In the matter of an Arbitration under the Commercial Rent (Coronavirus) Act 2022

Between

SHELLINA GULUM-HUSSEIN

Applicant

v.

SHEET ANCHOR INVESTMENTS LIMITED

Respondent

FINAL AWARD

Introduction

1. The Applicant is the tenant of premises at Unit 23, Eden Square Shopping Centre, Urmston, Greater Manchester ("the Premises"). She is a sole trader carrying on business as "Hair Definition", a hair salon ("the Business"). She seeks relief from payment of a protected rent debt in respect of the Premises under the provisions of the Commercial Rent (Coronavirus) Act 2022 ("CRCA"). She is represented by Sandhill Solicitors ("Sandhill").

2. The Respondent is the long leasehold owner of 23 Eden Square Shopping Centre, Urmston registered with title number MAN109675. The Respondent purchased this property on 9 April 2021, subject to the Applicant's lease of the Premises dated 23 November 2009 ("the Lease"). On 9 April 2021, the Applicant's arrears of rent were assigned to the Respondent by way of a Deed of Assignment of Rent Arrears dated 9 April 2021 ("the Deed of Assignment"). The Respondent is represented by Scott-Moncrieff & Associates Ltd ("Scott-Moncrieff"). I shall refer to the Applicant and Respondent as "the parties" hereafter.

Reference to arbitration

3. In outline, the following of relevance occurred:
   (i) On 17 August 2022, Sandhill wrote to Osborne Clarke LLP (who at some stage were the Respondent's solicitors regarding this matter). They referred to no agreement being reached on arrears of rent and as such stated an intention to apply to an independent arbitrator under the CRCA to resolve the issues. They described their letter as formal notification under s.10 of the CRCA to make a reference to an arbitration body.

(ii) Scott-Moncrieff responded by letter sent by email on 31 August 2022. They stated that they had been instructed by the Respondent. Amongst other things, they attached an up-to-date arrears statement. They observed that "your Notice" contained no specific offers of settlement as expected under the Commercial Rent Code of Practice nor provided any supporting evidence. The letter stated that the Respondent was willing to enter into negotiations before triggering a costly procedure for both parties.

(iii) Sandhill responded by letter addressed to Osborne Clark but emailed to Scott-Moncrieff on 7 September 2022. This referred to an offer purportedly made by the Applicant to pay arrears when her business was viable but the Respondent rejected the offer. However, by now due to the pandemic and inflation she was said to be no longer able to pay the debt accrued during the protected period so proposed a complete write-off. It further stated that if there was no response, given the lack of time to make a referral to an arbitrator, an application would be made. The Applicant offered to cover the costs of the arbitration even in the event that the arbitrator decides in the Applicant's favour.

(iv) Scott-Moncrieff replied by email on 9 September asking for clarification of the costs offer, referring to the official guidance about information the Applicant was obliged to provide, the expectation that tenants who are able to pay their rent debt in full should do so and that the onus is on the tenant to show that she cannot pay or what she can pay and that she has a viable business.

(v) Sandhill responded by letter sent by email on 14 September 2022. This clarified why the Applicant was proposing a write-off as she did not have the necessary funds to pay the debt and attached a screenshot of the Applicant's current business accounts[1]. It also stated that the costs offer was limited to the arbitrators' fees and not the Respondent's separate legal costs.

(vi) Scott-Moncrieff replied by email on 20 September 2022 stating that the Respondent does not agree to the protected arrears being written-off, and asking for further financial disclosure regarding the Applicant's finances and assets. Sandhill responded by email on 21 September 2022 stating that the accounts provided show that the Applicant does not have the means to pay the debts accrued during the protected period, and that a referral to begin arbitration proceedings would be made given the time limit to do so would soon be at an end. It withdrew any costs offer made.

(vii) The reference by Sandhill under s.10 of the CRCA was made to the Consumer Code for Online Dispute Resolution (CCODR, an approved arbitration body for the purposes of s.7 of the CRCA) on 22 September 2022. The reference was for an arbitration on the papers with no oral hearing. It attached an undated and unsigned Formal Proposal.

Procedural history

4. I was appointed on 27 September 2022 and wrote by email to the parties' solicitors on 28 September 2022[2] with some procedural requirements and seeking agreement on common ground. This led to agreement on matters summarised in 8 below. I also reminded the Applicant that written statements had to be verified by a Statement of Truth under s.12 of the CRCA. I

[1] These consisted of one page showing available balances as of 14:57 on Tuesday 13 September 2022 which I address in 24 below.

[2] By this letter and responses, the parties agreed that service of documents and all communications would be electronic by email.

therefore required the Applicant's Formal Proposal to have the formalities required by s.11 and s.12 of the CRCA.

