FALCON CHAMBERS ARBITRATION

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

Between

RESTAURANT SW3 LIMITED

Applicant

and

(1) SLOANE STANLEY PROPERTIES LIMITED

(2) SLOANE STANLEY LLP

Respondent

Preliminary Issue Award

Background:

A. By Directions Order No.1 dated 30.11.2022 I directed that the Respondents' emails specified in the preamble to that order ("the Application emails") were to be treated as an application that the reference to arbitration be dismissed, to be determined as a preliminary issue ("the Application").

B. I directed further that the Applicant provide its submissions in response to the Application by 08.12.2022, and thereafter by Directions Order No.2 I extended time for those submissions to 16.12.2022.

C. The Applicant filed and served its submissions, prepared by Ms Taylor Briggs of Counsel, on 16.12.2022, and I received submissions in reply for the Respondents on 22.12.2022 prepared by their solicitor, Ms Lauren Taylor of Howard Kennedy LLP ("HK LLP").

D. The Application to dismiss is made on two bases:

a. On the basis that the reference to arbitration by the Applicant is invalid because no evidence in support was provided with the formal proposal, in breach of the mandatory requirement of s.11(3) of the 2022 Act; alternatively

b. Because of abuse of process, on the basis of what is described as the Applicant's dilatory approach to this reference having regard to a number of matters including (a) the Applicant's failure to provide supporting evidence, (b) failures to communicate promptly with FCA, (c) failure to pay the arbitration fee until threatened by a peremptory unless order and (d) late requests for extensions of time both for payment of the arbitration fee and for submissions in reply to the Application.

E. In the course of preparing my determination, I drew the parties' attention to two further issues that relate to the possible invalidity of the reference to arbitration being (a) compliance with s.11(7)(b) of the 2022 Act and (b) compliance with s.11(7)(c) of the 2022 Act. I directed the filing and exchange of further submissions from the parties in respect of both these issues, and in respect of which I received submissions from both parties' representatives on 20.01.2023. The Applicant's Written Submissions were again provided by Ms Briggs, and the Respondents' submissions by email were provided by Ms Taylor, both on 20.01.2023.

UPON having read and considered the parties' submissions in respect of the Application comprising (a) the Application Emails; (b) the Applicant's Written Submissions submitted on 16.12.2022; (c) the Respondents' submissions in reply by email dated 22.12.2022; and (d) the Applicant's and the Respondents' further submissions of 20.01.2023

The Tribunal hereby orders that:

1. The Applicant's reference to arbitration is dismissed.

Reasons

Factual background

1. The Applicant is the tenant of premises situate at 221 Kings Road, London SW3 5EJ pursuant to the terms of a lease dated 26.08.2011 ("the Lease"), and from which it operates a restaurant business known as My Old Dutch.

2. By an email dated 23.09.2022 and timed at 17:33 the Applicant, by Teacher Stern LLP ("TS LLP") its solicitors, submitted to FCA a "*completed Referral Form for arbitration under the Commercial Rent (Coronavirus) Act 2022 together with their Formal Proposal*."

3. The Formal Proposal comprised three short paragraphs, as follows:

    1. *This is the Applicant's Formal Proposal in support of their referral to arbitration made on 23 September 2022 under the Commercial Rent (Coronavirus) Act 2022 ("the Act").*

2. *The Applicant seeks full relief from payment of the sums due during the "protected period" under the Act.*

3. *The Applicant intends to submit supporting evidence, which will follow.*

4. No supporting evidence at all was provided or included with the Formal Proposal or arbitration referral form.

5. With regard to the contents of the referral form:

   a. Paragraph 3, box (a) directs the applicant to set out "*the amount of commercial rent arrears in dispute*". In response to this the Applicant did not insert a figure but the words "*The full amount of sums due in the protected period under the Commercial Rent (Coronavirus) Act 2022*".

   b. Paragraph 7, box (b) asks the applicant "*Whether you intend to supplement your Formal Proposal with evidence from witnesses of fact and experts, giving details in each case*". The Applicant wrote in response: "*The Applicant intends to supplement their Formal Proposal with evidence from witnesses of fact (names to be confirmed) but not with any expert evidence*".

6. On 10.10.2022 at 19:12 FCA wrote by email to TS LLP, copied to HK LLP, proposing me as arbitrator and a proposed fee in this reference.

7. No reply was received from the Applicant.

8. On 12.10.2022 HK LLP, for the Respondents, emailed FCA (copied to TS LLP) stating that "…*we have not been provided with the Applicant's referral or documents. Please can we be provided with the same*". FCA replied on the same day, copying both parties, that that was the responsibility of the Applicant.

9. On 19.10.2022 FCA wrote to TS LLP, chasing a reply to the email of 10.10.2022.

10. On 25.10.2022 HK LLP also emailed TS LLP, asking whether its client intended to pursue the referral to arbitration.

11. On 01.11.2022 TS LLP replied stating, inter alia, that "...*We are taking instructions from our client in relation to the proposed arbitrator and his fee and hope to revert shortly in this respect.* It also attached to this email its FCA arbitration referral form dated 23.09.2022, the Formal Proposal dated 23.09.2022, and a letter to Sloane Stanley Properties Ltd dated 01.11.2022 also enclosing the former two documents.

12. On 02.11.2022 HK LLP for the Respondents emailed FCA, enclosing an email of the same date that it had sent to TS LLP, making the point that a referral to arbitration made under s.11(1) must be accompanied by supporting evidence under s.11(3), and making further complaint regarding the Applicant's conduct as amounting to an abuse of process.

13. That email was referred to me for my consideration, although at that date I had not yet been formally appointed as arbitrator, only proposed.

