FCA

FALCON CHAMBERS ARBITRATION

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

Between

London Dockside Limited (in Administration)

Applicant

and

Mayor and Burgesses of the London Borough of Newham

Respondent

AWARD

Introduction

1. In this Award, terms defined in the Commercial Rent (Coronavirus) Act 2022 ("CRCA") are used in accordance with their meaning for the purposes of CRCA.

2. The Applicant seeks relief from payment under CRCA in relation to a Protected Rent Debt. The Applicant says the amount of the Protected Rent Debt is £3,320,300.65[1] (including interest to date) on the basis the "Protected Period" began on 21 March 2020 and ended on 18 July 2021.

3. The Respondent says the amount of the Protected Rent Debt is £2,880,696.63 (including interest to date) on the basis it contends the Protected Period began on 21 March 2020 but ended on 17 May 2021.

4. In addition, the Applicant is in arrears to the Respondent in respect of sums due following the end of the Protected Period and before 30 March 2022 ("the Non Protected Rent Debt"). The Applicant calculates the Non Protected Rent Debt to be £1,911,811.53 (including statutory interest to date and VAT) and £1,628,235.79 (including statutory interest to date and excluding VAT). The Applicant's application for relief is supported by calculations on the basis of which it says the Non Protected Rent Debt can be met in full.

5. The Respondent calculates the Non Protected Rent Debt to be £2,351,219.02 (including statutory interest to date and including VAT) and £2,002,518 (including statutory interest to date and excluding VAT). The Respondent's higher calculation is rooted in its contention the Protected Period ended on 17 May 2021 rather than on 18 July 2021.

6. The Non Protected Rent Debt is not the focus of this Award, but its correct calculation necessarily does have a bearing on the Applicant's overall financial

[1] NB. Each of the figures for the Protected Rent Debt and Non Protected Rent Debt given in these paragraphs are F+H's figures, provided by email on 28 April at 3.01pm, as confirmed to be accurate by Freeths, by email on 28 April 2023 at 4.15pm, for the purposes of my Award.

position and viability for the purposes of this Arbitration. The existence of the Non Protected Rent Debt also provides the background to the Applicant's entry into administration on 31 March 2022.

The Background to the Reference

7. The Applicant is the sub-tenant of Plot 1, Royal Business Park, Dockside Road, London, E16 2FQ ("the Property") under a sub-lease dated 25 September 2019 made between Royal Docks Hotel Property Limited as landlord and the Applicant as tenant for a term of 50 years and 75 days from 25 September 2019 ("the Lease")[2]. The Applicant's title is registered at HM Land Registry under Title No. TGL538077.

8. The initial rent under the Lease was the yearly rent of £1,950,000 plus VAT per annum. The yearly rent is subject to annual review in accordance with the formula set out in Schedule 3 to the Lease, with increases capped at 4%. In addition, the Lease reserves the payment of the insurance premium under Schedule 5 and any sums payable by the tenant under the Head Leases as further and additional rent. Interest, also reserved as rent, is payable on any arrears at the rate of 4% above the base rate of the Royal Bank of Scotland[3].

9. The Applicant owns and operates the business of an hotel at the Property, the "Hampton by Hilton Hotel, London Docklands". It has a franchise agreement with Hilton Hotels dated 7 October 2014 ("the Hilton Franchise Agreement")[4]. At all material times the Property has been managed by RBH Hotels UK Ltd ("RBH").

10. The Respondent holds a rent deposit from the Applicant in the sum of £2,340,000 pursuant to a Rent Deposit Deed dated 28 November 2019.

[2] Prior to the grant of the Lease, the Applicant held a lease dated 7 October 2014. This was surrendered on the grant of a lease dated 31 January 2018. This was surrendered on the grant of the Lease as part of a restructuring of the superior interests in the Property: Witness Statement of Simon Bonney dated 23 September 2022, paras.26-27.
[3] Statutory interest at 8% is payable on the Non Protected Rent Debt within the Administration.
[4] SB2/1.

11. The Respondent holds the immediate reversionary interest in the Lease following the grant of a headlease of the Property dated 28 November 2019 and made between Possfund Custodian Trustee Limited and the Respondent for a term of 50 years from 28 November 2019 at a yearly rent of £1,550,000 plus VAT ("the Head Lease")[5]. The yearly rent is subject to annual review in accordance with the formula set out in Schedule 3, with increases capped at 4%.

12. The Applicant paid the rents prior to the Pandemic and has done so again since it entered administration on 31 March 2022.

13. In 2020, a Rent Concession Agreement dated 18 November 2020 was entered into between the Respondent and the Applicant regarding the repayment of the Applicant's arrears accrued since March 2020. The arrears were to be repaid over a period of 6 years. The Applicant paid the Respondent the initial payment of £195,000 (made up of £162,500 of rent and £32,500 of VAT), which was due at the outset of the Agreement. Thereafter, as the Covid Pandemic continued, it was unable to make further payments[6].

14. On 28 April 2021, the Respondent gave the Applicant 14 days notice terminating the Rent Concession Agreement. On 28 June 2021, the Respondent issued a formal 14 day demand in respect of all sums then outstanding under the Lease. On 19 August 2021, the Respondent issued a formal letter before action[7].

15. The Commercial Rent (Coronavirus) Bill was introduced into Parliament on 9 November 2021. The same day the Government published a new Commercial Rents Code of Practice.

[5] The Respondent's head leasehold title is registered at HM Land Registry under Title No. TGL539000.

[6] Report of Ian Elliott 24 October 2022, para. 3.2.4-3.2.10.
[7] Report of Ian Elliott 24 October 2022, para. 3.2.4-3.2.10.

16. On 10 November 2021, the Government also introduced legislation protecting commercial tenants from debt claims in respect of rent arrears accrued during the period 20 March 2020 to 18 July 2021.

17. On 17 January 2022, the Respondent commenced proceedings[8] in debt against the Applicant for £1,764,630. That sum represented the amount the Respondent claims in respect of the Non Protected Rent Debt, including interest, VAT and costs, to that date. The proceedings were commenced during the currency of the statutory moratorium to 31 March 2022 on the forfeiture of leases and issue of winding up proceedings under the Coronavirus and Corporate Insolvency and Governance Acts 2020.

18. On 31 March 2022, the day the statutory moratorium expired, the Applicant was placed into administration by its director because it could not pay the Non Protected Rent Debt[9] (the "Administration"). This resulted in the automatic stay of the Respondent's proceedings under Schedule B1 to the Insolvency Act 1986[10].

19. The Applicant appointed Michael Kiely and Simon Bonney of Quantuma Advisory Limited as joint Administrators[11]. Since 31 March 2022, the rent under the Lease has been paid as an expense of the Administration[12].

20. On 18 July 2022, the Respondent, as majority creditor, exercised its right in the Administration to issue an application under section 97 and paragraph 12(1)(c) of Schedule B1 to the Insolvency Act 1986 to replace the joint Administrators and to appoint its own new joint Administrators, Simon Carvill-Biggs and Ian Corfield of FRP Advisory Trading Ltd ("the FRP Administrators")[13].

[8] Report of Ian Elliott 24 October 2022, para. 3.2.4-3.2.10.
[9] Witness Statement of Simon Bonney 23 September 2022, para. 11.
[10] Report of Ian Elliott para. 3.2.10.
[11] Report of Ian Elliott, para. 3.2.10. WS of Simon Bonney.
[12] Witness Statement of Simon Bonney, Annex B, p. 29.
[13] Witness Statement of Simon Bonney and exhibit p. 72. Report of Ian Elliott, para. 3.3.

21. Following an application by the appointed joint Administrators to the High Court for directions, on 18 August 2022 the High Court made an Order in the Administration ("the Court Order"). The Court Order was made:

> "UPON the … Respondent confirming that it will not, in any qualifying decision procedure, vote against any proposal made by the administrators of the [Applicant] to make a reference to arbitration under the [CRCA]."

22. The Court Order included:

    a. during the period for which this Order is in force the affairs, business and property of the Applicant is to be managed by the administrators of the company (para. 2);

    b. during the period for which this Order is in force any act required or authorized under any enactment to be done by an administrator of the [Applicant] may be done by any or all of the persons for the time being holding that office, subject to paragraph [8][14] of this Order;

    c. the Administrators shall by 4pm on 24 August convene a virtual meeting to seek decisions of the Applicant's creditors on –

        i. the replacement of Michael Kiely by the FRP Administrators; and

        ii. the proposals produced by the Administrators pursuant to para. 49 of Sched. B1 IA 1986 and circulated to creditors on 22 May 2022, as revised insofar as advised. The proposals to include a proposal that the administrators of the Applicant may (if so advised) commence and pursue arbitration proceedings against the Respondent under the CRCA (para. 4);

        iii. the decisions to be made by 3 September 2022 in any event (para. 6);

        iv. in the event the Applicant's creditors decide to replace Michael Kiely as an Administrator of the Applicant with the FRP Administrators –

[14] The Court Order refers to paragraph 7. That is an obvious typographical error in my opinion. That paragraph relates to the payment as an expense of the Administration of the expenses of the virtual meeting described at paragraph 4.

1. Mr Bonney shall have sole discretion as to whether to commence arbitration proceedings under the CRCA and, if such proceedings are commenced, shall have sole conduct of the proceedings (para. 8(1);
2. The FRP Administrators shall together have sole conduct of all other matters in the administration; and
3. The Respondent shall pay the reasonable costs of the handover of responsibilities from Mr Bonney and Mr Kiely to the FRP Administrators (para. 8(3))[15].

23. I am told, and it is not disputed, that the reason the Court appointed Mr Bonney to have sole conduct of the CRCA arbitration proceedings was as a result of the potential or perceived conflict that was apparent given the FRP Administrators had advised the Respondent prior to being appointed and were appointed on the Respondent's application[16].

24. Consequent upon the Court Order, since 2 September 2022, Mr Bonney and the FRP Administrators have been the Applicant's Joint Administrators. As a result, so long as the Court Order is in force, Mr Bonney has sole conduct of this Arbitration on behalf of the Applicant and the FRP Administrators have sole conduct of all matters in the Administration except this Arbitration.

25. Importantly, the Applicant has continued to trade in administration and continues to do so at the date of this Award. The period of the Administration was extended in March 2023, with creditors' consent, to 31 March 2024[17].

26. In the Arbitration, the Applicant is represented by Freedman + Hilmi LLP ("F+H") and, specifically, by the F+H Partner, Mr Julian Johnstone, acting on the instructions

[15] WS of Simon Bonney and exhibit at p. 70, Report of Ian Elliott, para. 3.4.
[16] Applicant's Submissions – not disputed in Respondent's Reply.
[17] The Respondent's 28 March 2023 Written Submissions.

of Mr Bonney. The Respondent is represented by Freeths LLP ("Freeths") and Mrs Andy Creer of Counsel.

27. Notwithstanding the Court Order, on 17 March 2023 Ashtons LLP ("Ashtons"), the solicitors acting for the FRP Administrators, wrote to me directly on behalf of the FRP Administrators during the course of this Arbitration. Their letter concerned the conduct of the Arbitration. It set out Ashtons' views as to the operation of the CRCA and the FRP Administrators' views as to what they consider to be the correct outcome.

28. Previously, on 21 November 2022 and 27 January 2023, the FRP Administrators also wrote to Freeths regarding Mr Bonney's evidence in, and conduct of, the Arbitration. The first of the FRP Administrators' letters was attached by Freeths to its Expert's Further Report in this Arbitration. The second of the FRP Administrators' letter was attached to Mrs Creer's Submissions on behalf of the Respondent in this Arbitration. In each case, in support of the Respondent's case that the Applicant's reference to Arbitration should be dismissed.

The Course of the Reference in Overview

29. This reference has a number of specific features. The changing nature of the evidence, and the sheer volume of the evidence, is reflected in the length of this Award.
    a. There exists a legal dispute between the parties as to the correct identification of the "Protected Period" under s. 5 CRCA and, hence, the quantum of the "Protected Rent Debt" under s. 3 CRCA (and the Non Protected Rent Debt).
    b. The Respondent is a local authority landlord. In this Arbitration, the Respondent has taken the view that the concept of "solvency" within CRCA does not apply to the Respondent as landlord under the Lease[18]. As a result, the Respondent has chosen not to provide me with any material pertaining to

[18] Respondent's Submissions para. 14.

its own position for the purposes of my assessment of the appropriate treatment of the Protected Rent Debt if relief is given to the Applicant under the CRCA.

c. In pursuing this reference to Arbitration pursuant to the terms of the Court Order, Mr Bonney gives detailed evidence in accordance with the provisions of CRCA that the Applicant's business is, or would become, viable if given relief from payment of the Protected Rent Debt under the CRCA. The Applicant says the most recent financial materials available show the Applicant's business has recovered from the impact of the Coronavirus Pandemic and weathered the consequences of war in Ukraine and volatility in the cost of utilities.

d. In the letter sent by Ashtons dated 14 March 2023, the FRP Administrators say the issue of the Applicant's viability "*ultimately falls within the FRP Administrators' sole discretion"* and that the reference to Arbitration should fail[19].

e. In Ashtons' 14 March 2023 letter, they said they intended to make an application to the High Court for further directions within the Administration unless Mr Bonney accepted the FRP Administrators' views for the purposes of the Arbitration. Mr Bonney has not accepted those views. No such application to the High Court was made.

f. The Respondent's own stance in this Administration is that the FRP Administrators' view is not decisive of itself for the purposes of my assessment of viability under the CRCA. It raises an issue as to whether the statutory purpose of relief under the CRCA can be achieved.

g. Much of the evidence available consists of forecasts produced from time to time by RBH, the professional hotel operator of the Applicant's business, presently retained by the FRP Administrators. RBH has compiled actual monthly trading results and new monthly forecasts of the profitability of the Applicant's business for 2023 and 2024 throughout the period of this

[19] They also objected to the appointment of any expert accountant to consider figures for the purposes of this Arbitration as a usurpation of the FRP Administrators' functions.

reference. In November 2022, the volatility in the pricing of utilities resulted in RBH altering their forecasts to forecast the Applicant's business would make loss in 2023 and 2024. RBH has since re-appraised its previous treatment of utilities amongst other matters. It now forecasts the Applicant will make profits in both 2023 and 2024.

h. The Respondent's own experienced Expert, Mr Ian Elliott of Avison Young, considers that the Applicant's business should be more profitable in 2023 and 2024 than Mr Bonney has suggested himself on behalf of the Applicant or RBH suggests.

i. Against the changing background of the RBH forecasts, it has been unhelpful during this Arbitration that there was a hiatus in the provision to the Applicant of the Applicant's actual trading figures and RBH's new forecasts between December 2022 and mid March 2023. The result being that the parties' written Submissions were produced at a time when more immediate material should have been available. That means the position has had to be re-visited since the actual figures for December 2022-February 2023 and the updated forecasts were all produced to together on 21 March 2023.

j. The receipt of the most recent actual figures and RBH's changed forecasts has also occasioned further review. This means it must be remembered as at the date of this award that:

    i. the parties' section 11 CRCA Proposals and supporting Witness Statements and Reports commented upon RBH's forecasts at the dates those documents were prepared in the Autumn of 2022. That said, the background and the fundamental points of principle addressed remain relevant. These also remain the s. 14 CRCA Proposals;

    ii. at the time the parties' January 2023 Submissions and February 2023 Replies were prepared they responded to the fact that the most recent (and rather different) RBH forecasts available recorded the Applicant would make a loss in each of 2023 and 2024. This means the position shown in Mr Bonney's EOSv. 5 (produced on the basis of the then RBH

forecasts provided) is dramatically different from the position now shown in Mr Bonney's EOSv. 6 (produced on the basis of the most recent RBH forecasts). It is also right to add here that Mr Bonney identified at the time that he considered certain elements of the previous RBH forecasts were unrealistic and unduly pessimistic. The March disclosure evidences Mr Bonney's concerns were well founded;

iii. by the date of the oral hearing on 27 March 2023, the further disclosure evidences that the Applicant made an actual profit on trading of £994,000 in 2022.

iv. RBH's recent forecasts are that the Applicant will make a forecast profit on trade of just under £500,000 in 2023 and £574,000 in 2024[20].

k. Although the Applicant's most recent oral submissions commend the Applicant's Revised Final Proposal to me, that is to write off the Protected Rent Debt save for £261,111 and direct payment by instalments over 2 years as set out there, the Applicant acknowledges, in the light of the Applicant's improved financial position as presented in EOSv. 6 (as compared to EOS and EOSv.2), I must make whatever award I consider appropriate under s. 14(5) CRCA. That is if I determine to award relief and consider neither of the Revised Final Proposals to be sufficiently consistent for the purposes of s. 14 CRCA.

l. The Respondent's primary case since 15 November 2022 has been that I should determine that the Applicant's business is not viable, and would not be viable even if the Applicant were to be given relief from payment of any kind, such that the reference should be dismissed. The Respondent's secondary case is that it is only its own Revised Final Proposal which is consistent with s. 14, such that I must make an award in those terms and write off the Protected Rent Debt save for £962,664 and give time for that sum to be paid by instalments

[20] Pre-Pandemic, the Applicant's earnings before tax ("EBT") were £296,014 in the year ending 31 December 2019.

over 2 years. Two somewhat inconsistent reactions to the issue of the Applicant's viability.

m. It will be noted that the issue of a payment by instalments is not in dispute as between the Applicant and Respondent if an order for relief is made.

30. Against this backdrop, I turn to consider the Final Proposals, the evidence and the Submissions. I also record something of the course of the Arbitration.

The Reference to Arbitration and the Parties' Final Proposals

31. On 23 September 2023, the last date when this was possible in accordance with s.9(2) CRCA, the Applicant referred to arbitration the matter of relief from payment of the Protected Rent Debt. The reference was made to Falcon Chambers Arbitration ("FCA") under ss.10 and 11 CRCA. FCA is an approved arbitration body under s.7 CRCA.

32. Following contact between FCA and the parties, I was appointed by FCA on 10 October 2022 in accordance with s.8(1)(b) CRCA. On 12 October 2022 I circulated an arbitration agreement to the parties. My fees were paid by the Applicant on 21 October 2022. On 8 November 2022 the arbitration agreement was signed on behalf of the Applicant. On 17 November the arbitration agreement was signed on behalf of the Respondent, who also identified, by way of amendment, that it disputed the amount of the Protected Rent Debt. The arbitration agreement, as amended by the Respondent, was re-signed on behalf of the Applicant on 22 November 2022.

The Applicant's Formal Proposal

33. The Applicant's reference to Arbitration was accompanied by a letter dated 23 September 2022 setting out the Applicant's formal proposal and a detailed 35 page Witness Statement dated 23 September 2022 made by Mr Bonney with a very substantial series of exhibits. I refer to certain only of the elements of Mr Bonney's Witness Statement below.

34. In the Referral documents, the Applicant put the amount of the protected rent debt as £3,246,128.85 or thereabouts (including interest of £354,749.14 to 25 December 2022), on the basis the Protected Period began on 21 March 2020 and ended on 18 July 2021.

35. The Applicant's formal proposal for resolving the matter of relief from payment of the protected rent debt, made for the purposes of s.11 CRCA, and on the assumption that the reference to arbitration was not dismissed for a reason set out in s.13(2) and (3) CRCA, was as follows. That:
    1. the Applicant proposed to pay, in settlement of the protected rent debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2020 to 18 July 2021 falling within the definition of Rent in s.2(1) CRCA, the sum of £293,378 plus VAT;
    2. the Applicant proposed to pay this sum of £293,378 in 6 instalments:
        a. on 24 June 2023, the sum of £48,896 plus VAT;
        b. on 29 September 2023, the sum of £48,896 plus VAT;
        c. on 25 December 2023, the sum of £48,896 plus VAT;
        d. on 25 March 2024, the sum of £48,896 plus VAT;
        e. on 24 June 2024, the sum of £48,896 plus VAT;
        f. on 29 September 2024, the sum of £48,898 plus VAT.
    3. the Applicant proposed the balance of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2022 to 18 July 2021 falling within the definition of Rent in s.2(1) CRCA be written off.

36. As mentioned, Mr Bonney's Witness Statement was made in support of the Applicant's Formal Proposal. It is accompanied by a statement of truth in accordance with the requirements of s. 12 CRCA. It contains a fully reasoned and supported analysis of Mr Bonney's approach.

37. Mr Bonney's exhibit comprises the leasehold titles and associated documents; the Hilton Franchise and Management Agreements; an Estimated Outcome Statement ("EOS"); RBH's (then) commentary on the Management Accounts; the (then) RBH Forecast; a preferential creditors schedule; an unsecured creditors schedule; filed audited accounts for the period 1 April 2018 to 31 December 2020; rent, service charge and insurance documents; utilities documents; Capex documents; insurance documents; Covid-19 support schedule; bank statements to 31 August 2022; business rates documents; correspondence and Administration documents. I have read all these documents carefully.

38. Mr Bonney explained that by reason of his appointment and the role he had undertaken as Joint Administrator since 31 March 2022 he is closely acquainted with the Applicant's business and the facts and matters relevant to the Applicant's Formal Proposal (para. 2). During the course of the Administration and in preparing his statement, he had liaised with Andrew Marr and others at RBH, the operator of the Applicant's Hotel. He also liaised with Sameer Gheewala and others at Apirose Real Estate Investment (Apirose). Apirose provide the Applicant's owner, Royal Docks Hotel Holdings Ltd, with administrative and managerial support. Mr Gheewala was the person at Aprirose responsible for liaising with RBH prior to 31 March 2022 with regard to the operation and management of the Hotel on behalf of Mr Mansukhal Gudka, the director of the Applicant and the Applicant's owner (para.3).

39. Construction of the Hotel had begun in 2015 and was completed in 2017. The Hotel opened for trading the same year. The Hotel's primary business was / is servicing attendees of trade fairs and conferences at the nearby ExCeL London Exhibition Centre.

40. The Hotel was self-funded by operational cashflow until early 2020 and operated profitably prior to the onset of the COVID-19 pandemic. Its earnings before tax

("EBT") were £296,014 in the year ending 31 December 2019[21] It's trading for the first two months of 2020 improved on the first two months of 2020. That improved trading performance was expected to continue during 2020.

41. The Hotel and the Property were affected by the legislation and regulations imposed in response to the COVID-19 pandemic ("the Restrictions"). At paragraphs 31-32, Mr Bonney provided details of the use of the Property between March 2020 and July 2021. Mr Bonney also explained that Restrictions on trading continued to affect the Hotel and Property until 18 July 2021. Annex C to his Witness Statement comprises a detailed summary of the Regulations.

42. The impact of the Restrictions was significant (para. 21). After the Hotel became subject to the Restrictions, the Applicant made very significant losses in 2020 and 2021. A £1,633,723 loss on trading in the year ending 31 December 2020 and a loss of £984,443 in the year ending 31 December 2021.

43. These losses were sustained notwithstanding Government support: £297,030 in respect of the job retention scheme; £502,688 in respect of business rates relief expiring in March 2023; and £28,714 in respect of COVID-19 grants. In addition, the Applicant's owner had taken no money out of the business and no remuneration in his role as a director[22].

44. In Annex A, Mr Bonney set out his calculation of the Protected Rent Debt in the (then) sum of £3,246,128.85, comprising rent (incl. VAT) in the sum of £2,891,379.71 for the period 25 March 2020 to 18 July 2021 and interest[23] in the sum of £354,749.14, for the period 25 March 2020 to 24 December 2022.

[21] WS of Simon Bonney para. 28.
[22] WS Simon Bonney paras. 33-34
[23] At the rates of 4.1% to 16 December 2020, 4.25% to 3 March 2022, 4.5% to 17 March 2022, 4.75% to 31 March 2022 and 8% from 31 March 2022. The rise to 8% is based on the assumption the Respondent becomes entitled to the full amount of the protected rent debt following the arbitration (for example, if the referral was dismissed). The Respondent would become entitled to statutory interest on the Protected Rent Debt at 8%

45. In Annex B, Mr Bonney set out his calculation of the Non Protected Rent Debt in the (then) sum of £1,765,030.63, comprising rent (incl. VAT) in the sum of £1,701,343.93, interest[24] in the sum of £33,686.70 for the period 19 July 2021 to 30 March 2022, and (estimated) legal costs in the Respondent's January 2022 legal proceedings of £30,000.

46. Mr Bonney said that in January and February 2022 the Hotel's business had been hit again by the impact of the Covid Omicron variant.

47. Mr Bonney explained that following their appointment on 31 March 2022 as Joint Administrators, it had become apparent to Mr Kiely and himself as they organised the Administration, that trading at the Hotel was exceeding its forecasts by an appreciable margin. They thought the Applicant might be capable of being rescued as a going concern if that continued. Provided that the issue of the Protected Rent Debt could be resolved in such a way that maintained the viability of the Applicant's business. Either by agreement with the Respondent or through an award under the CRCA.

48. He said that initially, there was uncertainty as to the extent to which the trading would continue to improve, bearing in mind the volatility in the economy generally and in respect of energy prices in particular. As a result, taking into account the significant other debts the Applicant had to satisfy before any proposal could be formulated to deal with the Protected Rent Debt, it had not really been practicable to formulate a realistic proposal during the summer of 2022 (para. 12).

49. By mid August 2022, Mr Bonney said the uncertainty over whether the Applicant's trading would continue to improve had resolved itself. The Hotel had exceeded its forecast significantly over the summer. However, at the same time, the volatility in

from 31 March 2022 pursuant to the insolvency Rules. Some £170,472.14 between 31 March 2022 and 24 December 2022.

[24] Rate changes as above to 30 March 2020.

the energy markets had resulted in electricity prices for businesses going up to unprecedented levels. He identified that electricity costs are significant costs for hotels. This volatility made it difficult to judge what the Applicant might be able to afford in respect of the Protected Rent Debt (para 13).

50. The Government's announcement on 8 September 2022 of its intention to set up an energy price cap scheme for businesses and the publication of the details of that scheme on 21 September 2022 had altered that position. As at the date of his Witness Statement, there was now a degree of certainty as to energy prices which businesses did not previously have (para. 14). The Applicant was, therefore, able to make a formal proposal for payment of part of the Protected Rent Debt in instalments (para. 45).

51. Mr Bonney said the Applicant had traded profitably since 1 March 2022 (para. 44) and had sufficient funds accrued from profitable trading to pay the Non-Protected Rent Debt and its other creditors and other sums it was liable to pay in the Administration in full. It was, however, currently restricted from paying those sums by the operation of the Insolvency Act 1986 and the Insolvency Rules (para. 8).

52. As such, Mr Bonney emphasised that whilst the Applicant had accrued sufficient cash to enable it to pay all its debts other than the Protected Rent Debt at the date of the referral, it was not able under the Insolvency Act 1986 and Insolvency Rules to exit the Administration or make an interim payment to creditors without a further order of the Court. Any order would need to take into account the (contingent) liability to the Respondent in respect of the Protected Rent Debt. The operation of CRCA rendering the Applicant's liability contingent until the conclusion of this Arbitration (para. 46).

53. At paragraph 73, Mr Bonney summarised his view that the Applicant was:

> "… in the light of its current cash-rich position, its liabilities and its forecast future trading, viable in the parlance of the [CRCA], provided that it obtained

> an appropriate award of relief from payment under [CRCA]. Once its liabilities are paid, there is not reason to believe that it will not continue making a profit on its trading in the future"

And at paragraphs 77-78, said:

> "In order to preserve, or as the case may be, restore and preserve the viability of the [Applicant], the [Applicant] does require a very significant reduction of the Protected Rent Debt and also time to pay. It is not able to meet the Protected Rent Debt in full or even a significant proportion of it. If it were required to meet the Protected Rent Debt in full it would be immediately insolvent. Its net cash position, including the FF&E Reserve as at 31 August 2022 amounted to £2,660,186, without taking into account the current costs of the Administration. Its total liabilities, including the Protected Rent Debt, exceed £5,000,000 including VAT.
>
> 78. The proposal made by the [Applicant] seeks to preserve and/or restore and preserve its viability while providing for such payments by way of instalments that it can make to the [Respondent] in respect of Protected Rent Debt. For these reasons, I believe that the [Applicant's] proposal is consistent with the principles [of the CRCA]."

54. At that stage, Mr Bonney said the Applicant was forecast to trade profitably in the future such that it was able to make a formal proposal to pay the sum of £293,378 in respect of the Protected Rent Debt by instalments between 24 June 2023 and 29 September 2024 (paras. 9, 45 and 46). Mr Bonney did, however, also note that once the Applicant had fully analysed the Government's scheme it may need to revise its Formal Proposal (para. 82 and para 59(g)).

55. To support the Applicant's Formal Proposal, Mr Bonney provided a comprehensive line by line account of relevant financial matters, his treatment of them, the reasons

for that treatment, and his treatment of known and anticipated future expenditure. I do not seek to replicate the detail and analysis here, but it was presented in the following form:

a. at paragraphs 48-54, he discussed the Furniture Fittings and Equipment Reserve ("FFE")[25]. The percentage provision for renewals of furniture, fittings and equipment out of total revenue. Mr Bonney's analysis is important in considering the EOS and the sum Mr Bonney assesses is available to pay the Protected Rent Debt, so I do return to this below;
b. at paragraphs 55-57, cash in the bank;
c. at paragraphs 58-62, the content of the Estimated Outcome Statement ("EOS")[26] he had produced. The EOS summarised and collated all of the relevant information from the other financial documents exhibited. Its purpose was to set out the amount Mr Bonney considered would be available to the Applicant to pay towards the Protected Rent Debt as at 31 December 2024 (assumed to be 2 years after the award);
d. at paragraphs 63-70, the content of the Applicant's trading records for the Hotel for the period 1 January 2019 to 31 August 2022 and forecasts. These were set out in a spreadsheet prepared by Andrew Marr of RBH at Mr Bonney's request. The spreadsheet contained the management accounts prepared by RBH ("the Management Accounts") and RBH's forecasts for trading for the period 1 September 2022 to 31 December 2024 ("RBH's Forecast"). The Applicant's trading for the period between 1 April 2018 to 31 December 2020

[25] References to exhibits included to line 101 of the Management Accounts and RBH's Forecast; the Hilton Franchise Agreement (SB2, clause 6.6); the Hilton Franchise Agreement, definition of Standards in the Addendum (SB2, page 42); the Hotel Management Agreement between the Applicant and RBH (SB2, p. 74, clause 14); record of discussion with RBH that it would not require strict compliance with clause 14 of the HMA "no issue if this was reduced over the next couple of years" (SB3, p.124); the Hilton Franchise Agreement, Standards (SB3, p. 116); Mr Gheewala's spreadsheet summarising expenditure out of the FF&E Reserve since 1 January 2019, "FF&E and Capex") (SB3, p. 110-114); Hilton's 2023 2023 fee and costs guidelines (SB3, p. 119), Hilton's Mandatory IT documents (p. 120-123) and Hilton's Standards for televisions not to exceed 7 years of age (p. 116).
[26] SB3.

was also recorded in its Financial Statements filed at Companies House[27]. The Financial Statements were subject to independent audit by Haysmacintyre LLP;

e. at paragraph 71, the treatment of VAT;

f. at paragraph 73, the interest free Westcrown loan which the Applicant had used to fund the rent deposit. Westcrown was itself in voluntary liquidation. Mr Bonney said he was advised it had written off the debt (which was only repayable in circumstances which had not eventuated), and that Westcrown was to be dissolved shortly. He said the loan could therefore be ignored for the purposes of assessing the Applicant's viability;

g. at paragraph 80, the Rent Deposit Deed. A neutral matter as the Respondent would in the usual course have recourse to it, but was entitled to have it topped up in the event it made a withdrawal;

h. at paragraph 81, director's remuneration and dividends. Mr Bonney said he understood that the Applicant's owner acquired the Applicant on 20 December 2019. Since that date, its directors had not received any remuneration and the Applicant's owner had not taken out any dividends or other sums, viewing the Applicant's business as a long term investment.

56. As mentioned above, I return to Mr Bonney's treatment of the FF&E Reserve here for the purposes of the various EOS provided in this Arbitration. I set Mr Bonney's reasoning out fully in the paragraph below because it is a matter of some controversy when considering viability as at the date of this Award. On the one hand, the Respondent's Expert considers Mr Bonney is overly conservative: the Applicant should have reduced / reduce the FF&E Reserve to retain £100,000 only now. On the other, the FRP Administrators consider that the entirety of the FF&E Reserve must be ringfenced: the Applicant cannot deploy any part of the FF&E cash it holds in order to meet present financial obligations and ease pressure. They mention possible expenditure requirements that the Applicant may have to meet in 2025/2026. The FRP Administrators were also previously catering for a 4%

[27] SB3, pp7-51.

deduction into FF&E from 1 April 2023 (as a result of RBH's use of that % in its spreadsheet figures).

