FALCON CHAMBERS ARBITRATION

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

Between

LONDON CLUBS NOTTINGHAM LIMITED

Applicant

and

UKRO PROPERTY HOLDINGS I LIMITED

Respondent

AWARD

Introduction

1. The Applicant is the tenant of the property known as The Axis, Upper Parliament Street, Nottingham NG1 6LP ('the Property') under a 25 year lease dated 4 April 2008 ('the Lease'). The Respondent is the freehold owner of the Property, and is the Applicant's landlord under the Lease.

2. The Applicant operates a casino business from the Property. The Applicant is a wholly owned subsidiary of London Clubs International Limited ('LCIL') and (with other subsidiaries of LCIL) forms part of a wider group of companies ('the Group') now owned by Silver Point Capital.

3. The Applicant seeks relief from payment of a protected rent debt in respect of the Property, pursuant to the Commercial Rent (Coronavirus) Act 2022 ('the 2022 Act'). The Respondent does not accept that the Applicant should be entitled to any such relief.

4. The Applicant has referred the dispute to arbitration pursuant to s.9 of the 2022 Act. The reference was made to Falcon Chambers Arbitration, which is an approved arbitration body for the purpose of s.7 of the 2022 Act.

5. My appointment as Arbitrator on this reference was confirmed by the Respondent on 23 September 2022, and by the Applicant on 26 September 2022.

6. The Applicant has been represented throughout by Janine Cheema of Hill Dickinson LLP. The Respondent has been and is represented by Aimee Teague of Shoosmiths.

Procedural background

7. The reference to arbitration was made by the Applicant by letter dated 6 September 2022. In accordance with s.11(1) of the 2022 Act, the reference to arbitration included a formal proposal from the Applicant for resolving the matter of relief, by way of a witness statement from Alex Oswald dated 5 September 2022.

8. The Respondent put forward a formal proposal in response by way of a witness statement of James Taylor dated 23 September 2022, the time in s.11(2) of the Act for providing this response having been extended by agreement between the parties pursuant to s.11(6)(a).

9. On 7 October 2022 the Applicant submitted a second witness statement of Alex Oswald, of the same date. The stated purpose of that statement was to respond to issues raised by Mr Taylor in his statement of 23 September 2022: Mr Oswald confirmed that it was not a revised formal proposal by the Applicant.

10. On 8 November 2022 I made a procedural order ('the Order') permitting the Applicant to rely on this statement, notwithstanding the objection made to it by the Respondent (on the basis that the Act did not provide for further evidence in the absence of a revised proposal).

11. The Order gave an opportunity to the Respondent to provide a response to the second statement of Mr Oswald, if the Respondent wished to do so. The Respondent subsequently provided a second witness statement of James Taylor, dated 22 November 2022.

12. Also in the Order of 8 November 2022 (as amended on 22 November 2022):

    a. I asked the parties to consider whether there were any matters arising from the financial information or documentation provided by the parties in respect of which they agreed it would be appropriate to appoint an expert under s.37 of the Arbitration Act 1996; or whether they agreed that any such matters could effectively be addressed in written submissions. The parties subsequently confirmed to me that they agreed that no expert was required; and

    b. I directed that any request for an oral hearing was to be made by 4pm on 2 December 2022. Following an email sent to me on behalf of the Applicant on 21 November 2022, this date was varied to 4pm on 29 November 2022. Neither party requested an oral hearing.

13. In addition to the witness statements referred to above, both parties provided written submissions, in accordance with my Order, on 20 December 2022.

The protected rent debt

14. The Applicant's referral form states that the sum of commercial arrears in dispute in this arbitration is £534,880.36. The parties are agreed this sum is a protected rent debt, as defined in and for the purpose of s.3 the Act.

15. Interest is payable on this sum pursuant to clause 5.20 of the Lease, and continues to accrue for as long as the arrears remain unpaid. As at 23 September 2022, the interest totalled £33,433.70; and as at 20 December 2022, £40,775.51. Interest payable on unpaid rent is treated as rent for the purpose of the 2022 Act, under s.2(1)(c); and this interest also constitutes protected rent debt for the purpose of that Act. The present reference to arbitration relates to the sum of £534,880.36 together with all such interest accrued or accruing thereon (together 'the Debt').

