IN THE MATTER OF AN ARBITRATION PURSUANT TO THE

COMMERCIAL RENT (CORONAVIRUS) ACT 2022.

CIArb Case Ref: DAS-01400-H6D8R

AN IN THE MATTER OF AN ARBITRATION

BETWEEN:

A

Applicant

AND

R

Respondent

FINAL AWARD

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<u>To maintain consistency this Award will, so far as possible and unless otherwise stated, utilise the terminology and abbreviations set out in the Parties' submissions.</u>

<u>While I refer extensively to the parties' submissions and arguments, it is inevitable that I will not make express reference to every point raised or document provided. This does not mean I have not taken full account of all matters before me.</u>

<u>I would like to thank Counsel, Mr Michael Pryor for A and Mr Geoffrey Zelin for R, Claire Munn and the other members of the team at Maples Teesdale and Matthew Cropp and the other members of the team at Wedlake Bell, for their prompt and courteous help and assistance.</u>

INTRODUCTION

1. The seat and applicable law of this Arbitration is England and Wales. The parties agree the arbitrator is to conduct the arbitration in accordance with the provisions of the Commercial Rent (Coronavirus) Act 2022 ("CRCA" or "the Act") and where relevant the Arbitration Act 1996.
2. I was appointed as Arbitrator on 17 February 2023 by the Chartered Institute of Arbitrators ("CIArb") being an "approved arbitration body" as provided in the Act.
3. <u>Procedure.</u> This is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996 (the 1996 Act). The statutory framework governing this arbitration is contained in the CRCA and the Arbitration Act save where amended by the CRCA.
4. The Applicant is A, represented by Rosalind Cullis and Claire Munn of Maples Teesdale LLP of 30, King Street, London EC2V 8EE ("MT").
5. The Respondent is R, represented by Matthew Cropp of Wedlake Bell LLP of 71, Queen Victoria Street, London EC4V 4AY ("WB").
6. The property to which the dispute relates is the Cinema at X. By a lease dated 27 November 2003, R is the Landlord and A is the Tenant of the premises.

DISPUTE AND ARBITRATION

6. The dispute relates to the parties' failure to agree relief from payment of rent during the protected period as provided in the CRCA.
7. On 22 September 2022 A requested the appointment of an arbitrator by CIArb under its Commercial Rent Debt Arbitration Scheme and I was appointed by CIArb on 17 February 2023.
8. Following my appointment, on 20 February 2023 I provided the parties with my Terms of Engagement as Arbitrator and invited A to provide the "written statement" referred to in the application to CIArb.
9. On 22 February 2023 WB asked for an oral hearing to consider two preliminary issues (the "Part 1 and Part 2 Issues") which they identified from the A formal proposal as required under Section 11(1) of CRCA and the R response as required by section 11(2) of the Act.
10. On 24 February MT confirmed they were instructed by A and on 1 March indicated they did not agree the Part 1 and Part 2 Issues should be dealt with as preliminary issues with an oral hearing and suggested a delay while certain aspects of the dispute became clearer. WD disagreed and confirmed the request for an oral hearing to make submissions leading to an Award on preliminary issues.
11. On 8 March in a letter to the parties I concluded that the Part 1 issue goes to my jurisdiction which I have the power to determine; the Part 2 issue relates to the business viability of A which I am expressly required by the CRCA to determine on appointment; Section 20(1) CRCA provides that on application of either party for an oral hearing I am required to have an oral hearing. If follows that there must be an oral hearing following which I should issue an award in relation to the Part 1 and Part 2 issues.
12. Following further exchanges in relation to the arrangements for the hearing I issued my Order for Directions on 30 March 2023 recording various agreed matters (including agreement that the Protected Rent Debt ("PRD") is £1,836,913.50 inclusive of VAT) and gave Directions for the oral hearing of the Preliminary Issues on 15 and 16 May 2023 at WB's offices.
13. Pursuant to my Directions I received Witness statements from Mr Cropp (with exhibit MAC 1) for R and Mr K (and Enclosures A-G) for A on 20/21 April; second statements from Messrs Cropp and K (and exhibits MAC 2 and RK 1) on 28 April, and on 3 May a third statement from Mr Cropp introducing a supplemental report from Azets (MAC 3).
14. On 10 May WB provided the hearing bundle as directed and on 12 May both parties provided skeleton arguments and copies of authorities.
15. The hearing took place at WB's offices from 10 am to 1pm and 2pm to 4.30 pm on 15 May and 10am to 11.15am on 16 May 2023.

16. At the conclusion of the hearing the parties confirmed the Award on the Preliminary Issues should deal first with the jurisdiction issue and then the question of A viability.
17. If the arbitrator concludes A's business is not viable, the arbitration must be dismissed. In this event, the parties invite the arbitrator to give a view in relation to the arbitration costs and apportionment, but subject to party submissions (if any) by letter to the Arbitrator within 7 days.
18. If the arbitrator determines A is a valid business, he will invite the parties to provide draft directions for the completion of the reference and defer decisions as to costs.
19. I confirmed my intention to provide the Award on Preliminary Issues by 4pm on Friday 19 May 2023.

PRELIMINARY ISSUES

20. The Preliminary Issues for determination are identified in paragraph 7 of the Order for Directions of 30 March 2023:

    7.1.1 Whether or not the reference to arbitration should be dismissed on the ground that High court proceedings were issued prior to 9 November 2021 and, as a result the Applicant's reference is outside the jurisdiction of the arbitrator conferred by the Commercial Rent (Coronavirus) Act 2022; and

    7.1.2 Whether the Applicant's business is viable or would be viable if given relief from payment of the Protected Rent Debt.

BACKGROUND/CHRONOLOGY

21. Mr K's first statement explains that A and other companies in the A group operates cinemas in the UK and elsewhere. A is a wholly owned subsidiary of the A plc. There are over 100 sites in the UK and Ireland including the premises in X. The principal income is box office revenue, sale of food and drink within the cinemas and advertising.
22. Mr K also provides background in relation to the impact of the Covid 19 pandemic on A and paragraphs 8 – 18 of his first statement are generally accepted by the Respondent.
23. A's business was adversely affected by the pandemic during the period from 21 March 2020 18 July 2021. This period is defined in the CRCA as the "Protected Period".
24. A's business was severely impacted by a number of local and national lockdowns and even when permitted to open, the cinemas were affected by regulations that had an impact on admissions. These included the requirement for social distancing, the rule of six from 14 September 2020, curfews at either 10 PM or 11 PM and finally the decision of film studios to either delay film release dates or to bypass cinemas entirely, sending films straight to the streaming platforms, which denied cinemas the

opportunity to show the films. These all impacted on attendances during the Protected Period.

25. As a result of the impact of Covid 19, A was unable to pay the rent, service charge and insurance rent for the premises and other premises operated by the A group. The parties agree the resulting Protected Rent Debt is £1,836,913.50.
26. A submit the pandemic had an unprecedented impact on its finances. Pre-Covid A was profitable. In 2020 and 2021 it was loss-making.
27. A say the management accounts for 2022 suggest the financial position is recovering but recovery will be held back if the Respondent and other landlords insist on full payment of the rent, service charge and insurance rent that fell due during the Protected Period.
28. On 12 August 2021, R issued a claim against A to recover outstanding unpaid rent. A filed its defence on 14 September 2021 and on 14 January 2022 R filed an application for summary judgement. On 20 January 2022 A filed an application to stay the proceedings.
29. The application for summary judgement was listed for hearing in November 2022 by which time Chapter 11 bankruptcy proceedings had commenced in the USA and in the UK this arbitration had commenced.
30. While this part of the award is concerned with background and chronology it is appropriate to note the Part 1 Issue as to jurisdiction turns on the significance of a court claim issued before 10 November 2010. Should such proceedings be stayed pending arbitration under the CRCA scheme or does the existence of such proceedings before 10 November 2020 take the present dispute outside the arbitration scheme created by the Act.
31. To return to the chronology, Mr K explains in his first statement that to survive the pandemic and withstand the losses being incurred by its subsidiaries including A, A plc drew on all its revolving credit facility in 2020, then issued new convertible bonds the same year and took out a further private placement loan in 2021. A and other group entities have granted guarantees and security in relation to financing arrangements totalling circa $6 - 7 billion under a New York law governed "Legacy facilities agreement" in 2018 and a secured debtor- in- possession ("DIP") credit agreement dated 9 September 2022.
32. On 7 September 2022 A plc including A commenced Chapter 11 cases in the United States bankruptcy Court for the Southern District of Texas which A says was to implement a de-leveraging transaction to reduce debt, strengthen the balance sheet and provide financial strength and flexibility.
33. On 22 September 2022, A applied to CIArb for the appointment of an arbitrator in relation to their failure to agree relief from the payment of the protected rent in relation to the X cinema as provided under the provisions of CRCA. A provided the formal offer in relation to the Protected Rent as required by S.11(1) of the Act.
34. R responded with a S.11(2) proposal on 5 October 2022 which declined any concession in relation to the PRD for a number of reasons including A's financial

position and inability to pass the viability test the arbitrator is required to undertake under CRCA before considering possible relief from payment.