57. Mr Bonney explains his own approach as Joint Administrator as follows:

"Basis of the FF&E Reserve

48.Hotels invariably set aside a percentage provision for renewals of furniture, fittings and equipment ("FF&E") out of total revenue. The provision is used to fund the replacement of furniture, fittings and equipment as these items become worn or damaged over time. The replacement of worn and damaged furniture, fittings and equipment is essential to maintain the brand and the attractiveness of hotels, which in turn is a key driver for occupancy and room rates.

49.The Hotel is branded as a Hilton Hotel and its business has a particular emphasis on corporate guests by reason of its proximity to ExCeL London. The requirement to replace worn and damaged furniture, fittings and equipment in the Hotel must be viewed in this context. Failure to maintain the furniture, fittings and equipment at the Hotel appropriately would likely have a significant impact on occupancy and room rates. The Tenant's provision for the replacement of FF&E is placed in an FF&E reserve ("the FF&E Reserve") and used to pay for the replacement of furniture, fittings and equipment as required. The provision is provided for in line 101 of the Management Accounts and RBH's Forecast.

50.There are two agreements which are relevant to the replacement of furniture, fittings and equipment in the Hotel.

(a) The Hilton Franchise Agreement (p1, SB 2), which contains the following relevant provisions:

(i) Clause 6.6, pursuant to which Hilton may periodically require the Tenant to upgrade the Hotel's fixtures, equipment, furnishings, furniture, signs, computer hardware and software and related

equipment, supplies and other items to meet the current Standards, at the Tenant's cost (p19, SB 2);

(ii) The definition of Standards in the Addendum to the Hilton Franchise Agreement (p42, SB 2):

> "all standards, specifications, requirements, criteria, and policies developed by [Hilton] and/or its Affiliates from time to time for use by [the Tenant] in connection with the design, construction, renovation, refurbishment, appearance, equipping, furnishing, supplying, opening, operating, maintaining, marketing, services, service levels, quality, and quality assurance of System Hotels, including the Hotel, whether contained in the Manual, set out in this Agreement or in other written communications updating or supplementing the same".

The Hilton Franchise Agreement does not contain a requirement on the Tenant to maintain an FF&E Reserve. Nevertheless, in light of clause 6.6 and the definition of the Standards, the Tenant must maintain an adequate provision for the replacement of worn and damaged furniture, fittings and equipment in the Hotel to ensure compliance with the Standards and in anticipation of any upgrades required by Hilton. Failure to do so could result in the Tenant being in breach of the terms of the Hilton Franchise Agreement which would have an impact on continued trading.

(b) The HMA between the Tenant and RBH (p74, SB 2), which contains contractual obligations on the Tenant with regard to the FF&E Reserve as follows:

(i) Under clause 14.1 of the HMA, the Tenant is contractually obligated to allow RBH to deduct 3% of total revenue to be added to the FF&E Reserve and the Tenant is obligated to make up any shortfall[28];

[28] I note, at this point, that RBH's Forecasts and Reports consistently deducted 4% for FF&E from 1 April 2023 until their most recent 2023 materials were provided in March 2023. That decision, of itself, accounted for a significant difference in the treatment of the Applicant's financial position in the RBH forecasts for the

(ii) Under clause 14.3 of the HMA, the FF&E Reserve may only be used for renewals of furniture, fittings and equipment in the Hotel [I add, the funds held in the FF&E Reserve Account may be used by the Operator only in accordance with the agreed Annual Budget for the relevant Year or as otherwise agreed by the Owner or pursuant to clause 14.5];

(iii) Under clause 14.5 of the HMA, the FF&E Reserve not spent in its year of accrual may be carried forward to the following year "in accordance with good practice so as to allow the funding of replacement of major items of FF&E in a cost efficient manner that minimises disruption to the Hotel operations" (p98, SB 2).

51. Following discussions with RBH, I have obtained its assurance that it will not require strict compliance with the provisions of the HMA noted above in the present circumstances. It says that "it would have no issue if this was reduced over the next couple of years" (p124, SB 3). This pragmatic approach by RBH reflects the fact that the Hotel has only been open since 2017 and that, accordingly, the current requirement for significant expenditure out of the FF&E Reserve is more limited than would be the case if the Hotel had been operating for longer. It enables the Tenant to increase the amount it can pay to the Landlord in respect of the Protected Rent Debt. However, RBH notes in the same communication that a major refurbishment of the bedrooms in the Hotel may need to be undertaken within the next few years and that this could be mandated by Hilton Hotels under the Hilton Franchise Agreement. The Standards include fixed renovation cycles for furniture and soft furnishings of between 7 to 10 years (e.g., p116, SB 3). Accordingly, notwithstanding RBH's consent to the relaxation of the strict requirement to set aside 3% of total revenue into the FF&E Reserve, the Tenant must maintain an adequate reserve for the future in order to preserve its viability and to ensure that the Hotel's brand and stock is maintained in

Administrators from 1 April 2023 onwards. In my opinion, Mr Bonney and F+H's reading of the documents is correct on this point. This now seems to have been accepted.

accordance with the Standards, including the likely requirement to carry out a full renovation of bedroom furnishings and furniture from 2024/2025.

Payments into and out of the FF&E Reserve

52.In the normal course of events, RBH deducts 3% of total revenue generated by the Hotel and places it in the FF&E Reserve. Payments into the FF&E Reserve have been continued during the Administration in the light of the Hotel's profitable trading. These payments are shown in the provisions for renewal line in the Hotel's management accounts prepared by RBH.

53.Mr Gheewala has prepared a spreadsheet summarising expenditure out of the FF&E Reserve since 1 January 2019 (entitled "FF&E Reserve and Capex") (pp110-114), SB 3). Because the Hotel was completed in 2017, FF&E expenditure was relatively limited in these early years. In addition, the closures during the COVID-19 pandemic reduced the need for FF&E expenditure. Accordingly, the historic expenditure between 1 January 2019 and 31 August 2022 amounts to £138,402 (p110, SB 3). Additional details regarding this expenditure are included within separate worksheets in the spreadsheet (pp111-114, SB 3).

54.Mr Gheewala has also set out in the FF&E Reserve and Capex the known future expenditure required from the FF&E Reserve between 1 September 2022 and 31 December 2024 (p110, SB 3). In summary:

(a) In 2022, certain works and costs which have been commissioned but not yet completed and paid, the cost of which is estimated to be £23,472; and

(b) In 2023 and 2024:

(i) anticipated mandatory costs required by Hilton, in the total estimated sum of £341,548, including the replacement of guest room televisions and an upgrade of in room entertainment and connected services. The work is required by Hilton's 2023 fee and cost guidelines (p119, SB 3) and the

Mandatory IT documents (pp120-123), mandated by Hilton pursuant to the Standards and Hilton's requirement in the Standards for televisions not to exceed 7 years of age (p116, SB 3). The Tenant is contractually obliged under clause 6.6 to comply with these requirements pursuant to clause 6.6 of the Hilton Franchise Agreement;

(ii) The replacement of condensers, in the total estimated sum of £50,000. There are 17 condensers in the Hotel of which 2 had to be replaced in 2021. Mr Gheewala forecasts that a further 8 condensers may have to be replaced in 2023 and 2024."

Mr Bonney's evidence is that his approach leaves sufficient sums in the FF&E Reserve to meet identified future expenditure in the foreseeable future. The sums are shown in the various versions of the EOS for the purposes of this application for relief and viability assessment. It is identified that in 2025/2026 further sums may be required, but explained that is a considerable time away from the date of this viability assessment. Mr Bonney anticipates the Applicant will be in a position, by that stage, to generate funds to meet FF&E expenditure.

The Respondent's Formal Proposal

58. In accordance with s.11(2) CRCA, the Respondent's Formal Proposal was due by 6 October 2022. In response to a request made by the Respondent on 4 October 2022 under s. 11(6)(a) CRCA, the Applicant consented to a 14 day extension of time for the Respondent to make its formal proposal by 4pm on 20 October 2022.

59. In response to an application made to me on the afternoon of 20 October 2022 under s. 11(6)(b) CRCA[29], I extended time to 4pm on 24 October 2022. As a consequence, I also extended time to 4pm on 7 November 2022 for the making of the Applicant's revised proposal.

[29] The Applicant's solicitors confirmed the application was not opposed, but that they were without instructions given the limited time provided to them to seek instructions that day.

60. The Respondent's Formal Proposal was given on 24 October 2022. In it, the Respondent calculated that the Applicant owed the Respondent commercial rent arrears under the Lease for the period between 25 March 2020 and 17 May 2021 in the sum of £2,570,608.51 or thereabouts, (including interest up to 24 October 2022 of £75,123.51), which it defined as the Protected Rent Debt. The interest calculated at a rate of 4% above the base rate of the Bank of Scotland plc from time to time.

61. The Respondent's Formal Proposal was that the Applicant paid in settlement of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2020 and 18 July 2021[30] falling within the definition of Rent in s.2(1), the sum of £1,499,045 plus VAT[31]. Writing off the remainder of the Protected Rent Debt.

62. The Respondent relied upon the Report dated 24 October 2022 of Ian Elliott, a Principal of Avison Young. Mr Elliott is a registered valuer who specialises in hotel and hospitality property. His Report was accompanied by a statement of truth and a statement that it was prepared in compliance with the Royal Institution of Chartered Surveyors Statement for Surveyors acting as expert witnesses.

63. Mr Elliott recorded that his instructions were to review and consider the Applicant's written proposal and associated supporting information to assist in the preparation of the Respondent's formal response pursuant to s.11 CRCA: para. 2.2. He said that he had been provided with "extensive documentation"[32] for this purpose. At paragraph 4.1, he added that his instructions were:

> "to consider whether the [Applicant's] formal proposal in respect to the "Protected Rent Debt" is realistic".

[30] The period stated here was not to 17 May 2021. The date when the Res[pendent says the protected period ended.

[31] There was no proposal this sum should be paid by instalments.

[32] As listed in Schedule 1 to the Report.

64. Mr Elliott explained that he was instructed by Freeths to proceed on the basis that the Hotel re-opened and its services recommenced on 17 May 2021, and thus was no longer subject to a closure requirement[33]. Accordingly, all references in his Report to the Protected Rent Debt were to the principal sum which outstanding on 17 May 2021 plus interest of £75,123.51 to 24 October 2022: £2,570,608.51. As a result, Mr Elliott was not instructed to consider the Proposal on the basis the Protected Period ran to 18 July 2021.

65. Mr Elliott made clear in paragraph 2, that:
    a. he had not had the opportunity to meet with the Applicant tenant or RBH. He added that it would be advisable to facilitate a meeting with RBH to discuss their forecast for 2022 and their projections for 2023 and 2024 as these appeared to form the backbone of what monies are available to the Applicant to pay rent;
    b. the time available to undertake his work had been shorter than normal and this impacted on his findings;
    c. the position in respect to utility and business rates costs was currently uncertain and small fluctuations in these line items could materially impact on the Hotel's profitability. As a consequence of this he said:
        "I would stress there is a more than normal greater level of subjectivity when making forecasts of future hotel performance";
    d. Some of the items raised in Mr Bonney's evidence were outside his area of expertise. His own comments were:
        "largely in respect to the profit that I believe the hotel should be capable of generating over the next 5--years."

[33] At para. 4.3 Mr Elliott referred to para. 30 of Mr Bonney's Witness Statement: "these closure requirements were relaxed on 17 May 2021, the Hotel remained subject to specific coronavirus restrictions until 18 July 2021". Mr Elliott commented "No detail of these restrictions are provided and the Tenant provides no evidence of how its business was adversely affected by the Step Regulations".

66. Mr Elliott properly disclosed that he was a co-signatory to a valuation of the Property prepared for the Respondent as at 17 September 2019: para. 2.9. This was not, therefore, the first time Mr Elliott has previously considered this specific Hotel. He brings the benefit of that prior experience to this task.

67. Mr Elliott provided a narrative of his response to Mr Bonney's EOS. He recorded that it was outside his instructions and/or expertise to comment on all the heads set out (treatment of cash at bank, the costs of the Administration, sum available to secondary preferential creditors, sum available to ordinary unsecured creditors). He provided a fully reasoned explanation of his views where matters fell within his own specialist experience and expertise.

68. Mr Elliott identified that "Profit (EBT) 1 April to 31 October 2022 as per Management Accounts" in the sum of £785,714 and the "Paid into FF&E Reserve 1 April to 31 August 2022" in the sum of £105,535 represented the net profit from trading between those dates and sums to be paid into the FF&E Reserve for the same period. He said, this "looks reasonable": para. 4.13.

69. As regards "Movements in the FF&E Reserve from 1 September 2022"[34], Mr Elliott agreed with Mr Bonney's evidence at paras 48-54, as I have set out above. He added that whilst Hilton can require certain works to be undertaken his own experience was that in the current market they are often prepared to defer these so long as the existing equipment is functional. As such, it was his own view that it is possible the mandatory capex is overstated by Mr Bonney. He suggested this should be discussed with Hilton, but his sense was that the current FF&E allowance which had been made by Mr Bonney is too high: para. 4.9.

70. As to "Movements in the FF&E Reserve from 1 September 2022", he said he believed it "entirely possible" the mandatory capex may be deferred and or of a lesser

[34] FF&E and Capex document, p110-114

amount with the result there may be a higher surplus presently available to the Applicant and (paras. 4.15-4.16):

> "In point of fact, it seems to me slightly implausible that a tenant that had operated at a loss for a substantial period of time would implement upgrade of the television systems unless it was directly mandated to do so. For this reason, I consider it inappropriate to allow for these works in the short term and I therefore disregard this cost."

At paragraph 4.37 he added:

> "I consider a FF&E Reserve to be a pre-requisite cost to ensure the long term future of an operational hotel, however, what is not clear to me at this time is what allowance will be required post to the capex works which have been allowed for in terms of mandatory expenditure. I have considered the actual costs for 2019 and on this basis believe a retained sum of £200,000 is an overstatement of this liability and … adopted a cost of £150,000. The reality is that this cost could be higher or lower than the suggested levels and is something that arguably requires independent review."

71. At paragraph 4.18, he addressed "Profit from future trading from 1 September 2022". That showed a balance of (£19,481) representing the (then forecast) loss of EBT from 1 September 2022 to 31 December 2024 in accordance with RBH's Forecast. He said, at face value this appears reasonable, but it is not possible to comment on how likely that out-turn is without an interview with them or access to future bookings:

> "not least as the market is currently very fluid": para. 4.18.

72. In terms of "Expense Adjustments" at paragraphs (f) and 4.19, he said:

"it is important to note that this small loss takes into account RBH's very significant estimated increases in energy costs as a result of the recent extreme volatility in energy markets[35].

Mr. Marr comments that these very significant estimated increases for energy costs cannot be considered particularly reliable because of the volatility[36]. On 8 September 2022, just after RBH's forecast was prepared, the Government announced its intention to publish an Energy Price Cap Scheme for businesses. The utility costs in RBH's Forecast to do not take into [account] the Scheme and do not therefore reflect what the likely costs will be taking into account the impact of the scheme."

Mr Elliott added this section of his Report was "arguably key" to assessing the monies available to pay back rent.

73. Rather than making "Expense Adjustments" Mr Elliott prepared his own profit and loss account. He had prepared projections which he vetted internally with his colleagues. In preparing his projections, he explained he reviewed the historic trade, the RBH Forecasts and undertook research into the local market. He had likewise considered the operational costs for the Property based on other similar operations. He noted that:

> "in the current economic environment where inflation is exceptionally high compared to the recent past and when the Government's now defunct mini budget created huge uncertainty it is clearly a very difficult time to make any forecast."

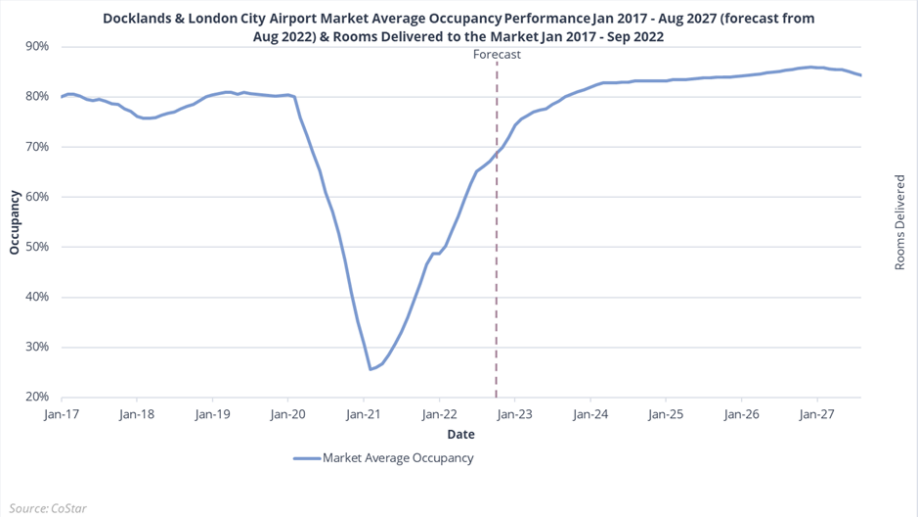
74. Like Mr Bonney, Mr Elliott said he regarded RBH as a competent and experienced operator (para. 4.20). However, Mr Elliott adjusted RBH's Forecast for the Hotel (paras. 4.21-4.24), as follows:

[35] See line 73 tab 2022 to 2024 compared to the same line in tabs 2019 to 2021.
[36] WS of Simon Bonney, exhibit 3, p. 3.

a. Room sales.

Mr Elliott considered existing and proposed supply in the local area. He also considered a forecast for the area prepared by Co-Star. He estimated that occupancy in the area would stabilize in 3 years time at around 85.5%. He adopted 84%, which he said he considered "reasonable" in the location. Expressing the view:

> "In reality, the Hampton by Hilton brand ordinarily outperforms its competitive set and my projections are below that level.
>
> I am in agreement with RBH over the average room rate".



b. Room costs.

Mr Elliott considered RBH's room costs were higher than he would expect of an hotel in this location. He said that they were more than other hotels he was aware of and represented a 47.5% increase in payroll between 2019 and 2023. This was more than he had seen in other London hotels. He would wish to discuss this with RBH because:

> "if I adopt "Room Costs" in line with other operators I am aware of then the profits generated [by the Applicant] could increase significantly above that I have allowed for".

75. At paragraphs 4.24-4.29, Mr Elliott made further adjustments to elements of RBH's Forecast. Again, he agreed with the comments Mr Bonney had made about it:

    a. at the date of RBH's Forecast the actual liability for Business Rates could not accurately be assessed. He noted the actual business rates liability should become clear by late November 2022 after the latest re-valuation was concluded. He believed that the liability would be decreased, but any savings would be phased;

    b. he agreed with Mr Gheewala's estimate for the Applicant of the likely costs of Utilities as set out in paragraph 59(g) of Mr Bonney's Witness Statement:

        "This position could well change again following the recent u-turn on support and again, I would suggest this position is monitored closely";

    c. in general, the insurance costs in RBH's Forecast looked high as a percentage of turnover. Even after the amendment proposed by Mr Gheewala, summarised by Mr Bonney at paragraph 59(j), Mr Elliott said RBH's forecast insurance costs still appeared high. As regards RBH's forecast:

        "when I compare these to their 2019 level I note that this cost appears to have increased by around 230%. This is above the general increase I've seen in insurance costs. I have adopted the same level as Mr Bonney in my forecast as I have no evidence to question the findings provided to him by the tenant."

    d. he agreed with Mr Bonney that the FF&E Reserve "should be no more than 3% of turnover".

76. Mr Elliott's own forecast of trade for 2023 to 2028 was summarised as follows:

Summary Table - Avison Young Projections	Year 1	Year 2	Year 3	Year 4	Year 5
Av. Room Occupancy	78.00%	82.50%	84.00%	84.00%	84.00%
Av. Room Rate	122.50	125.56	128.70	131.92	135.22
Revenue (£)					
Rooms Department	7,289,113	7,902,380	8,247,211	8,453,392	8,664,726
Food & Beverage Sales	346,556	375,714	392,108	401,911	411,959
Other F&B Income / Room Hire	7,600	8,239	8,599	8,814	9,034
Minor Operating Department	166,960	171,134	175,412	179,798	184,293
Rental/Other Income	-	-	-	-	-
Total Sales	7,810,230	8,457,467	8,823,331	9,043,914	9,270,012
Operating Expenses	2,351,732	2,543,990	2,654,675	2,721,042	2,789,068
Gross Operating Income	5,458,498	5,913,477	6,168,656	6,322,872	6,480,944
Undistributed Expenses	1,341,136	1,320,858	1,369,164	1,390,997	1,413,376
Gross Operating Profit	4,117,362	4,592,620	4,799,491	4,931,875	5,067,568
Fixed Charges	3,848,604	4,043,118	4,149,126	4,253,598	4,360,682
EBITDA - Net Cash Flow	268,758	549,501	650,365	678,277	706,886
% Profit Ratio	3.44%	6.50%	7.37%	7.50%	7.63%

77. At paragraphs 4.31-4.32, Mr Elliott commented on RBH's (then) forecast as follows:

> "in general overview, I find it interesting that turnover for 2023 is forecast to be around 21% higher than the 2019 trade pre-COVID and yet profit for 2023 is forecast to be -1% of turnover as against the 2019 profit of 4.6% of turnover. Clearly costs have risen and are likely to continue to rise, however more generally I am aware that many hoteliers have been able to lose much of these costs through increases in turnover and that does not appear to have been the case at this hotel. This is something that it would be interesting to discuss further as without full details of the existing and forecast trade it is difficult to comment on.
>
> 4.32 As the above graph shows, I believe the hotel is capable of trading more profitably than currently allowed for in Mr Bonney's Witness Statement, even after the adjustments he's made, many of which I broadly agree with. In summary, I believe the hotel should be able to generate a profit in 2023 & 2024 of nearly

£818,260, whereas on a like for like basis, after adjustment Mr Bonney estimates this to be £379,074 (namely RBH's (then) Forecast profit for 2023 and 2024 together with adjustments as per paragraph 59 (g, h, i, j and k)."

78. At paragraph 4.35, Mr Elliott agreed with Mr Bonney that it was necessary to include working capital for the purposes of the EOS and that the sum suggested by Mr Bonney was "realistic".

79. Mr Elliott's overall conclusion at paragraph 6 was:

"I am of the view that the hotel will be more profitable than allowed for by Mr Bonney. I consider the amount that is available with respect to the protected rent debt to be £1,499,045.

I would caution that at the current time, costs and income are changing very quickly and any forecast trade must be viewed with a greater than normal level of subjectivity."

80. Helpfully, Mr Elliott replicated Mr Bonney's EOS together with his own inputs at that stage, as follows:

LONDON DOCKSIDE LIMITED (in Administration)
Estimated Outcome Statement (VAT excluded)

	Mr Bonney's Opinion		Mr Elliott's Opinion	
ASSETS AT 31 AUGUST 2022	**£**	**£**	**£**	**£**
Cash at Bank - Day One	1,480,049		1,753,937	
FF&E Reserve - Day One	273,887		273,887	
Profit (EBT) 1 April to 31 August 2022 as per Management Accounts	785,714		785,714	
Paid into FFE Reserve 1 April to 31 August 2022	105,535		105,535	
Intercompany debtor	15,000		15,000	
COSTS OF THE ADMINISTRATION		2,660,186		2,934,073
Administrators' Remuneration (Quantuma)	(240,000)		(240,000)	
Administrators' Remuneration (FRP)	(75,000)		(75,000)	
Legal fees	(225,000)		(225,000)	
Sundry Expenses	(10,000)	(550,000)	(10,000)	(550,000)
Balance		2,110,186		2,384,073
MOVEMENTS IN THE FF&E RESERVE FROM 1 SEPTEMBER 2022				
FFE Reserve payable at 3% of total revenue to 31 December 2024	545,415		372,990	
Committed expenditure from FF&E Reserve between 31 March and 31 August 2022	(14,687)		(14,687)	
Anticipated mandatory expenditure from FF&E Reserve to 31 December 2024	(415,020)		(100,000)	
Net increase / decrease in FF&E Reserve		115,708		258,303
Balance		2,225,894		2,642,376
PROFIT FROM FUTURE TRADING FROM 1 SEPTEMBER 2022 (before adjustments)				
EBT - September to December 2022	16,941		16,941	
EBT - 2023	(77,059)		268,758	
EBT - 2024	40,637		549,501	
Balance		(19,481)		835,200
EXPENSE ADJUSTMENTS				
Adjustment re cost of utilities following Government announcement	193,042			
Adjust EBT on reduction of payments into FF&E Reserve from 4% to 3% from April 2023	139,957			
Adjustment re reduced insurance costs	141,158			
Adjustment re increased business rates from 1 April 2023	(58,661)			
Adjusted balance		415,496		0
AVAILABLE TO SECONDARY PREFERENTIAL CREDITORS		2,621,909		3,477,576
Secondary preferential claims				
HMRC - VAT	(83,916)		(83,916)	
HMRC - PAYE	(11,044)		(11,044)	
Statutory Interest (8 Months)	(5,698)		(5,698)	
		(100,658)		(100,658)
AVAILABLE TO ORDINARY UNSECURED CREDITORS		2,521,251		3,376,918
Unsecured non-preferential claims				
Trade & Expense Creditors	(140,674)		(140,674)	
Non-Protected Rent Debt incl interest to 30 March 2022 and costs	(1,481,473)		(1,481,473)	
Statutory Interest (12 months from 31 March 2022 to 31 March 2023)	(155,726)		(155,726)	
		(1,777,873)		(1,777,873)
ESTIMATED SURPLUS AS AT 31 DECEMBER 2024 INCLUDING FF&E RESERVE		743,378		1,599,045
Proposed retention in FF&E Reserve		(200,000)		150,000
Working Capital		(250,000)		(250,000)
Available for proposal re Protected Rent Debt		293,378		1,499,045

The Applicant's Revised Formal Proposal

81. In accordance with my direction, on 7 November 2022[37] the Applicant submitted a Revised Final Proposal. That represented a reduction on its original Proposal. It was that:

    1. the Applicant proposes to pay, in settlement of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2020 to 18 July 2021 falling within the definition of Rent in s.2(1) CRCA, the sum of £261,112 plus VAT;
    2. the Applicant proposes to pay this sum of £261,112 in 6 instalments:
        a. on 24 June 2023, the sum of £43,518 plus VAT;
        b. on 29 September 2023, the sum of £43,518 plus VAT;
        c. on 25 December 2023, the sum of £43,518 plus VAT;
        d. on 25 March 2024, the sum of £43,518 plus VAT;
        e. on 24 June 2024, the sum of £43,518 plus VAT;
        f. on 29 September 2024, the sum of £43,522 plus VAT.
    3. the Applicant proposes the balance of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2022 to 18 July 2021 falling within the definition of Rent in s.2(1) CRCA be written off.

82. The Applicant relied on the Witness Statement of Mr Bonney dated 23 September 2022 together with the Second Witness Statement of Mr Bonney dated 7 November 2022 and the further documents exhibited[38]. The new exhibit comprised Mr Bonney's EOS v.2; Hotstats comparison; Administration Progress Report; What to look for in a hospitality TV; RBH October Financial Report.

83. Mr Bonney explained (para. 4):

[37] An application was made to me under s.11(6)(b) CRCA on 7 November 2022 at 3.29pm to extend time for filing and service to 5pm given an IT issue. I did this with the (immediate) agreement of the Respondent's solicitors. In the event, the Revised Proposal was served at 4.07pm.
[38] 125 pages plus electronic spreadsheets.

a. on 21 October 2022, RBH sent their October Financial Report. That contained actual figures for September 2022 (to replace the figures in the Forecast). They had also made some changes to the October 2022 to August 2023 Forecast;
b. the Applicant had come out of its fixed utilities deals since the Formal Proposal, and was now subject to variable rates. RBH had reported it had not yet been able to fix a new 6 or 12 month deal. Mr Gheewala had been told by Apirose's utilities broker that the Applicant was unlikely to be offered any fixed arrangements whilst it remains in Administration. RBH may be able to explore a new fixed rate deal with the existing provider, but had not yet done so. RBH's October Financial Statement contained utilities costs at variable rates to August 2023. As predicted by Mr Bonney and Mr Elliott, RBH's estimated variable utilities costs were nevertheless now lower than the previous RBH estimate in the Management Accounts and RBH Forecast. Mr Bonney commented that due to continuing volatility the estimates could be higher or lower than the Applicant may have to pay;
c. the FRP Administrators had submitted the 6 month progress report on 20 October 2022. Their costs of the Administration to date were significantly higher than Mr Bonney had estimated previously;
d. the changes in total revenues between September 2022 and March 2023 in the October Financial Report necessitated a small adjustment to the FF&E Reserve movements;
e. these changes were reflected in EOS v2.

84. RBH's October Financial Report showed the Applicant had increased revenue and EBT for September 2022 compared to RBH's forecast in the Management Accounts and RBH Forecast (para. 6). RBH had told him the Hotel experienced higher room rates in September and October 2022 than they had anticipated. That had increased total revenue from the RBH Forecast for September 2022 from £583,863 to £689,625[39]. As a result, RBH had increased its forecast revenue for October and

[39] Cell P44, tab 2019 and Cell H44 October Financial Report.

November 2022. RBH had also adjusted its costs, for example the sum paid into the FF&E Reserve, calculated by fixed percentage based on revenue (para. 9).

85. Mr Bonney explained RBH's forecasts were amended on a rolling basis each month and they had also amended their October 2022 to August 2023 forecast. He anticipated a further financial report on or around 21 November 2022. To the extent that I wished to take that into account, he said a copy could be provided as soon as prepared and circulated. He said that he would be happy to provide any comments and that the Respondent may also wish to comment on it (paras. 6-7)[40].

86. In terms of utilities, Mr Bonney added the Applicant was likely to remain on variable rates until it came out of administration, so the situation was likely to remain the same until at least March 2023 [assuming the Applicant came out of administration at that date following the conclusion of this arbitration before that date]. These were likely to be higher than fixed rates (para. 13).

87. Mr Bonney had previously given an estimate of £75,000 for the FRP Administrators' remuneration following their appointment and a total estimated cost of the Administration of £550,000. He said that this estimate was based on the FRP Administrators' suggestion prior to their appointment that their total time costs for a period of two years would be in the region of £150,000. On 20 October 2022, the FRP Administrators prepared and filed the 6 month progress report on the Administration[41]. FRP reported that their fees for less than one month following their appointment, up to 30 September 2022 amounted to £75,067. In addition, the Respondent's costs relating to the FRP Administrators' appointment and recoverable as an expense of the Administration amounted to £127,555. He said he was also advised that the FRP Administrators had instructed KPMG to undertake

[40] Mr Bonney made clear he understood there was no scope for the Applicant to prepare a further revised proposal at that point, but that I may consider it appropriate to assess the Applicant's Revised Proposal in the light of that report given it would be available by the date of my assessment.
[41] P6-60, SB6.

VAT returns which would involve further disbursements in the Administration. In consequence the total known costs of the Administration to 30 September 2022 amounted to £624,729. Assuming the Administration continued until the end of March 2023 (viewed at that stage), provision also needed to be made for the estimated costs to that date.

88. Mr Bonney said he had (para. 15):

> "assumed, conservatively, that FRP's total fees to the end of March 2023 will be £175,000 (£75,067 to date and a further £100,000 to the end of March 2023). I have also increased the legal fees to £347,664 to reflect the current legal fees reported by FRP of £297,664 (including the Respondent's costs recoverable in the Administration) and providing for a sum of £50,000 for further legal fees to the end of March 2023. I have increased the provision for Quantuma's fees to £275,000 and I have increased the sundry expenses to £30,000 to provide for the cost of the instruction of KPMG dealing with the VAT returns.
>
> 16.The increase in these figures is significant. However, it should be noted that the material increase is a consequence of the Landlord's decision to appoint replacement administrators."

89. As regards EOS v. 2:

> "The Estimated Outcome Statement v.2 collates all of these adjustments and indicates that the overall amount available for the proposal re Protected Rent Debt is lower, at £261,112. Unfortunately, while the forecast for trading over the next few months has improved, this has been more than offset by the significant increase in the administration costs caused by the Landlord's decision to appoint replacement administrators." (para. 20)

90. Mr Bonney exhibited the FRP Administrators' 20 October 2022 Progress Report for the period 31 March 2022-30 September 2022[42] ("the October Progress Report").

[42] SB6, B666-716.

In Section 2, Estimated Outcome for Creditors, the FRP Administrators recorded Mr Bonney and Mr Kiely were pursuing the first statutory objective as set out in paragraph 3(1) of Schedule B1 IA 1986, failing which they would pursue the second statutory objective.

