

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

**BETWEEN:**

**WRIGHT BROTHERS KITTYHAWK LTD**

**Applicant**

**- v -**

**WELLINGTON PUB COMPANY LIMITED**

**Respondent**

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**FINAL AWARD**

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**The Parties and the Premises**

1. The Applicant, Wright Brothers Kittyhawk Limited is the tenant in occupation of property at 240 St John Street, Islington London EC1V 4PH. The Applicant is represented by Chris Wright from Protected rent debt - co.uk. The Applicant seeks relief from the payment of £84,846.31 in protected rent debt in relation to the premises pursuant to the Commercial Rent (Coronavirus) Act 2022 ("CRCA").
2. The Respondent is Wellington Pub Company Limited. The Respondent's formal proposal is that the protected rent debt is repaid by 27 September 2023, the expiry date of the Applicant's lease. The Respondent is represented by Alison Cornelius and Paul Clark from Criterion Asset Management Limited, managing agents for Wellington Pub Company PLC.

## Procedural Background

3. On 22 September 2022, the Applicant made a reference to arbitration (“the Reference”) in relation to the matter of relief from payment of a protected rent debt arising under the Respondent’s tenancy, the Reference being made pursuant to section 9 of the Commercial Rent (Coronavirus) Act 2022 (“CRCA”). The Reference was made to the Consumer Code for Online Dispute Resolution (“CCODR”), an approved arbitration body for the purposes of section 7 of the CRCA.
4. The referral form:
  - a. Identified the protected rent debt of £84,846.31 comprising rent arrears;
  - b. Confirmed that the Applicant had served notice of intention to make this reference to arbitration on the Respondent on 4 August 2022 in accordance with section 10(1) of the CRCA;
  - c. Made a formal declaration confirming that the Applicant is not subject to any of the circumstances listed section 10(3) of the Act, namely:
    - i. there is no company voluntary arrangement which relates to any protected rent debt that has been approved under section 4 of the Insolvency Act 1986;
    - ii. there is no individual voluntary arrangement which relates to any protected rent debt that has been approved under section 258 of that Act; and
    - iii. there is no compromise or arrangement which relates to any protected rent debt that has been sanctioned under section 899 or 901F of the Companies Act 2006.

## **Appointment**

5. On 30 September 2022, I was appointed as Arbitrator via an email from Mr Aaron Moore from the Consumer Code for Online Dispute Resolution (“CCODR”). I accepted the appointment in an email dated 3 October 2022 copied to the Parties.

## **Directions**

6. On 5 October 2022, I wrote to both Parties directing them as follows.
  - a. To the Applicant, requesting confirmation by 4pm on 12 October 2022;
    - i. when the Referral was served on the Respondent;
    - ii. that the Referral included the relevant documents;
    - iii. that the Referral and the Documents include everything relied on to the formal proposal pursuant to Section 11(1) of the Act; and
    - iv. any amended proposal, following receipt of a response from the Respondent, if any, shall be sent to me and served on the Respondent, by 4pm 28 days after the Referral, excluding the date of Referral.
7. The Applicant responded to the Directions on 5 October 2022 confirming that notification of the intention to make a referral to arbitration was sent to the Respondent on 4 August 2022.
  - a. To the Respondent requesting confirmation by 4pm on 12 October 2022 as follows;
    - i. if and when the Referral and Documents were served;
    - ii. by 4pm, 14 calendar days (excluding the date of service) after the Referral and Documents were served on you, the Respondent shall send to me and

serve on the Applicant any formal proposal in response along with supporting documentation, pursuant to Sections 11(2) and (3); and

iii. Any amended proposal with supporting documentation, following receipt of any amended proposal from the Applicant, shall be sent to me and served on the Applicant, by 4pm 28 days after your first proposal, excluding the date of your first proposal pursuant to Sections 11(4) and (5).

8. The Respondent responded to the Directions on 10 October 2022 stating that the Referral and Documents were served by the Applicant on Friday 30 September 2022 at 22.19 and not served with the documents at the same time that they were submitted to the CCODR (on 22nd September 2022) as recommended in the Statutory Guidance for Arbitrators.

9. Whilst the Applicant did not respond to the Respondent's comment in 8 above, nevertheless I am satisfied that the pre-arbitration stage has been satisfied.

10. The Respondent's formal proposal was received on 13 October 2022 pursuant to Sections 11(2) and (3) of the CRCA.

11. My award is made on consideration of the following documents provided by the Parties.

a. Applicant's formal proposal and Applicant statement signed by Gregory and Patrick Wright dated 13 September 2022. The Applicant's written statement has been verified by a statement of truth as required under section 12(2) of the CRCA.

b. Respondent's formal proposal signed by Paul Clark of Criterion Asset Management dated 13 October 2022. The Respondent's written statement has been verified by a statement of truth as required under section 12(2) of the CRCA.

c. Documents identified within the Directions issued 5 October 2022.

