

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

BETWEEN:

HIRE 4 LOWER (TOOL HIRE AND SALES) LIMITED

Applicant

- v -

- 1. CDR NOMINEECO 1 LIMITED and**
- 2. CDR NOMINEECO 2 LIMITED acting as nominees for**
- 3. THE ARCH COMPANY PROPERTIES LIMITED**
- 4. Acting as general partner of the Arch Company Properties L.P**

Respondent

FINAL AWARD

The Parties and the Premises

1. The Applicant, Hire for Lower (Tool Hire and Sales) Limited is the tenant of premises at ARCH 171, Sail Street, Lambeth, London SE11 6NQ. The lease of the property was granted by Network Rail Infrastructure Limited to the Applicant on 15 February 2005 (“the Lease”). Colin Tall is the Director of this business which he has built up for about 20 years. The Applicant is represented by Michael Large from Setfords Law Limited.
2. The Respondents as landlords are, CDR NOMINEECO 1 LIMITED and CDR NOMINEECO 2 LIMITED acting as nominees for THE ARCH COMPANY PROPERTIES LIMITED acting as general partner of THE ARCH COMPANY PROPERTIES L.P. The Respondents became the landlord of

the property on or around 4 February 2019. The Respondent is represented by John Cook, Senior Credit Manager employed by The Arch Company Properties Limited and Darren Clegg, Senior Consultant Solicitor at Realty Law.

Procedural Background

3. On 11 August 2022, the Applicant made a reference to arbitration (“the Reference”) in relation to the matter of relief from payment of a protected rent debt 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, which included the Applicant’s formal proposal:
 - a. Identified the protected rent debt of £133,072.79 comprising rent arrears for a period of 122 days from 21 March 2020 to 12 April 2021;
 - b. Confirmed that the Applicant had served the notice of intention to make this reference to arbitration on the Respondent on 12 August 2022 in accordance with section 10(1) of the CRCA;
 - c. Included a formal declaration confirming that the Applicant is not subject to any of the circumstances listed in section 10(3) of the CRCA, 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.

5. On 19 August 2022, the Applicant sent a letter to the Respondent enclosing further copies of documents in accordance with the CRCA. The Respondent responded to the letter of 19 August 2022 on 1 September 2022.
6. The Applicant stated that no counter proposal was received from the Respondent, noting that the 1 September 2022 letter did not appear to be a proposal for the purposes of the CRCA and inviting me to disregard the letter due to the following reasons;
 - a. “firstly, it did not contain any proposals, although there is a demand for payment (“we expect your client to arrange full payment without delay”);
 - b. secondly, if that is a proposal, which seems unlikely, it is not expressed to be pursuant to section 11 of the CRCA as is required in section 11(7) of the CRCA;
 - c. thirdly, no evidence is provided in support of it (section 11(3) of the CRCA) and any proposal must be accompanied by supporting evidence; and
 - d. fourthly, it was not signed with a Statement of Truth as required by Section 12(2) of the CRCA and the Applicant invited me to disregard it in accordance with Section 12 (3) of the CRCA.”
7. In response, the Respondent maintained that the letter of 1 September 2022 was sufficient acknowledgement of the letter of 19 August 2022 with a revised proposal to follow. I accept this response.

Appointment as Arbitrator

8. On 21 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 23 September 2022 sent to the Parties.

9. On 23 September 2022, the Applicant's revised proposal was sent to me and the Respondent via email.

Directions

10. On 27 September 2022, I wrote to both Parties directing them as follows;

11. To the Applicant, requesting confirmation by 4pm on 6 October 2022;

- a. when the Referral was served on the Respondent;
- b. that the Referral included the relevant documents;
- c. that the Referral and the Documents include everything relied on to amount to the formal proposal pursuant to Section 11(1) of the Act; and
- d. 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.

12. In response, the Applicant submitted its final proposal on 27 and 28 September 2022, via email to me and copied to the Respondent, accompanied by evidence and a witness statement from Colin Tall, as required by sections 11(2) and (3) of the CRCA.