14. On 10.11.2022 at 6:17pm FCA emailed the parties stating that I had been proposed as arbitrator in this matter, enclosing the FCA arbitration agreement and inviting all parties to sign and return by 4pm on 18.11.2022. It also enclosed a fee note for the arbitration fee, payable by the Applicant.

15. The parties' returned the signed arbitration agreements on 18.11.2022. I have counter-signed them.

16. The arbitration fee had still not been paid. On 21.11.2022 FCA wrote to the Applicant, acknowledging receipt of the arbitration agreement and requesting payment again.

17. On 24.11.2022, and now that I was formally appointed and agreed as arbitrator, I wrote directly the Applicant's solicitors, making the point that by s.19(4) of the 2022 Act the fee was to be paid in advance of the arbitration, and that I would be likely to make a peremptory unless order directing payment if it was not settled by 4pm on 28.11.2022.

18. On 28.11.2022 at 15:08 the Applicant's solicitors emailed stating that "*We understand that our client has made a payment to our firm in respect of your fees. Our Accounts department have confirmed that this payment should clear in our account tomorrow, upon which we will arrange for immediate payment of your fees, and apologise for the delay in this respect.*"

19. In light of that I replied on the same day 16:16 to say that I would check to see whether payment had been made by 01.12.2022. The Respondents' solicitors protested this extension of time, which I noted but did not consider required a response. Payment of the arbitration fee was in fact made on 30.11.2022, whereupon I issued Directions Order No.1.

20. Directions Order No.2 and the reasons given therein complete the narrative. Having directed submissions from the Applicant to be filed and served by 4pm on 08.12.2022, for the reasons given in that order I extended time to 4pm on 16.12.2022

Analysis

Invalidity of reference – s.11(1), (3) and no supporting evidence

21. Before I address this issue, it is worth noting and dismissing a theoretical conundrum that might be said to arise if (as I do indeed find for the reasons set out in more detail below) that the reference to arbitration is invalid because of its failure to comply with the requirements of s.11(3) – namely, how can I determine that issue within this arbitration?

22. The question does not actually arise, because otherwise it is the same circular question that would prevent any arbitrator ruling on his or her own jurisdiction. Arbitration under the 2022 Act is a statutory arbitration for the purposes of the Arbitration Act 1996 ("the 1996 Act, and see s.94 of that Act. By s.22 and Schedule 1 of the 2022 Act, the 1996 Act

applies as modified to arbitrations under the 2022 Act, and by s.95 of the 1996 Act the 2022 Act is treated as the arbitration agreement.

23. Under s.30 of the 1996 Act the arbitral tribunal may rule on its own substantive jurisdiction:

> *"…that is, as to (a) whether there is a valid arbitration agreement…"*

24. Thus, in determining an application as to whether or not a valid reference to arbitration under the 2022 Act has been made, the arbitrator is being asked to rule on its own substantive jurisdiction under s.30 of the 1996 Act as to whether or not there is a valid arbitration agreement.

25. As recorded above, I have read and considered the parties' written submissions in connection with the Application, and I grateful to both Ms Briggs and Ms Taylor for the clear and precise presentation of their respective positions.

26. I note that the Applicant (at para.18 of its Written Submissions) summarises the Respondent's position in its email of 02.11.2022 as being that the reference is both invalid and time-barred. I do not myself think that the Respondents were making two separate points. To be precise, I understand the Respondents' point as being that the reference is now, in effect, time barred, *because* it is invalid and it is now too late to cure because 24.09.2022 has passed, which was the deadline for any applications to be made under the Act. In short, Respondents' argument is that the Applicant had to make a valid application by the deadline and it did not.

27. The reason why the application is said to be invalid is because of a basic failure to comply with ss.11(1) and (3) of the 2022 Act, which states (emphasis added):

> *(1) A reference to arbitration **must include a formal proposal** for resolving the matter of relief from payment of a protected rent debt.*
>
> *(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).*
>
> *(5) A revised formal proposal must be accompanied by any further supporting evidence.*
>
> *(6) The periods **in subsections (2) and (4)** may be extended—*
> *(a) by agreement between the parties, or*
> *(b) by the arbitrator where the arbitrator considers that it would be reasonable in all the circumstances.*

> *(7) In this section "formal proposal" means a proposal which is —*
> *(a) made on the assumption that the reference is not dismissed for a reason set out in section 13(2) or (3),*
> *(b) expressed to be made for the purposes of this section, and*
> *(c) given to the other party and the arbitrator.*

28. It is not in issue that the Applicant' formal proposal in this case was not accompanied by any supporting evidence.

29. It is arguably possible to read these provisions in a very specific and separate fashion, and to distinguish between the use of the phrase "must include" in s.11(1) and "must be accompanied by" in s.11(3). This is a point that is argued for the Applicant in its Written Submissions, where it is suggested that it is implicit in this wording that the evidence in support is separate from, as opposed to part and parcel of the formal proposal. The point is also made that s.9(2), which prescribes the period in which a reference to arbitration must be made does not refer to either the formal proposal or supporting evidence.

30. In other words, I understand the Applicant's position as follows:

    (a) There was a time limit (24.09.2022) by the Applicant had to have made its reference to application. It did that on 23.09.2022, on the basis that it sent its email with a referral form to FCA on that date.

    (b) There is a requirement under s.11(1) that that reference must include a formal proposal. It did that by including as an attachment with its email of 23.09.2022 the document called "Applicant_s Formal Proposal dated 23.09.2022".

    (c) The requirement under s.11(3) that the formal proposal "must be accompanied by supporting evidence" is a separate one. Its absence at the time the reference to arbitration is made does not matter.