16. The protected period to which the Debt relates is the period from 21 March 2020 to 18 July 2021.

The legal framework

17. Section 13 of the 2022 Act provides as follows.

> "(1) This section sets out the awards open to an arbitrator on a reference under this Part.
>
> (2) If the arbitrator determines that –
>
> (a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,
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> (b) the tenancy in question is not a business tenancy, or
>
> (c) there is no protected rent debt,
>
> the arbitrator must make an award dismissing the reference.
>
> (3) If after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business -
>
> (a) is not viable, and
>
> (b) would not be viable even if the tenant were to be given relief from payment of any kind,
>
> the arbitrator must make an award dismissing the reference.
>
> (4) Subsection (5) applies if, after making that assessment, the arbitrator determines that (at the time of the assessment) the business -
>
> (a) is viable, or
>
> (b) would become viable if the tenant were to be given relief from payment of any kind.
>
> (5) In that case, the arbitrator must resolve the matter of relief from payment of a protected rent debt by –
>
> (a) considering whether the tenant should receive any relief from payment and, if so, what relief, and
>
> (b) making an award in accordance with section 14."

18. Section 14 of the 2022 Act deals with the award on the matter of relief from payment, and this is considered further below.

Eligibility

19. For this dispute to be eligible for the grant of relief, the pre-conditions set out in s.13(2) of the 2022 Act must be satisfied.

20. For the purpose of this section, the existence and amount of the protected rent debt is agreed; there is no dispute that the Applicant's tenancy of the Property is a business tenancy for the purpose of s.2 of the Act; and manifestly, there has been no agreement on the matter of relief from payment of the protected rent debt.

21. In the light of this agreement, and on the basis of the evidence before me, I am satisfied that the conditions in s.13(2) of the 2022 Act are met.

22. The final pre-condition, set out in s.13(3), is viability. It must be shown that the tenant's business is viable, or would be viable if relief from the protected rent debt was given. If it is not, the reference must be dismissed.

23. Viability is not defined in the 2022 Act. However it is provided in the Commercial Rent (Coronavirus) 2022 Act Guidance, issued by the DBEIS pursuant to s.21(1)(a) of the 2022 Act ('the Guidance'), that a key question in making the assessment of viability 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": paragraph 6.3.

24. That the Applicant's business is, here, viable in the required sense is necessarily the basis of the reference made by the Applicant to arbitration. The question of the viability of the Applicant is addressed directly in Mr Oswald's first statement, at paragraphs 55 to 60.

25. The Respondent concedes that the Applicant has demonstrated the viability of the Applicant's business: Respondent's written submissions, at paragraph 19.

26. In these circumstances, I take the view that I can and should proceed on the basis that the parties have agreed that the condition in s.13(3) is met, and so move to consider the matter of relief from payment under s.14.

27. Alternatively, and in so far as I am required to determine (rather than accept the agreement of the parties as to) the Applicant's viability for the purpose of s.13(3), I am in any event satisfied on the evidence before me that this condition is met.

28. In so concluding I have regard in particular to the following matters, which appear from the Applicant's written evidence, and which are not challenged (indeed, are relied upon) by the Respondent.

28.1 For the five year period from 2014 to 2018, the Applicant's business was "a very successful and profitable enterprise" (as put by Mr Oswald in his first statement, at paragraph 9) with an average annual EBITDA of £734,660. EBITDA (Earnings Before Interest Tax Depreciation and Amortization) is a key performance indicator, and is used by the Applicant's management to measure profitability, as it approximates to the operating cashflow generated by the business.

28.2 The substantial negative EBITDA in 2019 (-£678,100) was exceptional, and attributable to action taken by the Applicant to mitigate risks resulting from a licence review process being undertaken by the Gambling Commission. The measures taken to safeguard the licences held by the Group adversely affected the profitability of the Applicant's business. Mr Oswald's evidence is that this was, however, a temporary state of affairs, and it is expected that the business should be able to recapture lost revenue over time: first statement, paragraphs 22 to 24, and 55.

28.3 During 2020 and 2021, the Applicant's business sustained a £2.4 million EBITDA loss, attributable to the effect of the Covid-19 pandemic and the resulting lockdowns and statutory restrictions (which are detailed at paragraphs 25 to 30 of Mr Oswald's first statement).

28.4 After the lifting of restrictions in July 2021, Mr Oswald confirms that "revenues returned and grew over the second half of the year, generating positive EBITDA and a positive trajectory" (first statement, at paragraph 34); at least until new COVID uncertainty returned at the end of the year. 2022 revenues and EBITDA were lower due to temporary factors (such as high energy prices and cost of living issues), but the business is expected to be overall EBITDA positive in 2023 and beyond (Mr Oswald's first statement at paragraph 55).

