

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022

AND

IN THE MATTER OF

XXXX LIMITED

Applicant

and

XXXX LIMITED

Respondent

FINAL AWARD

Dated: 14 June 2023

Sole Arbitrator: Arthur D Harverd

Introduction

1. The parties to this dispute are:
 - (i) XXXX Limited, the Applicant in these proceedings is a wholly owned subsidiary of XXXX Group plc. It operates 16 cinemas under its brand and provides the head office function for a further seven venues.
 - (ii) XXXX Limited, the Respondent, is the landlord of the Applicant's cinema in XXXX. XXXX City Council and XXXX (then named XXXX) are named on the lease dated 6 February 2013 for the cinema in XXXX. XXXX City Council subsequently assigned its interest in the property to XXXX in an underlease dated 21 November 2018. XXXX states that XXXX City Council no longer has any interest in the property.
2. A dispute arose between the parties regarding the relief of the rent payments due by XXXX to XXXX during the periods that the venue was obliged to close or function at a reduced level because of the coronavirus pandemic.
3. XXXX applied to the Chartered Institute of Arbitrators to appoint an arbitrator and on 8 March 2023 I, Arthur David Harverd FCA, FCI Arb, was appointed as sole arbitrator to determine the dispute and I accepted the appointment.
4. The seat of the arbitration is London, England.

The relevant Acts and Guidance documents

5. The arbitration is governed by the Arbitration Act 1996 and the Commercial Rent (Coronavirus) Act 2022 ("*the Act*"). Schedule 1 of the Act incorporates certain modifications of the Arbitration Act 1996 in relation to arbitrations undertaken under the Act.
6. Regard is given to the "*Guidance: Commercial rent code of practice following the COVID-19 pandemic*" ("*the Code Guidance*") published on 7 April 2022 by the Departments for Business & Trade; Business, Energy & Industrial Strategy; and Levelling Up, Housing & Communities, and to their "*Guidance to arbitrators and approved arbitration bodies on the exercise of their functions in the Act*" ("*the Arbitrators Guidance*") also published in April 2022.
7. Section 11 of the Act is entitled "*Proposals for resolving the matter of relief from payment*" and contains the following subsections:
 - (i) *A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt.*
 - (ii) *The other party to the arbitration may put forward a formal proposal in response within the period of 14 days beginning with the day on which the proposal under subsection (i) is received.*

- (iii) *A formal proposal under subsection (i) or (ii) must be accompanied by supporting evidence.*
- (iv) *Each party may put forward a revised formal proposal within the period of 28 days beginning with the day on which the party gives a formal proposal to the other party under subsection (i) or (ii).*
- (v) *A revised formal proposal must be accompanied by any supporting evidence.*
- (vi) *The periods in subsections (ii) and (iv) may be extended:*
 - a) *by agreement between the parties; or*
 - b) *by the arbitrator where the arbitrator considers that it would be reasonable in all the circumstances.*
- (vii) *In this section "formal proposal" means a proposal which is:*
 - a) *made on the assumption that the reference is not dismissed for a reason set out in section 13(2) or (3);*
 - b) *expressed to be made for the purposes of this section; and*
 - c) *given to the other party and the arbitrator.*

8. The definition of a "protected rent debt" is given in section 3 of the Act:

3. "Protected rent debt"

- 1) *A "protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent.*
- 2) *Rent due under the tenancy is "protected rent" if:*
 - a) *the tenancy was adversely affected by coronavirus (see section 4); and*
 - b) *the rent attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy (see section 5).*
- 3) *Rent consisting of interest on an unpaid amount within section 2(1)(a) or (b) is to be regarded for the purposes of subsection (2)(b) as attributable to the same period of occupation by the tenant as that unpaid amount.*

- 4) *A period of occupation by the tenant that began, or ended, at a time during a particular day, is to be treated as including the whole of that day.*
 - 5) *If any rent due under the tenancy is attributable to a period of occupation by the tenant of which only part is of the description in subsection (2)(b), then so much of the rent as can be reasonably attributed to that part of the period is protected rent.*
 - 6) *An amount treated by section 2(4) as unpaid rent is to be regarded as unpaid protected rent if the rent debt that was satisfied (in whole or part) by drawing it down from the tenancy deposit would otherwise have been a protected rent debt.*
9. The term "*adversely affected by coronavirus*" is explained in section 4:

4. "*Adversely affected by coronavirus*"

- 1) *A business tenancy was "adversely affected by coronavirus" for the purposes of section 3(2)(a) if, for any relevant period:*
 - a) *the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or*
 - b) *the whole or part of those premises, was of a description subject to a closure requirement.*
- 2) *For this purpose:*
 - a) "*closure requirement*" means a requirement imposed by coronavirus regulations which is expressed as an obligation:
 - (i) *to close businesses, or parts of businesses, of a specified description; or*
 - (ii) *to close premises, or parts of premises, of a specified description and*
 - b) "*relevant period*" means a period beginning at or after 2 pm on 21 March 2020 and ending at or before:
 - (i) *11.55 pm on 18 July 2021, for English tenancies; or*
 - (ii) *.....*
- 3) *A requirement expressed as an obligation to close businesses or premises of a specified description, or parts of businesses or premises of a specified description, every day at particular times is to be regarded for the purposes of subsection (2)(a) as a closure requirement.*

10. Pursuant to section 11(1) of the Act XXXX set out a formal proposal for resolving the dispute about the unpaid rent, namely:

- 1) That 100% of the Protected Rent Debt for the periods where the business was subject to a full closure requirement (where there was no ability to trade) be waived: this is a total of £21,963.88 excluding VAT.
- 2) That 75% of the Protected Rent Debt for the periods where the business was required to close every day at particular times be waived: this is a total of £2,553.49 excluding VAT.
- 3) That the balance of the outstanding rent for the Protected Period be settled in 24 monthly instalments, the first of which payments will be made on the 1st of the month following determination of this arbitration. This is a total of £13,784.47 excluding VAT repaid at a rate of £574.36 excluding VAT per month.
- 4) No relief is sought from payment of any insurance during the Protected Period. No interest is to be charged on the late payment of that rent. Each party pays their own legal and professional fees.

11. XXXX' response to the above proposal delivered under section 11(2) of the Act was as follows:

- 1) The Applicant's proposal is not accepted.
- 2) That £7,128.12 of the Protected Rent Debt for the periods where the business was subject to a full closure requirement (where there was no ability to trade) be waived.
- 3) That none of the Protected Rent Debt for the periods where the business was required to close every day at particular times be waived.
- 4) That the balance of the outstanding rent for the Protected Period be settled over two months the first of which payments will be made on the 1st of the month following the determination of this arbitration. This will be two equal payments of £15,586.96 excluding VAT.
- 5) Interest which should have accrued on the late payment of Protected Rent Debt is waived. The interest waived by XXXX as at 27 August 2022, the date of its response, amounted to £4,276.79.
- 6) Immediate payment of all outstanding service charge fees of £29,197.15 as at 27 August 2022.

Financial implications of the Applicant's proposal and the Respondent's counter proposal.

12. The Applicant provided a detailed schedule of the Protected Rent Debt periods between 21 March 2020 and 18 July 2021, together with quarterly apportionment rates for the daily rental charge analysed as to the number of days in each quarter or part quarter. The total Protected Rent Debt period extended over five quarters and 29 days. The rent for this period amounted to £38,302.04.

13. The financial calculations relating to the Applicant's proposal are as follows:

	£
Rent normally due during closure requirement periods	25,368.53
Rent normally due during periods of specific restrictions, but not closures, i.e. social distancing and limits to opening times	12,933.51
Total rent normally due during Protected Rent Period	<u>£38,302.04</u>

The Applicant's proposal for rent relief embraces:

	£
Full waiver of rent during periods of national lockdown and Tier 4 closure requirements	21,963.88
75% waiver of rent during periods of Tier 1 (medium alert) and Tier 2 (high alert) restrictions	2,553.49
Total waiver of rent sought	<u>£24,517.37</u>