91. FRP's October Progress Report included the following paragraphs (B670-671):

"On appointment of the Quantuma Administrators in March 2022 we understand that they were provided with trading projections displaying a £519k loss in the 12 month period to March 2023. However, we are pleased to report that the Hotel has in fact, under RBH's management, traded better than expected.

Ongoing operations and trading forecasts are prepared by RBH and these are being reviewed on a regular basis with meetings being held to discuss the budgets and the Hotel's current performance.

Trading outlook

The Hotel has "bounded back" considerably over the summer months due to certain high profile events and as reflected adjacently and below the first 12 months of the Administration are forecast to achieve a trading profit of approximately £1.0m.

However the UK economy is predicted to present more challenging times ahead as shown in the table below, with RBH predicting the company will now break even in the periods from January 2023 through to March 2024

…

Some element of uncertainty is being softened by the HM government capping energy costs for businesses for 6 months from 1 October 2022. However, at the time of writing the Company is still exploring the options available to secure the best terms for the supply of energy to the hotel. The FRP Administrators clearly cannot commit to long term energy contracts, and the implication of such

discussions with the Company being subject to formal insolvency proceedings its as yet not clear.

Based on RBH's advice and recent challenges to the UK economy, the energy comments above, and the risk of recession (following negative growth in the quarter to 31 August 2022) and well publicised talk of a "cost of living" crisis means that long term forecasting is difficult, and the future profitability of the Hotel remains uncertain.

The Rent Arbitration process

As noted earlier, the remaining Quantuma Administrator has sole conduct of the Arbitration process.

… The Quantuma Administrator continues to believe that the Company can be restored to solvency and has provided the following update:

> *The Company has recently referred a portion of outstanding rent … to arbitration proceedings …if successful, is likely to mean that all creditors may be paid in full. This process has recently commenced and in order not to prejudice the process, no further information will be provided at this time. However, creditors will be provided with further information once the outcome is known*.

We have requested a copy of the Arbitration submission for the Company's records and to better understand the purported route to solvency but have yet to receive it.

Having considered the financial information that is being prepared by RBH and the Directors sworn statement of affairs, it remains unclear to the FRP Administrators at this stage how the Company can be restored to solvency as this would require a larger right off than is due to [the Respondent] from the Protected Period. (approx. £2.9m).

Areas requiring further clarification include:

- Treatment of pre-appointment accrued FFE reserve, specifically its availability to bridge any funding gap;
- Assumptions regarding ongoing FFE accruals and likely capital expenditure to maintain Hilton brand standards (intrinsic to the Hotel value and performance);
- Working capital cycles including the treatment of VAT;
- Assumption that there are no tax charges from trading profits due to offset against historic losses;
- Level of Arbitration Award for Protected Rent Debt; and
- The Administration exit strategy, which must be done in a manner that protects creditors' interests.

Absent further information or explanation, our analysis indicates that there is a potential shortfall in funding to restore the Company to solvency and no apparent options to mitigate such shortfall.

This is an unusual situation and the FRP Administrators therefore consider it appropriate to give balanced opinions and context to creditors on the potential outcomes. We therefore comment hereon assuming that a rescue cannot be achieved.

Our analysis below [Estimated outcome for creditors assuming that a solvent rescue cannot be achieved (B672)], depicts an outcome assuming trading continues to March 2023 with an illustrative outcome as at March 2024 although our ability to continue to trade medium term cannot be justified at this point in time in view of the decrease on the estimated return for creditors and execution risk in an uncertain economy (i.e. an alternative strategy would be required; see later)".

In section 3, Anticipated exit strategy and extension to the Arbitration, they said (B674):

"Given trading forecasts and lack of visibility over the Quantuma Administrator's Arbitration process, the FRP Administrators will monitor the position closely and continually consider whether alternative strategies should be pursued. This could include a sale of the business and assets.

Creditors will be notified accordingly of any change in strategy or decision to extend the Administration …".

92. Mr Bonney commented on the FRP Administrators' October Progress Report at paragraphs 20-27 of his Witness Statement. He said the contents of the Report, particularly the contents mentioned below, did not reflect his understanding or views. He expressed his own views and reasoning in his Witness Statement as follows:

"21. Under the heading "trading outlook" (p14, SB 6), FRP state that "*the UK economy is predicted to present more challenging times ahead*". While I agree with that comment, I do not agree with their subsequent conclusion that RBH predicted that the Tenant would only break-even in the periods from January 2023 through to March 2024. As I explained in my first witness statement, the break-even position for EBT during this period reflected in the Management Accounts and RBH Forecast, on which the original Estimated Outcome Statement was based on the removal from EBT of up to 4%[43] of total revenue for provisions for renewal (to the FF&E Reserve) and also on forecast utilities costs which did not take into account the Governments scheme for business. As I also mentioned, RBH had confirmed that it would not require the Tenant to make that provision in the circumstances prevailing. In the light of these factors, the Tenant's trading is predicted to be better than break-even as suggested by FRP and the original Estimated Outcome Statement. The trading position is now predicted to be even more robust following the circulation of the October financial report.

[43] Rather than 3%

23. FRP's Administrators further comment in this section, that long term forecasting is difficult and future profitability is uncertain, is acknowledged. However, the key performance indicators for the hotel contained in the Management Accounts and RBH Forecast and updated in the October financial report suggest that it is more likely than otherwise that the hotel will remain profitable, barring any unforeseen contingencies arising such as a further extended period of lockdown. I note that that is also the view of Mr Elliott who has prepared a report on behalf of the Landlord.

24. Under the heading 2. Estimated Outcome for the creditors (p15, SB 6), FRP state that "*having considered the financial information that has been prepared by RBH and the Directors' sworn statement of affairs, it remains unclear to the FRP Administrators at this stage how the [Tenant] can be restored to solvency as this would require a larger write off of rent than is due to LBN from the Protected Period*" and "*absent further information or explanation, our analysis indicates that there is a potential shortfall in funding to restore the Company to solvency and no apparent options to mitigate such shortfall*". FRP goes on to state that they comment assuming that a rescue cannot be achieved.

25. I disagree with these comments and conclusions and I note that had I been asked to comment on them prior to the report being filed, I would have explained to the FRP Administrators the basis upon which their comments and conclusions do not reflect the Tenant's current financial position. As it is, the financials in both the Management Accounts and RBH Forecast and the October financial report, as summarised in the Estimated Outcome Statement and the Estimated Outcome Statement v.2, indicate that:

a. The Tenant will have sufficient funds to pay off its creditors, including the Landlord in respect of the Non Protected Rent Debt, and be restored to solvency (and viability) if it is awarded relief from payment of a substantial element of the Protected Rent Debt. It currently has sufficient funds to pay the all of its creditors save for the Landlord in respect of the Protected Rent Debt;

b. There is no potential shortfall in funding to restore the Tenant to solvency;

c. It is not correct to assume that a rescue cannot be achieved. A rescue can be achieved if the Tenant is granted relief from payment of a substantial proportion of the Protected Rent Debt.

26.It is notable that Mr Elliott's report prepared on behalf of the Landlord evidences his belief that the Tenant will be viable if it is granted relief from payment of part of the Protected Rent Debt, although I do not agree that the Tenant will be able to meet the amount he believes it ought to be able to pay in that respect."

93. In response to Mr Elliott's own Report, Mr Bonney said that if the Protected Rent Debt was limited to the period 17 May 2021 as advised by Freeths, Mr Elliott had failed to take into account the increase in the Non Protected Debt the Respondent was owed. That would increase by about £675,529.34 and this sum would fall to be removed from the sums available to meet the protected rent debt in the bottom line of Mr Elliott's EOS table. He also pointed out that on the basis it was agreed the Applicant should retain an FF&E Reserve, Mr Elliott's bottom line figure should be reduced by £300,000. These 2 adjustments would reduce Mr Elliott's figure available to pay the Protected Rent Debt to £349,628.66.

94. Generally, and subject to the points he himself identified, Mr Bonney encouraged me to prefer RBH's revenue forecast for 2023 and 2024 to Mr Elliott's own forecast. He noted that RBH is an independent hotel operator with particular knowledge and experience of running this Hotel over the last 5 years (para, 38). He said Co-Star's report had not been provided, but the table showed higher pre-COVID occupancy rates than RBH's actual figures (para. 39). He pointed out that Co-star's table also showed recovery would be continuing in the first half of 2023 and that it was reasonable to assume it would not, therefore, achieve the average occupancy achieved in 2019 for the year (para. 40). Additionally, the economy was not in the same position as in 2018, following COVID and the shock caused by the war in Ukraine, with the economy now in recession. Mr Bonney said a comparison set of

other hotels, prepared by Hotstats, an industry wide tool used by RBH, supported RBH's view of occupancy rates and room costs (paras. 42-48).

95. As to Mr Elliott's suggestion that mandatory capex may be overstated by Mr Bonney, and Mr Elliott's decision not to attribute any sum for smart room technology and new televisions, Mr Bonney said the expenditure was "mandated" for 2023 and 2024. He said Mr Elliott's suggestion Hilton may agree to defer is "speculation and unevidenced". Mr Bonney also expressed the view that hotel customers' choice of hotels is impacted by up to date technology so the cost should not be avoided even if it was not mandatory. He relied on a passage from HotelTechReport a website that comments on information technology in hotels (paras. 49-53).

96. In conclusion, Mr Bonney commended the merits of the Applicant's Revised Proposal.

The Respondent's Revised Formal Proposal

97. In accordance with s.11(4) CRCA, the Respondent's Revised Formal Proposal was due by 4pm on 21 November 2022. On the afternoon of 21 November 2022, the Respondent applied for an extension of time to 4pm on 24 November 2022 under s. 11(6)(b). I granted the extension.

98. As set out below (the Course of the Arbitration), it had become clear on 15 November 2022 that the Respondent was likely to challenge the Applicant's case on viability. Between 22 November and 30 November, a considerable amount of unexpected correspondence ensued. That necessitated a series of Orders for Directions in short order. This was the result of a letter from the FRP Administrators to Freeths dated 21 November 2022 regarding Mr Bonney's evidence in this Arbitration [paras. 318-319 below] and RBH's pessimistic treatment of utilities costs for 2023 and 2024 in the further forecasts they released that week.

99. On 24 November 2022, the Respondent submitted its Revised Final Proposal. This reduced the sum sought under its Proposal as follows:

    1. the Applicant pay in settlement of the protected rent debt, the sum of £962,664;
    2. the Respondent proposes the Applicant paid the sum of £962,664 in the following instalments:
        2.1 On 24 June 2023, the sum of £150,000;
        2.2 On 29 September 2023, the sum of £150,000;
        2.3 On 25 December 2023, the sum of £165,000;
        2.4 On 24 March 2024, the sum of £165,000;
        2.5 On 24 June 2024, the sum of £165,000;
        2.6 On 29 September 2024, the sum of £167,664.

100. The Respondent relied on the Report of Mr Elliott dated 24 October 2022 and the Further Report of Mr Elliott dated 23 November 2022. Mr Elliott's Further Report was accompanied by a statement of truth and statement of RICS compliance.

101. Mr Elliott's Further Report attached the FRP Administrators' letter dated 21 November 2022 to Freeths LLP and its enclosures [paras. 318-319 below]. They also included a letter from Freeths to the FRP Administrators dated 16 November 2022 enclosing a copy of Mr Bonney's Witness Statement [para. 132 below].

102. Mr Elliott's own comments on the contents of the FRP Administrators' 21 November 2022 letter were limited. He said they were better placed than him to comment on the Applicant's solvency and that he bowed to the FRP Administrators' analysis of that as it was outside his general area of practice (paras. 2.4-2.5, 3.3-3.4). He said:

> "I note that FRP are unclear as to how the [Applicant] can remain solvent. My forecasts suggest that the [Applicant] should be capable of trading profitably in

the future, although the overall level of profit may mean that the actual amount available will exceed the profit the hotel generates up to 31 December 2024".

103. The list of information Mr Elliott set out at paragraph 3.2 suggests that Mr Elliott had not been provided with RBH's latest forecast reports produced earlier that same week. As a result, he considered the same material available to Mr Bonney at the date of Mr Bonney's Second Witness Statement.

104. As before, Mr Elliott stressed that his Further Report had been prepared within a very short timetable and without full access to the management team or complete information. He repeated that it would be advisable to facilitate a meeting with RBH to discuss their forecast for 2022 and their projections for 2023 and 2024. He identified these appeared to form the backbone of what money was considered available to pay the Protected Rent Debt.

105. He said:

"In particular, it is unclear why RBH have not updated their 2024 forecast which appears to have been based on a return to their pre-pandemic trade, whereas most London hotels are now ahead of that level because of the stronger than expected recovery" (para. 2.7).

106. Mr Elliott noted (paras. 3.1-3.2):

a. RBH's October Progress Report showed the Applicant's actual September trade was 18% higher than RBH projected. He said that added £63,000 to the bottom line in October;
b. RBH had revised their forecast for the last 4 months of 2022 from a total EBT of £16,941 to £256,506. He said:

"This demonstrates the unpredictability of the hotel business and, indeed, highlights the unreliability of RBH's forecasts";

c. RBH's forecast turnover for the year ended 31 August 2023 was now almost 3.25% higher than their earlier forecast at around £7.8m as opposed to £7.546m. He said:

> "Interestingly, it remains below their actual turnover of £8.031m for 2019";

d. Quantuma's costs had increased by 14.5%;

e. he took a different view of the likely future trade that can be generated at the Hotel to RBH. That is, a more favourable view.

107. For the purposes of Mr Elliott's Further Report, Mr Elliott this time adopted the Applicant's calculation of the Protected Rent Debt for the purposes of his own calculation of the EOS v 2[44]. Commenting on RBH's forecasts as compared to actual figures, Mr Elliott concluded (para. 3.4):

> "in simple terms, over reliance on RBH's forecasts would appear imprudent as their forecast turnover and profits have recently been understated. For the month of September 2022, they achieved EBT that was some 200% higher than their forecast. After one month's further trade in, their revised EBT for the last four months of 2022 is forecast to be £265,506 as opposed to a previous forecast profits of only £16,941. Further Mr Bonney anticipates the actual profit will in fact be higher £295,000."

108. Mr Elliott properly accepted the points Mr Bonney had made about cash at the bank; the increase in the Non Protected Rent Debt if the Protected Rent Debt was varied; and his arithmetical error in the calculation of the FF&E Reserve (paras. 3.6-3.7).

109. Mr Elliott said his own 2023 forecast was 1.33% ahead of RBH's original Forecast. RBH had now adjusted their trade between January and August 2023, with the result they forecast a slightly higher turnover for 2023 at £7.743m. He said

[44] Making clear the issue was a matter for my determination. Again, at para. 3.5.

that was now less than 1% adrift from his own forecast. Mr Elliott added that his own forecast was coloured by the trade actually achieved, which was still lower than he would expect (para. 3.8).

110. Mr Elliott commented (para. 3.10):

"I remain confident that my forecasts are more realistic than those currently tabled by RBH".

111. Mr Elliott drew attention to a November 2022 PWC report on the hotel sector which suggested RevPAR growth of over 18% for 2023 if the winter was mild and/or 12% if the winter was harsh. PWC's worst case forecast for 2023 was a return to 101% of pre-Pandemic levels. He said this would suggest a turnover for the Property of over £8.81m for 2023.

112. Mr Elliott set out a table of monthly occupancy for the period where actual trade and / or late 2022 and 2023 and 2024 forecasts had been provided by RBH (3.10):

	2019	2020	2021	2022	2023	2024	Variation 2023 & 2024
Jan	53.9%	59.0%	27.6%	19.9%	64.8%	64.8%	0.0%
Feb	70.8%	67.3%	33.4%	44.6%	79.6%	84.6%	6.3%
Mar	68.5%	22.3%	34.6%	70.2%	77.9%	77.9%	0.0%
Apr	76.8%	5.6%	35.0%	75.0%	76.6%	75.0%	(2.0%)
May	80.6%	0.0%	35.5%	73.9%	77.2%	73.9%	(4.2%)
Jun	90.1%	0.0%	35.5%	83.9%	83.7%	84.5%	1.0%
Jul	90.3%	22.6%	47.2%	79.5%	77.4%	81.5%	5.3%
Aug	87.3%	28.6%	63.3%	71.7%	74.5%	82.4%	10.6%
Sep	77.9%	25.8%	67.7%	69.0%	76.0%	79.5%	4.5%
Oct	84.1%	25.1%	65.9%	77.3%	79.8%	80.3%	0.6%
Nov	83.6%	26.7%	77.6%	81.3%	79.4%	81.3%	2.5%
Dec	76.4%	29.9%	51.4%	73.3%	76.4%	77.2%	1.0%

113. In passing, I pause to note this table provides a good reflection of:

(a) the fact that January to March are always the poorest months for the Hotel – pre or post Pandemic;

(b) the impact of Covid;

(c) the pace of recovery from the affects of Covid once the Hotel was fully able to re-open after 17 May 2021 and then once the remaining Restrictions on the Bar and Restaurant ("Rule of 6" etc.), were removed on 17 July 2021;

(d) the impact on that recovery of the Omicron variant between December 2021 and February 2022;

(e) the level of occupancy achieved during the Administration;

(f) RBH's forecast figures for 2023-2024.

114. Mr Elliott made a number of further points about RBH's forecasting (paras. 3.10-3.19), that:

a. despite September 2023's actual occupancy proving to be 4.6% above RBH's September 2023 forecast, RBH had nevertheless decided to reduce October 2023's occupancy rate.

b. the variations in the table between RBH's Q1 in 2023 and 2024 could be explicable given the timing of Easter and other events. However, he failed to understand why RBH's April to August forecasts varied so much and never showed a return to 2019 levels;

c. he could not understand RBH's forecast growth in Average Room Rates. He said an explanation should be sought as to how they had been arrived at by RBH given they were below both the forecast prepared by PWC and Co-Star;

d. he was concerned at the number of different RBH Forecasts in circulation with different versions given to Mr Bonney and FRP within the same month;

e. whilst he considered RBH a "competent and experienced operator", RBH had recently been shown to underestimate trade and:

> "Operators occasionally understate trade to ensure they out rather than under perform";

f. his own thoughts on occupancy had been derived from discussions with Hilton and other Hilton owners who "universally" advised him Hampton by Hilton

lead the market in terms of occupancy and RevPAR. As a consequence, Mr Elliott said he:

> "would expect this hotel to lead the way in this area".

115. Mr Elliott did not consider the Hotstats comparison date produced by Mr Bonney was "meaningful" here. He said he "must confess to be shocked by the properties included [by Hotstats] as competitors". In any event, he said Mr Bonney had misunderstood the point he was making by reference to the costs when expressed on a Per Occupied Room Basis. The actual POR cost applied by RBH here was higher than he believed to be "realistic" (paras. 3.16-3.18).

116. As a result, at paragraph 3.19 he said:

> "In conclusion, I remain confident that the hotel can trade to turnover slightly ahead of that suggested by RBH. This is borne out by the latest forecast from PwC and Costar. I further remain of the view that there is potential to better control certain cost items with the results that I believe the hotel should be profitable in 2023 and beyond. I would however agree that the scale of the rent is such, that the ability of the property to be profitable is much more sensitive than normal to relatively small fluctuations in either turnover or costs."

117. Mr Elliott added he had scanned the customer reviews for the Hotel on Expedia, Tripadvisor, Booking.com and Kayak. There were nearly 10,000 reviews in total. The Hotel was generally rated Great, Excellent or Good (paras. 3.20-3.21).

118. Nothing caused Mr Elliott to consider the mandatory upgrade of the TVs would be a "pre-requisite for Hilton". His views on reserving sums in the FF&E Reserve for this remained unchanged (para. 3.20). He said the HotelTechReport did not appear to be focussed on the UK market, was somewhat dated and provided no background to the surveys it references. It did not lead him to alter his views that Mr Bonney set aside too much by way of FF&E in his EOS.

119. As against Mr Bonney's EOS v 2, Mr Elliott's own EOS v2 was:

LONDON DOCKSIDE LIMITED (in Administration) Estimated Outcome Statement (VAT excluded)					
		S Bonney Opinion		I Elliott Opinion	
ASSETS AT 31 AUGUST 2022	**Source**	**£**	**£**		
Cash at Bank - Day One		1,480,049		1,480,049	
FF&E Reserve - Day One		273,887		273,887	
Profit (EBT) 1 April to 31 August 2022 as per Management Accounts		785,714		785,714	
Paid into FFE Reserve 1 April to 31 August 2022		105,535		105,535	
Intercompany debtor		15,000		15,000	
			2,660,185		2,660,185
COSTS OF THE ADMINISTRATION					
Administrators' Remuneration (Quantuma)		(275,000)		(275,000)	
Administrators' Remuneration (FRP)		(175,000)		(175,000)	
Legal fees		(347,664)		(347,664)	
Sundry Expenses		(30,000)		(30,000)	
			(827,664)		(827,664)
Balance			1,832,521		1,832,521
MOVEMENTS IN THE FF&E RESERVE FROM 1 SEPTEMBER 2022					
FFE Reserve payable at 3% of total revenue to 31 December 2024		552,804		567,866	
Committed expenditure from FF&E Reserve between 31 March and 31 August 2022		(14,687)		(14,687)	
Anticipated mandatory expenditure from FF&E Reserve to 31 December 2024		-415,020		(100,000)	
Net increase / decrease in FF&E Reserve			123,097		453,179
Balance			1,955,618		2,285,700
PROFIT FROM FUTURE TRADING FROM 1 SEPTEMBER 2022 (before adjustments)					
EBT - September to December 2022		295,506		295,506	
EBT - 2023		75,312		199,135	
EBT - 2024		40,637		460,854	
Balance			411,455		955,495
EXPENSE ADJUSTMENTS					
Adjust EBT on reduction of payments into FF&E Reserve from 4% to 3% from April 2023		140,072		0	
Adjustment re reduced insurance costs		141,158		0	
Adjustment re increased business rates from 1 April 2023		(58,661)		0	
Adjusted balance			222,569		0
AVAILABLE TO SECONDARY PREFERENTIAL CREDITORS			2,589,642		3,241,195
Secondary preferential claims					
HMRC - VAT		(83,916)		(83,916)	
HMRC - PAYE		(11,044)		(11,044)	
Statutory Interest (8 Months)		(5,698)		(5,698)	
			(100,658)		(100,658)
AVAILABLE TO ORDINARY UNSECURED CREDITORS			2,488,984		3,140,537
Unsecured non-preferential claims					
Trade & Expense Creditors		(140,674)		(140,674)	
Non-Protected Rent Debt incl interest to 30 March 2022 and costs		(1,481,473)		(1,481,473)	
Statutory Interest (12 months from 31 March 2022 to 31 March 2023)		(155,726)		(155,726)	
			(1,777,873)		(1,777,873)
ESTIMATED SURPLUS AS AT 31 DECEMBER 2024 INCLUDING FF&E RESERVE			711,111		1,362,664
Proposed retention in FF&E Reserve			(200,000)		(150,000)
Working Capital			(250,000)		(250,000)
Available for proposal re Protected Rent Debt			261,111		962,664

120. All in all, Mr Elliott was of the view the Hotel will be more profitable in 2023 and 2024 than allowed for by Mr Bonney (and RBH). The amount Mr Elliott considered available for the Protected Rent Debt was therefore the higher sum of around £963,000 (para. 3.25). After corrections, the main areas of variance between his own assessment and Mr Bonney's being identified as the level of FF&E, the need for future capex and the profit he thought the Hotel can generate.

121. Mr Elliott noted, however (para. 3.26):

"As before, I would caution that at the current time, costs and income are changing very quickly and any forecast trade must be viewed with a greater than normal level of subjectivity".

THE COURSE OF THE ARBITRATION

122. There have been a series of Orders for Directions throughout the course of the Arbitration. There have been a number of extensions of time and there has been a need for additional directions to be given and further decisions taken.

123. After I encouraged discussion between solicitors, F+H wrote to me on 10 November 2022 identifying the legal issue relating to the extent of the Protected Period and the impact this had on the calculation of the Protected Rent Debt and, hence, the Non Protected Rent Debt. They provided a draft directions timetable. At that stage, they also informed me that Freeths had indicated in discussion that the Respondent may contest viability in any event. F+H said the Respondent's position should be clarified in its Revised Formal Proposal and the evidence supporting that. They said both solicitors believed that I would benefit from written submissions from the parties with regard to the matters in dispute and that an oral hearing may be necessary. As F+H put it:

"the parties believe that an oral hearing may be of benefit. At the very least, the financial information available in this arbitration is detailed and to the extent that you require clarification of any aspects of that information, providing that clarification orally is likely to be more effective than written clarification."

124. As mentioned in Mr Bonney's Second Witness Statement, F+H suggested I may wish to give a direction with regard to the Applicant's on-going RBH monthly reports (released on about the 21st of each month). Their proposed direction was that the Applicant provide the summaries of these reports to me and to the Respondent, along with updated Estimated Outcome Statements, so that these could be available on the date of assessment. The Applicant rightly acknowledged that CRCA

did not provide for the possibility of the Applicant revising its Proposal again following publication of these reports, but it was suggested that it was within my jurisdiction to direct that they were circulated so that I could, if I considered it appropriate, take them into account in making my Award.

125. On 15 November 2022, Freeths confirmed to me that the Respondent did dispute whether the Applicant was viable irrespective of any award of relief from payment.

126. On 21 November 2022 at 2.56pm, Freeths applied for an extension of time from 4pm that day to 24 November 2022 at 4pm for the Respondent to provide its Revised Formal Proposal. On 22 November 2022 I granted that extension.

127. On 22 November 2022, I notified the parties by email of my Order for Directions. That set a timetable for Submissions and Submissions in Reply (if so advised) running to 20 January 2022 with a provisional date to be fixed for a one day oral hearing to be held in the week of 30 January 2023. I also included provision for the appointment of an expert accountant to assist me with regard to viability, if required and agreed. I directed that the Applicant was to provide the summaries of the RBH Reports to the Respondent's solicitors and to myself, along with updated Estimated Outcome Statements, within 5 working days of release to them.

128. In accordance with my direction, on 22 November 2022 F+H provided RBH's latest actual results and forecast to March 2023 ("the November Financial Report"). They drew my attention to the following matters, in particular:

a. the Applicant's actual financial results for October 2022 showed increased total revenue of £790,676 compared to RBH's forecast revenue of £729,731 in the October Financial Report and actual EBT of £198,618 compared to RBH's forecast EBT of £133,184;

b. the utilities costs of £18,628 for October 2022 and RBH's forecast utilities cost of £44,187 for November 2022 reflecting the fact that the Hotel's utilities contracts came to an end in October 2022.

c. as a result of these changes, total actual and forecast EBT for the period September 2022 to December 2022 had increased to £413,545 from total actual and forecast EBT of £265,506 for the same period in RBH's October Financial Report.

d. a small reduction in EBT for the period January to March 2023 of £8,256 in the November Financial Report.

129. Mr Bonney had adjusted EOS v.2 to reflect these changes. This update was attached as EOS v.3. It showed the amount available for the Applicant's proposal regarding the Protected Rent Debt was now £370,895.

130. F+H also wrote they had that day received a further document from RBH with significantly increased utilities costs. They said the document was currently being reviewed and the Applicant would be seeking clarification from RBH. To that end, on 24 November 2022, Mr Johnstone of F+H wrote to me (and to Freeths) in the following terms:

"Further to my email on Tuesday, I now attach a document sent to me by RBH yesterday containing the October results, with a new forecast to September 2023. I refer to this as the November Financial Report v.2. I also attach a number of other documents which I need to bring to your attention. In the light of these documents, the Applicant applies for further and/or other directions to those proposed in your email at 12.24pm on Tuesday 22 November 2022.

The October financial results are the same as the October financial results in the November Financial Report sent to you on Tuesday. However, RBH has, apparently at the request of the Applicant's FRP Administrators, provided a new

forecast for subsequent months based on very significantly increased utilities costs.

The forecast utilities costs in RBH's November Financial Report were as follows:

November	December	January	February	March
44,187	48,244	38,219	46,658	41,221

RBH's November Financial Report v.2 has utilities costs as follows:

November	December	January	February	March
95,000	95,000	96,000	96,000	96,200

April	May	June	July	August	September
95,583	95,583	95,583	95,583	95,583	95.583

The cost of utilities has, it is said, doubled since the November Financial Report was prepared by RBH earlier this month.

The effect of this increase is stark. In the October Financial Report, the forecast EBT for the 12 months from September 2022 to August 2023 of +£379,956 [profit] has been replaced with a forecast EBT from October 2022 to September 2023 of -£178,716 [loss]. I am liaising with both the Quantuma Administrator, Simon Bonney (as it is he who has sole conduct of these arbitration proceedings) and also representatives of the shareholder (to whom the Applicant would be returned if it successfully exits administration and who have an intimate knowledge of the trading of the Hotel).

Mr Bonney has very serious concerns as to (a) the basis upon which RBH's new forecasts have been prepared and (b) whether the new forecast utilities costs are representative of the actual utilities costs the Applicant is likely to have to pay

over the next 27 months (while the November Financial Report v.2 extends only to September 2023, RBH has also prepared new forecasts for the FRP Administrators (again, at their request) for the whole of 2023 and 2024. The FRP Administrators have given those forecasts to the Respondent solicitors, without reference to Mr Bonney).

The basis upon which these documents have been prepared

1. RBH sent me the new report yesterday, following my request, made in the context of the November Financial Report originally provided to you only having a forecast to March 2023. I was also copied into an email on Tuesday by Simon Carvill-Biggs, one of the FRP Administrators, appointed at the request of the Respondent, to Mr Bonney, attaching a number of other documents. These documents and Mr Carvill-Biggs' email are copied here for your reference [as set out below]. There is an exchange of correspondence between Freeths and FRP regarding the Applicant's financial results and new forecasts prepared a few days ago for 2023 and 2024 [("the 21 November letter")].

2. [reference to the terms of the Court Order] …

3. It is apparent from the letter from FRP to Freeths dated 21 November 2022 [paras. 318-319 below] and the letter from Freeths to FRP dated 16 November 2022 to which it responds [para. 132], that the FRP Administrators have involved themselves in the conduct of these arbitration proceedings in a manner which does not respect paragraph 8(1) of the Court's order of 18 August 2022 [paras. 21-22 above]. I am instructed by Mr Bonney that:

(a) He was not consulted by the FRP Administrators with regard to the exchange of correspondence between them and the Respondent's solicitors despite having requested that any correspondence be shared between the Administrators before being sent out, given that there is a risk of perceived or actual conflict;

(b) The information provided by the FRP Administrators to Freeths includes, on its face, confidential information of the Applicant which would not, in the ordinary

course of events, be provided by an Administrator of a company to a creditor. In my view, it is not information that ought to have been shared in this manner with the Respondent in the context of this arbitration. In particular, Mr Bonney did not have the opportunity to consult with RBH with regard to the new forecast utility costs, in particular with regard to the context in which they have been used in the new forecasts (as to which I will comment further below).

4. It is also apparent that the FRP Administrators instructed RBH to prepare the new forecasts for 2023 and 2024 on the basis of the new utilities costs and that the purpose of their preparation was for use in this Arbitration. As noted in paragraph 67 of Mr Bonney's First Witness Statement, RBH advised that in the ordinary course of business it only prepares 12 month rolling forecasts each month and that it is not RBH's normal practice to provide longer forecasts.

5. It is also apparent that FRP has written to Freeths, the Respondent's solicitors (on the day that the Respondent sought its extension of time for the submission of its formal proposal) in a manner designed to support the Respondent's recently stated intention to argue that the Applicant's business is not viable (noting that the Respondent's original formal proposal served on 24 October 2022, was based on a report which indicated that the Applicant could afford to pay £1.5m over the course of the next two years). FRP refer to viability at length in their letter to Freeths in a manner which strongly supports the Respondent's new case that the Applicant's business is not viable. For the avoidance of doubt, Mr Bonney does not agree with FRP's analysis as to viability or of the Applicant's ability to exit Administration if the arbitration proceedings are concluded successfully. …

Whether the new forecast utilities costs are representative of the actual utilities costs the Applicant is likely to have to pay over the next 27 months

6. The purpose of rehearsing the above matters is to consider the context in which these new utilities costs and the new forecasts prepared by RBH for 2023 and 2024 have been created, with a view to determining how much weight should be given to them in respect of the determination by you of the viability of the

Applicant's business and to provide context for the Applicant's application for further and/or other directions.

7. Mr Bonney has very serious concerns about whether these new forecast utilities costs are truly representative of the costs that the Applicant is likely to have to pay over the next 27 months. In particular, at page 15 of the Freeths Response 21.11.22 document is an email from Alex Mackey to RBH and FRP setting out the likely utilities costs "*for the remainder of the winter*", assuming no contract is in place. According to FRP's letter (at page 3 of the pdf), this email forms the basis of RBH's new utilities costs figures.

