

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

**BETWEEN**

**[Name Redacted]**

**Applicant**

**and**

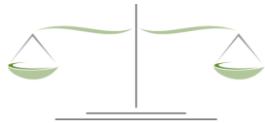
**[Name Redacted]**

**Respondent**

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

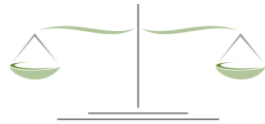
**Arbitrator's Final Award**

**12<sup>th</sup> July 2023**



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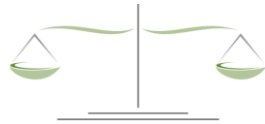
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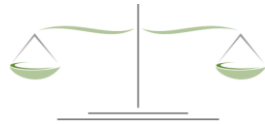
## 1.0 Introduction

- 1.1 In this arbitration, the Applicant is [Name Redacted] (“the Applicant”), [Address Redacted]. The Applicant is represented by Mr Mark Lomax Director of Lomax Property Consultancy Limited.
- 1.2 In this arbitration, the Respondent is the [Name Redacted] (“the Respondent”, together “the Parties”), [Address Redacted]. The Respondent is represented by Mr Mark Robertson, Partner at Bevan Brittan LLP.
- 1.3 The Applicant is the tenant under a lease of cinema premises known as [Name Redacted] (“the Premises”) dated 24<sup>th</sup> September 2004 made between (1) the Respondent and (2) [Name Redacted] (“the Lease”). The Lease was granted for a term of 25 years from 24<sup>th</sup> September 2004 (expiring on 23<sup>rd</sup> September 2029).
- 1.4 There is a dispute in relation to the matter of relief from payment of a protected rent debt arising under the Lease pursuant to section 9 of the Commercial Rent (Coronavirus) Act 2022 (“the CRCA”).
- 1.5 On 14<sup>th</sup> 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 28<sup>th</sup> February 2023, the CI Arb appointed me, Niall Lawless, as Arbitrator to make an Award(s) in this dispute and I accepted the appointment.
- 1.7 On 1<sup>st</sup> 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 CRCA; 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 CRCA, the Arbitrator provided the following outline timetable:
  - The Applicant shall serve its submissions no later than Wednesday 15<sup>th</sup> March 2023.
  - The Respondent shall respond to the Applicant’s submissions no later than Friday 14<sup>th</sup> April 2023.



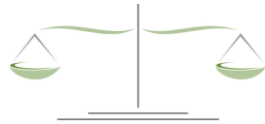
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- The Applicant shall serve any reply to the Respondent's response no later than Friday 28<sup>th</sup> April 2023.
  - The parties should expect the Arbitrator's Stage 2 Award not later than Friday 12<sup>th</sup> May 2023.
- 1.9 In respect of the process and timetable, the Arbitrator invited the Parties to make any submissions that they wished to make before the end of Friday 3<sup>rd</sup> March 2023.
- 1.10 However, at a preliminary meeting on 10<sup>th</sup> March 2023, the Respondent informed the Arbitrator that there was no dispute as to eligibility and that it was therefore willing to proceed to submissions on Stage 3 (the matter of relief from payment). With the Parties' consent, the Arbitrator then issued the following directions:
- The Applicant shall serve its submissions no later than Wednesday 29<sup>th</sup> March 2023.
  - The Respondent shall respond to the Applicant's submissions no later than Friday 12<sup>th</sup> May 2023.
  - The Applicant shall serve any reply to the Respondent's response no later than Friday 2<sup>nd</sup> June 2023.
  - The parties should expect the Arbitrator's Stage 3 Award not later than Friday 16<sup>th</sup> June 2023.
- 1.11 The Applicant sent its submissions electronically on Wednesday 29<sup>th</sup> March 2023.
- 1.12 The Respondent sent its response submissions electronically on Friday 12<sup>th</sup> May 2023.
- 1.13 The Applicant sent its reply to the Respondent's submissions electronically on Friday 2<sup>nd</sup> June 2023.
- 1.14 On Tuesday 6<sup>th</sup> June 2023, the Respondent e-mailed the Arbitrator that the Friday 2<sup>nd</sup> June 2023 submission contained additional information and requested the opportunity to file a response to the reply before 16<sup>th</sup> June 2023.
- 1.15 On Tuesday 6<sup>th</sup> June 2023, the Arbitrator adjusted the Stage 3 timetable for this Arbitration as follows:
- The Applicant served its submissions no later than Wednesday 29<sup>th</sup> March 2023.
  - The Respondent responded to the Applicant's submissions no later than Friday 12<sup>th</sup> May 2023.
  - The Applicant served its reply to the Respondent's response no later than Friday 2<sup>nd</sup> June 2023.
  - The Respondent shall serve its Rejoinder to the reply to the Respondent's response no later than Friday 16<sup>th</sup> June 2023