	£
The Applicant accepts that full rent is payable during times that the venue was permitted to open normally during the pandemic	12,933.51
25% rent payable during periods of Tier 1 and Tier 2 restrictions	851.16
Total rent now payable over 24-month period	<u>£13,784.67</u>

XXXX' counter proposal can be summarised as:

	£
Waiver of rent	7,128.12
Waiver of interest as at 27 August 2022	4,276.79
Total	<u>£11,404.91</u>

Eligibility of dispute for arbitration

14. Paragraph 35 of the Code Guidance sets out the matters that have to be checked before any reference to arbitration is made:

- a) Is a business tenancy in place?
- b) Is there a protected rent debt?
- c) Is there a dispute regarding relief from payment of the protected rent debt?
- d) Is the tenant the subject of a CVA, IVA, or compromise or arrangement?

15. I am satisfied that the answers to the above items confirm that the dispute is eligible for arbitration:

- a) The lease dated 6 February 2013 and the underlease dated 21 November 2018 (see paragraph 1 (ii)) demonstrate that the Applicant's tenancy is a business tenancy.
- b) There is a protected rent debt.
- c) There is a dispute regarding relief from payment of a protected rent debt.
- d) The Applicant is not the subject of a CVA, IVA, compromise or arrangement. However, there is a petition for the winding up of the Applicant that will be heard in the High Court on 28 July 2023 (see paragraph 24).

Assessment of the viability of XXXX and the XXXX cinema

16. The next stage of the arbitral process is to assess the viability of XXXX and the XXXX venue. Section 13(3) of the Act states:

"If after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business:

- a) *Is not viable; and*

b) *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.*"

17. The Act then continues as follows:

"13(4). Subsection (5) applies if, after making that assessment, the arbitrator determines that (at the time of the assessment) the business:

a) *is viable; or*

b) *would become viable if the tenant were to be given relief from payment of any kind.*

13(5). In that case the arbitrator must resolve the matter of relief from payment of a protected rent debt by:

a) *considering whether the tenant should receive any relief from payment and, if so, what relief; and*

b) *making an award in accordance with section 14."*

18. An assessment of XXXX's business viability and that of the XXXX cinema is central to the determination of the dispute and attention is now given to that assessment. Viability is not the same as solvency. The Collins Dictionary's definitions of viability include, inter alia, "*capable of becoming actual*", "*feasible*", and "*within the bounds of possibility*".
19. XXXX has supplied a draft Statement of Comprehensive Income for the year ended December 2021. This embraces all cinemas under its control. With total revenue of £14,308,112 the reported loss for the year was £4,552,355. Draft management accounts for the year ended 31 December 2022 record an improving trend in revenue of £23,438,000 and a loss of £1,949,000.
20. XXXX's audited financial statements for the year ended 31 December 2021 are not yet available. The draft balance sheet as at 31 December 2021 records a total shareholders' deficit of £20,623,562, which was an increase in the shareholders' deficit of £4,552,355 compared to the previous year end 31 December 2020 when the shareholders' deficit was £16,071,207.
21. The draft balance sheet as at 31 December 2021 shows current assets of £15,878,767, of which cash at bank and in hand amounted to £535,137. Total current liabilities were £42,715,601, meaning that there were net current liabilities of £26,836,834.
22. The above figures raise questions as to the viability of XXXX and this is addressed in the notes to the draft financial statements as at 31 December 2021 in a section headed "Going concern". The company directors state that the financial statements are prepared on a going concern basis which assumes the company will be able to meet its future obligations as they fall due and the company will settle all payments within the agreed terms. It is stated that the company is reliant on financial and other support from a parent company in order to meet its obligations and written

confirmation has been received from its ultimate parent undertaking that it will support the company with financial and other support as necessary.