28.5 Anticipated changes to the Gambling Act 1968, increasing the cap on the number of slot machines per casino licence, is also expected to have a significant positive effect on the business revenues. The current estimate of the Applicant's management is that these changes will result in an additional annualised £600,000 EBITDA for the Applicant (Mr Oswald's first statement, at paragraphs 56-57).

29. The viability of the Applicant's business is considered further below in the context of the question of relief. For the avoidance of doubt, any matters there referred to which have not been set out above, have also informed my conclusion that the Applicant's business is currently viable for the purpose of ss.13(3) and (4) of the 2022 Act.

Relief: the principles

30. In accordance with s.13(5)(a) of the 2022 Act, I am now required to consider whether the Applicant should be given any relief from payment of the protected rent debt, and if so, what relief.

31. Under s.14(6), an arbitrator's award may give the tenant relief from payment of the debt, or state that the tenant is to be given no relief from payment. As set out in s.6(2), relief from payment may be given by:
(a) writing off the whole or any part of the debt;
(b) giving time to pay the whole or any part of the debt, including by allowing the whole or any part of the debt to be paid by instalments; and/or
(c) reducing (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or any part of the debt.

32. In the event that the award made gives the tenant more time to pay, the payment date must be within the period of 24 months beginning with the day after the day on which the award is made: s.14(7) of the 2022 Act.

33. In determining what, if any, relief to award, the key principles that I must apply are set out in s.15(1) of the 2022 Act, as follows:

"(1) The principles in this section are –

(a) that any award should be aimed at –
(i) preserving (in a case falling within s.13(4)(a)), or
(ii) restoring and preserving (in a case falling within s.13(4)(b)),
the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency, and

(b) that the tenant should, so far as it is consistent with the principle in paragraph (a) to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay."

34. It is accepted in this case that even if the protected rent debt was written off entirely, this would not impact on the Respondent's solvency. Accordingly my concern under the principle contained in s.15(1)(a) of the 2022 Act ('the First Principle'), is to preserve the viability of the Applicant's business.

35. The terms of s.15(1)(b) ('the Second Principle') set out that the tenant should be required to meet its obligations as regards payment of the protected rent, *so far as this is consistent with* the First Principle. It is clear from the terms of s.15 that the tenant's obligation to make payment of the protected rent is qualified by the consideration of the tenant's viability. As set out in the Guidance (at paragraph 5.4.2) the goal is to preserve the tenant's viability (and also the landlord's solvency, so far as this is at risk), in determining how much the tenant can afford to pay, and how quickly. It is equally plain however that subject only to this consideration, the Applicant should be required to meet its obligations as regards payment of the protected rent in full and without delay.

36. Before determining what award to make, I am required by s.14(2) of the 2022 Act to consider the final proposals advanced by the parties in accordance with s.11 of that Act. Where, as here, both parties have put forward final proposals under this section, if I consider that both proposals are consistent with the principles in s.15 then I must make the award set out in whichever of them I consider to be the most consistent: s.14(3)(a). If I consider one proposal is consistent with these principles and the other is not, I must make the award set out in the proposal that is consistent: s.14(3)(b). If I conclude that neither is consistent with the s.15 principles, I must make whatever award I consider appropriate: s.14(5).

The formal proposals

37. The Applicant's formal proposal appears from Mr Oswald's first statement at paragraphs 61 to 77. Mr Oswald refers to the fact that the rent (meaning rent, service charge and insurance payable under the Lease) accruing during the protected period up to 23 June 2021 (as opposed to the whole of the protected period, up to 18 July 2021) amounted to £1,228,253.84. Of this sum, the Applicant has paid a total of £693,373.48, representing 56% of the rent accruing during that part of the protected period. The circumstances in which this payment was made are set out in Mr Oswald's first statement at paragraphs 63-66. The Applicant seeks relief by way of the remainder of the rent for the protected period, in the sum of £534,880.36, to be relieved in full.

38. The Respondent's formal proposal is set out in the first statement of Mr Taylor. The Respondent seeks payment of the whole of the outstanding protected rent debt, but will accept deferred payment in two equal instalments: proposed by Mr Taylor to be paid on 31 December 2022 and 23 June 2023. As the first of these proposed payment dates has now passed, the Respondent's written submissions invite me to make a determination reflecting that the Respondent's proposal was intended to provide the Applicant with a short period to pay the first instalment, and additional time to pay the second.

39. Both parties contend that only their proposal is consistent with the principles in s.15 of the 2022 Act. The Respondent contends, in the alternative, that if *both* proposals are found to be consistent with the relevant principles, its proposal is more consistent with those principles.

Viability

40. In assessing the viability of the business of the tenant, I am required by s.16(1) of the 2022 Act to have 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.