13. To the Respondent requesting confirmation by 4pm on 6 October 2022 as follows;

- a. if and when the Referral and Documents were served;
- b. 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

- c. 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).

- 14. On 6 October 2022, at 10:51 and 12:50, I received two emails from the Respondent, copied to the Applicant containing the Respondent's response to the Directions and its formal proposal and supporting evidence pursuant to Sections 11(2) and (3) of the CRCA.

- 15. I am therefore satisfied that the pre-arbitration stage has been met.

- 16. My award is made on consideration of the documents below provided by the Parties.
 - a. The Applicant's formal and final proposal and witness statement of Colin Tall dated 20 September 2022.

 - b. The Respondent's revised formal proposal and supporting documents dated 6 October 2022 made pursuant to section 11(4) of the CRCA.

 - c. Other documents submitted in the Applicant's list of documents identified within my Directions dated 27 September 2022.

Eligibility for grant of Relief

- 17. The first issue to be determined is eligibility under section 13(2) of the CRCA.

- 18. Section 1(1) of the CRCA 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

19. I have been provided with a copy of the lease between the Applicant and the Respondent which confirms that the Applicant occupies the premises for the purpose of its business and the lease creates a business tenancy as defined by Part II of the Landlord and Tenant Act 1954. I consider this as sufficient evidence to satisfy the requirement of section 1(1) of the CRCA.

Protected Rent Debt

20. The Applicant's formal proposal stated that the Respondent did not consider the total protected rent debt to be a protected rent debt. The Respondent's revised formal proposal indicates that £118,230.04 of the protected rent debt figure represents back rent awarded to the Respondent in two rent review arbitrations undertaken on 15.02.2017 and 15.02.2022 and agree with the Applicant that there is a protected rent debt of £133,072.79 in accordance with section 3(1) of the CRCA. As a result, the Parties are now in agreement that £133,072.79 represents protected rent debt relating to the period from 21 March 2020 to 12 April 2021.

Parties must not have reached agreement

21. It is evident from formal proposals and other documents submitted that the Parties had not resolved the matter of relief from payment of a protected rent debt before the reference was made to CCODR.

Viability

22. I now turn to the question of viability. 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.

23. The Applicant maintains in the final proposal that it has a strong balance sheet strength of around £3.3million and is in a position to meet its obligations and day-to day demands. I also note that the Respondent accepts the Applicant's business as viable, referring to Key Performance Indicators extrapolated from the Applicant's filed accounts from 2018 to 2021 indicating as the Respondent states, "significant cash, capital shareholders' funds and dividends paid to the sole Director". The requirement for viability has therefore been met.

24. Based on the above, I am satisfied that the requirements of section 3(2) of the CRCA have been satisfied and 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.

25. I now turn to consider final proposals put forward by the Parties under section 11 of the CRCA.

Section 14 of the CRCA

26. Section 14 of the CRCA principles must be applied in considering how to resolve the matter of relief from payment of a protected rent debt. Section 14 of the CRCA sets out as follows.

“14 Arbitrator’s award on the matter of relief from payment

(1) This section applies where the arbitrator is considering how to resolve the matter of relief from payment of a protected rent debt as required by section 13(5).

(2) Before determining what award to make the arbitrator must consider any final proposal put forward to it by a party under section 11.

(3) Where both parties put forward final proposals under section 11—

- 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.
- c. Where only the party making the reference to arbitration puts forward a final proposal under section 11, the arbitrator must make the award set out in the proposal if the arbitrator considers that the proposal is consistent with the principles in section 15.

Otherwise, the arbitrator must make whatever award the arbitrator considers appropriate (applying the principles in section 15).”

27. 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

28. The Applicant's final proposal, proposes the following:

- a. that the outstanding principal amount of protected rent debt is £133,072.79 per annum exclusive and relates to the period from 21 March 2020 to 12 April 2021;
- b. that the Applicant should pay 50% of the Protected Rent debt balance, £66,536.39 or such sum as I determine the Protected Debt to be plus Vat;
- c. that the balance of payment is made by 12 equal instalments over a period of 12 months; and
- d. that no interest be payable on the protected rent debt.

