RENT DUE UNDER THE COMMERCIAL RENT (CORONAVIRUS)
ACT 2022

Of

PAUL ROSE LL.M FRICS FCIArb

ARBITRATOR

27 October 2023

BACKGROUND

1. This award is on the amount of relief of rent to be granted that has arisen in an arbitration between the parties under The Commercial Rent (Coronavirus) Act 2022 (“the 2022 Act”). The subject property is a hotel comprising of 17 rooms. The Claimant is (REDACTED) which is the tenant of the Hotel. The Claimant claims to operate the premises as (REDACTED). The Respondent is (REDACTED) which is the Landlord of the Hotel. In this Award I shall refer to each party simply as Landlord or Tenant as appropriate.
2. The parties have been unable to agree on the appropriate relief concerning rental arrears arising under the Commercial Rent (Coronavirus) Act 2022; which shall hereinafter be referred to as the CRCA.
3. In this reference the Claimant, is represented by (REDACTED) a partner in (REDACTED) which firm of Solicitors has now merged with (REDACTED) to become (REDACTED) The Respondent is represented by (REDACTED), a partner in (REDACTED) Solicitors.
4. On 12 August 2022, through its Solicitors (REDACTED), the Claimant gave Notice of its intention to apply for arbitration to the Respondent and its Solicitors, (REDACTED), under the CRCA. That letter contained the Claimant’s first proposal noted below.
5. On or about 23 September 2022 the Claimant applied to the Dispute Appointments Service of the Chartered Institute of Arbitrators for the appointment of an arbitrator.
6. I was approached by Dispute Appointments Service of the Chartered Institute of Arbitrators on 27th January 2023 to act as Arbitrator. After checking for conflicts, I advised I would be able to accept the appointment on the same day.
7. On 2nd February 2023, I was appointed to act as Arbitrator by the Chartered Institute of Arbitrators.

STATUTE SEAT AND APPLICABLE LAW

8. This Arbitration is a statutory arbitration pursuant to Section 94 of the Arbitration Act 1996 as amended by the Commercial Rent (Coronavirus) Act 2022.
9. The seat of the Arbitration is England and Wales.
10. The applicable law is that of England and Wales.

CONDUCT

11. I contacted the parties on 3rd February 2023 and following engagement in correspondence the parties agreed to negotiate further. Consequently, I granted a series of stays of proceedings between 21st February 2023 and 5th June 2023, a period of 99 days or 14 weeks.
12. I arranged a case management conference (“CMC”) for Tuesday 13th June 2023. Following that case management conference. I then issued my Order number 1 on procedure on 21st June 2023. In the CMC the parties agreed to adopt a procedure of documents only as more suited to the protected rent in dispute.
13. The Claimant provided their statement of the case with repeated first offer on 4th July 2023. The Respondent provided their statement of case repeating their first offer on Tuesday 18th July 2023.
14. Following receipt of the statements of case I convened a second case management conference on 5th September 2023 to clarify certain matters. Following this second case management conference, both the Claimant and the Respondent sent me their final offers on 15 September 2023.

ELIGIBILITY

- 15 I raised the issue of eligibility at the initial meeting on June 13th 2023. At this time, neither party had produced their statement of case. However, the Disputes Appointment Service

of the Chartered Institute of Arbitrators had supplied me with a copy of email dated 9th November 2022, sent to them by (REDACTED). In that email, (REDACTED) admitted that shortly prior to the first lockdown (REDACTED) client was in discussions with (REDACTED) with a view to (REDACTED) managing (REDACTED) client's hotel business. However, owing to the COVID pandemic, the arrangement did not proceed, but the hotel was closed for the period set out in (REDACTED) client's application and the premises were not sublet to anyone. (REDACTED) had included (REDACTED) in this correspondence and suggested that if the Respondent intended to make a revised proposal, this should be forthcoming as soon as possible.