41. By s.16(3), in making an assessment under s.16(1) I am required to disregard the possibility of the tenant (a) borrowing money, or (b) restructuring its business.

42. In relation to the Applicant's viability, and in addition to the matters referred to at paragraph 28 above, I note and have regard to the following factors.

43. I consider first, as they are perhaps most straightforward, the matters of previous rental payments made under the Lease, for the purpose of s.16(1)(b); and the impact of coronavirus on the business of the tenant, under s.16(1)(c).

44. *Previous rental payments* As to these, there is no dispute that the Applicant has paid all of the rent due under the Lease pre- and post-pandemic, save for the protected rent debt. Mr Oswald's evidence is that the Applicant has also paid amounts other than rent – including service charge and insurance – when they fell due (first statement at paragraph 71). The EBITDA figures show profitability *after* this cost has been taken into account.

45. *Impact of coronavirus* I am entirely satisfied that the dramatic shift in the financial position of the Applicant between 2018 and 2021 and the £2.4m EBITDA loss sustained by the Applicant in 2020 and 2021 was caused, at least in a substantial part, by the coronavirus. As observed in the Applicant's written submissions, the Applicant's casino business is wholly premises-based: when the business was shut down, it could not trade, and no (or only very low) income could be generated. It is clear that there have historically been other specific matters impacting on the Applicant's business: as in 2019, when the licence review process instigated by the Gaming Commission resulted in significant losses and the large negative EBITDA figure in that year. I accept that there has also been (and will continue to be) other more general factors impacting on the Applicant's trading and revenues, such as high energy prices and the cost of living crisis. However these do not in my view detract from the fact that the COVID-19 pandemic, and its associated lockdowns and restrictions, had an immediate and significant impact on the Applicant's business over the protected period, from which it will take some time to recover. The Applicant's forecast return to profitability is considered in more detail below.

46. *Assets and liabilities* The Applicant's balance sheet as at 31 December 2020 (within the latest published accounts) shows net liabilities of £25,442,000. Mr Oswald explains that of this, £25,386,000 is payable to Group undertakings and relates to intra-group funding, and not to external debt (first statement, paragraph 42). It is said to relate to historic fit out costs, with interest thereon, and operating losses in the earlier years of trading and then during the pandemic.

47. Draft balance sheets for 31 December 2021 and 30 June 2022 (not yet finalised or audited) show a similar picture of significant net liabilities, the bulk of which is owed to Group undertakings. As at 31 December 2021, the draft balance sheet shows £26,897,000 net liabilities, of which £26,579,000 is owed to Group undertakings; as at 30 June 2022, the figures are £27,802,000 and £27,054,000 respectively.

48. On the basis of these draft balance sheets, both net liabilities and amounts owed to Group undertakings by the Applicant have increased in the 18 months after 31 December 2020.

49. Mr Oswald acknowledges that technically, this intra-group balance is repayable on demand to the parent company: a matter which could plainly have a significant impact on an assessment of viability. However, he points out that it would not be in the parent company's interest to seek repayment from a business which is expected shortly to return to profitability. He observes, further, that despite a reference in the 2020 accounts to a 'material uncertainty' about the Applicant's ability to continue as a going concern without support from a parent undertaking nevertheless he as a director felt able to sign off the 2020 accounts on a going concern basis. The substance of Mr Oswald's evidence is that there is no imminent prospect that the Applicant will be required to repay the amounts owed by the Applicant to Group undertakings, and that these liabilities are not a threat to the Applicant's current viability.

50. I note that, on the basis of the draft balance sheets, the Applicant's net liabilities have increased in the 18 months after 31 December 2020 by a greater amount than its (also increased) liability to Group undertakings. In other words, if the amounts owed to Group undertakings are effectively ignored for the purpose of the balance sheets, the Applicant's net liabilities have nevertheless increased from 31 December 2020 to 31 December 2021, and again to 30 June 2022.

51. *Other information relating to the financial position of the tenant* In addition to the question of the balance sheet position of the Applicant, it is necessary for me to consider further the relationship of the Applicant with the Group of which it forms part. This arises in the light of the matters raised by the Respondent in the witness statements of Mr Taylor, and by way of written submissions. The Respondent's position is that there is evidence to suggest that the Group has significant funds available from which the protected rent debt could be met; and that the Applicant has failed to explain why the Group is not in a position to or cannot provide funds to the Applicant to pay this debt. The Respondent maintains that there is no evidence from which I can be satisfied that, unless it is given the relief sought, the viability of the Applicant would be at risk.