PARTY SUBMISSIONS

35. *In this section the parties' cases and submissions are set out or summarised to assist the discussion, analysis, and conclusions. To the extent reference is not made to any submission or identified document, the omission does not mean I have overlooked or failed to take account of it.*
36. The preliminary issues were drafted by R. The first goes to jurisdiction. The second concerns the viability of A. Section 13 of CRCA requires before considering whether a tenant should receive any relief from payment and if so what relief, the arbitrator must first determine that the tenant's business is viable or would become viable if the tenant were to be given relief from payment of any kind.
37. While it is for the Applicant to establish that the business is viable, it is the Respondent that challenges this tribunal's jurisdiction and required an oral hearing and a preliminary award in relation to the two issues. I will therefore summarise the Respondent's position as to jurisdiction followed by the Applicant's then the Applicant's position as to viability and finally the Respondent's.
38. **Jurisdiction – Respondent.** The High Court claim was issued on 13 August 2021 nearly 3 months before the bill that led to the CRCA. The Respondent applied for summary judgement. Whilst the CRCA is clear that proceedings in respect of Protected Rent Debt ("PRD") issued on or after 10 November 2021 are subject to a mandatory stay pending the outcome of a CRCA arbitration, the Act is silent on the position where proceedings were started before that date.
39. The Respondent's position is that the arbitration ought not be allowed to proceed.
40. The arbitration is governed by the Arbitration Act 1996 as modified by the CRCA. There is no modification to section 9 of the 1996 Act. The present arbitration is a statutory arbitration falling within sections 94 to 98 of the 1996 Act. The CRCA is treated as an arbitration agreement between the parties. The result is that A will not be able to apply for a stay of the claim because it has served a defence in the proceedings.
41. The Respondent relies on the Parliamentary proceedings (especially the comments of the relevant Minister as reported in Hansard during the committee stage of the Bill) to aid construction of the statute. R relies on the HL decision in **Pepper v Hart [1993] AC 593.**
42. R submits it was never Parliament's intention that the stay provisions in CRCA Schedule 2 or the arbitration provisions in Part 2 would apply where proceedings were already underway – see the statement of the relevant minister (Paul Scully MP) as set out in Hansard.
43. The Respondent's court proceedings were commenced before 10 November 2021, are not subject to the statutory provision to stay proceedings in relation to rent

arrears and accordingly the present dispute falls outside the scope of the statutory provision for arbitration.

44. **Applicant's Case -Jurisdiction**. The substantive right to apply for arbitration is set out in section 9 CRCA. Section 10 requires the tenant first give notice of their intention to make a reference. Section 11 requires the reference to include a proposal for relief from payment of the Protected Rent Debt.
45. Schedule 2 to the Act provides a tenant with protection from court proceedings issued after 9 November 2021 by requiring a mandatory stay of proceedings where a tenant applies for a stay, and a moratorium preventing the issue of such proceedings between passage of the Act and either the final day for a tenant making a reference or the conclusion of any arbitration.
46. A's position is that all they needed to do to trigger the substantive right to arbitration under section 9 was to make a reference within the time limits. All that is necessary is to establish that the tenant and landlord of a business tenancy are in disagreement on relief from payment of a PRD and that the reference was made within six months of the CRCA being passed.
47. R's claim predates 9 November 2021 and accordingly A do not have the protection provided in Schedule 2 of the Act, but this does not affect the substantive right to arbitrate.
48. The Minister's comments, as recorded in Hansard can only be an aid to construction of the statute if it is "*ambiguous or obscure or the literal meaning leads to an absurdity*" – Pepper v Hart. There is nothing ambiguous about the legislation. The substantive right to arbitrate is granted in Section 9 not Schedule 2. There is no expression of the time limit on who may make the application to arbitrate either in Section 9 or elsewhere in the 2022 Act. There is no need to consult Hansard to ascertain who is entitled to apply beyond the clear words of Section 9.
49. Accordingly, any tenant of a business tenancy facing a protected rent debt who applies before the cut-off date in Section 9 (6 months after CRCA enactment) may make a reference to arbitration; applicants who are the defendant to proceedings predating 10 November 2021 do not enjoy the protection in paragraphs 2 and 3 of Schedule 2 of the 2022 Act, but a court considering an application to stay proceedings for arbitration will consider the application on its merits and retains a discretion to stay proceedings as occurred in a county court action involving A - **Eden Commercial v Cine-UK Ltd**.
50. R's reliance on section 9 of the Arbitration Act 1996 (application to stay court proceedings after acknowledgement of service but before defence) is misplaced since the section requires the existence of an arbitration agreement. In the case of statutory arbitration, the statute is deemed to be the arbitration agreement. In the present case, the 2022 Act was not in existence when R commenced the court proceedings in 2021. There was no arbitration agreement to which Section 9 of the 1996 act could apply.

51. **Viabilty – Applicant's case (A).** A's proposal for relief pursuant to section 11 (1) of the Act was to waive 320 days of rent and to pay the remaining rent in 24 equal monthly instalments. The proposal was rejected for a number of reasons including that A is not viable and therefore the arbitration reference should be dismissed pursuant to section 13(3) of the Act.

52. The arbitration scheme under the Act requires the arbitrator to be satisfied that the relevant tenancy is a business tenancy, that there is a protected rent debt and that the tenant satisfies the viability test in section 16 of the Act.

53. The parties agree there is a business tenancy and an agreed PRD of £1,836,913.50.

54. For A to gain relief in relation to the protected debt, it must establish it is a viable business. In assessing viability section 16(1) of the act requires the arbitrator to have regard to the assets and liabilities of the tenant including any other tenancies, previous rental payments, the impact of coronavirus on the business of the tenant and any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

55. Section 16(3) provides that the arbitrator must disregard the possibility of the tenant borrowing money or restructuring its business and section 15(2) provides that the arbitrator must disregard anything done by the tenant with a view to manipulating their financial affairs so as to improve their position in relation to an award to be made under section 14.

56. Viability is to be considered at the time of the assessment not an earlier or later date.

57. If the arbitrator decides the tenant is not viable and would not be viable even if given relief from payment of any kind, they must dismiss the reference.

58. Paragraph 6 of the statutory "Guidance to Arbitrators" ("the Guidance") sets out how an arbitrator should go about the viability exercise. The 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 continue trading"* (para 6.3).

59. Paragraph 6.10 – 6.17 set out specific indicators to take account of the evidence that may assist the arbitrator in reaching a conclusion as to viability.

60. A accept it is undeniable they have financial difficulties, and that the parent company-initiated Chapter 11 proceedings in Texas on 7 September 2022. The evidence of Mr K, including year-end accounts for 2019, 2020 and 2021(draft) and

various other financial documents shows the impact of coronavirus and that the business is now picking up steadily, but the refusal of landlords to agree relief is holding back development. The Chapter 11 proceedings prevent creditors from proceeding to wind up group companies including A. The A group is restructuring through the Chapter 11 proceedings rather than A, and this should be taken into account by the arbitrator when considering the viability of A.

61. Mr K shows improving accounts for the premises in X.

62. A was in solid health in 2019. Unsurprisingly the accounts for 2020 paint a very different picture, but by the end of 2021 matters were improving and the management accounts for the premises show a gradual climb back. The improvement at the premises is continuing. The arbitrator may wish to consider the income and expenditure in the accounts and how that is improving, including recent forward projections.

63. In the circumstances the arbitrator can find that A is a viable business or would be if the relief claimed were granted.

64. **Viability – Respondent's case.** The words "viable" and "viability "are not defined in the Act and should be given their natural and ordinary meanings. One question is whether the business is going to be able to achieve solvency or financial stability within a reasonable (and fairly short) time so that it will be able to continue for the medium to long term. What is a reasonable time, depends on the circumstances, but should not be more than a small number of years, perhaps 24 months is a suitable benchmark.

65. In assessing viability, the arbitrator must disregard anything done with a view to manipulating financial affairs to improve the position in relation to an award to be made under section 14 and the possibility of the tenant borrowing money or restructuring its business. The arbitrator must however have regard to the assets and liabilities of the tenant including other tenancies, previous rental payments, the impact of coronavirus on the business, and any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

66. Paragraph 6.3 of the Guidance says 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. The statutory test at sections 13(3) and (4) of the Act is whether the tenant's business is, or would be, viable if the tenant were to be given relief from payment of any kind. This includes writing off the whole of the debt. The PRD must therefore be left out of account in assessing viability.