(a) These utilities costs have been adopted by RBH for the next 27 months. Mr Mackey was, however, only forecasting costs for the period November 2022 to March 2023, a period of 5 months. It is not clear on what advice or evidence RBH has forecast the utilities costs for the period from 1 April 2023;

(b) Mr Mackey was also estimating the costs on the basis of there being no contract in place. RBH has adopted these costs for the next 27 months, apparently assuming that there will no contract in place for the whole period. It is not clear that that is a reasonable assumption;

(c) Mr Mackey estimates the electricity and gas costs for November 2022 to March 2023 to be £358,074, or £71,614.80 a month, based on 320,041 kWh electricity use and 365,265 kWh gas use. A further £6,000 a month is required to be added to cover other utility costs (water and waste), giving a total of c. £77,500 a month. RBH forecast £95,000 a month for these months (and following months). The reason for this difference is not explained;

(d) It is not clear whether and how the government support for businesses in respect of energy costs has been factored in. There are deductions in Mr Mackey's email which the Applicant assumes relates to the government support but no evidence is provided as to the value of that support;

8. The questions above arising out of these costs and the assumptions around them have not been set out by RBH or subject to any analysis (as far as can be

ascertained). Mr Bonney has not had the opportunity to discuss these questions with RBH.

In all of the circumstances, the Applicant considers that these new forecasts ought not to be relied upon as the sole relevant evidence as to the likely utilities costs over the next 27 months, particularly given the fact that your determination as to viability will depend on your assessment as to what these costs are likely to be. … It is not clear why RBH were not in a position to forecast utility costs accurately earlier (assuming that their then forecasts were inaccurate) because they and the Applicant were aware that the Applicant would be coming out of contract at the end of October 2022.

Furthermore, the manner in which these forecasts have been prepared, at the request of the FRP Administrators appointed at the request of the Respondent, may impact on the evidential weight that ought to be given to them. The Applicant will refer to this in submissions.

For this reason, the Applicant seeks additional and alternative directions: [including, the production of the Applicant's utilities consumption figures and for the appointment of an independent utilities expert in the Arbitration] ….

The Applicant does not make this application lightly but in recognition of the fact that the answers to the questions as to the utilities costs may well be crucial in respect of your determination as to the viability of the Applicant's business."

I have set the content of this letter out fairly fully because it marked a pivotal moment in the course of the Arbitration and the evidence.

131. The first of the additional documents F+H brought to my attention was an email entitled "LDL Administration Process" sent by Simon Carvill-Biggs of the FRP Administrators to Mr Bonney on 22 November 2022 at 4.40pm and its own attachments. The email said:

"We received the attached letter from Freeths [the 16 November 2022 letter] and have responded as attached [the 21 November 2022 letter].

Based on the information we have to hand, we no longer consider that a solvent exit, or "Rescue as a Going Concern" is achievable.

As a result we are now considering alternative outcomes to protect the interests of creditors and achieve the appropriate purpose of the Administration.

Happy to discuss at a mutually convenient time."

132. The attached letter from Freeths to the FRP Administrators dated 16 November 2022 was in the following terms:

"As part of this arbitration process, the Tenant has made formal revised Proposal in respect of the amount of protected rent payable together with supporting evidence regarding this in the form of witness statement by Simon Bonney dated 7 November 2022 (the "Witness Statement"). A copy of this revised proposal is enclosed with this letter together with the Witness Statement. At paragraphs 21–27 of the Witness Statement, Mr Bonney makes a number of comments in relation to your recent 6-month progress report [the October Progress Report] and so, we ask whether you have any comments in response to this or regarding the Witness Statement generally given that it raises certain challenges in relation to the content of your report.

We look forward to hearing from you."

133. The third attachment was the FRP Administrators' 21 November 2022 Letter to Freeths in reply. I refer to the content of this letter in detail in my Decision [paras. 318-319, 328 below].

134. The final attachments were an HDO 12m rolling forecast to Sep 23 and Appendix 5 Forecast Period ended December 2022; Appendix 5 Hampton Docklands

Calendar Year 2023 forecast; Appendix 5 Hampton Docklands Calendar Year 2024 forecast. These forecasts included RBH's latest increased forecast utility costs.

135. On 24 November 2022, I invited Freeths to provide their comments in response to F+H's proposed variation of the Directions timetable. In the event there was agreement between the parties, I indicated I would proceed to make a further Order for Directions. If there was not, I asked for both parties' availability to attend a virtual meeting to consider the Applicant's application and/or other directions in the week of 28 November 2022.

136. On 24 November 2022, Freeths asked me to amend the existing Directions to defer the date for the first Submission to 9 December 2022 as a result of the Applicant's application for further directions.

137. On 25 November 2022, Freeths wrote that:

> "given the serious and significant ramifications for the determination of the Arbitration and the important issues in discussion",

they considered the Applicant's application was better dealt with at a substantive application hearing where the Respondent was represented by Counsel. They suggested either 30 November 2022 or a date after 2 December 2022 (being the only dates on which their Counsel could appear). They said the Respondent intended to oppose the Applicant's application in its entirety and set out "non-exhaustive" reasons. Amongst other matters, they added:

> "Given the clear professional view provided by FRP in its correspondence of 21 November, irrespective of whether FRP are involved in the arbitration, it would seem likely that FRP are intending to recommend an insolvent exit from administration in any event given their interpretation of the forecasts."

138. On 25 November 2022, F+H agreed to Freeths' suggested extension of the dates for Submissions and to the virtual hearing date of 30 November 2022. I made

a further Order for Directions and arranged a 2.5 hour hearing on 30 November 2022 in accordance with the parties' agreed time estimate. During the afternoon of 29 November 2022, I was informed by F+H that the parties had reached an agreement on the Applicant's application for further directions. In summary, the parties had agreed to the appointment of a single joint utilities expert to advise on F+H's proposed questions (which Freeths agreed), and a set of further agreed directions. I made a further Order for Directions encapsulating the agreed terms and replacement dates on 30 November 2022. My Order included:

a. permission for the Applicant to file additional evidence with regard to the forecast cost of utilities and with regard to gas and electricity usage at the Hotel on a monthly basis for the months from November 2021 to October 2022 inclusive by 4pm on 1 December 2022 and the gas and electricity usage at the Hotel for November 2022 as soon as those figures become available;
b. permission to the parties to rely on the written report of an independent expert, being an energy broker or equivalent, to be appointed as a single joint expert, with regard to the agreed questions as to the likely cost to the Applicant of electricity and gas between November 2022 and 31 December 2024 based on the monthly electricity and gas usage recorded for the months from November 2021 to November 2022 inclusive, on certain agreed bases, amongst other matters;
c. the parties to agree the identity of the expert to be appointed and the terms of their appointment by 4pm on Wednesday 7 December 2022 or … for me to make a direction for the appointment of the expert and the terms of the appointment by 4pm on Thursday 8 December 2022;
d. the expert's report to be filed by 4pm on 15 December 2022 or as soon as practicable thereafter;
e. permission to the parties to submit written questions to the expert in connection with their report within two days of the expert's report being filed;
f. extensions to the timetable for Submissions and Replies (if any) such that these would be provided sequentially between 11 January and 10 February;

g. provisional date to be fixed for a one day oral hearing to be held in the week of 20 February 2023;
h. the reservation of the right for me to appoint an expert accountant to assist me given the issues now identified as in dispute, including viability;
i. the Applicant to provide the summaries of the RBH Reports to the Respondent's solicitors and to myself, along with updated Estimated Outcome Statements, within 5 working days of release to them.

139. In accordance with my further Order, Mr Johnstone provided a Witness Statement dated 1 December 2022. He explained that the figures in the documents attached had been given to him by Sameer Gheewala of Aprirose and Andrew Marr of RBH. The exhibit contained sample invoices for gas (April 2022) and electricity (June 2022); the first two pages of a presentation prepared by RBH for its clients in relation to energy usage and costs at hotels; and some comments by RBH with regard to wholesale energy prices.

140. On 7 December 2022, the parties and I agreed the appointment of Mr Tom Kelly of Inteb Commercial Energy Experts ("Inteb"), as a single joint expert, and the terms of his appointment. The documents provided to him included:

a. an email from Mr Mackey which was a copy of page 15 of the pdf entitled "Freeths Response 21.11.2022", one of the enclosures to Mr Elliott's Further Report dated 24 November 2022 relied upon by the Respondent in respect of its Revised Proposal;
b. the document entitled RBH's estimated energy costs from 1 November 2022 to 31 December 2022 which was an amalgamation of data from the spreadsheets enclosed with Mr Elliott's Report dated 24 November 2022.

RBH's document "estimated energy costs from 1 November 2022 to 31 December 2022" forecast was:

Year	Electricity Costs	Gas Costs	Total Costs
2023	£768,000	£312,000	£1,080,000
2024	£612,000	£249,600	£861,600

141. Mr Kelly's independent Joint Expert Report was dated 15 December 2022. Mr Kelly's own forecast cost of electricity and gas for the Hotel between 1 January 2023 and 31 December 2024, on the basis of the Applicant remaining on variable rates with its current suppliers for the months November 2022 to March 2023 inclusive, and on variable rates with other suppliers (if cheaper) for the months 1 April 2023 to 31 December 2024 inclusive, was very considerably lower than RBH's November (v2) forecast. It was as follows:

Year	Electricity Costs	Gas Costs	Total Costs
2023	£591,753	£199,437	£791,190
2024	£591,753	£217,484	£809,237

Based on current Out of Contract (OOC) rates of 73.03p/kWh (electricity) and 26.9p/kWh (gas).[45] Rates inclusive of The Energy Bill Relief Scheme (EBRS) discount until 31/03/2023 and Climate Change Levy at the prevailing rate but excluding Standing Charges or VAT.

Mr Kelly explained that the forecasted costs on variable rates would be the same from the Applicant's current supplier or any other supplier. A new supplier would only take on the Applicant as a new client on the basis of a contracted term, and as a result contract rates would apply (rather than variable or deemed rates). Generally, Mr Kelly advised, non-contract terms were similar across suppliers, so he did not expect significant variation or benefit between staying with the current suppliers on variable rates and moving to a new supplier to also remain on variable rates.

[45] In an email dated 16 December 2022, Mr Kelly confirmed in answer to a question from F+H that these figures did not include any provision for movement in electricity and gas prices during 2023 and 2024 as these were as yet unknown.

142. Mr Kelly was also asked to give his opinion as to the forecast cost of electricity and gas for the Hotel between 1 January 2023 and December 2024 on the basis the Applicant moved to a new fixed rate contract with its suppliers or other suppliers from 1 April 2023 and remained on fixed rates to 31 December 2024. In Mr Kelly's opinion, the figures would be much lower again:

Year	Electricity Costs	Gas Costs	Total Costs
2023	£517,283	£96,532	£613,814
2024	£543,406	£116,856	£660,262

Based on contracted rates of 69.0p/kWh (2023) and 67.0p/kWh (2024) for electricity and 17.0p/kWh (2023) and 17.0p/kWh (2024) for gas, accurate as of 09/12/2022. Rates inclusive of The Energy Bill Relief Scheme (EBRS) discount until 31/03/2023 and Climate Change Levy at the prevailing rate but excluding Standing Charges or VAT.

143. In response to a question asking Mr Kelly to estimate standing charges, Mr Kelly explained that he could not estimate the standing charges for each agreed scenario until there was a contract offer in place. He said suppliers often use this to negotiate preferential unit rates, payment terms etc, rather than have a fixed Standing Charge price. As a result, he said he could not provide an accurate figure for this to include in the calculations.

144. Mr Kelly said that his assessment had been made on the likelihood of the Applicant obtaining a new fixed rate contract assuming it was able to come out of Administration (for the purposes of the questions put to him on 31 March 2023), based on current contracted rates for 2023/2024. He said there was currently no indication that the Applicant would be unable to obtain a fixed rate contract if it was able to come out of Administration, however this depended on the credit rating and risk profile undertaken by potential suppliers. He pointed out additional requirements might apply as part of a fixed rate contract offer, such as shorter BACS payment terms, Direct Debit payment or security deposit requirements.

145. He added that he had not made any assumptions that the Applicant could not obtain a new fixed rate contract if it remained in Administration. Whether this was or was not the case would not be known until suppliers were approached direct to undertake credit checks on the Applicant. If the Applicant was not able to come out of Administration and obtain a fixed rate contract with its current supplier or other suppliers, then the variable rates he had provided in answer to the initial question would apply.

146. Mr Kelly's Executive Summary encapsulates his independent expert opinion as follows:

> "Inteb have provided technical expertise relating to the forecasting of operational utilities costs at the Hampton by Hilton Hotel in response to the current forecast 2023 & 2024 figures.
>
> Currently the hotel is looking at forecast energy costs of £1,080,000 in 2023 and £861,600 in 2024, however we have calculated that these could be reduced to £791,190 and £809,237 respectively when looking at current variable rates, and £613,814 and £660,262 respectively if the [Applicant] is able to move to a new fixed rate contract from 1 April 2023, based on current contracted rates for the 2023 and 2024 years.
>
> This represents a significant cost saving on utilities against the current forecast across both years."

147. On 16 December 2022, Mr Kelly answered additional questions posed by F+M as follows:

> <u>What is the current trend for electricity and gas prices – upward, downward or steady?</u>
>
> Based on the most recent data set available (as at 16/12/2022) the current trend for electricity and gas prices is that recent marginal gains seen due to the recent cold snap are being offset by the healthy amount of LNG cargoes coming into the UK and Europe, and improved wind forecasts alongside warmer temperatures

leading to lower gas demand. Prior to late November prices were showing a steady drop back to levels seen during summer-22, a trend which has been arrested due to the colder than usual December temperatures.

How do you anticipate electricity and gas prices changing during 2023 and 2024 or is it not possible to come to any conclusion about this?

Electricity and gas prices remain very volatile and subject to short-notice change from geopolitical issues such as the ongoing Russian involvement in Ukraine and the ability of EU nations to store and import gas for power generation. As a result it is difficult to accurately forecast how prices will change during 2023 and 2024, so we are unable to come to a conclusion about this. As previously stated we prefer to base our calculations on fact, and so forecast figures have been provided on forward electricity and gas prices at a point in time (09/12/2022) based on 12/24 month contract prices we have been obtaining for other clients of similar volume and load profile.

148. On 19 December 2022, Mr Kelly answered additional questions posed by Freeths as follows:

The forecast consumption in scenario (ii) and scenario (iii) remains constant. Given the unit cost of electricity reduces 5.5% from 73.03p/kWh to 69.0p/kWh, why is the total cost of electricity in 2023 12.6% lower?

The total cost of electricity in 2023 is lower because the Energy Bill Relief Scheme (EBRS) discount applies until 31/03/2023. Currently there is no indication that the scheme will be extended beyond this date, so the discount has not been factored in to the same periods during 2024

Same question in respect of gas: how does a 36.8% reduction in the unit cost (26.9p to 17.0p) result in a 51.6% reduction in the annual total cost in 2023?

The total cost of gas in 2023 is lower because the Energy Bill Relief Scheme (EBRS) discount applies until 31/03/2023. Currently there is no indication that the

scheme will be extended beyond this date, so the discount has not been factored in to the same periods during 2024.

The report states that "an assessment has been made on the likelihood of the Applicant obtaining a new fixed rate contract assuming it is able to come out of Administration…". But it does not then give that assessment. Please state the likelihood in percentage terms.

As stated in the report issued on 15/12/22 (v4.0) "There is currently no indication that the Applicant would be unable to obtain a fixed rate contract if it is able to come out of Administration, however this depends on the credit rating and risk profile undertaken by potential suppliers. Additional requirements may apply as part of a fixed rate contract offer, such as shorter BACS payment terms Direct Debit payment or security deposit requirements." As such we are unable to state a likelihood in percentage terms as we would need to approach a number of suppliers on behalf of the Applicant to obtain this information from them

Is it also correct that that you have not made any assumption that the Applicant will be able to obtain a new fixed rate contract if it remains in Administration?

Yes, that is correct

In your experience what percentage of customers in Administration are able to obtain a new fixed rate contract?

We do not hold an accurate number in response to this question, and the likelihood is that a response based on past experience will have changed significantly since Covid19 and the current Energy Crisis, as energy suppliers focus more on low risk customers. As stated in our report we would not know this for sure until suppliers are approached direct to undertake credit checks on the Applicant.

Please confirm that you have not made provision for any movement in future prices as it is not possible to predict such movements with an acceptable degree of certainty.

We have not made provision for any movement in future prices as it is not possible to predict such movements with an acceptable degree of certainty. Electricity and

gas prices remain very volatile and subject to short-notice change from geopolitical issues such as the ongoing Russian involvement in Ukraine and the ability of EU nations to store and import gas for power generation. The forecast figures we have provided on forward electricity and gas prices are correct at a point in time (09/12/2022) based on 12/24 month contract prices we have been obtaining for other clients of similar volume and load profile."

149. Notwithstanding the Submissions later made by the Respondent's Counsel that the questions put to Mr Kelly were not the right ones, these were agreed questions. As an independent Joint Expert, I accept Mr Kelly's evidence at the date it was given as the best evidence as to the then appropriate forecast pricing of variable and fixed price contracts for the Hotel[46].

150. Mr Kelly's Expert Report vindicated Mr Bonney's concerns about the level of the utilities forecasts in RBH's November Report v.2, as expressed contemporaneously by F+H on 24 November 2022.

151. In accordance with my Directions, on 16 December 2022 F+H provided:

a. RBH's November results. Those showed actual EBT for the month at £124,994 (profit); and

b. RBH's forecast to October 2023. RBH forecast EBT -£16,004 (loss)

("the December Financial Report").

RBH's Andrew Marr said in his covering email to F+H said:

"See attached report as requested - November actuals + updated forecast to October '23. Please let me know if you have any questions.

[46] I note, of course, that because no fixed price contract was entered on 1 April 2023 my reliance in that regard is limited to the points of principle Mr Kelly set out.

Note regarding utility costs: We have not yet received an invoice for November gas costs

Subsequent to finalising the November numbers, we received an electricity invoice which was around half what we were expecting. We will correct in December hence the big drop in costs from November to December in the forecast. Our brokers' view is that current costs will continue and hence utility costs have dropped considerably since the last forecast issued."

152. F+H enclosed Mr Bonney's revised EOS v.4. They provided the following comments to assist myself and Freeths with regard to the updated content of that document:

"The revised Estimated Outcome Statement v.4 contains the following adjustments from the previous version:

a. There is a small upward adjustment to "*FFE Reserve payable at 3% of total revenue to 31 December 2024*" reflecting an increase in forecast revenue for the period covered by the December Financial Report.

b. There is a small downward adjustment to "*Adjust EBT on reduction of payments into FF&E Reserve from 4% to 3% from April 2023*".

c. There are significant adjustments to the EBT figures for September to December 2022, 2023 and 2024 under the heading "*Profit from future trading…*". These adjustments reflect higher actual EBT than previously forecast in November 2022, consequent adjustments to forecast EBT for December 2022 and the significant changes to electricity and energy costs since the Estimated Outcome Statement v.3 was prepared. Note that the EBT figures for the period from November 2023 come from the most recent RBH forecast for that period, attached to Mr Elliott's report dated 24 November 2022 prepared on behalf of the Defendant.

d. An additional adjustment has been added under the heading "Expense Adjustments" to reflect Mr Kelly's forecast for energy costs for 2023 and 2024, assuming that the Applicant is able to enter into fixed rate contracts for gas

and electricity from April 2023. The calculation of this adjustment is at the bottom of the page. Note the following in relation to these calculations and the adjustment:

(i) The base line figures for gas and electricity come from RBH's December Financial Report, to reflect RBH's downward adjustment of forecast energy costs, rather than from the figures given to Mr Kelly in his instructions. This is because RBH's new forecasts for EBT are based on their new lower forecast for energy costs, so any adjustment to those forecasts must take that into account.

(ii) I have added to Mr Kelly's forecast costs a yearly sum of £49,500 to reflect the fact that he is unable to estimate the cost of standing charges and has therefore excluded them from his forecasts. The figure of £49,500 per annum reflects Mr Mackey's advice to RBH previously to provide for £4,000 a month for electricity and £4 a day for gas in respect of standing charges.

(iii) It is notable that following RBH's downward adjustment to energy costs, their forecast and Mr Kelly's forecast for variable rates are very similar. However, there is a substantial adjustment in the event that the Applicant is able to secure fixed rate contracts from April 2023.

(iv) For the purpose of the Estimated Outcome Statement v.4, the Applicant provides for an adjustment based on fixed rates being obtained in April 2023. However, as submissions may be made in relation that, I have included the xl version of the [EOS] so that the effect of its removal of the adjustment can be ascertained.

(v) There is a significant reduction to the figure available for the proposal re Protected Rent Debt, the cause of which can be almost entirely attributed to the sudden increase in forecast energy costs.

If I can be of any further assistance to either you or to Mr Turner in relation to the interpretation of any aspect of the Estimated Outcome Statement, I am willing and able to provide that assistance ahead of the

date for submissions, with a view to narrowing any issues to those that are genuinely in dispute."

153. On 11 January 2023, the Respondent provided its Submissions in accordance with my Directions. In accordance with the parties' agreement and on the Applicant's application, I extended time for the Applicant's Submissions to 23 January 2023 (an IT issue had resulted in the need for a short extension), and for the Respondent's Reply to 2 February 2023.

154. The Respondent's Submissions attached a copy of a further letter from the FRP Administrators to Freeths dated 27 January 2023. The letter of 27 January 2023 refers to a letter from Freeths to the FRP Administrators dated 19 January 2023. Freeths 19 January 2023 letter has not been provided. Nor has the email of 23 December 2022 mentioned there.

155. In the FRP Administrators' 27 January letter, Mr Carvill-Biggs said he found it:

"somewhat surprising given the contents of my letter dated 21 November 2021, and email dated 23 December 2022, that the information [Freeths was] requesting has not already been shared with the Arbitrator in relation to the issue of viability".

Of course, that was not the case. I refer further to the content of this letter in my Decision [para. 330 below].

156. The Applicant's Submissions were provided in accordance with my direction. They attached EOS v. 5.

157. On 23 February I sought the views of both parties as to the appointment of an expert accountant in accordance with the provision which had been included in the agreed orders for Directions. I also sought the parties' views as regards an oral hearing focussing on the various forms of financial information provided.

158. On 23 February 2023, F+H responded constructively to the Respondent's reasonable complaint regarding the plethora of different spreadsheets it was, by now, necessary to open to establish RBH's actual figures for 2022 (and the fact "they do not allow ready comparison of the figures"[47]). F+H produced "Spreadsheet L: Consolidated Financial Summary for 2022".

159. At the stage the Arbitration process commenced in September 2022, the Applicant had actual results for 2022 up to 31 August 2022. Spreadsheet L included RBH's October, November and December Financial Reports. These contained respectively, the Applicant's actual results for September, October and November 2022 and the actual results for December 2022 which they had just received.

160. Having clarified, through exchanges of correspondence, that the role of any accountancy expert would be limited to any opaque issues of documentary interpretation, and having established both parties' views as to their preferred way forward[48], I wrote to both parties on 1 March 2023 to arrange a ½ day oral hearing. The hearing to be focussed specifically on the key financial information. The main function being clarification, and the removal of any possible misunderstandings between the parties and myself, in considering the extensive financial materials.

161. In my email of 1 March 2023, I provided a range of dates for that short oral hearing to take place from 9 March onwards. I made clear my concern if the Arbitration timetable was yet further delayed. On 8 March, the hearing was arranged for 22 March 2023 (the first date when the Respondent's Counsel was available).

162. On 16 March 2023, F+H wrote to me and to Freeths enclosing a copy of a letter to them from the FRP Administrators' solicitors, Ashtons, dated 14 March 2023. F+H

[47] Respondent's Submissions in Reply para. 16.
[48] In essence, concerns the involvement of an expert accountant would now delay the conclusion of the Arbitration.

explained Ashtons' letter said F+H was to forward the letter and an attached spreadsheet to me (and to all parties in the Arbitration), and in the event F+H did not so by 10am 16 March, Ashtons would contact me. F+H said their own instructions were to provide me with the Applicant's comments on Ashtons' letter and spreadsheet and they proposed to do that during the course of the next day. They said they would limit those comments and avoid any repetition of points already made in Submissions.

163. I did not open Ashtons' letter or the spreadsheet pending Mr Johnstone's submissions and correspondence from, and with, Freeths about it. Ashtons' letter was later admitted into evidence on 22 March 2023. I summarise its content below (Decision) [para. 338]. For present purposes, I simply note that the letter stated the FRP Administrators intended to apply to the High Court for Directions unless Mr Bonney accepted their view as to viability for the purposes of this Arbitration. The FRP Administrators said viability was ultimately a matter for them alone.

164. At 11.32am on 16 March 2023, Ashtons wrote to me direct in their capacity as the solicitors acting for the FRP Administrators. Ashtons said that although F+H had informed them they had forwarded Ashtons' letter to me it was "regretful that (despite our request) we were not copied into that correspondence to you". The email continues:

> "I am therefore now writing to you directly in order to ensure that you have my and Fiona's contact details in relation to any matters within the arbitration proceedings where input from our clients is required. I trust that you have been made aware by Mr Bonney and his solicitors, and as is clearly set out in our attached letter, that my clients have conduct of all matters in the administration of London Dockside Limited ("the Company"), save for conducting the arbitration process. As such, any matters such as the exit strategy from administration, which is of course crucial in the context of considering viability for the purposes of the arbitration process, fall within our clients' remit and are matters in relation to which our clients have to be consulted within the arbitration process.

I trust that you are making the landlord's representatives aware of my clients' position, our letter of 14 March 2023 and the effect it has on the arbitration process.

In the circumstances, please ensure that we are advised, as a matter of urgency, of any upcoming steps within the arbitration process at which viability (or indeed any other matters such as payments to creditors and other matters that fall within my clients' remit) will be addressed.

For ease of reference, I attach a further copy of our letter dated 14 March 2023 but understand that this letter and the enclosures referred to therein (i.e. our clients' calculations and a bundle of relevant correspondence) have already been forwarded to you by Freedman + Hilmi.

Please kindly acknowledge receipt of this email."

165. F+H wrote to me, and to Freeths, at 1.03pm that day. Mr Johnstone said (amongst other matters):

"…, until such time as the High Court gives further directions, Mr Bonney has sole conduct of these arbitration proceedings on behalf of the Applicant and, in my submission, neither Ashtons nor the FRP Administrators have locus to write you or to request you to communicate with them in connection with the arbitration process.

I would also mention that the reason why the split of duties in relation to the conduct of the administration was put in place and agreed to by the Respondent was to prevent the possibility of there being any conflict of interest in the conduct of the arbitration in circumstances where FRP's appointment was made at the request of the Respondent and FRP had advised the Respondent with regard to the administration prior to their appointment. The appointment of a conflict administrator in this type of situation is not unusual.

In summary, in my submission:

1. The FRP Administrators do not have any role in the conduct of the arbitration proceedings on behalf of the Applicant;

2. Ashtons is not the appointed legal representative of the Applicant in these arbitration proceedings;

3. Neither FRP nor Ashtons have locus to write to you or to request you to communicate with them in connection with the arbitration;

4. Freedman + Hilmi LLP is the appointed legal representative of the Applicant pursuant to s.36 of the Arbitration Act 1996;

5. Accordingly, it would be inappropriate for you to communicate with Ashtons or FRP direct;

6. You may give such directions to the parties' representatives as you consider appropriate in accordance with your powers under the Arbitration Act 1996 and the Commercial Rent (Coronavirus) Act 1996, including in relation to the provision of evidence, if you think it is necessary or appropriate to do so;

7. It is a matter for you to accord such weight as you consider appropriate to any evidence in Ashtons' letter that is relevant to the issues you are due to determine in your award.

… Neither I nor Mr Bonney have been given any financial information by the FRP Administrators in relation to the Applicants' results for January and February 2023, despite a number of requests, so the more recent financial information contained in the spreadsheet, including the substantially updated forecasts for trading during 2023 and 2024, is new to us both. I would hope therefore that you will accord us the opportunity to comment on it, at least briefly and subject to the Respondent having the same opportunity. ….".

166. At 10.45am on 17 March 2023, Freeths wrote to me:

"…, the FRP Letter raises several serious questions within the arbitration proceedings such that we consider that you must proffer further directions before the parties are able to proceed further.

We would, therefore, kindly request that you provide clarification / directions in relation to the following issues: -

Whether the parties have permission to rely upon the FRP Letter and supporting bundle (presumably these form part of the correspondence and it is therefore not for Mr Johnstone alone to determine the relevance of these to the arbitration)?
If so, what directions should be made for the parties to make submissions in relation to this new evidence?
Whether the parties have permission to make submissions in relation to Ashtons email of 11:32am (although it appears that Mr Johnstone has also sought to do so) and, if so, what directions are made in this regard?
Whether the hearing should go ahead on 22 March 2023 if an application to Court is made by FRP, as proposed in their letter, and which is not heard prior to 22 March 2023?
If the hearing does proceed, will the FRP letter form part of the subject matter that the parties will be required to comment / make submissions on?
If an application to Court is made by FRP, should the arbitration be stayed until determination of that application?"

"We understand from Ashtons that Mr Bonney has sought an extension of time until 5pm today to respond to their letter; however, should they not receive confirmation of his agreement to their client's position, then they intend to make an application for directions urgently thereafter. If Mr Bonney does not intend to comply with Ashtons' request (which seems likely), then an Insolvency Court will be asked to determine issues that will have a direct and serious effect on the conduct of arbitration and the matters to be determined within it."

"In conclusion and as stated above, the decision of what directions should be made in this arbitration and how it might interplay with the anticipated application by FRP for determination of key issues pertaining to the viability of the Applicant is yours. However, to the extent that it is requested, the Respondent's principal position is as follows: -

i. the parties should be entitled to rely upon the FPR Letter in the arbitration.

ii. Mr Johnstone should provide the bundle of documents enclosed with the FRP Letter together with any response made by the Applicant and any subsequent correspondence / application relating to this

iii. The parties should be entitled to make submissions in relation to the FRP Letter and any response by the Applicant.

iv. If an application for directions is made by FRP, then the arbitration should be stayed pending determination of that application."

Freeths did not seek to make any submissions in opposition to the points F+H had raised regarding Ashtons' actions in corresponding directly with me, and requesting that I correspond with them. As F+H's points regarding Ashtons' locus in this Arbitration reflected my own views, I have not entered correspondence with them.

167. In their response, F+H pointed out that the Arbitration was duly constituted under the CRCA 2022 and was being proceeded with by the Applicant in accordance with the directions of the High Court dated 18 August 2022 and was already at a very late stage. They said Ashtons' letter was not clear what directions the FRP Administrators may seek now which would impact on the conduct of the Arbitration: sub-paragraph 18a to d. of the Ashtons' Letter set out the directions they say that they intend to seek in very general terms. In relation to those, they said:

> 18a. clarity on the basis of the Joint Administrators' appointment and the proposed exit strategy.
>
> The basis of appointment is not in dispute. The proposed exit strategy is currently a matter for the FRP Administrators but, as has been set out in submissions, it is not fixed and the shareholder of the Applicant is entitled to contest that strategy pursuant to para 74 of the Insolvency Act 1986. <u>The Applicant's position in the arbitration with regard to viability at the time of assessment is therefore that the</u>

mode of the Applicant's exit strategy may include a solvent exit. The FRP Administrators may apply to the High Court for clarity with regard to their exit strategy but the High Court will not give approval to an exit strategy in advance. If a dispute between the FRP Administrators and the shareholder and/or Mr Bonney as to the proper exit strategy is referred to the High Court, the High Court will determine that dispute but it is unlikely that the determination will take place in the near future. The parties to that dispute will need to prepare evidence and a hearing will need to be arranged. So, unless the arbitration proceedings are:

(i) stayed … pending such a dispute being determined by the High Court or

(ii) stayed by the High Court by means of an injunction pending such a dispute being determined by the High Court

the FRP Administrators' application for directions relating to the exit strategy are not going to impact on the conclusion of the arbitration. In relation to (i) above, the Applicant does not agree that a stay imposed … would be appropriate … and in relation to (ii) it is not clear … that the High Court has jurisdiction to order the arbitration proceedings be stayed and, even if it did have jurisdiction, …, it is highly [un]likely that it would make such an order in circumstances where the arbitration is already at its last stage and the FRP Administrators have done nothing to date to bring this matter to the High Court since September 2022. Furthermore, there is a real question as to why the FRP Administrators consider it necessary to intervene in the arbitration.

