

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

REASONS FOR AWARD – Gavin Dingley FCI Arb, Sole Arbitrator

BETWEEN:

[REDACTED]
[REDACTED]

Claimants

-And-

[REDACTED]

Respondent

REASONS FOR AWARD

1. These are the Reasons for the Award that I make in this Arbitration.
2. The matter referred to arbitration by the Claimants [REDACTED] [REDACTED] is set out in its Notice for Arbitration (**Dispute Resolution Ombudsman Arbitration Referral Pro Forma**) dated 21st June 2022, by which Claimants contend that a debt of £410,170.64 is rent which was unpaid during the “Protected Period” of 21st March 2020 to 18th July 2021. By contrast Defendants ([REDACTED] [REDACTED]) claim that I only have jurisdiction to resolve a sum of £218,750.20 which they say is the rent that is unpaid during the “Protected Period” of 21st March 2020 to 18th July 2021 (**the Protected Period**).
3. The procedural history is that:
 - a. I was appointed as Sole Arbitrator by the Dispute Resolution Ombudsman on 10th August 2022;

- b. On 10th August 2022 I issued **Procedural Order No. 1** and gave the following directions to the Parties:
- i. Whether they have any objections to my appointment, if so on what basis;
 - ii. Whether they have any objections to the jurisdiction of this Tribunal, and if so on what basis;
 - iii. Whether the Parties wish to have an oral hearing or are content for the matter to proceed and to be determined on the papers alone;
 - iv. If the matter is to proceed on the papers, whether they object to the following timetable:
 - a. The Claimant is to file all evidence relied upon and their proposal for resolving the matter of relief from payment of a protected rent debt by no later than 4 pm on 26th August 2022;
 - b. The Respondent is to file all evidence relied upon and their proposal for resolving the matter of relief from payment of a protected rent debt by no later than 4 pm on 2nd September 2022;
 - c. The Claimant is to file any reply and any further evidence by 5th September 2022;
 - v. The Claimant and Respondent are at liberty to vary the above upon an application.
 - vi. All communication and submissions in this matter are to be sent via email [REDACTED] CC'ing my clerk [REDACTED] [REDACTED], [REDACTED] and [REDACTED]

[REDACTED]. The Claimant must also CC the Respondent and vice versa.

vii. If no response is received by 10 am on Monday 15th August 2022 the matter will proceed as detailed in (iv), above.

4. On 15th August 2022, I received emails from both the Claimant and the Respondent. The Claimant requested an extension to the deadlines in Procedural Order No.1 on the basis of the availability of its Counsel and the Respondent objected to this application.

5. On 16th August 2022, I made **Procedural Order No.2**, amending **Procedural Order No.1** as follows:

- a. The Claimant is to file all evidence relied upon and their proposal for resolving the matter of relief from payment of a protected rent debt by no later than 4 pm on 26th August 2022;
- b. The Respondent is to file all evidence relied upon and their proposal for resolving the matter of relief from payment of a protected rent debt by no later than 4 pm on 2nd September 2022;
- c. The Claimant is to file any reply and any further evidence by 4 pm, 6th September 2022;
- d. Late submissions and evidence which is filed outside the timelines stated above will not be considered unless a formal application is made at least 24 hours before the deadline;
- e. Parties are to address me as to why an oral hearing is necessary for their submissions and if applicable canvass dates for a hearing in September or October; and
- f. The Claimant and Respondent are at liberty to vary the above timelines upon an application in writing.