31. It seems to me that this this is a forced, or strained, reading of ss.9 and s.11. I do not disagree with the point that supporting evidence is not "part and parcel" of the formal proposal, in the sense that it is a separate item. Nor do I consider that s.9(2) can be divorced from s.11(1). S.9(2) sets the time frame during which a reference to arbitration must be made, and s.11(1) sets out what must be done in order to make a proper reference to arbitration. The critical question in this case is what is meant by the requirement that that separate item – the supporting evidence - must "accompany" the formal proposal, which in turn "must" be included with reference to arbitration?

32. This question is one of statutory interpretation bearing on the validity of an act or otherwise, and in addressing that question I have in mind the following principles. I am conscious of Lord Steyn's remarks in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340, where he said, at [23] that:

rigid mandatory and directory distinction, and its many artificial refinements, have outlives their usefulness. Instead…the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity"[1].

33. I also note the remarks of the Court of Appeal in *Newbold v Coal Authority* [2013] EWCA Civ 584 at [70] that:

> *…In all cases, one must first construe the statutory or contractual requirement in question. It may require strict compliance with a requirement as a condition of its validity. In Mannai at 776B Lord Hoffman gave the example of the lease requiring notice to be given on blue paper: a notice given on pink paper would be ineffective. Against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation, and the parties in the case of a contractual requirement, would have intended a sensible, and in the case of a contract, commercial result.*

34. In addition, and considering the reference the Court of Appeal made in that case to *Mannai* and the blue/pink paper test – and although it was a case concerning the interpretation of a notice to quit - it is also relevant to note the Lewison LJ's very recent remarks on, in *OG*

> *It is, I think, clear from Mannai that if a notice fails to satisfy the substantive conditions upon which its validity turns, the question of how it is to be interpreted does not arise. In Trafford MBC v Total Fitness UK Ltd [2002] EWCA Civ 1513, [2003] 2 P & CR 2 the question was whether a break clause had been validly exercised. Having referred extensively to Mannai, Jonathan Parker LJ (with whom Mummery LJ agreed) said at [49]:*
>
> > *"The process of determining whether a notice complies with the requirements of the provision pursuant to which it is given (be that provision statutory or contractual) involves, as a first step, a consideration of what, on its true construction, the notice says. The contents of the notice then have to be matched against the relevant requirements in order to determine whether it meets them. Speedwell Estates and Burman make it clear that, at this second stage, there is no basis in either Carradine or Mannai for, in effect, rectifying any defects or omissions in the notice so as to bring it into line with the relevant requirements."*

35. Bearing those principles in mind, in my view the plain and ordinary meaning of the section, and its purpose, is to create an efficient platform for the practical and speedy resolution of references under the Act. It does so by requiring the applicant to put together a package

[1] I note that this a passage that the Applicant refers to in its further Written Submissions in respect of compliance with s.11(7). I have it in mind in addressing both s.11(3) and s.11(7).

of information, i.e. its formal proposal *and* evidence in support so as to provide the starting point for the whole process.

36. The reference to arbitration "must" include a formal proposal, and the formal proposal "must be accompanied by" supporting evidence. If there is no supporting evidence, then there is no formal proposal, and if there is no formal proposal then a valid reference has not been made. I shall return to this important linkage between s.11(1), and s.11(3) in paragraph 62 and 63 below.

37. I appreciate that there is a different choice of wording between s.11(1) and s.11(3) – where in the former the word "include" is used, and in the latter the phrase "accompanied by" is used. As a matter of language Peter "accompanies Jane" when he works alongside her. If he is walking at a distance behind her then he is following her – the word accompany might be used in that instance, but it would be stretching the meaning of the word, and I consider that it is stretching a point too far to say that "accompanied by" in s.11(3) can have that stretched meaning. In my view, the correct interpretation "accompanied by" in s.11(3) (a) as a matter of ordinary English, (b) in the context of this section and (c) in light of its statutory purpose is that has the same sense as "together with".

38. I derive support for this interpretation in several ways.

39. First, as a matter of language I do not consider that there is a material difference between "must include" and "must be accompanied by". It is not disputed, correctly in my view, that "must include" in s.11(1) means that the formal proposal to come together with the reference to arbitration. But if the Applicant is correct that it is possible for there to be a valid reference to arbitration with a bare formal proposal, but no supporting evidence because it can come at a later date – at which point the formal proposal is then "accompanied" by the evidence, then by the same token it could be argued that the formal proposal itself is not required at the outset. It can be sent later, at which point the reference to arbitration will "include" it.

40. In addition, the present tense of "must be accompanied by" indicates that the applicant was required to prepare a package of two items to constitute the reference – the formal proposal and the supporting evidence. S.11(3) does not, for example, provide that the formal proposal should be "supplemented by" or "followed by" supporting evidence, or that "supporting evidence must be provided" by a date or set time period thereafter. This method of presenting a case, and requiring that evidence be provided at the same time as the substantive claim is issued, is not unique. It is not dissimilar to the procedure required under Part 8 of the Civil Procedure Rules, which provides, at r.8.5 that "*(1) When the claimant files the claim form, they must also file any written evidence on which they intend to rely. (2) The claimant must serve their written evidence on the defendant with the claim form*".