18b. to d. are not matters which impact on the conduct of the arbitration. If the High Court makes an order in the future that clarifies or changes the split of duties in the 18 August 2022, that may result in a change of the Applicant's position in the arbitration, assuming the arbitration has not already concluded, but that cannot be anticipated and would only take effect from the date of the High Court's order. For the time being, the order of 18 August 2022 remains binding. In my submission, there is no conflict of laws and this is covered in the Applicant's

submissions. In any event, in relation to the arbitration, this is a matter for you, not the High Court. 18d. is not a matter that needs concern you.

I would emphasise two further points in relation to what Mr Turner says:

(a) The exact directions that the FRP Administrators may seek from the High Court are not set out in any detail. Their letter in relation to this is very vague.

(b) It is unclear what the FRP Administrators' motive is in seeking to intervene in the conduct of the arbitration at this late stage. You may or may not consider that to be relevant, but if you do consider it to be relevant:

The Applicant has incurred the vast majority of the costs it will incur in the arbitration already, so it cannot be a concern with regarding to the incurring of future costs. There is no risk of an adverse costs order in respect of inter-partes costs by reason of s.19(7). The costs associated with your fees are already fixed by s.19(5) and (6). An award of relief from payment of the Protected Rent Debt will benefit the general body of creditors, as it will reduce the Applicant's liabilities. The only party that benefits from the FRP Administrators' intervention is therefore the Respondent."

168. I invited the parties to liaise in the first instance, and then to revert to me. On 17 March 2023, I made a further Order for disclosure of the new RBH material and bank statements. The production of these actual figures and new RBH forecasts was agreed by Freeths.

169. On 20 March 2023, I issued my reasoned decision that the Arbitration should proceed, including the hearing on 24 March 2023. I said I was prepared to limit that hearing to the information already provided prior to 16 March 2023 if to do otherwise would cause the Respondent any prejudice in preparing for the hearing. I adjourned consideration of the parties' submissions regarding the treatment of the Ashtons' letter until the conclusion of that hearing.

170. Following my Order, on 21 March 2023 Ashtons provided F+H with the new RBH January and February 2023 actual figures and forecasts and F+H forwarded them to myself and Freeths. They comprised:

a. the January and February 2023 results and RBH forecast to December 2023;

b. a RBH forecast from April 2023 to March 2024.

F+ H commented:

"The January and February 2023 results [RBH EBT -£170,451 January (loss) and £6,487 (profit) February 2023] and forecasts [RBH to 31.12.23 £497,314 (profit) and £502,839 (profit)] show a very significant improvement on future trading [as compared to EOS v5]. An important consequence of this is that there will be an increase in the figure that the Applicant's business may have available to pay towards Protected Rent Debt. … propose to prepare and send to you and Mr Turner a revised Estimated Outcome Statement v.6.

Cash balances

I have also been provided with the following cash balances by Ashtons:

1. Administration account as at 17 March 2023: £1,197,940.47;
2. First Data: £102,886 (net of anticipated charges);
3. FF&E Reserve as at 17 March 2023: £491,425;

Total: £1,792,251.47.

The cash balance for the Amex account will be provided as soon it becomes available.

Unfortunately, I need to liaise further with Ashtons and the FRP Administrators with regard to the reported administration cash in bank figures, not including the

FF&E Reserve. FRP state that these total just over £1,300,000 plus the figure for Amex to be reported. The expected figure is:

Cash as at 31 March 2022 (on appointment)

£1,480,049;

1. EBT between 1 April 2022 and 28 February 2023:

£1,085,299

(which includes trading receipts and payments)

2. Less Admin costs (non-trading costs) paid to date:

£(483,652)

Total:

£2,081,696

So absent significant unidentified non-trading payments (i.e. administration costs), the cash at bank figure ought to be a minimum of £2,081,696 (net of any VAT receipts) rather than the £1,300,000 reported. There remains over £700,000 unaccounted for. Some of this may be in the Amex account but taking into account the following factors:

- income is generally cash (rather than delayed as invoicing);
- Funds received will ordinarily be in excess of net revenue reported because they will include accrued VAT not yet paid to HMRC; and
- Some trading payments relating to current income will not yet have been made because the payments don't yet fall due

The bank balance would be expected to be in excess of the £2,081,696 reported above.

I will be asking Ashtons to confirm whether there are any other accounts holding cash for the business, whether further non-trading payments have been made and for a receipt and payment account to 17 March 2023."

171. In the light of the updated information, F+H provided Mr Bonney's EOT v 6. That is as follows:

Estimated Outcome Statement (VAT excluded) to 31 March 2025

ASSETS AT 31 AUGUST 2022	£	£
Cash at Bank - Day One		1,480,049
FF&E Reserve - Day One		273,887
Profit (EBT) 1 April to 31 August 2022 as per Management Accounts		785,714
Paid into FFE Reserve 1 April to 31 August 2022		105,535
Intercompany debtor		15,000
		2,660,186
COSTS OF THE ADMINISTRATION		
Quantuma fees and sundries to March 2023	(247,425)	
Legal fees (FH), Counsel's fees, arbitration costs	(260,412)	
Quantuma Fees and Legal Costs (future provision)	(75,000)	
FRP fees to March 2023	(385,000)	
Legal fees (Ashtons)	(56,303)	
FRP sundries to date	(72,000)	
LBN costs net of LBN contribution to handover	(68,754)	
FRP Fees and Legal Costs (future provision)	(120,000)	
		(1,284,894)
Balance		1,375,292

MOVEMENTS IN THE FF&E RESERVE FROM 1 SEPTEMBER 2022

FFE Reserve payable at 3% of total revenue to 31 March 2025*		600,000[49]
Committed expenditure from FF&E Reserve between 31 March and 31 August 2022		(14,687)
Anticipated mandatory expenditure from FF&E Reserve to 31 December 2024		(415,020)
Net increase / decrease in FF&E Reserve	170,293	
Balance		1,545,585

PROFIT FROM FUTURE TRADING FROM 1 SEPTEMBER 2022 (before adjustments)

EBT - September to December 2022[50]	463,549	
EBT - 2023	497,314	
EBT - 2024**	570,037	
EBT - to March 2025**	(140,462)	
Net increase from profit from trading		1,390,438
Balance		**2,936,023**

EXPENSE ADJUSTMENTS

Deposit on fixed energy contract	(122,400)
Adjust EBT on reduction of payments into FF&E Reserve from 4% to 3% from April 2023***	0
Adjustment re reduced insurance costs	122,158
Adjustment re increased business rates from 1 April 2023	(58,661)

[49] This would be £557,000 to December 2024

[50] These EBT figures are the "current" RBH Forecasts. That is, the most recent forecasts provided in this Arbitration.

Adjusted balance		(58,903)
AVAILABLE TO SECONDARY PREFERENTIAL CREDITORS		2,877,120
Secondary preferential claims		
HMRC - VAT	(83,916)	
HMRC - PAYE	(11,044)	
Statutory Interest (from 31 March 2022 to 31 October 2023)****	(8,863)	(103,823)
AVAILABLE TO ORDINARY UNSECURED CREDITORS		2,773,297
Unsecured non-preferential claims		
Trade & Expense Creditors	(140,674)	
Non-Protected Rent Debt incl interest to 30 March 2022 and costs	(1,481,473)	
Statutory Interest (from 31 March 2022 to 31 October 2023)****	(187,969)	
		(1,810,116)
ESTIMATED SURPLUS AS AT 31 MARCH 2025 INCLUDING FF&E RESERVE		963,181[51]
Proposed retention in FF&E Reserve		(200,000)
Working Capital		(250,000)
Available for proposal re Protected Rent Debt		513,181

[51] As at December 2024 there would be a £100,000 difference.

* Estimate based on actual and forecast figures for September 2022 to March 2024. Figures for April 2024 to March 2024 based on prior year's figures

** Figures from spreadsheet provided by Ashtons on 14 March 2023

*** The RBH Spreadsheet for January and February 2023 corrects the FF&E Reserve figure from 4% to 3% for the period from 1 April 2023 so the adjustment is no longer required

**** Assumes the Administration ends on 31 October 2023

172. In the light of the timing of Ashtons' production of the up to date actual figures and forecasts for 2023 to F+H, Freeths accepted my offer that the 3 hour hearing on 22 March 2023 should be restricted to all financial material previously disclosed. It being agreed that further oral submissions would follow on a new date on the impact of the new further RBH information.

173. At the conclusion of the initial oral session on 22 March 2023, I made a further Order for Directions directing that the evidence was closed as at 22 March 2023. With the parties' agreement, I admitted into evidence Mr Bonney's EOS v.6; Ashtons' Letter of 14 October 2023 and the Ashtons' Correspondence Bundle; F+H's reply and attachments. I also directed that the resumed session of the oral hearing on 27 March 2023 was to focus solely on the impact of the financial information disclosed on 21 March 2023 and EOSv.6.

174. I directed that the parties were to provide and to exchange their written submissions regarding (a) the content of Ashtons' letter to F+H dated 14 March 2023 and the attachment to it (paras. 338 and 341 below) and (b) F+H's / Quantuma's reply dated 18 March 2023 and the attachment to it (paras. 365 and 368-369 below) by Tuesday 28 March at 4pm.

175. In accordance with my Order, on 22 March 2024, F+H provided the Ashtons' Letter, Ashtons' Correspondence Bundle and F+H's response to the Ashtons' letter of 14 March 2023 and attachments.

176. The oral hearing focussed on the further financial information concluded on 27 March 2023. The parties provided their written submissions regarding the Ashtons' correspondence and the reply to that correspondence by close of business on 28 March 2023.

177. As the oral hearing was not to be the final step in the Directions timetable, I extended time for the production of my Award under s.17 CRCA with the parties' agreement. Most recently, I extended time again for the purpose of the production of agreed figures. These were provided to me following the parties' agreement during the afternoon of 28 April 2023.

178. To the best of my knowledge, Ashtons have not proceeded to make their proposed application to the High Court for directions.

DECISION

179. I have had regard to all the material put forward by the parties, together with the parties' written and oral submissions. I have carefully considered all the evidence and submissions even though I do not refer to each and every matter each party mentions. I am grateful for the thorough and measured way in which Mr Johnstone and Mrs Creer have approached their submissions.

Eligibility conditions

180. To have jurisdiction to make an award resolving the matter of relief from payment of a protected rent debt I must be satisfied that:

(a) the tenancy is a business tenancy;

(b) there is a protected rent debt;

(c) the parties have not resolved the matter of relief from payment of the protected rent debt before the reference to arbitration was made;

and

the Applicant's business is viable or would be viable (at the time of assessment) if relief from payment of the protected rent debt were given.

181. In this Arbitration, it is common ground that the Applicant was entitled to make a reference to arbitration and there are no matters which would have necessitated the dismissal of the reference under s. 13(2).

182. If, after assessing the viability of the tenant's business, I determine 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,

I must make an award dismissing the reference under s. 13(3) CRCA.

183. For these purposes, the reference to "relief from payment of any kind" is a reference to the definition in s. 6(2) CRCA:

"Relief from payment", in relation to a protected rent debt, means any one or more of the following –

(a) writing of 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;

(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.

184. The "time of the assessment" of viability under CRCA is the date of my Award. Contrary to Ashtons' letter of 14 March 2023 [para. 338 below], it was not the date of the referral to Arbitration on 23 September 2022.

185. At paragraph 14 of the Respondent's Submissions, Mrs Creer submits there are 3 points which I should bear in mind when considering the reference. She says:

a. the CRCA is not drafted with a local authority landlord in mind. A local authority is not subject to the legislative regime under the Insolvency Act 1986 and the concept of solvency does not apply to it.

b. the CRCA does not contemplate that a tenant will be in administration, less that it will have a separate administrator dealing purely with the arbitration under CRCA.

c. it is not clear how any award will be binding on the FRP Administrators, that is, how the obligations to make payments sits alongside their professional duties.

186. She expanded these points in the Respondent's Further Submissions as follows:

a. it is well-known that CRCA was brought into force quickly and it would not be surprising in those circumstances if the Act did not cover all eventualities, as here, a local authority landlord and a tenant in administration;

b. the concept of "preserving a landlord's solvency" is applicable to private entities, not those concerned with public governance. A local authority has a statutory duty to continue to pay for and provide certain services, even when it is already in debt. Each version of the Commercial Rent Code of Practice[52]

[52] June 2021, April 2021, November 2021 and April 2022

was predicated on the proposition that a tenant should meet its liabilities under its lease where possible. CRCA incorporates this guiding principle in section 15(1)(b), while seeking to preserve the tenant's viability. It cannot have been Parliament's intention that the commercial tenant of a local authority should have the benefit of unbalanced scales, in light of the fiduciary duty to tax-payers as to the proper use of public money, including the recovery of debts owed;

c. sub-sections 10(3) and (5) CRCA seek to ensure that any arbitration cannot affect an existing arrangement under a different statutory regime. There is no comparable jurisdictional issue with an administration. The absence of provision is entirely explicable on this basis. It does not indicate that the Act must contemplate a tenant being in administration or have been designed to be practically workable in that situation.

187. Whatever the view one takes as to these 3 points, the Respondent did not explain how it considers that each one of these matters should be taken forward as a matter of principle in an arbitration where it has been accepted that the eligibility requirements under s. 13(2) CRCA are met. In this Arbitration, the Respondent has chosen not to produce any evidence as to the impact of an award of relief upon the Respondent as a local authority. The basic fact of administration does not, of itself, necessitate the decision, without more, that the business of the tenant in administration cannot be viable under the CRCA. A matter the Respondent now accepts. Hypothetically, if relief from a Protected Rent Debt is sought, and provided, the sum otherwise available to unsecured creditors *as a class* may be substantially increased in accordance with the operation of the CRCA.

188. On the facts here, the Administrators' proposals, voted upon by the Applicant's creditors in accordance with the terms of the Court Order, included a referral to

Arbitration seeking relief under the CRCA if Mr Bonney, as Joint Administrator, so advised. That was part and parcel of the very the Court Order which created the split administration and pursuant to which the FRP Administrators were appointed.

189. In essence, I agree with Mr Johnstone (Submissions, para. 9), that:

a. CRCA is relevant and must have been drafted having in mind all possible landlords of tenancies falling within its provisions, whatever their nature and status. Landlord is not defined in CRCA[53], so there is no question but that a local authority landlord may be a landlord for the purposes of CRCA;

b. it is irrelevant that a local authority is not subject to the legislative regime under the Insolvency Act 1986, because:

i. the concept of a landlord's solvency is expressly stated to be by reference to its ability to pay its debts as they fall due and not by reference to anything in the Insolvency Act 1986: section 15(3) CRCA. A local authority landlord may be unable to pay its debts as they fall due in the same way as any other landlord;

ii. if, however, the preceding sub-paragraph (i) is not correct, and a local authority landlord could not be insolvent for purposes of CRCA because local authorities generally are not subject to the insolvency regime in the Insolvency Act 1986, an arbitrator would simply not be required to assess whether any award it might make was consistent with preserving the landlord's solvency;

iii. the Respondent has provided no evidence in this Arbitration with regard to its own financial position and solvency. Section 16(2) of the Act provides that the Tribunal must "*so far as is known*" have regard to

[53] With the exception of the reference in section 2(2)(b) where the expression is stated to include a person acting for a landlord.

the assets and liabilities of the landlord and any other information relating to its financial position in assessing the Respondent's solvency. In the absence of any relevant information, the Tribunal must therefore assess that the Respondent is solvent and that any award the Tribunal may make will not contravene the principle in section 15(1)(a) that the Award should preserve the Respondent's solvency.

c. it must be incorrect for the Respondent to submit that CRCA does not contemplate that a tenant will be in administration, or that it will have a separate administrator dealing purely with an arbitration under CRCA:

   i. CRCA expressly provides that a tenant subject to a company or individual voluntary arrangement under the Insolvency Act 1986 or a compromise or arrangement under s.899 or 901F of the Companies Act 2006 relating to any protected rent debt may not make a reference to arbitration: ss. 10(3) and 10(5). There is no similar exclusion in relation to tenants in administration. Therefore, CRCA allows a tenant in administration to make a reference to arbitration under CRCA and must contemplate that a such a tenant may do so. The only other possibility is that the parliamentary draftsmen overlooked the existence of the administration regime. That appears unlikely. The fact that a tenant is in administration may be a matter that an arbitrator takes into account when considering the question of viability. However, it is submitted that this would not, on its own, be determinative of the question of viability as administration is a rescue process, not a terminal process;

   ii. the fact that there is a split administration in the present case is irrelevant to any of the matters that the Tribunal must determine. The Tribunal must assess the relevant evidence before it in making any determination. The existence of a split administration is, of itself, not relevant evidence.

d. The Respondent's submission that it is not clear how any award will be binding on the FRP Administrators or how the obligation to make payments sits alongside their professional duties, is not a matter for the arbitral Tribunal. If the Tribunal makes an award providing for the payment of part or all of the Protected Rent Debt, whether on staged basis or otherwise, the FRP Administrators (or the directors of the Applicant if it exits administration) must deal with that as a liability of the Applicant arising at such date as it falls due to be paid under the award, just as they would have to deal with the payment of the full amount of the Protected Rent Debt immediately following the conclusion of the arbitration if the Tribunal were to dismiss the reference.

The Issues

190. The issues in dispute between the parties which fall for my determination are:[54]

a. **The extent of the protected period under CRCA**.

The Applicant's position is that the protected period extends to 18 July 2021.

The Respondent's position is that the protected period extends to 17 May 2021.

b. **The calculation of the Protected Rent Debt**.

This calculation is dependent on my determination as to the extent of the Protected Period under CRCA.

c. **Consequently, the calculation of the Non-Protected Rent debt**.

Whilst not a matter for me to determine in my award, it is necessary for me to know the amount of the Non-Protected Rent debt because it constitutes a

[54] Email 10 November 2022 from the Applicant's solicitor in response to my email of 7 November 2022. Email 15 November 2022 from the Respondent's solicitor.

significant deduction from the amount available to the Applicant to pay towards the Protected Rent Debt.

d. **Whether the Applicant is viable irrespective of "relief from payment of any kind**".

That is, if the Applicant's business is viable or would become viable if the Protected Rent Debt is reduced to zero and all interest on the Protected Rent Debt is removed, such that the existence of the Protected Rent Debt is taken out of account altogether.

e. **If the Applicant is viable, the terms of any award of relief from payment under s. 15 CRCA are in dispute**.

Both parties have made Final Proposals. Each contends that only their own is consistent for the purposes of s. 14 CRCA. Although, the Applicant also recognises that I may decide to make an award of relief in excess of their Final Proposal on the basis of recent actual results and trading forecasts if I consider neither parties' Proposal consistent with s. 14 CRCA.

In the event of relief, the principle of payment by instalments is agreed in each party's Final Proposal.

191. It is beyond doubt that the purpose of this reference to arbitration under the CRCA was not simply to establish the amount of the Protected Rent Debt as Ashtons assert in their letter of 14 March 2022 [para. 338 below]. In accordance with the Court Order and further to the Creditors' Meeting, during its Administration the Applicant has made a referral to arbitration under the CRCA in order to seek relief in respect of the payment of the Protected Rent Debt.

The extent of the Protected Period and the Protected Rent Debt

192. Turning to the first legal issue. The Respondent contends that the Protected Period under CRCA ended when the closure requirements terminated on 16 May 2021. In Mrs Creer's submission, the Applicant was not "adversely affected" as defined in section 4 CRCA when it was able to operate its hotel accommodation without being subject to a closure requirement. She says that in defining "protected rent" section 3(2) CRCA requires the tenancy to be adversely affected "AND" to be attributable to a protected period and a tenancy is only adversely affected for any relevant period if it was subject to a closure requirement under section 4 (Respondent's Submissions paras. 31-35).

193. Mrs Creer submits the provisions of CRCA should be narrowly construed because they interfere with the contractual freedom of the parties; a fundamental principle in English law. She submits the use of the conjunctive in s. 3(2) was intended to limit the amount of the protected rent debt in respect of which a tenant can obtain relief (RS para. 36).

194. In the alternative, she submits that even if the Protected Rent Debt relates to the entire period ending on 17 July 2021, the Applicant should not be granted relief in respect of all the rent accruing as:

a. the business did not close completely throughout that period; and/or

b. after 17 May 2021 the restrictions on the Applicant's business were minimal (RS para. 37).

195. As I explain below, the Respondent's arguments are incorrect as regards the identification of the "Protected Period". The analysis set out in its submissions

focusses on certain only of the applicable statutory provisions. The relevant "key concepts" are also explained in the Commercial Rent (Coronavirus) Act 2022 Guidance Part One, paragraph 4.

196. Section 3 CRCA defines "Protected Rent Debt" as follows:

(1) A "protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent.

(2) Rent due under the tenancy is "protected rent" if –

(a) The tenancy was adversely affected by coronavirus (see section 4), and

(b) The rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy (section 5).

(3) Rent consisting of interest on an unpaid amount within section 2(1)(a) or (b) is to be regarded for the purposes of subsection 2(b) as attributable to the same period of occupation by the tenant as the unpaid amount.

(4) A period of occupation by the tenant that began, or ended, at a time during a particular day is to be treated as including the whole of that day.

(5) If any rent due under the tenancy is attributable to a period of occupation by the tenant of which only part is of the description in subsection (2)(b), then so much of the rent as can be reasonably attributed to that part of the period is protected rent.

197. Section 4 defines "Adversely affected by coronavirus" as follows:

(1) A business was "adversely affected by coronavirus" for the purposes of section 3(2)(a) if, for any relevant period –

(a) The whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or

(b) The whole or part of those premises,

was of a description subject to a closure requirement.

(2) For this purpose –

(a) "closure requirement" means a requirement imposed by coronavirus regulations which is expressed as an obligation –

(i) to close businesses, or parts of businesses, of a specified description, or

(ii) to close premises, or parts of premises, of a specified description; and

(b) "relevant period" means a period beginning at or after 2pm on 21 March 2020 and ending at or before –

(i) 11.55pm on 18 July 2021, for English business tenancies …".

(3) A requirement expressed as an obligation to close businesses or premises of a specified description, or parts of businesses or premises of a specified description, every day at particular times is to be regarded for the purposes of subsection (2)(a) as a closure requirement.

(4) It is immaterial for the purposes of subsection (2)(a) that specific limited activities were (as an exception) allowed by the regulations to be carried on despite the obligation to close (and accordingly the fact they were permitted or carried on is to be disregarded in determining whether the tenancy was adversely affected by coronavirus)

(5) …

(6) In this section "coronavirus regulations" means regulations -

(a) Made under section 45C of the Public Health (Control of Disease) Act 1984 (whether or not also made under any other power) and

(b) Expressed to be made in response to the threat to public health posed by the incidence or spread of coronavirus.

198. Section 5 defines "Protected Period" as follows:

(1) The "protected period", in relation to a business tenancy adversely affected by coronavirus, is the period beginning with 21 March 2020 and ending with –

(a) Where the business tenancy comprises premises in England –

(i) If subsection (2) identifies a day earlier than 18 July 2021, that day, or

(ii) In any other case, 18 July 2021

…

(2) The relevant day for the purposes of subsection (1)(a)(i) … is the last day on which (or for part of which) –

(a) The whole or part of the business carried on by the tenant at or from the premises, or

(b) The whole or part of those premises,

was of a description subject to either a closure requirement or a specific coronavirus restriction.

(3) In subsection (2) "specific coronavirus restriction" means a restriction or requirement (other than a closure requirement) imposed by coronavirus regulations which regulated any aspect of –

(a) The way a business, or a part of a business, of any specified description was to be carried on, or

(b) The way any premises, or any part of premises, of a specified description were or was to be used.

(4) …

(5) In this section "closure requirement" and "coronavirus regulations" have the same meaning as in section 4.

199. Sections 3, 4 and 5 operate together to set out a clear and coherent statutory scheme. The result of which, when applied to the facts of this case, is that the Protected Period extended to 18 July 2021. Contrary to the Respondent's submissions, s.3(2)(a) and s.4 say nothing about how long a closure requirement must last in order for a tenancy to be adversely affected by coronavirus. It is only in s.3(2)(b) that the requirement for the rent to be attributable to a Protected Period is introduced and that states that requirement is determined in accordance with s.5, which provides that the Protected Period continues until the last day on which the tenant's business or premises was subject to either a closure requirement or a specific coronavirus restriction.

200. It is notable that the Respondent's submissions make no reference at all to s.5. If correct, the Respondent's interpretation of CRCA renders the final part of s.5(2) entirely redundant.

201. As a result, and as correctly analysed by the Applicant in its Submissions, s.3(2) CRCA provides that rent due under a tenancy is protected rent depending on the answer to two separate questions. Question 1 is whether the tenancy was adversely affected by coronavirus, as to which the reader is referred to s.4. Section 4 provides

a definition as to the phrase "adversely affected by coronavirus": if, for any relevant period, the business or the premises was of a description subject to a closure requirement. The answer to this first question must either be yes or no. In the current case, it is common ground that the business was subject to closure requirements. This question does not involve any consideration as to the period in which a closure requirement was imposed: simply that the closure requirement was imposed for any relevant period.

202. Question 2 is whether the rent is attributable to a Protected Period, as to which the reader is directed to s.5. This provides that the Protected Period begins with 21 March 2020 and ends on either 18 July 2021 or the last day (if earlier) on which the tenant's business or premises was subject to either a closure requirement or a specific coronavirus restriction. It is common ground that the Applicant's business and/or the Hotel were subject to specific coronavirus restrictions until 18 July 2021[55].

203. Section s.3(5) provides for that part of a sum of rent that can be reasonably attributed to a Protected Period to be protected rent. This means that if the rent is payable on a quarterly basis, as is the case with the rent due under the Lease, the quarterly rent should be apportioned as between a Protected Period and a non-protected period if the last day of the Protected Period falls between a quarter day. This is also consistent with paragraph 4.25 of the Guidance to Arbitrators.

204. The Guidance to Arbitrators contains a useful summary of the legal position: see paragraphs 4.9, 4.14-4.27. In explaining the operation of Protected Periods, paragraph 4.27 also gives the specific (and, for present purposes, analogous),

[55] See para. 38 of the Respondent's Submissions where it is acknowledged that the Applicant's business was subject to the restrictions in Schedule 3 of the Step Regulations.

example of a café. The Guidance explains the applicable Protected Period ran from 21 March 2020 to 18 July 2021 because:

> "(whilst cafes and restaurants were able to open before, this was when restrictions ended on table booking size as did the requirement for customers to eat while seated)".

The paragraph cites the summary of Protected Periods for businesses at Annex A to the Code of Practice (SB6, p89, B745). The table at Annex A states that the Protected Period for Hospitality and Nightclubs ended on 18 July 2021.

205. The Respondent's submission that the sections of CRCA should be narrowly construed is of no relevance here. The statutory provisions cannot properly be interpreted in any other way than as the Applicant contends.

206. Further, I agree with Mr Johnstone that the Respondent's alternative submission amounts to an invitation to impose additional conditions as to the extent of the Protected Period over and above the conditions imposed by CRCA by reference to the actual likely impact of the specific coronavirus restrictions. There is no scope for me to take such matters into account in determining the extent of the Protected Period as they are not conditions imposed by CRCA.

207. Annex C to Mr Bonney's Witness Statement explains that the Property and/or the Hotel was the subject of the list of statutory closure requirements and specific coronavirus restrictions set out below. At paragraph 31 of Mr Bonney's Witness Statement, he also provides the information he was given about the operation of the Property during the period 20 March 2020 to 18 July 2021:

a. On 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020/327 ("the Business Closure Regulations") came into force. Paragraph 2 of the Business Closure Regulations required the closure of the dining room and bar in the Hotel and the parts of the Tenant's business which related to the services provided in the dining room and bar.

   The Hotel closed for business on 23 March 2020[56].

b. On 26 March 2020, the Business Closure Regulations were revoked and replaced by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350 ("the Restrictions Regulations"). Paragraphs 4 and 5(3) of the Restrictions Regulations required the closure of the dining room and bar in the Hotel and required the cessation of the carrying on of the business of providing holiday accommodation, save in respect of limited classes of persons.

   As a result, the Hotel re-opened briefly in April 2020 on a limited basis for NHS staff and key worked but closed again in May and June 2020 due to the very low demand from these groups[57].

c. With effect from 4 July 2020, the Restrictions Regulations were revoked and replaced by The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020/684 ("the Second Restrictions Regulations").

   The Applicant was permitted to re-open those parts of the Hotel subject of the closure requirements noted in paragraphs a and b above and to re-commence the business of providing holiday accommodation in the Hotel, subject to the restrictions set out therein. The Applicant was restricted from providing a service of the provision of a conference venue during the emergency period defined in paragraph 3, pursuant to paragraph 4 and Schedule 2 of the Second Restrictions Regulations.

[56] Witness Statement Simon Bonney para. 31.
[57] Witness Statement Simon Bonney para. 31.

Due to the lack of trade fairs and conferences taking place at London ExCel and non-existent international travel, demand remained very low[58].

d. On 18 September 2020, the Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020/1008 ("the Hospitality Regulations") and the Health Protection (Coronavirus, Collection of Details etc and Related Requirements 2020/1005 ("the Collection of Details Regulations") came into force.

   The dining room and the bar in the Hotel were relevant premises for the purposes of the Hospitality Regulations and the Collection of Details Regulations.

   The Hospitality Regulations provided that, during the emergency period (defined in paragraph 3 of the Second Restrictions Regulations), the Applicant had to take all reasonable measures to restrict the number of persons that could be permitted to book a table in or be admitted as a group to the dining room and bar in the Hotel. The Collection of Details Regulations required the Applicant to take the steps provided therein in the carrying on of its business relating to the dining room and the bar in the Hotel.

e. On 5 November 2020, the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020/1200 ("the Fourth Restrictions Regulations") came into force.

   Paragraphs 15 and 16 of the Fourth Restriction Regulations required the closure of the dining room and bar.

f. On 2 December 2020, material parts of the Fourth Restrictions Regulations were revoked and replaced by The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020/1374 ("the Tiers Regulations").

[58] Witness Statement Simon Bonney para. 31.

The Applicant was permitted to re-open the dining room and bar.

g. On 16 December 2020, the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment) Regulations 2020/1533 ("the Amendment Regulations") came into force. Paragraph 2 of the Amendment Regulations provide that the London Borough of Newham was tier 3 under the Tiers Regulations.

Part 2 of Schedule 3 of the Tiers Regulations required the closure of the dining room and bar in the Hotel and the cessation of the carrying on of the business of the provision of holiday accommodation in the Hotel, save in respect of limited classes of persons.

The Hotel remained open solely for key workers and essential staff during this period and until May 2021[59].

h. On 20 December 2020, the Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020/1611 came into force. The London Borough of Newham was stated to be in Tier 4 and subject to Tier 4 restrictions.

The Hotel and the Applicant's business remained subject to the restrictions mentioned in paragraph f. above.

In January 2021, the Hotel was awarded a Ministry of Defence contract which resulted in it achieving 35% occupancy until July 2021 when the contract ended[60].

i. On 29 March 2021, the Tiers Regulations were revoked and replaced by The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021/364 ("the Steps Regulations"). Paragraph 7 and the Step 1 restrictions in paragraphs 9, 12 and 13(4) of Schedule 1 of the Steps Regulations required the

[59] Witness Statement Simon Bonney para. 31
[60] Witness Statement Simon Bonney para. 31

continued closure of the dining room and bar in the Hotel and the cessation of the carrying on of the business of the provision of holiday accommodation, save in respect of limited classes of persons.

j. On 12 April 2021, the Health Protection (Coronavirus, Restrictions) (Steps and Local Authority Powers) (England) (Amendment) Regulations 2021/455 come into force, providing for the same restrictions under the Step 2 restrictions in paragraphs 9, 12 and 13(4) of Schedule 2 of the Step Regulations.

k. On 17 May 2021, the Health Protection (Coronavirus, Restrictions) (Steps and Other Provisions) (England) (Amendment) Regulations 2021/585 came into force.

The Applicant was permitted to re-commence its services at the Hotel subject to restrictions in Schedule 3 of the Step Regulations and in the Hospitality Regulations.

l. On 18 July 2021, the Steps Regulations and the Hospitality Regulations were revoked and the Applicant was permitted to provide its services at the Property and/or Hotel without restriction.

208. The Health Protection (Coronavirus, Restrictions) (Steps and Other Provisions) (England) (Amendment) Regulations 2021/585 was a specific coronavirus restriction because it (a) regulated the way in which the Applicant's business could be carried out and (b) the Applicant's business was of a specified description: the business of selling food or drink for consumption on the Hotel premises. These restrictions were not restrictions excluded by s.5(4). They were not concerned with the display of information and they did not apply more generally than to businesses selling food or drink for consumption on premises.

