

IN THE MATTER OF THE ARBITRATION ACT 1996
and the
COMMERCIAL RENT (CORONAVIRUS) ACT 2022
and
IN THE MATTER OF AN ARBITRATION

Between

[REDACTED] (Claimant/Lessee/Applicant)

and

[REDACTED] (Respondent/Landlord)

and relating to a dispute about

Rent protected Debt

on a property at

[REDACTED]

**FINAL AWARD IN RELATION TO QUANTUM
INCLUDING COSTS**

by

**Matthew S Martin FCIArb FRICS
Chartered Arbitrator, Chartered Surveyor**

30th August 2023

1.0 THE BACKGROUND

- 1.01 [REDACTED] once held an interest in a property at [REDACTED] [REDACTED] (the premises). [REDACTED] [REDACTED]. The property was inherited by [REDACTED] [REDACTED] (the landlords) in equal shares. It is leased to [REDACTED] (the tenant) for 35 years from 25 December 1991 (the tenancy). The tenant is in the business of operating [REDACTED].
- 1.02 The premises were subject to restrictions caused by Coronavirus Pandemic. It had to close for the period 21st March 2020 to 18 July 2021 (the closure period). The Rent was still due. That rent is protected under the provisions of the Commercial Rent (Coronavirus) Act 2022 (the Act). This protected rent is referred to as a protected rent debt.
- 1.03 On the 18th July 2021, the protection offered by the Act was lifted. The landlord sought payment of the outstanding rent. There was period of negotiation, but no agreement was reached.
- 1.04 On 4th August 2022, the tenant wrote to the landlord giving notice under Section 10 1 (a) of the Act of their intention to apply for arbitration.
- 1.05 On 14th September 2022, the tenant made an application to the Chartered Institute of Arbitrators (the CI Arb) for the appointment of an arbitrator. In that notice the tenant stated the protected rent debt was £158,387.93 excluding VAT. An identical figure was stated by the landlord's solicitor in their letter dated 18th November 2022 to Messrs Maples Teesdale LLP solicitors for the tenant. Thus, there is common ground on the amount of protected rent debt.
- 1.06 On or about 26th October 2022 the landlord raised a jurisdictional matter which revolved around the incorrect landlord's name on a document which I gather was the application to the CI Arb. That objection was withdrawn on in a letter dated 18th November 2022.

[REDACTED]

- 1.07 The CIArb contacted me on 24th March 2023 offering me the opportunity to act subject to a conflict of interest check. I wrote to the CIArb advising there was no conflict. My appointment was confirmed on 28th March 2023.
- 1.08 The lessee is represented by [REDACTED]
[REDACTED]
[REDACTED]. The landlord is represented [REDACTED]
[REDACTED]
[REDACTED]
- 1.09 My mandate and my jurisdiction is given by the CIArb appointment, the Act and the Arbitration Act 1996.
- 1.10 The parties have not indicated any agreement as to the seat of the Arbitration. As we are dealing with English Law, the seat of the Arbitration will be England and Wales.
- 1.11 There was an extended period of time after my appointment where additional information was requested by the parties. That took time. I then came down with a severe dose of influenza and sought the patience of the parties till it past. It took away nearly a month of my working year. I thank all parties in exercising their patience.
- 1.12 My order for direction no 1 was sent to the parties on 3rd April 2023. This called for submissions by 21st April 2023, with a right of reply. At the landlords' request direction, (no 2) dated 21st April 2023 was dispatched which called for new information from the tenant by 31st May 2023. At the tenants request a further direction (No 3) dated 10th May 2023 was dispatched and which provided for more information from the landlord.
- 1.13 Now I, Matthew S Martin FCIArb FRICS C.Arb C.Surv, having heard, read, and considered all those matters put before me, do hereby publish my First and Final Award including costs. I thank the Parties and their representatives for their assistance in this matter.