- 16** In the proceedings, and within the appendices to his Statement of Defence and Reply, (REDACTED) attached extracts of guest comments posted on Booking.com that had been posted during the protected rent period; indicating that the hotel had been occupied by guests in the protected rent period. Occupation of the hotel would impact upon the eligibility of the claim.
- 17** The first case management conference preceded receipt of the Statements of Case and Replies and thus, (REDACTED) appendices. During the CMC, the question of whether there was an issue regarding eligibility was discussed, and the parties' Solicitors agreed that the claim was eligible. This was recorded in paragraph 6 of my Order for Directions No 1 dated 21 June 2023. It was only after issuing my Order No 1 that the Claimant's Solicitors produced the appendices to the Statement of Claim and Reply to the Claimant's Reply.
- 18** Although the parties Solicitors initially agreed that eligibility was not an issue, the Respondent's Solicitor has questioned the Claimant's statement that the hotel was closed during the protected rent period and has requested that I apply the principle of the balance of probability to the Claimant's representations. However, the Arbitrator's functions under the CRCA do not include such judgment save as to ascribing weight to evidence. Therefore, the issues that have emerged are below and which are listed as matters in dispute.

MATTERS IN DISPUTE

19.1 Whether the manuscript note allegedly prepared by (REDACTED) representing the Respondent and appended to the Claimant's statement of Claim is proof of an agreement to reduce the annual rental commitment. This is insofar that this impacts upon relief of rent to be granted during the protected rent period.

19.2 The appropriate relief from payment

19.3 Costs

THE PROTECTED RENT

- (i) For definition of protected rent in the CRCA Section 3(i) is "protected rent is a debt under a business tenancy consisting of unpaid protected rent."
- (ii) Rent paid during the protected rent period cannot be protected rent as it is not unpaid and is not a debt.
- (iii) The parties appear to agree what the rent should have been payable during the protected rent period of 21st March 2020 to and including 18th July 2021 (Section 4 of CRCA) as being £175,757.04 at the rate of £132,000 per annum (a daily rate of £361.64).
- (iv) Under the terms of the CRCA the amount on which I may give relief i.e., the protected rent, before considering any payments made, is **£175,757.04**.
- (v) The Claimant has also paid £5,000 of rent which must be credited to his debt account.

THE APPROPRIATE RELIEF FROM PAYMENT - EVIDENCE

THE OFFERS

The Claimant's first proposal and Statement of Claim

20 The Claimant argues that the whole of the Claimant's business was adversely affected by the coronavirus pandemic and was closed for the period of the protected rent. The claim is that no income was received during the relevant period but the Claimant accrued liabilities for all its usual outgoings; which the Claimant stated was shown in their accounts for the year ended 31 March 2021 and 31 March 2022. The Claimant stated that the business survived by obtaining Director's loans.

21 The Claimant also asserts that in or around June 2021, at a meeting between (REDACTED) a director of the Claimant, and (REDACTED) representing the Respondent, an agreement was reached whereby rent would be payable at a rate of £50,000 per annum for a two-year period including the protected rent period. In support of this assertion the Claimant has appended a copy of a manuscript note. This is Appendix 7 of the Claimant's statement of case. I refer to this note further below.

22 The Claimant attached to their claim, eight appendices. These comprised:

Appendix 1: The lease dated 30 March 2017

Appendix 2: Claimant's letter of Notification to apply for Arbitration dated 12 August 2022

Appendix 3: Respondent's Proposal dated 22 September 2022; to which I refer below.

Appendix 4: Claimant's Arbitration scheme application of 23 September 2022

Appendix 5: Claimant's signed Directors' Report and Financial Statement year ended 31 March 2022

Appendix 6: Claimant's signed Directors' Report and Financial Statement year ended 31 March 2021

Appendix 7: Manuscript note allegedly made by (REDACTED) at an alleged meeting in June 2021.

Appendix 8: Claimant's cash flow forecast for 12 months to June 2024.

23 The Claimant's first proposal was to pay the Respondent at the rate of £50,000 per annum, thus equating to £66,577.14 inclusive of interest and payable in equal monthly instalments over 12 months.