209. As the Applicant submits, and I accept, its business or parts of its business at the Hotel and/or the Hotel or parts of the Hotel were therefore the subject of closure requirements as defined in section 4 of the Act:

a. between 21 March and 3 July 2020;

b. between 5 November and 1 December 2020;

c. between 16 December 2020 and 16 May 2021;

and

d. specific coronavirus restrictions, as referred to in s.5(3) CRCA, continued to apply to Applicant's business at the Hotel until 18 July 2021.

210. Accordingly, the Applicant is correct that the Protected Period with regard to the Applicant's tenancy commenced on 21 March 2020 and expired on 18 July 2021.

The Calculation of the Protected Rent Debt

211. The Applicant is necessarily also correct that Protected Rent Debt is the sum of the unpaid rent under the Lease which is attributable to the period 21 March 2020 to 18 July 2021.

212. The Respondent's calculation in its Formal Proposal is incorrect. On the basis of the instructions provided to him, Mr Elliott's supporting calculation in his first Report is also incorrect.

213. The FRP Administrators have adopted the Respondent's mistaken approach to the calculation of the Protected Rent Debt in their own assessment of the Applicant's financial position from time to time. Including in their October Financial

Report, letter of 21 November 2022[61], and the enclosures to Ashtons' 14 March 2023 letter. Their own factual and legal reasoning for doing so has not been explained in these documents.

214. The result is, however, that the FRP Administrators have thus far undervalued the amount of the Protected Rent Debt that is the subject of this Arbitration. This being the value of the "contingent" debt. The Applicant and Respondent's agreed calculation of the correct sum of the Protected Rent Debt as at 28 April 2023 is £3,320,300.65 (including interest). For the purposes of the CRCA, £3,320,300.65 is the sum that should be taken out of account, by way of "any relief", for the purposes of a "step 2" (as described in the Guidance), viability assessment of the Applicant's business under the CRCA.

The calculation of the Non Protected Rent Debt

215. In the circumstances, the Applicant's calculation of the Non-Protected Rent Debt was also always correct[62]. The Applicant says the Respondent is entitled to statutory interest at 8% on the Non-Protected Rent Debt for the period from 31 March 2022. This has been accounted for in each of Mr Bonney's EOS under the heading Statutory Interest.

216. Because the FRP Administrators have chosen to adopt the Respondent's mistaken approach, the amount of the Non Protected Rent Debt has been treated by the FRP Administrators as a larger sum than it actually was / is. See, for example,

[61] Notwithstanding receipt of Mr Bonney's Witness Statement which also set out the accurate legal position.
[62] Annex B. The Applicant points out in Submissions that a correction needs to be noted in Annex B. The interest figures provided there are in fact to 30 March 2022 and not to 24 December 2022 as stated.

the FRP Administrators' own EOS included within their letter of 21 November 2022 and, most recently, their recent Rolling Insolvency review of March 2023. The Non Protected Rent Debt has been overvalued.

217. The Applicant and Respondent's agreed calculation of the correct sum of the Non Protected Rent Debt as at 28 April 2023 is £1,911,811.53 (including statutory interest and VAT) and £1,628,235.79 (including statutory interest and excluding VAT).

218. For the purposes of the CRCA, I consider that £1,628,235.79 is the sum that should be taken into account for the purposes of my step 2 viability assessment of the Applicant's business. In the absence of evidence that the Applicant cannot recover the VAT on this sum, I accept Mr Bonney's evidence that the Applicant should be able to set off VAT payable by the Applicant on rent against VAT on other sums paid to it.

Viability

219. Having established these relevant figures, I turn in more detail to the statutory framework for assessing viability for the purposes of CRCA. It is as follows:

> Section 13(3), states that if the arbitrator determines that (at the time of assessment) the tenant's business is not viable and would not be viable even if the tenant were to be given relief from payment of any kind, the arbitrator must dismiss the reference.
>
> Sections 13(4) and (5), state that if the arbitrator determines that, at the time of assessment, the tenant's business is viable or would become viable if the tenant were to be given relief from payment of any kind, the arbitrator must consider

whether the tenant should receive any relief from payment and, if so what relief, and make an award in accordance with section 14.

Section 16(1), provides that an arbitrator must have regard to:

- the assets and liabilities of the tenant,
- the previous rental payments made under the business tenancy from the tenant to the landlord,
- the impact of the coronavirus on the business of the tenant, and
- any other information relating to the financial information of the tenant that the arbitrator considers appropriate.

Section 16(3), provides that an arbitrator must, in making an assessment of viability, ignore the possibility of the tenant:

- borrowing money or
- restructuring its business.

220. Echoing the statute, section 2 of the Guidance to Arbitrators emphasises at paragraph 2.6 that the assessment of the viability of the tenant's business at Stage 2 is to establish whether the tenant's business is viable or would become viable if given relief from payment. An arbitrator needs to consider such information as is provided by the parties and as the arbitrator considers appropriate, to properly assess and determine this point.

221. Section 6 of the Guidance to Arbitrators contains detailed guidance for the purposes of the assessment of the tenant's viability. It is only if, at the time of the arbitrator's assessment of the viability of the tenant's business, the business is

viable or would become viable, if the tenant were given relief from payment of any kind, that the arbitrator must then go on to determine whether the tenant should receive relief and, if so, what relief: para. 6.1.

222. In particular, section 6 of the Guidance explains why viability is not defined in CRCA and states (with my emphasis), that:

> "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" (para 6.3 of the Guidance)"
>
> "The assessment of viability (and indeed each arbitration) is to be made on a case by case basis, concerning the immediate landlord and occupying tenant relationship. The arbitrator can consider the impact of the tenant's other debts and their wider financial situation." (para. 6.4).
>
> "The determination of viability is specifically for the purposes of this Act and is not intended to have broader application. This test of viability is distinct from an assessment as to whether the business is solvent. Nonetheless, arbitrators should be mindful that a determination of non-viability may have other implications for a tenant business. Arbitrators should ensure that any determination of non-viability is justifiable and the reasonings for such must be set out in the award dismissing the reference to arbitration." (para. 6.6.)
>
> "It is the tenant's responsibility to provide evidence to support their proposal and to enable the arbitrator to determine the viability of the tenant's business. However, the arbitrator may request information from the tenant in order to assess viability using the power to decide on procedural and evidential matters in section 34(1) of the Arbitration Act 1996." (para. 6.7)
>
> "The arbitrator is to assess the viability of the tenant's business in a holistic and common-sense way, considering the circumstances of that business. There is

no one indicator which can be used to determine whether a tenant business is viable …" (para 6.10).

"Sections 13(3) and 13(4) of the Act make it clear that the arbitrator is to assess whether the tenant's business is viable (or would be viable if relief were given) at the time of the assessment. Accordingly, any indicators of viability and any evidence reviewed should be used to assess viability at the time of the assessment. On that basis, evidence relating to the business prior to or during the coronavirus pandemic would only be relevant insofar as it speaks to current viability, although the arbitrator will of course take into account seasonal variations in business." (para. 6.11)

223. Paragraphs 6.12-6.17 of the Guidance give some examples of types of evidence which may be helpful, along with a table of possible indicators and evidence. An arbitrator is to consider the reliability of profit forecasts taking into account the context in which the business operates and whether current or expected market factors might make it difficult to predict future profitability.

224. I have applied both the statutory test and the Guidance in reaching my decisions. The length of my decision on viability reflects the development of the financial information and its replacement / supplementation by more up to date information as it has become available, and the correspondence from the FRP Administrators and the additional directions made following their intervention.

225. The evidence before me at the date of my assessment comprises three major elements. These all overlap to some degree:

a. The evidence of Mr Bonney and of Mr Elliott;

b. The exhibits and disclosure which comprise the financial materials compiled by RBH from time to time (including actual results and forecasts), and the parties' evidence and submissions regarding the content and reliability of RBH's materials in this Arbitration;

c. The FRP Administrators' views, and the parties' evidence and submissions regarding the content of that correspondence and its impact in this Arbitration.

Mr Bonney and Mr Elliott

226. The major part of the evidence before me is the direct evidence in this Arbitration of Mr Bonney, the Administrator given responsibility for the conduct of the Applicant's reference to arbitration under the Court Order, and Mr Elliott, the Respondent's Expert. Mr Bonney's evidence includes his comments upon the FRP Administrator's October Report.

227. Each of Mr Bonney's Witness Statements and Mr Elliott's Reports has been provided in accordance with the requirements of s. 12 CRCA. It is verified by a statement of truth and, in Mr Elliott's case, also by the Royal Institution of Chartered Surveyors' professional compliance statement for the production of independent expert evidence.

228. Fundamentally for the purposes of my assessment, there is much that Mr Bonney and Mr Elliott agree upon in their evidence and approach to the Applicant's business[63]. That includes the identification of accurate utility forecasting as key for the purposes of assessing the Applicant's viability.

[63] And Mr Elliott properly identifies where there are matters upon which he is not qualified to express a view.

229. The major points of disagreement between Mr Bonney and Mr Elliott are identified by the Respondent (para. 24 of the Respondent's Submissions), as:

a. the treatment of FF&E and future capital expenditure, and

b. the level of profit that the Hotel should be able to generate.

230. In the case of each disagreement, it is not because Mr Elliott disagrees with the fundamental approach that Mr Bonney has adopted in considering the Applicant's business. It is also not because Mr Elliott advances the approach the FRP Administrators set out in their correspondence with regard to these matters. Both Mr Bonney and Mr Elliott disagree with the FRP Administrators' ringfencing of the entirety of the FF&E Reserve; identified that RBH previously included 4% FF&E provision in their forecasts for 2023 (instead of the appropriate 3% deduction from 1 April 2023); and consider that, if anything, RBH is likely under-forecasting the Applicant's future profitability.

231. The extent of the disagreement between Mr Bonney and Mr Elliott is that, in Mr Elliott's own professional opinion as a hotel valuation expert, Mr Bonney is himself too cautious in his approach to the FF&E Reserve and too conservative in his approach to the Applicant's future profitability as a result of the RBH forecasts. This is plain from the side by side EOS v.1 and v.2 Mr Elliott very helpfully compiled for comparison.

232. Mr Bonney's evidence has been provided with care and in an understated fashion. Mr Bonney has explained that his (and Mr Kiely's) own initial view was that the Applicant may not be capable of rescue as a going concern. He has also explained how the Applicant's trading caused him (and Mr Kiely) to reconsider, and change, that view whilst they acted in the Administration. He identified why he was

concerned as to the impact of volatility in utility pricing upon the Applicant, and why he did not, therefore, make this referral to arbitration until he was confident he had formulated a practical Proposal. He has set out why he considers the Applicant's business to be viable if granted appropriate relief under the CRCA. Views most recently communicated through his instructions to F+H and in the March 2023 documentation.

233. Mr Bonney identified at the outset that the FRP Administrators did not share his views. He has provided a detailed and transparent response to all the issues raised, including as to the difference between his views and Mr Elliott's and his views and those of the FRP Administrators'. Mr Bonney has given a detailed line by line justification of the reasons why he considers that his own view as to the viability of the Applicant's business is the correct one in this Arbitration under the CRCA.

234. When RBH produced their November 2022 Report v.2, Mr Bonney immediately identified that RBH's utility price forecasting for the remainder of 2022 and 2023 and 2024 was probably unwarranted, and likely to be an unreliable basis upon which to make decisions as to viability. The production of the Joint Expert Report wholly vindicated his views about those RBH forecasts. As has the subsequent actual evidence of the Applicant's utility costs for the relevant months.

235. Throughout Mr Bonney has accurately identified the sum of the Protected Rent Debt and the Non Protected Rent Debt. It is also noteworthy that Mr Bonney has never sought to contend the Protected Rent Debt is required to be reduced to zero under the CRCA for the purposes of any relief (if granted, and at "step 3"). Indeed, it is a sign of Mr Bonney's own confidence in the robustness of his analysis of the Applicant's viability that Mr Johnstone's most recent instructions were that I may form the opinion that the Applicant's Revised Final Proposal is no longer consistent

with s. 14 CRCA on the basis that EOSv.6 supports payment of a higher sum by way of relief.

236. The Respondent's own treatment of their expert's evidence is somewhat internally inconsistent. On the one hand, Mrs Creer says in the Respondent's Submissions that the Reports of Mr Elliott are "heavily caveated" and his task "invidious" in seeking to review second hand information (para. 21). Possibly seeking to distance the Respondent from Mr Elliott's more favourable views of the future profitability of the Applicant's business and treatment of FF&E for the purposes of my assessment of viability. On the other hand, Mrs Creer invites me to prefer Mr Elliott's more optimistic opinions as to the Applicant's likely future profitability to those of Mr Bonney and RBH.

237. The Respondent continues to rely entirely upon Mr Elliott's Reports to justify the content of the Respondent's Formal Proposal and the Respondent's Revised Formal Proposal under the CRCA. In the event that I decide the Applicant's business is viable, Mrs Creer invites me to find that it is only the Respondent's Revised Formal Proposal which is consistent, or more consistent, with the provisions of the CRCA when considering relief.

238. It is right that Mr Elliott's Reports include certain disclaimers. I have set these out above (para. 65). They highlight the appropriate matters he rightly wished to bring to my attention in accordance with the professional guidance. Fundamentally, however, Mr Elliott has explained in his Reports why he has specific concerns as to the approach adopted by RBH for the FRP Administrators. He has done so on the basis of the materials RBH have produced and he has given evidence in support of his own analysis.

239. Mr Elliott has clearly undertaken his task in accordance with all relevant professional guidance for independent experts. He has been instructed by the Respondents in this Arbitration precisely because he is an acknowledged expert in the hotel valuation field.

240. When it comes to the 2 major points of difference between Mr Bonney and Mr Elliott, Mrs Creer says:

> "The Respondent submits Mr Elliott's assessment is based on applying his extensive experience of the hotel sector to RBH's forecasts and his evaluation should be preferred to Mr Bonney's." (para. 29)
>
> "Mr Elliott is of the view that certain capex could be postponed. Clearly, it is morally repugnant for the Applicant to be planning expenditure on improving its product (guest room televisions) in preference to accrued rent, which was due under a contract. Neither party having approached Hilton directly over the point." (paras 26-28).
>
> "Arguably this is misleading where 1st WS/Simon Bonney (§50) notes that under the Hotel Franchise Agreement, Hilton *may* require the Applicant to upgrade the facilities. Non-compliance with the franchisor's published standards is not a ground for immediate termination of the franchise agreement cl.14.1.2 (*cf*. entering into administration, cl.14.2 SB2, B275)."

241. As to Mr Bonney's views as to the appropriate treatment of the FF&E Reserve, Mr Johnstone submits it is not misleading to describe the capex as mandatory because the Applicant has a contractual liability to comply with Hilton's requirements and Hilton has published its requirements. Paragraph 50(i) of Mr Bonney's First Witness Statement refers to the contractual provision allowing Hilton to require the Applicant to upgrade (para 50(i), A21). Mr Bonney subsequently confirms that Hilton had published its requirements in accordance with that

provision (para. 54, A23 and p119-123, SB3, B483-486). The fact that non-compliance is not a ground for immediate termination of the Hilton Franchise Agreement does not make the expenditure non-mandatory.

242. For my part, I consider Mr Elliott's expertise and market experience is very strong evidence to support the view a business tenant would now seek to utilise an element of the cash otherwise held against future expenditure on FF&E to support its present business needs as a result of the Administration. I assume that would be through the type of commercial discussion Mr Bonney himself initiated with RBH. I note Mr Elliott's market experience as regards Hilton. I also note the points Mr Bonney has made as to why RBH would likely be sympathetic to this course given the facts relating to the Hotel. Mr Bonney also quotes his own conversation with RBH's Finance Director in this regard.

243. For the purposes of my viability assessment under the CRCA, and as between the approach adopted by Mr Bonney and Mr Elliott, I consider that Mr Bonney's more conservative focus on the costs of "mandatory" expenditure on FF&E in 2023 and 2024 is the right one. Mr Bonney has sought to balance the fact that the Applicant must hold sums by way of FF&E Reserve, and must continue to set aside sums into the FF&E Reserve (as both Mr Bonney and Mr Elliott agree), with the reality that only a certain identified element of the large sums presently held as cash will actually require to be expended in the foreseeable future. Mr Bonney has established those sums, as far as possible, in 2023 and 2024.

244. For the reasons Mr Bonney has set out, there is no real alternative other than to consider that RBH's views as to the Applicant's likely future profits from trading at the Hotel remain the best evidential starting point for my purposes. RBH have personal experience of running the Hotel and fuller data. As a bottom line, Mr

Bonney's more conservative approach on future profitability is therefore preferable.

245. However, given:

a. Mr Elliott's own expertise;

b. RBH's (understandable) identified difficulties in forecasting over a 2 year period; and

c. RBH's demonstrable recent history of sometimes underestimating the Applicant's businesses' actual performance (and overestimating some costs),

I consider that Mr Elliott's own views about, and "feel" for, the RBH figures here is not to be discounted. In my opinion, there is very good evidence to suggest that RBH's forecasts for trading and profitability will ultimately prove to be somewhat understated. This forms an important element of an holistic approach to viability under the CRCA.

246. In conclusion, in so far as Mr Bonney and Mr Elliott agree on those matters before me, I take comfort from the fact Mr Elliott endorses Mr Bonney's approach. In so far as they differ, I agree with all the points made by Mr Johnstone in the Applicant's Submissions in support of the benefits of Mr Bonney's approach. Essentially, however, I take very considerable confidence from Mr Elliott's overall impression and I consider that is a matter to which weight should properly also be attached in this Arbitration.

RBH

247. The second set of evidence I have is the RBH monthly reports and further financial information re-calculating the actual monthly position and forecasts as the

Applicant has continued to trade. These have been provided following my Directions (almost always as expressly agreed by Applicant and Respondent) and in accordance with my Directions. These necessarily reflect the changing picture throughout the course of this Arbitration.

248. At the dates the parties provided their Formal Proposals in September, October and November 2022, the most recent iterations of the Estimated Outcome Statement were EOS v.1 and 2. When the parties provided their Submissions in January 2023 and their Replies in February 2023, the most recent iteration of Mr Bonney's EOS was EOS v.5.

249. Whilst much of the discussion in Submissions focusses on EOS v.5, and I have carefully considered all the points made there as part of my assessment, the belated release of the actual 2022 results and the trading figures for January and February 2022, together with more up to date RBH forecasts for 2023 and 2024, renders academic the detail of some of the debate regarding the bottom line shown on EOS v. 5.

250. The alteration in the position between EOS v.5 and EOS v.6, demonstrates an improving trading position up to the date of my assessment. The Applicant submits the latest forecasts continue to show that the Applicant's business is viable and that it has recovered from Covid and weathered the crisis in Ukraine and the volatility of energy costs over the winter whilst it has been on (higher) variable rates as a result of the end of its contracts and the Administration.

251. In essence, in November 2022 the rise in energy prices led to RBH forecasting that the Applicant's business would make losses in 2023 and in 2024[64]. The present picture is one where the Applicant's actual 2022 results of c.£994,000 profit from trade and its results for January and February 2023 now mean RBH is forecasting profits for 2023 and 2024. RBH's latest forecast of a £497,314 profit for the Applicant in 2023 represents a difference of £794,000 from its last forecast for 2023. RBH's latest forecast for 2024 now shows a profit for the Applicant of c. £574,000.

252. Where Mr Bonney and Mr Elliott have differed from RBH in their respective treatment of the relevant figures they have identified exactly why that is the case. There is no question other than that RBH has a very difficult task. Both Mr Bonney and Mr Elliott record their competence and experience.

253. RBH themselves identify the dangers of long range forecasting and the inherent risks of any cash flow prediction here. Mr Bonney has explained they would not normally be asked to look 2 years ahead. Mr Elliott echoes their view about looking ahead so far. The FRP Administrators have also noted the uncertainty of forecasting. As such, undue, or decisive, weight cannot, and should not, be placed upon forecasts of a kind that RBH would not normally be asked to produce in the hotel business. Actual evidence is more reliable. Both of itself, and as a reality check, in approaching the content of any of the individual RBH forecasts.

254. The considerable danger of reliance on a long range forecast to support any decision to be made here is very well illustrated in this case. In November 2022, RBH's blunt responsive reaction to volatility in utility pricing was applied by them to each and every month across the entirety of the next 2 year period. That was

[64] Spreadsheets D and H.

through the forecast contained in the November 2022 Report v2 produced for the FRP Administrators and then provided to Mr Bonney. The content reflected a short term reactive decision taken by RBH in one month which caused them to dramatically alter the forecasts of the Applicant's profitability right through to 31 December 2024. A decision which proved to be unduly pessimistic and mistaken even as regards the actual utility costs incurred in the very month in which the decision was taken, and in the immediately following few months to date. The result of corrections being a major reason why predicted losses have become predicted profits.

255. During 2022, the wider evidence shows that RBH under-forecast total revenue and, consequently, also under-forecast EBT. The forecast total revenue for the period September to November 2022 in the Management Accounts (line 44) was £1,902,716. Actual total revenue for the same period was £2,290,680 (November and December Financial Reports (line 44).

256. Similarly, forecast EBT for the period September to November 2022 in the Management Accounts (line 44) was £81,081. Actual EBT for the same period was £417,797.

257. In Submissions in February (para. 32), Mrs Creer posed the following rhetorical question:

> "Between the Original RBH accounts (spreadsheet A, all 4 months estimated) and the December Financial Report (spreadsheet D, 3+1 estimate), there is a ~£475k increase in the total revenue for last four months of 2022 (£2,441,426 vs £2,916,440), amounting to a +19% difference. This emphasises the unreliability of RBH's forecasts. What if their 2023/24 forecasts are out by the same margin, but this time over-stated?"

Whilst I understand the point made, the evidence I take from this is that RBH tends to understate its forecasts. I consider it is inherently improbable on the material before me that any such 19% RBH overestimate will result. The evidence strongly points to a pattern of underestimation.

258. More recently, in the Respondent's oral submissions, Mrs Creer identified that the recently disclosed materials show the trading performance of the Applicant is indeed improving. She took me to the Original Management Accounts A for 2022 (8+4) predicted turnover to the end of 2022 at £6,913,798 and EBT at £577,578 and to Spreadsheet L, which showed the Applicant's turnover to the end of 2022 was £7,362,113. That was a £448,415 increase on RBH's projection 4 months beforehand. That is a 6.5% increase.

259. In the Respondent's oral submissions on the recent RBH financial material disclosed and EOS v.6, Mrs Creer said it was "in itself a matter of concern" that a few more months of actual data resulted in "substantially different" forecasts from RBH. In her submission, it has been a pattern throughout this Arbitration that RBH has produced "wildly different forecasts". She said that must undermine confidence in the reality of any one of the RBH forecasts. Mrs Creer took me orally to a number of other RBH forecasts and actual figures which again show further variance.

260. As Mr Johnstone put it in Submissions, this under forecasting of revenue and EBT by RBH no doubt reflects the difficulty in forecasting and RBH's understandable desire to take a cautious approach and no criticism of RBH is suggested by noting this. However, it is a relevant factor to take into account when considering the viability of the Applicant's business, that RBH's forecasts on total revenue and EBT may be on the conservative side.

EOS v.6 and the differences in approach between RBH and the Parties

261. On 28 March 2023, at the date of the oral hearing, the relevant EOS was EOS v. 6 prepared by Mr Bonney to 31 March 2025. EOS v.6 states £513,181 plus VAT is presently available for the Protected Rent Debt in Mr Bonney's view. That is a marked increase from the sum of £293,378 plus VAT identified by the Applicant as available at the date of the Formal Proposal and £261,112 plus VAT at the date of the Revised Proposal.

262. The Applicant says the EOT establishes that the Applicant can be restored to solvency in 2023. They say, and I agree, that I must have regard to the most up to date data contained in the RBH December, January, February and March Financial Reports and EOT v.6 in determining viability. Rightly noting that the time of assessment under the CRCA is the relevant date for these purposes, not the position several months ago.

263. There are 2 main differences for the change in RBH's forecasts between late 2022 and March 2023. The first is due to the estimated energy costs of the business being reduced in line with the current fall in energy prices. RBH's previous estimate of the cost of utilities in 2023 was £884,000. Its latest forecast is £497,000. A difference which represents a £386,000 in EBT.

264. This difference supports the Applicant's submissions that RBH's previous provision for utilities was overstated. The alteration in RBH's approach reflects the Applicant's concern that RBH had not adopted the correct approach previously. They simply took the October and November 2022 anticipated high utility costs and applied them over each month for the next 2 year period. Mr Johnstone says RBH's

approach has now caught up with Mr Bonney's views and has resulted in a much more realistic picture.

265. The change on RBH's part also fully vindicates the Applicant's decision to openly query RBH's utility forecasting and approach in November 2022. And to seek the production of the independent expert utilities report at the date it was produced in this Arbitration.

266. The second main difference is RBH's new forecast for total revenue in 2023. It previously forecast £7.66m. It now forecasts £8m[65]. That is a predicted increase in the Applicant's revenue of 8.5%

267. RBH has also now adopted Mr Bonney's approach with regard to the appropriate percentage payment into FF&E. That is at 3% and not the 4% they had previously set aside from April 2023. RBH's previous use of 4% was incorrect (and seemingly not identified by the FRP Administrators). This correction has a beneficial effect on EBT.

268. As regards insurance, it remains the case that the Applicant considers RBH's forecasts for insurance are overestimated. The evidence is that, contrary to RBH's previous forecasts, the Consolidated 2022 Financial Statement now shows £100,000, that is £8,333 a month, was actually spent on insurance[66]. As such, RBH's previous 2022 forecasts were overstated. Notably, the actual sum spent on insurance was broadly in line with Mr Gheewala's own estimate of £8,800 a month[67] set out in Mr Bonney's Witness Statement. It is instructive that Mr Bonney's

[65] Cells U73 and U44.
[66] Line 39, cell P39. £100,000
[67] B492.

comments regarding RBH's insurance pricing were supported by Mr Elliott in his Report. Mr Elliott's own opinion was, again, that Mr Bonney's allowance was itself probably too high.

269. Against the background of the inaccurate 2022 forecast, RBH's present forecast for 2023 now attributes £175,000 to insurance. That is a 57% increase on 2022. If the same increase is applied to 2024 that represents a very significant increase in insurance premiums indeed over a 2 year period. The advice the Applicant has received from Mr Gheewala's broker is that the Applicant's insurance costs should increase by between 8 and 15%[68] during that time. So, Mr Johnstone submits, one can assume to about £110,000 in 2023 and £115,000 in 2024. This would represent an increase of £25,000 over 2 years. Not the £150,000 presently forecast by RBH.

270. Taking Mr Gheewala's approach to EBT impacts beneficially, to the tune of £125,000, on the EBT as forecast by RBH. On the basis of all the evidence before me as to RBH's approach to insurance forecasting, I consider Mr Gheewala's approach is the right one. I adopt the Applicant's evidence and reject RBH's forecast insurance figures for the purposes of my assessment.

271. Although Mrs Creer submits that the fact RBH has now corrected the 4% to 3% for the FF&E deduction, but has not changed the approach to insurance costs, suggests the Applicant's evidence on insurance costing is undermined, I do not agree.

[68] A26, para. 59J; B505.

272. EOS v.6 shows the Applicant's assets unaltered. Importantly, there is no evidence before me that any of the Applicant's assets have been the subject of disposal or that there is any contract for disposal. The Applicant's assets are intact and its business is trading.

273. EOS v. 6 shows the Administration costs have been updated to reflect the excess *increase* of £500,000 in the costs of the Administration since EOS v.5 was prepared in February 2023. That is a very large sum. It is a significant feature of any assessment of the Applicant's viability that the EOS prepared contain a double set of Administration costs and substantial professional costs at this level. This is necessarily a considerable financial burden upon the Applicant. Mr Johnstone points out that either the Applicant's shareholder or the Respondent would be entitled to have the costs reviewed by the High Court.

274. In taking the picture through to 31 March 2025, EOS v.6 follows RBH's most recent forecast by including what are, without doubt, the Applicant's 3 worst months of every trading year. Seasonal variations evidence January to March are never good months for the Applicant's business and that they are not representative of the year as a whole. I agree with the Applicant that a more representative picture for 2025 would, therefore, have included the 3 following months too. Alternatively, and as previously, to forecast to December 2024 only.

275. As at December 2024, this would make roughly £100,000 difference to EOS v.6. The removal of the January to March 2025 loss from EBT and of the sums paid into FFE in respect of that extra period. Given that there is no forecast for April to June 2025, I agree that it is more representative to look at the forecast to December 2024 when considering viability.

276. With regard to the further RBH material, Mrs Creer said that although RBH now forecast that profit at the end of 2023 will be "significantly better" than their last forecast, the start of the year had not proved that to be the case. That said, it is accepted that January and February 2023 "substantially outperformed" 2022.

277. In my opinion, the evidence relating to January and February 2023 simply bears out that any decision focused upon the figures for January and February is unlikely to provide a highly unreliable guide to any year as a whole. First, they are the Applicant's poorest trading months. Second, the fact of Covid in 2021 and Omicron in January and February 2022 would tend to suggest RBH may have struggled to call on recent comparable evidence when formulating this January and February 2023 forecast in 2022.

278. The Respondent points to RBH's most recent forecast and submits that RBH forecasts that it will only be in September and December 2023 that trade will be better than it was in 2022. So, overall, the Respondent says the RBH forecast for 2023 will not be as profitable as 2022 if looked at month to month. The fact the overall outlook is more positive does not necessarily translate into a final result that is as positive for the Applicant as may appear, it submits.

279. The Respondent also submits that the Applicant's latest actual results and RBH's forecast show that although trading performance is improving, the surplus available for the Protected Rent Debt is falling. Mrs Creer says that RBH's adjustment from 4% to 3% FF&E provision (to reflect its contractual entitlement from 1 April 2023), has automatically boosted EBT. RBH's change in the treatment of utilities also has a significant impact.

280. Mrs Creer says these 2 changes alone should have boosted profit by £500,000. The fact that they have not is a concern. Against that, in my view, it must be recognised that the costs of the Administration have been increased by £500,000 in EOS v. 6. Thus, cancelling out the beneficial impact of these corrections by £500,000.

281. In my opinion, the Respondent's arguments fail to take into account that the Applicant is now forecast by RBH to be in profit for 2023 notwithstanding the existence of present economic challenges which did not exist at this stage in 2022. The month by month comparison Mrs Creer seeks to draw is not a like for like one in reality. Regardless of the fact that RBH overstated utilities costs by a substantial margin, it is beyond doubt that utilities costs have independently increased. As has inflation. Neither of these factors is specific to the Applicant. As regards the Applicant itself, its previous fixed rate utilities contract also ended on 31 October 2022. Since then, it has not entered a replacement fixed rate contract.

282. In summary, the Respondent says it is:

> "good more profit is forecast and there is a turnover improvement for 2023 but, overall, because of the variance in the [RBH] forecasts we cannot be confident the business is viable and, because there is no cash flow forecast, we cannot see the position at the date the Applicant exits administration."

283. To my mind, there is an element of unreality in the Respondent's stance here. A decision must be reached on the best evidence available. A forecast is simply a forecast and it must be evaluated on that basis. The RBH forecasts evidence improvement. They fall to be considered as part of the evidence along with the Applicant's actual improved trading figures and actual costs. The actual figures are

established evidence from which safer conclusions can be drawn. Mr Bonney has explained why RBH says it has not produced cash flow forecasts.

284. In summary, as regards the RBH evidence, notwithstanding the Applicant has had a year in administration, and notwithstanding any impact there may be as a result of the FRP Administrators' marketing the Hotel (as to which I have no evidence), the Applicant's business had a profitable year in 2022. RBH, who are conservative forecasters, forecast the Applicant's business to be in profit at the end of 2023 and 2024.

The FRP Administrators

285. The third set of evidence before me is in the form of the FRP Administrators' letters to Freeths dated 21 November 2022 and 27 January 2023 and Ashtons' letter to F+H dated 14 March 2023 (with attachments) and F+H's / Quantuma's reply dated 18 March 2023 (with attachments). This has created a parallel track of argument within the Arbitration.

286. The FRP Administrators' letters and Ashtons' letter is not material provided in accordance with the timetable set in this Arbitration and has not been provided in accordance with the evidential requirements of s.12 CRCA. It does not carry a statement of truth.

287. Section 12(3) CRCA permits me to disregard any written statement provided to me by a party (whether made by the party or another person), which relates to a matter relevant to the Arbitration if not verified by a statement of truth. Notwithstanding that these letters have caused a not insignificant degree of

disruption and delay to this Arbitration (and no doubt increased costs), it would not be appropriate to disregard them.