6. On 26th August 2022, I made **Procedural Order No.3** amending **Procedural Order No.2** as follows:
 - a. The Claimant is to file all evidence relied upon and their proposal for resolving the matter of relief from payment of a protected rent debt by no later than on 31st August 2022, 1 PM;
 - b. The Respondent is to file all evidence relied upon and their proposal for resolving the matter of relief from payment of a protected rent debt by no later than 4 pm, 14th September 2022.
 - c. The Claimant is to file any reply and any further evidence by 4 pm, 20th September 2022;
 - d. Late submissions and evidence which is filed outside the timelines stated above will not be considered unless a formal application is made at least 24 hours before the deadline;
 - e. The Claimant and Respondent are at liberty to vary the above timelines upon an application in writing.
7. On 21st September 2022, I invited both parties to make submissions on whether they would like an oral hearing or they would be content to proceed on the papers alone. However, I only received submissions from the Respondent who submitted that they were content for the matter to proceed on the papers. I proceeded on this basis.
8. On 29th September 2022, I sent the parties my draft award for comments and invited submissions on costs by 4th and 6th October 2022, respectively.
9. In these proceedings:
 - a. The Claimant was represented by [REDACTED].

b. The Defendant was represented by [REDACTED].

10. I am grateful to the parties for their clear, helpful and concise submissions in writing.

11. I set out these Reasons under these headings:

- I. The Background**
- II. The Issues**
- III. The Evidence**
- IV. The Submissions and the Law**
- V. Discussion**
- VI. Decision**
- VII. Costs**

I. The Background

12. In the Notice for Arbitration Pro Forma, there is limited scope to provide much information about the dispute. That being said, the Claimant has attached an Insolvency Act Application Notice, dated 20th June 2022, a witness statement of [REDACTED] with an exhibit of what appears to be Facebook photos and a Facebook profile. In addition, there are a series of letters and emails exchanged between both Parties' solicitors, the last of which is 25th May 2022. This sets the framework for the dispute.

13. In the witness statement of [REDACTED], dated 20th June 2022 it is stated that the Respondent served him with a Statutory Demand on 7th June 2022 but dated 18th May 2022. However, the Claimant has not yet taken action to set aside this demand. He suggests that the only reason he fell into arrears was because of the COVID-19 Pandemic. He makes a series of other allegations such as the fact his lease has been forfeited and that the Respondent has been trading his business without his permission and utilising his chattels and the premises license which he obtained. Finally, he suggests that he is amenable to a resolution and tried to engage with the Respondent on the issue of settlement, but this offer has not been reciprocated.

14. By contrast, in the witness statement of [REDACTED], dated 8th September 2022 the Respondent states that he is the principal beneficiary of the property at [REDACTED]. He states that the total outstanding sum due in respect of rent and insurance monies before the application of interest is £410, 170.64 but that the Claimant has sought to refer all his arrears as opposed to the just the sum due during the Protected Period to this arbitration. The Respondent submits that the sum which concerns the Protected Period is £218,750.20. The Respondent points to the fact that the Claimants have been in arrears since August 2018 when their lease began and therefore any suggestion that arrears have arisen simply as a consequence of the Covid-19 Pandemic is wrong.

II. The Issues

15. The issues, in this case, are applying the Commercial Rent (Coronavirus) Act 2022 Guidance are:

- a. Whether the Claimant's tenancy is a 'business tenancy';
- b. Whether all the Claimant's arrears constitute 'Protected Rent Debt';
- c. Whether the Claimants tenancy was adversely affected by Coronavirus;
- d. Whether the Claimants business is viable and whether it would or would not be viable even if the tenant were given relief from payment, of any kind; and
- e. Whether the Claimant should be afforded any relief from payment and if so, to what level.

III. The Evidence

The Claimant's Evidence

16. There was no oral hearing in this matter, and I decided this case on the papers alone.

17. The Claimant filed a witness statement of [REDACTED] dated 20th June 2022. A summary of which is contained in paragraph [12], above. In addition, there were two further witness statements filed by the Claimant of [REDACTED], dated 31st August 2022 and 20th September 2022 respectively.