[REDACTED]

2.00 THE TENANTS PROPOSAL

2.01 On 14th September 2022, the same day as the application to the CI Arb, the tenant wrote to the landlord proposing that;

- 1) That 100% of the Protected Rent Debt for the periods where the business was closed (ie where there was no ability to trade) is waived. That figure is £92,531.31
- 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. That figure is £9,271.55
- 3) That the balance of the outstanding rent for the protected period of £56,585.07 is settled over 24 months at £2,357.71 per month.
- 4) Confirmation is given that the tenant will not seek relief from any insurance payment during the closure period.
- 5) No interest is to be charged
- 6) Each party pays their own costs.

3.00 THE LANDLORDS' PROPOSAL

3.01 Their proposal is detailed in [REDACTED] letter dated 18 November 2022 to [REDACTED]. It proposed,

- 1) That the tenant pay 100% of the Protected rent Debt [being the rent that fell due for the period 21 March 2020 – 18 July 2021] a total of £158,387.93
- 2) That 50% of the protected Rent Debt [£79,193.96] be paid within 7 days following determination of this arbitration and
- 3) The other 50% be settled by way of 6 equal payments every month payable on the 1st day of the month.
- 4) Interest will not be charged
- 5) There be no relief for payment of insurance due during the closure period.
- 6) Each party pays their own costs.

3.02 I am satisfied that the unpaid rent is the protected rent debt. The protected rent debt is £158,387,93.

3.03 Overleaf these proposals are expressed in tabular form:

[REDACTED]

Item	Protected Rent Debt	Up front Payment	Amount seeking to be waived	Balance Due	Stage Payments	Over what time
Tenant/ Applicant	158,387.93	Nil	101,802.86	56,585.07	Equal payments every month	24 months
Landlord	158,387.93	79,193.96	Nil	79,193.96	Equal payments every month	6 months

4.00 THE FIRST ISSUE – BUSINESS TENANCY and NOTICE

4.01 Section 1 (1) of the Act permits relief from payment of protected rent debts due from a tenant to a landlord under a business tenancy. So as a start I need to establish if the lease dated 25 Dec 1991 is a business tenancy. I have seen the lease dated 25th December 1991. A definition of a business tenancy is a tenancy to which part 2 of the Landlord and Tenant Act 1954 applies. That is a tenancy comprised of a property which is of or includes premises that are occupied by the tenant for business purpose. That is the case here.

4.02 Based on the above I am satisfied the lease is a business tenancy as envisaged by the Act. I am also satisfied the notice of arbitration meets the requirements of Section 10 of the Act.

5.00 THE ISSUES AS DEFINED BY THE ACT

5.01 These issues are defined initially by reference to section 13 of the Act. This section sets out the awards which are open to me. Section 13 (2) does not apply here. Sections 13(3)-(5) do apply. Sections 14 and 15 also referenced.



- 5.02 The main question(s) for me to resolve:-
- Is the Tenanrs business viable or would it be viable if rent relief were given?
 - If so, should the tenant be given relief and if so, what form should that take?
- 5.03 I must also comply with a section 15 principle which is:-
- The award must disregard any actions taken by the either party to manipulate their financial affairs on order to improve their position when considering the viability of the tenant and the solvency of the landlord. That means any restructure or re-organisation undertaken by the parties so as to improve their position in relation to an award must be disregarded when considering viability and solvency.
- 5.04 Staying with Section 15 of the Act my award should (a) be aimed at preserving or restoring and preserving the viability of the business of the tenant so far as that is consistent with the preserving the landlord's solvency.
- 5,50 Section 15 continues with the words in sub section (b) that the tenant should so far as it is consistent with the principle set out in section 15(a) (see item 5.04 above) to do so be required to meet its obligations as regards the payment of the protected rent in full and without delay.

6.00 RELIEF FROM PAYMENT IF ANY.

- 6.01 As the tenant is the Claimant, the burden falls on them to prove to me that relief if any, from all or part of the protected rent, should be granted.
- 6.02 My first focus in on the position of the Respondent and their burden placed on them in relation to matters relating to solvency or otherwise. They via their solicitors Messrs Joelson provided me with a signed statement made under oath which deals with the Respondent's solvency. [REDACTED] supplied me with information showing the income of [REDACTED] for three years starting with the year 2019/2020. All three years show total income for the tax year is £20,082 (yr. 2019/20), £16,374 (yr. 2020/21) and £12,383 (yr. 2021/22).