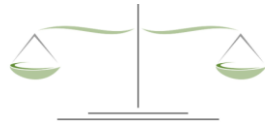
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- The Applicant shall serve its Surrejoinder (if any) to the Respondent's Rejoinder no later than Friday 23<sup>rd</sup> June 2023
  - The parties should expect the Arbitrator's Stage 3 Award not later than Friday 7<sup>th</sup> July 2023.
- 1.16 On Wednesday, 21<sup>st</sup> June 2023 the Applicant e-mailed the Arbitrator that whereas the deadline for the Respondent's Rejoinder was to be no later than Friday 16<sup>th</sup> June 2023, it had not been received. Accordingly, it would not be possible for the Applicant to submit its Surrejoinder no later than Friday 23<sup>rd</sup> June 2023.
- 1.17 On Wednesday, 21<sup>st</sup> June 2023 the Respondent replied that it had intended to send its Rejoinder on Friday, 16<sup>th</sup> June 2023, but due to an administrative error it had not been sent. The Respondent enclosed its Rejoinder, and confirmed that it was happy for there to be an extension of time for Applicant to submit its Surrejoinder.
- 1.18 On Thursday, 22<sup>nd</sup> June 2023, the Arbitrator adjusted the Stage 3 timetable for this Arbitration as follows:
- The Respondent served its Rejoinder to the reply to the Respondent's response on Wednesday 21<sup>st</sup> June 2023
  - The Applicant shall serve its Surrejoinder (if any) to the Respondent's Rejoinder no later than Wednesday 28<sup>th</sup> June 2023
  - The parties should expect the Arbitrator's Stage 3 Award not later than Wednesday 12<sup>th</sup> July 2023.
- 1.19 On Wednesday, 28<sup>th</sup> June 2023 the Applicant sent its Surrejoinder to the Respondents Rejoinder.
- 1.20 On Friday, 7<sup>th</sup> July 2023 the Arbitrator asked the Parties to make additional submissions in respect of the CRCA section 14(7) 'payment date' and the allocation of the Arbitrator's fees. The Parties made submissions on Tuesday, 11<sup>th</sup> July 2023.
- 1.21 Accordingly, the Arbitrator has made his Award in this Arbitration based on documents only. The documents included the Applicant's submissions (*Wednesday 29<sup>th</sup> March 2023*), and Respondent's response submissions (*Friday 12<sup>th</sup> May 2023*), the Applicant's reply to the Respondent's submissions (*Friday 2<sup>nd</sup> June 2023*), the Respondent's Rejoinder (*Wednesday 21<sup>st</sup> June 2023*), the Applicant's Surrejoinder (*Wednesday 28<sup>th</sup> June 2023*), and the Parties' additional submissions on the CRCA section 14(7) 'payment date' and the allocation of the Arbitrator's fees (*Tuesday 11<sup>th</sup> July 2023*).



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1.22 The professionalism of the Parties' representatives, on behalf of the Applicant Mr Mark Lomax Director of Lomax Property Consultancy Limited, and on behalf of the Respondent Mr Mark Robertson Partner at Bevan Brittan LLP, has greatly assisted the Arbitrator.