67. Para 6.14 of the Guidance provides that at the very minimum the tenant should provide at least the last 12 months full bank account information including savings accounts, current accounts, and loan accounts.

68. It is the tenant's business as a whole that has to be viable, not just the business conducted at the particular premises. The viability assessment is to be made at the date of the assessment and not at some future date. Further borrowing or reconstruction must be disregarded.

69. Azet's Report (on which the Respondent relies) shows that A was a viable business before the pandemic but is no longer viable and would not be viable even if the whole of the £1.8 million PRD was written off.

70. Profit of £5.1 million in 2019 became a loss of £144 million in 2020. The draft accounts for 2021 show a loss before tax of over £12 million and a total loss of over £9 million and do not appear to provide for A's potential liability under guarantees entered into in February 2018 and September 2022.

71. The evidence of Mr M in other proceedings shows loans and credit facilities of over $5 billion and further debt guaranteed by A of over $760 million.

72. A is dependent on the support of its ultimate parent which is restructuring under Chapter 11 protection.

73. Azets state that even if A were to achieve profits equal to the highest profit achieved in the previous five years it would take 9 1/2 years to restore the company to balance-sheet solvency. If its profits were in line with average profits over the previous five years, it would take 70 years.

74. A is unable to meet its liability of £2.5 million to another landlord who in consequence presented a winding up petition. The winding up proceedings have been stayed due to the Chapter 11 proceedings in the USA.

75. If the Chapter 11 proceedings do not result in a satisfactory restructuring arrangement, the group is likely to be wound up. In this event, A would be unable to meet its financial obligations to creditors and would inevitably be wound up.

76. But for the Chapter 11 proceedings and the current protection these provide, A's position would be hopeless, and it would have been wound up by now. A has not produced any evidence that suggests otherwise. Mr K has done no more than show that in isolation, the cinema at X would be a viable proposition. But that is not the question. The question is whether, judged as at the date of assessment and disregarding any possibility of borrowing or restructuring, A's business is viable. It

clearly is not. X cannot be divorced from the rest of the business. For as long as it remains part of A's business it will, without restructuring or borrowing, be dragged down and drown in an ocean of debt.

ISSUES/DISCUSSION/CONCLUSIONS

Issue 1 – Whether or not the reference to arbitration should be dismissed on the ground that High Court proceedings were issued prior to 9 November 2021 and, as a result the Applicant's reference is outside the jurisdiction of the arbitrator conferred by the CRCA.

77. Section 30 (1) Arbitration Act 1996 as modified by Paragraph 1(1) of Schedule 1 to CRCA provides the arbitral tribunal may rule on its own substantive jurisdiction as to the matters submitted to arbitration in accordance with the arbitration agreement. In statutory arbitration schemes, the statute itself is the arbitration agreement (s. 95(1) of the 1996 Act).
78. The Guidance provides this includes "*whether the Act applies to the dispute or matter in question*" and "*what matters have been submitted to arbitration in accordance with the Act".*
79. **R case** is that they commenced proceedings in the High Court for the recovery of rent arrears which included the PRD, on 13 August 2021 almost 3 months before the Bill that led to the CRCA and applied for summary judgement on 14 January 2022.
80. They submit Schedule 2, para 3 CRCA, while clear where proceedings in respect of PRD are issued on or after 10 November 2021, and must be stayed pending the outcome of any arbitration, the Schedule is entirely silent on the position where proceedings were started before that date.
81. Given the modifications to the Arbitration Act 1996, A will not be able to apply for a stay of the claim under CRCA because it has served a defence - section 9(3 of the 1996 Act.
82. They invite me to have regard to Parliamentary proceedings as an aid to construction of the statute, relying specifically on the House of Lords decision in **Pepper v Hart** [**1993]** and to consider the comments of the relevant Minister (Paul Scully MP) in response to a proposed amendment which would have removed the reference to the date, 10 November 2021, in paragraph 3(1)(a) of Schedule 2. The Minister opposed the amendment and Parliament rejected it, leaving para 3(1)(a) unchanged.
83. R's case is that Schedule 2 makes no provision for court proceedings that commence before 10 November 2021 (as in the present case) and it is not open to the court to stay proceedings for a CRCA arbitration as would be a mandatory requirement if the proceedings were commenced after 10 November 2021.
84. In the absence of clarity within the schedule or the Act as a whole, construction of the Act should take account of and be assisted by, the relevant parliamentary proceedings as recorded in Hansard.

85. The first problem with the Respondent's case is the assumption that Schedule 2 relates to CRCA arbitrations rather than tenant protection (including a temporary moratorium) against the remedies otherwise available to landlords in civil debt proceedings.
86. Section 23 and Schedule 2 creates a temporary moratorium on enforcement of protected rent debts. The landlord may not during the moratorium period, make a debt claim to enforce the PRD (defined as a claim to enforce a debt in civil proceedings etc.).
87. Paragraph 3 applies to proceedings on a debt claim made on or after 10 November 2021 but before the date on which the Act was passed, and which are made by the landlord against the tenant and relate to debts which include the protected rent debt.
88. Paragraph 3 (3) provides where a party makes an application, the court must stay the proceedings and if judgement is given in favour of the landlord during "the protected period" in relation to a protected rent debt, then providing the judgement debt is unpaid and the matter of relief is subject to arbitration, the judgement debt may not be enforced before the end of the moratorium period.
89. If relief from payment is awarded, the judgement debt is altered in accordance with the arbitration award.
90. Accordingly, while quite unusual, the purpose and meaning are clear. Section 23 and Schedule 2 creates protection for qualifying tenants who apply for CRCA arbitration in relation to court proceedings commenced after 10 November 2021 with a moratorium period in which, on application, court proceedings must be stayed, and judgments cannot be enforced. The moratorium continues to the end of the arbitration reference and if the arbitrator grants relief in relation to the PRD, a judgment must reflect the relief granted in the arbitral award.
91. **A's case** starts not in Schedule 2 to the Act but in Section 9 which provides -

"(1) This section applies where the tenant and the landlord under a business tenancy are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt.

(2) A reference to arbitration may be made by either the tenant or landlord within the period of six months beginning with the day on which this act is passed.

(3) The Secretary of State may by regulations made by statutory instrument extend the period allowed by subsection (2) for making references to arbitration …………"

92. The parties agree this is a business tenancy and that they are not in agreement as to the resolution of the matter of relief from payment of an agreed PRD of £1,836,913.50 (incl VAT) plus interest.
93. Section 9 contains the substantive right to apply to arbitration but before doing so the tenant must notify their intention to make a reference under section 10 and include a proposal for resolving the matter of relief from payment (section 11). A complied with sections 10 and 11.
94. Schedule 2 provides a moratorium period in which the usual remedies in civil debt proceedings are not available to landlords. This protection does not assist A because

the proceedings instituted by R were issued months before the Bill was published that became the 2022 act.

95. For tenants with Schedule 2 protection, the court, on application by a tenant <u>must</u> stay the proceedings for CRCA arbitration. The protection includes a moratorium preventing the issue proceedings between 10 November 2021 when the bill was published and either the final day for a tenant making a reference to arbitration or the conclusion of any arbitration. While A do not have a right to a mandatory stay it remains open to them to apply to the court for a stay which the court <u>may</u> nevertheless grant on its merits.
96. A's position is that all it needed to do to trigger the substantive right to arbitrate was to make a reference during the time limit provided by section 9. There was no other limit on making such reference beyond compliance with the section and giving notice under section 10.
97. The question that arises is whether the fact R's claim was made before A could be entitled to a mandatory stay as subsequently provided in section 23 and Schedule 2, means A is not entitled to the section 9 statutory right to arbitrate.

98. Mr Pryor in his submissions during the hearing confirmed the practical effect for A is that while they can arbitrate, they do not come within the time provisions of Schedule 2 for tenant protection and must therefore take their chances in persuading the court to stay proceedings in the absence of the right to a mandatory stay that would have been available if the court proceedings had commenced on or after 10 November 2021.

99. If the absence of the right to a mandatory stay, where debt claim proceedings are underway before 10 November 2021, were to remove the tenant's substantive right to arbitrate under section 9, it would be the procedural tail wagging the substantive dog!

100. A accept the effect of the proposed amendment as reported in Hansard would have been to give the Schedule 2 protections to proceedings issued before 10 November 2021 as well as those after that date, but the amendment was rejected for the reasons explained by the Minister. The question, however, is whether this extract from Hansard can or should be used as an aid to the construction of the statute.

