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

Between

Hyde Park South Limited

Applicant

and

Royal Commission for the Exhibition of 1851

Respondent

FINAL AWARD

The Parties and the Premises

1. The Applicant, Hyde Park South Limited, represented by Cripps LLP of 22 Mount Ephraim, Tunbridge Wells TN4 8AS, is the tenant of premises located at 191 Queen's Gate, London SW7 ("the Premises").

2. The Respondent, Royal Commission for the Exhibition of 1951, is a registered charity and is represented by Farrer & Co LLP, 66 Lincoln's Inn Fields, London WC2A 3LH. The Respondent is the Applicant's landlord of the Premises.

3. The Applicant occupies the Premises pursuant to a lease dated 9 July 2018 for a term of 20 years commencing on 29 September 2017 ("the Lease").

4. The Applicant occupies the Premises for the purposes of its business which is a tourist hostel offering shared dormitory style accommodation aimed at travellers on a budget. The Applicant's business operates under the Astor Hotel brand, a family business which was started in 1974.

Procedural Background

5. On 22 September 2022 the Applicant made a reference to arbitration ("the Reference") in relation to the matter of relief from payment of a protected rent debt arising under the Applicant's tenancy, the Reference being made pursuant to section 9 of the Commercial Rent (Coronavirus) Act 2022 ("CRCA"). The Reference was made to Falcon Chambers Arbitration ("FCA"), an approved arbitration body for the purposes of section 7 of the CRCA.

6. The referral form:
    a. Identified the protected rent debt as £174,736.44 (inclusive of interest calculated to 23 September 2022).
    b. Confirmed that the Applicant had served notice of intention to make this reference to arbitration on the Respondent in accordance with section 10(1) of the CRCA and enclosed copies of the s.10 notification and the Respondent's response to this.
    c. Attached a copy of the Applicant's formal proposal as required by sections 11 and 12 of the CRCA.

7. The Referral form stated that no agreement had been reached between the parties as to whether: the Applicant's tenancy was a business tenancy within the meaning of section 2 of the CRCA; the dispute had not already been resolved by agreement; the protected rent debt was not subject to a CVA, IVA or compromise; and the debt fell within the definition of "protected rent debt" for the purposes of the CRCA. However, these matters have not been controversial and I have proceeded on the basis that these matters are agreed between the parties.

8. In the circumstances I am fully satisfied that the arbitration is properly constituted.

9. FCA proposed my appointment as arbitrator, gave details of my proposed fee, and invited the parties to confirm acceptance of my appointment, which they duly did. On 6 October 2022 I issued a procedural order which, amongst other things, confirmed that FCA had appointed me as the arbitrator in respect of the arbitration.

10. After the parties had each put forward formal proposals and revised proposals in accordance with section 11 (see below) it was clear that the parties were not in agreement as to the Protected Period for the purposes of s.5 of the CRCA and therefore were not in agreement as to the level of the Protected Rent Debt for the purposes of s.3 of the CRCA. Accordingly on 21 November 2022 I made a further procedural order directing that this dispute was suitable to be determined at the same time as the substantive question of relief under the CRCA and without the need for a preliminary issue. I accordingly made directions to progress the arbitration and, amongst other things, directed that:
    a. any request for an oral hearing was to be made by 5pm 25 November 2022;

b. if no such request was made, the parties were to indicate, by 5pm on 29 November 2022, whether they wished to make any further written submissions, which would be required to be served by 5pm 5 December 2022.

11. Neither party requested an oral hearing. Bother parties made further written submissions, in the form of the witness statements listed below.

The Evidence

12. In addition to the parties' proposals, the evidence I have been provided with comprises the following:
    a. The statement of Stephen Iseman of Sopher +Co LLP, chartered accountants , dated 22 September 2022, together with four exhibits.

    b. The first statement of Alexander Henry James Rivers, the Applicant's Managing Director, dated 22 September 2022, together with three exhibits.

    c. The statement of John Lavery, the Respondent's Secretary, dated 12 October 2022, together with two exhibits.

    d. The second statement of Mr Rivers, dated 31 October 2022 plus an additional exhibit.

    e. The second statement of John Lavery dated 18 November 2022.

f. The third statement of Mr Rivers, dated 30 November 2022.

g. The fourth statement of Mr Rivers, dated 16 December 2022 plus an additional exhibit.

h. The third statement of John Lavery dated 22 December 2022.

13. Neither party has invited me to direct the disclosure of any additional evidence, and in view of the amount of rent in dispute and the need to resolve this matter without further delay and costs I do not propose to do so. Accordingly, I make my award following consideration of the above evidence.

The Formal Proposals and Revised Proposals

14. The Applicant's Formal proposal in accordance with s.11(1) of the CRCA is dated 22 September 2022 and proposed that the protected rent debt (identified as £174,736.44) be written off in its entirety.

