FALCON CHAMBERS ARBITRATION

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

Between

HANBURY PRINT.COM LIMITED T/A THE PRINT TEAM

Applicant

and

SERGE AND VIVIENNE PRIMACK

Respondents

Final Award

Procedural background

1. On 22 September 2022, Hanbury Print.com Limited t/a The Print Team ("**the Applicant**"), acting by Solomon Taylor & Shaw LLP ("**the Applicant's Solicitors**"), commenced arbitral proceedings by the submission of a Referral to Arbitration form dated 20 September 2022 ("**the Referral**") to deal with the matter of relief from payment of what is said to be a protected rent debt.

2. The other parties to the arbitration are Serge and Vivienne Primack ("**the Respondents**"), who are represented by 360 Law Services Limited.

3. The Applicant was at the time of the Referral the tenant of premises at rear of 93 and ground floor, 95 Golders Green Road, London NW11 8EN.

4. The Respondents are and have since 1 June 2009 been the registered freehold owners of property within which the premises demised by the Applicant's lease are situated, registered under title number MX338695.

5. The Referral was sent to Falcon Chambers Arbitration ("**FCA**"), an approved arbitration body for the purposes of the Commercial Rent (Coronavirus) Act 2022 ("**CRCA**"). The Referral comprised a request that FCA appoint an arbitrator in respect of the dispute between the Applicant and the Respondents.

6. By s.10 CRCA:

(1) Before making a reference to arbitration—

(a) the tenant or landlord must notify the other party ("the respondent") of their intention to make a reference, and

(b) the respondent may, within 14 days of receipt of the notification under paragraph (a), submit a response.

(2) A reference to arbitration must not be made before—

(a) the end of the period of 14 days after the day on which the response under subsection (1)(b) is received, or

(b) if no such response is received, the end of the period of 28 days beginning with the day on which the notification under subsection (1)(a) is served.

(3) A reference to arbitration may not be made, an arbitrator may not be appointed, and no formal proposal under section 11(2) or (4) may be made, where the tenant that owes a protected rent debt is subject to one of the following—

(a) a company voluntary arrangement which relates to any protected rent debt that has been approved under section 4 of the Insolvency Act 1986,

(b) an individual voluntary arrangement which relates to any protected rent debt that has been approved under section 258 of that Act, or

(c) a compromise or arrangement which relates to any protected rent debt that has been sanctioned under section 899 or 901F of the Companies Act 2006.

(4) A reference to arbitration must be made to an approved arbitration body.

(5) After a reference to arbitration has been made, an arbitrator may not be appointed, and no formal proposal under section 11(2) or (4) may be made, during any period where the tenant that owes a protected rent debt is the debtor under one of the following—

(a) a company voluntary arrangement which relates to any protected rent debt that has been proposed and is awaiting a decision under section 4 of the Insolvency Act 1986,

(b) an individual voluntary arrangement which relates to any protected rent debt that has been proposed and is awaiting a decision under section 258 of that Act, or

(c) a compromise or arrangement which relates to any protected rent debt that has been applied for and is awaiting a decision under section 899 or 901F of the Companies Act 2006.

(6) This section, so far as relating to a company voluntary arrangement and a compromise or arrangement under section 899 or 901F of the Companies Act 2006, applies to limited liability partnerships (as well as to companies).

7. By s.11 CRCA:

(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.

8. In the Referral form, the Applicant stated at paragraph 7(b), in response to the question "Whether you intend to supplement your Formal Proposal with evidence from witnesses of fact and experts, giving details in each case":

"*Mr Charles Hanbury, a director of the Applicant company, has provided an informal statement providing the background to this matter and putting forward the Applicant's position. That statement is supported by the appropriate financial information and evidence both as to the impact of the pandemic on the Applicant's business and on the viability of the business.*

The Applicant will also provide a copy of the Letter of Notification and supporting documents."

9. The Referral form states at paragraph 8: "Please attach a copy of your Formal Proposal, including any supporting information."