288. The fact of the Administration was itself already important information. As is the fact the Administration has recently been extended (on the basis of creditors' approval), to 31 March 2024 (Respondent's March Submissions, para. 8). That is, subject, of course, to any further court orders.

289. The FRP Administrators are presently responsible for running the Administration of the Applicant under the Court Order. They make the decisions in that Administration under the Court Order (subject to Mr Bonney's conduct of this Arbitration). Information regarding the Applicant's assets and liabilities, the course of the Administration, and their decisions in the Administration, specifically as to the purpose of the Administration, is information which relates directly to the financial position of the Applicant under s. 16 CRCA and falls within the provisions of the CRCA Guidance.

290. The FRP Administrators' November 2022 decision, taken on the basis of the material before them then, was that the Applicant could not then be rescued as a going concern (as explained in their 21 November letter [paras. 318-319 below]). They reiterate that decision in their 27 January 2023 letter [para. 330 below]. This is plainly important, and significant, information when I ask myself the key question whether, the Protected Rent Debt of £3,320,300.65 aside, the Applicant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading, such that it is viable under the CRCA.

291. The Joint Administrators' difference of views was identified by Mr Bonney in his original Witness Statement and in the documents he exhibited. In Mr Bonney's Second Witness Statement, he provides a detailed examination of the reasons for the differences between the Joint Administrators' views, as later set out in their letter to Freeths of 21 November 2022, and his own views. Specifically, as to why, in this Arbitration, Mr Bonney's own reasoned analysis is that the Applicant's business is viable, and that the Applicant should be able to exit administration and trade profitably in future if it is granted relief under CRCA.

292. Mr Johnstone provided Ashtons' 14 March 2023 letter to me as they requested. The Applicant did not oppose the Respondent's application for its late admission into evidence. As a result of my further directions, the evidence before me now also includes F+H's reply to Ashtons and Quantuma's reply to the FRP Administrators dated 18 March 2023 (with attachments) [paras. 365 and 368-369 below]. As explained in paragraph 174 above, I added a further stage at the end of the Directions timetable so that both the Applicant and the Respondent could make written submissions focussed upon this new material by close of business on 28 March 2023.

293. The Applicant is right to point out, however, that the form in which the FRP Administrators' conclusions have been provided (including the absence of a statement of truth), necessarily has some impact on its weight in this Arbitration. Each letter also contains a degree of unfortunate misunderstanding as to what I have been told by the parties to the Arbitration and, specifically, by Mr Bonney and F+H. The commentary devoted to such matters may communicate a sense that the 21 November 2022 [paras. 318-319 below], 27 January 2023 [para. 330 below] and 14 March 2023 [para. 338 below] letters were written with a degree of frustration. I put that on one side, however.

294. In the Ashtons' letter [para. 338 below] there is also criticism that the parties to the Arbitration jointly agreed to instruct an Independent Expert to review RBH's utilities costs last November for the purposes of this CRCA assessment. And objection to the fact the parties' Directions included provision for an independent accountant, if required (although it is not clear how they were aware of that fact). Again, I put those comments on one side. Some of the content of Ashtons' letter does, however, reflect legal misunderstandings as to the way the CRCA operates. Including the level of the Protected Rent Debt and the purpose of this Arbitration.

295. Overall, the level of analysis contained in the materials produced by the FRP Administrators and communicated for use in this Arbitration does not match the quality of the Applicant's explanatory evidence supporting its own approach under the CRCA. Unfortunately, some of the content of the recent letters comprises assertion. In contrast, the Applicant's evidence and submissions dissect the relevant financial materials and the conclusions that can be drawn from them. The Applicant analyses the details for the specific purpose of applying the provisions of the CRCA as at the date of the assessment in this Arbitration. In each case, in Mr Bonney's evidence, under the banner of a statement of truth as to his views and opinions. Those being the views and opinions of the Administrator given conduct by the Court of this Arbitration under the CRCA on behalf of the Applicant.

296. The Applicant's stance is that I may take into account the FRP Administrators' opinion in reaching my own determination as to viability. However, for the reasons it sets out, the Applicant submits that the FRP Administrators' analysis is wrong in the light of the financial evidence available in the Arbitration, and that limited weight should be given to it. The Applicant considers that it is based on a flawed analysis and it was and remains, in any event, premature to come to the conclusion

the Applicant cannot be rescued as a going concern in the light of the Applicant's improving financial position and before the grant of relief under CRCA.

297. The Applicant also suggests strongly that the FRP Administrators have adopted contrary positions on particular points of detail (the exclusion of the FF&E Reserve, the valuation of the Non-Protected Rent Debt and other deductions) in order to justify their stance rather than looking at these points on their merits and then coming to a conclusion as to whether the Applicant can be rescued solvently. Furthermore, they say, they have sought to intervene in the Arbitration in a manner which can only be described as hostile to the Applicant's position in the Arbitration. They say their motive for doing so is unclear.

298. The Applicant submits the early correspondence in the Ashford's Correspondence [March bundle (CB) pages 1-222] provides context to the matters set out in Ashtons' Letter of 14 March 2023 and the FRP Administrators' letter of 21 November 2022[69]. In the Applicant's submission, these matters show that the FRP Administrators adopted a particular stance against the possibility of the Applicant's solvent rescue from the outset of their appointment. I form no view on this suggestion for the purposes of my assessment.

299. It is important that I make clear that the Respondent does not share Ashtons' view that that the FRP Administrators' opinion regarding the Applicant's viability is conclusive for the purposes of an assessment under CRCA in this Arbitration. In so far as the Respondent's Submissions (para. 2) may initially have been interpreted differently, the Respondent has clarified that was not its intent. The Respondent's Submissions (para. 2) state the reference should be dismissed on the basis that the

[69] Bundle B p846.

FRP Administrators have assessed the Applicant's business and determined that it will not be able to make a solvent exit from administration even if the whole of the Protected Rent Debt is written off. As such, any award cannot satisfy the requirements of s. 13(4) CRCA. The Respondent's Submissions continue that "if contrary to the FRP Administrator's professional assessment" it is held that the Applicant's business is viable or would be viable if relief from payment of some of the Protected Rent Debt were awarded, I should make an award on the basis that its Revised Formal Proposal is consistent, or most consistent, with the principles in s. 15. That being based on a more optimistic analysis of the Applicant's profitability than set out by Mr Bonney.

300. In the Respondent's Submissions in Reply (paras. 7-8), it says the Respondent does not submit in this Arbitration that the fact of administration is determinative of viability, though it is a highly material consideration. It also clarifies that the Respondent does not submit in this Arbitration that I must reach the same conclusion as the FRP Administrators. The Respondent says its point is more nuanced, if the FRP Administrators have formed the view that rescue of the Applicant's business as a going concern cannot be attained, then any award made will not achieve the statutory objective of enabling the Applicant to remain or to become viable.

301. The Respondent also says the significant difference of opinion between the FRP Administrators' assessment of the Applicant's financial outlook and Mr Bonney's, and the very fact the different administrators fundamentally do not agree on whether the Applicant can be rescued, should in and of itself be a "red flag" on the issue of viability (para. 10).

302. Most recently, in the Respondent's 28 March 2023 Submissions, Mrs Creer put matters as follows. That on the basis the FRP Administrators will ultimately decide the fate of the Applicant, their opinion is clearly highly relevant to a determination under CRCA, both in terms of their assessment of the future viability of the Applicant and whether the statutory purpose of an award could be realised (para. 23).

303. In response to Mrs Creer's "nuanced" point, the Applicant submits that the Respondent's Submissions fail to address the fact that the joint administrators of a company in administration may be mistaken when they form a view that the company cannot be rescued (paras. 5-6). In those circumstances, a member of the company is entitled to apply to the Court for relief under paragraph 74 of Schedule B1 of the Insolvency Act 1986. Such relief could include an order requiring the joint administrators to proceed with the administration on the basis that the company can be rescued as a going concern, where the evidence indicates that it can be rescued. The paragraph states:

"(1) A creditor or member of a company in administration may apply to the court claiming that –

The administrator is acting or has acted so as unfairly to harm the interests of the applicant (…), or

(a) The administrator proposes to act in a way which would unfairly harm the interests of the applicant (…)

…

(3) The court may –

(a) grant relief;

(…)

(4) In particular, an order under this paragraph may –

(a) regulate the administrator's exercise of his functions;

(b) require the administrator to do or not to do a specified thing

(c) (…)

(d) provide for the appointment of an administrator to cease to have effect".

304. The Applicant says its business is viable. With regard to the Administration, it submits the evidence before me shows that it is now solvent (see [then] EOT v.5 as at 31 March 2023), and that if the FRP Administrators do not work to achieve its rescue, as threatened, the Applicant's member may exercise its legal right to apply under paragraph 74 of Schedule B1. In these factual / legal circumstances, the Applicant says the Arbitral Tribunal's award can achieve the statutory objective of enabling the tenant to remain or become viable under the CRCA (Reply, para. 6).

305. The Applicant also points out that the FRP Administrators have not put the Applicant into a Creditors Voluntary Liquidation. The Applicant suggests this may be in light of the significantly lower utility costs and improved trading results since their letter was written on 21 November 2022. In any event, given the position shown in the recent EOT, and in circumstances where the Applicant's business can and ought to be restored to viability by an award in this Arbitration, the shareholder of the Applicant would be entitled to apply to the Companies Court for directions under paragraph 74 of Schedule B1 to the Insolvency Act 1986 to require the FRP Administrators to apply for permission to distribute the available funds to meet all unsecured creditors' claims and to restrain the FRP Administrators from placing the Applicant into a CVL on the grounds that such a step would harm its interests. The Applicant says that in circumstances where there are sufficient funds to meet unsecured creditors' claims in full, there is no reason why such an application would not succeed. (Submissions, para. 59)

306. On this basis, the Applicant submits that the question as to whether the Applicant's business is viable but for the question of the Protected Rent Debt remains a question which must be determined in this Arbitration by reference to the evidence before me (Submissions, para. 60). The fact that the FRP Administrators state that they believe the Applicant cannot be rescued is not determinative of that question if:

a. I determine, having considered the evidence, that the Applicant can be restored to viability for the purposes of awarding relief under the CRCA and

b. Where the shareholder has the ability to apply to the Companies Court for relief if the FRP Administrators' view does remain unchanged following an award and/or as the Administration continues.

307. As matters stand, the FRP Administrators confirm that the Applicant will continue to trade. Mr Johnstone says, the fact that the FRP Administrators may be marketing the Hotel is not relevant to the question as to whether the Applicant's business is viable, if, as the Applicant submits, it can still be rescued (Reply, para. 10).

308. Against the background of these submissions, and as the FRP Administrators' conclusions are necessarily a matter of clear concern to me in this Arbitration, I have considered the FRP Administrators' correspondence with care. In particular, the correspondence the Respondent relies upon in this Arbitration as regards the impact of the FRP Administrators' views. I have also considered the Applicant's responses in Witness Statements, Submissions and its letters.

309. The Ashtons' Correspondence Bundle (CB) contains correspondence primarily between Mr Bonney and the FRP Administrators showing the development of their differences as to whether the Applicant can exit Administration solvently. I agree with Mr Johnstone that there is little material in the Correspondence Bundle which assists. Much of the financial information in the Correspondence Bundle, including in appendices to Christies' report (CB,18-83), is now significantly out of date as at the date of my assessment.

310. The Ashtons Correspondence shows (and the FRP Administrators' 21 November 2022 letter had already referred to the fact that), on 20 September 2022, the FRP Administrators shared with Mr Bonney a spreadsheet containing an estimated outcome statement for A after 1 and 2 years of trading (CB, 88-89) for the purposes of reporting to creditors. The FRP Administrators said this demonstrated a shortfall after payment of the unsecured creditors and Administration costs. That shortfall of £407,484 after one year of trading reflected 2 major differences in view between the FRP Administrators and Mr Bonney:

a. the FRP Administrators did not include the FF&E Reserve at the onset of the Administration and further accruals into the FF&E Reserve during that year (with a value of £273,887 and c. £200,000 respectively);

b. the FRP Administrators (wrongly) stated the value of Non Protected Rent Debt as (then) £1,689,534 as opposed to (then) £1,481,473. A mistake which made a difference of £208,061 on its own.

In total, these issues had a value of c. £682,000, substantially more than the shortfall.

311. In the Respondent's January 2023 Submissions (para. 15), Mrs Creer quotes 3 discrete passages from the FRP Administrators' October 2022 Progress Report[70] (exhibited by Mr Bonney in SB6 (B666-716)). I have set these passages in context within the sections I extracted above [paras. 90-91 above]. The passages are:

> "Having considered the financial information that is being prepared by RBH and the Directors' sworn Statement of Affairs, it remains unclear to the FRP Administrators at this stage how the company can be restored to solvency as this would require a larger right off than is due to [the Respondent] from the Protected period. (approx. £2.9m)".
>
> "Absent further information or explanation, our analysis indicates that. There is a potential shortfall in funding to restore the Company to solvency and no apparent options to mitigate such shortfall."
>
> "Our ability to continue to trade medium term cannot be justified at this point in time in view of the decrease on the estimated return for creditors and execution risk in an uncertain economy".

In my view, these 20 October 2022 passages are better read in context. They were part of a broader summary looking at the picture from a different perspective to Mr Bonney. The sum attributed to the Protected Period for "right off" was also understated.

312. The Applicant points out the FRP Administrators' statement that RBH's then forecasts indicated that the Applicant's business would only break even from January to 2023 to March 2024 is based on an analysis which ignores the revenue deducted from EBT for the FF&E Reserve (as shown in their table). The period of their analysis includes two periods of traditionally quieter trading (January to March

[70] for the period 31 March 2022-30 September 2022

2023 and January to March 2024) and only one period of traditionally busier trading (April to November 2023). The Applicant submits a fairer analysis would have included the period April to November 2024) (Submissions, paras. 45-46). In so far as relevant for present purposes, I agree with that. Mr Bonney's reasons for disagreeing with the FRP Administrators October Progress Report are detailed in paras 22 to 23 of his Second Witness Statement (A47-48) [see para. 92 above].

313. The Applicant also takes issue with the FRP Administrators expressed doubt as to how the Applicant could be restored to solvency (p15, SB 6, B671), stating that it would require a larger write off of debt than is due to the Respondent in respect of the Protected Rent Debt. In Submissions, the Applicant says the comment is not supported by any evidence of the Applicant's financial position. At the date of their Submissions (paras. 46-47):

a. both (the then poorer) EOT v.5 and the EOT as at 31 March 2023 showed that the Applicant has substantial cash surpluses at 31 December 2023 (£400,000) and at 31 March 2024, if the Protected Rent Debt is discounted:

b. the FRP Administrators provided no calculation in their Progress Report supporting this comment. Their analysis of the Applicant's liabilities states that unsecured creditors total £4,740,000 (table, p16, SB6, B672 and table, p17, SB6, B673). The trade and expense creditors (table, p17, SB6, B673) accords with the Applicant's figure. The rent arrears are, however, substantially overstated at £3,971,000. The Applicant's (then) figure in respect of the Non Protected Rent Debt was £1,481,473, not including the VAT element which is recoverable and can be offset against the VAT received from customers;

c. the FRP Administrators' figure must include the Protected Rent Debt, which is a contingent liability not a current liability. It is taken from a table within the Directors' Statement of Affairs (B673) which does not purport to separate out

any element of Rent relating to the Protected Period for the purposes of the CRCA.

314. As a final point, the Applicant's Submissions noted that the Applicant's significantly better than forecast trading in October and November 2022 meant that the FRP Administrators' analysis in these tables and its commentary in the October 2022 Report is, in any event, out of date for the purposes of my assessment. It says, the Respondent's references at paragraphs 15b) to 15d) of its Submissions to the FRP Administrators' comments, in support of its position that the Applicant's business is not viable are therefore misconceived (paras. 48-49). I agree that the Results then mentioned are now out of date at the date of my own CRCA assessment.

315. I also note that Mrs Creer evidenced one of her own criticisms of the RBH's forecasts by pointing to:

"the unreliability of RBH's forecasts by comparison of the Management Accounts and RBH's forecast ("the original RBH Accounts") and the October Financial Report, which show a significant change in outlook based on just 1 more month's trading results. (Submissions, para. 25)"

316. The Ashtons' Correspondence Bundle shows that on 2 November 2022, the FRP Administrators informed Mr Bonney that they had come to the conclusion that the Applicant could no longer be rescued solvently (CB, p132). I have read the entirety of the Bundle. The Applicant is right that whilst much of the material Ashtons required to be placed before me is not directly relevant to the matters I have to determine, some of it provides context to the matters set out in the FRP Administrators' letter of 21 November 2022 and Ashtons' letter of 14 March 2023.

317. As mentioned above, on 16 November 2022 Freeths sent Mr Bonney's First Witness Statement in the Arbitration to the FRP Administrators [Course of the Arbitration, para. 132 above]. They asked for their comments, including as to Mr Bonney's "challenges in relation to the content of your [October Progress] Report" (B844).

318. The letter of 21 November 2022 sent by the FRP Administrators to Freeths provides the most complete summary which I have as to the FRP Administrators' own thinking. The FRP Administrators referred back to the content of this letter in their subsequent letter to Freeths on 27 January 2023 [para. 330 below].

319. On 21 November 2022, they wrote (amongst other matters):

1. As the FRP Administrators we have asked on five separate occasions to receive a copy of the Quantuma Administrator's submissions to the Arbitrator so that we can not only maintain proper books and records, but also so that we can fulfil our statutory duties to report to creditors and pursue an appropriate administration strategy. Unfortunately, the Quantuma Administrator failed to deliver up his proposal or the documents provided to the Arbitrator in support of his submission [B846 and 847]. Consequently, we have only had a short window of opportunity to review [Mr Bonney's Witness Statement] and prepare the observations below;

2. The Court Order is clear that all matters outside of the arbitration rest solely with the FRP Administrators. There is therefore no need or requirement for our reports to be provided or approved by the Quantuma Administrator [847];

3. Due to personal holiday commitments, the FPH Administrators previously communicated to the Quantuma Administrator via e-mail on 11 October 2022

that the six month progress report needed to be sent out by close of business on 20 October 2022. We therefore invited Quantuma Administrator's information as soon as possible. Having received the Quantuma Administrator's analysis on 18 October 2022 there was no meaningful time to assess the assumptions or merits of a solvent outcome as depicted in the Quantuma Administrator's analysis.

4. Had we received such information at an earlier stage, …, then our six month report … may have contained different commentary to acknowledge that information although, for the reasons set out in this correspondence, we do not expect that it would have caused us to substantially amend our report [B847].

5. The first time that the FRP Administrators have received any detailed analysis or information submitted to the Arbitrator was that which accompanied your e-mail and letter dated 16 November 2022. This again gives us limited time to properly analyse its contents.

Financial performance update

[Mr Bonney's Witness Statement] includes considerable analysis of the [Applicant's] financial performance both since the Administration and going forwards from both the perspective of the Quantuma Administrator and Mr Elliot[71]. However, from the perspective of our statutory duties as Administrator, such analysis is irrelevant as we must rely upon the pre-eminent advice and forecasts of the appointed specialist hotel manager (ie. RBH) when reporting to creditors and making strategic decisions to meet our statutory duties under the Insolvency Act 1986.

We now provide an update on the latest RBH financial forecasts (provided to us on 18 November 2022) so that [the Respondent], and indeed all parties in the

[71] It appears Mr Elliott's Report was not provided to them.

Arbitration (if forwarded by the Respondent within the Arbitration), are contemporary in their knowledge.

- Latest forecasts now show EBT as follows
- January 2023-December 2023 £508,286 LOSS
- January 2024-December 2024 £308,092 LOSS
- A key driver of the change in financial forecasts relates to energy prices. As noted in [Mr Bonney's Witness Statement] the fact that the [Applicant] is in administration has further frustrated RBH's attempt to secure cost beneficial energy contracts. A copy of RBH's agent's e-mail confirming the latest projected energy costs is contained in appendix 2.
- Whilst these recent changes are material in their own right when determining the ongoing strategy of the administration, they do not detract from our previous concerns as to how a solvent exit could be achieved which we first raised with the Quantuma Administrator on 20 September 2022 and then subsequently when reporting to creditors in our six month progress report dated 20 October 2022.

Estimated Outcome Analysis

We now turn to the estimated outcome aspects of [Mr Bonney's Witness Statement] where we compare the Quantuma Administrators' analysis with our own, making comment where there are differences but also noting that we ourselves have only just received updated forecasts from RBH.

… unless stated, the figures have been extracted from the Directors' Statement of Affairs or provided by (RBH).

In short … We consider that as at 30 March 2023 (that being the 12 month anniversary of the Administration) there is in fact a substantial shortfall to unsecured creditors, meaning that the [Applicant] cannot be restored to solvency even if the entire rent from the Protected Period is written off. Indeed, given the

losses forecast by RBH, this shortfall worsens from hereon for the foreseeable future.

The key differences between the respective analyses are as follows:

• Deposits: Customer deposits amounting to £83,000 (according to RBH) as at the date of the insolvency must be removed from the EBT or risk double counting in cash generation.

• Energy costs: as noted earlier.

• Corporation Tax – should an award be made that reduces the Protected Rent Debt, it is possible that this will trigger a necessary revision of the [Applicant's] historic accounts and tax position. With such a substantial credit to the [Applicant's reserves], it is possible that a Corporation Tax charge may become due, albeit it would sit as an unsecured non-preferential creditor … We are seeking advice on the position from our appointed tax advisers, KPMG;

• FFE Reserve: [Mr Bonney's Witness Statement] references various percentage calculations, some of which we do not recognise (including the 4% accrual number …). Notwithstanding this, we therefore must rely upon the RBH forecasts (as an independent data source) which contains the customary 3% accrual[72], and would make the following comments:

° RBH have stated that the entire FFE Reserve, including that accrued prior to the [Applicant's] insolvency, is required to meet projected capital expenditure including Hilton brand standards. Once again, the FHP Administrators, being exclusively responsible for the wider insolvency, must rely upon the most pertinent source of advice / data, ie that being provided by RBH.

° … we understand from information provided by RBH that certain 2023 expenditure is not replacement expenditure but is in fact mandatory "prop-tech" upgrades.

[72] Which RBH had not applied from 1 April 2023. They had been using 4%.

° we have received no indication from Hilton in our discussions with them that capital expenditure of any nature can be deferred, and we do not consider it as appropriate in an insolvency situation for any party including ourselves as Administrators to speculate or rely upon conjecture in this regard.

° we would note that non adherence to such capital expenditure requirements, and especially the Hilton requirements, would have significant adverse implications to the hotel's value, and by definition its trading outlook and value to all stakeholders.

° as such, the FHP Administrators do not consider it appropriate that an "allocation" of purported surplus FFE reserve could be made available to pay unsecured creditors.

The viability and solvency tests

Based on the latest financial forecasts and our review of [Mr Bonney's Witness Statement] we would make the following observations:

• The [Applicant's] ability to trade from January 2023 onwards (based on forecasts prepared by RBH) was previously marginal and could only cautiously consider future headwinds in a cost of living crisis, but has now materially worsened due to an inability to access cost effective energy contracts. As a result:

° continuing to trade from January 2023 onwards is value destructive to all stakeholders and cannot currently, based on the evidence to hand, be justified by the FRP Administrators (being solely responsible for such matters); and

° with viability now at risk, it does not support the Quantuma Administrator's assertions around a return to solvency or address the need to protect creditors (a clear statutory requirement).

• we consider the estimated outcome analysis as portrayed by the Quantuma Administrator is substantially flawed due to the reasons already rehearsed above,

indeed the position worsens the longer the [Applicant] continues to trade from January 2023 based on our RBH forecasts."

The FRP Administrators included an analysis of the funds flow for the first year of the Administration to 30 March 2023.

Estimated Realisations as at 30 March 2023	£	£
Cash at Bank	1,480,049	
EBT from trading (April 2022 - March 2023)	1,037,234 [*RBH's then estimate to March 2023*]	
	15,000	
		2,532,283
Costs **of Administration**		
Estimated Professional Fees	(827,664)	
		(827,664)
Estimated Funds Available to meet Claims of Creditors		1,704,619
Secondary Preferential Creditors		
HMRC – VAT	(83,916)	
HMRC - PAYE	(11,044)	
Statutory Interest (8 months)	(5,698)	
		(100,658)

Available to ordinary unsecured creditors		1,603,961
Trade & Expense Creditors	(140,674)	
Non Protected Rent Debt incl. interest to 30 March 2022 and costs	(1,777,768) [*This reflects the Respondent's calculation of the Protected Period as ending on 17 May 2021 not the Applicant's calculation to 18 July 2021*]	
Statutory interest 12 months – 31 March 2022 to 30 March 2023	(155,726)	
		2,074,168
Other adjustments		
Working capital requirements as per Quantuma Administrator		(250,000)
ESTIMATED (DEFECIT) AS AT 30 MAR 2023		(720,207)

The FRP Administrators said:

"We comment as follows:

° As shown, there will be insufficient funds available to meet the costs, expenses under claims (excluding for this analysis only any award for PRD) of creditors.

° whilst the professional fees are estimated and subject to approval by creditors, those fees and expenses are payable in priority to both preferential unsecured and non preferential unsecured creditors. Therefore, funds must be reserved in full to meet these.

° it is therefore, in our opinion, not possible to hand back control of the [Applicant] to its directors before the end of March 2023 due to lack of available assets for distribution. As a result, the Administration will therefore require an extension for a further 12 months.

° However, as already noted above and in Appendix 5, the forecast EBT for the 12 months periods to December 2024 and 2025 and losses of £508,286 and £308,092 respectively. Medium term viability is therefore currently very much in question and an application to creditors and / or the court to continue trading cannot be justified by the FRP Administrators. (my emphasis)

Conclusion

Given the above observations from the information available to the FRP Administrators, we consider that the purpose of the Administration can no longer be to rescue the [Applicant] as a Going Concern, as per Paragraph 3 of schedule B1 to the Insolvency Act 1986. To continue to trade without adopting an alternative strategy in the short term would lead to an acceptable diminution in the return to the non preferential unsecured creditors." (my emphasis)

320. As a matter of fact, these are decisions which have been taken by the FRP Administrators in performance of their role under the Court Order and within the Administration.

321. At paragraph 16 of the Respondent's Submissions, Mrs Creer relies upon the 21 November 2022 letter to Freeths. She says the FRP Administrators' assessment in their letter was "less optimistic" than in their October Report. The specific passages Mrs Creer quotes are:

"Continuing to trade from January 2023 onwards is value destructive to all stakeholders and cannot currently, based on the evidence to hand, be justified by the FRP Administrators (being solely responsible for such matters)."

"There is an inherent risk of future failure particularly in light of the latest trading forecasts prepared by RBH"

322. In this Arbitration, the Applicant submits:

a. In the penultimate bullet point in commentary under the heading Progress Report (p2, B847), the FRP Administrators state that had they had the information they say that they did not receive from Mr Bonney, their commentary in the October Progress Report might have been different, but that they did not expect it would have caused them to substantially amend their report. This is difficult to reconcile with the financial data available to them at the time and which was summarised in EOT v.2, which shows a substantial cash surplus;

b. The FRP Administrators should, in any event, have been in a position to reach the same conclusions as Mr Bonney with regard to the question of the Applicant's financial position. They had the same financial data as Mr Bonney from RBH. They simply did not analyse that data correctly – in particular, their calculation of the Applicant's rental liabilities was incorrect, including as it did the Protected Rent Debt when it was only a contingent liability;

c. The FRP Administrators then noted under the heading Financial performance update (B848) the financial data contained in Appendix 5 to Mr Elliott's report, being RBH's forecasts for trading to the end of December 2022, 2023 and 2024 (G. Forecast to end December 2022, H. Forecast 2023 & I. Forecast 2024). They noted that these forecasts indicated:

    i. a profit of £1,120,233 to the end of December 2022;

ii. a loss of £508,286 in 2023;

iii. a loss of £308,092 in 2024.

d. They noted that a key driver of this change in forecasts related to energy prices. RBH had not forecast the very significant increase in energy prices in their previous reports. In the Management Accounts and RBH's Forecast (A. Management Accounts, 2022, 2023 and 2024, line 73), utility costs were forecast to rise from c. £18,600 a month in September 2022 to £62,700 a month in October and November 2022 and gradually decreasing thereafter to £43,728 in December 2023 and £23,583 in December 2024. In their forecasts at Appendix 5 to Mr Elliott's report, RBH forecast a figure of £94,700 a month in November and December 2022, and figures in excess of £95,500 a month throughout 2023 and £77,383 a month throughout 2024. However, by December 2022 "*these estimates were, it transpires, grossly overstated*":

i. The subsequent December Financial Report noted that the combined cost of utilities for November and December 2022 would be £124,000 (D. December Financial Report, line 73) rather than the figure of nearly £190,000 in the forecast for 2022 in Appendix 5 of Elliott Two (G. Forecast to end of December 2022).

ii. For the period January to March 2023, the December Financial Report forecast monthly utilities costs of £64,000 a month and for April to October 2023, £71,583 a month (D. December Financial Report, line 73).

iii. For the whole of that period in 2023, RBH estimated in December 2022 that the total costs of utilities would be £693,283, as opposed to the total figure of £956,383 in its earlier forecast at Appendix 5 of Elliott Two (H. Forecast 2023).

iv. When asked to produce an independent expert report, Mr Kelly estimated that the cost of utilities at variable rates for the period

January to October 2023 would be £643,245 (E. Hampton by Hilton utility costs forecast (scenario ii));

v. Furthermore, that wholesale gas prices have fallen significantly since the New Year;

vi. RBH's estimates did not (and still do not) take into account the likelihood that the Applicant can obtain fixed rate contracts at any time in 2023 and 2024 if it comes out of administration. That would result in further significant reductions in utility costs as estimated by Mr Kelly (F. Hampton by Hilton utility costs forecast (scenario iii))[73].

323. The Applicant says that the FRP Administrators predicted a substantial shortfall for unsecured creditors as at 30 March 2023 (p3, B848). In reaching this conclusion, they noted four differences between their analysis and Mr Bonney's:

a. they stated that customer deposits amounting to £83,000 must be removed from EBT on the basis that it risks double counting. The Applicant says no explanation is provided in relation to this. Customer deposits are advanced payments by customers on rooms and, as far as the Applicant is concerned, should be included within EBT, but, of course, only once. It says there is no suggestion in any reports submitted by RBH that customer deposits may be double counted;

[73] As to fixed rate contracts, Mr Kelly has not ruled that out. As the Applicant submits, Mr Kelly does give a positive response to this question in his Expert Report, subject to the potential conditions he suggests might apply. The Applicant submits none of these are likely to pose any difficulties for the Applicant when it comes out of administration. Whilst Mr Kelly does not offer an opinion as to the same question if the Applicant remains in administration as he does not have sufficient information to make a judgment. However, it is right to say that he does not say it will not be able to obtain a new fixed rate contract in that event.

b. RBH has since reduced significantly its energy costs forecasts (as mentioned above);

c. they raise the possibility of Corporation Tax liability arising on an award reducing the Protected Rent Debt. As no further data is available as to whether this possibility is actually realistic, it should be discounted for the purposes of assessing viability;

d. they disagree with Mr Bonney's analysis and treatment of the FF&E Reserve:

    i. they say that they do not recognise the 4% accrual figure at paragraph 19 (para 19, Mr Bonney's Second Witness Statement, A47 and see also the explanation given at para 59(i) of Mr Bonney's First Witness Statement, A26). However, this percentage is evidenced in all of RBH's forecasts from April 2023. For example, in the Management Accounts (A, Management Accounts, 2023, line 101) the increase in the percentage from 3% to 4% in April 2023 is readily ascertainable. Total revenue for March 2023 (line 44) was forecast to be £636,697. The provision for renewals to the FF&E Reserve (line 101) was forecast to be £19,101. This is 3% of the total revenue figure. In April 2023, total revenue (line 44) was forecast to be £591,729. The provision for renewals to the FF&E Reserve (line 101) was forecast to be £23,669. This is 4% of the total revenue figure. For all of the months following April 2023, the provision for renewals to the FF&E Reserve is calculated as 4% of total revenue in place of 3% of total revenue.

    ii. they do not consider it appropriate to include the FF&E Reserve at all in their calculations and they refer to emails from RBH at appendix 4 of their letter in support of this (B849 and B863-868). In these emails, RBH indicate that the whole of the FF&E Reserve and further accruals (whether at 3% or 4%) are required to meet future capital expenditure needs. However, these comments need to be viewed in context:

1. RBH refer expressly to planned capital expenditure in 2025 and 2026 some time beyond the scope of the Tribunal's determination;

2. The Applicant's EOTs all account for the mandatory capital expenditure anticipated from 2023 onwards and only proposes to take into account the surplus of the FF&E Reserve once this mandatory expenditure has been accounted for. The FRP Administrators' reference to mandatory expenditure is therefore irrelevant, as it is already accounted for by the Applicant;

3. clause 14.1(c) of the Hilton Management Agreement (p98, SB 2, B342) contains a provision entitling RBH to deduct 3% of total revenue. It does not entitle RBH to deduct 4% as it forecasts doing from April 2023;

4. Rob Ledson, the Chief Financial Officer of RBH confirmed to Mr Bonney that RBH "*would have no issue if this* [the accruals to FF&E Reserve] *were reduced over the next couple of years*" (para 51, Mr Bonney's First Witness Statement, A22 and p124, SB3, B488);

5. for the purposes of exiting the administration solvently and paying creditors, the FF&E Reserve and all the accruals have to be taken into account, because the funds are legally available to creditors in the same way as any other funds of the Applicant. The FRP Administrators' suggestion that an allocation of surplus of FF&E Reserve cannot be made available to pay creditors is wrong in law. The whole of the FF&E Reserve is available to creditors;

6. for the purposes of determining viability, the FF&E Reserve and all the accruals to it ought to be taken into account, once the mandatory capital expenditure has been accounted for, because the funds represent cash available in the Applicant's business. This is the approach adopted by the Applicant and, in its submission, it

is the correct approach. It says the approach of the FRP Administrators is wrong.