23. The going concern note also states that the Group has reached agreement with the dissenting shareholders of another entity with respect to the payment of the judgment on their outstanding consideration. Under this agreement the Group has paid \$170m of the judgment and \$92m has been paid into an escrow account to be available to the Group as additional liquidity under certain circumstances. The fund in the escrow account will be paid to the dissenting shareholders no later than March 2022. The directors note, however that inherent uncertainties in the business represent material uncertainties that may cast significant doubt on the company's ability to continue as a going concern and, therefore, to continue realising their assets and discharging their liabilities in the normal course of business. The financial statements do not contain any adjustments that would arise if the financial statements were not drawn up on a going concern basis.
24. I am informed that XXXX has faced substantial legal costs resisting a High Court challenge for a winding up order and that the XXXX cinema's management accounts reflect its share of these costs. A winding up petition dated 22 August 2022 was issued by a third party against XXXX. A further winding up petition against XXXX's parent company was issued later and on 7 November 2022 an order of the Business and Property Court of the High Court ordered that a hearing of the petitions before an ICC judge be listed for 28 July 2023.
25. In brief summary XXXX provided the following information in support of its viability:

- (i) Before coronavirus the financial position was steady and consistent. The closure requirements and restrictions significantly and negatively impacted on the 2020 and 2021 business, as demonstrated in figures for all its venues:

£000s	2022	2021	2020	2019	2018	2017
Revenue	23,438	14,620	10,995	38,092	36,294	36,735
Operating profit	(1,949)	(3,061)	(31,250)	1,840	2,915	7,869
Net assets	tbc	(20,623)	(16,071)	14,210	7,976	5,283

The fall in revenue in 2020 and 2021 was due to Covid closures and restrictions. There was, however, an improving attendance between the three years 2020, 2021 and 2022, with a corresponding increase in revenue and a decrease in operating losses.

- (ii) Because of the pandemic the 2020 audited accounts of XXXX reported a loss of £31,250,000 which included an impairment of fixed assets at a cost of £25.64m. A further loss of £3,061,000 is shown in the draft 2021 accounts.
- (iii) Attendances in 2022 were around 60% of those for 2019. It is expected that in 2023 attendances will return to about 80% of the 2019 level.

- (iv) With customers returning and more high-quality films being released, the business will be viable going forward assuming the Protected Period Rents are addressed satisfactorily.
- (v) The Protected Rent Period runs from 21 March 2020 to 18 July 2022. The total unpaid rent for this period amounts to £38,302.04.
- (vi) The continued payment of rents by the XXXX cinema post the Protected Rent Period is further evidence of a viable business.
- (vii) During the closure periods customer numbers and hence sales were nil. During the periods of specific restrictions sales were limited as a direct result of the mandatory social distancing requirements. This is borne out by the admission numbers at the XXXX cinema and XXXX's entire estate.
- (viii) To survive the pandemic XXXX's parent company drew all of its revolving credit facility, issued new convertible bonds and took out more loans. No dividends have been paid to shareholders since the start of the pandemic. In September 2022 the Group company filed for a Chapter 11 bankruptcy to enable a restructuring of its business.
- (ix) In accordance with section 16(3)(a) and (b) of the Act an arbitrator is required to disregard these emergency borrowings and the Chapter 11 bankruptcy. In the meantime, the parent company continues to support its subsidiaries including XXXX.
- (x) XXXX is a viable business and is expected to return to its pre-pandemic levels, although this will take some time.
- (xi) There are a number of risks and uncertainties to the business all or which will require, or impact on, the ability of the reinvestment of profit to meet customer expectations. A favourable Protected Rent Debt relief is required to support the company's recovery over the next few years.

The XXXX cinema's viability

- 26. The XXXX cinema is not an independent stand-alone enterprise but is a branch of XXXX. As such, no balance sheet is prepared for the XXXX facility, and it does not have a separate bank account. The only available financial information relating to the XXXX cinema is the management accounts, of which copies for the years 2017 to 2022 have been provided.
- 27. The management accounts record that attendance levels reduced significantly between 2017 and 2019, although the venue continued to be profitable. These were both years prior to the coronavirus pandemic. I am told that the reasons for this decline in attendance are connected to the building of a hotel directly outside the cinema. The hotel opened in 2017, after a construction period that extended over several years which impacted on the cinema's visibility

because of road closures and hoarding around the area which restricted sight and access to the cinema, and the opening in 2017 of a new separately owned and operated cinema nearby.