41. I am fortified in my understanding of the natural meaning of word "accompany", or the phrase "accompanied by" by a decision of the New Zealand courts. In *Wielgus v Removal*

Review Authority [1994] 1 NZLR 73, concerned with a statutory requirement that an appeal be "accompanied by" a prescribed fee, Fisher J said:

> *It would be difficult to suggest that where the notice of appeal takes the form of a facsimilied communication, and the fee is then despatched by a different method of communication half an hour after the facsimile, and received on the day following the receipt of the facsimile, the appeal is still "accompanied" by the fee, at least within the time limit….Language is elastic to a certain point but snaps when asked to part company altogether with previously accepted meanings…*

42. Secondly, if, as the Applicant contends, supporting evidence can be submitted at a later date, then s.11 does not provide a mechanism or a deadline for when that evidence should be provided. In that indeterminate sense both the respondent to the reference and the arbitrator are left in limbo until either the applicant provides that evidence or the arbitrator is required to make directions. Whilst the arbitrator does have the power to make procedural orders it is unlikely that s.11 was predicated on the reference getting off to an incomplete start which would require the very type of procedural difficulty and delay that is a feature of this reference itself.

43. The 2022 Act is designed to provide a practical and efficient vehicle for the timely resolution of disputes, and in my view s.11 does so by directing that the tenant produce a combined formal proposal and evidence in support. That provides the platform for the arbitration that follows – the respondent knows what it has to reply to, and why, and the arbitrator understands the parameters of the dispute. This does not contradict the arbitrator's powers to direct further or additional evidence as may be appropriate in any given case – but the starting point has to be that there at least a baseline of evidence that the applicant has adduced by which to start the process[2]. On the facts before me I do not need to consider what would be sufficient baseline evidence to satisfy s.11(3), because the Applicant in this case has filed nothing at all. I merely observe that if there are other cases where an applicant has filed some evidence, albeit it weak evidence, it may be that it has done the minimum necessary to comply, and that that the arbitrator can thereafter progress matters and give further directions for additional evidence if he or she so chooses; but that is not the case here.

44. Thirdly, s.11(6) expressly allows extensions of time only in respect of s.11(2) and s.11(4) – i.e. the counter-proposal or revised formal proposals. If, as the Applicant contends, the supporting evidence is something that can be submitted separately from the formal proposal, then there would or should have been a power to extend time for that as well.

[2]It may also be the case that in other references, which were made sufficiently before the deadline of 24.09.2022, if they did not include supporting evidence at the outset, that providing that evidence later might cure that defect provided all the necessary ingredients (reference, formal proposal and supporting evidence) were constituted and properly served by the deadline of 24.09.2022. In my view, in such a case it would be open to the arbitrator to treat the reference as having been properly constituted on the date those elements were all present. That is not possible on the fact of this case, where the formal proposal itself was invalid on its face, and it was not supported by supporting evidence, and the deadline for making a reference to arbitration has now passed.

But on my reading of s.11, there is no need for such a power at all – and hence its absence. When the arbitrator extends time for s.11(2) and or s.11(4), he or she is by definition giving the same time for the supporting evidence because that evidence will have to "accompany" those proposals.

45. Fourthly, my approach is consistent with the approach taken in an award published on 15.12.2022 in the case of *Hanbury Print.com Ltd v Serge and Vivienne Primack*, a decision by Mr Toby Boncey, in which it was determined that a failure to include a formal proposal with the reference to arbitration rendered the reference invalid, and is incurable. As explained in that decision, a valid reference requires a valid formal proposal, otherwise the timing and mechanics of the 2022 Act cannot work properly. In my view, and for the same reasons, the formal proposal requires supporting evidence and without it the timing and mechanics of the 2022 Act do not work properly[3]. I explain the connection further in paragraphs 62 and 63 below.

46. Fifthly, I am fortified in my view that a reference to arbitration must be made *ab initio* with both the formal proposal *and* evidence in support having regard to the statutory guidance that was publicly available in support of the 2022 Act and well in advance of the deadline of 24.09.2022, as follows. The statutory guidance all points in the same direction.

47. On 07.04.2022 the government published updated guidance entitled "*Commercial rent code of practice following the Covid-19 pandemic*" ("the Code"). Part Two and Annex C to that guide gave guidance as to the 2022 Act and the arbitration process. The guidance at Part Two, para.64 *et seq post* is expressly stated to be statutory guidance under the Secretary of State's power in s.21(1)(b) of the Act.

48. Part Two, para.96 explains the submission of formal proposals. It states (emphasis added):

> *96. Under the Act, a formal proposal is a proposal* ***which is****:*
>
> *a. made on the assumption that the arbitrator is required to resolve the matter of relief from payment of a protected rent debt;*
>
> *b. specified as made for the purposes of section 11 of the Act;*

[3] Incidentally, although I do not rely on this, I note that at paragraph 42 of that decision, the arbitrator noted that (emphasis added): *At that time it was sent to the Respondents (4 August 2022), the Letter of Notification was not accompanied* ***by all the supporting evidence*** *now contained in the Bundle (including the Statement). However, it could be said on behalf of the Applicant that (a) it is not required to supply* ***all evidence at the time*** *of the formal proposal (a matter on which I express no concluded view) and (b) the Bundle and the supporting evidence it contained was supplied at the time the Letter of Notification was sent to FCA. Accordingly, I do not consider that s.11(3) necessarily prevents the Letter of Notification from being a formal proposal.*" The learned arbitrator's reference to "all" the evidence suggests that he considered, as I do, that there must at the very least be some evidence that accompanies the formal proposal.

c. given to the other party and to the arbitrator;

d. accompanied by supporting evidence; (see suggested non-exhaustive list at Annex B); and

e. verified by a statement of truth.