10. The Referral was accompanied by a bundle of documents ("**the Bundle**"), which contained (inter alia) the following documents:

(1) A statement made and signed by Charles Hanbury, director of the Applicant ("**the Statement**") which:

(a) Was referred to in the index to the Bundle as "Tenant's Proposal";

(b) Is the "informal statement" referred to in paragraph 7(b) of the Referral; and

(c) Contained the following passage under the sub-heading "**Proposal**" (after some details about the stress of Covid and the matter upon Mr Hanbury and his family which are not material for present purposes):

"*I am now thankfully on the road to recovery and am content running the business, dealing with my clients and looking forward to the move to new premises and re building the turnover.*
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*I am hoping that my offer to clear the rent with **one immediate payment in full and final settlement** will be acceptable and enable me to clear my debt, in order to allow me to move forward with my life and my business.*".

(2) A letter of notification dated 4 August 2022 from the Applicant's Solicitors to the Respondents ("**the Letter of Notification**") which:

(a) Was referred to in the index to the Bundle as "Letter of Notification and enclosures";

(b) Was headed "LETTER OF NOTIFICATION OF INTENTION TO MAKE A REFERRAL TO ARBITRATION PRUSUANT TO THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022" (sic.);

(c) Stated: "…this is a Letter of Notification of our client's intention to make a referral to arbitration to determine the protected rent payable by our client in accordance with the terms of the Commercial Rent (Coronavirus) Act 2022"; and

(d) Contained the following passage under the sub-heading "Tenant's Proposal":

"*Our client has attempted to engage with you to reach an amicable resolution for a settlement of the protected rent but sadly, to no avail. We understand that to date, you have failed to engage in any way whatsoever with our client and have simply demanded payment of the full rent due under the Lease regardless of Government guidelines and the obvious impact that the pandemic has had on the tenant's business. This is of course most regrettable.*

We are therefore now instructed to put forward a final proposal before a referral to arbitration is made, to settle the outstanding protected rent totalling £37,239.56 in the sum of £25,000 being roughly two thirds of the outstanding rent. We believe this to be a most generous and sensible compromise in the circumstances taking into account both the prolonged periods when the Premises were closed in accordance with the national lockdowns and the considerable impact that the pandemic has had on our client's business resulting in the downturn in trade and profits as shown in the enclosed evidence.

In accordance with the Act, you do not have to respond to this Notification of Referral but if you wish to do so, you have 14 days to submit a response. In the absence of a settlement, we will be making a referral to arbitration to determine the protected rent within the timeframe specified under the Act. This letter of notification will of course be provided to the arbitrator.

We sincerely hope that you will take this opportunity to avoid the unnecessary time and costs of referring this matter to arbitration by accepting the generous proposal set out herein. We await hearing from you accordingly.".

11. On 18 November 2022, I issued a procedural order ("**Procedural Order No 1**") which, amongst other things, confirmed that FCA had appointed me as the arbitrator in respect of the arbitration; that pursuant to section 30 of the Arbitration Act 1996 ("**AA**"), as modified by Schedule 1 to the CRCA, I could rule on my own substantive jurisdiction; and directed that the following matters would be determined as preliminary issues on the papers after 9 December 2022 should neither party notify me of its desire to have a hearing to determine these issues by that date:

(1) Whether the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt for the purposes of s.11 CRCA;

(2) If it has, what, if any, directions ought now to be given to progress the arbitration, including in particular whether I should direct that time be extended for the purposes of any formal proposal to be supplied under s.11(2) or (4) CRCA; and

(3) If it has not:

(a) Whether a reference under Part 2 CRCA has been made such that I have jurisdiction to make an award pursuant to s.13 CRCA;

(b) If so, what further directions ought to be made, including in particular whether I should direct that time be extended for the purposes of any formal proposal to be supplied under s.11(2) or (4) CRCA.

12. Directions were also given requiring the Applicant to confirm (together with any further evidence upon which it may wish to rely): whether it contends that it made a reference to arbitration under Part 2 CRCA including a formal proposal for resolving the matter of relief from payment of a protected rent debt for the purposes of s.11 CRCA; if so, whether a document in the bundle accompanying the Referral form dated 20 September 2022 is said to be that formal proposal and, if so, which one; and whether, and if so, how and when, any document said to be a formal proposal was given to the Respondents and the Arbitrator.