24 In the Claimant's Reply to the Defence the Claimant attached Appendix G comprising a copy of the confirmation of having paid £5,000 of rent on 16 June 2021. Thus, the first proposal is reduced by that £5,000 payment to £61,577.14. The sum of £61,577.14 represents 35.04 % of the protected rent, leaving £114,179.90 or 64.96% of the protected rent to be written off.

25 During stays of proceedings, on 17 February 2023, the Claimant provided further copies of accounts not previously provided. These accounts comprised of:

- Projected Profit and Loss and Balance Sheet 1 April 2022 to 30 November 2022 with a note that the company was dormant in the previous year due to COVID.
- The unsigned Financial Statements for the year ended 31 March 2020.
- The unsigned Financial Statements for the year ended 31 March 2021.
- The unsigned Financial Statements for the year ended 31 March 2021

26 Under paragraph 22 above, I had already been supplied with the financial statements for the year ending 31 March 2021 in Appendix 6 to the Claimants statement of claim; and the statements for the year ending 31 March 2022 in Appendix 5 to the same statement of claim.

27 I noted that the profit and loss figures in the financial statements for the following years showed losses. These were as follows:

27.1 2019 (£34,621)

27.2 2020 (£34,981)

27.3 2021 (£35,329)

27.4 2022 (£35,791)

28 Although I had not been supplied with the profit and loss account for 2019 or 2020, both of which preceded COVID, I had been supplied with the profit and loss account for the year ended 31 March 2021. This showed the administrative expenses of £369 for 2020; and £348 for 2021. The profit or loss for each year is shown in paragraph 27 above.

The Respondent's first proposal

29 The Respondent's first proposal was to accept an amount of £131,817.78 being rent at the rate of £99,000 per annum plus interest, at a rate to be determined by me. This sum equates to 75 % of the protected rent debt albeit that it is exclusive of interest. It therefore writes off £43,939.26 or 25% of the debt.

The Claimant's final proposal

30 Following the second case management conference of September 5th 2022, the Claimant's second and final proposal is to pay £100,000 inclusive of interest for the protected rent debt payable in equal monthly instalments of £4,167 over 24 months and starting not earlier than the day after the award. This equates to 56.90% of the total debt exclusive of the £5,000 credit; requiring 43.10% of the debt to be written off. After crediting back the £5,000 paid, this nets to a payment of £95,000 or 54.05% of the protected rent debt and thus writing off £80,757.04 or 45.95% of the debt.

The Respondent's final proposal

31 The Respondent's final offer is the same as their first proposal, namely to accept £131,817.78 plus interest at a rate to be determined by me. This writes off £43,939.26 of the protected rent debt or 25% of the debt, having credited the tenant with the £5,000 payment.

MY CONCLUSION AND REASONS ON THE ISSUES

- 32** I first deal with the question of whether the manuscript note allegedly prepared by (REDACTED) representing the Respondent and appended to the Claimant's statement of claim is proof of an agreement to reduce the annual rental commitment to £50,000 p.a.
- 33** The note contains two typed tables from June to December 2016 in the total sum of £87,440; and amounts between January and December 2017 totalling £47,000. The remaining notes are handwritten.
- 34** Of the handwritten notes, there appears to be an odd and illegible formula for an amount 'to be paid' for 'April '2 – March 23' together with two further notes. One is for 2022 and, though barely legible, appear to be invoice received 'Jan-March@ 5,000; and for 'April-Dec' = 85/9 + the formula. The note for 2023 is 'Jan -March 100/12 +2 and for April 100/12.

35 I do not see any writing on the note to indicate any agreement that relates to commuting the annual rental commitment to £50,000 p.a. Moreover, there is nothing on this note to indicate its author. I cannot find any corroborating evidence to support the Claimant's allegation that this note was prepared by (REDACTED) representing the Respondent. Even if it was prepared by (REDACTED) I cannot see any evidence to support the allegation that it constitutes an agreement to reduce the annual rent to £50,000 p.a. Consequently, I find that the Claimant's allegation in this regard as not proven.