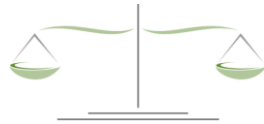


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## 2.0 Party's contentions and Award sought

### Applicant

- 2.1 The Applicant says that it leases the Premises for the purposes of its [Business Type Redacted].
- 2.2 The Applicant says that according to section 4 of the CRCA it was adversely affected by the Covid-19 pandemic, because the whole or part of its Premises were subject of three Hospitality sector national lockdown closure requirements, and that in addition there were three periods where it was required to close the Premises at specific times.
- 2.3 The Applicant says that the time periods during which the Applicant's business was adversely affected by the Covid-19 pandemic were:
  1. 21<sup>st</sup> March 2020 to 3<sup>rd</sup> July 2020 (National Lockdown 1): The Applicant says that although the first lockdown measures were not in place until 26<sup>th</sup> March 2020 (*The Health Protection (Coronavirus Restrictions) (England) Regulations 2020*), the nation was in effect under lockdown from 16<sup>th</sup> March 2020 following the Prime Minister's televised instructions to 'stop non-essential contact and travel' and subsequently on 23<sup>rd</sup> March 2020 to 'stay at home'. As its customers followed these instructions admissions to the Premises collapsed overnight. The lockdown continued until 3<sup>rd</sup> July 2020 when these regulations were revoked.
  2. 14<sup>th</sup> October 2020 to 4<sup>th</sup> November 2020 (Tier 1 Closure Restrictions): The Applicant says that London was placed into Tier 1 (*The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020*) which required hospitality businesses to close at 10.00 pm. Restrictions had moved into Tier 3 by 17<sup>th</sup> October 2020. Although the impact on the Premises opening hours remained the same as Tier 1 in terms of closure requirements the requirement 'not to meet with anybody outside their household or support bubble in any indoor seating.' (*Local Covid 19 alert level update: 15 October 2020*) removed its audience completely.
  3. 5<sup>th</sup> November 2020 to 2<sup>nd</sup> December 2020 (National Lockdown 2): The Applicant says that pursuant to England's fourth lockdown law (*The Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020*) the Premises were required to close.
  4. 3<sup>rd</sup> December 2020 to 20<sup>th</sup> December 2020 (Tier 2 Closure Restrictions): The Applicant says that on 30<sup>th</sup> November 2020 the UK Government made new regulations to bring into force a new tier system (*The Health Protection (Coronavirus, Restrictions) (All Tier) (England) Regulations 2020*). London was placed into Tier 2 and remained there until it was escalated to Tier 4 on 21<sup>st</sup> December 2020. Under Tier 2 restrictions hospitality businesses were allowed to remain open but



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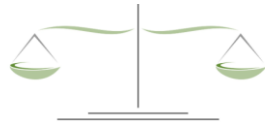
- they still had to close early, this time at 11.00 pm (instead of 10.00 pm as was required under the first system). Tier 2 also prohibited people from meeting those not part of their support bubble.
5. 21<sup>st</sup> December 2020 to 5<sup>th</sup> January 2021 (Tier 4 Closure Restrictions): The Applicant says that on 19<sup>th</sup> December 2020, the Prime Minister and the Government's Chief Scientific Advisor and Chief Medical Officer gave a press conference in which they stated urgent changes were needed to the coronavirus restrictions. They announced a new Tier 4 and said London, the South East and East of England would be placed in this tier the following day with a new alert level 'Stay at Home'. Tier 4 restrictions prohibited people from leaving their homes without a reasonable excuse, from meeting those not part of their household and/or support bubble. Hospitality businesses were ordered to close, including cinemas. London remained in Tier 4 up to the start of the third national lockdown on 6<sup>th</sup> January 2021.
6. 6<sup>th</sup> January 2021 to 16<sup>th</sup> May 2021 (National Lockdown 3): The Applicant says that the third national lockdown became effective at midnight on 6<sup>th</sup> January 2021 (*The Health Protection (Coronavirus, Restrictions) (No.3) and (All Tiers) (England) (Amendment) Regulations 2021*). The third national lockdown ended on 29<sup>th</sup> March 2021 beginning with step 1 of the Prime Minister's 'Road Map out of Lockdown' but cinemas were not allowed to reopen until step 3 on 16<sup>th</sup> May 2021.