### **Eligibility for grant of Relief**

12. The first issue to be determined is eligibility under section 13(2) of the CRCA which I now consider below.

13. Section 1(1) of the CRCA provides that the Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration provided the following conditions are met to determine eligibility;

- a. the tenancy in question must be a business tenancy;
- b. the rent debt in dispute must be a protected rent debt;
- c. the Parties must not have reached agreement on the matter of relief from payment of the protected rent debt; and
- d. it must be the case that the tenant's business is viable or would be viable if given relief from payment of a protected rent debt.

### **Business Tenancy**

14. The Parties agree that the tenancy is a business tenancy, with the Respondent acknowledging and referring to the lease with the Applicant.

### **Protected Rent Debt**

15. The proposals submitted by the Parties confirm the protected rent debt figure as £84,846.21.

### **Parties must not have reached agreement**

16. The Parties have failed to resolve the matter of payment hence the referral to arbitration.

## **Viability of Business**

17. Viability is not defined within the CRCA, but the DBEIS Commercial Rent (Coronavirus) Act 2022 Guidance (issued under section 21 of the CRAR) states at paragraph 6.3: “In making the assessment of viability a key question is whether protected rent debt aside, the tenant’s business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.
18. The Applicant’s describes the business as “small and unsophisticated” with the failure of business interruption insurance taken out by the Applicant to pay out resulting in the accumulation of debt, leaving the Applicant unable to pay rent due to the Respondent in full. The Applicant states that, “I had to borrow to preserve viability and restore cashflow for the business I run. I am building back but this will take time and there is a lot of uncertainty stemming from emerging effects so safety nets and fallback need to be bigger than previously.”
19. In response, the Respondent’s states that “The tenant has not paid the 1st September 2022 quarter’s rent in full in advance in accordance with the terms of their lease. The tenant is paying arbitrarily £1,750 per week which either calls into question the viability of their business, or indicates the tenant has decided not to pay rent in accordance with their contractual obligations, when they are clearly able to do so.”
20. The Applicant submitted a signed statement from Ali Asif, Principal at Charterhouse Whittenby Associates which states as follows:  
  
“CWA are responsible for the Audited accounts on behalf of Wright Brothers Kittyhawk trading as The Peasant 240 St John Street EC1. Gregory and Patrick Wright Co-Directors have

been running this award-winning Pub-restaurant for some 22 years and we consider it a viable business moving forward.”

21. I accept the signed statement above. My review of the Applicant’s bank statements from August 2021 to August 2022 and unaudited financial statements for Year ending 31 March 2020 and 31 March 2021 conclude that whilst it is clear that the Applicant’s business has financial difficulties, it has managed to keep its doors open, operating the business as a viable concern. The requirement for viability has therefore been met and I am satisfied that the requirements of section 3(2) of the CRCA have been satisfied. I will proceed on the basis that the parties have agreed the above, and resolve the matter of relief from payment of protected rent debt under s14 of the CRCA.

#### **Section 14 of the CRCA**

22. Section 14 of the CRCA applies in considering how to resolve the matter of relief from payment of a protected rent debt as required by section 13(5) of the CRCA, which states as follows.

“Before determining what award to make the arbitrator must consider any final proposal put forward to it by a party under section 11. (3) of the CRCA. Where both parties put forward final proposals under section 11 of the CRCA:

- a. 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;
- b. 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.”

## **Section 15 of the CRCA**

23. The principles which I must apply in resolving the matter of relief from payment are those in section 15 of the CRCA, which states as follows:

“(1) The principles in this section are—

(a) that any award should be aimed at—

(i) preserving (in a case falling within section 13(4)(a)), or

(ii) restoring and preserving (in a case falling within section 13(4)(b)), the viability of the business of the tenant, so far as that is consistent with preserving the landlord’s solvency, and

(b) 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”.

24. I now turn to consider final proposals put forward by the Parties under section 11 of the CRCA for relief from payment.

### **Applicant’s proposal**

25. The Applicant proposes the following:

- a. that the amount of Protected Rent Debt is assessed as £84,846.31;
- b. the amount of relief requested is £84,846.31;
- c. If applicable, the Applicant be given relief from immediate repayment and time to pay any balance over 24 months; and
- d. order that the Respondent pay 50% (half) of the Arbitrators fee, pursuant to section 19 (5) of the CRCA.



normal with cost-of-living issues hitting consumers and our costs have risen and I do not think it needs proving as this is universal.

30. The Applicant maintains states that, “We do not claim that the Landlord was not impacted, but that by being an asset holder, they did not suffer anything like the same impacts as the Claimant, moreover the Respondents “office” based business from which they run the administration connected to the property was not closed or restricted unlike the Claimants business.”
31. The Applicant adds that “We claim that the formal proposal asking for relief under the Arbitration does exactly what was intended by Government, it shares the impacts between the two parties. These are parties who we must not forget, are not equal in size, standing or have suffered equally the effects of the pandemic. Therefore, the proposal for relief outlined above fairly recognises and reflects both the different sizes, financial standing and the effects of the pandemic.”