5. The Applicant's Formal Proposal with a Statement of Truth was submitted on 5 October signed by the Applicant. I extended time under s.11(6)(b) of the CRCA until 13 October 2022 for the Respondent's Formal Proposal in response pursuant to s.11(2) of the CRCA. On 13 October 2022, the Respondent submitted its formal proposal pursuant to s.11(2) of the CRCA with a Statement of Truth signed by Mr Barry Flint of LCP Management Ltd which organisation acts for the Respondent. He also confirmed that he is authorised by the Respondent to sign its formal proposal. I deal with the detail of the formal proposals in 20-29 below.

6. Following further correspondence with the parties, I issued Procedural Order for Directions No 1 on 4 November 2022. These required the Applicant to produce by 21 November 2022 more detailed financial documents consisting, amongst other things, of her personal bank account information (pre and post Covid) as the Business is not incorporated[3], business bank accounts, financial accounts and other such documents and information. I also directed that the Respondent provide a redacted copy of the Deed of Assignment referred to in 2 above and evidence of any possible insurance claim for recovery of protected rent debt by the Respondent's predecessor or Respondent as the Applicant raised this as an issue. As the parties had intimated they required more time to put forward revised formal proposals, I extended time to 21 and 28 November 2022 for the Applicant and Respondent respectively.

7. The Applicant provided disclosure pursuant to the Order of 4 November on 21 November. The Applicant did not produce a revised formal proposal. On the same day, the Respondent provided the document ordered and confirmation that there was no insurance for recovery of protected rent debt. On 28 November, the Respondent produced a revised formal proposal. On the same day, I asked the Applicant to confirm that s.10(3) and (5) of the CRCA did not apply (this only applies to company and individual arrangements and the like) and that she had not made a claim or recovered under any Business Interruption Policy of Insurance. Sandhill responded on 29 November confirming that s.10(3) and (5) do not apply and that unspecified payments had been received from her business interruption insurers automatically (she says that she did not make a claim as she had not realised that her insurance policy applied to covid closures). This led to further correspondence with the parties that I deal with in 30-31 below.

8. The following is common ground between the parties:
   (i) Notice of Intention to make a reference was properly and validly given by the Applicant under s.10 of the CRCA.
   (ii) The tenancy of the Premises is a business tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies pursuant to s.2(5) of the CRCA.
   (iii) There is a protected rent debt of £17,604.27 pursuant to s.3(1) and (2) of the CRCA.
   (iv) The sum of £2,004.27 out of the protected rent debt of £17,604.27 comprises service charge, and any dispute over the services provided will be dealt with separately to this arbitration.
   (v) The relevant period and dates of closure requirements are not in issue and there is no need for an attribution under s.3(5) of the CRCA.

[3] There was an issue whether the Business was a limited liability company which I deal with in 14 below.

(vi) The parties have not reached agreement on the matter of relief from the payment of the protected rent debt.

Eligibility for grant of Relief

9. S.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 (if not resolved by agreement). Section 11 deals with proposals for resolving the matter of relief from payment, so far as may be relevant, as follows:

"(1) A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent.
(2) 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 (1) is received.
(3) A formal proposal under subsection (1) or (2) must be accompanied by supporting evidence.
(4) 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 (1) or (2)."

10. Under s.13(2):
"If the arbitrator determines that-
(a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,
(b) the tenancy in question is not a business tenancy, or
(c) there is no protected rent debt,
the arbitrator must make an award dismissing the reference."

11. There was and is no agreement on relief from payment of the protected rent debt. There is agreement that the tenancy is a business tenancy and on the amount of protected rent debt (see 8(ii) and (iii) above). Therefore, s.13(3) of CRCA applies:
"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.

(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.

(5) In that case the arbitrator must resolve the matter of relief from payment of a protected rent 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".

Viability of the Applicant's business

12. Therefore, the viability of the Applicant's business has to be assessed. Viability is not defined by the CRCA but valuable guidance is provided by the Commercial Rent (Coronavirus) Act 2022 Guidance ("CRCA Guidance"). This is statutory guidance to arbitrators about the exercise of their functions under Part 2 of the CRCA. Paragraph 6.3 states that 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". It is the tenant's responsibility to provide evidence to support any proposals made and to enable the arbitrator to determine the viability of the tenant's business and I may request information from the tenant under s.34(1) of the Arbitration Act 1996 as slightly modified by paragraph 2(c) of Schedule 1 to the CRCA. The CRCA Guidance has a table of possible indicators and evidence that can usefully be requested. I utilised my statutory powers to request such documents and information from the Applicant to help determine viability in my Procedural Order for Directions No 1 in 6 above.