28. Despite the fall in attendance between 2017 and 2019, the XXXX cinema remained in profit in 2019, achieving an EBITDA (earnings before interest, taxation, depreciation and amortisation) of £80,000 arising from revenue of £1,054,600.
29. The detrimental effect of coronavirus on the attendances and finances of the XXXX cinema can then be seen in 2020 and 2021 during lockdown closure periods and other restrictions comprising social distancing and early closing requirements. All restrictions terminated on 18 July 2021.
30. The huge reduction in attendance levels during the coronavirus period is evident in the following figures both for the XXXX venue and for all of XXXX's cinemas:

<u>Attendance Levels</u>	<u>XXXX</u>	<u>XXXX</u>
Full year 2017	93,393	2,494,068
Full year 2018	83,985	2,399,896
Full year 2019	79,542	2,454,712
First half 2020	21,254	-
Second half 2020	2,969	-
Full year 2020	24,223	810,144
First half 2021	3,414	-
Full year 2021	25,937	863,287
First half 2022	29,003	-
Full year 2022	57,303	1,471,859

Attendance levels during the second half of 2020 and the first half of 2021 were negligible. Attendances for the full years 2020 and 2021 were, respectively, 55,319 and 53,605 lower than those in 2019.

31. 2022 recorded a good recovery in attendances in the circumstances in both the XXXX venue and the entire XXXX estate.

32. XXXX believes that good progress will now be made as a number of blockbuster films, whose release had been delayed because of coronavirus, will now be exhibited and more quality films will be produced and distributed.
33. There was a corresponding decrease in revenue during 2020 and 2021 in line with the fall in attendances. Losses were made in these two years. A summary of the profit and loss management accounts for the XXXX venue in the years 2018 to 2022 is as follows:

	2018	2019	2020	2021	2022
Revenue	£1.076m	£1.054m	£288k	£424k	£800k
EBITDA	£49k	£80k	-£182k	-£37k	-£99k

34. The revenue figures for the three worst affected half years (H1 is the first half of the year and H2 is the second half) were:

	2020 H1	2020 H2	2021 H1
Total Revenue	£245k	£43k	£44k

XXXX' solvency

35. XXXX stated that its sole income is the rent payable by XXXX under the XXXX cinema lease. XXXX has used all of its available reserves and has outstanding debt with its superior landlord, including service charges, insurance costs and the rent at the core of this dispute.
36. Without receipt of the rent to meet the above costs, XXXX stated that it risks their superior lease being forfeited and steps being taken by the landlord in regard to its insolvency. XXXX stated that no relief is available on the rent due to the superior landlord, who is not willing to offer anything. XXXX' unaudited financial statements for the year ended 31 December 2021 recorded that trade debtors amounted to £38,547. Other unspecified debtors were £9,078.
37. The notes to XXXX' unaudited financial statements for 2021 included the following statement:

"Going concern

The financial statements have been prepared on a going concern basis as the company has the support of related parties and the directors have confirmed that, if required, funds will be made available to meet liabilities as they fall due."

38. Despite the confirmation that funds will be made available to meet liabilities, XXXX drew attention to section (3)(a) of the Act which states that the arbitrator must disregard the possibility of the tenant or the landlord borrowing money.

39. XXXX is owned by XXXX Limited. In view of section 16 (3)(a) of the Act, which states that in assessing viability and solvency, the arbitrator must disregard the possibility on the tenant or the landlord borrowing money or restructuring its business, XXXX declined my request for a copy of the audited financial statements of its parent company as it did not see the relevance of supplying them. I am informed that XXXX' superior landlord is a third party with no connection to it.

Analysis of the parties' positions

40. In a foreword to the Code Guidance government ministers, inter alia, stated the following:

"However, we also recognised that the road to recovery for some business owners would be a very long one, especially high street stores dependent on footfall, returning to pre-pandemic levels. That is why we introduced a moratorium on commercial landlords evicting tenants struggling to pay their rent. We stopped landlords seizing stock owned by the tenant in lieu of rent, so that businesses in rent arrears were not forced to go to the wall by their landlord."