13. Both parties were directed to exchange and lodge any written submissions or evidence they may wish to rely upon in relation to the preliminary issues by 4pm on 9 December 2022.

14. Further to my directions in Procedural Order No 1, the Applicant's Solicitor emailed on 23 November 2022 stating (inter alia):

"*2. … we confirm on behalf of the Applicant that it is our contention that a reference has been validly made to Arbitration under Part 2 of the CRCA including a formal proposal for resolving the matter of relief from payment of a protected rent debt for the purposes of Section 11 of the CRCA. In this respect, we further confirm that the formal proposal is contained in the Bundle that has been submitted to you. That proposal is dated 4th August 2022 and can be found at pages 78-86 of the Bundle.*[1] *As can be seen from the Bundle, the proposal was sent both by email and by post to the landlord and copied to their agent by email. In addition, the Arbitrator is referred to the overview provided by the Applicant at pages 3-5 of the Bundle*[2] *and the*

[1] For the avoidance of doubt, the document at pp.78-86 of the Bundle is the Letter of Notification.

[2] For the avoidance of doubt, the document at pp.3-5 of the Bundle is the Statement.

proposal that is set out therein and all supporting evidence in the Bundle itself. Given the unexpected increase in costs in this arbitration process, the Applicant does not feel it is in a position to revisit that proposal that in all the circumstances, was a generous proposal as it is. For the sake of clarity, the Respondent never replied to either the initial proposal of 4th August 2022 or to the latter proposal contained in the Bundle. The Applicant does not intend to rely on any further evidence in relation to such matters as provided for in paragraph 7(2) of the Order.

3. … the Applicant is happy with the submissions made and contained within the Bundle and has no further submissions to make in respect of the Preliminary Issues save as stated herein. The Applicant can also confirm that it has no further evidence that they wish to submit at this stage.

4. … The only contact received on this matter was on 22nd September 2022, when this firm received an email from an Aryeh Kramer on behalf of the landlord. We understand Mr Kramer is now instructed as agent for the landlord…

15. Mr Kramer's contact information was also supplied. This having been the first occasion when Mr Kramer had been mentioned, I gave further directions by my procedural order dated 23 November 2022 ("**Procedural Order No 2**"), requiring (inter alia) that Mr Kramer be copied into correspondence in respect of the arbitration.

16. My Procedural Order No 2 having been sent to Mr Kramer on the same day, I received an email from Neville Langston of 360 Law Services Limited, advising that "360 Law Services Limited are acting on behalf of the Respondent" in relation to the arbitration and stating:

"*Please note that we do object to the appointment of the arbitrators and the Respondent will be submitting their written submissions in due course, in accordance with the directions set out in Procedural Order Number One, dated the 18 of November 2022.*"

17. However, no such submissions were received from or on behalf of the Respondent by the deadline of 4pm on 9 December 2022.

18. Neither party requested a hearing of the Preliminary Issues in accordance with my procedural directions and accordingly I indicated that I would proceed to determine the Preliminary Issues without a hearing.

19. However, Neville Langston of 360 Law Services Ltd emailed at 18:50 on 12 December 2022 stating inter alia:

"*We sincerely apologise for the attached late submissions by the Respondent.*

This was due to an administrative error, and Friday's deadline not being flagged up by our diary until today."

20. That email attached written submissions on behalf of the Respondent raising (broadly) three categories of submission:

    (1) Submissions to the effect that the Applicant's business did not need to close during any Government lockdown periods or that the reduction in the Applicant's business was not "caused by Covid" (paras 2-4) ("**Category A**");

    (2) Submissions based on *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* and *London Trocadero (2015) LLP v (1) Picturehouse Cinemas Ltd (2) Gallery Cinemas Ltd (3) Cineworld Cinemas Ltd* and a previous decision of Greville Healey as an FCA arbitrator (paras 5-9) ("**Category B**"); and

    (3) Submissions to the effect that the arbitration is in some sense an abuse of process or that the Applicant is not entitled to bring the matter to arbitration due to the existence of some other stayed court proceedings and concluded arbitral proceedings "in relation to the same matter" (para 1) ("**Category C**").