36 I next turn to the evidence in support of the offers.

37 Of the papers sent to me by the Chartered Institute of Arbitrators ("CI Arb"), there is included (REDACTED) email of 9 November 2022 sent by (REDACTED) representing the Claimant, to the CI Arb. (REDACTED) stated that the Claimant had been in discussions with (REDACTED) shortly prior to the first lockdown, with a view to (REDACTED) managing the hotel business; but owing to the pandemic the arrangement did not proceed and the hotel was closed and not sublet to anyone. In the Claimants Reply the Claimant stated their belief that (REDACTED) or its director (REDACTED) were the previous occupiers of the premises before they took the current lease.

38 In the Claimants Reply to the Defence, the Claimant alleges that he asked (REDACTED) if he would look after the property in the Claimant's absence while the hotel was closed to ensure that the building was secure and maintained. Against this, the Respondent has asked the Claimant to expand on previous submissions that (REDACTED) as Director of (REDACTED) was operating as a manager at the property on behalf of the Claimant during the pandemic and what business role that he took.

39 In the Claimants Reply to the Statement of Defence, the Claimant produced Appendix B which is the Office Copy of title number (REDACTED) which shows the leasehold title of the hotel. The title shows a lease granted by (REDACTED) to (REDACTED), one of whose Directors was (REDACTED).

- 40** It is not in issue that (REDACTED) was the lessee under a lease granted for 15 years from 29 October 2007 expiring on 28 October 2022. Neither is it in issue that, as evidenced in the copy of the Companies House extract in appendix C of the Claimants Reply that (REDACTED) was dissolved on 19 February 2019. This contrasts with the Claimants statement in their reply in paragraph 37 above that they believed that (REDACTED) or its director (REDACTED) were the previous occupiers of the premises before the Claimant took the current lease.
- 41** In their Reply, The Claimant stated that the hotel closed for business on 20 March 2020. However, at paragraphs 4.1 and 4.2 of the Claimants Reply, the Claimant refers to their Appendix D. Appendix D comprises a search on the Companies house website of (REDACTED) Company number (REDACTED) The extract shows that (REDACTED) is the sole Director of that company. At paragraph 4.2 the Claimant admits that from the filing history of (REDACTED) its registered office address was changed from (REDACTED) to the subject property's address on (REDACTED) The registered office was then changed again on 6 May 2021 to (REDACTED).
- 42** The Claimant denies knowledge of the changes of the registered address of (REDACTED) until it was brought to their attention by the Respondent. The Claimant also states no knowledge of why the registered office address of (REDACTED) was changed to that of the Claimant's hotel.
- 43** The principal issue, raised by the Respondent, is their concern that the hotel was apparently occupied during the protected rent period. The Respondent produced extracts of comments posted by various individuals as guests' reviews on Booking.com on various dates during the protected rent period, both in their statement of claim and in their Reply to the Claimant's Reply. These reviews indicated to the Respondent that the hotel was occupied during the protected rent period.
- 44** In the Claimant's Reply at item 5.5, the Claimant denied knowledge about these reviews and alleged that these were brought to his attention by the Respondent's statement of defence.

- 45** In their Reply to the Claimant's Reply, the Respondent states that they are unconvinced by the Claimant's explanations or alleged lack of knowledge in relation to the Booking.com reviews. It is because of this evidence that the Respondent is not satisfied that the Claimant ceased trading throughout the relevant period.
- 46** In my review of the submissions and facts I also have regard to the Claimant's provision of a cash flow forecast for the 12 months to June 2024 as an appendix to their statement of claim. In the income section, the total income forecast as rent from booking.com for this period amounts to £415,000. This is an average of £34,625 per month. The forecast booking.com rent receivable forms 78.47% of the forecast income.
- 47** In the expenses section, the booking.com charges forecast for the 12 months to June 2024, total £79,425. This averages to £6,618.75 per month, or 35.52% of the expenses. I regard these averages and percentages as significant.
- 48** From the nature of the reviews posted on Booking.com and from the print offs of the Booking.com website provided by the Respondent, especially one particular page in Appendix A to the statement of defence. This page shows the reviews from (REDACTED) (23 July 2020) (REDACTED) (3 August 2020) (REDACTED) (3rd August 2020) and (REDACTED) (15 August 2020) opposite which, is a picture of the hotel with the address "(REDACTED)", I have no reason to doubt that these reviews were posted and are genuine.
- 49** Considering that the Hotel was expected to achieve much of its income through Booking.com in the cashflow forecast, combined with these reviews, I would have thought it more probable than not that any bookings through Booking.com would have been sent to the Claimant company, particularly as the Claimant has asserted that they own and operate the premises as the (REDACTED) Hotel. This is especially so in the case of charges from Booking.com. which form a significant feature of the expenses of the Claimants cashflow forecast.