15. On 12 October 2022 the Respondent put forward a formal proposal pursuant to s.11(2) of the CRCA. This proposal was as follows:

1. The principal rent payable during the protected period pursuant to the Lease is repaid in full over a two year period.
2. Repayment to be made in equal, consecutive quarterly instalments.
3. The repayment of the rent is not to be subject to interest which would otherwise be payable pursuant to the Lease.

16. The Applicant made a revised proposal in accordance with s.11(4), having agreed an extension of time in which to do so with the Respondent. The

Applicant's Revised Proposal, which was set out in Mr Rivers' second witness statement ("the Applicant's Revised Proposal") dated 31 October 2022, was that 80% of the remaining protected debt and the interest accrued to date on the protected debt be written off with the balance to be paid over a 2 year period.

17. The Respondent made a revised proposal pursuant to s.11(4) of the CRCA ("the Respondent's Revised Proposal") on 18 November 2022 proposing:

    1. The Protected Rent Debt (as defined in the Act) be reduced by £50,000 and repaid in full over a twenty four month period;
    2. Repayment to be made in equal, consecutive quarterly instalments;
    3. The repayment of the rent not to be subject to interest which would otherwise be payable pursuant to the Lease.

Overview of the Legal Framework

18. Section 1(1) of the CRCA provides that the Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration.

19. Section 3(1) of the CRCA provides that "a protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent.

20. By section 3(2) of the CRCA, rent due under the tenancy is only "protected rent" if:

    "(a) the tenancy was adversely affected by coronavirus; and

    (b) the rent is attributable to a period of occupation by the tenant for, or a period within, the protected period applying to the tenancy".

21. Section 13 of the CRCA sets out the awards open to the arbitrator and provides as follows:

"13(2) If the arbitrator determines that—

(a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,

(b) the tenancy in question is not a business tenancy, or

(c) there is no protected rent debt,

the arbitrator must make an award dismissing the reference.

"13(3) If, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—

(a) is not viable, and

(b) would not be viable even if the tenant were to be given relief from payment of any kind,

the arbitrator must make an award dismissing the reference.

"13(4) Subsection (5) applies if, after making that assessment, the arbitrator determines that (at the time of the assessment) the business—

(a) is viable, or

(b) would become viable if the tenant were to be given relief from payment of any kind.

"13(5) In that case the arbitrator must resolve the matter of relief from payment of a protected rent debt by—

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

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

22. Section 14 of the CRCA deals with the award on the matter of relief from payment, and I consider this further below. However, I must first determine whether the dispute is eligible for the grant of relief, as required by section 13.

Eligibility

23. For the dispute to be eligible for the grant of relief:
    a. the parties must not have resolved the matter of relief themselves before the reference: CRCA s. 13(2)(a);
    b. the tenancy must be a business tenancy (namely, a tenancy within Part II of the Landlord and Tenant Act 1954 (CRCA section 2(5)): CRCA s.13(2)(b));
    c. there must be a protected rent debt: CRCA s.13(2)(b);
    d. it must be shown that the tenant's business is viable or would be viable if relief from the protected rent debt were given: CRCA s. 13(2) & (3).

    If any one of these conditions is not met, the case fails on the grounds of eligibility and the reference must be dismissed.

The parties must not have resolved the matter of relief

24. The parties have evidently not resolved the matter of relief from payment by agreement. This condition is accordingly met.

The tenancy must be a business tenancy

25. The Applicant has addressed the relevant criteria in Mr Rivers' first statement. The Respondent appears to accept that the Applicant's tenancy is a business tenancy within Part 2 of the 1954 Act and I have no reason to conclude that it is not. I accordingly find that this condition is satisfied.

The Protected Rent Debt

26. A protected rent debt is unpaid protected rent: CRCA s.3(1). Rent is protected rent if the business tenancy was adversely affected by Coronavirus and the rent is attributable to a period of occupation by the tenant for or within the protected period: CRCA s.3(2). A business tenancy was adversely affected by Coronavirus if the whole or part of the tenant's business or its premises was subject to a closure requirement: CRCA s.4(1).

27. The parties agreed there was a protected rent debt for the purposes of the CRCA but were not, initially, in agreement as to the amount of this debt.

28. As set out above, the Applicant had identified the protected rent debt in the Referral as £174,736.44 (inclusive of interest calculated to 23 September 2022). It is clear from Mr Rivers' first witness statement that the Applicant regarded the Protected Period as comprising the period commencing on 21 March 2020 and ending on 17 May 2021 (paragraphs 21 to 27 of his first statement). The Applicant's calculation of the Protected Rent Debt followed at paragraphs 28 to 31 of this statement. The sum of £174,736.44 was calculated as arears for the period 21 March 2020 to 17 May 2021 of £231,780.10, less four instalments of £16,666.67 which had been paid by the Applicant on 10 August 2020, 7 September 2020, 16 October 2020 and 16 November 2020 and less the December 2019 quarter's rent, which the Applicant had paid in full. This gave a total of £162,922.61, which, when interest of £11,813.83 was added gave a total of £174,736.44.