29. If this proposal is agreed, the Applicant will arrange to make a payment of £5549.69 plus VAT to the Respondent immediately, and with the following eleven equal instalments to be paid on the first day of each calendar month thereafter.

30. The Applicant's breakdown of the Protected Rent Debt, set out in Appendix 2 of the formal and final proposal is set out in the table below.

| PERIOD | PROTECTED RENT DEBT (UNPAID) |
|---|-------------------------------------|
| 21 MARCH 2020 – 31 MARCH 2020: 10 DAYS | £3,055 |
| 1 APRIL 2020 – 31 DECEMBER 2020: 9 MONTHS | £98,504.52 |
| 1 JANUARY 2021 – 31 MARCH 2021: 3 MONTHS | £27,877.26 |
| 1 APRIL 2021 – 12 APRIL 2021: 12 DAYS | £3,666 |
| TOTAL 12 MONTHS 22 DAYS | £133,072.79 |

31. The business operated by the Applicant involves the hire and sales of small tools, power tools, machinery and supply of gas and consumables to hospitality businesses, the general public and office and shop refurbishment companies. Part of this business was in the non-essential retail sector and when counter services to the general public, delivery and

hospitality business were mandated to close during the period from 21 March 2020 to 12 April 2021, the business was closed in its entirety from 21 March 2020 until May 2020.

32. Colin Tall, Director and Principal of the business states that he built the business from nothing and has been working in it full time for the past twenty years, working 60-70 hours each week in addition to a 4-hour return journey home on the 3-4 days spent in the office, on a salary of around £8,794 with dividends as the only real source of income from the business.
33. The Applicant describes the impact of the coronavirus on the business as dire resulting in the loss of a huge amount of business not only from the general public but from the hospitality trade and office refurbishments. The Applicant stresses that the knock-on effect was huge with almost no work done in hospitality, (which was mandated to close). Similarly, as a huge number of people worked from home during the pandemic, the demand for office refurbishment was reduced to almost nil.
34. Prior to Covid, the Applicant stated that the business had 10 consistent years of growth and adds that, whilst the business is recovering, the recovery has yet to return to pre-covid levels. Turnover compared to this time last year (2021) is down on 21%, last July, pre covid was probably down about 20% so the Applicant claims to be about 40% down on where the business was pre-covid.
35. The Applicant submitted an application to the Respondent for a rent-free quarter in June 2020, which was rejected by the Respondent in late 2021 on the grounds of net assets, dividends profitability, namely viability. The Applicant stated that it was common place for discounts to be given to commercial tenants who, like the Applicant was running a non-essential retail business closed during the same relevant period. The Applicant had expected no advantage other than a parity with those tenants, some of whom the Applicant is in

competition with. Due to the delay in the receipt of the Respondent’s decision on the application, the Applicant had assumed that the application had been approved.

36. On 23 June 2022, the Applicant stated that the Respondent imposed a backdated rent increase at a rent review for 15th February 2017 and 15th February 2020. The rent increase, increased the rent from £59,371 per annum to £171,000 per annum exclusive. As a result, the Applicant went from having no protected rent debt to having a protected rent debt of £14,827.74 to £133,072.79, both exclusive of VAT. The Applicant claims to have paid a number of previous rental payments due under the lease until the start of the protected rent debt period as set out in Appendix 2 of the Formal and Final proposal.