### **Respondent’s proposal**

32. The Respondent proposes that the protected rent debt is repaid in full by 27 September 2023, the expiry date of the Applicant’s lease.
33. During the year to 31st March 2021 the Respondent states that the company faced numerous challenges brought about by the global economic slowdown caused by the Covid 19 pandemic and regulatory changes.
34. The Respondent maintains that the shutdown of the hospitality sector throughout the United Kingdom during the financial year April 2020 – March 2021 resulted in a decline in revenues of £ [REDACTED]. The decrease was due to the various support packages that the Respondent offered its tenants and the fact that a significant quantum of contractual rent was not paid as per the lease agreement in place.

35. The Respondent states that operating profit for the period was £ [REDACTED] Profit before tax was £ [REDACTED]). The net decrease in cash of £ [REDACTED] was a result of the UK Government enforced lockdowns resulting in blanket closures on hospitality businesses.
36. The Respondent confirmed that they are solvent but do not agree that they have not suffered financial hardship as a result of the pandemic emphasising that £ [REDACTED] in lost profit before tax is directly as a result of Covid 19.
37. The Respondent states that the main support package was rejected by the Applicant. The support package, accepted by 71% of the Respondent's tenants was a rent-free period which equated to nearly 7.5 months was linked to a 5-year reversionary lease in order to fulfil the requirements of their bond holders.
38. The Respondent therefore considers that they have 'shared' the burden as outlined in the tenant's formal proposal and dispute the assertion that they were not impacted. Rent, the Respondent claims, is the only source of income and this decreased significantly.

#### **Relief sought**

39. The focus here is on the extent to which the Applicant can pay a protected rent debt considering, on the one hand, the viability of the tenant's business, and on the other hand, the solvency of the landlord – so a balance between the parties is achieved.
40. The Respondent notes that Section 15 (b) of the Act states that "the tenant should, so far as it is consistent with the principles in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent debt in full and without delay".
41. However, it is clear that to direct that the Applicant pay the total protected rent debt of £ [REDACTED] would have some impact on the viability of this business. The closing balance for the Applicant's account for August 2021 bank account is £ [REDACTED], not enough to pay the

protected rent debt. The unaudited financial management accounts indicate that the business has significant debts which, whilst not requiring payment, could have a significant impact on the future viability of the business. I also note that despite more outgoings than incomings, the business has kept on going.

42. I accept the Applicant's statement that if relief is not given, this business would have to close. I also accept that Respondent's statement that it has been impacted by the impact of the pandemic, given rent is the only income for the Respondent. Whilst the Respondent has shared in the impact of the pandemic with those tenants accepting the support package, it is clear that the Respondent has failed to share the financial burden with the Applicant.
43. However, writing off 100% of the protected rent benefit as proposed by the Applicant is inconsistent with the requirements of section 15 of the CRCA as it does not share the "financial burden" with the Respondent.
44. The Government recognises that landlords and tenants have been affected by the pandemic, hence the Government's policy of "sharing the financial burden". Non-payment of rent is a real impact, that could have an impact on the long-term solvency of the Respondent. I agree with the Respondent that the Government provided some support to tenants however the Government still expects Landlords to share the financial burden. I do not believe that the Respondent's proposal represents sufficient support taking into account the requirements of the Applicant's business to remain viable and when it is clear that full repayment of the protected rent debt might lead to the closure of this business. The Respondent's proposal for full repayment of the protected rent debt is inconsistent with the requirements of section 15 of the CRCA.
45. It is my view that writing off 50% of the protected rent debt will provide some relief to the Applicant's viability while being consistent with requirement for the Applicant to meet its

obligations under the tenancy. Based on the above, the amount of relief requested is reduced by 50% to £42,423.16.

### **Payment period**

46. The Applicant seeks relief from immediate repayment and time to pay the balance over 24 months. The Respondent disagrees, requesting that payment of the protected rent debt be repaid in full by 27 September 2023, the expiry date of the Applicant's lease. I accept the Respondent's proposal given the uncertainty concerning the expiry date of the Applicant's lease.

47. Now I, Ekundayo Akande, having carefully considered the proposals and submissions of the parties, hereby award and direct as follows:

- a. The amount of protected debt relief to be paid to the Respondent is reduced by 50% to £42,423.16.
- b. The protected debt relief of £42,423.16 must be paid in instalments of £3856.65 each month from the 27<sup>th</sup> of November 2022 and be repaid in full by 27 September 2023, the expiry date of the Applicant's lease.
- c. The Respondent must pay 50% (half) of the Arbitrators fee, pursuant to section 19 (5) of the CRCA.

### **Publication of the award**

48. Pursuant to section 18(2), I am required to publish this award. I intend to publish the award on the CCODR website. I have formed the provisional view that the sums in paragraphs 26, 34, 35, 36 and 41 contain commercial information which ought to be redacted from the award pursuant to section 18(4). I will therefore publish the award in full on the CCODR website unless either party indicates to me by 4pm on 4 November 2022 that they wish me

to do otherwise in which case I will consider any submissions put forward in relation to that issue together with any evidence submitted in support of any such submissions.

**Seat of the arbitration**

49. Pursuant to AA section 95(2), the seat of this arbitration is in England and Wales.

**Ekundayo Akande LL. B, M.A, MBA, FCIArB on 4 November 2022 at the Consumer Code for Online Dispute Resolution (CCODR).**