

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

Between

████████████████████

(CLAIMANT)

and

██

(RESPONDENT)

FINAL AWARD

**Peter R Sansom
Arbitrator**

INTRODUCTION

1. The Applicant is [REDACTED], who is the tenant of the properties concerned in this matter. [REDACTED] was represented in these proceedings by [REDACTED].
2. The Respondent is [REDACTED] was represented in these proceedings by [REDACTED].
3. The parties entered into a tenancy agreement in September 2013 by which the Applicant leased from the Respondent the property at [REDACTED].
4. The terms of the Commercial Rent (Coronavirus) Act 2022 (henceforth “the Act”), at Part 2, includes express provision for the arbitration of disputes and provided that, upon the occurrence of a dispute, either party could apply to an approved arbitration body.
5. A dispute having arisen between the parties in respect of payment of a protected rent debt, [REDACTED] applied, on 22 September 2022, to the Chartered Institute of Arbitrators (CI Arb), being an approved arbitration body for the purposes of Section 7 of the Act, for the nomination of an arbitrator.
6. On 30 January 2023, I was nominated by the CI Arb as arbitrator in this matter, and I wrote to the parties, on 08 February 2023, confirming my nomination to which neither party has objected. I am satisfied that I possess the jurisdiction to proceed to arbitrate the dispute.
7. The seat of the arbitration is England.

PROCEDURE

8. On 04 August 2022, the Applicant advised the Respondent of its intention to proceed to arbitration in compliance with Section 10(1)(a) of the Act. Under Section 10(1)(b) the Respondent had fourteen days to submit a response.
9. With no response being received, the Applicant referred the matter to arbitration on 22 September 2022 in compliance with Section 10(2)(b) of the Act. The Applicant completed the standard CI Arb “Request for the appointment of an Arbitrator” form and submitted it along with supporting documents.
10. On 23 September 2022, as per Schedule 11(1) of the Act, the Applicant included in its reference to arbitration a formal proposal for resolving the matter of relief from payment of a protected rent debt.
11. On 07 October 2022, the Respondent submitted a formal counter proposal along with supporting documents.
12. On 03 March 2023, the Applicant submitted a revised formal proposal.
13. On 10 March 2023, the Respondent submitted a revised formal counter proposal.
14. On 17 March 2023, the Applicant provided comments on the revised formal counter proposal.
15. On 21 March 2023, the Respondent advised that it had no further inputs to submit.

FACTS

16. On 19 September 2013, the parties entered into a lease agreement by which the Applicant leased from the Respondent the premises known as [REDACTED]
[REDACTED]

THE MATTERS IN DISPUTE GENERALLY

17. The Applicant accepts that there are substantial arrears of rent, in the amount of £92,314.75.
18. The Applicant says that a significant portion of the outstanding balance is protected rent in terms of the Act, and as such the Respondent is not entitled to bring a claim or enforce against it for the outstanding balance. In its formal proposal the Applicant proposed a 50% reduction in the outstanding balance to £46,157.38, to be paid off over a period of two years.
19. The Respondent, in its counter proposal, proposed that the Applicant should pay a revised total sum of £36,269.86 by way of three separate monthly instalments.
20. The Applicant in its revised proposal of 03 March 2023, replaced its first proposal to limit the debt to £46,157.38 and proposed to pay the total sum of £15,000.00 in three separate monthly instalments.
21. The Respondent confirmed that its position remains unchanged and confirmed that the Applicant should pay £36,269.86 by way of three separate monthly instalments.
22. I am satisfied that the pre-arbitration stage has been met.
23. I **Peter R Sansom** now make and publish this, my Final Award, as follows, and upon the limited issue set out by the parties.
24. I thank both parties' representatives for the helpful and courteous manner in which this reference has been conducted, and for the submissions which I have received, all of which have greatly assisted my understanding of the issues.

THE SUBJECT OF THIS FINAL AWARD

25. I do not propose to recite each of the parties' respective submissions here in detail, only in summary, but I shall, of course consider them all.

The Applicant's case is that:

26. It accepted that it was in arrears with its rent payments to the Respondent and originally understood the outstanding balance to be approximately £92,314.75.
27. It became aware that the Respondent was intimating that it would commence enforcement action to recover the outstanding balance.
28. The Respondent is not entitled to take such action because the majority of the outstanding rent monies are protected by Section 3 of the Act.
29. Its business was subject to a closure requirement on three separate occasions, 23 March to 20 July 2020, 05 November to 02 December 2020, and 06 January to 11 April 2021. In terms of the Act, these three periods are defined as protected periods.
30. By Section 23 of Schedule 2 of the Act, the Respondent is not entitled to bring a claim or enforce against it to recover the debt incurred during the protected periods.
31. It communicated its position to the Respondent in its letter date 04 August 2022 but receiving no response it submitted its application for arbitration, and in its formal proposal attached thereto, it proposed a 50% reduction in the outstanding balance to £46,157.38 to be paid by monthly instalments over a two-year period.
32. Following a counter proposal from the Respondent dated 07 October 2022, it issued a revised formal proposal whereby it reduced the protected rent debt to £15,000 to be paid in three equal instalments.
33. It notes that the Respondent has maintained its most recent position that it requires repayment of the amount of £36,269.86 by way of three separate monthly instalments.
34. It accepts the Respondent's calculation that the total protected rent debt is £62,314.72 but denies that the Respondent's first and revised counter proposal are fair or reasonable.