13. Disclosure by the Applicant comprised (i) two HSBC bank accounts (nos [redacted] and [redacted]) for the Applicant's Business which was used through a limited liability company, HD Studios Ltd ("HD Studios"), company number 06958425; (ii) an HSBC account no [redacted] for a £10,000 Bounce Back Loan ("BBL") taken out in May 2020 (first payment date 26 June 2021 and final repayment due by 26 May 2026 at £177.47 per month) and evidence of a £10,000 grant; an HSBC Credit Card used for working capital for the Business; (iii) HD Studios unaudited financial statements for the years ended 31 July 2019-31 July 2022 (prepared in accordance with the provisions applicable to companies entitled to the small companies exemption); (iv) accounts for another property/business owned by the Applicant ("Fiddlers Lane") from 2018-2022 with a Lloyds Bank Facility (no [redacted] and confirmation of a BBL for £3,500 (monthly repayments of £58.33 starting on 14 June 2021); (v) various NatWest and Barclays personal and savings/ISA accounts and credit cards for the Applicant. This comprised documents and information I had required. I analyse this in the following paragraphs but my overall conclusion is that for the purposes of s.13(4)(a) of the CRCA, the Applicant's Business at the time of the assessment is viable.

14. The daily running of the Business is mainly through HSBC account [redacted] ("the Business Account") which has an overdraft facility of [redacted] As with all the HSBC accounts, these are in the name of HD Studios. However, the Lease is in the name of the Applicant personally. I queried this and both the Applicant and Respondent have confirmed this to be the case. The Lease has never been assigned to HD Studios or any other entity or person. In reality, the Business is financed personally by the Applicant and if HD Studios was to fail, she is the contracting party responsible for all obligations under the Lease. The Applicant is the sole Director and this is essentially her own personal company. Its financial statements are therefore important in assessing viability of the Business, as well as her personal bank accounts and savings given the Business is not a limited liability company but that of a sole trader.

15. Rent for the Premises is paid through the Business Account. This amounts to £1,300 per month and there are other business expenses. The HSBC Credit Card is used to pay for daily stock such as hair products and this credit card is paid for monthly by the Business Account. Further funding for the Business Account comes from HSBC Account [redacted] which pays into the Business Account each month as necessary, mainly for rental payments. The balances on this account have steadily depleted to [redacted] by the end of October 2022. Comparing records pre-covid to post covid is

obscured a little by the BBL of £10,000 taken out in May 2020. A Grant of £10,000 was also provided to the Business in April 2020, and a BBL of £3,500 was provided to Fiddlers Lane albeit this is a separate business of the Applicant. Some recoveries were also made under the Business Interruption section of the Applicant's Policy of Insurance which I deal with in 30-31 below. Taking all this into account, the following is of note:

(i) Turnover of the Business was for the year ended 31 July 2019, for the year ended 31 July 2020, for the year ended 31 July 2021 (sales of and other income of) and (sales of and other income of) for the year ended 31 July 2022. After administrative expenses including rent and Directors' remuneration as its main components, profit was correspondingly , , and .

(ii) The balances of the Business Account varied from on 27 March 2019 to on 27 February 2021, on 27 September 2021 to on 27 October 2022 and on a few occasions a small deficit. Total payments in and out each month varied.

(iii) Net assets decreased to for 2022.

(iv) The figures from 2020 include the BBL loan of £10,000 and Grant of £10,000. The BBL loan is being paid off at the monthly rate of £177.47 from June 2021 for 5 years. However, the BBL loan, Grant and Business Interruption recoveries inflate bank balances from April 2020 onwards.

(v) All rent of £1,300 per month (other than the protected rent debt) has been paid when it fell due.

(vi) Whilst there are some National Insurance payments in the unaudited financial statements, the Business and any labour is essentially only that of the Applicant. She has enjoyed Directors' remuneration of and in 2021 and 2022. As such, recoveries, Grant, BBL loan and further input by the Applicant from her own resources has kept the business going pre covid, during covid and after to date with some but not much room for leeway at the current time. This varies each month.

(vii) Net profit for the separate business of Fiddlers Lane was in the year ended 5 April 2022 (similar to net profit in 2018 and 2019) after fairly heavy losses in the previous 2 years albeit repairs/maintenance appear to have been undertaken then.

16. Therefore, in all the circumstances, I consider that the Applicant's business is presently viable. I now have to consider whether the Applicant should receive any relief from payment and if so, what relief and make an award in accordance with section 14.

Arbitrator's award on the matter of relief from payment

17. Section 14 states as follows:
    (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 s.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.

(4) 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.

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

(6) An award under this section may-

(a) give the tenant relief from payment of the debt as set out in the award, or

(b) state that the tenant is to be given no relief from payment of the debt.