29. In his first witness statement Mr Lavery referred to Mr Rivers' calculation and, using Mr Rivers' figures, suggested the correct calculation was £162,921.62 plus interest. However, Mr Lavery explained that the protected period began

on 21 March 2020 and ended on 18 July 2021, this being the date when Hotels were able to re-open in England in accordance with the relevant legislation. On that basis Mr Lavery said that the number of days falling within the protected period was 485 and the total rent payable in this period would therefore be £265,753.43 (paragraph 12 of his first statement). Having regard to the sums paid by the Applicant (as set out in Mr River's first statement) he concluded that the protected rent debt would in fact amount to £196,894.95 plus interest.

30. In his second statement, dated 31 October 2022, Mr Rivers, at paragraph 4, agreed with the Respondent's figures on the overall rental arrears. At paragraph 5 he said "the calculation at paragraph 10 below seems to me to be the correct one, with the Protected Rent Debt of £162,922.37 (somehow in our original calculation we reached a figure of £161,922.61 and Farrar have reached £162,921.61) ..." Mr Rivers did not agree the length of the Protected Period and further stated, at paragraph 9: "While it would clearly be in the interests of HPSL to agree a longer protected period I can confirm that as far as HPSL is concerned the protected period ended on 17 May 2021 and not 18 July 2021."

31. In his second statement Mr Lavery maintained his position as to the correct length of the Protected Period but made no new submissions, stating that the Responding Party would defer to the assessment of the Arbitrator.

32. The third statement of Mr Rivers then made the following concession, at paragraph 4:

"As a result of the first two sets of submissions the duration of the Protected Period remains in dispute, In order to assist the arbitrator and to narrow the issues that the arbitrator has to consider, HPSL confirms that it will agree the Protected Period as being from 21 March 2020 to 18 July 2021. .."

33. Mr Rivers went on to explain, however, that there was confusion arising from Mr Lavery's second statement as to the allocation of payments totalling £66,666.67, i.e. the four instalments of £16,666.67 which had been paid by the Applicant. This meant that there was again confusion as to the amount of the Protected Rent Debt and the Respondent's proposal to reduce this by £50,000. Mr Rivers invited me to direct the Respondent to produce a supplemental statement making its position clear.

34. On 2 December 2022 I wrote to the parties setting out what I understood to be agreed position, namely:

    1. The Protected Period runs from 21 March 2020 to 18 July 2021.

    2. The total rent which fell due in this period was £265, 753.43.

    3. The quarter's rent due for December 2020 had been paid in full by the Applicant. Thus an apportioned rent for the period 21 March to 24 March 2020 had been paid. This amounted to £2,191.80.

    4. Four payments of £16,666.67 were also paid by HPSL, amounting to £66,666.68.

        a. Paragraph 29 of Mr River's first statement explained that these payments were made on 10 August 2020, 7 September 2020, 16 October 2020 and 16 November 2020 and that they were made in respect of the rent due in the Protected Period (i.e. 21 March 2020 – 18 July 2021).

b. Paragraph 12 of Mr Lavery's statement, dated 12 October 2022, accepts that these payments were made. On this basis he confirmed that the protected Rent Debt is £196,894.95.

35. I invited the Respondent to confirm that its proposal was that the sum of £196,894.95 be reduced by £50,000 (i.e. to £146,894.95) and asked both parties to confirm that the matters set out above were agreed. The Respondent confirmed this on 7 December 2022. The Applicant confirmed that the Protected Rent Debt was agreed to be £196,894.95 and the matter set out above were agreed on 9 December 2022.

36. The Applicant also indicated at this time that it wished to make further written submissions. I accordingly directed the parties to agree a timetable to exchange final written submissions, which they did. The Applicant filed the fourth statement on behalf of Mr Rivers on 16 December 2022 and the Respondent filed the third witness statement of Mr Lavery, dated 22 December 2022 on 23 December 2022.

37. In the circumstances, the parties have agreed that there is a Protected Rent Debt and that this is the sum of £196,894.95.

The Viability of the Tenant's Business

38. The final eligibility criterion is viability: section 13(3). I have to be satisfied that the Respondent's business is viable or would become viable if it were to be given one of the permitted forms of relief from payment of the protected rent debt: "the Viability Condition".

39. Viability is not defined in the CRAR but as the DBEIS Commercial Rent (Coronavirus) Act 2022 Guidance (issued under section 21 of the CRAR)

("the 2022 Guidance") states at paragraph 6.3: "*In making the assessment of viability a key question is whether protected rent debt aside, the tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.*"

40. For the purposes of section 13(3), the assessment as to the Respondent's viability is to be made now (at the time of the assessment). It is apparent that both parties accept that the Applicant is viable for the purposes of section 13(3). Having reviewed the evidence set out above, I am satisfied that the Applicant is viable and that the relevant eligibility conditions are met.