21. It seems to me that the Category A submissions do not go to the Preliminary Issues. Rather, they go to the question whether, if I do have jurisdiction to make an award under s.13 CRCA, I should make an award dismissing the reference under s.13(2). Should I have jurisdiction to make an award under s.13, the Respondents will have a further opportunity to make submissions as to whether I should make an award dismissing the reference pursuant to s.13(2) or (3) CRCA. Accordingly, these submissions are not relevant to the determination of the Preliminary Issues and will not be considered further at this stage.

22. The Category B submissions also do not seem to me to relate to the Preliminary Issues. Rather, they appear to go to the effect of rent cesser clauses and whether terms may be implied into commercial leases suspending payment of rent during closure periods. Should I conclude in determining the Preliminary Issues that I do have jurisdiction under Part 2 of CRCA, the Respondents will have a further opportunity to make submissions in relation to these decisions, insofar as these might be said to be relevant to any other issue in the arbitration (a matter upon which I express no view at this stage).

23. The Category C submissions are as follows:

"*1. These submissions are made without prejudice to the fact that it is the position of the Respondent that the applicant is not entitled to bring this matter to arbitration in light of the fact that the court has already stayed a claim against the Applicant in relation to the same matter, and ordered the Applicant to pay indemnity costs following their application to strike out the Respondent's defence. Further, a separate Arbitration commenced by the Applicant has now been concluded. The Applicants are continuing their abuse of process by commencing yet another set of proceedings.*"

24. Whether there has been an abuse of process so as to prevent a valid reference being made is a different question to whether the Respondents might be able to rely upon any decision made in the Court proceedings, any award made in the separate arbitration, or any submissions made by the Applicant in either set of proceedings in support of their position as to whether an award should be made dismissing the reference under s.13 CRCA in the event a valid reference has been made (as suggested in the Category A submissions). That is a matter which is not relevant to the Preliminary Issues.

25. Annexure A to the Respondents' submissions is an unsigned copy of the Applicant's Particulars of Claim in claim number G6QZ10T4 in the County Court. That claim appears to be a claim by the Applicant for specific performance, injunctive relief and damages in relation to alleged disrepair. It is not a claim in relation to relief from protected rent debt and accordingly is not relevant to the issues in the arbitration (save perhaps that the Respondents may seek to rely upon the contents of the Particulars of Claim or any decision of the Court in relation to what order should be made under s.13 CRCA in the event I were to have jurisdiction to make an award under that section).

26. The Respondents have supplied no other details of the court proceedings or separate arbitral proceedings of which they complain, although I note that an award on a reference under Part 2 CRCA concerning relief from a protected rent debt would have to have been published under CRCA s.18 and I am not aware of any such decision concerning these parties.

27. The Applicant's position, as set out in its Referral at paragraph 3(e), as to whether the parties have similar claims against each other or against other parties is as follows:

"*The Applicant has no other claims of this nature against either the Respondent or any other parties. The Applicant is involved in a separate arbitration process with the Respondent but that is nothing to do with protected rent during the pandemic. The said ongoing arbitration relates to the landlord's failure to fulfil his repairing obligations under the lease. The arbitrator has found in favour of the tenant and is currently in the process of considering quantum and costs. It is unknown what claims the Respondent may have against any other parties.*"

28. I consider further below how the Category C submissions ought to be dealt with.

Decision and Reasons

29. The AA applies to this arbitration as modified by s.22 and Schedule 1 of the CRCA.

30. Arbitration under the CRCA is a statutory arbitration for the purposes of the AA: s.94 AA.

31. Arbitral proceedings were commenced by the Applicant giving notice in writing to FCA requesting that FCA appoint an arbitrator, by sending the Referral to FCA: s.14(5) AA.