49. The point is repeated at Annex C, under the heading "Reference to Arbitration", where it states in bullet point form that (emphasis added):

- *The applicant must make a reference to an approved arbitration body.*
- *It must confirm that the pre-arbitration steps have been carried out and that the dispute is eligible for arbitration.*
- ***It must include a formal proposal for resolving the dispute with its reference accompanied by supporting evidence.***
- *It must pay arbitration fees in advance of the arbitration taking place.*
- *It is recommended that the applicant state whether it is party to any other eligible disputes with the respondent that can be consolidated*
- *The approved arbitration body will review the information provided and appoint an arbitrator from its list to deal with the case.*

50. This guidance to landlord and tenants is consistent with the guidance issued to arbitrators, published by the government in April 2022 and entitled "Commercial Rent (Coronavirus) Act 2022 Guidance: Guidance to arbitrators and approved arbitration bodies on the exercise of their functions in the Act" ("the Guidance"). Para.1.2 of this guide states that Part 1 thereof is statutory guidance issued under s.21(1)(a) of the 2022 Act.

51. Part One, para.2.4 states: "*The reference to arbitration must be accompanied by a formal proposal for resolving the dispute with supporting evidence"*.

52. Part One, para.3.17 states (emphasis added):

> *At Stage 3, having established that the dispute is eligible for arbitration, the arbitrator is to resolve the matter of relief from payment of the protected rent debt. This stage differs from the usual form of arbitral proceedings involving statements of claim and defence. Instead,* ***when making a reference to arbitration the applicant is required to include (at Stage 1) a formal proposal (together with supporting evidence) for resolving the matter of relief from payment.***

53. Part One, para.7.4 states (emphasis added)

> *7.4 Under the Act, a formal proposal is a proposal which is:*
>
> *7.4.1. Made on the assumption that the arbitrator is required to resolve the matter of relief from payment of a protected rent debt;*
>
> *7.4.2. Expressed to be made for the purposes of section 11 of the Act;*

7.4.3. Given to the other party and to the arbitrator;

7.4.4. Accompanied by supporting evidence; (see table at Annex B of the Code of Practice28 and, in relation to the viability of the tenant's business, see evidence column in table after paragraph 6.17);

7.4.5. Verified by a statement of truth (a formal proposal is a 'written statement' – see paragraph 12.24).

54. In further support of the Applicant's position my attention is drawn to s.13(2) of the 2022 Act which sets out certain circumstances in which the arbitrator must dismiss the reference. It is argued that if Parliament had intended the failure to include supporting evidence to warrant dismissal then it might have reasonably been expected to include such a provision.

55. This argument does not assist the Applicant. S.13 is not concerned with "sanctions", properly so called. It is concerned with cases where there is a valid reference to arbitration, but where the defined circumstances set out in s.13(2) or (3) apply. In those scenarios the arbitrator is required to make a prescribed decision. That has no bearing on a case such as this, where no valid reference to arbitration has been made in the first place. A decision to dismiss the reference is also not a "sanction", properly so called. It is a direction that gives expression to the finding that the reference to arbitration is invalid, and that in the circumstances the arbitrator has no jurisdiction to proceed. Parliament did not need to make express provision for the dismissal of invalid references either because (a) it quite literally goes without saying, or (b) because it would be possible in any given case for a respondent to waive defects in the process if it wished to, and in such a case there is no reason why the arbitrator should not proceed. This is not such a case.

56. I also note the argument advanced on the Applicant's behalf that a failure to provide supporting evidence "accompanying" the formal proposal is essentially an evidential or procedural defect. For the reasons given above, I do not consider that its absence can be characterised or minimised as such. If the 2022 Act intended to treat supporting evidence as a subsequent and subsidiary stage of the process then it could reasonably have treated it as a separate, and distinct requirement that followed on after the reference to arbitration with a formal proposal had been made. It did not. It required that the formal proposal itself be accompanied by evidence, and it is that combined package that forms constitutes the reference.

57. The Applicant quotes Part One, para.6.7 of the Guidance which states that the arbitrator may request information from the tenant using his powers under s.34(1) of the 1996 Act. But the quotation is incomplete. Para.6.7 in full states:

It is the tenant's responsibility to provide evidence to support their proposal and to enable the arbitrator to determine the viability of the tenant's business. However, the arbitrator may request information from the tenant in order to assess viability using the power to decide on procedural and evidential matters in section 34(1) of the AA96.

58. This supports the approach I have taken. The primary responsibility is on the tenant to comply. Once he, she or it does so – by providing the formal proposal and evidence in support start with – the reference is validly made and the arbitrator can exercise his or her powers under s.34 of the 1996 Act, if he or she wishes, to direct more information and evidence. But if the reference is invalid, for want of any evidence in support *at all*, then I do not consider that it is a matter that remains within the Arbitrator's discretion to cure.

59. I also note that the Applicant prays in aid paragraph 10 of the Arbitration Form, which states "*There will be an opportunity to supply further information, if needed"*. I agree with Ms Taylor's submission in reply that there is nothing misleading about this paragraph, when properly read in the context of the Arbitration Form as a whole. Paragraph 10 appears under the section headed "Formal Proposal" as follows (emphasis added):

> *Formal Proposal*
>
> *8. Please attach a copy of your Formal Proposal,* ***including any supporting information****.*
>
> *9. The Formal Proposal should cover the outcome you are seeking, including what proportion of the rent debt you envisage should be repaid, and the schedule you propose for repayment of any remainder.*
>
> *10. There will be an opportunity to supply* ***further information****, if needed.*
>
> *11. For a list of examples of the type of* ***supporting evidence*** *you may wish to include, please see the Statutory Guidance for Arbitrators and the Code of Practice published by the Department for Business, Energy & Industrial Strategy.*

60. The wording of the Arbitration Form is consistent with s.11 of the 2022 Act, as I have explained above. Paragraph 8 requires the applicant to attach its formal proposal and "supporting information". This is as per s.11(3). Paragraph 10 is a statement that, if required, there will be an opportunity to supply "further" information, if needed. This applies, as I have explained, where base line supporting evidence has been provided, and the arbitrator can then direct, if required, further information or evidence. Paragraph 11 then directs the applicant to both the Code and the Guidance, by which the applicant would appreciate the points I have set out above – i.e. that its formal proposal must be provided together with its supporting evidence.