37. The Applicant maintains that the rent due was paid, (apart from 1 quarter) before the rent was retrospectively increased. The Applicant stresses that the proposed offer is to pay more than 50% of the total rent and it is only on 50% of the total protected debt on which relief is sought. The Applicant paid the old uninincreased rent for that period (apart from June-July-August 2022) on which VAT was paid. When that is taken into account, the Applicant maintains that if the relief sought was granted, the payment would represent 66.08% of the total increased rent for that period as set out within the table below.

| Period | Protected Rent Debt | Rent Paid Ex VAT at £4957.58 per calendar month |
|---|----------------------------|---|
| 21 Mar 2020 to 31 March 2020: 10 days | £3,055 | £1,629.80 |
| 1 April to 31 December 2020 :9 months | £98,504.52 | £44,618.22 |
| 1 Jan to 31 March 2021: 3 months | £27,877.26 | £14,872.74 |
| 1 April to 12 April: 12 days | £3,666 | £1,955.76 |
| Total 12 Months 22 days | £133,072.79 | £63,076.52 |
| Grand total | | £196,149.31 |
| Percentage of all rent paid for period if a further £66,536.39 was paid in line with Applicants proposal | 66.08% | £196,149.31 less £63,076.52 less £66,536.39 = £66,536.40 |

38. The Applicant admits that as a result of the damage suffered to the business by the coronavirus and the protected rent debt, the Applicant is likely to have to vacate the building in occupation since February 2005 as it is simply not going to be worth their while to stay in occupation of it. The business will continue, as it remains viable but sooner rather than later, the Applicant will have to relocate to new premises.

Respondent's proposal

39. The Respondent opposes the Applicant's proposal and proposes pursuant to s11(4) of the CRCA that the Applicant discharges the whole of the protected debt totalling £133,072.79; and interest is waived.

40. The Respondent revised proposal states that £118,230.04 represents back rent awarded in two rent review arbitration awards for rent reviews undertaken on 15.02.2017 and 15.02.2020 of Mr Hywell G Hughes FRICS handed down on 23.06.2022 where rent was determined at £129,500 for 15.02.2017 and £171,000 for 15.02.2022. The Respondent counters the Applicant's claim that the Respondent has been unfair stating that the Applicant had benefited from many years of business occupation at below market rent and it was simply a matter of timing when the review took place and the rent review was determined during the period after the first lockdown of 23 March 2020. The Respondent maintains that the rent awarded by the Arbitrator is not a "rent debt proper" in the sense that it is not a quarterly accruing rent but a one off catch up.

41. The Respondent maintains that the purpose of the Statutory Coronavirus Arbitration scheme created by CRCA 2022 is to allow an independent arbitrator to assess the viability of a tenant's business and so determine whether or not to grant relief. The scheme is intended to assist tenants in their normal trading activity. For the reasons stated, where the protected rent debt wholly and substantially arises from a rent review which (a) extends back to pre-

covid times and (b) a reasonable and prudent tenant would have prepared for and factored the likely increase in rent into their cashflow. The Applicant states that “It cannot be right that a tenant should avail themselves of a scheme, which is intended to protect viable companies against failure”.

42. The Respondent states that the Applicant proposed that payment of 50% of the protected rent debt be paid by equal instalments over a period of 12 months but failed to explain why it can find that amount of cashflow in year 1 but is unable or unwilling to find the same amount of cashflow to pay the balance of the Protected Rent Debt.

43. The Respondent maintains that both the proposed reduction of 50% of the protected rent debt and the proposal to pay by instalments are not justified and are unacceptable.

44. On the Applicant’s viability, the Respondent finds no justification for accepting the arbitrary 50% discount proposed by the Applicant having regard to the matters below.

- a. The Applicant was not forced to close the business during the period of the covid lockdown. Rather the Applicant chose to close the business. It can have no right to be compensated by the Respondents for a business decision (as opposed to a government directive). The Applicant was in the business of trading with construction sites, all of whom were given permission to operate during the national close down. There was no government mandated closure of the construction sector.

45. The Respondent maintains that the scheme is meant to protect businesses who would not be viable as per section 13(3)(a) of the CRCA or would not be viable even if they are given relief as per section 13 (b) (a) of the CRCA. The Applicant, the Respondent states fails by a large margin to meet both criteria with the business remaining viable even if relief were refused.

