

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE PROVISIONS OF THE COMMERCIAL RENT
(CORONAVIRUS) ACT 2022**

BETWEEN

[Name Redacted]

Applicant

and

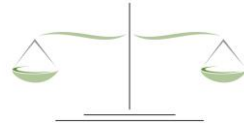
[Name Redacted]

Respondent

**Dispute in relation to relief from payment of a protected rent debt arising under the lease for the
[Address Redacted]**

Arbitrator's Final Award by Consent

22nd June 2023



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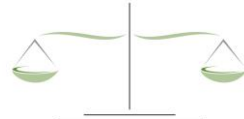
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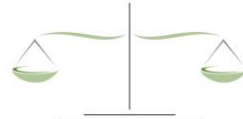
1.0 Introduction

- 1.1 In this arbitration, the Applicant is [Name Redacted] (“the Applicant”), [Address Redacted]. The Applicant is represented by its Property Director.
- 1.2 In this arbitration, the Respondent is the [Name Redacted] (“the Respondent”), [Address Redacted]. The Respondent is represented by Mr Gavin O'Donovan, Managing Associate at Mishcon de Reya LLP.
- 1.3 The Applicant is the tenant under a lease of premises at [Address Redacted] (“the Premises”) dated 22nd October 2007 made between and Applicant and the Respondent (“the Lease”). The Lease was granted for a term of 25 years from 4th May 2007.
- 1.4 There is a dispute in relation to the matter of relief from payment of a protected rent debt (“the Debt”) arising under the Lease pursuant to section 9 of the Commercial Rent (Coronavirus) Act 2022 (“the CRCA”).
- 1.5 On 13th September 2022, the Applicant made an Application to the Chartered Institute of Arbitrators (“the CI Arb”) in relation to the dispute, for the appointment of an Arbitrator under the CRCA and the CI Arb’s Commercial Rent Debt Arbitration Scheme.
- 1.6 On 16th March 2023, the Chartered Institute of Arbitrators appointed me, Niall Lawless, as Arbitrator to make an Award(s) in this dispute and I accepted the appointment.
- 1.7 On 16th March 2023, the Arbitrator wrote to the Parties highlighting that the Department for Business, Energy, and Industrial Strategy “*Guidance to arbitrators and approved arbitration bodies on the exercise of their functions in the Act*” provides that the arbitration process in the CRCA can be divided into three stages: Stage 1: the pre-arbitration stage; Stage 2: the arbitrator’s assessment of whether the dispute is eligible for arbitration under the Act; Stage 3: the arbitrator’s assessment of the matter of relief from payment of a protected rent debt.
- 1.8 In respect of Stage 2: the Arbitrator’s assessment of whether the dispute is eligible for arbitration under the Act, the Arbitrator provided the outline timetable:
 - The Applicant shall serve its submissions no later than Wednesday 5th April 2023.
 - The Respondent shall respond to the Applicant’s submissions no later than Friday 5th May 2023.



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- The Applicant shall serve any reply to the Respondent's response no later than Friday 26th May 2023.
 - The parties should expect the Arbitrator's Stage 2 Award not later than Friday 9th June 2023.
- 1.9 In respect of the process and timetable, the Arbitrator invited the Parties to make any submissions that they wished to make before the end of Wednesday 22nd March 2023.
- 1.10 On 21st March 2023, the Respondent replied that a Stage 2 Award was not required, it said that the dispute was eligible for arbitration under the Act, because: a) there are arrears of rent; b) the relevant Lease is a business tenancy; c) the tenancy was adversely affected by coronavirus; d) the rent fell due within the Protected Period set out in the Act, and e) there is no agreement in relation to the rent.
- 1.11 With its 21st March 2023 letter, the Respondent included draft directions for the Stage 3 arbitration. It invited the Applicant to agree the draft directions by 4pm on Wednesday 29th March 2023 and said that in the absence of the Applicant's agreement, the Arbitrator is asked to make directions in the form proposed by the Respondent.
- 1.12 On 21st March 2023, the Applicant made submissions on the Respondent's draft directions.
- 1.13 Taking into account the Applicant's submissions, on 22nd March 2023, the Arbitrator sent the Parties his Order for Directions Number One dated 22nd March 2023.
- 1.14 Order for Directions Number One dated 22nd March 2023 confirmed that the Parties' agreement was that the arbitration timetable would be:
- i. By 4pm on 6th April 2023, the parties shall agree the amount of the Protected Rent Debt. If the parties are unable to agree the Protected Rent Debt, they shall file their respective calculations of the Protected Rent Debt and documents in support by 4pm on 6th April 2023 for the Arbitrator to determine the Protected Rent Debt amount.
 - ii. The timeframe for the parties to put forward revised proposals pursuant to section 11(4) of the CRCA be extended pursuant to section 11(6) as set out below.
 - iii. By 4pm on 27th April 2023, the Applicant shall file and serve the evidence and written submissions upon which it intends to rely, and any revised proposal pursuant to section 11(4) of the CRCA.