101. The use of parliamentary material as an aid to statute construction is permitted in limited circumstances - **Pepper v Hart,** but A submit the test in that case is not met because there is no ambiguity in the statute.

102. In reply, Mr Zelin for R, argued the comments of the Minister in relation to the proposed amendment (which was rejected) clearly show the intention of Parliament. The Act must be construed as a whole and forms a scheme, and as the Minister explained, Parliament's intention was that before 10 November 2021, tenants would have no right to arbitrate under the Act. Section 9 and Schedule 2 are intended to work together, otherwise it opens the door to arbitrations where court proceedings are already underway. For this reason, the 2022 Act only applies to PRD after 10 November 2021.

103. <u>**Discussion**</u> - Before **Pepper v Hart** the courts did not permit reference to comments made in Parliament and reported in Hansard, as an aid to the construction of legislation. There were and are several important, mainly constitutional, reasons for this.

The House of Lords judgement in this case is important because it recognised that today there will be times where the comments of the relevant minister or sponsor of a Bill may show the clear intention of Parliament and therefore should be available as an aid to construction of the statute.

104. But the circumstances where reference to parliamentary material may be used are limited. – "*as an aid to the construction of legislation* ***which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words*** **"**Lord Browne -Wilkinson.

105. I agree with Mr Pryor at paragraph 20 of his skeleton, the 2022 Act in the context of the present arbitration is not ambiguous. The procedural provisions of Schedule 2 are not available to A because R's court proceedings were underway before 10 November 2021.

106. However, it is equally clear and therefore unambiguous that Section 9 provides a substantive right for a tenant to refer a dispute to arbitration where the landlord and tenant under a business tenancy are not in agreement as to the resolution of the matter of relief from payment of a PRD. The right to arbitrate is dependent on giving notice of intent under Section 10, a proposal under Section 11 and starting within six months from the date on which the Act was passed.

107. Both parties referred me to a number of other authorities including **R(L) Commissioner for the Metropolis [2008]** and **Chilcott v Revenue and Customs Commissioners [2010]**. I accept that for there to be *ambiguity* the relevant words to be construed must be open to more than one construction and agree with Mr Pryor it is necessary to stand back and look at Section 9 and ask what the alternative meaning of that section is, the alternative that might create the "mischief", ambiguity and therefore difficulty in determining the *ordinary and natural meaning* of the words.

108. The Minister's statement in Hansard, even if available as an aid to construction, does not provide clarity in relation to the construction of Section 9 which provides the substantive right to arbitrate. It is Schedule 2 that creates protections and safeguards for tenants facing debt claims after 10 November 2021. Clearly those protections are not available to A.

109. Mr Zelin argues the Act must be construed as a whole and forms part of a scheme. Section 9 and Schedule 2 are intended to work together because otherwise it opens the door to *arbitrations* where proceedings are already underway. I respectfully disagree, Section 9 does not limit tenants to the arbitration of PRD disputes occurring on or after 10 November 2021 because the "protected period" under section 5 which is required in arriving at the PRD was from 21 March 2020 until 18 July 2021. All PRD disputes going to arbitration must surely pre-date the Bill and the CRCA.

110. The problem with the Respondent's argument is the proposition that Schedule 2 provides a time before which, arbitration of PRD disputes as to relief, is not available. Section 23 create a temporary moratorium and Schedule 2 contains provisions preventing a landlord with PRD from using the usual remedies in court proceedings

namely, debt claims, the commercial rent arrears recovery power, enforcement of the right of re-entry or forfeiture and the use of the tenant's deposit.

111. For present purposes we are concerned with the debt claim in civil proceedings. It is noticeable that the only reference to arbitration in section 23 is in relation to the end date for "the moratorium period".

112. Neither Section 9 or Section 23 and schedule 2, prevent a tenant arbitrating a dispute for relief from a PRD arising before 10 November 2021, but for those disputes that are referred to arbitration before that date, the protection from the potential remedies in debt claims in civil proceedings is not available.

113. The Respondent has not satisfied me there is ambiguity in the Act that satisfies the test in **Pepper V Hart** that would permit me to use the parliamentary material as an aid to construction. On my reading of the judgements in **Pepper v Hart** caution is required in any event, and if I am wrong and may use Hansard as an aid, I do not find the passages to which I was directed of assistance in the construction of Section 9 of the Act.

114. Further, since I do not see the ambiguity (or obscurity or an absurdity) in the plain meaning of the wording of Section 9 and 23 there is no need to look to Hansard for assistance.

115. The remaining argument advanced by R concerns the modifications to the Arbitration Act 1996 in Schedule 1 to the CRCA. There is no modification to section 9 of the 1996 Act. The Respondent notes Section 9(3) requires a party to proceedings, seeking a stay for arbitration, to do so after acknowledgement of service but before taking a substantive step in the proceedings, usually the service of a defence. They argue that as A has served a defence, they cannot apply for a stay of the court proceedings for CRCA arbitration.

116. A's response to this argument is essentially that at the time R commenced the proceedings there was no CRCA.

117. Section 9 of the 1996 Act applies to "*A party to an <u>arbitration agreement</u>*" seeking a stay of legal proceedings for arbitration. Section 95(1) of the 1996 Act provides that in statutory arbitrations the *statute* is to be regarded as the *arbitration agreement*.

118. There was no statute and therefore no arbitration agreement on which A could make an application to stay when the legal proceedings commenced or when A was required to serve a defence.

119. While there is force in A's submission that the application of Section 9(3) of the 1996 Act would be inappropriate, these are not matters within the scope of my jurisdiction. Whatever difficulties the parties encounter in the court proceedings in applying for a stay or to lift a stay, they are matters for the court not an arbitrator.

120. The Preliminary Issue goes to my substantive jurisdiction. The application of Section 9 of the 1996 Act is a matter for the court alone and I do not presume to offer advice to the court.

121. **<u>Conclusions</u>** - For the reasons set out I have concluded the substantive statutory right to arbitrate disputes about relief in relation to protected rent debt in

Section 9 of the CRCA 2022, is not excluded where, as here, R commenced debt claim proceedings against A before 10 November 2021.

122. R having commenced such proceedings before 10 November 2021, the temporary moratorium and other enforcement protection provided to tenants under section 23 and schedule 2 CRCA is not available to A.

123. it is not necessary or appropriate to construe Section 9 and Section 23 and schedule 2 together. The former relates to the substantive right to arbitrate and the latter to the protections available to some tenants (but not A) from remedies that would otherwise be available to a landlord in court proceedings.

124. I am not satisfied there is ambiguity in Section 9, 23 and Schedule 2 as required to satisfy the Pepper v Hart test and provide an exception to the general rule and thereby permit the inclusion of Parliamentary papers including passages from Hansard as an aid to construction of the Act, but if I am wrong and such material is available as an aid to construction, I am not persuaded the passages from Hansard to which I was directed assist in the construction of Section 9 in relation to the preliminary issue.

125. I have also concluded that the operation of section 9(3) of the 1996 Act in relation to CRCA arbitration and the stay of civil debt proceedings in court is not within the scope of my jurisdiction, and not within the ambit of the preliminary issue. This is a matter for the court not the arbitrator.

126. **It follows I have concluded the Applicants reference is not outside the jurisdiction of the arbitrator as confirmed by the Commercial Rent (Coronavirus) Act 2022 and that the reference to arbitration should not be dismissed.**

Issue 2 – Whether the Applicant's business is viable or would be viable if given relief from payment of the Protected Rent Debt.

127. I first consider the relevant sections of the Act and underline the most important phrases for the analysis and discussion.

128. The arbitration awards available to the arbitrator on a reference under CRCA are set out in section 13. If the parties have resolved the matter of relief from payment of a PRB before the reference was made, the tenancy in question is not a business tenancy, or there is no Protected Rent Debt, the arbitrator must make an award dismissing the reference (S.13(2). None of the three criteria apply in the present reference.

129. S. 13(3) provides that if, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business is not viable and would not be viable even if the tenant were to be given relief from payment of any kind, the arbitrator must make an award dismissing the reference.

130. S.13(4) and (5) provide in the alternative that if after making that assessment the arbitrator determines the business is viable or would become viable if the tenant were to be given relief from payment of any kind, the arbitrator must resolve the matter

of relief from payment of a protected rent debt by considering whether the tenant should receive any relief from payment and if so what relief and by making an award in accordance with section 14.

