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

Between

GLENDOLA LEISURE LIMITED

Applicant

and

MITCHELLS & BUTLERS RETAIL (NO.2) LIMITED

Respondent

FURTHER AWARD

Introduction

1. This Further Award is supplemental to my Award dated 13.3.2023 and should be read in the light thereof.
2. In paragraphs 118 to 121 of that Award I addressed the matter of the arbitration fees and indicated a *provisional* view. I gave the Respondent an opportunity to make representations, if it so wished.

3. I have since received submissions from the Respondent. It invites me to depart from the default position under CRCA s.19(5) (which is that the parties should share the arbitration fees). It asks that I direct that the Applicant alone bear the arbitration fees. This is to reflect what is said to be the Applicant's entirely unreasonable behaviour and conduct, which is alleged to have involved an attempt to exploit CRCA and to have been contrary to the spirit and intent of the legislation.
4. I have also received submissions in reply from the Applicant. The Applicant rejects the criticisms made by the Respondent. It contends that the Respondent's submission is wrong and that the Respondent should be rebuked for its unfounded allegation. The Applicant says the default position should be adhered to.
5. I have reviewed and carefully considered the submissions in their entirety, even though I only refer to extracts in this Further Award.

Decision

6. The default position under CRCA s.19(5) is as above. However, I may make a different award if I consider it more appropriate to do so.
7. The default position entails that a non-equal split of the arbitration fees should not simply be event/result-driven. Indeed, the Respondent accepts that defeat is not a sufficient ground to displace the prima facie sharing of the arbitration fees. Thus, I am not influenced by an assessment of the relative success or failure of the parties' substantive cases (on which the parties are divided).
8. In looking to all the circumstances when determining if it would be more appropriate to make an award other than as per the default position, I believe that the conduct of the parties is, in principle, a potentially important factor.

9. Is the Applicant guilty of the egregious conduct which the Respondent attributes to it? In my view, it is not. In my opinion, the Applicant's behaviour does not warrant condemnation through a non-default order in respect of the arbitration fees. I do not consider that it is appropriate to depart from the mandated starting point.
10. I do not accept that the Applicant improperly used the legislation. I do not accept that the need for this arbitration was the product of the Applicant's unreasonable refusal or failure to engage with the Respondent and to agree a payment plan. I believe that this is merely a case where the parties did not manage to resolve their differences by agreement and hence the Applicant invoked the statute. I do not attribute blame to either party.
11. Neither do I accept that the Applicant's behaviour in the arbitration is worthy of the degree of other criticism levelled by the Respondent. Although the Applicant caused some (modest) delay by seeking an extension of time for its revised formal proposal, and despite the fact that it was slightly late in complying with some of the directions, I do not believe that the delay and the shortcomings were serious. Neither did they have any effect on the arbitration fees.
12. I have slightly more sympathy with the Respondent in its complaint that the Applicant: (a) tried, but failed, to introduce documentation/evidence in the form of a belatedly produced financial forecast; (b) failed to refer to the 24.9.2020 meeting in its original evidence, which led to additional directions. Nonetheless, I am not persuaded that such conduct was unreasonable. The Applicant was entitled to attempt to introduce the new material, and was entirely candid about its nature and origin. The fact that I declined to admit it does not mean that the Applicant acted improperly. As for the 24.9.2020 meeting, I recorded in my Award (para.44) that the Applicant's failure to mention that meeting was just an innocent oversight.

13. I have considered all the Respondent's criticisms of the Applicant, including those not specifically addressed above. Whether taken individually or cumulatively, they do not cause me to conclude that any award is more appropriate than the default position that the arbitration fees should be shared equally.

14. Therefore, I now make this Further Award in terms reflecting the above conclusion.

Publication

15. Pursuant to CRCA s.18, this Further Award will be published on the FCA website. It contains no commercial information which must be excluded under s.18(3).

Disposition

16. I hereby award and direct as follows:

The Respondent must reimburse the Applicant 50% of the arbitration fees paid by the Applicant.

Seat of the arbitration

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

Date of the award

18. This Further Award is made by me, Martin Dray FCI Arb, this Monday 20.3.2023.

Signature



Martin Dray FCI Arb