..... "Where they can afford to do so, the Code states that a tenant should meet their obligations under their lease in full.

It makes clear that a tenant can't keep the doors of their business open if it comes at the expense of the landlord's solvency. However, tenants should not have to take on more debt - or restructure their business - in order to pay their rent."

41. The Introduction to the Guidance Code explains the purpose of the Act in the following terms:

"9. As noted above; the government's intention is that, where possible, rent debt accrued as a result of the COVID-19 pandemic should not force an otherwise viable business to cease operating. Contractual commitments should be respected as far as possible while achieving a proportionate balance between the interests of landlords and tenants."

42. XXXX produced a detailed schedule that included the dates that the XXXX venue was either fully closed during lockdown periods or was permitted to open subject to certain restrictions. The number of days relating to each category of closure or restriction was recorded, together with the normal rent applicable to each of the categories. In summary, the figures are as follows:

(i) Number of full day closures:	
National Lockdown 1	105
National Lockdown 2	28
Tier 4 and National Lockdown 3	89
National Lockdown 3	53
Total days:	<u>275</u>

(ii) Tier 1 and Tier 2 restrictions: 41 days

- (iii) The rent relief sought for National Lockdown days amounts to just over three quarter rent periods and the 75% rent relief sought on the Tier 1 and Tier 2 periods amount to less than half a full quarter, hence the total number of periods for which full or partial relief is sought is about three and a third, which relate to the three quarters that the venue's attendances and revenue suffered the most.
 - (iv) The Applicant makes no claim for rent relief for periods when the venue was allowed to open fully, even though the attendance levels demonstrate that the number of patrons was considerably lower than pre-pandemic levels.
43. XXXX explained that its counter proposal of, inter alia, a waiver of £7,128.32 for the Protected Rent Debt was for the periods when the business was subject to a full closure requirement, i.e. where there was no ability to trade. However, these periods do not reconcile with the schedule of the dates of the mandatory closure period and other restrictions provided by XXXX or those set out in the timelines in Annex A of the Code Guidance, which includes a chart showing the first date a sector was mandated to close (in full or part) until the date relevant restrictions were lifted for that sector. For theatres and cinemas, the start date for closures or other restrictions was 21 March 2020 and the termination date was 18 July 2021. Cinemas were permitted to open for specified periods during these dates, i.e. from 4 July 2020 to 4 November 2020, after which there was a further mandated closure until they could open again from 17 May 2021. From then on, the "*Rule of Six*" remained, which limited indoor social gatherings and thereby restricted the number of seats in the cinema that were available to patrons.
44. Restrictions were also placed on the times that cinemas were required to close in the evenings. Average closing times pre-Covid in the XXXX cinema were around midnight for weekdays and between 1.00am and 2.00am at weekends, which means Friday and Saturday nights and, on bank holidays, Sunday nights.
45. I was informed that the evening business generates in excess of 75% of the cinema's revenue. A closing time of 10.00pm or 11.00pm meant that at weekends the cinema was unable to screen a movie beyond 8.00pm or 9.00pm as the average performance time is between 2.5 and 3 hours. The curfew restricted evening screenings to one showing per night rather than three on weekend and bank holiday nights. The financial implications of the closure and restricted periods are evident in the reduced attendance and revenue levels shown in paragraphs 30 to 34.
46. I was also told that attendance levels are generally very reliant on the film product, which makes it difficult to identify consistent quarterly variations in attendances, although there are some traditionally quieter periods during the year. The first few weeks of January and the whole of August can be quiet, but in 2022 popular films were released in the summer and Christmas periods, both of which enjoyed successful extended runs, thereby bucking the trend of lower audience numbers in January and August.