#### Applicant's Proposal One

- 2.4 The Applicant says that rents due during the Protected Rent Period from 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021 were:

<u>Rent</u>	<u>Due</u>	<u>Paid</u>
21/03/20 - 24/03/20	£1,813.19	£0.00
25/03/20 - 23/06/20	£41,250.00	£0.00
24/06/20 - 28/09/20	£41,250.00	£0.00
29/09/20 - 24/12/20	£41,250.00	£0.00
25/12/20 - 24/03/21	£41,250.00	£0.00
25/03/21 - 23/06/21	£41,250.00	£0.00
24/06/21 - 18/07/21	<u>£10,631.44</u>	£0.00
Protected Period	£218,694.63	£0.00
Outstanding Protected Period Rent		<b>£218,694.63</b>





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2.5 Based on the above and the Applicant's Appendix 1 calculation, the Applicant asks the Arbitrator to decide:

1. That 100% of the Protected Rent Debt for the periods where the business was subject to a full closure requirement (i.e., where there was no ability to trade) is waived. This is a total of £127,762.90 plus VAT.
2. That 75% of the Protected Rent Debt for the periods where the business was required to close every day at particular times is waived. This is a total of £12,801.72 plus VAT.
3. That the balance of the outstanding rent for the Protected Period is settled in 24 monthly instalments, the first of which payments will be made on the 1<sup>st</sup> of the month following determination of this Arbitration. This is a total of £78,130.01 plus VAT repaid at a rate of £3,255.42 plus VAT per month.
4. That no interest is to be charged on late payment of that rent.
5. That each party pays their own legal and professional fees arising out of this Arbitration.

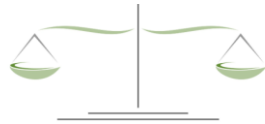
2.6 The Applicant points out that it does not seek any relief from payment of any insurance during the Protected Period.

#### Applicant's Proposal Two

2.7 The Applicant says that on 27<sup>th</sup> October 2022 the rent review dated 24<sup>th</sup> September 2019 was determined by an appointed arbitrator increasing the annual rent from £165,000.00 per annum to £175,000.00 per annum. This increases rent changes accrued in the outstanding Protected Period Rent to £231,948.85 and the Protected Rent Debt to £153,609.56.

2.8 The Applicant says that accordingly rents due during the Protected Rent Period from 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021 became:

<u>Rent</u>	<u>Due</u>	<u>Paid</u>
21/03/20 - 24/03/20	£1,923.08	£0.00
25/03/20 - 23/06/20	£43,750.00	£0.00
24/06/20 - 28/09/20	£43,750.00	£0.00
29/09/20 - 24/12/20	£43,750.00	£0.00
25/12/20 - 24/03/21	£43,750.00	£0.00
25/03/21 - 23/06/21	£43,750.00	£0.00
24/06/21 - 18/07/21	£11,275.77	£0.00
Protected Period	£231,948.85	£0.00



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Outstanding Protected Period Rent		<b>£231,948.85</b>
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2.9 Based on the above and the Applicant's Appendix 2 calculation, the Applicant asks the Arbitrator to decide:

1. That 100% of the Protected Rent Debt for the periods where the business was subject to a full closure requirement (i.e., where there was no ability to trade) is waived. This is a total of £135,506.11 plus VAT.
2. That 75% of the Protected Rent Debt for the periods where the business was required to close every day at particular times is waived. This is a total of £13,577.59 plus VAT.
3. That the balance of the outstanding rent for the Protected Period is settled in 24 monthly instalments, the first of which payments will be made on the 1<sup>st</sup> of the month following determination of this Arbitration. This is a total of £82,865.15 plus VAT repaid at a rate of £3,452.71 plus VAT per month.
4. That no interest is to be charged on late payment of that rent.
5. That each party pays their own legal and professional fees arising out of this Arbitration.

2.10 The Applicant points out that it does not seek any relief from payment of any insurance during the Protected Period.