61. I also consider, as it is a point raised at paragraph 33 of the Applicant's Written Submissions, that paragraph 7(b) of the Arbitration Form is likewise consistent with my treatment of s.11(3). It invites the applicant to state *"Whether you intend to supplement your Formal Proposal with evidence from witnesses of fact and experts, giving details in each case*". This is entirely consistent with the position I have explained above. Save for the requirement under s.12 that written statements must be verified by a statement of truth, the nature of the supporting evidence that must accompany the formal proposal is not prescribed. It may take the form of accounts, written statements, financial statements, or expert evidence or anything else that constitutes evidence – what I have referred to as a

base line of evidence that accompanies the formal proposal. In that scenario the reference is validly made, and the arbitrator has jurisdiction and the power to direct further evidence, and to that end it is appropriate that the Arbitration Form invites the applicant to indicate whether that it is something that is anticipated.

62. For all the reasons set out above, I consider that under s.11(3) the requirement is that supporting evidence "must be" supplied together with, i.e. at the same time, as the formal proposal.

63. The consequence that flows from this relates back to the point I trailed at paragraph 36 above. Both s.11(1) and s.11(3) impose mandatory requirement, using the imperative word "must". I do not consider that the word "must" can have a different meaning or application in these two subsections. The reference has to have a formal proposal, and the formal proposal has to have supporting evidence. A bare proposal will not suffice. The result is that that they are linked, and the s.11(3) requirement forms part and parcel of what constitutes the formal proposal, over and above, or in addition to, the criteria at s.11(7) which I address in more detail below. Hence the point I stated at paragraph 36 above – the reference to arbitration "must" be include a formal proposal, and the formal proposal "must be accompanied" by supporting evidence. If it is not accompanied by supporting evidence, it is not a properly constituted formal proposal, and s.11(1) has not been complied with.

64. Alternatively, but coming to the same result, one can read s.11(3) as constituting an extension of the s.11(1) requirements. Taken together, a reference to arbitration under s.11(1) must include a formal proposal, and by extension under s.11(3) it must also include supporting evidence. Either way, I consider it artificial to divorce the two sub-sections. The net result is that in my view there has been a failure under s.11(1), and consistent with the arbitration decision in *Hanbury* this reference to arbitration is, in my view, a nullity.

65. In concluding this section of my determination, there are two further aspects of the Applicant's submissions that I wish to address.

66. The first is the argument developed on the Applicant's behalf that in the circumstances of this case I have a discretion, as the arbitrator, to decide how to proceed. This argument is predicated on the bases that (a) the reference was validly made in time, (b) there is nothing in the Act to suggest that it ought to be dismissed automatically, (c) the reference is not abusive (a point which relates to the second limb of the Respondents' argument), and that therefore I have the power to decide how to proceed. Reasons are then presented as to why I should exercise such discretion to direct the provision of supporting evidence and a timetable for the parties to follow.

67. However, in light of my treatment of s.11, the predicate "(a)" of this argument fails. The reference was not validly made in time, and therefore this is not a case where the arbitrator is in a position to choose between dismissing the claim or making directions instead.

68. The second is directed towards the points made on the Applicant's behalf about unfairness, or the disproportionate effect, on the Applicant of a decision to dismiss the

reference. These remarks are presented in the context of trying to persuade to me exercise a discretion that I do not consider that I have. However, the notion of "unfairness" to the tenant does touch upon a broader concern that I have borne in mind in my interpretation of s.11, as follows.

69. I appreciate that the process of interpretation and construction, whether of contractual or statutory wording, is something that is a little more of an art than a science, and that words can strike different people in different ways. In that sense, and in particular in the context of the Covid 19 pandemic and its impact on business tenants across the country, it is perhaps tempting to try and find a reading of the 2022 Act that will assist the applicant tenant who may otherwise lose its opportunity to mitigate the debt it owes it landlord.

70. However, to allow such considerations to affect one's reading of the statute would be to allow the heart to rule the head. It would also be misplaced sympathy. It is simplistic to suggest that it is only tenants who suffered the effects of the pandemic on their businesses. There are landlords of all shapes and sizes who also suffered enormously in terms of the rental income stream they depended upon. It is not the function of the law or the arbitrator to determine whether a landlord or tenant is more or less deserving of a reading of the s.11 that will tend one way or the other. Parliament chose to strike a balance by interfering with what would otherwise have been the parties' common law rights by creating a regime that provided a particular time limited pathway for the resolution of arbitrations that were properly constituted within that time frame. It is not unreasonable that for a tenant to take advantage of the protection offered by this regime it comply promptly and properly with the requirements imposed. If a reference to arbitration was not made, or was not validly made, in that window of time, then Parliament did not otherwise or further interfere with the parties' common law or statutory rights in respect of rent arrears.

71. In my view, this answers the question posed by Lord Steyn in *R v Soneji*, in that I consider that it can be said that Parliament intended to set requirements that would control the validity of the reference to arbitration. I also consider that it meets the considerations referred by the Court of Appeal in *Newbold*. The process created by Parliament, to mediate between the equally important yet competing interests of landlords and tenants affected by the pandemic, was to create a simplified arbitration process which required, from the outset, the applicant to bring forward and present together its formal proposal and accompanying supporting evidence in order to trigger a valid reference. It is not uncommercial or insensible, in the event that such steps are not take, that a reference to arbitration has not been properly made.