52. I start from the point that, under the terms and for the purpose of s.15 of the 2022 Act, my focus and concern is with the business and the viability of the business of "the tenant". The issue is whether "the tenant" should be required to meet its obligations, not whether any third party may be able to.

53. That said, it will plainly be relevant for this purpose to consider any and all sources of funds which may be available to the tenant, including from third parties, from which the tenant may be able to meet these obligations while preserving the viability of its business. This could potentially include funds available from group companies. In considering the availability of funding, however, it is necessary also to have regard to s.16(3) of the 2022 Act: which requires that the possibility of the tenant borrowing money, or restructuring its business, must be disregarded.

54. Mr Oswald's evidence deals with what are described as the cash management arrangements between the Applicant and the Group. His evidence, in his first statement, is that within the Group cash is managed centrally, by way of an intra-group account. I am told that limited amounts of cash are held in the Applicant's bank account; that surplus cash is transferred out, and funding needs for payments are met either by cash transfers in from the Group, or by payments made on the Applicant's behalf by fellow Group companies. Mr Oswald acknowledges that the effect of this is that during periods of slow or unprofitable trading, the business is effectively dependent on the Group to provide liquidity (paragraph 53). He likens this centralised arrangement to an overdraft of revolving credit facility with a bank: first statement at paragraph 54.

55. In response to the challenge made to Mr Oswald's evidence in the first statement of Mr Taylor on behalf of the Respondent, Mr Oswald provides some further information about the

Applicant's arrangements with the Group in his second statement. He states that the Applicant "cannot readily call upon group financing. It has no such unilateral right." He confirms that the arrangements described in his first statement describe group procurement arrangements, where payments are centralised; and not to the ability to call down funding to pay rent arrears or meet other debt obligations (paragraph 17).

56. The Applicant's bank statements for the period from 1 August 2019 to 26 July 2022 are exhibited to Mr Oswald's first statement.

57. Much remains unclear about the workings of the centralised funding arrangements which Mr Oswald describes. The bank statements show numerous and various debits from and credits to three bank accounts over the period to which they relate. No reconciliation of the sums moving in and out of these accounts is immediately obvious on inspection, and none has been provided as part of the evidence.

58. It would undoubtedly be preferable to have a more detailed picture of these arrangements. The evidence I have, however, is that the monies passing between the Applicant and the Group are for the purpose of cash management. Although it appears that the arrangement (operating as a credit facility) may enable the Applicant to obtain funds from the centralised set up for the day to day operation of its business, where it might otherwise have cash flow problems, there is nothing to suggest that the Applicant is able to obtain monies more generally, or in significant amounts. To the contrary, Mr Oswald's states directly that the Applicant has no unilateral right to call upon group financing to meet debt obligations.

59. I note the criticism of Mr Oswald's evidence at paragraph 12 of Mr Taylor's second statement: that paragraphs 47 to 50 of Mr Oswald's first statement are inconsistent with paragraph 17 of his second. I do not accept this: it seems to me that there is a sufficiently clear distinction drawn in Mr Oswald's evidence between day to day cash management or procurement arrangements, and an arrangement or right by which the Applicant would now be entitled to require or obtain funding of the significant monies required to discharge the protected rent debt.

60. I consider that Mr Oswald's evidence can fairly be criticised as lacking in detail about the precise nature of the Applicant's use of the centralised payment system. Mr Taylor suggests that rent could or might be a payment which would ordinarily be met from surplus cash held by the Applicant, and so a liability which would ordinarily be expected met from funds obtained from this source. However, I must make my determination based on the evidence before me. Neither party requested an oral hearing, although both had the opportunity to do so, having seen the statements and documentary evidence provided by the other party. On the basis of the written evidence that is available, I accept the Applicant's evidence as provided and consider that this is sufficient to support the Applicant's case that the Applicant has no present right to obtain funding from the Group to meet the protected rent debt; whether or not, as Mr Taylor suggests, the operation of the cash management system could or might generally include funds for regular payments of rent.

61. I do not consider that the fact that, in response to a winding up petition presented by the Respondent on 19 May 2020, 50% of the arrears then outstanding were paid, is evidence which is inconsistent with this. The presentation of the petition is addressed in the evidence in Mr Oswald's first and second statements (at paragraphs 63 and 4 respectively) and in the statements of Mr Taylor (at paragraphs 13 and 5 respectively). As is pointed out in the written submissions on behalf of the Applicant, this petition was brought against LCIL, the Applicant's parent company: which is also surety under the Lease. That LCIL was able to and did make payment of an amount of arrears in this context is no evidence, in my view, that the Applicant is or would be able to access readily available cash from within the Group to discharge its debts for present purposes.