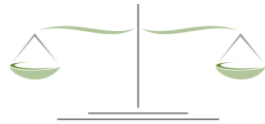
#### Respondent

2.11 Based on the Applicant's Proposal One, the Respondent says that its final proposal, was contained in its 22<sup>nd</sup> September 2022 letter to the Applicant.

2.12 That in accordance with that, the Respondent asks the Arbitrator to decide that:

1. The protected rent debt (as defined in section 3 of the CRCA) in the amount £218,694.63 be paid in full.
2. The protected rent debt be paid in equal monthly instalments of £9,112.28 (plus VAT) over a 24-month period.
3. The interest payable on the protected rent debt is reduced to zero.

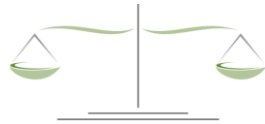
2.13 The Respondent says that the result of the rent review determination was that the rent payable under the Lease increased with effect from 24<sup>th</sup> September 2019 from £165,000.00 per annum to £175,000.00 per annum. Therefore, pursuant to the terms of the Lease a 'top up' rent payment fell due to be paid by the Applicant to the Respondent immediately after 27<sup>th</sup> October 2022. The



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proportion of that payment which relates to the protected period is £13,254.22 (“Additional Sum”), which is the amount in dispute between the Parties.

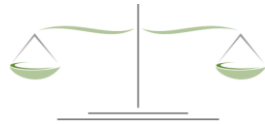
- 2.14 The Respondent says that the Applicant’s Proposal Two should be ignored because the Additional Sum cannot be treated as part of the protected rent debt which is the subject of this Arbitration.



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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 there are [Business Information Redacted].
- 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 that the consequence of the government's Covid-19 closure requirements and restrictions, was a significant and negative impact on the Applicant's business in 2020 and 2021.
- 4.3 The Applicant says that it generates sales from the [Business Information Redacted]. Accordingly, during the periods of Covid-19 pandemic closure customer numbers and sales were nil, and that during the periods of Covid-19 restrictions which included mandatory social distancing, sales were limited.
- 4.4 The Applicant says that the Covid-19 pandemic denied it of the opportunity to [Business Information Redacted].
- 4.5 The Applicant presents two sets of financial figures for the Arbitrator to consider. The first financial figures are the Applicant's Revenue, Operating Profit and Net Assets for 16 cinemas for the period from 2017 to 2022. The second financial figures are the profit and loss management statements for the Premises for the period from 2018 to 2022.
- 4.6 The Applicant says that whereas its Revenue and Earnings before interest, taxes, depreciation, and amortization ("EBITDA") for the year ending 31<sup>st</sup> December 2019 was £38,092,814 and the EBITDA was £4,232,528, the consequence of the Covid-19 pandemic for the year ending 31<sup>st</sup> December 2020 was to reduce Revenue to £10,995,270 with a negative EBITDA of -£2,302,615.
- 4.7 The Applicant says that in respect of the financial performance at the Premises, for the year ending 31<sup>st</sup> December 2019 the Revenue was £3,233,000 and the EBITDA was £717,000, the consequence of the Covid-19 pandemic for the year ending 31<sup>st</sup> December 2020 was to reduce the Revenue to £978,000 with a negative EBITDA of -£160,000.
- 4.8 Whereas the Applicant presents two sets of financial figures for the Arbitrator to consider, the Applicant says that the Arbitrator should consider the Applicant's business being carried on at the Premises is most relevant in considering the quantum of relief. The Applicant says that it makes no



commercial nor common sense to consider the Applicant's business as a whole, and that the protected rent debt is best considered against the specific business being carried on at the Premises.