(7) Where an award under subsection (6)(a) gives the tenant time to pay an amount (including an instalment), the payment date must be within the period of 24 months beginning with the day after the day on which the award is made.

(8) In subsection (7) "the payment date" means the day specified in the award as the day on which the amount concerned falls due for payment.

(9) An award giving the tenant relief from payment of a protected rent debt is to be taken as altering the effect of the terms of tenancy in relation to the protected rent constituting the debt.

(10) Subsection (9) means, in particular, that-

(a) the tenant is not to be regarded as in breach of covenant by virtue of-

(i) non-payment of an amount written off by the award, or

(ii) failure to pay an amount payable under the terms of the award before it falls due under those terms.

(d) Any amount payable under the terms of the award is to be treated for the purposes of the tenancy as rent payable under the tenancy.

(11) In this section "final proposal" means-

(a) the revised formal proposal put forward by a party under section 11(4), or

(b) if there is no revised formal proposal put forward by a party, the formal proposal put forward by the party under section 11(1) or (2)."

18. Section 15 sets out the **Arbitrator's principles** 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.

(2) In considering the viability of the tenant's business and the landlord's solvency for the purposes of subsection (1), the arbitrator must disregard anything done by the tenant or the

landlord with a view to manipulating their financial affairs so as to improve their position in relation to an award to be made under section 14.

(3) For the purposes of this section, the landlord is "solvent" unless the landlord is, or is likely to become, unable to pay their debts as they fall due."

19. The assessment of viability and solvency is dealt with in s.16 as follows, so far as may be relevant:

"(1) In assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to-
   (a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party,
   (b) the previous rental payments made under the business tenancy from the tenant to the landlord,
   (c) the impact of coronavirus on the business of the tenant, and
   (d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

(3) In making an assessment under subsection (1) or (2), the arbitrator must disregard the possibility of the tenant or the landlord (as the case may be)-
   (a) borrowing money, or
   (b) restructuring the business"

The formal proposals

20. The Applicant's formal proposal under s.11(1) of the CRCA of 5 October 2022 explained that during the protected period, the Business was forced to close due to the Government restrictions. Had she been allowed to open, the Business could not have operated due to social distancing limitations and the number of people who could be present in an enclosed environment at one time. Due to this, the Business made no income during this period.

21. In an attempt to maintain good relations with the landlords and at great personal expense to herself and the Business, she made a proposal during the pandemic to pay the debt. This was to use the £10,000 Government grant the Business received during the pandemic to pay £10,000 by the end of July 2021, and to pay any further arrears accrued thereafter in a flexible manner as no income was being received due to closure of the Business. She also proposed to hand over the keys and "...essentially forfeit the lease to the landlords by the end of December 2021". However, the landlords would not negotiate and outright rejected the offer with no counter proposals. They provided minimal time to pay the full debt owed before issuing a section 25 notice under Part 2 of the Landlord & Tenant Act 1954 which is the subject of separate litigation.

22. The Applicant's proposal is to write off the arrears accrued during the protected period as to enforce this would put the Business at risk of becoming insolvent. Inflation and rising energy bills means it is no longer viable for the Business to also be paying a substantial debt accrued at a time when it made no income, in addition to meeting current rental obligations and liabilities.

23. Initially after re-opening the salon, the Applicant was using the £10,000 Grant received to refurbish the shop (there is a figure of £12,363 for repairs and maintenance in the financial statements ending 31 July 2021) to attract new customers and help pay the ongoing rent in addition to repaying the BBL she took out and as such, this pool of money has now been exhausted. Custom is said to have picked up slightly but not to pre-Covid levels. The Applicant says the Business makes enough income per month to meet the current monthly liabilities as they fall

due (approximately £2,000 per month including wages and the BBL repayments) but there is no surplus income being generated that could be used to pay off the debt accrued during the protected period. The Applicant's anticipation is that this will be the case for the foreseeable future.

24. The formal proposal attached a sheet showing balances as at 13 September 2022 for the two HSBC accounts, the BBL account and the credit card. These showed balances of ████ (this refers to the overdraft facility of ████ so the sheet showed an "available balance" of ████), ████, ████ (denoting the balance of the BBL) and a credit card balance of ████. However, these accounts were not named and were a snapshot of one day. Therefore, I directed for more documents and information to be provided (see 6 above).

25. The Respondent's formal proposal under s.11(2) was in the form of a statement by Mr Barry Flint (see 5 above) signed by him on 13 October 2022. This set out the history of how the Respondent purchased the property (see 2 above). It confirmed agreement that the Lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies and to the amount of the protected rent debt subject to the correct amount of the service charge[4]. It also addressed the periods of the Applicant's closure though this was subsequently agreed (see 8(v) above).