[REDACTED]

- 6.03 He is one of two directors in a [REDACTED]. It showed a profit after tax for the year to 31 March 2022 of £30,964. I am told he has never drawn a salary. He has a modest pension.
- 6.04 [REDACTED] was supplied. I have seen details of 4 bank accounts collectively holding £139,188 (rounded) in April 2020. [REDACTED]. They are two of three directors. In the year to 31st March 2022 the company made a profit of £20,995. She holds no pensions.
- 6.05 The tenant in his defence focuses more on the cash assets, property holdings and directorships of companies. It has not provided me with any information on any dividends paid. That view is supported by the information past to me by [REDACTED].
- 6.06 Based on the above it could be [REDACTED] would have some financial difficulty if relief of the rent protected debt was given. Mr Berman less so. Moving now to matters of relief if any.
- 6.07 I was supplied with a written statement from [REDACTED] who wrote on behalf of the tenant. [REDACTED]. I was supplied with skeleton income statements and balance sheets for the 5 years from 2017. Those which I mostly focused on were years 2020, 2021 and draft accounts for year 2022 - financial year is December to December.
- 6.08 In a simplistic form they show the following (see item 2.41a)i tenants' written statement)

£000s	Year 2022	Year 2021	Year 2020	Year 2019	Year 2018
Revenue	23,438	14,620	10,995	38,092	36,294
Operating Profit	(1,949)	(3,061)	(31,250)	1,840	2,915
Net Assets	TBD	(20,623)	(16,071)	14,210	7,976

[REDACTED]

- 6.09 It is not surprising the worst operating profit was in year to December 2020. The cinemas were closed from 21st March – 31st December, just on 78% of the trading year. In the year to December 2021 the closure period was 55% of the trading year. Then in 2022 the doors opened to the public and the figures show an increase in revenue of 60% to £23,438,000.
- 6.10 In its submissions under item c iii [REDACTED] in terms of total attendance numbers for all 16 cinemas account for 9.71% in year 2022, 9.56% in year 2021, 9.00% in year 2020 9.4% in year 2019 and 10.62% in year 2018. It is fair to say it is a major contributor to the group.
- 6.11 It is clear from the detailed draft accounts provided the business has been adversely affected by the pandemic. The impact results in losses in 2020 and reduced profits in year 2021. Respectively they are an operating loss of £31,250,524 and a loss £3,061,033 from a respective revenue of £10,995,270 and £14,308,112.
- 6.12 In item 3.01 the tenant says Picturehouse/Cinemas are a viable business and they [tenant – my words] anticipate returning to pre pandemic levels but it will take time. The management accounts for the year ending December 2022 show EBITDAR (Earnings before interest, tax, depreciation, amortization, and rent) is put at £2,681,000. After rent of £2,634,000, the gross profit comes in at £47,000.
- 6.13 Management accounts for the 3 months from 1st Jan – 31st Mar 2023 show attendance of 430,223. In the management account to Dec 2022 the attendance stands at 1,471,859. As percentage of the annual figure the 2023 figures show 29%. Put it another way, 29% of last year's attendance (year to Dec 22) was achieved in the first three months of the tenants trading year. Operating Gross Profit is £4,452,000 (rounded). EBITDAR before rent shows £776,000 (rounded). EBITDAR show profit of £142,000 (rounded). Those figures show to me a return to better times for the applicant.
- 6.14 Gathering all this information, I conclude all these figures show a company which is viable. Looking at the accounts from Barclays it shows cash reserves of £343,407 as

[REDACTED]

at 31st March 2022. In the year to December 2021 cash reserves were £535,137, an increase of £194,426 or 57%. And the year to December 2021 "income producing doors" were closed from 01 Jan 21 – 17 Jul 21.