62. Further and in any event, I also accept the Applicant's submission that even if, as a matter of fact, the Applicant was able to procure funding from a Group company in order to make payment of the protected rent debt, this would amount to borrowing money and so fall foul of the terms of s.16(3) of the 2022, by which I am required to disregard this possibility in making an assessment of the viability of the Applicant's business. Mr Oswald's evidence (unchallenged, as I have noted, in the absence of any cross examination) is that the centralised cash management arrangements operated like a revolving credit facility. Accordingly, so far as these arrangements enable the Applicant to draw down or call upon monies from the Group in excess of the amount of the cash payments which have been made by the Applicant into the centralised fund – that is, in so far as the Group company is "providing liquidity" to the Applicant from time to time – the Applicant is effectively borrowing money from the Group. If as a matter of fact it would be possible for the Applicant to obtain monies in this way to discharge the protected rent debt, I am satisfied that it is not something, pursuant to the terms of s.16(3), to which I can have regard in making my assessment for the purpose of s.15.

63. *Forecasts* Although it is not a matter to which arbitrators are specifically directed by the 2022 Act, I consider it appropriate to take into account, in addition to the matters addressed above, what the Applicant's financial position is forecast to be during the two years after the date of the award, because it is necessary to consider what if anything the tenant will be able to pay in that period consistently with the business remaining viable (I refer to the terms of s.14(7) of the 2022 Act).

64. As set out by Mr Oswald in his first statement, the Applicant is forecast to be overall EBITDA positive in 2023 and beyond. The trading summary table provided (from which the average pre-2018 EBITDA is drawn) forecasts a positive EBITDA of £10,500 in 2023; £235,400 in 2024; and £325,400 in 2025. The more detailed monthly projections show a return to positive EBITDA from June 2023. (These figures do not take into account payment of the Debt.)

65. Mr Oswald also describes the anticipated changes in the Gambling Act 1968 which (as referred to at paragraph 28.5 above) it is estimated will result in an additional annualised £600,000 EBITDA for the Applicant. I note however that at the present date there is no firm date for the anticipated implementation of these changes; so for present purposes I can attach little weight to this factor.

66. Although a key performance indicator, EBITDA provides only a fairly high level indication of what funds may, during the relevant two year period, be available to the Applicant to make any payment of the protected rent debt. They are before interest, tax, depreciation and amortization are taken into account. Nevertheless, and with that qualification, they represent the best assessment of the likely profitability of the Applicant's business for the next two years. They show (following a long period of largely negative EBITDA during and immediately after the pandemic period) an imminent return by the Applicant's business to profitability; and a fairly rapid increase in that profitability thereafter. In my view I cannot and should not ignore this forecast profitability when considering the question of relief.

67. Before proceeding further, I note that (amongst other points made on each side) both parties refer to the fact that they have had experiences with third parties, in the context of debts arising as a result of the impact of the pandemic, in which those third parties have taken different (and, each party submits) more reasonable approaches to the question of the payment or compromise of those claims, than has the other party in the present dispute. Whether or not that has been the case, unless the position of either party is as a result affected in a way which impacts on the considerations arising for the purpose of the present reference, I do not consider that this is relevant matter for present purposes.

Relief

68. In accordance with the principles set out in s.15 of the 2022, the Applicant should be required to meet its obligations as regards payment of the protected rent (in full and without delay) so far as is consistent with preserving the viability of the Applicant's business.

69. In the circumstances and for the reasons set out above, I am satisfied that the Applicant's business is currently viable. I must now consider and determine what amount, if any, of the protected rent debt the Applicant can afford to pay, and how quickly, while preserving this viability: see paragraph 35 above. I have concluded that I must for this purpose proceed on the basis that the Applicant cannot, as the Respondent has suggested, call on Group finance for the purpose of meeting this debt.

70. The Applicant's cash flow generation and profitability was impacted significantly by the coronavirus, and since the end of the protected period throughout 2022 the EBITDA remained heavily negative. However the Applicant is forecast to be EBITDA positive – to return to profit – from 2023 and beyond. In my view it would in accordance with the s.15 principles for the Applicant to be required to make payments to the protected rent debt from the positive EBITDA anticipated for the period after June 2023. There is nothing to suggest that the ongoing viability of the Applicant would be put at risk by the application of an appropriate part of this forecast positive EBITDA to the payment of the Debt; and it would not be in accordance with the Second Principle for the Applicant to be able to retain the whole of the monies generated during this period, effectively at the expense of the Respondent to whom the protected debt is owed. I consider that the Applicant can afford and should be required to pay part of these profit monies in discharge of that debt, consistently with the relevant principles.