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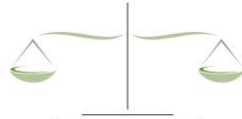
- iv. By 4pm on 18th May 2023, the Respondent shall file and serve its evidence and written submissions upon which it intends to rely in response, and any revised proposal pursuant to section 11(4) of the CRCA.
- v. By 4pm on 1st June 2023, the Parties shall notify the Arbitrator in writing:
 - a. if they require an Oral Hearing. This direction shall not prejudice the parties' rights at paragraph 12 of this order; and
 - b. if any further directions are required.

If an Oral Hearing is not requested and no further directions are sought by the Parties, the Arbitrator shall issue his written award by 4pm on 22nd June 2023.

- 1.15 In accordance with the 22nd March 2023 Order for Directions Number One, on 5th May 2023, the Parties agreed that the Protected Rent Debt figure was £233,079.90 (including VAT) as set out in the attached Adobe Acrobat document and summarised as:

Protected Rent Debt (21 st March to 18 th July 2021)	Agreed Calculation of the Protected Rent Debt (including VAT)
Rent	£175,391.31
Insurance	£22,256.15
Service Charge	£35,432.44
Total	<u>£233,079.90</u>

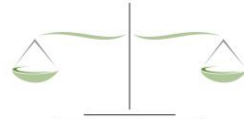
- 1.16 The Applicant sent its submissions electronically on Thursday 27th April 2023.
- 1.17 On Tuesday 16th May 2023, the Applicant sent a three-year forecast for the tenant entity prepared by its UK Finance Director.
- 1.18 On Tuesday 16th May 2023, the Respondent sent its response submissions electronically, which also contained the Respondent's revised proposal pursuant to section 11(4) of the CRCA at paragraphs 8 (a) – (b), and the Respondent's response on the Applicant's 16th May 2023 three-year forecast.
- 1.19 On Monday 5th June 2023, the Arbitrator wrote to the Parties that as set out in the Order for Directions Number 1 dated 22nd March 2023, as at 4pm on 1 June 2023, the Parties have not notified the Arbitrator in writing: a) if they require an Oral Hearing or b) if any further directions are required. Accordingly, the Parties should expect the Arbitrator's Stage 3 Award not later than 4pm on 22nd June 2023.
- 1.20 In the Respondent's 16th May 2023 submissions, it refers to the Applicant's last filed accounts, for the year ended 31st December 2020. On 9th June 2023, the Arbitrator asked the Respondent to send



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him a copy of the accounts it refers to, before the end of Tuesday 13th June 2023. On 9th June 2023, the Respondent sent a copy of the Applicant's full accounts.

- 1.21 Accordingly, the Arbitrator was proceeding to make his Award in this arbitration based on documents only. The documents included the Applicant's submissions (*Thursday 27th April 2023 and Tuesday 16th May 2023*), the Respondent's responses (*Tuesday 16th May 2023*), and the Applicant's accounts, for the year ended 31st December 2020 (*Friday 9th June 2023*).
- 1.22 On 22nd June 2023, the Applicant wrote accepting the Respondent's revised formal proposal as set out in the Respondent's written submission dated 16th May 2023 at paragraph 8.
- 1.23 On 22nd June 2023, the Parties made additional submissions in respect of the CRCA Section 14(7) 'payment date' and the allocation of the Arbitrator's fees.
- 1.24 The professionalism of the Parties' representatives, on behalf of the Applicant [Name Redacted], the Property Director of [Name Redacted], and on behalf of the Respondent by Mr Gavin O'Donovan Managing Associate Mishcon de Reya LLP, has greatly assisted the Arbitrator.