18. The first statement of [REDACTED], dated 31st August 2022 stated that the terms agreed between him, and the Respondent was annual rent on the following basis:

i. Annual Rent as follows:

15 August 2018 – 14 August 2019 = £100,000 plus VAT

15 August 2019 – 14 August 2020 = £131,000 plus VAT

15 August 2020 – 14 August 2021 = £140,000 plus VAT

15 August 2021 – until end of the contractual term = £140,000 or open market rent (whichever is higher)

ii. Term: 15 August 2018 to 14 August 2025

iii. By Clause 6.1: the Tenant shall pay the Annual Rent and any VAT in respect of it by four equal instalments in arrears on the Rent payment dates (as defined)

iv. By Clause 36.1: The Landlord may re-enter the Property at any time after the following occurs

36.1.1 Rent is unpaid 28 days after becoming payable whether it has been formally demanded or not;

36.1.2 Any breach of any condition of, or any tenant covenant in this Lease...

19. It is also said that in or around December 2019, the Claimant's business took a downturn and that he decided to alter and refurbish the premises. It was decided that he would turn the business into an Italian restaurant. The renovation took place in early 2020 and the national lockdown commenced in March 2020. The restaurant formally re-opened sometime in March 2021.

20. It is suggested that the Respondent was supportive of the Claimant's change in premises and that in a difficult financial climate they should not be concerned about the outstanding rent and that it could be dealt with at a later stage. Moreover, the Claimant goes as far as to say that the Respondent promised that the rent due during the lockdown period would be written off.
21. On 20 May 2020, the Landlord's agent [REDACTED] sent the Claimant's an email [Exhibit Y2K] which the Claimant suggests says that the Landlord will formalise an agreement for an initial 3-month rent holiday from 9 March 2020 to 8 June 2020. It is also said that he was assured that he would not be charged any rent during this period but when things returned to normal, and the restaurant and nightclub re-opened full rent of £50,000 per annum would be due. The Claimant's position is that all of the rent due over the protected period should be written off.
22. The Claimant outlines the forfeiture process in his witness statement by stating that a few emails were exchanged in January 2022 about rent arrears before the forfeiture of the lease. It is alleged that the Landlord then attended the premises in person whereupon he assured the Claimants that he would not take any action in respect of the rent arrears and that the contents of the emails sent should be ignored by the Claimants. Sometime in March 2022, the Claimant contends that the Respondent proposed that they sell the restaurant to him.
23. On 29 March 2022, it is said that the Respondent attended the premises to discuss the rent with the Claimants. This did not produce a resolution as one of the two Claimants was not present. On 2 April 2022, the Claimant alleges that there was a further meeting between him and the Respondent which did not take place because the Respondent did not attend. Thereafter on 6 April 2022, the Respondent requested that the Premises Manager permit him entry to the property, thereafter locks were changed, and the lease became forfeited.
24. The Claimants agree with the schedule of arrears prepared by the Respondent [Exhibit YK4] aside from the payment of £3,500 which has not been accounted for and is also evidenced in the bank statements provided by the Claimant. The Claimant suggests that the total arrears are £156,005.85 plus VAT and seeks relief for this entire amount as well as costs.

25. In the second witness statement of [REDACTED], dated 20th September 2022 the Claimant responds to the witness statement of the Respondent, dated 8th September 2022. In this statement, he clarifies his position and suggests that the sum due for the Protected Period is £191,420.44. In addition, he contends that what the Respondent says about the financial support the Claimants received is incorrect. He suggests that the businesses received £50,000 for the club, £50,000 for the restaurant and a further £12,000 for both businesses on their second request from the government. It is also stated that the Claimants spent approximately £250,000 in their renovations of the premises.
26. On or around late September or early October the Claimant states that their businesses were struggling financially, and that the Respondent lent them £9,000 to fund the purchase of public liability insurance of which, £7,000 was later returned by the Claimants the following week. It is suggested that the Claimant was misled by the Respondent about the rent arrears and the forfeiture of their lease so that the Respondent could capitalise on the renovation of the premises.
27. Similarly, the Claimant states that rather than the “sporadic” payments of £5,000 per week as suggested by the Respondent which began in November 2021, he was paying £3,500 per week since January 2022. This is supposedly exhibited in the bank statements annexed to the witness statement [**Exhibit YK2**].