26. The Respondent described meeting with the Applicant in May 2021 to discuss the arrears. In June, the Applicant was said to be working on her business plan and needed to speak with her accountant and was working hard to clear the arrears but income was slack. On 7 June 2021, the Applicant is said to have stated that she should be able to pay £5,200 upfront and the balance of the arrears in 12 equal instalments together with the current rent. However, the Respondent instructed Scott-Moncrieff in June 2021 to pursue arrears and a demand letter was sent on 21 June 2021. The Applicant is said to have told Scott-Moncrieff that she needed to review the figures and was not unwilling to pay. During without prejudice lease renewal negotiations on 21 July 2021, Mr Flint is said to have proposed that the Applicant use the £10,000 Government Grant towards the debt with an offer to pay the balance in a flexible manner and surrender the lease. However, Mr Flint says that this was not accepted. A Pre-Action Letter was then sent by Scott-Moncrieff to the Applicant on 6 October 2021. The Applicant is said to have requested additional time to respond but no further contact was made with Scott-Moncrieff. Mr Flint says he tried to engage with the Applicant to discuss the arrears but no resolution was reached.

27. The Applicant is said to have instigated Lease renewal proceedings but Mr Flint points out that her formal proposal mentions a surrender. The Respondent's position is that the arbitration will deal with the protected arrears and the lease renewal proceedings will deal with the Lease/renewal lease terms. Mr Flint refers to the Arbitrator's principles in s.15 of the CRCA. He states that the Respondent will not provide evidence of its solvency as relief from payment would not pose a risk to its solvency. At the time of the Respondent's formal proposal, the Respondent had not seen enough evidence to comment on the viability of the Applicant's business (which led to my

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[4] At this time, the protected rent debt was agreed between the parties at £18,015.14 but this included uncertainty over whether the service charge of £2,415.15 included in this figure related to all or part of the protected period. Subsequently, the parties agreed that £410.87 of the service charge was outside the protected period reducing the protected rent debt to £17,604.27. This is recorded in correspondence. The Applicant disputes whether all services were properly provided but this is outside the scope of the CRCA and Sandhill's email of 1 November 2022 at 21.47 confirmed that this would not be pursued in this arbitration but would be investigated separately.

Procedural Order for Directions No 1 on 4 November 2022). Mr Flint noted that the Applicant had recently paid invoices relating to non-protected rents and that when assessing viability the Applicant's assets should be considered. The Respondent mentions 29 Fiddlers Lane and [redacted] (said to be the Applicant's residence) in this context.

28. In the event the Business is found to be viable, the Respondent considers there is insufficient evidence to support writing off the debt as requested by the Applicant (in whole or in part). The Respondent considers that the Applicant had not at this time supported her contention that she is unable to pay the protected debt in full. However, the Respondent sympathises with tenants dealing with the pandemic and acknowledges the difficulties they faced in weathering the storm. In the interest of landlord and tenant relationships, and taking into consideration the lease renewal proceedings, the Respondent's proposal is a 15% write off of the protected rent (not service charge) and time to pay the debt by way of 12 monthly instalments. The Respondent considers that this may preserve the viability of the Business whilst upholding the Applicant's liability to meet her obligations under the Lease.

The Respondent's revised formal proposal

29. Although both parties time to put forward revised formal proposals was extended, the Applicant did not do so. The Respondent did by way of a further Statement by Mr Barry Flint, signed and dated 24 November 2022 with a Statement of Truth. This was sent by email on 28 November 2022. This revised formal proposal did not provide any further supporting evidence but relied on the evidence and documentation produced by the Applicant in response to Procedural Order for Directions No 1. The Respondent made the following points:

    (i) The Respondent's initial formal proposal was made as a gesture of goodwill and without sight of the Applicant's financial disclosure.
    (ii) The Applicant's HSBC business bank accounts appear to be well managed and have been mainly in credit although occasionally making use of the small overdraft facility.
    (iii) The Business made a profit in the protected period of 21 March 2020 to 12 April 2021 and the income statement for the year ended 31 July 2021 shows a profit of [redacted]. Pre and post covid profits appear to be "similar" (for amounts, see 15(1) above).
    (iv) The Applicant has savings in an ISA. She has rental income at Fiddlers Lane which was renovated in 2019 and 2020 but now appears to generate a regular income with an overall profit and the property should generate income going forward.
    (v) The Applicant has not shown a clear financial hardship and received £6,286 for furlough in January 2021 from Trafford MBC and had funds to pay a large legal bill of £14,194 in September 2020.
    (vi) It is not straightforward to analyse the Applicant's financial position but the overall impression provided is that her business is viable. Her business accounts show that despite having to close, the Business was not significantly impacted over the protected period, she manages her finances well, has a couple of income streams and a manageable number of loans to pay off. She also has savings in an ISA. The Respondent stated: "On the basis the business continues to grow and taking into account the additional rental income that the Applicant should expect from the property at Fiddlers Lane, it appears that the Applicant may well be able to operate a viable business and at the same time pay off the arrears owed to the Respondent."