71. The application of these monies to payment of the protected rent debt would of course reduce the profitability of the Applicant for a further limited period. I do not however have any reason to suppose that this will alter the attitude that the Applicant's parent company has taken, to date, to the issue of seeking repayment of the current liabilities of the Applicant to the Group undertaking (which is described by Mr Oswald in paragraph 45 of his first statement). Mr Oswald explains that it is not in the interest of the parent company to call in the debt when the Applicant does not have sufficient funds to pay, but is expected to return to profitability. This debt, or part of it, has been outstanding for a number of years. I consider it unlikely that the ongoing viability of the Applicant's business would be jeopardised by any action taken by the parent company, if the return to profitability is delayed for a short further time.

72. I turn to consider the final proposals put forward by both parties.

73. In the light of the matters and my view set out above, I do not regard the Applicant's formal proposal (that the entire Debt, together with any further accrued interest, be written off) as consistent with the principles in s.15. It appears to me to be unrealistic for the Applicant to expect to return to profitability by the middle part of 2023, improving over 2024 and 2025, without paying any part of those profits to the Respondent in respect of the protected rent debt. In my view the Applicant can afford to pay some part of the protected rent debt within the next two years consistently with and while preserving the viability of its business. In the circumstances, the Applicant's proposal that the whole of the Debt should be written off is not consistent with the Second Principle.

74. However, and in the light of the same factors, nor do I regard the Respondent's formal proposal as consistent with the s.15 principles. On the basis that any possibility of funds being provided from the Group must be disregarded, I do not consider that the Applicant is in a position to pay the whole of the protected rent debt within a six to nine month period, as proposed by the Respondent (or indeed, even within the whole relevant two year period after the date of my award (s.14(7)), consistently with preserving the viability of its business. The

total forecast EBITDA for this period is less than the present amount of the Debt. To require the Applicant to make payment as the Respondent proposes would not, in my view, be in accordance with the First Principle.

75. The effect of these conclusions is that the present dispute is not one to which s.14(3) applies (see paragraph 36 above). Having concluded that neither party's final proposal is consistent with the principles in s.15, under s.14(5) it is accordingly for me to make an award which I consider appropriate, applying the principles in s.15. My task is to determine how much the tenant can afford to pay, while preserving its viability; and how quickly: Guidance at 5.4.2.

76. As set out above, I have concluded that the Applicant can afford to pay some of the protected rent debt, without risk to the viability of its business, out of the forecast profits of that business for the period from June 2023 onwards. I now have to consider what amount of these profits the Applicant can afford to pay, consistently with the applicable principles.

77. The forecast EBITDA figures on which the Applicant relies in relation to its viability are set out above. I take into account that profit forecasting is, by its nature, uncertain; and that there are factors (such as inflation rate, or changes to the Gambling Act) which may impact either negatively or positively on the reliability of any prediction. I also take into account that these EBITDA profitability figures are before tax, interest, depreciation and amortization: which factors, once deducted, will reduce the monies available to meet the Applicant's obligations in relation to the protected debt. I have not been provided with any direct evidence, either factual or expert, as to how far this will reduce the forecast profitability figures.

78. Doing the best I can on the evidence that the parties have chosen to put before me, I consider it reasonable to proceed on the basis that 60% of the Applicant's forecast earnings could be paid towards the protected rent debt, without putting at risk the viability of the Applicant's business. In reaching this figure I have taken into account what seems to me to be a reasonable maximum proportion by which earnings could be expected to be reduced by tax, interest, depreciation and amortization, over the relevant years. I have seen the Applicant's statutory accounts for the year ending 31 December 2020 (the only year for which they have been provided), which show a loss for that year of £2,428,000. For the same year, the Applicant's trading summary shows a negative EBITDA of £1,642,500. The accounting loss total represents a deduction from the EBITDA figure of in the region of 45% of that figure. 2020 was not, of course, a usual year, but one in which the business was by virtue of the pandemic under more negative pressure that in an ordinary year. I have no equivalent information for any of the Applicant's more standard trading years between 2014 and 2018. However this is an indication, for that year, of the relationship between the Applicant's EBITDA and its total profit (or loss), and (taking into account the context of the 2020 figures) I have considered this as giving some support for the figure which I have concluded is appropriate. In all the circumstances I consider that, consistently with the applicable principles, the Applicant should be required to pay these sums from forecast earnings, towards meeting its obligations as regards the payment of protected rent.