35. It believes a significant payment to the Respondent will have a serious impact and will place severe strain on its ability to continue trading.

36. It believes the Respondent has a lack of understanding and knowledge of the fashion industry in which it operates.

The Respondent's response is that:

37. The Applicant occupies the premises to undertake its business of the retail sale of clothing and as such is a non-essential retailer and thus the only protected period under its occupancy was between 21 March 2020 and 12 April 2021.

38. The total protected rent debt of the Applicant totals £62,314.72, comprising £52,089.72 for rent plus £10,225.00 for service charges.

39. The total includes credit for payments made by the Applicant in August and November 2021, March and April 2022.

40. It has studied the Applicant's unaudited accounts for the period ending 31 December 2021 and notes that it holds current assets in the amount of £1,473 017.00, net assets in the amount of £1,293,664.00, and cash in the amount of £187,569.00. It thus believes it is reasonable to request the Applicant to settle the outstanding rent balance.

41. It proposed to permit a 50% reduction in the rent element of the total debt giving an amount to be repaid of £26,044,86. It seeks to recover the service charges in full.

42. It thus requires the Applicant to pay a total amount of £36,269.86, to be paid in three equal monthly instalments.

43. It acknowledges the Applicant's counter response of 10 March 2023 but declines to change its position on requiring the sum of £36,269.86 to be paid in three equal monthly instalments.

44. The first issue to be determined by me is eligibility under section 13(2) of the Act.

45. 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 provided the following conditions are met to determine eligibility:

- a. The tenancy in question must be a business tenancy;
- b. The rent debt in dispute must be a protected rent debt;
- c. The Parties must not have reached agreement on the matter of relief from payment of the protected rent debt; and
- d. It must be the case that the tenant's business is viable or would be viable if given relief from payment of a protected rent debt.

(a) Business Tenancy

46. I have not been provided with a copy of the lease between the Applicant and Respondent. However, I am satisfied from the documents submitted to me that the parties accept that such lease has been entered into.

(b) Protected Rent Debt

47. The Applicant's formal proposal stated that the Respondent did not consider the total protected rent debt to be a protected rent debt. The Respondent's formal counter proposal indicates that £62,314.72 is the value of the protected rent debt on the Applicant's account. The figure includes previous payments made by the Applicant. As a result, the Parties are now in agreement that £62,314.72 represents protected rent debt relating to the period from 21 March 2020 to 12 April 2021.

(c) Parties must not have reached agreement

48. It is evident from formal proposals and other documents submitted that the Parties had not resolved the matter of relief from payment of a protected rent debt before the reference was made to the CI Arb.

(d) Viability

49. Viability is not defined within the CRCA, but the Department for Business, Energy & Industrial Strategy Commercial Rent (Coronavirus) Act 2022 Guidance (issued under section 21 of the Act) states at paragraph 6.3: “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.
50. The Applicant maintains, in its submission dated 03 March 2023, that the Respondent’s interpretation of its last filed accounts to 31 December 2021 does not demonstrate its ability to pay the Respondent’s counter proposal or that the counter proposal is fair and reasonable.
51. The Applicant states that although COVID restrictions have been removed and retail trading in the fashion industry is improving it is slow and cashflow will take time to recover to pre-COVID levels. The Applicant contends that a significant award against it is likely to have a serious impact and place severe strain on its ability to continue trading.
52. Based on the above, I am satisfied that the requirements of Section 3(2) of the Act have been satisfied and I will proceed on the basis that the parties have agreed the above.
53. I will now turn to consider the final proposals put forward by the parties under Section 11 of the Act.

Section 14 of the Act

54. Section 14 of the Act applies in considering how to resolve the matter of relief from payment of a protected rent debt as required by Section 13(5) of the Act, which states:

“14 Arbitrator’s award on the matter of relief from payment

- (1) This section applies where the arbitrator is considering how to resolve the matter of Relief from payment of a protected rent debt as required by section 13(5).
- (2) Before determining what award to make the arbitrator must consider any final proposal put forward to it by a party under section 11.

- (3) Where both parties put forward final proposals under Section 11—
- (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.
 - (c) Where only the party making the reference to arbitration puts forward a final proposal under section 11, the arbitrator must make the award set out in the proposal if the arbitrator considers that the proposal is consistent with the principles in Section 15.”