32. The CRCA is treated as the arbitration agreement, and the Applicant and Respondents are treated as parties to that agreement: s.95 AA.

33. Section 30(1) AA permits me to rule on my own substantive jurisdiction, including as to whether the CRCA applies to the dispute and as to what matters have been submitted to arbitration in accordance with the arbitration agreement (here, in accordance with the CRCA).

34. Section 34 AA provides that it shall be for the arbitrator to decide all procedural and evidential matters subject to the right of the parties to agree any matter.

35. There is a moratorium on a landlord who is owed a protected rent debt from using certain specified remedies during the moratorium period. In the present case, the moratorium period (as defined by s.23(2) CRCA) will continue until the day on which the arbitration concludes.

36. Section 21 of the CRCA permits statutory guidance to be issued to arbitrators. The Commercial Rent (Coronavirus) Act 2022 Guidance ("**the Guidance**") has been issued pursuant to that power. The Guidance provides as follows:

> *2.4. The reference to arbitration must be accompanied by a formal proposal for resolving the dispute with supporting evidence…*
>
> *2.10. It is mandated by the Act that the above procedure prevails over the provisions of the AA96. However, the AA96 will apply to the extent it is not inconsistent with the Act (subject to the modifications made to the AA96 by Schedule 1 to the Act…*

3.15. Once the pre-arbitration steps above have been carried out the applicant can make a reference to arbitration. A reference is made when the applicant gives notice in writing to an approved arbitration body, requesting that that body appoint an arbitrator (or arbitrators) in respect of that matter. In practice that should be done by completing the approved arbitration body's application form…

3.17. The reference must also contain the applicant's formal proposal and supporting evidence for resolving the matter of relief from payment of a protected rent debt…

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; …

7.4.5. Verified by a statement of truth (a formal proposal is a 'written statement'…

7.5. … the party making a reference to arbitration… must include its formal proposal with the reference.

7.10. The arbitrator must consider the final proposal or proposals, as appropriate, by reference to the arbitrator's principles in section 15 of the Act…

12.15. Under the Act, rather than the usual form of arbitral proceedings involving statements of claim and defence etc, formal proposals for resolving the matter of relief from payment of a protected rent debt are submitted by the applicant, with the respondent having the opportunity to submit their own proposal. Proposals must be accompanied by supporting evidence. Assessment of those formal proposals and supporting evidence is the main way in which the arbitrator is to resolve the dispute between the parties…

12.16. … the Act's approach of the parties submitting formal proposals (rather than providing for the usual form of arbitral proceedings) is intended to limit the amount of document disclosure to ensure the process is efficient and cost-effective (especially since the parties must meet their own legal or other costs).

12.17. That said, the arbitrator retains the broad discretion pursuant to section 34 of the AA96 to decide, save where they are inconsistent with the provisions of the Act, all procedural and evidential matters in the arbitration, including as to whether further written statements must be provided, further documents disclosed and/or any further questions should be put to and answered by the respective parties and when and in what form this should be done.

The first preliminary issue

37. The first preliminary issue is whether the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt for the purposes of s.11 CRCA.

38. The Applicant contends that the Letter of Notification was a formal proposal. It is said that "*the proposal was sent both by email and by post to the landlord and copied to their agent by email*". The Applicant also added: "*In addition, the arbitrator is referred to* [the Statement] *and the proposal that is set out therein and all supporting evidence in the Bundle itself*".

39. The Respondents have not provided any submissions of assistance in relation to this issue.

40. A "formal proposal" is defined by s.11(7) CRCA as meaning:

    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.

41. By s.11(3) CRCA, a formal proposal under s.11(1) must be accompanied by supporting evidence.

42. 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.