The Respondent’s Evidence

28. The Respondent filed a witness statement, dated 8 September 2022 within which he contends I only have jurisdiction to resolve the issue of the sum of £218,750.20 for rent unpaid during the Protected Period of 21 March 2020 to 18 July 2021. Additionally, there is an annexed statement of account [**Exhibit NW1**] which he says shows that the Claimants have been in arrears since August 2018 and that the debts have not accrued from the Pandemic alone. The Respondent also states that it does not disagree with the circumstances set out in the Claimant’s witness statement other than to say the situation is “oversimplified”.
29. It is stated that due to increasing arrears which in January 2020 stood at £172,433.68 that [REDACTED] brought in a business partner, [REDACTED] and the lease was assigned

to them both. It is then suggested that he was told by the Claimants that they had obtained COVID-related loans for each of their companies for £50,000 and two further grants of £85,000 as well as two further grants of £18,000.

30. The Respondent alleges that only £21,000 inclusive of VAT was paid during the Pandemic period. He contends that the grant money was used to fund a restaurant called [REDACTED] rather than address the arrears stemming from the arrangement between the Claimant and respondent which this arbitration is concerned.
31. The Respondent accepts that a 3-month rent holiday had been agreed between the parties from 9 March 2020 until 8 June 2020 [Exhibit NW1]. However, he denies that he ever agreed that he would forgo “a very substantial sum owed in unpaid rent”. Rather, he suggests that the rent was “postponed” during the lockdown and that the rent was to be paid once trading had restarted.
32. The Respondent suggests the notion that the rent was forgiven is mistaken and that the parties had agreed to a payment plan from November 2021 of £5,000 per week plus VAT which was to continue until the arrears had been repaid. He states that this sum was paid weekly for 3 months from early November 2021 until mid-January 2022 but on occasion, payments were missed. He also states that at no stage did he attempt to buy the restaurant from the Claimants.
33. The Respondent states that the electricity supplier was seeking entry to the premises and that a Bailiff had been instructed to collect outstanding business rates related to commercial rates due before December 2019 and the lockdown. On 5 April 2022, the Respondent instructed a [REDACTED] who gained entry to the premises and repossessed the property from the Claimants in light of the substantial arrears. The Respondent also strongly refutes the claims of the Claimant which related to deliberately taking back the premises to run their business and seizing their chattels.

IV. *The Submissions and the Law*

34. Unfortunately, neither party has addressed me on the law or indeed the Commercial Rent (Coronavirus) Act 2022 Guidance (**the Guidance**) which is the principal instrument which governs these disputes. All I have been provided with are a series of witness statements and exhibits which are annexed to those statements. This leaves

many unanswered questions when making my determination. This was despite offering parties several opportunities to make their submissions and making directions to that effect.

V. Discussion

Issue 1: Business Tenancy

35. The first issue is whether the Claimant's tenancy is a 'business tenancy'. There does not appear to be any dispute between the parties on this issue and I find on the evidence presented to me that the property in question is a 'business tenancy' as defined in Part 2 of the Landlord and Tenant Act 1954 (the '1954 Act') on the basis that the premises in question were being used as a nightclub and restaurant.

Issue 2: 'Protected Rent Debt'

36. The second issue I have to determine is what amount constitutes a 'Protected Rent Debt' for the purposes of this dispute. The Claimant initially stated this amount was £410,170.64 and then later revised its figure to £191,420.44. while the Respondent contends this amount is £218,750.20. There is some disagreement between the Parties as to what the protected Rent Debt amount actually is. It is my view on the evidence presented that the correct figure is **£191,420.44**, which accords with the Respondent's exhibit NW1 and includes the additional payment which the Claimants made of £3,500 which was not credited to the ledger.