41. It follows that I must now proceed to determine whether the Respondent should receive relief and, if so, what relief should be awarded.

Relief from Payment: the Principles

42. In accordance with section 13(5)(a) of the CRCA I must decide whether the Respondent should be given any relief from payment of the protected rent debt and, if so, what relief. The awards which I am permitted to make under section 14(6) are either:

(1) To give the tenant relief from payment by means of any one or more of the following (section 6(2)): (i) writing off all or any part of the debt; (ii) giving time to pay the whole or part of the debt (including by instalments); (iii) reducing (including to zero) any interest otherwise payable by the tenant;
or

(2) To determine that the Respondent is to be given no relief from payment.

43. In the event that any award I make gives the Respondent more time to pay, the payment date must be within the period of 24 months beginning with the day after the date of the award: section 14(7).

44. In deciding whether the tenant should receive any relief from payment and, if so, what, I must consider the final proposals put forward by the parties: section 14(2). I must consider these final proposals by reference to the arbitrator's principles set out in section 15 of the CRAR ("the Principles") . What I must decide is:

    a. Whether both proposals are consistent with the Principles, in which case I must decide which is the most consistent proposal and make an Award in terms of this proposal;
    b. If only one proposal is consistent with the Principles then I must make an award in terms of that consistent proposal;
    c. If neither final proposal is consistent I may make an Award in terms which I consider to be the most appropriate applying the Principles.

45. The Principles to be applied when considering the matter of relief are that:
    a. Any award should be aimed at preserving or, as the case may be, restoring and preserving the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency ("the First Principle"); and
    b. The tenant should, so far as it is consistent with the first principle to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay ("the Second Principle").

46. Section 16 requires me to make this assessment having regard to:
    a. The assets and liabilities of the tenant, including any other tenancies to which the tenant is a party;

b. The previous rental payments made under the business tenancy from the tenant to the landlord,
c. The impact of coronavirus on the business of the tenant, and
d. Any other information relating to the financial position of the tenant that I consider appropriate.

47. In assessing the solvency of the landlord I am similarly required to have regard to the assets and liabilities of the landlord and any other information relating to its financial position: section 16(2). A landlord is solvent unless the landlord is, or is likely to become, unable to pay their debts as they fall due.

48. In this case the Respondent has not sought to address the question of its own solvency It has, however, referred to the fact that it is a charitable organisation and, as such, is bound to safeguard its assets and ensure that any concession agreed in respect of rent payable by its tenants is based on a balanced and reasoned assessment.

49. The Applicant submits that the Respondent's charitable status is not a factor which should be taken into account in the context of this arbitration: see Mr River's fourth statement at paragraph 10.

50. The Respondent must act in accordance with its charitable status and act in the best interest of the charity's objectives but this is not the same thing as preserving solvency. I agree that the charitable status of the Respondent is not a matter which is relevant to this arbitration. As such I proceed on the basis that this is not a case where relief from payment would pose a risk to the landlord's solvency.

51. In this case the final proposals which I have to consider are:

a. the Applicant's Revised Proposal that 80% of the remaining protected debt and the interest accrued to date on the protected debt be written off with the balance to be paid over a 2 year period (i.e. the Protected Rent Debt of £196,894.95 would be reduced by £157,515.96 meaning that the Applicant would pay £39.378.99).

b. the Respondent's Final Proposal, that the Protected Rent Debt of £196,894.95 be reduced by the sum of £50,000 to £146,894.95 to be repaid in equal consecutive quarterly payments, with interest being written off.

Relief From Payment

52. At this stage the question for me is the extent to which the Applicant can afford to pay the Protected Rent Debt balancing the viability of its business and the solvency of the Respondent (paragraph 7.15 of the 2022 Guidance). As I have already stated the Respondent's solvency is not a factor.

53. In assessing viability I am required to, so far as known, have regard to the following matters in accordance with s.16(1) of the CRCA:

a. The assets and liabilities of the tenant, including any other tenancies to which the tenant is a party.
b. The previous rental payments made under the business tenancy from the tenant to the landlord.
c. The impact of coronavirus on the business of the tenant.

d. Any other information relating to the financial position of the tenant that I consider appropriate.

54. At the outset I make the following points with regard to viability for the purposes of the CRCA:

a. As set out above, viability is not defined in the CRAR. The concept of viability is specifically for the purposes of the CRCA and is distinct from the question of the solvency of the tenant (see e.g. the 2022 Guidance at paragraph 6.6).

b. Viability is not the same concept as profitability. Assessing viability, and when making an assessment as to how the pandemic has impacted on the tenant's business as required by s.16(1)(c), it is likely to be helpful to look at net/gross profit margins pre and post pandemic but it does not follow that a business which is not trading profitably, or which has not returned to pre-pandemic profitability, is not viable.

c. The key question for me is what relief, if any, is necessary to preserve the Applicant's viability and I am to approach matters in a common sense and holistic way: See the 2022 Guidance at paragraph 6.10.

d. When determining the question of substantive relief I am required to look to the Applicant's financial position now and for the foreseeable future, not retrospectively.