(vii) The Respondent's view is that the Applicant has not evidenced her position that she cannot pay the debt at all and that it should be written off. In contemplation of the financial disclosure provided, the Respondent's revised offer is to apply a 10% write off (applying to the protected rent of £15,600 and not the service charge of £2,004.27 which should be paid in full) and 12 months to pay this off. The Respondent considers that this is a "reasonable offer."

Business Interruption recoveries

30. I had ordered disclosure of all bank account statements for the last 12 months and quarterly from March 2019 until September 2021. Following scrutiny of these, by email on 30 November, I asked for some additional bank statements from the quarterly cycle to check on various monthly payments being made. I also further enquired about the Business Interruption Policy/recoveries as mentioned in 7 above. I required further details by 6 December along with a copy of the Policy of Insurance. This was provided on 5 December with some accompanying documents and an explanation as follows:
    (i) The Applicant had not been keeping track of when monies were coming in as there was no need due to her working on a month-to-month basis.
    (ii) She had not known she could claim under her insurance policy. In fact, payments were received automatically which she assumed had been made in 2020 (as that was when the first lockdown occurred). The payments were made in 2021 in response to a Supreme Court judgment against another insurer earlier that year.
    (iii) The payments were made as follows:
        (a) 2 and 7 July 2021 £14,359
        (b) 9 August 2021 £ 3,968
        (c) 27 September 2021 £ 1,457
        (d) 11 October 2022 £ 873.90
    (iv) On the advice of her accountant, the Applicant took the monies as a salary and dividends with the balance used to meet business expenses and for her own living expenses due to her lack of income, ie mortgage repayments, food, bills, car expenses, to build the business back up. She also used some to continue with meeting rental obligations as they were falling due. Further bank statements were produced showing that rental payments of £1,300 per month were made from April 2021 onwards (there were 2 payments of £1,300 in May 2021) even though business had not returned to pre-Covid levels.
    (v) The Applicant says that the Grant in 2020 was used for legal fees on an unrelated matter but she had mistakenly thought that the insurance money was used for this, and another grant was received in May 2021 (said to have been for £8,000 from Trafford MBC as a Covid closure grant given to support small businesses) which was used for refurbishment as shown in the HD Studios accounts ending July 2021.
    (vi) Upon enquiry I made of the Applicant, she confirmed that she had recently called her insurers who intimated that the payments made were final, the October 2022 payment being final interest due.

31. The Respondent considers that the insurance monies changes the landscape and refers in particular to the second principle in s.15(1)(b) CRCA. It maintains that the Applicant was in a position to pay the protected rent debt but decided not to do so. It enquired on 1 December if it could submit an amended revised formal proposal. I replied on the same day referring to the CRCA whereby each party may submit one revised proposal and there is no provision for a further amended Final Proposal. I invited the Respondent to revert with reference to the CRCA and CRCA

Guidance if it disagreed. Scott-Moncrieff sent an email on 13 December referring to paragraph 12.17 of the CRCA Guidance (reference to an arbitrator's broad discretion under s.34 of the Arbitration Act 1996 on all procedural and evidential matters save where they are inconsistent with the provisions of the CRCA). Balancing when extra disclosure/information about business interruption recoveries was provided against the relatively late timing of the request, and considering paragraph 12.17 of the CRCA Guidance and the provisions of s.34 of the Arbitration Act 1996, I considered that I should allow both parties a short further submission by email by 4pm on 15 December but not as a further revised final proposal under s.11 and s.14(11) of the CRCA. Scott-Moncrieff provided an email submission for the Respondent on 14 December. This repeated Mr Barry Flint's Statement of 24 November but withdrew the offer of a credit (which had comprised a 10% write off of £15,600-see 29(vii) above) as the Respondent considers that the Applicant should, and likely can, pay the protected rent debt in full. The Respondent's position is that this further disclosure does not support an inability to pay the protected rent debt. The further disclosure shows the Applicant has received income and financial assistance from various sources during and after the pandemic but has made no payment of the protected rent debt. The Respondent is still agreeable to payment by instalments over 12 months.