Issue 3: Was the Claimant's tenancy adversely affected by Coronavirus

37. The third issue I must decide in this dispute is whether the Claimant's tenancy was adversely affected by Coronavirus. This is described in the Guidance as a business tenancy which was 'adversely affected by coronavirus' for the Act's purposes, if the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or if the whole or part of the premises themselves, were subject to a closure requirement under coronavirus regulations during a 'relevant period'.

38. Within the Guidance, the term ‘closure requirement’ means a requirement specified in coronavirus regulations to close either premises (or parts of premises), or businesses (or parts of businesses), of a specified description. For these purposes, it does not matter if certain limited activities were allowed at the premises as an exception to the closure requirement. If businesses that were required to close their business or premises were still allowed by the regulations to do certain activities, these activities should be disregarded when determining whether a tenancy was adversely affected by coronavirus and therefore within the scope of arbitration. For example, certain retail businesses were required to close during some periods but could make deliveries or respond to online, telephone or postal orders (without admitting customers). This is a closure requirement, despite the exception.

39. It is undeniable that the Claimant’s business was adversely affected by the closure requirement to both the restaurant and nightclub which operated from the premises therefore, I find this part of the criteria met.

Issue 4: Whether the Claimant’s business is viable and whether it would or would not be viable even if the tenant were given relief from payment, of any kind

40. I have found this part of the arbitration troubling as the Claimants have presented little or no evidence as to their viability or addressed the issues raised in the Respondent’s witness statement as to their solvency and liabilities. That being said, I find, having assessed the evidence from both parties that the Claimant’s business is not viable. I also find that even if the Claimant were granted relief the business would still not be viable. I make these findings for the following reasons:

- a. First, it appears that the Claimants have little, or no assets and they have substantial liabilities in respect of this tenancy which were accruing long before the Protected Period began. In January 2020 it is said that these stood at £172,433.68. moreover, it appears that the Claimants have since leased new premises in [REDACTED] for a different restaurant called [REDACTED].
- b. Second, if one looks at the payment schedules exhibited by both parties by virtue of bank statements or annexed accounts it is clear that the Claimants were

in arrears and made sporadic payments and did on occasion miss payments, to the extent that the lease was forfeited and there was a payment plan agreed to deal with their substantial arrears.

- c. Third, whilst I do not doubt that the national lockdown and Pandemic affected the Claimant's business and their ability to run their business, I do not think this was the sole or major contributing factor to their downfall or why I find that their business is not a viable one.
- d. Finally, I would reiterate that it is extremely unfortunate that neither party thought it appropriate to address me on the issue of 'viability' of the Claimant's business in their submissions or provide any of the suggested evidence in the Guidance and therefore many questions are in essence left unanswered when making this assessment.

Issue 5: Whether the Claimant should be afforded any relief from payment and if so, to what level.

- 41. I find for the reasons stated above in paragraphs 39 (a) – (e) that the Claimant should not be afforded any relief from payment and the arrears accrued during the Protected Period. Therefore, there remains an outstanding amount to the Respondent for this period in the sum of **£191,420.44 plus interest** which runs from the last day of the Protected Period, that being 18th July 2021 until the debt is enforced.

VI. Decision

- 42. In summary, I make the following award that the application for relief under the Commercial Rent (Coronavirus) Act 2022 by the Claimants is dismissed. The Claimants are to be given no relief from payment.

VII. Costs

43. I invited submissions by both parties on the issue of costs. Considering all of the matters and submissions by both parties, my judgment is that the appropriate costs order is that there be no order as to costs. My rationale for doing so is that both the guidance and the Commercial Rent (Coronavirus) Act 2022 are clear in specifying that the parties must meet their own legal or other costs in connection with the arbitration, pursuant to section 19(7) of the aforementioned act.

Seat of the arbitration: London, United Kingdom

Date of this Final Award: 7th October 2022

THE DISPUTE RESOLUTION OMBUDSMAN

A handwritten signature in black ink, appearing to read 'G. Dingley', written over a horizontal line.

Mr. GAVIN DINGLEY

Sole Arbitrator