

IN THE MATTER OF AN ARBITRATION

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

BETWEEN:

ADAM & JULIE GARRETT

Applicant

-and-

WELLINGTON PUB COMPANY PLC

Respondent

FINAL AWARD

Introduction

1. The dispute relates to rent and interest due from the Applicant to the Respondent pursuant to a lease made between the parties [hereinafter referred to as 'the Lease']. The Applicant's business is known as 'Compasses' situated at 158 Thorpe Lea Road, Egham TW20 8HA [hereinafter referred to as "the Premises"]. The Applicant is the tenant under the Lease and the Respondent is the landlord.
2. There is no dispute between the parties in respect of the eligibility of the reference and it is agreed that the Applicant has complied with the requisite timescales for notifying the Respondent and bringing the claim.
3. Arrears of rent has accrued and remain in dispute. There is a dispute between the parties in respect of the amount of the protected rent debt. The Applicant states that the protected rent debt is in the sum of £46,500.00 and the Respondent states that it is in the sum of £56,056.41. The Applicant has made an application under The Commercial Rent (Coronavirus) Act 2022 [hereinafter referred to as "the Act"] for relief.

The Parties

4. The Applicant carries on business running a public house called 'the Compasses'. The Applicant is represented by Chris Wright of Protected Rent Debt.

5. The Respondent is the Applicant's landlord pursuant to the said Lease and is represented by Alison Cornelius of Criterion Asset Management Limited.

Jurisdiction and Seat of Arbitration

6. The parties have been unable to resolve their dispute in relation to the protected rent debt and the Applicant has commenced this arbitration pursuant to the Act. The Act itself provides the jurisdiction for this arbitration and the seat of the arbitration is England and Wales.
7. I was appointed as the arbitrator and the parties were notified of my appointment on 23rd September 2022.
8. The referral is for an arbitration on the papers with no oral hearing.

Procedural and Interlocutory Matters

9. I had received the following documents [hereinafter referred to as 'the Documents'] as part of the Applicant's referral;
 - a. Nat West Bank Statements and Nat West Current Account Summaries
 - b. The Government's policy statement on Resolving Commercial Rent Arrears accumulated due to Covid 19.
 - c. 2 Fitch Affirm reports.
 - d. The Code of Practice.
 - e. The Commercial Rent (Coronavirus) Act 2022.
 - f. The Commercial Rent (Coronavirus) Act Bill.
 - g. Government Press Release.
 - h. 2 Venn diagrams.
 - i. The Applicant's formal proposal.
 - j. The Applicant's notification of intention.
 - k. The Applicant's statement.
10. A summary of the correspondence and documents received are as follows.
The Applicant's referral included its formal proposal and narrative statement.
11. The Respondent's formal proposal was received on the 13th October 2022.
12. On 24th October 2022, Mr. Wright emailed Ms. Cornelius to seek an extension until 7th November 2022 for the filing of the Applicant's revised proposal. The Applicant's revised proposal was received on 7th November 2022.

13. In an email dated 7th November 2022, Ms. Cornelius requested an extension of time until 18th November 2022 to file the Respondent's revised proposal.
14. On 17th November the Respondent's revised proposal was received accompanied by the rent debt statement in the sum of £56,056.41 which the Respondent relies upon as being the protected rent debt, the Respondent's 'Covid 19 Support for Tenants Statement' and the Respondent's annual report and accounts to the year end 31st March 2021.
15. Both parties have filed final proposals, which I have detailed below.
16. I thank both parties for their engagement in this process and take this opportunity to apologise for the delay in publishing this Award.
17. I have carefully reviewed all of the evidence and the submissions from the parties.

The Statutory Requirements

18. Section 13 of the Act sets out the Awards that are available.

Arbitration awards available

(1) This section sets out the awards open to the arbitrator on a reference under this Part.

(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.

(3) 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 debt by—

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

(b) making an award in accordance with section 14.

19. Section 14 of the Act sets out what to consider when determining the 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.

(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;
- (b) a guarantor of the tenant's obligation to pay rent, or a former tenant who is otherwise liable for a failure by the tenant to pay rent, is not liable in respect of anything mentioned in paragraph (a)(i) or (ii);
- (c) a person other than the tenant who is liable for the payment of rent on an indemnity basis is not liable—
 - (i) to pay any unpaid protected rent written off by the award, or
 - (ii) 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).