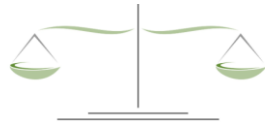
- 4.9 The Applicant says that in line with the Arbitrator's principle 15(a)(1)(i) which says that the Arbitrator's Award should be aimed at preserving the viability of the Applicant, the Arbitrator should decide to support the Applicant's formal proposal to pay £3,452.71 (plus VAT) per month for 24 months, because based upon the 3-Year Management Forecast for the Premises, the EBITDA for the Premises remains positive for the period from 2023 to 2025. Whereas if the Arbitrator should decide to support the Respondent's formal proposal that £9,112.28 (plus VAT) per month should be paid for 24 months, it returns the business at the Premises to a loss for 2023 and 2024, which by definition means that the Respondent's formal proposal does not comply with the Arbitrator's principle 15(a)(1)(i).
- 4.10 The Applicant says that the principal risk and uncertainties to the business include [Business Information Redacted], all of which require, or impact the ability of, the reinvestment of profits into the business to ensure that the quality of the products meet the customers' expectations whether it be through [Business Information Redacted].
- 4.11 The Applicant says that the available funds used to address these risks and uncertainties were exhausted during the pandemic and any relief will be important in enabling such investment to continue and thus assist the future viability of the business and, in particular, support the business' recovery over the next few years.
- 4.12 In summary, the Applicant says that although it is a viable business and is anticipated to return to pre-pandemic profit levels this will take some time, and a favourable Protected Rent Debt relief is required to support its recovery and the restoration of its viability.

#### Respondent

- 4.13 The Respondent acknowledges that the Covid-19 pandemic had a significant impact on the Applicant's business, as is evident by the Applicant's accounts for the years ending 2020 and 2021.
- 4.14 The Respondent says that other than the protected rent debt and the Additional Sum as set out at paragraphs 2.7 to 2.10 above, the Applicant has met all other rental liabilities under the Lease. This indicates that the Applicant is able to meet its liabilities under the Lease, which indicates that it is a viable business and is so irrespective of whether relief from payment is awarded.



- 4.15 The Respondent says that the principles to be applied when considering the matter of relief are that:
- 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; 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.
- 4.16 The Respondent says that in this Award, the Arbitrator's focus in establishing viability should be on current, not past financial performance; and refers the Arbitrator to section 6.11 of the CRCA guidance to arbitrators:
- "Accordingly, any indicators of viability and any evidence reviewed should be used to assess viability 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".*
- 4.17 The Respondent says that in the Applicant's Friday 2<sup>nd</sup> June 2023 reply to the Respondent's response, the Applicant included a profit forecast for the years 2022 to 2025. The Respondent says that for the years 2023 to 2025 (when the 24-month repayment period of the Respondent's proposal would apply), the Applicant is forecasting a significant profit: £2.87million (2023), £4.23million (2024) and £4.57million (2025). The Respondent says that this emphasises that payments of £9,112.28 per month over a 24-month period are clearly affordable and will not result in the Applicant going from profit to loss, let alone resulting in the business becoming unviable.
- 4.18 With the Applicant's profit forecast for the years 2022 to 2025 in mind the Respondent reiterates the importance of the second limb of the Arbitrator's principles (section 15(1)(b) of the CRCA), being that the Applicant 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.
- 4.19 The Respondent says that under the Respondent's Proposal as set out at paragraph 2.12 above, payment of the protected rent debt (amounting to a yearly sum of £109,347.31) equates to a payment of only 3.8% of the Applicant's projected profit after tax for 2023 and 2.6% of the projected profit after tax for 2024. The Respondent says that it is obvious that the Respondent's Proposal is affordable and will not affect the Applicant's business' viability and therefore the Applicant should



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be required to pay in full as required by section 15(1)(b) but over the 24-month period offered by the Respondent.

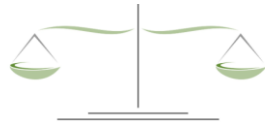
- 4.20 The Respondent says that in the Applicant's Friday 2<sup>nd</sup> June 2023 reply to the Respondent's response, the Applicant included a second piece of additional documentation which relates only to the subject premises. The Respondent says that the key question for the Arbitrator is whether payment of the protected rent debt is affordable for the business as a whole. The Respondent says that in any event, the Applicant's three-year forecast for the subject premises taking account of the Respondent's proposal show it returning to profit in 2025, and therefore, the business at the subject premises will clearly remain viable if an award is made based on the Respondent's proposal.