6.15 Section 15 (1) (a) places an obligation on me to observe the principles. Quoting from the Act...

- The principles in this section are-
 - Preserving or restoring and preserving the viability of the business of the tenant so far as that is consistent with preserving the landlord's solvency.

6.16 I have considered very carefully all the information passed to me by the tenant. Overall, the tenants' evidence was of assistance but not enough in my mind to meet its burden of proof namely a write of 64% of the protected debt and evidence to show the business was not viable.

6.17 The conclusion is I consider the tenant's business is a viable business, should be liable for the rent protected debt and capable of paying all the rent protected debt. But to impose an immediate payment of all or a large portion of the rent protected debt could in my view have a negative impact on the tenant's immediate cash flow. This in turn could affect the solvency of the landlord.

6.18 I consider the tenant is capable of supporting a series of payments over a period of time. The tenant sought a write off of 64% of the debt. Given the burden of proof and it not been met I will not be writing off any of the debt. Gathering all the information I will issue an award where the tenant is to pay the landlord an immediate payment of £15,838.79 (10% of the sum due) within 14 days and subsequent 24 monthly payments the first on the 1st October 2023 of £5,939.54 per calendar month for 23 months and a final payment on month 24 of £5,939.36. Section 14(7) permits me to order a staged payments but over a maximum of 24 months.

6.19 As the parties agree there shall be no charge for interest. I do not award any.



7.00 THE COSTS

7.01 Section 19 (1)(a & b) of the Act defines costs as my fees and expenses and the fees of the CI Arb. When the tenant made their arbitration application, they paid £5,500 plus VAT to the CI Arb. Of that £5,000 is my fee and £500 is the appointment fee to the CI Arb. Total costs are therefore £5,500 plus VAT.

7.02 Generally, the Act calls for my costs and CI Arb costs to be split 50/50 unless the arbitrator considers it more appropriate in the circumstances to award a different proportion. I have found nothing in the submissions to suggest to me that costs should be split otherwise than 50/50 between the parties. It is noted both parties agree the fees are to be split 50/50. As the costs were paid by the tenant my award will call for the landlord to immediately reimburse half of my fees and half of the CI Arb fees.

8.00 CONCLUSION

8.01 Although I only summarise parts of the evidence, I have read all of the submissions of both parties and have taken all the evidence into account in reaching my decision.

7.04 Finally would the parties please note that a copy of this award but will be sent to the CI Arb where it will be placed for viewing by the public. All reference to address, names of parties will be blacked out.

See declaration over...



9.00 THE DECLARATION

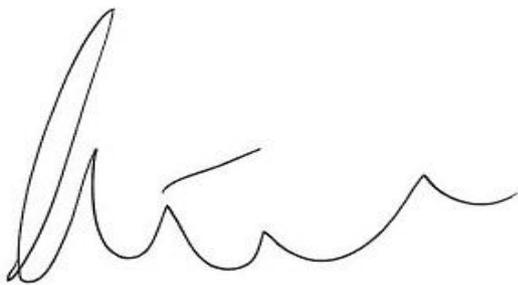
9.01 Now I, Matthew Stephen Martin FRICS FCI Arb, C.Arb, C.Sur, having carefully considered all the submissions of the Parties as set out in the documents provided to me do hereby **AWARD, DIRECT AND DECLARE that:**

- 1 Within 14 days of the date of this award the tenant will pay the landlord £15,838.79.**
- 2 From 01 October 2023 the tenant will pay the landlord every month for 23 months the sum of £5,939.54 plus a final payment on month 24 of £5,939.36.**
- 3 The landlord will immediately reimburse the tenant with 50% of my costs of £5,000 plus VAT.**
- 4 The landlord will immediately reimburse the tenant with 50% of the CI Arb fee of £500 plus VAT.**

9.00 THE DATE

9.01 30th August 2023

10.00 THE SIGNATURE



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**Matthew S Martin FRICS FCI Arb
Chartered Arbitrator, Chartered Surveyor, Registered Mediator**