46. The Respondent referred to the key performance indicators extrapolated from the Applicant's filed accounts for the years ending 2018 to 2021 contained within the Applicant's proposal and Colin Tall's witness statement. These, the Respondent states, show significant cash, capital, shareholders' funds and dividends paid to the Director.

Consideration of relief sought

47. The next stage involves consideration of the relief from the protected rent debt taking into account the Parties proposals and the requirements of section 15 of the CRCA which states as follows.

48. Under the CRCA, relief from payment of a Protected Rent Debt may be one or more of

- a. Writing off the debt or a part of it;
- b. Giving the Tenant time to pay all or part of the debt, which includes making payment by instalments; and
- c. Reducing or writing off any interest otherwise due under the tenancy.

Section 15 of the CRCA

49. The principles which I must apply in resolving the matter of relief from payment are those in section 15 of the CRCA, which provides:

“(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

50% relief from total protected rent debt

50. The total protected rent debt of £133,072.79 consists of backdated rent reviews totalling £118,230.04 from a prior arbitration award provided as Exhibit JC1 and the inclusion of the application for quarter free rent period representing £14,842.75 for the period 26.06.2020, subsequently rejected by the Respondent.

51. The Applicant proposes a reduction of 50% of the total protected rent debt. The question to be determined is whether failure to grant relief on 50% of the protected rent debt representing £66,536.39 plus VAT as proposed by the Applicant would have an impact on the viability of the Applicant's business or the Respondent's solvency.

52. It is clear from the unaudited financial reports submitted by the Applicant that the business is viable and is able to discharge this debt. I accept the reduction in profit margins realized by the Applicant, but I am not satisfied that payment of the protected rent debt will result in the demise of this business. The business remains viable, is able to run its day-to-day affairs and there are no outstanding liabilities or debts against the business.

53. Furthermore, the Applicant has cash in the bank, has a generally improving financial position and should be able to afford to pay more than it has proposed and still maintain its viability. I am satisfied that the Applicant can afford to discharge the protected rent debt and should meet its obligations under the lease in full. Based on the above, the Applicant's proposal for

50% reduction in protected rent debt does not fully satisfy the requirements of section 15 of the CRCA, fails and is dismissed.

Payment period

54. I now turn to the proposal by the Applicant that payment of the protected rent debt be made by equal instalments over a period of 12 months. The Respondent rejects this, stating that the Applicant has failed to explain why payment is to be made over 12 months. Given that the Applicant paid increased rent outside the protected rent period of £493,582.15 on 23 August 2022, it is clear that relief from having to pay immediately would give the Applicant time to recover whilst providing additional support at a time when the Applicant, like most organisations are beginning to recover from the effects of the pandemic.

55. Granting relief to allow the Applicant to pay £66,536.39 plus VAT, by instalments over 12 months would support the Applicant's while being consistent with the requirement for the Applicant to meet its obligations under the tenancy. Based on the above, the Applicant's proposal for payment of the protected rent debt to be made by equal instalments over a period of 12 months is granted.

Interest

56. The Applicant proposes that no interest be payable on the protected rent debt. The Respondent accepts, proposing that interest be waived on the full amount. As a result, interest will not be paid by the Applicant on the protected rent debt.

Costs

57. The rule in arbitrations is that the losing Party should pay the winning party's costs of the arbitration. However, section 19(7) of the CRCA provides that each party must bear its own costs.

Publication of the award

58. Pursuant to section 18(2) of the CRCA, 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 award contains no 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.

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

- a. The applicant's proposal to reduce the protected rent debt by 50% is dismissed.
- b. The full payment of £133,072.79 plus VAT must be paid by the Applicant to the Respondent in 12 equal instalments payable on the 1st day of the month after the date of this award.
- c. The Applicant will not pay interest on any part of the total protected rent debt figure.

Seat of the arbitration

60. Pursuant to section 95(2) of the Arbitration Act, the seat of this arbitration is in England and Wales.

Ekundayo Akande LL. B, M.A, MBA, FCIArB on 7 November 2022 at the Consumer Code for Online Dispute Resolution (CCODR).