### **Relief from payment**

#### Arbitrator's reasoning and Decision

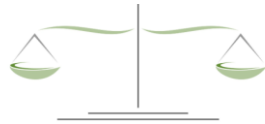
- 4.21 Before determining what Award to make the Arbitrator must consider the Parties' final proposals made under section 11 of the CRCA.
- 4.22 In this Arbitration, as both Parties have put forward final proposals then in accordance with section 14(3) of the CRCA:
- a. if I consider that both proposals are consistent with the principles in section 15, I must make the award set out in whichever proposal I consider to be the most consistent; but
  - b. if I consider that one proposal is consistent with the principles in section 15 but the other is not, I must make the award set out in the proposal that is consistent; and
  - c. if I decide that neither final proposal is consistent, I may make an award in terms which I consider to be the most appropriate applying the section 15 principles.
- 4.23 The Adjudicator accepts that there was a serious and adverse impact on the Applicant's business as a consequence of the government's Covid-19 closure requirements and coronavirus restrictions during the protected period.
- 4.24 Whereas, the Applicant says that its business will return to viability if it is given relief from payment of the protected rent debt, the evidence that it has provided in this Arbitration leads the Arbitrator to the conclusion that the Applicant's business is currently viable.





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- 4.25 In the Applicant's Friday 2<sup>nd</sup> June 2023 reply to the Respondent's response, the Applicant included a profit forecast for the years 2022 to 2025, where the Applicant forecasts profits of: £2.87million (2023), £4.23million (2024) and £4.57million (2025).
- 4.26 The Arbitrator accepts and agrees with the Respondents argument that the Applicant's profit forecast for the years 2022 to 2025 emphasises that payments of £9,112.28 per month over a 24-month period are affordable and will not result in the Applicant going from profit to loss, and cause the business to become unviable.
- 4.27 The Arbitrator says that it is the wrong approach to consider the Applicant's "specific business being carried on at the premises" to be most relevant in considering the quantum of relief.
- 4.28 Whereas the Applicant is a party in this Arbitration, the "specific business being carried on at the premises" is not. In addition, it is not uncommon in a business with multiple profit centers for one or more profit centers to be loss making, but that does not mandate that the business as a whole will be loss making or lack viability.
- 4.29 The Applicant says that to ensure its future viability it needs to have available funds to invest in [Business Information Redacted], all of which require, the reinvestment of profits into the business. The Applicant says its Proposal One and Proposal Two are consistent with enabling such investment to continue and thus assist the future viability of the business and, in particular, support its business' recovery over the next few years.
- 4.30 The Applicant has failed to demonstrate that there is a nexus between the Applicant's viability depending upon future investment as outlined at paragraph 4.29 above, and it being given the relief from payment of the protected rent debt that it seeks. It is a feature of a market economy that capital expenditure programs fluctuate according to the prevailing economic situation. The CRCA does not contemplate relief from payment of the protected rent debt being given to make funds available for investment in the Applicant's business premises.
- 4.31 Accordingly, the Arbitrator decides that the Respondent's Proposal as set out at paragraph 2.12 above, is most consistent with the principles set out in section 15 of the CRCA.



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**The amount of protected rent debt – the rent review “Additional Sum”**

- 4.32 On 27<sup>th</sup> October 2022 the rent review dated 24<sup>th</sup> September 2019 was determined by an appointed arbitrator increasing the annual rent for the Premises from £165,000 per annum to £175,000 per annum.
- 4.33 The difference between the Applicant’s Proposal One and Proposal Two as set out at paragraphs 2.4 to 2.10 above is based on the rent due pre-determination of the rent review dated 24<sup>th</sup> September 2019.
- 4.34 The Applicant’s Proposal One identifies the amount of commercial rent arrears in dispute as £218,694.63 excluding VAT. This is the rent under the Lease for the period from 21<sup>st</sup> March 2020 to 18<sup>th</sup> July 2021, at the then passing rate of £165,000 per annum. The Applicant’s Proposal Two based on the passing rate of £175,000 per annum, is that the protected rent debt is £231,948.85. The Additional Sum in dispute between the Parties is £13,254.22.
- 4.35 In accordance with section 14(3) of the CRCA I have decided that the Respondent’s Proposal as set out at paragraph 2.12 to be the most consistent with the principles in section 15. Therefore, it is not necessary for me to consider the merits of the Applicant’s and the Respondent’s submissions on this matter further.
- 4.36 Under the CRCA, as I have decided that the Respondent’s Proposal is the most consistent with the principles in section 15, I must make an Award as set out in the Respondent’s Proposal. I have no discretion to make any other Award.
- 4.37 In addition, the Respondent says that the Additional Sum cannot be treated as part of the protected rent debt which is the subject of this Arbitration.
- 4.38 Accordingly, whereas the Arbitrator notes that the sum of £13,254.22 remains at large, the Arbitrator has no jurisdiction to decide what relief should be given in respect of this “Additional Sum”. However, based on the Parties professional conduct in this arbitration, the Arbitrator is confident that the payment terms for the outstanding “Additional Sum” will be settled in a practical and sensible way.