43. However, I find that the Letter of Notification was not a "formal proposal" at the time it was given (being 4 August 2022) for each of the following independent reasons:

    (1) It was not made "on the assumption that "the reference is not dismissed" for a reason set out in section 13(2) or (3). There were no arbitral proceedings under Part 2 CRCA at the time of the Letter of Notification. The Letter of Notification contained a proposal to settle the dispute "before a referral to arbitration is made", not a proposal to take effect if the substantive arbitral jurisdiction were engaged. The Letter of Notification was what it purported to be, namely a letter notifying the Respondents of the Applicant's intention to make a reference to arbitration in accordance with s.10 CRCA;

    (2) There is nothing in the Letter of Notification expressing the proposal contained therein to be made for the purposes of s.11 CRCA. No reference is made to s.11 whatsoever. Rather, the Letter of Notification describes itself as a letter of notification, in the heading and the opening paragraphs; and/or

(3) The Letter of Notification was not (when it was sent to the Respondents by email and post) "given to… the arbitrator". This was first sent to FCA in the Bundle.

44. I further note that the Letter of Notification was not verified by a statement of truth at its date (the only statement of truth appearing on the Referral form itself). However, if this were the only failure to comply with the requirements of the CRCA for a formal proposal, s.12(3) of CRCA would give me *power* to disregard the document not so verified, but would not *require* that outcome. Given my conclusion that the Letter of Notification was not in any event a formal proposal, and given that, had it been a formal proposal, it was later verified by a statement of truth in the Referral, there is no need for me to determine whether I would have seen fit to disregard it.

45. I also find that the Letter of Notification did not satisfy the requirements for a "formal proposal" at the time it was included in the Bundle attached to the Referral. This is for each of the following independent reasons:

(1) The proposal in the Letter of Notification was not made on the assumption that the reference is not dismissed for a reason set out in section 13(2) or (3). I do not consider that it was implicit in the Letter of Notification that the proposal contained therein was one made as part of the arbitration, or to be relied upon therein, rather than as a necessary precursor. A letter of notification had to be written, and included in the Bundle, because it was necessary for the purposes of s.10 CRCA. The Letter of Notification contained a proposal to settle the matter *prior to the reference*, not a formal proposal *for the purposes of the reference*. If any proposal prior to arbitration could satisfy the requirement in s.11(7)(a) of CRCA were it included in the documents supplied as part of the reference, the requirement in that subparagraph would be substantially denuded of content, because it could always be said to be implicit in the structure of s.13 CRCA and in the fact that an otherwise valid formal proposal has been made for the purposes of s.11 CRCA that the applicant assumed such proposal would be relied upon only if the arbitral tribunal has jurisdiction to resolve the matter of relief from payment of a protected rent debt. I do not consider that the character of the proposal in the Letter of Notification or the assumptions upon which it had been based changed by virtue of the inclusion of that letter (or the Statement) in the Bundle. Accordingly, I conclude that the proposal was not made on the requisite assumption, being instead a pre-arbitral proposal; and/or

(2) There is nothing in the Letter of Notification expressing the proposal contained therein to be made for the purposes of s.11 CRCA. No reference is made to s.11 whatsoever. Rather, the Letter of Notification describes itself as a letter of notification, in the heading and the opening paragraphs. The following matters reinforce my conclusion that the Letter of Notification does not contain a proposal "expressed to be made for the purposes of this section": (a) the Letter of Notification was referred to in the Referral form at paragraph 7(b) as a document with which the Applicant intended to supplement its formal proposal, not as being the formal proposal itself; and (b) it was also not described as a formal proposal (or indeed any sort of proposal) in the Bundle index.

46. I do not understand the Applicant to be contending that the Statement is itself a formal proposal. Indeed, it was referred to as an "informal statement" in the Referral. However, I find that the Statement is in any event not a formal proposal within the meaning of s.11 and does not contain such a proposal because the "Proposal" contained therein is not expressed to be made for the purposes of s.11 CRCA.

47. Nor do I consider that it is possible to read the Statement and the Letter of Notification together as a formal proposal, since neither is expressed to be made for the purposes of s.11 CRCA, and both are referred to in paragraph 7(b) of the Referral documents as being documents which (together with supporting documents and evidence) would be referred to in support of the formal proposal.

48. Accordingly, I conclude that the Applicant did not make a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt for the purposes of s.11 CRCA.

The second preliminary issue

49. Since I have concluded that the Applicant has not made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt for the purposes of s.11 CRCA, the second preliminary issue does not arise.