131. S.15 provides that the purpose of assessments that conclude the business is viable or would become viable and which therefore move to consider a section 14 award are governed by the "Principles" identified in section 15 (1), and in considering the viability of the tenants business the arbitrator must disregard anything done by the tenant or the landlord with a view to manipulating their financial affairs so as to improve their position in relation to an award to be made under section 14.

132. S.16(1) provides that in assessing the viability of the business of the tenant the arbitrator must, so far as known, have regard to the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party, previous rental payments made under the business tenancy, the impact of coronavirus on the business of the tenant, and any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

133. S.16(3) provides that in making an assessment under S.16(1) the arbitrator must disregard the possibility of the tenant borrowing money or restructuring its business.

134. Section 6 of the Guidance explains how the arbitrator should go about the assessment of the viability of the tenant's business. "Viability" is deliberately not defined in the Act or the Guidance, in order to take into account the vast array of different business models. In making the assessment of viability, *a key question is whether unprotected rent 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*.

135. The arbitrator can consider the impact of the tenant's other debts and their wider financial situation. Any determination of non-viability must be justifiable with the reasons provided in the award dismissing the reference to arbitration.

136. *It is the tenant's responsibility to provide evidence* to support their proposal (under S. 11(1) and *to enable the arbitrator to determine the viability* of the tenant's business.

137. The Section 16 requirements for assessing viability including the requirements to *disregard the possibility of the tenant borrowing money or restructuring their business* together with the indicators and evidence to assist in the determination of viability are referred to in the Guidance which suggests the exercise should be undertaken in a *holistic and common-sense way considering the circumstances of that business.* There is no one indicator that can be used to determine whether the business is viable.

138. Sections 13(3) and (4) make clear that the arbitrator is to assess whether the tenant's business is viable *at the time of the assessment*. On that basis, evidence relating to the business prior to or during the coronavirus pandemic would only be relevant insofar as it speaks to current viability, although the arbitrator will of course take into account seasonal variations in business.

139. While the evidence listed in the table as it appears in the Guidance will assist the arbitrator, the relative size of the business must be taken into account in deciding on the adequacy of the evidence provided by the tenant. However, both parties should be aware that the better the quality of the information provided, the more it will assist the arbitrator in determining the dispute and enable the responding party to consider the formal proposal and respond accordingly.

140. At the very minimum the tenant should provide at least the last 12 months for bank account information including current and loan accounts. Other information where available, will also be generally useful to the arbitrator such as financial accounts for each financial year after March 2019 or management accounts for each financial month/year after March 2019. The arbitrator may take into account whether any financial information has been audited by an independent third-party or is otherwise verifiable. Where available the arbitrator may find it useful to look at net profit margin or gross profit margin prior to the protected period compared to after closure requirements or specific restrictions affecting the business.

141. To summarise, the arbitrator must assess the viability of the tenant's business. Ignoring the PRD is the business viable or will it become viable in the foreseeable future. If the conclusion is that it is not viable, the arbitrator must make an award dismissing the reference. If the conclusion is that it is viable, the arbitrator proceeds to resolve the matter of relief from payment of a PRD and makes an award under section 14.

142. In making the assessment, the principles in section 15 are important, including the need to disregard anything done by the tenant with a view to manipulating their financial affairs to improve their position in relation to an award under section 14.

143. Section 16 sets out what the arbitrator is to have regard to in making the assessment and what he /she must disregard.

144. The Guidance provides the arbitrator with assistance in undertaking the assessment which should be undertaken in a holistic and common-sense way, considering the circumstances of the business. Evidence relating to the business prior to or during the coronavirus endemic is only relevant if it speaks to current viability.

145. The relative size of the business must be taken into account in deciding on the adequacy of the evidence provided by the tenant, but for a substantial business, in addition to financial information for at least 12 months, accounts for each financial year from March 2019 or management accounts may be expected including audited accounts and other financial information including net and gross profit margins before and after the protected period.

146. It is the tenant's responsibility to provide evidence to show the business is or if given relief from payment of a PRD will, within a reasonable period become viable. The tenant has the burden of proof. The standard of proof is the balance of probability.

147. As A has the burden of proving its viability as a business, I set out A's position in the section" Party Submissions" before summarising the position of R.

148. In the hearing on 15/16 May, the parties agreed R would make their submissions first, A would follow, and R would have a final reply. To assist the parties, I now adopt the same order in considering the hearing submissions.

149. **R Case** – A is in the course of being restructured and is going to be borrowing substantial sums of money. It is not and cannot be a viable business.

150. The A structure chart at page **294** of the bundle shows the complex interlinked nature of the A group including A. The exercise is to assess the viability of the tenant's business including other tenancies, not just the cinema at X. A appears to have over 100 cinemas in the UK and 200+ in Europe, although nothing has been provided in evidence of the total number of cinemas. Page **217** identifies at least 26 cinema that have been the subject of applications to CIArb for the appointment of CRCA arbitrators.

151. If A's business is not viable and would not be viable even if it were granted relief from payment of the PRD in its entirety, the reference to arbitration must be dismissed. The burden of proving viability rests with A and must be determined at the time of the assessment, now, not some previous or later date.

152. The viability of A includes not only the premises where it is the tenant, but those where its subsidiaries are the tenant.

153. Mr Zelin drew attention to **Tab 23**, starting at page **134** of the bundle – A's Annual Report and Financial Statements for the year ended 31 December 2020. The auditor's report at page **142** refers to material uncertainty whether the company is a going concern. At page **146** the balance sheet shows a reduction in shareholder funds from over £92 million to a deficit of £32 million. Note 11 page **166** highlights the corporate interdependency.

154. The Azet's report at page **128** on which R rely, indicates that A' s historic performance prior to the pandemic, shows it was a viable business model, but looking at the business now it is not viable and would not be viable even if the whole of the £1.8 million of PRD were written off (page **2011** of the bundle).

155. In 2020 A made a loss of over £144 million compared with a profit before tax of £5.1 in 2019. The draft accounts for 2021, provided without any explanatory notes show the loss before tax in that year was over £12 million and a total loss of over £9 million.

156. In addition to other concerning features of A's financial performance, its potential liability under a guarantee entered in February 2018 to secure group debts to its lenders, suggests A is guaranteeing group debts of over $5 billion. This in R's view is where the real weight A must bear is located.

157. **Tab 97** provides accounts for 2021 but these have not been audited and there are no reports or accounting records in support.

158. The Respondent submits that all the A companies including A are being restructured and will inevitably be involved in substantial further borrowing.

159. A measure of the seriousness of A's financial predicament is that a well-publicised plan to sell its cinemas did not produce a realistic buyer. The current restructuring suggests the unsecured creditors (including R) are in line for a dividend of less than 0.5p in the pound.

160. Section 16(3) requires the arbitrator to disregard the possibility of the tenant borrowing money or restructuring its business. The Respondent submits the only thing keeping A going is the life support provided by the Chapter 11 bankruptcy protection from the court in Texas. If the Chapter 11 plan fails (a distinct possibility), winding up of the group including A is inevitable (see the Disclaimer at page **1266** of the bundle).

161. But for the Chapter 11 restructure and new borrowing, A's position is hopeless and all they have produced to show viability are figures in relation to the cinema at X. The arbitrator has to deal with all of its business including all premises to determine viability.

162. Is A being restructured or is it simply a group restructuring under the Chapter 11 proceedings? Pages **188** and **191** make it quite clear that the "companies" including A are being restructured.

163. The Chapter 11 proceedings in the USA, if not entirely disregarded, make it abundantly clear that A is a party to the reconstruction exercise. Mr Zelin looked in detail at the Chapter 11 documentation in the bundle drawing attention to pages **786, 791, 797, 809, 827,832, 834, 835, 836, 838, 845, 854, 860, 863, 865, 868, 873, 874, 890, 894, 903.**

164. A Review of these references indicates in virtually all the elements (Term Sheets) forming the proposed Chapter 11 reorganisation plan, A is an integral part as an intercompany creditor and as a debtor. These include the Real Estate Plan and the Restructuring Term Sheet.

165. The Respondent submits A itself is clearly being restructured. Very little real information in relation to A has been provided by Mr K in his witness statement see tab 3 page **13**. There is no backup material or explanation nor before and after balance sheets. Only information relating to the cinema at X is provided, and even here the anticipated profit of £242,000 will not be sufficient to wipe out the losses for the X cinema in 2020 and 2021 (see page **2070**).

166. A has to establish it is not restructuring and won't use any borrowing, but the restructure facilities indicate that it is and it will.