20. Section 15 of the Act sets out the principles which I must apply in my determination.

Section 15 Commercial Rent (Coronavirus) Act 2022 - Arbitrator's principles

(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.

21. I now turn to consider the final proposals put forward by each party pursuant to section 11 of the Act for relief from payment. The matter of relief from payment is defined in section 6 of the Act as follows;

(1) References to the matter of relief from payment of a protected rent debt are to all issues relating to the questions—

(a) whether there is a protected rent debt of any amount, and

(b) if so, whether the tenant should be given relief from payment of that debt and, if so, what relief.

(2) “Relief from payment”, in relation to a protected rent debt, means any one or more of the following—

(a) writing off the whole or any part of the debt;

(b) giving time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments;

(c) reducing (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or any part of the debt.

The Applicant’s proposal

22. The Applicant filed a Formal Proposal dated 23rd September 2022 as follows;

- a) The amount of the Protected Rent Debt is assessed by the Applicant as £46,500.00.
- b) The amount of relief requested is £46,500.00.
- c) That the Protected Rent Debt be written off in its entirety.
- d) If applicable, relief is to be given from immediate repayment and time is to be provided to pay any balance over 24 months.
- e) The Respondent is to pay 50% (half) of the Arbitrator’s fees pursuant to section 19(5) of the Act.

23. The Applicant’s formal proposal and the statement in support set out the Applicant’s position in respect of the relief sought and the basis upon which the offer was made. I have not rehearsed all of the contents herewith but have considered them carefully and refer to them below.

24. Bank statements have been provided as evidence to demonstrate that there are regular sales and that the business is viable. I have also considered the

projections in respect of the business sector and the other documents provided.

The Respondent's formal proposal

25. The Respondent's proposal together with a Nat West Current Account statement from 31st March to the 29th April 2022 was filed on 13th October 2022. The first paragraph names the wrong Applicant, but as the heading and the facts referred to are applicable to the Applicant I have proceeded on the basis that this is an oversight. It contains a narrative statement in addition to the actual proposal, which is as follows;

- a) The amount of the Protected Rent Debt assessed by the Respondent is £56,056.41.
- b) The amount of the Protected Rent Debt payable by the Applicant is £56,056.41.
- c) The Protected Rent Debt is to be paid by 30th April 2024.

26. I have not rehearsed all of the contents of the narrative aspect of the formal proposal herewith but have considered them carefully and refer to them below.

The Applicant's revised proposal

27. The Applicant filed a revised proposal dated 7th November 2022 accompanied by screenshots of a communication from the Respondent in respect of support offered including a 3 month rent free period and 2 published Awards. The revised proposal does not differ from the formal proposal. I have not rehearsed all of the contents herewith but have considered them carefully and refer to them below.

28. The Applicant invites me to agree that the Applicants formal proposal is the most consistent with the Act and what was requested should be granted.

The Respondent's revised proposal

29. The Respondent filed a revised proposal which was received on the 17th November 2022. The revised proposal is as follows;

- a) The amount of the Protected Rent Debt assessed by the Respondent is £56,056.41.
- b) The amount of the Protected Rent Debt payable is £56,056.41.
- b) The Protected Rent Debt is to be paid by 30th April 2024 in equal instalments.

30. Again, I do not rehearse the revised proposal herewith. The Respondent has responded to a number of matters raised by the Applicant and has revised its proposal to include that the repayment of the protected rent debt should be paid in equal instalments. The rent statement is included with the revised proposal.

Relief sought

- 31. Whilst I have carefully considered all of the papers before me, I have not addressed every single disputed fact and have focussed on resolving the dispute in accordance with the Act.
- 32. There is a dispute between the parties in respect of the amount of the Protected Rent Debt. The Applicant states that it is in the sum of £46,500.00 and the Respondent states that it is in the sum of £56,056.41. I determine that the protected rent debt is in the sum of £56,056.41 as I have been provided with evidence of this figure by the Respondent in the form of a statement. No documentary evidence has been provided by the Applicant in support of its contention that the figure is £46,500.00.
- 33. The Respondent points out that the Applicant was not up to date with its post pandemic rent, contrary to what has been claimed. This calls into question, among other things, the viability of the Applicant's business. The term 'viability' is not defined within the Act. However, the Department for Business Energy and Industrial Strategy Commercial Rent (Coronavirus) Act 2022 Guidance states at paragraph 6.3 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. The Applicant has provided a number of bank statements, which I have carefully considered together with the projection forecasts. I note that it is trading effectively, funds are being generated and the business remains viable.