55. I make these points because the Respondent submits that the Applicant's Final Proposal is not a genuine attempt to assess what it can afford to pay in order to remain viable, but is instead a means to enable it to return to

profitability as soon as possible at the Respondent's expense. At paragraph 15 of Mr Lavery's first witness statement he says:

"My understanding is that the relevant test for the purpose of section 15 of the Act is not whether a concession would allow a tenant to recover all of its pandemic related losses and return quickly to profitability but whether the viability of the tenant's business could be preserved or restored. That might mean that a tenant would continue to trade at a loss for a period of time, not an uncommon scenario even for viable businesses."

56. Mr Lavery goes on to sympathise with the Applicant but comments that:

"it is neither reasonable nor within the principles of the Act for the financial burden it suffered to be simply transferred in full to the Responding party in order that the Referring Party can quickly recover its losses and return to profit."

57. The Respondent is right to say that the key aim of the CRCA is to preserve or restore the viability of the tenant's business and that this is not necessarily the same aim as enabling a business to quickly return to profitability. The extent to which a business is making a loss or profit, and if loss making is likely to continue to make a loss, is, however, a relevant consideration when making an assessment of viability.

58. The language used by Mr Iseman in his statement, and also at times by Mr Rivers in his evidence, might lead the reader to conclude that they align the concept of viability and profitability. For example, Mr Iseman in terms discusses what he regards as a reasonable level of profitability for the Applicant's business and he refers to the Applicant being in a position to enable it to recover the loses it accumulated during the pandemic (see e.g. paragraph 8 of his statement). However, I do not believe that Applicant's analysis of its financial position can fairly be criticised as being this simplistic.

Mr Iseman and Mr Rivers have undertaken an analysis of the Applicant' financial position which seeks to demonstrate and assess the *viability* of the business, and not merely its ability to return to profitability. I have found Mr Iseman's analysis of the Applicant's financial position of assistance in making my assessment of the Applicant's viability.

59. Having made this general observation I now deal specifically with the various matters I am required to consider under s.16(1).

The Impact of Coronavirus on the Tenant

60. As set out above, the Applicant's business is that of a hostel offering shared dormitory style accommodation at low price. Its target market is persons aged 18-40 travelling on a budget. It is inevitable, given the nature of the Applicant's business, that the pandemic had a serious detrimental effect. As Mr Rivers has explained (in his first statement) the Applicant never closed its doors to those already staying in its hostel but was forced to close to new arrivals at the start of the pandemic. By April 2020 the Applicant had only 10 paying guests (Mr Rivers' first statement, paragraph 36) but by May 2021 the Applicant had re-opened (Mr Rivers' first statement, paragraph 42).

61. Mr Rivers has explained that demand picked up by the summer of 2020 and occupancy levels reached 25-30% (Mr Rivers' first statement, paragraph 39). At paragraph 43 he states that:

"Business during the Summer of 2021 began to improve and we saw some weeks of sales that were reaching 40, even 50% pre-pandemic sales. Whilst this was not enough to see HPSL return to profitability, it seemed that the momentum was there for a sustained recovery."

62. He goes to explain that by early November 2021 the Applicant was looking towards a busy New Year but in that in the middle of November 2021, when the Omicrom variation to the virus was reported, the Applicant had over 1,000 bookings cancelled. By December 2021 the Applicant was "back to having a handful of residents and no new bookings" (Mr Rivers' first statement, paragraph 44.)

63. At paragraph 47 Mr Rivers states that April 2022 was the first month that the Applicant saw sales reach pre-pandemic levels. Since then it seems that the Applicant's business has returned to pre-pandemic levels. At paragraph 50 of his first statement Mr Rivers states:

"...2022 has so far shown real promise. As explained in the accountancy report our turnover for the first quarter of our current financial year is on a par with pre Covid levels meaning a return to profit on an annual basis by the end of the financial year. However as is also confirmed in the report there will be unlikely to be sufficient profit generated to manage the recovery of all losses suffered as a result of Covid in the absence of relief."

64. As for the financial impact of the pandemic on the Applicant's business I have not been provided with copies of the Applicant's financial statements but the Applicant relies on the evidence of Mr Iseman. Mr Iseman has been asked to review and report on the financial viability of the Applicant for the purposes of this arbitration. Mr Iseman explains, at paragraph 5 of his statement:

"I have reviewed the financial statements of HPSL for the year ended 31 March 2021 together with HPSL's own management accounts for the year ended 31 March 2022 and subsequent 3 months ended 30 June in order to report of the financial viability".