## 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).*

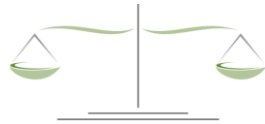
5.2 Section 19 'Arbitration fees and expenses', require the Arbitrator to exercise jurisdiction to make an Award in respect of arbitration fees paid by the Applicant under section 19(4).

5.3 On Tuesday 11<sup>th</sup> July 2023, the Applicant said that it anticipated that the Arbitrators fees would be split equally between the Parties directed by the CRCA.

5.4 On Tuesday 11<sup>th</sup> July 2023, the Respondent said that whereas the default position as set out at section 19(5) of the CRCA is that Arbitrators fees would be split equally between the Parties, the result of the Award may have an impact on the Parties' position on fees. The Respondent further submitted that if, following receipt of the Award, the matter of fees cannot be agreed between the Parties, any party contending that the Arbitrator should depart from the default position should file submissions within a set period of time (e.g., 7 days) with counter-submissions within a further period of time (e.g., a further 7 days).

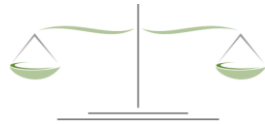
5.5 As the general rule under English Law is that costs follow the event, the Arbitrator would normally apply that norm when deciding which Party will pay his fees and expenses. In this Arbitration, the Arbitrator has decided that the Respondent's Proposal will be implemented, and which means that the 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. It is unnecessary to add an additional procedural stage whereby the Parties make further submissions on fees, incurring additional cost.



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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 CI Arb. 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 4.21 to 4.38 above, the Arbitrator decides that in accordance with the Respondent's Proposal:

1. The protected rent debt (as defined in section 3 of the CRCA) in the amount £218,694.63 be paid in full.
2. The protected rent debt be paid in equal monthly instalments of £9,112.28 (plus VAT) over a 24-month period.
3. The interest payable on the protected rent debt is reduced to zero.

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."*

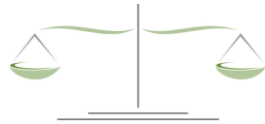
6.3 Section 14(8) of the CRCA defined the "the payment date" to mean the day specified in the award as the day on which the amount concerned falls due for payment.

6.4 In their Tuesday 11<sup>th</sup> July 2023 submissions, the Parties agree that payment of the instalments will commence on 1<sup>st</sup> August 2023, and that 24 equal monthly payments will be made such that the Protected Rent Debt is repaid in full by 1<sup>st</sup> July 2025.

6.5 Accordingly, the Arbitrator decides that payment of the instalments will commence on 1<sup>st</sup> August 2023, and that 24 equal monthly payments will be made such that the Protected Rent Debt is repaid in full by 1<sup>st</sup> July 2025.

6.6 For the reasons set out at paragraphs 5.1 to 5.7 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 CI Arb will publish a redacted version of this Arbitrator's Final Award on its website. I have attached a MS Word version of the Award and I have formed the provisional view that this redacted Award does not 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 Wednesday 19<sup>th</sup> July 2023.



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6.8 The Arbitrator's Award has been made in Lithuania on Wednesday, 12<sup>th</sup> July 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**

Wednesday, 12<sup>th</sup> July 2023