34. On a consideration of the evidence provided, I determine that the Applicant's business is viable and that the referral to arbitration is eligible to be considered pursuant to the Act. The requirement of viability is met and I am satisfied that the requirements of section 3(2) of the Act are established. I will therefore proceed to resolve the matter of relief from payment of the protected rent debt and determine that this case is eligible for the dispute to be determined pursuant to the Act.
35. I note the generic nature of a large part of the Applicant's evidence, but accept that the Applicant's business was adversely affected by the pandemic during the 'protected period' as described by section 5 of the Act and in the manner described in the evidence adduced by Applicant. I do not disregard the Applicant's revised proposal, even though it is identical to the Applicant's formal proposal.
36. I also accept the impact of the pandemic on the Respondent and the loss of profits as set out in the Respondent's formal proposal document.
37. I have confined myself to matters that form part of the arbitration and have carefully considered all of the documents and the submissions made together with the principles clearly set out at paragraph 15 of the Act and the Act specifically. In addition, I have considered the Awards that have been brought to my attention, along with a number of others, which I note are fact specific and not binding.
38. I have carefully considered both parties proposals. Section 11 of the Act requires each party to make proposals for 'resolving the matter of relief from payment of a protected debt'. It does not allow for me to impose or substitute an alternative proposal of my own, as set out at section 14 of the Act.
39. I have given careful consideration to section 15 of the Act and the principles contained therein. I note that, given the amount of the Applicant's post pandemic rent arrears in the sum of £52,323.96, requiring the payment of the protected rent debt is likely to effect the business irreversibly, even if the repayments are spread over 13 months. This period of time is the remainder of time left on the lease. The lease is not included in the documents before me but this timeline is not in dispute. The section 15 principles are clear and include preserving the viability of the business, where applicable.
40. I note the propositions that the Applicant asks me to agree with. I accept the difficulties suffered by the Applicant during and as a result of the pandemic. I see no evidence that the Respondent seeks to use information supplied in the course of this arbitration for rent reviews, negotiations etc. I have not been provided with evidence of the renovations and improvements that the

Applicant undertook and am unable to take this into account or quantify the value that it has been asserted was added to the premises as a result.

41. I note that the Applicant was offered a deal in the form of a rent free period in an attempt to assist and alleviate the effects of the pandemic. The Applicant did not avail itself of the '3-6-5' offer, as it was known, as a result of it being unsuitable for his business. I also note that the Respondent offered a number of other incentives and determine that the Respondent has shared and offered to share in the burden caused by the pandemic.
42. I note the Applicant's comments in respect of the need to have cash on account and how this would be depleted if were to be applied to pay the protected rent debt.
43. I have considered both parties proposals and the evidence in support. I accept the Applicant's revised proposal, which I have already noted is identical to its formal proposal. On a consideration of all of the information that I have before me, I determine that this proposal satisfies the principles set out in section 15 of the Act and the overriding objective. I have considered the bank statements and all other evidence provided. The Applicant's proposal preserves the viability of the Applicant's business, while being consistent with the requirement for the Applicant to maintain its ongoing obligations under the tenancy.
44. I determine that the Respondent must pay 50% of the Arbitrator's fee pursuant to section 19(5) of the Act.
45. Now I, Kemi Ojutiku, having carefully considered the proposals and submissions of the parties, together with all of the documents before me, hereby award and direct as follows;
 - a) The amount of the Protected Rent Debt is assessed at £56,056.41.
 - b) The Applicant is hereby granted relief from payment of the Protected Rent Debt by writing off the whole of the amount.
 - c) The Respondent must pay 50% (half) of the Arbitrator's fee, pursuant to section 19(5) of the Act.

Publication of the Award

46. 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 award contains no commercial information which ought to be redacted. I will therefore publish the award in full on the CCODR website

unless either party indicates to me by 4pm on Wednesday, 12th April 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.

Kemi Ojutiku FCI Arb

A handwritten signature in black ink, appearing to read 'K. Ojutiku', written in a cursive style.

6th April 2023

Consumer Code for Online Dispute Resolution (CCODR).