65. Mr Iseman's statement, at paragraph 6, sets out details of the Applicant's turnover from 2014 to 2021. The Applicant's turnover for the year ending March 2020 was £939,744. This compares to the year end March 2021,

where turnover significantly reduced to £118,300. As Mr Rivers notes, in his first statement, at paragraph 40, the year end 2020/2021 finished with income down 87.5% and a loss of £333,000. The loss before tax is said to be £333,841 by Mr Iseman.

66. The Management Accounts exhibited by Mr Iseman show that the Applicant was balance sheet insolvent at the year-end 31 March 2021 to the sum of (£4,748). These accounts show that in the following year the situation had deteriorated. The Applicant made a loss of (£198,858) and was balance sheet insolvent to the sum of (£203,606) at the year-end 31 March 2022.

67. At paragraph 8 of Mr Iseman's statement he states: "The business would not be viable going forward at that sort of revenue, given the passing rent of £200k per annum and the level of fixed operating costs." I understand this statement to refer to the period pre-March 2022. Mr Iseman goes on to say:

> "However, the results reported by the company for the first quarter of 2022/2023 ... are very encouraging with turnover achieved of £260k, equivalent to pre-pandemic levels on an annualised basis. This projected level of ongoing turnover indicates that the company should be able to return to profitability on an annual basis in 2022/23 and be able to meet ongoing liabilities including future rental costs in full. However, there is simply insufficient capacity to generate enough surplus profits in the short to medium term to enable all of the losses accumulated during the previous 2 years to be recovered if no relief is granted for a substantial proportion of the rent charged during period when the company was unable to operate at normal levels because of circumstances outside of the director's control."

68. When making his assessment of viability Mr Iseman has had regard to the fact that the Applicant's business has returned to 'normal operating levels' and he has assumed that the Applicant's turnover 2022/2023 will be at pre-

pandemic levels, with an annual turnover of £129,850. This is consistent with Mr Rivers' evidence, referred to above.

69. For the purposes of his viability analysis, Mr Iseman has looked at the Applicant's performance pre-pandemic and uses the four year period ending March 2020 as a representative period pre-pandemic. Noting, at paragraph 9, that the Applicant "trades with and has balances with a number of companies and business under the common management and control of the directors" and that the amount paid by way of remuneration and management charges to such related entities has fluctuated according to circumstances, he makes an adjustment to the actual costs the Applicant has incurred by way of such management charges to provide a flat annual fee of £50,000. In doing so he produces an 'adjusted profit' figure, which is an increase in the profit which would otherwise be shown for the relevant years. Mr Iseman explains that the adjusted profit figures indicates the level of actual annual cashflow generated by the business.

70. This analysis enables Mr Iseman to demonstrate that even if the Applicant's business returns to pre-pandemic levels, as anticipated, the business would not generate a sufficient 'surplus' to meet its existing liabilities, comprising its bank debt and the unprotected rent debt owed to the Respondent. I consider these debts further below.

71. Mr Iseman concludes, at paragraphs 22 and 23:

"...the losses for the year ended 31 March 2021 extinguished all of HPSL's previously accumulated profits, the further loss for 2021/22 has created a deficit of some £200k as at 31 March [2022], equivalent, coincidentally, to the full costs of a year's rent for the period in which HPSL was unable to trade normally.

On the basis of the upturn in trade in the first quarter of 2022/23, indicating a return to pre-Covid levels, it appears that despite the accumulated deficit to

date HPSL remains viable in that continuing to trade is reasonably anticipated by the directors to lead to an improvement in HPSL's financial position. The projected level of adjusted profitability is sufficient to enable HPSL to fully recoup the accumulated deficit after tax within a two year period returning it to full solvency, with the benefit of the relief identified in this report."

72. The relief Mr Iseman was envisaging was that the whole of the Protected Rent Debt be written off. Matters of course moved on since Mr Iseman produced his statement as each party produced a revised proposal. In response to the Respondent's Final Proposal Mr Rivers states (paragraph 5 of his fourth statement):

"if the Responding Party's revised proposal is adopted it will result in the business experiencing a shortfall of £80,036.00 which is simple not viable." Mr Rivers attaches a spreadsheet to his statement which is based on Mr Iseman's analysis discussed above, and which shows the £80,036 'shortfall' if the Respondent's Final Proposal were to be adopted. By 'shortfall' Mr Rivers means that this would be the figure which would appeal on the balance sheet – i.e. the Applicant would remain balance sheet insolvent to this extent.

73. At paragraph 9 of his fourth statement Mr Rivers maintains that an 80% write off is required for the Applicant to remain viable. He explains "if this relief is given the business will incur a shortfall of £26,278.00 as we will have to assume that the non-protected debt will be payable immediately." Mr Rivers explains that this level of 'shortfall' is manageable as it can be offset by directors not drawing any salaries for six months but that "[a]s a director of the business, I can also confirm that it would not be manageable for the directors to take no payments for the length of time that would be required (18 months) in order to offset a shortfall of £80,036.00."