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2.0 Parties' contentions and Award sought

Applicant

- 2.1 In accordance with section 11 of the CRCA, the Applicant asks the Arbitrator to decide as set out in its 13th September 2022 letter to the Respondent that the Respondent waives 253 days' rent and that the Applicant pays the remaining rent service charges and insurance costs due in respect of the protected period in equal monthly instalments over a period of 24 months.

Respondent

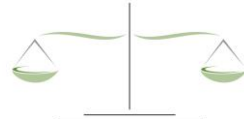
- 2.2 The Respondent says that the Applicant's proposal as set out in paragraph 2.1 above is a proposal to write off 77% of the Protected Rent Debt (i.e., write off £171,771.52 of the debt (and interest), paying only £51,277.58 in instalments of £2,136.57 over a 24-month period ("the Tenant's Proposal").
- 2.3 The Respondent says that on 20th January 2023, it made an initial proposal for the Protected Rent Debt to be paid in full in 24 equal monthly instalments in the amount of £9,711.66 per month.
- 2.4 In accordance with section 11(4) of the CRCA, in its Tuesday 16th May 2023 response submissions, the Respondent makes a revised proposal ("the Landlord's Proposal"):
- a. That 20% of the Protected Rent Debt be written off.
 - b. The remaining 80% (i.e., £186,463.92) be paid in equal monthly instalments of £7,769.33 over a 24-month period.



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3.0 The Law

- 3.1 As summarised in section 2 above, the Parties have not resolved the matter of relief from payment by agreement. The Parties agree that: a) the Lease is a business tenancy; b) the Debt exists; and c) the Debt is a protected rent debt and eligible for arbitration under the CRCA.
- 3.2 Where the Parties agree and confirm that a dispute is eligible for arbitration under the CRCA, the Arbitrator's reasoning and decision making to decide what award to make should follow a logical progression:
1. Under section 13(3) of the CRCA, if the Arbitrator does not make an Award dismissing the reference, under section 13(4) and (5) of the CRCA, the Arbitrator should determine that the Applicant's business is or would become viable if the Applicant were to be given relief from payment of any kind.
 2. The Arbitrator is then required to determine whether, and if so what, relief should be granted, and make an award under section 14 of the CRCA, applying the Arbitrator's principles set out in section 15 of the CRCA.
- 3.3 As both Parties have made offers in compliance with section 11 of the CRCA, under section 14 (3) of the CRCA:
1. 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.
 2. 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.
- 3.4 The principles in section 15 of the CRCA are that any award should be aimed at preserving (in a case falling within section 13(4)(a)) (the Applicant's business is viable), or restoring and preserving (in a case falling within section 13(4)(b)) (the Applicant's business would become viable), so far as that is consistent with preserving the landlord's solvency, and that the tenant should, so far as it is consistent with the principle in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay.



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4.0 Arbitrator's reasoning and Decision

Applicant

- 4.1 The Applicant says that it operates [a portfolio of premises] on a leasehold basis.
- 4.2 The Applicant says that before the Covid-19 pandemic, its business operations carried on at the premises were steady and consistent. The Applicant says as a consequence of the government's Covid-19 closure requirements and restrictions, that during the protected period in 2020 and 2021, there was a serious adverse financial impact, which all but destroyed its business.
- 4.3 The Applicant says that Earnings before interest, taxes, depreciation, and amortization ("EBITDA") averaged £58,000 before the pandemic, but that in 2020 and 2021, the EBITDA slumped to losses of £364,000 and £143,000. The Applicant says that in 2022, its financial performance made a small recovery, which will continue in 2023.
- 4.4 The Applicant says that provided customers return to [Business Type Redacted], it ought to recover over the longer term.
- 4.5 The Applicant says that its business will return to viability if it is given relief from payment of the protected rent debt. The Applicant says its recovery will be held back and put into jeopardy if the Respondent and other Landlords insist on full payment of the rent and other rent sums arising during the protected period.
- 4.6 In addition, the Applicant says that because of the Covid-19 pandemic it abandoned its capital expenditure program, and for longer term success it is imperative that it returns to pre-pandemic profits as quickly as possible so that it can re-start its capital expenditure program.