167. A has used the CRCA arbitration scheme to its benefit together with the Chapter 11 protection. On 2 August 2022 they served a section 10 CRCA notice knowing they would have to establish viability. This was at a time when they were already considering Chapter 11. On 22 August T (another A cinema and a different landlord) presented its winding up petition. On 7 September the Chapter 11 petition was presented in Texas which among other consequences stopped the T proceedings. On 9 September A entered the DIP credit agreement (guarantee) which released working capital and enabled it to continue to trade. On 22 September the X PRD was referred to arbitration and on 23 September A applied to stay the winding up proceedings. On 14 October A's solicitors asked for time to serve second section 11 proposals in relation to relief and recently suggested this hearing be put back to June 2023 when the restructuring under the Chapter 11 proceedings may have progressed.

168. R's conclusion is that, but for the Chapter 11 proceedings and the reconstruction and refinancing that continues to be negotiated under the protection of

the Texan court, both the group and A's position would be hopeless, and A would have been wound up by now.

169. A has not produced any evidence that suggests otherwise. All Mr K has provided are management accounts that suggest that in isolation the cinema at X would be a viable proposition. But that is not the question. The question is whether, judged as at the date of assessment and disregarding any possibility of borrowing or reconstructing, A's business is viable. It clearly is not. X cannot be divorced from the rest of the business. For as long as it remains part of A's business it will, without a successful restructuring and/or borrowing, be dragged down and drown in an ocean of debt.

170. **A Case – is set out in the skeleton argument para 37- 51 and Mr Pryor's submissions at the hearing on 16 May.**

171. The assessment of viability (section 16) requires the arbitrator to have regard to the assets and liabilities of the tenant including any other tenancies, previous rental payments, the impact of coronavirus on the business, and any other information relating to the financial position of the tenant the arbitrator considers appropriate. The arbitrator must disregard the possibility of the tenant borrowing money or restructuring its business.

172. The Respondent suggests a time limit by which A should demonstrate it will be viable, perhaps 24 months but you are required to approach the exercising in a common-sense way and may for example conclude a substantial right-off of the PRD leaving a more modest monthly payments over 24 months is the way to achieve viability.

173. A accepts it has a big problem, a large debt owed by the parent company, incurred to facilitate the acquisition of the "Z" group of cinemas in North America in 2018. A provided internal guarantee for this and in September 2022 and also entered a DIP credit guarantee at the start of the Chapter 11 process to ensure working capital and enable it to continue trading. A's problem arises because it is a guarantor.

174. What does section 16.3 require the arbitrator to disregard? S.16(3)(b) refers to "restructuring **its** business". What A is doing is to restructure by writing off its external debt.

175. The Chapter 11 restructure is being undertaken by the A group, not A, to get rid of debt (and the obligations of the group companies as guarantors). This is not a restructuring of A's business.

176. The Chapter 11 restructuring should happen within a few months, and it is appropriate for the arbitrator to take this into account.

177. A accepts that the overall Chapter 11 process involves some restructuring of A itself. It is a complicated process with a whole host of restructuring elements.

178. The Applicant submits S16(3) requires the arbitrator to distinguish between restructuring of the group, which can be taken into account, and restructuring by A which cannot. This is not an artificial distinction, s.16(3)(b) refers to "*it's"* business.

179. A is a viable underlying business, but with a huge underlying liability to the group. Rent is owed to R and other landlords, but overall A is a "cash cow" to the A parent/group. As such there is no reason why the parent would "pull the plug" on A, so

even if it takes a long time to implement the restructuring and resolve the group problems, the parent is not going to do anything that would jeopardise the future of A.

180. The arbitrator should have regard to the parts of the Chapter 11 reconstruction which relate to the group but disregard those that relate to A.

181. **In reply, Mr Zelin** referred to the interplay between section 15 (2) and 16(3). The arbitrator must disregard anything done by the tenant with a view to manipulating their financial affairs so as to improve their position in relation to an award to be made under section 14, when the tenant's viability is considered for a second time. S.15(2) is therefore applicable to the assessment of viability for the purpose of S.13(3) and (4).

182. The assessment of viability must be made now, not in the future, although the arbitrator should take future projections into account for at least a reasonable period.

183. A's main argument is that the arbitrator should separate the restructuring of the group from the restructuring of A, but there is clearly only a single package. A and the parent are entirely interconnected.

184. A's financial problems go beyond the existing guarantees. It is entirely dependent on the success of the Chapter 11 plan and at present it is entirely dependent on the support of the parent and the Chapter 11 protection.

185. In essence the recovery plan is to exchange debt for equity with secured creditors taking risk. The 2022 DIP A guarantee is for $1.9 billion. Under the Chapter 11 arrangements A will still have guarantee obligations of $1.4 billion.

186. The additional page provided with the A skeleton (with the blue bar at the top) indicates that even on their own projection, A's net assets in 2023 will be £11 million, reducing to £4 million in 2024 and less than £3 million in 2025. There is a significant likelihood A will need to borrow in the next two years even if the Chapter 11 package is adopted and proceeds to implementation in the USA and UK.

187. The Respondent submits the arbitrator cannot separate out the various strands of the restructuring package, but if you do, and concentrate on just A's business in the UK, they have provided no evidence about the financial position of the other cinemas. We have no idea if they have resolved issues with other landlords. There is no evidence showing how other cinemas are performing as compared to X. A has the burden of proof but there is no proof. You cannot pick out various restructuring strands or elements, it is all or nothing. A cannot show it is viable or will be viable within a reasonable period.

188. Following the hearing, **Mr Zelin** provided an unsolicited further brief submission which I permitted, and Mr Pryor provided a similarly brief response.

189. **Mr Zelin** made two points. The second was a technical one which is not of primary importance. The first considered A's suggestion that one can separate out those parts of the restructuring that relates solely to A, but there is no indication of how it might be done. If it were possible just to remove that part that involved the removal of the intercompany liabilities and the general unsecured creditors, that would result in an immediate liability for unsecured debts including the judgement debt owed to T and other rent arrears in relation to other leases (see **217)**. Leaving out X (S.16(3), and in the

absence of evidence in relation to the other cinemas, the Respondent estimates there would be an immediate liability of £7 million that A cannot pay. The consequence is that it would be wound up on the T petition. All that is preventing this is the Chapter 11 stay.

190. The reality is that the A restructure could not happen without the rest of the restructuring transactions (and vice versa). The Respondent's primary submission is that it all needs to be considered and either taken into account or disregarded together.

191. **Mr Pryor's** response was that the arbitrator is required to disregard the possibility of the tenant restructuring "**it's**" business, so in the case of the restructuring of the group of which the tenant is part, it is necessary to disregard the aspect of the restructuring which relate to the particular business. That is the effect of the restructuring on A's business, not the restructuring of the rest of the group. It may be the case that it would not have been possible to carry out separate restructuring of A and the rest of the group, but that is not the point. The arbitrator is invited to carry out the artificial exercise of ignoring reality, and in so doing the arbitrator should follow the statute and not be concerned with the fact that it requires an artificial exercise. The arbitrator must consider "it's" business and not any other party's business.

192. Looked at in isolation, A's projected profit for 2023 is over £23 million and therefore A is viable.

193. **Discussion.** The viability assessment for CRCA arbitration must, of necessity cover the PRD of a wide range of tenants ranging from small businesses in the hospitality sector where the sums involved are modest to international corporate entities where the PRD may be several million pounds (as here) and involve the consideration of financial positions following the pandemic that require a review of financial data with figures in the billions of pounds. The Act and the Guidance are designed to assist the arbitrator in the assessment of tenant viability and the necessary consideration of a very wide range of business models.

194. A accepts they have the burden of proving their business is today (the time of the assessment) viable or would become viable if it were to be given relief from payment of the PRD. The standard of proof required is the balance of probability.

195. The quality and extent of the material or evidence by which A, a substantial international organisation, proves it's viability, should clearly be more comprehensive and sophisticated than could reasonably be required of a small business. R submit that A have offered wholly insufficient evidence and materials such as financial statements, reports, and other information to prove their business is or will become viable.

196. It is noticeable that by far the greater part of the material relied on and contained in over 2200 pages of the hearing bundle were provided by R from publicly available sources, and very little material was provided or is relied upon by A.

197. Section 16 of the Act provides the basis for the arbitrator's assessment of viability.

198. The arbitrator is to have regard to S.16(1) (a-d) - the assets and liabilities of the tenant including any other tenancies to which the tenant is a party; the previous rental payments made by the tenant; the impact of coronavirus on the business of the

tenant; and any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

199. Section 16(3) (a and b) provides that the arbitrator must disregard the possibility of the tenant borrowing money or restructuring its business.

200. The Guidance provides helpful indicators and evidence to assist with the determination of viability. The exercise is to be undertaken in a *holistic and common-sense way* considering the circumstances of the business. There is a helpful table of possible indicators and evidence, but no one indicator should be used to determine whether a tenant's business is viable (6.10).