The third preliminary issue

50. The third preliminary issue is whether a reference under Part 2 CRCA has been made such that I have jurisdiction to make an award pursuant to s.13 CRCA.

51. By s.11(1) CRCA, "*A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt.*"

52. Since (given my conclusion in relation to the first preliminary issue) this requirement was not satisfied, the question is: what is the effect of the Applicant's failure to comply with the mandatory requirement of s.11(1) of CRCA?

53. CRCA does not provide in express terms for the consequences of a failure to comply with the requirement in s.11(1). There are, on the face of it, two possibilities:

    (1) The reference is valid despite non-compliance ("**the First Possibility**"); or

(2) The reference is a nullity for the purposes of conferring jurisdiction to make an award under s.13 of the CRCA, it being a requirement of a valid "reference to arbitration" for the purposes of the CRCA that it include a formal proposal for resolving the matter of relief from payment of a protected rent debt (albeit that arbitral proceedings were commenced by submission of the Referral) ("**the Second Possibility**").

54. I have received no submissions of any real assistance from either party in relation to this issue. The Applicant's submissions focused on the question whether there had been a reference containing a formal proposal as a matter of fact, not the jurisdictional consequences (if any) if (as I have found) the Referral was not accompanied by a formal proposal. 360 Law Services have simply asserted that the Respondents do object to my appointment.

55. In *R v Soneji* [2005] UKHL 49, Lord Steyn said (applying *AG Reference (3 of 1999)* [2001] 2 A.C. 91) that, in determining the validity of an act done in breach of a statutory provision:

"… *the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be said to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.*"

56. In *Newbold v Coal Authority* [2013] EWCA Civ 584, Sir Stanley Burnton said:

"*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 the Mannai case [1997] AC 749, 776B Lord Hoffmann 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… would have intended a sensible… result.*"

57. For the reasons which follow, I find that, on a true construction of s.11(1) CRCA, no valid reference to arbitration under Part 2 CRCA is made if it does not include a formal proposal for resolving the matter of relief from payment of a protected rent debt. It seems to me that Parliament can fairly be said to have intended that consequence, in light of other indications in the CRCA.

58. First, section 11(1) is expressed in mandatory terms: a reference to arbitration **must** include a formal proposal. If a valid reference could be made without complying with that requirement, mandatory language would be less appropriate. However, I do not regard this matter as

conclusive; there are many cases in which a failure to comply with statutory requirements expressed in mandatory language has not been held to result in the invalidity of the act in breach of that requirement (cf by way of examples only: *Tudor v M25 Group Ltd* [2003] EWCA Civ 1760; *7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd* [2004] EWCA Civ 1669).

59. Secondly, express provision is made in s.11(6) CRCA permitting the time periods in ss.11(2) and (4) to be extended by agreement or by the arbitrator. I find it to be implicit in the omission of s.11(1) from this provision that it is not possible for the arbitrator to extend the time in respect of a formal proposal under s.11(1). This makes sense if there has been no valid reference absent the inclusion of a formal proposal.

60. Thirdly, other provisions of the CRCA presuppose that there will be a formal proposal included in the reference.

61. Section 10(3) CRCA precludes in certain specified circumstances the making of a reference to arbitration, the appointment of an arbitrator and the making of a formal proposal under ss.11(2) and (4) CRCA. There is nothing expressly precluding the making of a formal proposal under s.11(1) separately in the event that the tenant were subject to the sort of CVA, IVA, compromise or arrangement relating to a protected rent debt listed in s.10(3), because there is no need to preclude this separately from the making of a reference to arbitration, in which it must be included.

62. Similarly, no reference is made to s.11(1) formal proposals in s.10(5). I consider this to be because it is inherent in the making of a reference to arbitration that such a formal proposal should already have been included in the reference.

63. Fourthly, the timing and mechanics of the CRCA do not work properly if a valid reference could be made without including a formal proposal.

64. The respondent may put forward a formal proposal in response under s.11(2) “within the period of 14 days beginning with the day on which the proposal under subsection (1) is received”. Absent such proposal, there is no opportunity to put in a formal proposal in response.