Relief from Payment: Decision

32. My first consideration is s.14(1)-(5) of the CRCA. Both parties have put forward final proposals under s.11. Although only the Respondent put forward a revised formal proposal, under s.14(11), "final proposal" means the revised formal proposal put forward under s.11(4) (in this case, the Respondent), or if there is no revised formal proposal put forward by a party, the formal proposal put forward by the party under s.11(1) (in this case, the Applicant). I need to consider whether both or either of the final proposals are consistent with the principles set out in s.15 above. Considering the Applicant's final proposals first, I have found (and the Respondent has accepted) that the Applicant's Business is viable at the time of assessment. Writing off the entire protected rent debt would obviously be beneficial to the Business. Under s.15(1)(a), the viability of the Business has to be consistent with preserving the landlord's solvency. This seems to be the case given that the Respondent has stated that relief from payment would not pose a risk to its solvency (see 27 above). However, the second principle is that the Applicant should, so far as it is consistent with the principle of preserving the viability of the Business, be required to meet her obligations as regards the payment of protected rent in full and without delay. The Applicant's Final Proposal does not take account of this. Given that her obligations under the Lease are the Applicant's personally, account can be taken of her other income and assets. She has the benefit of a small overdraft facility in the Business Account which has occasionally been used but generally speaking, the account has been in credit albeit for small amounts. Given that the Business is viable, the question to answer is to what extent can the Applicant afford to pay the protected rent debt balancing, on the one hand, the viability of the Applicant (tenant's) business, and on the other hand, the solvency of the landlord. The arbitrator's principles aim to strike a balance between the parties. Looking at this as a whole, writing off 100% of the protected rent debt as proposed is inconsistent with the requirements of s.15(1)(b) of the CRCA. It does not share the "financial burden" with the Respondent. By not writing it all off, I do not consider that enforcing part of the arrears puts the viability of the Business at risk, depending on the amount to be payable which I address below. The BBL loan, Grants, furlough payments, Business Interruption payments of £20,657.90 and the Applicant's inputs kept the Business going during the protected period when there was no income, so that the Business has a platform with which to go forward, albeit with some additional debt from the BBL loan. In looking at viability, I also take into account the financial

position regarding Fiddlers Lane and the finances of the Applicant, as set out in s.16(1)(d) of the CRCA.

33. The converse is the position of the Respondent. The government's policy is one of "sharing the financial burden". The final proposals of the Respondent made a modest allowance. It does not take into account that keeping the Business afloat during the protected period was only possible with government help and insurance recoveries though further debt accrued. The figures in the Business Account show very modest profit pre and post covid. The figures and profit for the year ended 31 July 2021 take account of the "other income" (see 15(i)). This includes the first Business Interruption payment in July 2021. Net assets of the Business decreased from 2019 to 2022. The overall proposal is that the Applicant pays £16,044.27 (£15,600 less 10% plus the service charge of £2,004.27) over the next 12 months. This amounts to £1,337.02 per month, which doubles the amount of monthly rent being paid for the next 12 months. I do not know why the service charge has been excluded in any reduction as "rent" for the purposes of the CRCA includes an amount payable as a service charge (see s.2(1)(b) and s.2(2)(c)). However, I do not consider that the Business is able to double its main expense and stay viable. The Business Account shows modest balances for most of the time and in the past few months and the other HSBC account shows consistent reductions in balances so that the balance is now quite small (see 15 above). The profits of the Business for the most part (and for the year ended 31 July 2022) are very small compared to the Protected Rent Debt. None of this is in keeping with the principle of preserving the viability of the Business. I therefore do not consider that the Respondent's Final Proposal is consistent with the principle set out in s.15(1)(a)(i) and would adversely impact the viability of the Business. In these circumstances, still less do I consider the Respondent's position of making no credit allowance with the full protected rent debt payable over 12 months is in keeping with s.15(1)(a)(i) (see 31 above). This would mean monthly repayments of £1,467.

34. However, the extent of recoveries tempers the overall position. The recoveries made under the Business Interruption Section of the Applicant's insurance policy came to light late in the day (see 7 above). The total recovered was £20,657.90 in addition to the BBL Loan, Grants and/or furlough payments. All of these helped to keep the Applicant in business. Some of these funds were used to refurbish the salon to attract new custom. The unaudited financial statements are not broken down in detail to examine precisely what monies were used/allocated. There clearly was a choice made in the allocation of the business interruption recoveries which should reflect in the question of relief but the monies overall appear to have been used responsibly and kept the Applicant and the Business afloat. Some allocations are difficult to reconcile with the position of the Applicant in her formal proposal, for example what funds were used to refurbish the salon, but overall she does not appear to have been profligate. However, the allocation frees other assets of the Applicant which is relevant in considering the preservation of viability under s.15(1)(a)(i) of the CRCA and to meet her obligations under s.15(1)(b).