<u>Failure to comply with s.11(7)(b) or (c)</u>

72. In light of my analysis above, I can treat the points arising under s.11(7)(b) and (c) more briefly. Each of these issues, and the issue arising above under s.11(3) are separate, and so each of them raise their own problem as to validity independently of each other.

73. S.11(7) provides:

> *(7) In this section "formal proposal" means a proposal which is-*

(a) made on the assumption that the reference is not dismissed for a reason set out in section 13(2) or (3),

(b) expressed to be made for the purposes of this section, and

(c) given to the other party and the arbitrator.

74. I address s.11(7)(b) first.

S.11(7)(b)

75. The requirement under s.11(7)(b) is straightforward and it is express. A formal proposal is defined as a proposal which is, *inter alia*, "*expressed to be made for the purposes of this section*".

76. The formal proposal, in this case, does not contain any words expressing that it is made for the purposes of s.11. It says only:

1. *This is the Applicant's Formal Proposal in support of their referral to arbitration made on 23 September 2022 under the Commercial Rent (Coronavirus) Act 2022 ("the Act").*

2. *The Applicant seeks full relief from payment of the sums due during the "protected period" under the Act.*

3. *The Applicant intends to submit supporting evidence, which will follow.*

77. Ms Briggs, for the Applicant, defends this omission by seeking to distinguish between the purpose of s.11(7) being "definitional" or whether it is "laying down requirements for the validity of a formal proposal". Her argument is that s.11(7) is intended to be "definitional" i.e. that is only intended to describe what a formal proposal is, rather than to set down strict requirements with which it must comply.

78. The argument is ingenious and neatly argued, but it is, in my view, a distinction without a difference. A formal proposal under the 2022 Act is, as is everything about it, a statutory construct. Its definition is what it is required to be. A formal proposal *is* a document that meets the requirements, or is as defined, under s.11(7). If it does not meet those criteria then it is not a formal proposal, or it cannot be defined as a formal proposal. It comes to the same thing.

79. One might fairly ask the question as to what purpose is served, or what purpose Parliament had in mind, when including the requirement (or definition) at s.11(7)(b). Putting to one side for the moment that that this may well fall within the blue/pink paper example in *Mannai* in any case, I agree with the further points made by Ms Briggs as to why it is important that such a provision was included. It is indeed important that the arbitrator and the parties are able to point with confidence to the document that represents a party's formal proposal – bearing in mind that this requirement applies both to an applicant's initial proposal, or a respondent's counter proposal, or either parties' revised formal proposals. However, I part company with the argument where that becomes a reason for downplaying

its importance. On the contrary. It is not a complicated requirement, and it forms an important function in providing clarity and coherence as part of process created by the 2022 Act the resolution of disputes.

80. Furthermore, even if there were room for further debate as to the purpose or function of s.11(7)(b), I consider that its wording is so clear, obvious, and mandatory, that there would have to be a very strong and compelling argument (which I do not see) to persuade me to do anything other than give the words their ordinary and natural meaning.

81. As to the submission referring to the consequences of a finding of invalidity on this basis, and my being asked to bear in mind Lord Steyn's remarks in *R v Soneji,* I do not consider the consequences of this failure to be a matter of discretion, or something that leads to an "unjustified windfall" for the Respondents. The Applicant knew, or ought to have known, what it needed to do in order to obtain the protection of the 2022 Act. The steps imposed were not onerous or complicated. Whether or not its failure to comply with the statutory requirements were a feature of the very late stage at which it made its application is not for me speculate. The possibility of a windfall for the Respondents is no more of a consideration than the fact that it would prejudice the Respondents if the reference was valid.

82. For these reasons, I consider the failure to express that the formal proposal was made for the purpose of s.11 another and separate ground for invalidity of this reference to arbitration in any event.

Failure to comply with s.11(7)(c)

83. I have set out s.11(7)(c) above. On the facts of this case the Applicant submitted its refence to arbitration on 23.09.2022, but first served those documents on the Respondents by email on 01.11.2022.

84. The question therefore arises whether, even if I had held that the reference was not invalid for breach of s.11(3) or s.11(7)(b), whether it would nevertheless be invalid for breach of s.11(7)(c). In other words, does s.11(7)(c) require a formal proposal to be given (or define it as being given) at the same time to the other party and the arbitrator, or in any event before the scheme expired on 24.09.2022?

85. I do not consider that the first of those possibilities can be right, and discount it. Unless an applicant were to use a single email addressed to both the arbitrator and the other party with attached documents or physically hand it to them simultaneously it is difficult to see how the formal proposal could be given to them at the same time. That cannot have sensibly what was intended by Parliament.

86. So the formal proposal can, and ordinarily will, be given separately. So when must that be? Is it necessary for those steps to have been taken by 24.09.2022?

87. Having raised this issue of my own accord, and on reflection, I consider that the resolution lies (a) in the correct application of ss.9(2) and 11(1), and (b) in appreciating that s.11(7)(c) requires the formal proposal to be given "the arbitrator"?

88. Taking the latter point first, the requirement that it be given to the arbitrator is itself difficult, because until formally appointed, either by agreement between the parties or by effect of the statute, there is no arbitrator. Under s.11(1) the applicant does not immediately supply anything to "the arbitrator". It only makes a reference to arbitration. That means that it makes its application to one of the approved arbitral bodies, which will first propose and then in due course appoint, the arbitrator.