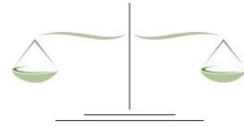
Respondent

- 4.7 The Respondent, as a [Business Type Redacted], does not claim that its solvency will be affected by the making of an award in this Arbitration and therefore does not present evidence as to its financial position. However, the Respondent asks the Arbitrator to note its status and, as such, its fiscal responsibilities and accountability in matters concerning its finances, which it says underly the approach it has taken to this Arbitration and the formulation of its proposals under section 11 of the CRCA.
- 4.8 The Respondent says that the principles to be applied when considering the matter of relief are that:



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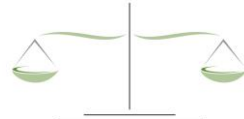
- a. Any award should be aimed at preserving or, as the case may be, restoring and preserving the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency ("the First Principle"); and
 - b. The tenant should, so far as it is consistent with the First Principle to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay ("the Second Principle").
- 4.9 The Respondent says that although the Covid-19 pandemic had a severe detrimental impact on the Applicant's business, evidence suggests that this impact was short term, and the Applicant's business is recovering.
- 4.10 The Respondent says that in respect to viability, the Applicant does not need debt relief because the negative business impact of the Covid-19 pandemic was in the past, and that the evidence presented by the Applicant leads to the conclusion that the Applicant's business is currently viable.
- 4.11 The Respondent says that the Applicant makes no attempt to address or explain why it needs the level of relief sought, and that the failure to analyse its financial position now and for the foreseeable future demonstrates that it has undertaken no genuine attempt to assess what it can actually afford to pay in order to remain viable.
- 4.12 The Respondent says that the focus of the Applicant's evidence is that it made a loss from lack of trading in 2020 and 2021, but that this is not determinative of the Applicant's viability under section 16 of the CRCA or whether the tenant is now able to meet its obligations.
- 4.13 The Respondent says that page 3 of the Strategic Report to the Applicants 2020 accounts refers to the Covid-19 pandemic "*as a significant but short-term impact on the Company's operations during 2020 and 2021*" and that note 23 to the 2020 accounts states "*Whilst Coronavirus has had a significant negative impact on the short term operations of the Company during 2020, the Directors believe the Company can continue as a going concern ...*".
- 4.14 The Respondent says that the Applicant's proposal, is simply a means to enable the Applicant to return to pre-pandemic profitability as soon as possible at the Respondent's expense.



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Arbitrator's reasoning and Decision

- 4.15 In light of the Applicant's 22nd June 2023 submission as set out at paragraph 1.22 above that it accepted the Respondent's revised formal proposal set out in the Respondent's written submission dated 16th May 2023 at paragraph 8; the Arbitrator redacts his reasoning.
- 4.16 Accordingly, the Arbitrator decides that with the Parties' consent the Landlord's Proposal as set out at paragraph 2.4 above, will be implemented.



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5.0 Arbitrator's fees

5.1 When making an Award under section 14 of the CRCA I must, in accordance with section 19(5) and (6), also make an Award in respect of arbitration fees paid by the Applicant under section 19(4):

- *Section 19(5): When the arbitrator makes an award under section 13 or 14, the arbitrator must (subject to subsection (6)) also make an award requiring the other party to reimburse the applicant for half the arbitration fees paid under subsection (4).*
- *Section 19.6: The general rule in subsection (5) does not apply if the arbitrator considers it more appropriate in the circumstances of the case to award a different proportion (which may be zero).*

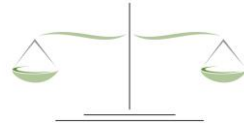
5.2 Section 19 'Arbitration fees and expenses', require the Arbitrator to exercise jurisdiction to make an Award in respect of arbitration fees paid by the Applicant under section 19(4).