65. Similarly, revised formal proposals under s.11(4) may be put forward “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)”.

66. It might be suggested that s.14(5) CRCA could be read so as to confer power on the arbitrator to make whatever award the arbitrator considers appropriate (applying the principles in s.15) even absent any formal proposal.

67. It might also be suggested that, although by s.14(2), before determining what award to make under s.13(5), the arbitrator must consider any final proposal put forward to it by a party under s.11, the word “any” is consistent with the possibility of there being no formal proposal whatsoever.

68. However, where both parties put forward formal proposals, the arbitrator must make an award consistent with s.14(3) (i.e. if both are consistent with the s.15 principles, the arbitrator must make the award set out in whichever proposal was most consistent, or if only one is consistent, the arbitrator must make the award set out in that proposal).

69. As explained above, if a valid reference could be made absent a formal proposal, there would then be no opportunity for the respondent to give a formal proposal in response at all. In that case it would be deprived of the opportunity to obtain a mandatory award pursuant to s.14(3) in the event its proposal was consistent with the s.15 principles. I do not consider that this result can sensibly have been intended.

70. Further, the arbitrator’s award, pursuant to s.17(1) CRCA, must be made as soon as reasonably practicable after (a) where both parties have put forward a final proposal, the day on which the latest final proposal is received, or (b) otherwise, the last day on which a party may put forward a revised formal proposal (see section 11(4)). It is not contemplated that there might be no formal proposal under s.11(1) such that these time limits are never engaged.

71. I am further reinforced in my conclusion by the following considerations:

    (1) If parties had to seek or the arbitrator had to make directions to enable the determination of a reference absent a formal proposal, this would add an extra layer of cost and delay to proceedings that are supposed to be efficient and cost-effective.

    (2) If an applicant need not accompany a valid reference with a formal proposal, this could be used by opportunistic tenants to create unfair delay. For while the arbitral proceedings continue, the moratorium period continues and the landlord cannot rely upon specified remedies.

The Category C abuse of process submissions

72. By s.33 AA, I have a duty to (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

73. It seems to me that it would in principle be appropriate as a matter of fairness to permit the Applicant an opportunity to respond to the Respondents' submission raised for the first time after the deadline for written submissions that the reference is an abuse of process before that issue is determined.

74. However, in light of my findings above about whether a valid reference has been made at all, it seems to me that it would be a waste of the parties' time and costs to invite further submissions on that issue at this stage.

75. Rather, I shall record that the Respondents have made a further objection that I lack jurisdiction on the grounds of abuse of process, which issue will fall to be determined should this award in relation to the Preliminary Issues be overturned.

Arbitration Fees and Costs

76. By s.19 of the CRCA:

> *(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.*

77. S.19(5) is of no application here since I am not making an award under s.13 or 14 CRCA.

78. S.20(6) relates to the costs of hearing fees where an award is made under s.13 or 14, so also does not apply.

79. Accordingly, pursuant to s.19(7) CRCA, the parties must meet their own legal or other costs and I make no award as to costs.

Publication

80. Pursuant to CRCA s.18, this Award must be published.

81. I have formed the provisional view that the Award contains no commercial information which ought to be redacted from the award pursuant to s.18(3) of CRCA, save for the passage indicated in red text above. I will therefore publish the award in full on the FCA website, save that the passage in red text shall be redacted, unless either party indicates to me by 4pm on 16 December 2022 that they wish me to do otherwise in which case before publishing the Award I shall consider any submissions put forward in relation to that issue together with any evidence submitted in support of any such submissions.

Disposition

82. **I hereby award and direct as follows:**

(1) The Applicant's reference is dismissed.

(2) This award shall be published in full on the FCA website, save that the passage in red text above shall be redacted, unless either party indicates to me by 4pm on 16 December 2022 that they wish me to do otherwise, in which case before publishing the Award I shall 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

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

Date of the award

84. This Award is made by me, Toby Boncey, on 15 December 2022.

Signature

Toby Boncey