Applicant's proposal

55. The Applicant's final proposal proposes the following:

- (a) that the outstanding principal amount of protected rent debt is £62,314.72 exclusive and relates to the period from 21 March 2020 to 12 April 2021.
- (b) that the protected rent debt is reduced from £62,314.72 to £15,000.00.
- (c) that the amount of £15,000.00 be paid by 3 equal instalments over a period of 3 months.

56. If this proposal is agreed, the Applicant will arrange to make a payment of £5,000.00 to the Respondent immediately, and with the following two equal instalments of £5,000.00 to be paid on the first day of each calendar month thereafter.

57. The Applicant has submitted comments in respect of the Respondent's understanding of its last filed accounts to 31 December 2021, that it believes are pertinent to its position.

- (a) That it took out a loan in the sum of £450,000.00 under the Covid Business Interruption Loan Scheme with a three-year repayment period.
- (b) Debtors of £1,474,713.00 is a paper asset only and does not equate to a cash holding.
- (c) Total assets less current liabilities when compared between 2020 and 2021 show a reduction of approximately 30% and this reduction is due to the Covid restrictions.

(d) That it experienced a trading loss of £307,589.00 for 2020 and £310,173.00 for 2021, giving a total trading loss of £617,762.00 over the two-year period of Covid restrictions.

Respondent's proposal

58. The Respondent's counter proposal was made up of the amount of £52,089.72 for the rent element plus £10,225.00 for service charges, giving a combined total of £62,314.72.

59. The Respondent notes that the Applicant's unaudited accounts for the year ending 31 December 2021 show that the Applicant had net current assets of £1,474,713.00, net assets in the amount of £1,293,664.00, and a cash holding of £187,569.00. The Respondent contends that on this basis it is reasonable to require payment from the Applicant.

60. The Respondent takes into consideration the aims of the Act are to seek an award that preserves the viability of the tenant's business in so far as it ensures the landlord's solvency, but at the same time the Applicant retains its obligation to pay the protected rent in full and without delay.

61. The Respondent's counter proposal is to reduce by 50% the rent portion of the balance from £52,089.72 to £26,044.86, but to recover the service charge of £10,225.00 in full. The Respondent details that the Applicant had the benefit of the provision of core services during the protected rent period plus additional measures taken to ensure a clean and safe environment for when the premises were reopened.

62. The Respondent thus proposes that the Applicant should pay the amount of £36,269.86 in three equal instalments.

Consideration of relief sought

63. I am conscious that I must consider the extent to which the Applicant can pay a protected rent debt considering, on the one hand, the viability of the tenant's business, and on the other hand, the solvency of the landlord. Accordingly, a balance between the parties must be achieved.

64. In addition to this, I am aware of Section 15 (b) of the Act which states that “the tenant should, so far as it is consistent with the principles in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent debt in full and without delay”.
65. I am satisfied that the evidence establishes that to direct that the Applicant pay the total protected rent debt of £62,314.72 would have some impact on the viability of the Applicant’s business.
66. Equally, I am not persuaded that reducing the debt to £15,000.00 as proposed by the Applicant is consistent with the requirements of Section 15 of the Act as it does not share the “financial burden” with the Respondent.
67. I find that my examination of all the evidence submitted to me leads me to the position that the proposal of the Respondent to reduce the rent debt by 50% to £26,044.86, is reasonable.
68. I take note that the Applicant has accepted the total protected rent stands at £62,314.72 and that this amount includes the service charge of £10,225.00.
69. Thus, the total amount to be repaid as proposed by the Respondent is £36,269.86, comprising £26,044.86 for rent plus the £10,225.00 service charge.
70. I am satisfied from my reading of the unaudited financial reports submitted by the Applicant that the business is viable and is able to discharge this debt. I accept the reduction in profit margins realized by the Applicant, but I am not satisfied that payment of the reduced protected rent debt will result in the demise of this business.
71. Furthermore, I am satisfied that the Applicant has cash in the bank, has a generally improving financial position and should be able to afford to pay more than it has proposed and still maintain its viability. I am satisfied that the Applicant can afford to discharge the protected rent debt and should meet its obligations to do so.

72. Based on the evidence before me, I decide that the Applicant shall pay the protected rent debt in the total amount of £36,269.86.

Payment Period

73. The Applicant, in its revised proposal, proposed to pay the sum of £15,000.00 in three equal instalments over a period of three months, thus at the rate of £5,000.00 per month.

74. As I have decided that the protected rent debt sits at the total amount of £36,269.86, I shall increase the requested payment period from three to six months. I thus direct that the total amount shall be paid in six equal instalments of £6,044.97 with the first instalment to be paid within twenty working days of the date of this Final Award and monthly thereafter.

75. The Applicant shall be relieved from paying interest on any part of the Protected Rent Debt.

THE COSTS OF THIS AWARD

76. The Respondent must pay 50% (half) of the Arbitrators fee, pursuant to Section 19 (5) of the Act.

This FINAL AWARD made and published by me Peter R Sansom this 31st day of March 2023.



**Peter R Sansom,
Arbitrator**