50 I note that in the Statement of Claim, the Claimant states that the hotel was closed throughout the relevant period and that no income was being received during the relevant period. However, the Statement of Claim includes " but the Claimant accrued liabilities for all its usual outgoings." The Claimant has not produced any detailed evidence of any of those outgoings in the accounts, to which I refer below.

51 From the reviews published on Booking.com and the cash flow forecast which factored in the Booking.com charges, on the balance of probabilities I find that there would have been booking .com charges. Given that the lease of the hotel is in the name of the Claimant, I further find that, on the balance of probabilities that such charges would have been sent to the Claimant. On the same reasoning, on the balance of probabilities, I find it more probable than not that the Claimant would, or at least was likely to have been, aware of any posted comments.

52 As to cessation of trading by the Claimant, because of the evidence from the review site of Booking.com, combined with the lack of trading accounts that show Booking.com charges, notwithstanding the Claimant's assertion that it "accrued liabilities for all its usual outgoings", I find there to be sufficient evidence to support the conclusion that, on the balance of probabilities, the hotel did trade during the protected rent period. I comment further on the lack of such trading accounts that would show accrued liabilities for all its usual outgoings, below.

53 Despite the Respondent's suspicions that the hotel did not cease trading during the protected rent period, the Respondent has reiterated its first proposal as its final proposal.

THE PROVISIONS OF THE CRCA

54 The CRCA sets out the principles that I must consider when looking at the final offers in Section 15. These principles can be summarised as:

- (i) They should aim to restore/preserve the viability of the tenant's business
- (ii) The tenant should meet their obligations under the contractual terms of the lease to pay rent as far as is consistent with (i) above.

- 55** Section 16 of the CRCA indicates that to which I must have regard when assessing viability. Essentially this section states that I must have regard to those matters when assessing viability if they are brought to my attention. They include
- (a) assets and liabilities of the tenant including any other tenancies to which the tenants are party
 - (b) the previous rental payments made by the tenant to the landlord under the business tenancy
 - (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.
- 56** I have not been presented with any detailed evidence regarding the assets and liabilities of the Claimant or information as to whether they own any other tenancies or businesses.
- 57** I have not been presented with trading accounts showing the costs of running the hotel incurred, when allegedly closed, to show such items as repairs and maintenance costs which would still have been incurred during the protected rent period. This contrasts with the Claimant's assertion that it "accrued liabilities for all its usual outgoings" notwithstanding the alleged closure of the hotel during the protected rent period. These expenses would be shown in the trading profit and loss accounts for the period.
- 58** The Claimant has only provided the accounting information as described above. The only accounts provided that are not cashflow forecasts, namely the financial statements for the years ending March 31 2020, 2021 and 2022 show a company with minimal financial movement. The expenses on the two abbreviated profit and loss accounts to the financial statements appear as small administrative costs.
- 59** The expense for the year ended March 31 2019, which is shown as an accrual in the financial statement for 2020, is £360. The expense for accountancy fees for the financial

statement year end of March 31st 2020 is also £360. The expense for accountancy fees for the financial statement year end of March 31st 2021 is £348. The expense for accountancy fees for the financial statement year end of March 31st 2022 is £462. These expenses resemble dormant accounts.