47. The forecast attendance for the XXXX cinema for 2023 is 63,033. The first quarter of 2023 achieved attendances of 15,591, which produced total revenue of £197,401. This level of attendance is in line with the full year forecast which, if achieved, is likely to lead to revenue in the region of £790,000 in 2023.
48. The question arises as to which entity has to be assessed for viability in this arbitration. Is it XXXX and its entire estate of multiple venues which, as noted, are subject to a winding up petition which will be heard in the High Court in July 2023, for which purpose a large amount of detailed financial information is likely to be available for analysis? Or is it just the XXXX venue that has to be assessed in these proceedings?
49. Guidance on this matter is to be found in paragraph 39 of the Code Guidance which, inter alia, states:
- “Only the business tenancy under which the tenant occupies the premises is in scope.”*
50. The Respondent is the landlord of the XXXX venue. I am not told that it has any interest in other venues operated by XXXX. I hold, therefore, that it is the viability of the XXXX cinema alone that has to be assessed in this arbitration and not that of the entire XXXX estate, which is subject to another action.
51. It was explained that the maximum number of customers that can be accommodated in the XXXX venue is equal to the number of seats, which is 329. The venue is rarely filled to its maximum capacity for various reasons. The average capacity is 40% over all performances, although capacities of over 70% are achieved for some productions in the first week of showing. The day of the week and time of the performance are also key factors. Capacity increases towards the end of the day and each week.
52. The revenue generated from customers is geared to the size of the catchment area, nearby venue competition and the quality of the productions.
53. The maximum annual revenue using 2022 price rates for customers at 40% capacity is £1.64m, but I am told that the nearby new competition will prohibit the venue from ever generating revenue close to the maximum.
54. The Applicant explained that the break-even point for the XXXX cinema, after absorbing general and head office costs is 71,000 admissions and revenue of £953,000 per annum, which it forecasts will be achieved in 2025. In the two years 2018 and 2019, prior to the pandemic, the venue comfortably exceeded their forecasts, hence its belief that the venue will be profitable in 2025 seems to be realistic.
55. XXXX submits that clearly the XXXX business cannot afford to pay the full protected rent sum of £38,302.04 as this will jeopardise its viability contrary to section 15 (1)(a) of the Act, which states that any award should be aimed at preserving or restoring the viability of a business, so

far as that is consistent with preserving the landlord's solvency. It can preserve its viability by paying a share of the rent over a reasonable period of time. Hence its formal proposal to pay £13,784.67 in 24 sequential equal monthly instalments of £574.36.

56. It appears that the Respondent has not taken into account the lengthy periods that the cinema was subject to full closure regulations, or other restrictions.
57. Financial forecasts for the XXXX venue for the three years 2023 to 2025 have been supplied. A 10% increase in attendances year-on-year is anticipated, reaching 76,270 in 2025 leading to a gross profit for the venue of £110,000 and a Group EBITDA of £34,000 after absorbing its share of head office and general costs.
58. The estimated break-even point, at which stage the venue will return to profit is expected to occur during 2025, when attendances are forecast to reach 71,000, producing revenues of £953,000.
59. I consider that the venue should then be viable and this will be assisted if appropriate rent relief is granted under the provisions of the Act.
60. I am satisfied that XXXX has supplied sufficient evidence to support its claim for Protected Rent Relief and that this is consistent with the arbitrator's principles as stated in s15 of the Act, namely that any award should be aimed at preserving, or restoring and preserving, the viability of the business of a tenant so far as that is consistent with preserving the Landlord's solvency.
61. As required under the Act, I have considered whether any relief awarded to the Applicant will affect the solvency of XXXX.
62. As previously noted, XXXX' only income is the rent receivable for the XXXX cinema. The Respondent utilises that rent to pay its own rent to the superior landlord. The Respondent asserts that without receipt of the rent from the Applicant it risks forfeiture of the lease from the superior landlord and that under the Act no account is to be taken of borrowing.
63. The Respondent is not an independent company which would need to borrow from an external third party to meet its commitments to the superior landlord. As noted, the Respondent is owned by XXXX Ltd, a large company that contains several operating divisions. The two directors of XXXX are members of the parent company's top management team, and the Respondent has no employees. XXXX stated that it believes that XXXX is a special purpose vehicle (SPV). This belief has not been challenged by XXXX. SPVs are often used to isolate property investments from other elements of a business. Thus it appears that the separation of XXXX from its parent company is of a technical nature. It is common practice in large corporations to transfer funds between the central head office and its subsidiaries as part of the normal treasury function, and there is no indication to suggest that this could not be arranged to meet XXXX' rent commitment to its superior landlord. Hence, I do not find that the rent relief granted to the Applicant under the Act is likely to affect the solvency of the Respondent.