89. The former point therefore provides the key to this question. S.9(2) provides that *"A reference to arbitration may be made either by the tenant or the landlord within the period of six months beginning with the day on which this Act is passed*". S.11(1) then provides that *"A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt*".

90. So it is only the reference to arbitration that must have been by the 24.09.2022 deadline, and that reference had to have included a formal proposal. But that formal proposal could and would only be given to "the arbitrator" some time after that, once he or she had been appointed. In cases such as this one (had it otherwise been valid), where the reference was made at the eleventh hour, ss.9(2) and 11(1) would have been satisfied and it would have been nonsensical to consider that the formal proposal was invalid because it had not been given to "the arbitrator" by the deadline as well. That would have been impossible, because at that point he or she is not "the arbitrator".

91. It therefore follows that a formal proposal is not invalid simply on the basis that it is received by the arbitrator only after the reference to arbitration has been made, even if that means the arbitrator received it after 24.09.2022. At that point it "is given" to the arbitrator and that limb of s.11(7)(c) is satisfied. By extension, and for the reasons given in paragraph 82 above, the formal proposal is likewise not rendered invalid if it is not given to the other party simultaneously, or after 24.09.2022. As long as it is in fact given to the other party then that requirement of s.11(7)(c) is also satisfied.

92. For these reasons, had I not held that this reference invalid because of breaches of s.11(3) or s.11(7)(b), I would not have dismissed for want of compliance with s.11(7)(c).

93. In coming to this conclusion I do not consider that I am giving a contradictory meaning to the word "*is*" in s.11(7), as between its meaning in connection with s.11(7)(b) and s.11(7)(c). A formal proposal "*is*" a document that meets all these criteria. One of those that it needs to be expressed to be for the purposes of s.11. This formal proposal does not. Another is that it needs to be given to the other party, and given to the arbitrator. The time for it being "given" is controlled by the process created by the 2022 Act. It must be included with the reference to arbitration, and that must have been made before the deadline of 24.09.2022. The time period for giving it the arbitrator or the other party is not

prescribed, but so long as it is fact given the other party and to the arbitrator (when he or she is appointed), then this criteria is satisfied.

Abuse of process

94. In light of my decision above with regard to the validity of the application, this limb of the Application does not arise. However, for the sake of completeness I will address it briefly.

95. Had I held that the application was validly constituted, I would not have considered that the conduct of the Applicant had reached the high threshold of abuse of process, that would warrant a dismissal of its application without further ado. Ms Briggs is right in drawing my attention to the principles and authorities that are summarised in the White Book 2022 at para.3.4.16. Whilst the chronology I set out above shows that there has been some delay on the part of the Applicant, I do not consider that it has yet been of such an order of magnitude, nor are there as yet additional factors, to colour it as abusive. When I have made directions the Applicant has complied, even if it has twice asked for extensions of time.

96. Nevertheless, I repeat the remarks I made in my Directions Order No.2 of 8 December 2022. I do have some sympathy for the position the Respondents have found themselves in, and I do think that the Applicant can and should have done more to engage more wholeheartedly with its own application. I can understand why the Respondents considered it reasonable to allege that the Applicant has been dilatory in the way in which it has proceeded.

97. Had I found that the reference to arbitration was valid, I would have made strict directions for the filing and service of supporting evidence by the Applicant, and extended time for the Respondents to provide their counter-proposal and supporting evidence.

Costs

98. S.19 of the 2022 Act governs the treatment of costs. I note that s.61 of the 1996 Act gives the arbitrator a general power to award costs (subject to any agreement of the parties), and that costs ordinarily follow the event, but the effect of s.95 of the Act is that the 2022 Act takes effect as the arbitration agreement between the parties. The dictates of s.19 therefore prevail. It provides:

> ***19 Arbitration fees and expenses***
>
> *(1) In this section references to arbitration fees are to—*
> *(a) the arbitrator's fees and expenses (including any oral hearing fees), and*
> *(b) the fees and expenses of any approved arbitration body concerned.*
> *(2) The Secretary of State may by regulations made by statutory instrument specify limits on arbitration fees, which may differ depending on the amount of protected rent debt in question.*
> *(3) A statutory instrument containing regulations under subsection (2) is subject to annulment in pursuance of a resolution of either House of Parliament.*

(4) The applicant must pay arbitration fees (other than oral hearing fees) in advance of the arbitration taking place.
(5) When the arbitrator makes an award under section 13 or 14, the arbitrator must (subject to subsection (6)) also make an award requiring the other party to reimburse the applicant for half the arbitration fees paid under subsection (4).
(6) The general rule in subsection (5) does not apply if the arbitrator considers it more appropriate in the circumstances of the case to award a different proportion (which may be zero).
(7) Except as provided by subsection (5) and section 20(6), the parties must meet their own legal or other costs.
(8) Legal or other costs incurred in connection with arbitration (including arbitration fees) are not recoverable by virtue of any term of the business tenancy concerned.
(9) In this section, "applicant" means the party which made the reference to arbitration.

99. Ss.19(5) and (6) do not apply, as this is not an award under s.13 or section 14.

100. S.20(6) – which is concerned with oral hearings and awards under section 13 or 14 – also does not apply.

101. S.19(7) therefore applies. The parties must meet their own legal or other costs, and I make no award as to costs. The arbitration fees that have been paid in advance by the Applicant are borne by it and there is no entitlement under s.19(5) to recover half from the Respondents. Had s.19(5) been engaged I would have adjusted the general rule under s.19(6) and reduced the Respondents' contribution to zero.

JOSEPH OLLECH

FALCON CHAMBERS

2 FEBRUARY 2023