201. The arbitrator is to assess whether the business is viable (or would be viable) if relief were given at the time of the assessment (6.11).

202. Smaller businesses may find it challenging to provide predictions on their future profitability, detailed financial records, or liquidity or other ratios as compared to a larger business, but both parties should be aware that the better the quality of the information provided, the more it will assist the arbitrator in determining the dispute (6.13).

203. R accept A's business was viable before the pandemic (Azet's report, tab 21 page **118 -132**).

204. A's funding of the Z cinema chain acquisition in 2018 included the provision of very substantial intergroup guarantees and guarantees to lenders by group companies including A. These potential and actual liabilities are a burden the pandemic exposed and a major reason for the seriousness of their current financial predicament.

205. The Impact of the pandemic with the long periods of complete closure and severe restrictions on attendances in other periods was catastrophic. The evidence provided by R (not challenged by A) is that A and the group had used all working capital and borrowing facilities by September 2022 and were obliged to file for Chapter 11 protection in the USA. At the same time in the UK, the enactment of the CRCA provided an arbitration mechanism where landlords and tenants were unable to agree how to deal with rent arrears that had built up during the pandemic. The right to and qualifying criteria for, such arbitrations is provided in Sections 9 to 11 of the Act.

206. A applied for the appointment of arbitrators in relation to a number of cinema premises involving various landlords. These included R and the X cinema where the agreed PRD is £1,836m.

207. Under the statutory arbitration scheme, the arbitrator is required to determine if the tenant should be granted partial or even complete relief from payment of the PRD, but only in relation to businesses that are or will be viable within a reasonable period.

208. R submits the evidence clearly establishes that A is being restructured and will probably have to borrow large sums of money in the future. It is guaranteeing billions not millions of pounds and is only trading because of the Chapter 11 protection.

209. The financial information publicly available or provided by A in relation to the years 2019, 2020, 2021 and 2022 shows it is not viable. For example, the 2019 audited accounts which were concluded in 2020 included "Material Uncertainty as a going

concern". (**142**). Subsequent accounts for 2021 have not been audited and there is no backup or notes to support the 2021 draft accounts. The only data for 2022 are management accounts consisting of a sheet of numbers with no explanation, backup material or other information whatsoever.

210. While the Azet report confirms A was a viable business in 2019 it has not been since and is not viable at present. The Respondent accepts the change is the result of the catastrophic impact of the pandemic, but Azet calculate on the basis of its pre-pandemic performance, A's problems will take between 9 and 70 years to resolve based on current trading indicators.

211. R submits the greatest financial problem facing A are the creditor and intercompany guarantees.

212. The Respondent, anticipating A will seek to distinguish between the group restructuring in relation to the Chapter 11 proceedings in the USA and the position of A itself and in isolation, identified the very extensive references in relation to the Chapter 11 filing and petitions that show that A is an integral part of the Chapter 11 restructuring.

213. The Chapter 11 restructure should therefore be disregarded in the assessment of viability.

214. A has not provided evidence that it is viable. It's only hope of survival is the success of the Chapter 11 process which is far from certain.

215. A cannot establish viability without including the possibility it will borrow money or restructure its business, and I note R's assessment that the restructuring of debt for equity by the secured creditors does not mean A's liability under the DIP guarantee of $1.9bn will be removed, the plan includes new borrowing by A group that A will have to guarantee to the extent of $1.4bn. This makes it rather more than a "possibility" that A will both borrow money and restructure its business. I further note that only about $644m of the $1.4Bn is likely to be available for all A companies as working capital.

216. None of this analysis was challenged by A in their submissions and the hearing.

217. R also point out that the profit projection provided as part of the A skeleton argument (<u>not as a witness statement that complies with the requirements of S. 12 of the Act and therefore to be ignored</u>) indicates net assets in 2023 of £11m, reducing to £4m in 2024, and under £3m in 2025, hardly the basis on which A can achieve and maintain viability on its own, without group support.

218. Mr Pryor conceded A have very large debts and that the intercompany and other lender guarantees are a "big problem". He further conceded that A is being restructured as part of the Ch 11 process, but S.16(3)(b) refers to *restructuring "<u>it's</u>" business.* This means the arbitrator must disregard the A restructuring part of the Chapter 11 process while having regard to the part of the chapter 11 restructuring that relates to the A group. It is not clear how this de-coupling could work in practice and how on a *common-sense* basis an arbitrator can make the distinction in the assessment process.

219. A suggest the restructuring should be approved and proceed to implementation soon, but one is entitled to be somewhat sceptical about the timeline given the rate of progress to date and the extent to which creditors will support the plan when many of the "classes" will lose 99.5% of the sums due to them.

220. A while conceding the A group Chapter 11 plan (which should be regarded in assessing A's viability), "could" fail, nevertheless seek to assure me there is no risk the group would "pull the plug" on A since it is a "cash cow" within the group. It may well be but its future guarantees of $1.4bn are surely an enormous potential millstone around its neck and a liability I should have regard to under S.16(1)(a) and (d) if not S.16(3).

221. R's response to A's separation of "it's" business from the group restructuring, is that you cannot separate the strands of what is one restructuring plan, and I must disregard all or none of the Chapter 11 restructuring. If I disregard all of it, A is not viable and has no realistic prospect of becoming viable.

222. Mr Pryor confirmed the assessment of viability is to be conducted in a "holistic *and common-sense way*," but in support of his separation of A from A group business within the Chapter 11 plan, giving regard to the group strand but disregarding the A strand, says in his email on 17 May,

"*It may be the case that it would not have been possible to carry out the separate restructuring of CCL and the rest of the group, but that is not point. The arbitrator is invited to carry out the <u>artificial exercise of ignoring reality</u>, and in so doing the arbitrator should follow the statute <u>and not be concerned with the fact that it requires an artificial exercise.</u> The arbitrator must consider "it's" business, and not any other party's business.*"

223. This submission contradicts Mr Pryor's earlier view during the hearing that the separation is "not an artificial distinction" – see para 178 ante.

224. The suggestion that I should carry out an artificial exercise that ignores reality is not a common-sense approach. A is an integral part of the Chapter 11 plan to restructure, and the strands cannot be separated, they are interwoven as Mr Zelin's exhaustive references clearly establish. The separation concept is not just an artificial exercise that requires a suspension of reality but a deeply unfair exercise that does not comply with the Arbitrator's principles in Section 15 of the Act. A is asking for its cake and to eat it.

225. Having carefully considered the evidence and submissions and for the reasons set out, I am satisfied and have concluded that A cannot be separated from the A group in considering the restructuring plan.

226. R have clearly established A is an integral part of the Chapter 11 restructuring plan. The plan is as critical to A and therefore its viability as it is to the future of the A group as a whole. I agree with R the strands cannot be separated and to try to would be an artificial exercise requiring me to ignore reality. To do so is not a common-sense approach to the assessment of viability but an exercise that produces a result that is unfair to the Respondent and a breach of the S. 15 Arbitrator's principles.

227. S. 16(3) requires the arbitrator, in making an assessment, to disregard the possibility of the tenant borrowing money or restructuring its business. The Respondent has established the real possibility A will borrow money and is restructuring its business, and A's only response is that A group is unlikely to "pull the plug" on its "cash cow". This ignores A's creditors.

228. It follows that to comply with section 16 (3)(a) and (b), I must disregard the entire Chapter 11 process in assessing the viability of A's business.

229. In answer to my question during the hearing - if I disregard all the Chapter 11 restructuring, is A viable on a stand-alone basis.? Mr Pryor responded that in that case it cannot be viable because of the current guarantees.

230. I accept Mr Zenil's submission in his email submission on 16 May following the hearing in relation to A's position on a stand-alone basis,

"W*e have no direct evidence of the level of the arrears at the other cinemas, but they are likely to be similar in amount to the arrears at X and the T, say £1.8 million each. So there would be an immediate liability of £7 million that A cannot pay, leaving aside any other GUC creditors and the outstanding pre-Chapter 11 rent and other liabilities of its 15 subsidiaries. Being unable to meet the liabilities, A would be wound up on the T petition. All that is preventing that is the Chapter 11 stay*."

231. A's viability is dependent on the very real possibility that it will borrow money and restructure its business. Without the separation of A and the A group and then having regard to the group restructuring but not A's, it's position on viability is untenable. Their viability is dependent on the Group restructuring plan which I must disregard. The only conclusion is that the A business is not viable and would not be viable even if it were given relief from payment of any kind in relation to the Protected Rent Debt.

232. Even if it were appropriate to separate A from the A group in the assessment and give regard to all the Chapter 11 plan or the group strand only, there is a further reason why the Applicant has not established the business is viable.