35. Neither of the final proposals are consistent with the s.15 principles but doubling rental payments for the next 12 months as the Respondent proposes would not preserve the viability of the Business even given the Applicant's overall recoveries/receipts. The later position of the Respondent would more than double monthly rental payments. Despite recoveries that helped preserve the Business during the protected period, the tenancy was adversely affected by coronavirus as the Business carried on by the Applicant as tenant at or from the Premises was subject to a closure requirement and the rent is attributable to a period of occupation by the Applicant, or for a period within, the protected period applying to the tenancy (all pursuant to s.3

and 4 of the CRCA). However, the recoveries need to be taken into account and as the Business is that of sole trader and not incorporated, all in the Applicant's name, inputs from the Applicant for payment of the protected rent debt can be factored into the overall position. Any payment requirement also needs to be matched with a realistic payment schedule given the financial position of the Business. Having carefully considered the final proposals and submissions of the parties and all the financial information produced, I consider that the Applicant should receive relief from payment of the protected rent debt under s.13(5) and that the following is appropriate under s.14(5) applying the principles in s.15:

(i) The total amount of the protected rent debt of £17,604.27 (inclusive of service charge of £2,004.27) be reduced by a third to £11,736 ("the reduced protected rent debt").

(ii) The sum of £11,736 in (i) above must be paid by the Applicant to the Respondent in 18 monthly instalments of £652 from 9 January 2023 and the 9th of each month until 9 June 2024 inclusive.

Costs

36. S.19(7) of the CRCA provides that each party must pay its own costs, so this is not an issue for me to determine. Under s.19(5) of the CRCA, when an award is made under section 13 or 14, the arbitrator must also make an award requiring the Respondent to reimburse the Applicant for half of the arbitration fees paid by the Applicant unless it is considered more appropriate in the circumstances to award a different proportion (which may be zero) whereby the general rule in subsection (5) does not apply (s.19(6)). The Respondent invites me to exercise my discretion so that the Applicant pays all of the arbitration fees. This is based on the Applicant's perceived conduct and lack of transparency which are said to have increased the Respondent's costs substantially. This is also due to the late information emerging about the Applicant's business interruption recoveries. The Applicant criticises the conduct of the Respondent in negotiations prior to making the Reference and says this is pertinent to the consideration of costs.

37. Whilst I do not consider the Applicant set out to withhold information from this arbitration regarding recoveries from business interruption insurers, this nonetheless only came to light after I raised it. However, I consider there has always been a genuine dispute. At this distance, I cannot conclude one way or another which party put forward various proposals to settle, and whether the conduct of either party was unreasonable. I consider that the reference to arbitration was unremarkable in all the circumstances. The business interruption recoveries might have led to a harder line being taken by the Respondent when making formal proposals and the Respondent has altered its position with a further submission (see 31) but the outcome would have been the same as my decision takes account of the recoveries and provided relief from payment. On balance, I consider that the general rule in s.19(5) is not displaced so that I hereby award the Applicant half the arbitration fees incurred in making the reference.

The Award and Publication

38. Therefore, in summary, having carefully considered the final proposals, submissions of the parties and all the financial information produced, and applying the provisions of the CRCA, I hereby award and direct as follows:

(1) The Applicant is to pay to the Respondent the reduced protected rent debt in the sum of £11,736 in 18 monthly instalments of £652 from 9 January 2023 and the 9th of each month until 9 June 2024 inclusive.

(2) The Respondent must reimburse the Applicant £450 (being 50% of the arbitration fees of £750 plus VAT paid by the Applicant to CCODR when making the reference) by 9 January 2023.

39. I have no objection to the sum of £450 in 38(2) above being deducted from the first instalment payable by the Applicant on 9 January 2023, so the payment in 38(2) above would be discharged by the Applicant's first instalment being £202, with all following instalments payable by the Applicant reverting to £652 from 9 February 2023 until 9 June 2024. However, in the absence of agreement between the parties on that, payments and payment dates by both parties are in accordance with paragraphs 38(1) and (2) above. For the sake of completeness, interest is not claimed nor do I consider it appropriate to make an award for interest in all the circumstances.

40. I am required to publish this award pursuant to s.18(2) of the CRCA. I intend to publish the award on the CCODR website. I have formed the provisional view that the account numbers in paragraphs 13, 14 and 15 and sums in paragraphs 14, 15 (account balance only), 15(i)-(iii) and (vi)-(vii), 24, 27 (the private address of the Applicant) and 29(iii) contain commercial and private information which ought to be redacted from the award pursuant to s.18(4). I will therefore publish the award in full (except for the redactions I have referred to) on the CCODR website unless either party indicates to me by 4 pm on 3 January 2023 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

41. Pursuant to s.95(2) of the Arbitration Act 1996, the seat of this arbitration is in England and Wales.

This Award is made and published by me, Andrew Davis LLB FCIArb, on the 21st December 2022 at the Consumer Code for Online Dispute Resolution (CCODR)

Andrew Davis