79. The first month in which the Applicant is forecast to return to a positive EBITDA is June 2023. From June to December 2023, three months (August, September and November) are forecast as negative, but the other four months in this seven month period as positive. I am of the view that is appropriate that the Applicant should be required to make a payment at the end of December 2023 to reflect the fact that the previous seven months are forecast to produce an overall positive EBITDA of £113,100.[1] This requires the Applicant to pay to the Respondent the sum of £67,860.

[1] This represents the estimated positive EBITDA figures for June (£2,200), July (£15,400), October (£13,000) and December (£113,000), a total of £143,600; less the negative figures for August (-£9,300), September (-£18,300) and November (-£,2900), a total of £30,500.

80. It is right that calculated on the EBITDA forecast from June 2023, this sum does not reflect the fact that the Applicant is due to continue to show a negative EBITDA (and so continued losses) for the first five months of this year. Against this, the Applicant has the benefit of a further period of deferment of any payment, until December 2023.

81. For the year to December 2024, the Applicant's forecast is an overall positive EBITDA of £235,400. Again, the monthly summary of the forecast shows that the seasonal and temporal factors which operate on the Applicant's business (which are acknowledged as normal and unremarkable: Applicant's written submissions at paragraph 58 and footnote 49) mean that EBITDA is anticipated to be negative in some months, and positive in others. Considering the monthly forecasts, and with regard to the fact that the majority of the Applicant's revenue is anticipated to be generated in the later part of the calendar year, and that the early months show the highest negative figures, from a practical point of view it seems to me reasonable and appropriate to provide for the Applicant to make two payments, at the end of July and at the end of December 2024, in relation to the balance of EBITDA for the immediately preceding periods. Accordingly for the seven month period to 31 July 2024, forecast to produce an overall positive EBITDA of £24,500, the Applicant should pay to the Respondent the sum of £14,700. For the further five month period to 31 December 2024, forecast to produce an overall positive EBITDA of £210,900, the Applicant should pay to the Respondent the sum of £126,540.

82. The relevant two year period for the purpose of s.14(7) expires at the end of January 2025. The month of January 2025 shows a negative EBITDA forecast, in respect of which I do not consider it appropriate that any further payment be made to the Respondent.

83. On this basis, the Applicant is required to pay to the Respondent the total sum of £209,100, by way of the instalments set out. Save as to these payments set out above, the Applicant is to be given relief from payment of the protected rent debt: that is, the Debt, and any further interest accruing thereon.

Arbitration fees

84. The terms of s.19(7) of the 2022 provide that each party must meet its own legal or other costs of the arbitration, so this is not an issue for me to determine.

85. As to arbitration fees, the default position under s.19(5) of the 2022 Act is that in making an award under s.14 I am obliged also to make an award requiring the Respondent to reimburse the Applicant 50% of the arbitration fees paid under s.19(4). However, pursuant to s.19(6), that general position does not apply if I consider it more appropriate in the circumstances of the case to award a different proportion.

86. In its written submissions, and in accordance with its case that the Applicant should not be required to pay to the Respondent any part of the protected rent debt, the Applicant asks me to make an award requiring the Respondent to pay the arbitration fees in full. The Respondent, in accordance with its own case that the Applicant should be required to pay the whole of the protected debt, seeks the converse: that the award should require the Applicant to pay the fees in full.

87. In the circumstances, given that in my award I have found that neither party's formal proposal is consistent with the s.15 principles and have required the Applicant to pay to the Respondent part, but not all, of the protected rent debt, I consider that it would be appropriate to make an award that reflects the default position, that each party should bear half of the arbitration fee.

Now I, Catherine Taskis KC, having carefully considered the submissions of the parties and the evidence with which I have been provided, hereby award and direct as follows:

(1) The Applicant shall pay to the Respondent the sum of £209,100 in respect of the Debt as defined above, in the following instalments: by 31 December 2023, the sum of £67,860; by 31 July 2024, the sum of £14,700; and by 31 December 2024, the sum of £126,540.

(2) The Applicant is to be relieved from paying any other sums under the terms of the Lease in respect of the period from 21 March 2020 to 18 July 2021.

(3) The Applicant and the Respondent shall each bear half of the arbitration fees. Accordingly the Respondent shall reimburse the Applicant for half of those fees, payment to be made within 28 days.

MADE AND PUBLISHED by me, Catherine Taskis KC at Falcon Chambers Arbitration, London, which is the seat of the arbitration, on 3 February 2023.

Catherine Taskis KC
3 February 2023