74. Thus, even if the Applicant were granted the relief it seeks (i.e. it were only required to pay 20% of the Protected Rent Debt over a period of two years) it would still remain balance sheet insolvent.

75. As stated above, I do not consider the Applicant's approach can fairly be said to be no more than a solution which simply enables the business to quickly recover its losses and return to profit at the expense of the Respondent. I consider it to be a genuine attempt to analyse what is required to maintain and preserve the viability of the business. A company can be viable and non-profitable, but a loss making business can reach a point where its losses are such that it can no longer be regarded as viable.

76. Mr Rivers explains, at para 15 of his second statement, that:

"The write down of the rent as proposed would allow HSPL to eradicate some of its losses, not to seek a return of its profit reserves, over a 2 year period and this strikes a fair balance given in this scenario we will still be trading at no profit and have no reserves to draw upon. Any profits that we make in the near future will be used to service the debt with the aim of arriving at a net zero position."

77. Mr Rivers makes this point again at paragraph 12 of his fourth statement: "HPSL experienced a loss of £520,243 over a 2 year period as a result of government mandated Covid-19 restrictions. The level of relief being sought will neither wipe out these losses nor restore profitability. It is simply the amount of relief that is required to protect the viability of the business."

78. Mr Lavery has criticised the Applicant for providing insufficient information as to its financial position: see his first statement at paragraph 7. Nevertheless, Mr Lavery does not challenge the figures put forward in Mr Iseman's

statement. As stated above, neither party has invited me to direct the disclosure of any additional evidence.

79. Mr Lavery (in his second statement) states that the proposal to pay 20% of the Protected Rent Debt is unacceptable and not consistent with the principles set out in section 15. The foundation for this submission is, however, his conclusion that the Applicant's evidence as to its inability to pay the Protected Rent Debt is "...based on its ability to return to a profitable entity at the Responding Party's expense rather than to remain as a viable business entity.": see paragraph 13 of this second statement. For the reasons discussed above, I do not consider this to be correct. I fully accept the Respondent's point that a business may well be viable even if trading at a loss for a period of time, but to remain a viable business entity the Responding party has to manage the level of its loss and the period for which it remains loss making.

The assets and liabilities of the tenant, including any other tenancies to which the tenant is a party.

80. There are no other tenancies to which the Applicant is a party. The Astor Hotel group currently operates hostels from five sites in the UK. All five hostels operate under the Astor brand but each is run as a separate business (Mr River's first statement paragraphs 9 to 11).

81. The Applicant did pay part of the contractual rent due under the lease for the Protected Period but it also owes further areas of rent to the Respondent in the sum of £109,884 which fall outside of the Protected Period.

82. Paragraph 6 of Mr Lavery's third statement refers to the assumption made by Mr Rivers that the Applicant will be required immediately to repay the

unprotected rent debt and he states that there is no basis for this assumption. It may be that the Respondent would be willing to allow the Applicant more time to pay these arrears but there is no evidence before me of a binding agreement to this effect. In the circumstances I must proceed on the basis that the unprotected rent arrears owed by the Applicant to the Respondent is a debt which falls to be paid by the Applicant in the usual way.

83. The other significant creditor of the Applicant is Barclays Bank. The Applicant has two loans from Barclays: one for £200,000, which was drawn down from 20 May 2020 for a term of 6 years expiring May 2026; the second for £50,000, which was drawn down in October 2020 for a term of 6 years expiring October 2026. The Applicant is repaying the capital back on these loans at a rate of £10,000 and £2,500 per quarter.

84. As Mr Rivers has explained in his second statement, at paragraph 13, in the Spring of 2022 the Applicant received a 6 month capital repayment holiday on its loans. The £200,000 loan has been extended by 12 months, so that it is repayable by May 2027. The smaller loan has been extended by a further 6 months to May 2027. Mr Rivers makes that point that the additional interest payable would mean that it would be difficult to ask for further extensions.

85. I am required, by section 16(3) of the CRCA, to approach this matter disregarding the possibility of the Applicant borrowing money or restructuring its business. However, I do not consider that this requires me to assume that the Applicant has no existing borrowings but simply to preclude me from taking into account any future additional borrowing that the Applicant might take to fund payment of the protected rent debt in the event that relief were refused. In this regard I note that paragraph 6.3 of the 2022 Guidance supports this approach as it explains the rationale of s.16(3) as follows:

"if a business took on more debt to become viable for the purposes of arbitration under the Act, they would likely be delaying the problem and risking their long term viability."