64. Paragraph 4.40 of the Arbitrators Guide states that relief from payment can be any one or more of:
- (i) Writing off the debt (in whole or in part).
 - (ii) Giving the tenant time to pay the debt (in whole or part).
 - (iii) Reducing or writing off any interest payable by the tenant in relation to all or part of the debt.
65. I hold that the Applicant's proposal for rent relief succeeds. This embraces a 100% waiver of the rent due during full closure periods amounting to £21,963.88, and a 75% waiver of the rent due during the Tier 1 and Tier 2 restrictions amounting to £2,553.49. The total rent relief awarded is therefore £24,517.37 plus any associated VAT.
66. I further hold that the rent of £12,933.51 for the period when the venue was permitted to open normally during the pandemic is payable in full by the Applicant to the Respondent, together with 25% of the rent due during the periods of Tier 1 and Tier 2 restrictions. This sum amounts to £851.16 hence a total rent of £13,784.67 plus any associated VAT is payable by the Applicant to the Respondent.
67. I also hold that the above rent of £13,784.67, plus any associated VAT shall be payable over a two-year period of consecutive monthly payments of £574.36 plus any associated VAT per month. This is the maximum time permitted under the Act for the late payment of rent that is determined to be due. This time period has been selected because although all service charges covering the Restricted Debt Period have been paid, my understanding is that service charges for later periods remain unpaid. These charges are outside the scope of the Act, but a staggering of rent payments may assist the Applicant to pay these charges in a timely manner.
68. I further hold that no interest shall be charged on the late payment of rent that is now payable in the said 24 consecutive monthly instalments.
69. Under section 19(v) of the Act, subject to certain exceptions, the arbitrator must make an award requiring the Respondent to reimburse the Applicant for half of the arbitration fees paid by the Applicant. The fees paid embrace the appointment fee of £250.00 plus VAT paid to the Chartered Institute of Arbitrators and the arbitrator's fee of £1,500.00 plus VAT, a total of £1,750.00 plus VAT.
70. I do not consider that there are any circumstances to alter the general rule in relation to costs and therefore hold that the Respondent shall reimburse the Applicant for half of the above fees, namely £875.00 plus VAT.
71. Accordingly, I, the said Arthur David Harverd, AWARD and DIRECT as follows:
- (i) The rent payable by the Applicant to the Respondent during the Protected Rent Period is waived in the amount of £24,517.37 plus any associated VAT.

- (ii) The Applicant shall pay the Respondent the balance of the rent due during the Protected Rent Period when the venue was permitted to open, which amounts to £13,784.67 plus any associated VAT.
- (iii) The said £13,784.67 shall be paid in 24 consecutive equal instalments of £574.36 plus any associated VAT commencing on 1 July 2023 with all subsequent monthly payments being made on the first day of each month thereafter.
- (iv) No interest shall be payable by the Applicant to the Respondent in respect of the rent for which relief has been granted or for the rent that is payable during the said 24 monthly payment periods of £574.36 plus any VAT commencing on 1 July 2023 to cover the rent that is payable in the Protected Rent Period.
- (v) The arbitration costs, which comprise the appointment fee of £250.00 plus VAT paid to the Chartered Institute of Arbitrators and the tribunal's fee of £1,500.00 plus VAT, initially paid by the Applicant in full, shall be shared equally between the parties. The Respondent shall therefore reimburse the Applicant in the sum of £875.00 plus VAT within 28 days of the date of this Award.

Arthur Harverd

Arthur Harverd
Arbitrator

14 June 2023

London, England, the seat of the arbitration.