233. The assessment of viability depends on the quality of the information, material and evidence submitted by the parties and especially the tenant who has the burden of proving that it is or will become viable if granted relief from payment. Large corporate entities are expected to put forward more detailed and sophisticated material and evidence in relation to the assessment of viability than smaller tenant businesses (Guidance para 6.13).

234. As a substantial part of a large international group, A has recourse to detailed and sophisticated resources from internal systems and external advisers. They are clearly utilising such resources in the development of A's part of the Chapter 11 plan. It is reasonable to suggest they could and should have produced much of the type of material identified in the table of possible indicators and evidence at the end of section 6 of the Guidance.

235. The only financial data, material and evidence provided in support of its viability are the witness statements and supporting exhibits of Mr K. These provide little

of the material it is reasonable to expect from a company of the size and sophistication of A. I agree with R, A have provided little if anything to support the proposition that A's business is viable or would become viable if it were to be given relief. There is no commentary or explanation of the financial records exhibited by Mr K.

236. His second statement, which introduced the management account forecast for 2023 does not contain any explanation of the basis for the forecast, and the further forecasts with projected results for 2024 and 2025 introduced as part of Mr Pryor's skeleton argument are similarly lacking in any explanation whatsoever and have to be disregarded as they do not comply with the requirements of Section 12 of the Act.

237. Given the almost complete lack of meaningful witness evidence I am not satisfied A have met the burden of proof and established on the balance of probability the company is viable or would be viable if given relief.

238. For these reasons, my assessment of the viability of A's business leads to the conclusion and I therefore determine that A's business is not viable and would not be viable even if A were to be given relief from payment of any kind.

239. Section 13 (3) of the Act therefore requires that I must make an award dismissing the reference.

240. CONCLUSION – Preliminary Issue 1

I have concluded the Applicants reference is not outside the jurisdiction of the arbitrator as confirmed by the Commercial Rent (Coronavirus) Act 2022 and that the reference to arbitration should not be dismissed.

241. CONCLUSIONS – Preliminary Issue 2

242. **I have concluded that A cannot be separated from the A Group in considering the restructuring plan.**

243. **Section 16(3) requires the arbitrator, in making an assessment, to disregard the possibility of the tenant borrowing money or restructuring its business. The Respondent has established the real possibility the Applicant, A, will borrow money and is restructuring its business.**

244. **To comply with section 16(3) (a) and (b), I must disregard the entire Chapter 11 restructuring process in assessing the viability of A's business.**

245. **A's viability is dependent on the very real possibility it will borrow money or restructure its business. Without the separation of A and the A group and then having regard to the group restructuring but not A's, the tenant's position on viability is untenable. Their viability is dependent on the group restructuring plan which I must disregard in the assessment of viability. The only conclusion is that**

the A business is not viable and would not be viable even if it were given relief from payment of any kind in relation to the Protected Rent Debt.

246. **Given the almost complete lack of meaningful witness evidence I am not satisfied A have met the burden of proof and established on the balance of probability the business is viable or would be viable if given relief from payment of any kind.**

247. **For these reasons, my assessment of the viability of A's business leads to the conclusion and I therefore determine, that A's business is not viable and would not be viable even if A were to be given relief from payment of any kind.**

248. **Section 13(3) of the Act therefore requires that I make an award dismissing the reference.**

COSTS

249. At the conclusion of the hearing on 16 May 2023, the parties agreed that if the Arbitrator concluded that A's business was not viable, the reference must be dismissed. In this event it was agreed I would provide a view in relation to the arbitration costs and apportionment and give the parties seven days in which to make any submissions in response following which I would issue a final award to include costs.

250. I provided a Note with my view as to Costs on 19 May 2023. On 26 May the Respondent provided submissions as to costs. In substance they were successful, and the Applicant's case is dismissed. Without the preliminary issues the arbitration would have continued and both parties would continue incurring costs. The preliminary issues have prevented additional arbitration costs and avoided further party costs which are irrecoverable in any event, The costs award should also reflect the Applicant's decision to initiate arbitration at a time when it was aware it was subject to insolvency proceedings and could not expect to surmount the CRCA Tenant viability test.

251. The Applicant submitted its costs submission on 1 June (following a permitted extension of time), in which they agreed with the arbitrator's proposals in the "Note" of 19 May. In response they explained they had started the arbitration in good faith and in the expectation the insolvency issues would not have been relevant when the viability assessment was undertaken. The oral hearing was the exclusive request of the Respondent who should pay the additional fee as provided in S.20(7), and not the 50% provision in S.20(6).

252. Sections 19 and 20 of the Act deal with arbitration fees and expenses. S.19(4) provides the Applicant must pay the arbitration fees in advance of the arbitration taking place. The applicant has paid the fees to CIArb (fixed at £6000). S.20 provides the party requesting an oral hearing must pay an additional fee for the hearing (£1000) in advance. The Respondent has not paid this fee to CIArb who advise it is payable to the Arbitrator.

253. S.19(5) and (6) provide that for S.13(3) Awards, the general rule is that the arbitrator must require the Respondent to reimburse the Applicant for half the arbitration fees. However, the general rule will not apply if the arbitrator considers it more appropriate in the circumstances of the case to award a different proportion (which may be zero) – S.19(6)

254. Similar provisions apply in relation to oral hearings (S.20(6) and (7)).

255. Subject to the specific provisions of the Act, Section 61 of the Arbitration Act 1996 applies, and costs should be awarded on the usual principle and follow the event except where in the circumstances this is not appropriate in relation to the whole or part of the costs.

256. In CRCA arbitration, the parties meet their own legal and other costs, and the cost exercise for the arbitrator is limited to the arbitration fees and oral hearing fee.

257. In this arbitration the Respondent required an oral hearing of the two preliminary issues it identified when A gave S.10 Notice in September 2022. The Respondent consistently maintained the Applicant could not establish the viability of its business.

258. The Respondent was unsuccessful in the first issue but successful in the second, viability, but the arbitrator is required to assess this as the first stage of the arbitration in any event. The Respondent having succeeded as to viability of the tenant's business, the final award must dismiss the reference.

259. Adopting the principal that costs should follow the event, I am persuaded the circumstances justify a departure from the general rule in S.19(5).

260. The time spent on the two issues at the hearing and in preparation of the award, while not equal, was not dissimilar, about 40% for Issue 1 and 60% for Issue 2.

261. I am not persuaded the Applicant anticipated its insolvency issues would be overcome by the time an arbitrator came to consider the viability of its business, but I do not agree with the Respondent it was always inevitable the reference would fall at the viability hurdle. It was therefore an arguable case for the Applicant to advance. Accordingly, while 50% contribution would be unfair to the Respondent, a more modest contribution of £1000 is appropriate in the circumstances.

262. The Respondent submits that but for the oral hearing of preliminary issues, the arbitration would be ongoing. This overlooks the fact they were unsuccessful in the jurisdiction issue and while successful as to viability, would have succeeded in the assessment under S.16 leading to a S.13(3) Award and dismissal of the reference without an oral hearing. My conclusion is that the oral hearing, while obviously helpful in the viability assessment was not essential (the excellent Skelton arguments with suitable documentation in support would have been sufficient) and I must not overlook the

intention in the Guidance, that CRCA arbitrations will usually be conducted on a "documents only" basis.

263. I have concluded that in the circumstances the Applicant should not pay 50% or other contribution to the fixed £1000 arbitration fee for the oral hearing which is payable by the Respondent.

FINAL AWARD

(a) **As to Preliminary Issue 1 – The Applicants reference is not outside the jurisdiction of the arbitrator as confirmed by the Commercial Rent (Coronavirus) Act 2022 and the reference to arbitration should not be dismissed.**

(b) **As to Preliminary Issue 2 – having assessed the viability of the Applicant, A's business, I determine the business is not viable and would not be viable even if A were to be given relief from payment of any kind, and pursuant to Section 13(3) Commercial Rent (Coronavirus) Act 2022 I hereby Award that the reference be dismissed.**

(c) **The Respondent shall within 7 days of this Award pay £1000 to the Applicant as a contribution to the Arbitration fees as provided in S.19(6) of the CRCA 2022.**

(d) **The Respondent has responsibility for payment of the fixed arbitration fee of £1000 in relation to the oral hearing. The Applicant is not required to make a payment to the Respondent in relation to the Oral hearing fees as provided by S.20(7) of the CRCA 2022.**

This Final Award is made in Sutton, Surrey, UK on 6 June 2023.

Signed ……………………………………………………………………………….

Charles L Brown. LLB. FCIArb.

Chartered Arbitrator.