86. In the circumstances, when considering the ongoing viability of the Applicant I have had regard to its existing liability to Barclays Bank, I have disregarded the possibility of extending these loans or borrowing further sums, and I have had regard to the outstanding unprotected rent debt owed to the Respondent.

Other Matters

87. In support of its proposal the Applicant also refers to the likely increase in its overheads going forward. Mr Rivers second statement, paragraph 11, refers to Mr Iseman's statement and his reference to the need for the business to have scope for normal ongoing capital expenditure. He states that the building was converted by HPSL into a hostel in 2009 so it is inevitable that an extensive refurbishment is now due. He also makes the point that the Applicant's rent is likely to increase from September 2022 and other factors which could negatively affect the business, such as inflation, recession, political uncertainty or an escalation of the war in Ukraine.

88. Mr Rivers expands on the pressures faced by the Applicant in his fourth and final statement at paragraph 7, where he explains that these comprise the following: (i) a rent increase expected to be approximately £50,000 per annum when the September 2022 rent review is concluded; (ii) utility bills are increasing due to the ongoing war in Ukraine; (iii) the price of goods has increased; (iv) wages on site have increased from an average of £7.70 per hour from 2015-2020 to a current £11.00 per hour and are expected to continue to rise, as are support staff salaries.

89. The Respondent comments on this at paragraph 6 of Mr Lavery's third statement, where Mr Lavery characterises these predictions as "...assumptions that are highly selective and designed to create a 'worse case' scenario rather than attempting to find a reasonable and satisfactory outcome for all involved."

90. It may be a fair criticism to say that the Applicant has sought to present its future exposure to increased overheads on a 'worse-case scenario' but it is nevertheless likely to be the case that the Applicant's overheads will increase given the current economic climate. I note in particular that the rent review provisions of the Applicant's tenancy provide for an upwards only, indexed linked increase with effect from 29 September 2022: schedule 3 to the Lease Nevertheless, I find Mr River's future predictions of limited assistance to the matter before me, other than by way of reinforcement of my conclusions, which I set out below.

Relief from Payment: Decision

91. The relevant concern for me, when seeking to apply the First Principle, is to preserve the viability of the Applicant's business. I accept that preserving the viability of the business is not the same as seeking to allowing a tenant to return to pre-Covid levels of profitability. I also have regard to the fact that the Applicant's turnover has now increased to pre-Covid levels. However, it does not follow from this that the Applicant is in a position to pay the Unprotected Rent Debt, or a substantial part of this.

92. It is evident from the Respondent's Final Proposal that it accepts that some relief is appropriate and I consider the Respondent has quite properly sought to balance the two section 15 principles based on its understanding of the Applicant's financial position. The Applicant's Final Proposal also recognises that as well as seeking to restore and preserve the viability of its business (the

First Principle) the Second Principle requires it to meet its obligations as regards payment where this is consistent with the First Principle.

93. In this case I have concluded that both parties' Final Proposals are consistent with the Principles. As such, I must decide which is the most consistent proposal and make an Award in terms of that proposal.

94. Having regard to the Applicant's financial position as a whole now and for the foreseeable future, and disregarding the possibility of the Applicant extending its existing bank liabilities, I have concluded that overall the Applicant's Final Proposal is the most consistent with the Principles. I am satisfied on the evidence before me the higher level of relief reflected by this proposal is needed to ensure that the Applicant's business will not be undermined and will remain viable.

95. I therefore determine that the Applicant' s Final Proposal is the most consistent and I am accordingly required to make an Award giving effect to this.

Arbitration Fees and Costs

96. Section 19(7) of the CRCA provides that each party must pay its own costs, so this is not an issue for me to determine. In accordance with section 19(5) of the CRCA, when an award is made under section 13 the arbitrator must also make an award requiring the respondent to reimburse the applicant half of the arbitration fees paid by the applicant, unless it is considered more appropriate to award a different proportion under subsection (6).

97. Neither party has invited me to make an award which differs from the mandated default position. Given the mandated default position, which appears not to envisage a 'costs following the event' approach, and given that I have not been invited to depart from this position I have formed the view that it would be appropriate to make an award which reflects the default position.

The Award and Publication

98. In accordance with section 18 of the CRCA I intend to publish this Award on the FCA website.

99. I hereby award and direct as follows:

(1) The Applicant is to be given relief from payment of the Protected Rent Debt, as defined above, as follows:

a. the interest accrued to date on the Protected Rent Debt is to be written off;

b. the sum of £157,515.96 (i.e. 80% of the Protected Rent Debt) is to be written off;

c. the balance of £39.378.99 (i.e. 20% of the Protected Rent Debt) is to be paid by eight equal quarterly instalments (in the sum of £4,922.37), the first instalment to be paid 7 days from the date of publication of this award.

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

100. The seat of this Arbitration is England and Wales: AA section 95(2). This Award is made by me, Elizabeth Fitzgerald, on 20 January 2023.

Signature 

Elizabeth Fitzgerald