- 60** I have not been supplied with full trading accounts for the trading year before the pandemic. Consequently, I have no evidence of the impact of COVID on the Claimant's business. As to details, all I have to rely upon are the cash flow forecasts provided by the Claimant. These are only forecasts and their use to me is limited by that fact.
- 61** From the sparse information supplied by the Claimant, I find that they have not proved their case for rent relief. I must therefore apply the provisions of section 15 (1) (a).
- 62** I can see under the terms of section 15 (1) of the CRCA, that both of the formal offers are aimed at restoring/preserving viability. The cash flow forecasts go towards this from the Claimants perspective. From the Respondents perspective, despite their concerns, their final offer repeats their initial offer.
- 63** On the evidence put to me, I can see that both offers appear consistent with the first part of section 15, i.e., the aim of the offer is to restore or preserve viability. Moreover, I find that both offers are consistent with the principles in section 15.
- 64** Consequently, under the terms of section 14 (3) (a) of the CRCA I must decide which offer is the most consistent with the principles of section 15, and award that offer.
- 65** The Respondent's offer repays more of the protected rent debt and therefore comes closer to the Tenant meeting their contractual obligations. In the absence of clear evidence that this is not consistent with section 15 (a) of the CRCA, I find that the Respondent's offer is more consistent with the principles of Section 15.

THE APPROPRIATE RELIEF FROM PAYMENT

66 Both offers are consistent with section 15. The Respondent's offer is the more consistent. I award under section 14 (3) (a), that the Respondent's offer is the most consistent.

COSTS

67 Section 19 (5) requires me to make an Award on the costs that reimburses the Applicant (the Claimant) for the application fee and my costs, unless, under section 19 (6) of the CRCA I consider it more appropriate to award alternatively.

68 I have not received any pleadings from the parties as regards costs. Both parties have cooperated fully with me in the proceedings. Consequently, there is no reason for me to depart from the default position.

69 Therefore, under Section 19 (5) of the CRCA I shall Award that the Respondent shall pay half of my fee by reimbursing to the Claimant applicant the fee already paid to the Chartered Institute of Arbitrators together with half of the application fee.

INTEREST

70 In the Guidance note to the CRCA, interest can form part of the unpaid rent due. Because I have found for the Respondent Landlord in this reference, and pursuant to section 49 of the Arbitration Act 1996, I shall Award the Landlord interest on the sum due, as claimed.

71 The Landlord has left the amount of interest to my discretion. Therefore, I shall award the Respondent Landlord simple interest on the sum awarded at the rate of 8% per annum from 14 days of the date of this Award to the date that the Claimant pays the sum awarded to the Respondent.

72 In reaching my decision, I have taken account of all matters addressed to me in writing. I have not found anything that outweighs my conclusions All other matters have been

considered in this arbitration and do not affect this award on the principle, costs, or interest.

NOW I, PAUL ROSE, DECLARE, DIRECT, ORDER AND AWARD:

- The Claimant shall pay to the Respondent on or by 4.00 pm Monday 13 November 2023, the sum of **£131,817.38 exclusive of VAT** where applicable, in full and final settlement of the claim as to rent due during the protected rent period namely 21 March 2020 to 18 July 2021.
- In addition, the Respondents shall pay to the Claimants simple interest at the rate of 8% per annum on the amount awarded from Monday 13 November 2023 up to the date that the Respondent pays the sum awarded to the Claimant.
- In addition, I award that the Claimant and Respondent shall each bear their own costs. Furthermore, the Respondent shall pay to the Claimants, one half of my fixed arbitral costs of £3,500 plus VAT (£700) totalling £4,200, and one half of the application fee already paid to the Chartered Institute of Arbitrators, by the Claimant.
- That should it be established in law that the Claimant is liable in law to HM Revenue and Customs for Value Added Tax on the whole, or any part of the amount so awarded, the Respondent shall further pay to the Claimant one half of such additional sum (if any) as might be properly chargeable and payable as VAT under the VAT regulations of HM Revenue and Customs.

Made this 27th October 2023 in London, England.



PAUL ROSE LLM FRICS FCIArb Chartered Arbitrator.