5.3 On 22nd June 2023, the Parties made submissions on the allocation of the Arbitrator's fees. The Respondent said that it had incurred significant costs as a result of the Applicant's failure to engage in respect of the Protected Rent Debt. The Respondent said that this process could have been avoided and therefore, the Arbitrator should make an award pursuant to section 19 (6) of the Act that the Applicant be responsible for the Arbitrator's costs.

5.4 The Arbitrator however notes that it was only in the Respondent's Tuesday 16th May 2023 response submissions that the Respondent made a revised proposal ("the Landlord's Proposal"). At that stage of the Arbitration, most of the costs would already have been incurred.

5.5 As the general rule under English Law is that costs follow the event, and the Arbitrator would normally apply that norm when deciding which Party will pay his fees and expenses. In this Arbitration, the Parties have agreed that the Landlord's Proposal is accepted, and which means that the Respondent has largely won in this dispute.

5.6 However, the presumption under section 19(5) is that the Arbitrator must (subject to subsection (6)) also make an award requiring the other party to reimburse the applicant for half the arbitration fees paid under subsection (4). No circumstances have been argued where the Arbitrator considers it more appropriate to award a different proportion.



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- 5.7 Accordingly, the Arbitrator decides that the Respondent will reimburse the Applicant for 50% of the £5,500.00 (exclusive of VAT) that the Applicant has paid the Chartered Institute of Arbitrators. The £5,500.00 is calculated as the Arbitrator's fee £5,000.00 (exclusive of VAT) plus the Appointment fee £500.00 (exclusive of VAT).



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6.0 Arbitrator's Award

6.1 For the reasons set out at paragraphs 4.15 to 4.23 above, the Arbitrator decides that in accordance with the Landlord's Proposal:

- a. That 20% of the Protected Rent Debt be written off.
- b. The remaining 80% (i.e., £186,463.92) be paid in equal monthly instalments of £7,769.33 over a 24-month period.

6.2 Section 14(7) of the CRCA provides:

"Where an award under subsection (6)(a) gives the tenant time to pay an amount (including an instalment), the payment date must be within the period of 24 months beginning with the day after the day on which the award is made."

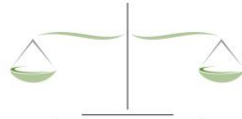
6.3 Section 14(8) of the CRCA defined the "the payment date" to mean the day specified in the award as the day on which the amount concerned falls due for payment.

6.4 The Applicant says that based on the Arbitrator's Award being dated 22nd June 2023, payment of the instalments should be completed by 21st June 2025, therefore the first of the 24 equal monthly payments should start on 21st July 2023 and made on the 21st of each and every calendar month thereafter. The Respondent says that the Applicant's proposal for the first payment to be made on 21st July 2023 is not necessary because that would result in the payments not commencing for another month. The Respondent says that a sensible payment date would be 1st July 2023, which would result in the Protected Rent Debt being repaid in full by 1st June 2025.

6.5 Some considerable time has passed since the Applicant's 13th September 2022 letter to the Respondent. Because of that passage of time the Arbitrator decides that payment of the instalments will commence on 1st July 2023, and that 24 equal monthly payments will be made such that the Protected Rent Debt is repaid in full by 1st June 2025.

6.6 For the reasons set out at paragraphs 5.1 to 5.5 above, the Arbitrator decides that the Respondent will pay the Applicant £2,750.00 (exclusive of VAT). The Arbitrator decides that the sum of £2,750.00 (exclusive of VAT) shall be paid within twenty-eight (28) days of the Arbitrator's Award.

6.7 In accordance with section 18 of the CRCA, the Chartered Institute of Arbitrators will publish a redacted version of this Arbitrator's Final Award by Consent on its website. I have attached a MS Word version of Award and I have formed the provisional view that this redacted Award does not



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contain confidential information which must be excluded under section 18. If either Party objects to such publication, I invite them to make submissions before 4.00 pm on Thursday 29th June 2023.

6.8 The Arbitrator's Award has been made in Lithuania on Thursday, 22nd June 2023.

Signed by

Niall Lawless.

Name and position

Niall Lawless Adjudicator

F.C.I.O.B., F.C.I.B.S.E., F.I.Mech.E.

C.Eng., F.B.C.S., F.C.I.Arb., F.R.S.A.

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Date

Thursday, 22nd June 2023