324. In summary, the Applicant submits the FRP Administrators' comments on 21 November 2022 under the heading "The viability and solvency tests" are based on what is now an out of date forecast of energy costs, an unexplained deduction with regard to customer deposits, an unquantified and uncertain possibility of a Corporation Tax liability and an erroneous treatment of the FF&E Reserve. The Applicant says the letter should therefore be viewed with a great deal of caution in considering viability as at the date of this assessment under the CRCA.

325. For these and the other reasons noted in their Submissions, the Applicant submit the analysis and evidence contained in the FRP Administrators' letter of 21 November 2022 is either incorrect and/or based on out of date financial information and should therefore be discounted in favour of more recent evidence relevant to the viability assessment "*at the time of assessment*" under the CRCA: s.13(3) and s.13(4) of the Act.

326. It is not my place to look behind the FRP Administrators' conclusions in the Administration, or to examine their correctness, and I certainly do not seek to do so. However, in this Arbitration, I accept the substantive points which the Applicant makes, and Mr Bonney explains in his Witness Statement, for the purposes of my own viability assessment at the date of my award in this Arbitration. I specifically note that the FRP Administrators repeatedly stated that they relied upon RBH's forecasts and advice and why they did so.

327. At the date the 21 November 2022 letter was written, the latest RBH forecasts which the FRP Administrators were evaluating (electronic App 5), showed:

2023 a loss of £508,286 on total revenue of £7,792,614

2024 a loss of £308,092 on total revenue of £8,031,037.

As at the date of my own assessment, the evidence now before me is that RBH's forecasts are:

2023 a profit of £497,314

2024 a profit of £570,037[74].

(I appreciate that the FRP Administrators have reconsidered solvency in 2023, of course.)

328. As regards other elements of the 21 November 2022 letter not relied upon by the Respondent (and not set out above), the Applicant adds in its Submissions:

a. the FRP Administrators view that the Applicant cannot be handed back to its director (B850) is also wrong:

b. it is not the Applicant's position that the Applicant would be handed back to its director prior to the distribution of funds to creditors. Administrators have the power to obtain the permission of the Court to pay creditors. Once this Arbitration is concluded, there will be no bar to doing that, if the Applicant has sufficient funds to do so. The Estimated Outcome Statement as at 31 March 2023 (*as at the date of these written Submissions*) indicates that it will have a surplus of over £400,000 (*that figure has now been updated*);

[74] Figures from the spreadsheet provided by Ashtons on 14 March 2023.

e. the FRP Administrators acknowledge that distributions to unsecured creditors can be made by administrators with the permission of the Court;

f. the remaining comments of the FRP Administrators suggest that the Applicant's proposal is to exit the Administration prior to the payment of unsecured creditors but that is not the Applicant's proposal. Mr Bonney's evidence is that an application to Court for permission to pay creditors is made, but it can only be made once this arbitration is completed and the status of the Protected Rent Debt is ascertained (para 47, Mr Bonney's First Witness Statement, A20). This procedure is not dependent on future EBT generation. Once the unsecured creditors are paid and the Applicant subsequently exits Administration solvently, future EBT generation will be a matter for the director/s;

g. while the payments to unsecured creditors would include VAT, the Estimated Outcome Statement as at 31 March 2023 (as at the date of these Submissions) shows that there would be sufficient funds to achieve that, not taking into account the substantial receipts of VAT from customers which the Applicant accrues but which are not included EOT;

h. the Applicant's submissions and evidence relating to viability are not dependent on a CVA process;

i. the FRP Administrators' table in this section of their letter (B851) sets out their forecast to 30 March 2023. It is equivalent to the EOT as at 31 March 2023 and the two can be compared:

    i. The FRP Administrators have not included any amounts within the Applicant's FF&E Reserve. For the reasons given above, this is wrong in principle. This accounts for a difference of (*then*) £503,174 between their analysis and the Applicant's analysis (Estimated Outcome Statement as at 31 March 2023 aggregate of lines 8, 18 and 33);

ii. The FRP Administrators figure for EBT from trading Apr 2022 – Mar 2023 is out of date. The figure is now £1,109,393 (Estimated Outcome Statement as at 31 March 2023, aggregate of lines 17, 43 and 44) (*i.e. at the date of these Submissions*). This accounts for a difference of £72,158;

iii. The FRP Administrators appear to have included VAT in respect of the Non-Protected Rent Debt. While the EOT as at 31 March 2022 shows that the Applicant is able to meet the VAT element from its forecast cash surplus, as noted in Mr Bonney's evidence, the Applicant's VAT is broadly neutral (para 71, Mr Bonney's Witness Statement, A33) and the Applicant has available cash in the bank representing VAT received from customers not included in the cash at the bank figures or EBT in the EOT to which recourse can also be made (para 55, Mr Bonney's Witness Statement, A23).

vii. Accordingly, the EOT as at 31 March 2023 (*as at the date of these submissions*) represents a more up to date and better analysis of the cash available to the Applicant to meet its liabilities to unsecured creditors on or around that date.

329. The Applicant points out that the forecasts evaluated by the FRP Administrators in preparing their 21 November 2022 letter were quickly superseded by the subsequent and more positive December Financial Report. They identify that the Respondent "notably does not refer to the December Financial Report at all in its submissions" (Submissions, para. 58). The Applicant says there are two particularly significant points to draw from the December Financial Report (D. December Financial Report):

a. The actual utility costs for November 2022 were significantly lower than the utility costs forecast by RBH for that month in their forecasts given to the FRP

Administrators in October 2022. As RBH note in their covering email (B870), the Applicant's electricity charge for November 2022 was half the figure RBH was expecting, RBH reduced the forecast utility costs for the months following November 2022 as a result;

b. The actual EBT for November 2022 exceeded the EBT forecast by RBH for that month in their forecasts given to FRP Administrators in October 2022. Part of the excess over the forecast was due to the lower than forecast utilities costs but not all. There was also an increase in total revenue over the forecast total revenue.

330. The Respondent's Submissions in Reply did not seek to address the Applicant's points made in respect of the FRP Administrator's 21 November 2022 approach. Instead, they exhibited another FRP Administrators' letter dated 27 January 2023 written to Freeths (Reply, paras. 11-12). In that letter, Mr Carvill-Biggs said he found it:

> "somewhat surprising given the contents of my letter dated 21 November 2021, and email dated 23 December 2022, that the information [Freeths was] requesting has not already been shared with the Arbitrator in relation to the issue of viability".

That was, of course, a misunderstanding. The letter continued:

> "The change in strategy of the Administration, i.e., to now achieve the second purpose per Paragraph 3(b) of Schedule B1 to the IA 1986 – achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) – was clearly communicated to all parties at the end of last year. …
>
> To answer your specific questions:

1. Based on our analysis there is no prospect of the Administration ending prior to 31 March 2023. Whilst an extension to the Administration could be made via a Court application, in the first instance we will seek approval from creditors in accordance with Paragraph 108 of Schedule B1 …

2. Trading will continue whilst marketing the asset for sale and will continue until a disposal is achieved and responsibility passes to a new operator/ owner. This will more likely take us past 31 March 2023 … (my emphasis)

3. I refer you to our letter dated 21 November 2022. The strategy is to achieve the purpose as set out in the second paragraph of this letter.

4. Yes. As detailed above, Christies & Co were engaged in December 2022 and marketing will commence shortly. …

To determine the appropriate Administration strategy to pursue, Mr Corfield and I continually review, analyse and consider the financial forecasts of the Company. A third party was engaged prior to Christmas to review the RBH forecasts as well as considering other relevant and material aspects which impact upon the viability of the Company. Our position remains that the strategy is to pursue the second purpose of Administration. …

Therefore, and as communicated to both you and Mr Bonney last year, on the information available to us, continuing to trade will likely result in an increased deficit. Based on this assessment and our own analysis of the solvency of the company, our strategy remains to pursue the second purpose of Administration to protect the interests of creditors. The marketing process for the sale of the Company's business and assets will commence in the coming days."

331. Again, I do not seek to look behind the FRP Administrators' decisions. These are a matter of fact.

332. For present purposes, no information regarding the identity or expertise of the third party was given. The appraisal was not enclosed. Nor is there any information as to the assumptions adopted. Including as to the treatment of FF&E and Capex, future trading figures, utilities, insurance and the level of the Protected Rent Debt and Non Protected Rent Debt. All matters relevant to my own viability assessment at this stage.

333. In their Submissions in Reply (para. 37), the Applicant points out it has not seen Freeths' letter to the FRP Administrators dated 19 January 2023 to which the FRP Administrators' letter of 27 January 2023 responds. The Applicant says it has requested Freeths to provide a copy but this request remains unanswered. It cannot therefore comment on the first paragraph of the FRP Administrators' letter other than to say that their letter of 22 November 2022 is in evidence before the Tribunal.

334. In addition the Applicant says in its Submissions in Reply (paras. 38-39):

a. The FRP Administrators state in the first sentence of numbered paragraph 1 of their letter that there is no prospect of the Administration ending prior to 31 March 2023. The Applicant has not suggested that it would end prior to 31 March 2023. However, it is Mr Bonney's view that it could exit Administration on or shortly after that date. The FRP Administrators do not offer any evidence in support of their statement. Mr Bonney does;

b. Their statement in the third from last paragraph of their letter unsecured creditors' claims cannot be paid in full is also contrary to Mr Bonney's view and is also unsupported by reference to the Applicant's management accounts and other financial evidence. Mr Bonney's analysis is supported by evidence. The EOT as at 31 March 2023 demonstrates that unsecured creditors' claims can be paid in full;

c. Their comments regarding the payment of instalments in the penultimate paragraph of their letter are correct. While the Applicant remains in administration, an instalment payment due on a particular date would remain an unsecured claim pending exit from administration and could only be paid at the same time as all other unsecured creditors. The relevance of this is unclear. The Applicant may exit administration before an instalment payment is made. If an instalment is not paid because the Applicant remains in administration, the payment will be delayed but the Respondent will receive statutory interest on the instalment amount;

d. In any event, to the extent that it is intended to constitute evidence, the FRP Administrators' letter:

…, in common with the FRP Administrators' letter of 21 November 2021, it is not verified by or contain a statement of truth as required by s. 12(2) of the Act.

335. At the date of the Applicant's February Submissions in Reply, they pointed to the fact the evidence also included the (then) EOT as at 31 March 2023 which indicated that the Applicant would have a surplus of over £400,000 after paying all of its unsecured creditors.

336. In addition to their detailed response to the content of that letter, the Applicant submits that because the FRP Administrators were appointed as Administrators on the Respondent's application their comments need to be considered in that context (Reply, para. 40). That is a matter I do not take further here, just as I do not take into account the Respondent's own submission relating to Mr Bonney's appointment (March Submissions, paras. 11a and 12).

337. Within the context of this Arbitration under the CRCA, and as at today's date, I again prefer Mr Bonney's current analysis of the specific financial points which the Applicant identifies as to viability for the purposes of my assessment under the CRCA, and in accordance with the Guidance.

338. I have mentioned above Ashtons' letter of 14 March 2022 [Couse of the Arbitration, paras. 162-167]. Ashtons wrote (amongst other matters):

> "The relevant points to be disclosed to the parties in the Arbitration are as follows:
>
> Viability a.
>
> The viability of the Company's business is fundamental to the arbitration awards available. In this respect:
>
> i. Viability was relevant at the time the reference to arbitration was made as the Arbitrator should have dismissed the reference to arbitration if the Company's business was not viable at that time (section 13 CRCA 2022). Our client's position is that they have not (despite requests) been provided with your client's submissions, nor the full calculations and evidence on which your client's assessment on viability was based.
>
> ii. Viability remains relevant as it also dictates the awards that the Arbitrator can make. The Arbitrator's principals require that "any award should be aimed at […] restoring and preserving […] the viability of the business of the tenant […]" (Section 15 CRCA 2022). Where the Company's business and assets are in the process of being sold, clearly it is impossible for any award to have the effect of restoring and/or preserving the viability of the Company.
>
> iii. On the issue of the Arbitrator assessing viability, she "must […] have regard to the assets and liabilities of the tenant […] and any other information relating to the financial position of the tenant that the arbitrator considers appropriate"

(Section 16). Therefore, it is essential that the Arbitrator is provided with the up-to-date information that is in the FRP Administrator's sole remit, including:

- The Company's assets are currently marketed for sale and are therefore not expected to be available to the Company in operating its business in the future.

- The Company's business will either be sold or will cease upon sale of the assets.

- The Company's liabilities (even excluding the PRD in its entirety) exceed its assets.

- A solvent exit from administration cannot be achieved even if a CRCA 2022 award reduced the Company's liability to LBN for PRD to £0. Clearly, therefore, any award in the Arbitration could not serve to reserve or preserve the viability of the Company's business.

iv. For ease of reference, we enclose a bundle of the correspondence between you/your client and our client [enc]. As can be seen from that correspondence, concerns regarding viability were first raised already at the point when the matter was being referred to Arbitration and of course also when the definitive decision on exit strategy (sale of business) was communicated to your client. It was highlighted to your client at that latter stage that our client was concerned regarding the costs in the Administration that would be incurred within the arbitration process if the FRP Administrators' assessment of viability was not recognised.

FRP Administrators' remit and strategy

b. The Order (also attached for ease of reference [enc]) sets out the split of responsibilities between the Joint Administrators and clearly provides that the responsibility for strategy within the Administration lies solely with the FRP Administrators.

i. Neither the Order nor the CRCA 2022 provide authority for the Quantuma Administrator and/or the Arbitrator to override decisions that fall within the FRP Administrators' remit in terms of strategy.

ii. The purpose served by the Arbitration is to assess the sums due to [the Respondent] in relation to [Protected Rent Debt]. Once that sum has been 'assessed' by way of an award in the Arbitration, it is treated as though that was the sum contractually due (i.e. the landlord no longer has a right to the balance). The extent to which the Arbitration would impact the FRP Administrators' remit is that they would be expected to accept the assessment of the liability to the landlord as per the arbitration award, similar to if there had been a court judgment in relation to any of the unsecured creditor claims. That, however, is the only aspect that overlaps with the FRP Administrators' remit.

Instruction of Expert Accountant

We are concerned that the Arbitrator and the parties to the Administration are considering the instruction of an expert accountant to consider the issue of viability. Clearly, it does not require such an expert to acknowledge the fact that the FRP Administrators have made the assessment that the Company is not expected to achieve a solvent exit and, in order to protect creditors' interests, the business is being sold.

i. It would therefore appear that it is being suggested that, within the Arbitration process, it is intended to review decisions made by the relevant administrators.

ii. Given paragraph 17(b) above we cannot understand what purpose the instruction of an accountancy expert within the Arbitration would or might serve. The Order does not provide the Quantuma Administrator with any authority in relation to anything other than conducting the Arbitration. The Administration strategy is a factor that is relevant to the Arbitration only insofar as it affects the awards available to the Arbitrator. The Arbitration process does not provide any authority to the Quantuma Administrator in relation to the decisions on

Administration strategy and, as such, you should simply pass on to the Arbitrator the decisions made by the FRP Administrators.

iii. Nothing in the CRCA 2022 provides a mechanism to review and/or challenge an administrator's actions and we are puzzled, therefore, what purpose a review of the Company's financial affairs is intended to serve in circumstances where the FRP Administrators' decision clearly is binding as far as the Arbitration is concerned.

iv. Any proposal to appoint an expert in this respect would be to purport to usurp the FRP Administrators' function under paragraph 3(1) of Schedule B1 to the IA 1986, read with paragraph 8(2) of the Order. The question of whether the administration should pursue as it objective the rescue of the Company as a going concerned or one of the alternative objectives in paragraph 3(1) is solely one for the FRP Administrators' discretionary judgment. In exercising that judgment, it is a matter for the FRP Administrators whether or not to seek further professional advice. This point has been placed beyond doubt by authority; see, for example, Davey v Money [2018] EWHC 766 (Ch), [255], per Snowden J (as he then was). We are concerned that this well-established principle of law should be drawn to the Arbitrator's attention to ensure that the FRP Administrators' decision on viability and exit strategy is finally accepted within the Arbitration process and before any direction in relation to an expert is considered.

Costs in Arbitration

Again, we must highlight in that respect our client's concern in relation to the costs that would be incurred as a result of this. We have advised our client that any such costs being incurred, as well as previous costs incurred within the Arbitration, should be reviewed and directions sought on whether they were reasonably incurred given our client's correspondence addressed to your client from 20 September 2022 (as referred to at paragraph 12 above. This includes the costs in relation to an energy expert we understand was instructed, and whose

findings (despite requests from our client) have not been shared by your client with the FRP Administrators.

Conflict between Arbitration award and Administration

There is somewhat of a conflict between insolvency laws and rules and any arbitration award (in particular sections 14(7) and 15(1)(b) CRCA 2022) which our client has highlighted to you in previous correspondence and which does not appear to have been referred to in the Arbitration.

i. Even if the Company was to be considered viable (which our client does not consider it to be), then it may still not be possible to comply with the terms of an Arbitration award within the context of an administration where payments to unsecured creditors can only be made within the applicable insolvency laws and rules. Payments to [the Respondent] cannot be made until the FRP Administrators are in a position to make payments to all unsecured creditors and then only in shares equally of any available assets (pari passu principle). The CRCA 2022 does not provide for any priority of the landlord over other unsecured creditors. Therefore, the usual awards of payments by instalments (which we understand is what it is your client is seeking although your client has to date failed to provide any details of his submissions within the Arbitration to our client) could not be complied with within an administration. The FRP Administrators can further not commit to being able to make payments to unsecured creditors within 24 months in any event.

ii. The responsibility of making payments to creditors lies solely with the FRP Administrators and it is therefore somewhat surprising that they have not been consulted on those aspects."

"Next Steps

18. In the event that this letter is not, by 10am on Thursday 16 March 2023, forwarded to the Arbitrator (copying this firm into that email) and you do not by

that deadline confirm that you accept and agree with the FRP Administrators' position as set out above, we have advised our client to seek directions from the Court on the following points:

a. clarity on the basis of the Joint Administrators' appointment and the proposed exit strategy;

b. the split of duties as contained within the Order;

c. the conflict between insolvency laws and rules and any arbitration award; and

d. costs incurred within the Arbitration.

19. We trust such an application to Court will not be necessary but wish to put you on notice on the issue of costs. Furthermore, as the issue of viability ultimately falls within the FRP Administrators' sole discretion, we have further advised our client that they should forward this letter to all parties in the Arbitration directly if your client fails to do so by 10am on Thursday 16 March 2023 as referred to above."

339. As between the Joint Administrators, the letter clearly evidences a very significant and ongoing dispute within the Administration as at the date of my assessment. That is a dispute that will have to be resolved by the Companies Court if it is not now otherwise resolved.

340. The Respondent's 28 March 2023 Submissions state that Ashton's letter provides a timely and highly material update on the FRP Administrator's assessment of the Applicant's prospects. Mrs Creer says she explains Ashtons' reasoning as follows. First, in order to be able to exit the Administration, the FRP Administrators need to be satisfied that all the Applicant's debts can be paid. This means either having the entirety of the funds available or being confident that they will become available. As all the creditors need to be paid proportionately and at the same time,

the FRP Administrators' position is that they would need to be in funds to be able to pay the amount of any Arbitration award (albeit due in future instalments) when the Administration ends. Accordingly, trading out of debt is not a strategy they can endorse. Second, the pari passu principle means that in discharging their professional duties the FRP Administrators cannot pay only one element of an unsecured creditors' debt, that is, they cannot pay the Non Protected Rent Debt on exit from Administration and defer the payment of the Protected Rent Debt (paras. 3-4).

341. Accompanying the Ashtons' letter, the FRP Administrators provided a Rolling Insolvency Review ("RIR") based on the (then) latest figures (February 2023 actual). In the RIR 2023, RBH now predict that the Applicant will make a profit of £497,314 in 2023. This contrasts with the loss of £508,286 previously predicted by RBH for 2023.

342. Mrs Creer submits that Mr Bonney's EOS v.6 proceeds on the basis that the Applicant will exit Administration solvently on 31 October 2023. However, she says the FRP Administrators' RIR shows, at that date there is likely to be a shortfall of >£1.3m, even if an award of only £260k is made in this Arbitration. She adds that over the following 5 months (taking us up to 31 March 2024 and the two year anniversary of the Applicant entering administration), the overall trading performance is forecast to be loss making (paras. 6-7):

Nov 2023	126,172
Dec 2023	(14,333)
Jan 2024	(202,677)
Feb 2024	14,844

March 2024	43,196
	(32,798)

I comment that I note that the months selected here include the Applicant's poorest trading month and months when trade is seasonally lower. I have already expressed the view that a RBH snapshot focused on January and February is a poor guide to overall annual performance when assessing viability.

343. Mrs Creer also informs me that the Administration has been extended with the consent of the creditors (para. 8). She records that it cannot continue beyond 31 March 2024 without an order from the Court. Permission would only be granted if the FRP Administrators can show that they will be able to achieve one of the statutory purposes of an administration within that further period, that is, rescue the business as a going concern or achieve a better outcome for the creditors.

344. Mrs Creer submits the RIR does not appear to justify an extension of the Administration (paras. 9-10). She says:

a. the RIR shows that the picture is only marginally improved if one looks at the position at 31 December 2024 (being a useful comparator with the original management accounts: spreadsheet A), with a shortfall of £1.17m. By the end of Q1 2025, the shortfall is predicted to increase to £1.43m.

b. it is also important to note that the RIR is based on certain assumptions adopted by Quantuma, with which the Joint Administrators do not agree, for example, (i) the treatment of £82,522 which were being held as customer deposits at 1 April 2022 (which the Joint Administrators believe will be counted in the EBT for the month that the guests stayed in the hotel) and (ii) using the

FF&E reserve. That is, taking the Applicant's outlook at its highest, the FRP Administrators cannot see a solvent exit at any point over the next two years.

345. Mrs Creer says the Applicant has suggested a solvent exit could be achieved by external funding from shareholders for VAT liabilities (para. 11c). However, if an Arbitration award is made on the basis that external funding must be disregarded, but in reality, such funding is necessary and made, then the Arbitration award may need to be reviewed. This is a point the Applicant has responded to specifically, as explained below.

346. Mrs Creer also suggests that "the reasonable inference" from Ashtons' letter is that Mr Bonney's firm, Quantuma, is seeking to minimise an award in the Arbitration so that either (i) the shareholder's necessary injection of capital is lower; or, (ii) if the Applicant is wound up, any distribution to the shareholders will be higher (para. 12). I do not accept that submission.

347. With regard to Mr Bonney's own 18 March 2023 letter in reply to the FRP Administrators following receipt of Ashtons' correspondence, and Mr Bonney's rival Exit Strategy document, the Respondent comments that Mr Bonney (para. 22):

a. uses the FF&E Reserve as available cash;

b. overstates the cumulative EBT at January 2023 as £1,400,000. The figure in the RIR being £1,078,812;

c. reduces the amount of fees in the Administration;

e. makes no provision for the payment of the Protected Rent Debt in accordance with the 6 instalments in the Applicant's Revised Proposal and does not provide the cash flow to suggest this would be possible.

348. Mr Bonney's £1,400,000 figure is actually stated to be cash in his own Exit Analysis. Not EBT. It therefore includes provision into the FF&E Reserve and receipts of VAT. It is not a cumulative EBT figure as suggested by Mrs Creer[75]. As such, point b above is evidently incorrect.

349. Mr Johnstone's Submissions on Ashtons' 14 March 2023 letter emphasise that the matters raised have been raised previously by the FRP Administrators in their letter dated 21 November 2022 (para. 2). They are already the subject of paragraphs 16-19 of the Respondent's Submissions dated 10 January 2023, paragraphs 50 to 61 of the Applicants' Submissions dated 23 January 2023, paragraphs 9 to 12 of the Respondent's Submissions in response dated 1 February 2023 and paragraphs 5 to 12 of the Applicant's Submissions in reply dated 10 February 2023. There is a point by point response to the matters raised in Ashtons' Letter in F+H's Letter and Quantuma's Letter of 18 March 2023.

350. As regards the points in Ashtons' letter that are or are partly relevant for the purposes of this Arbitration, Mr Johnstone sets out the Applicant's position in this Arbitration as follows (para. 7).

351. Paragraphs 11 to 13 of Ashtons' Letter rehearse summarily the difference in opinion between Mr Bonney and the FRP Administrators as to whether the Applicant can exit the Administration solvently. As set out by the Applicant, the mechanism by which the Applicant can achieve this, notwithstanding the FRP Administrators' opposition to that is by means of an application to the Court under paragraph 74 of Schedule B1 of the Insolvency Act 1986 (para. 59 of the Applicant's

[75] Email from F+H to myself and Freeths on 29 March 2023.

Submissions and paras. 5 and 6 of the Applicant's Reply Submissions). If, following an Arbitration Award giving relief from payment, the Applicant is indeed able to pay its creditors and the costs of Administration, the Court is likely to accede to such an application because rescue is the primary goal of Administration.

352. Parts of paragraphs 14 to 16 of Ashtons' Letter are not clear, but Ashtons' appears to be suggesting in paragraph 16 that Mr Bonney should request the Tribunal to determine that the Applicant's business is not viable because the FRP Administrators have concluded that it is not viable. However, this ignores the possibility of a successful application under paragraph 74 of Schedule B1, which in turn depends on the Applicant's financial position following an award. Accordingly, if the Applicant's financials support a determination that the Applicant's business is viable, as the Applicant submits, they will also support an application under paragraph 74 of Schedule B1 enabling the Applicant to exit Administration solvently in spite of the FRP Administrators' opposition.

353. Paragraph 17 a.i of Ashtons' letter is incorrect. The relevant date is the time of my assessment not the time the reference to Arbitration was made.

354. Paragraphs 17 a. ii. and iii. would be relevant if the Applicant's business had been sold, but this has not happened. The FRP Administrators have merely indicated that the Applicant's business is being marketed for sale. I add myself that Ashtons' 14 March letter provided no details at all regarding the progress or timing of any such sale.

355. The final bullet point under 17 a. iii. is wrong if the Applicant's analysis of the financials is accepted in this viability assessment.

356. Paragraph 17b i. rightly suggests that neither Mr Bonney nor the Arbitral Tribunal can override decisions that fall within the FRP Administrators' remit. It has not been suggested that the Arbitral Tribunal can do so. The Arbitral Tribunal does, however, have a statutory jurisdiction to determine whether the Applicant's business is viable for the purposes of CRCA. As a matter of law, the FRP Administrators' remit can be challenged under paragraph 74 of Schedule B1.

357. Paragraph 17 b. ii. of Ashtons' Letter notes that if an award from relief from payment is made in the Arbitration, any sum awarded to be paid by the Applicant will become due on the date for payment stated in the award. It is not clear in what sense Ashtons' believe that this "overlaps" with the FRP Administrators' remit or why that might be significant.

358. Paragraph 17 e. of Ashtons' Letter raises the prospect of a conflict between insolvency laws and rules and any Arbitration Award. The same point was raised in submission by the Respondent at paragraph 14 of its Submissions and responded to by the Applicant. In summary:

1. If no reference to arbitration had been made or if the reference was dismissed, for example, where the Tribunal determined that the Applicant's business was not viable, the Applicant would be liable for the full amount of the Protected Rent Debt payable immediately. The Protected Rent Debt would constitute an unsecured claim in the Administration rather than an expense in the Administration;

2. If an award for relief from payment is made, the liability for the Protected Rent Debt would be converted by the operation of CRCA into a liability for payment of the amount awarded on the date/s stated in the award. If the Applicant remained in Administration on the date an amount awarded

fell due to be paid, that payment would have to be treated by the FRP Administrators in the same way as any other liability of the Applicant.

3. Given the nature of the payment, Mr Johnstone suggests it is most likely that it should be treated as an unsecured claim in the Administration rather than as an expense of the Administration and treated in the same manner as any other unsecured claim. That, however, is not a matter for my decision.

4. To the extent that the Respondent did not receive payment on the date specified in the award, the Respondent would be compensated by statutory interest on the unpaid amount from that date to the date it was ultimately paid.

5. Ashtons' comments about this suggest that they are not taking into account that the alternative, where no relief from payment is awarded, is that the Applicant has to pay the full amount of the Protected Rent Debt plus interest from the date the rents became due to 30 March 2022 and statutory interest from 31 March 2022.

359. Paragraph 17 f. and g. of Ashtons' Letter refers to the possibility of external funding to achieve a solvent exit from Administration. Mr Johnstone says that Ashtons appear to be suggesting that if the Applicant's shareholder were, following an award giving relief from payment, to offer funding to facilitate an exit from Administration, the FRP Administrators would have to apply for directions "*to consider whether the award would need to be reviewed*". This plainly refers to s.16(3) CRCA which provides that the Arbitral Tribunal is not to take into account the possibility of borrowing or restructuring in determining viability. It is emphasised in the Applicant's submissions that it is not any part of the Applicant's case that it intends to rely on external funding in relation to the determination of viability. The Arbitral Tribunal would be bound to disregard that possibility if it had

been raised for the purposes of my viability assessment[76]. It has, of course, not been so raised, and neither has any restructure.

360. In any event, Mr Johnstone adds:

> "For the avoidance of doubt, no such [loan] proposal has been made by the shareholder to the FRP Administrators as far as Mr Bonney is aware. Mr Bonney alluded to the possibility of the Applicant obtaining a loan from the shareholder to cover VAT pending its recovery from HMRC in his email dated 11 January 2023 (p192, CB), but there is no evidence that such a loan would, in fact, be necessary or that the shareholder would be willing to advance one" (para. 7(h)).

361. In paragraph 17h, Ashtons state that the FRP Administrators' latest calculations show that there cannot be a solvent exit from Administration. Mr Bonney responds to these points in Quantuma's Letter to the FRP Administrators dated 18 March 2023 and his accompanying analysis (para. 7(j)). I note, and have read, the Applicant's submissions on the calculations (RSR) under the heading Rolling Solvency Review and Quantuma's Exit Analysis.

362. I have set out Ashtons' 14 March 2023 letter and Mr Johnstone's submissions about it in considerable detail, and I do so again in respect of Mr Bonney's letter below. I do so because these are important issues. It is important that neither set of Administrators considers any summary I may otherwise have provided was not an accurate reflection of their own reasoning.

[76] Mr Johnstone adds: However, there is nothing in the Act which would give rise to a cause for concern if, at some point following an award, the Applicant's shareholder were to put the Applicant in funds in order, for example, to bring forward the date on which the Applicant exits Administration solvently.

363. Whilst decisions upon the purpose of the Administration and any exit from Administration fall solely within the FRP Administrators' remit, and their own evaluation of the evidence before them in the Administration, the factual evidence before me as at the date of my award is that their decisions will be challenged. As mentioned above, this internal dispute is apparently set to be resolved in the Companies Court. At that stage, it will be a dispute resolved by the Court on its own evaluation of all relevant evidence then before it.

364. As a matter of common sense, I take the view that if a contract or contracts for the sale of the Applicant's business and/or Lease were in place and / or completion of any sale was imminent, the FRP Administrators and/or Ashtons would have said so in this correspondence. In the meantime, of course, if Mr Bonney's analysis is adopted, a solvent exit from Administration remains possible on the basis of his own evidence and approach.

365. In Quantuma's letter (Course of the Arbitration, paras. 172-175 above), Mr Bonney wrote on 18 March 2023:

> "The business is clearly viable. For the period April 2022 to January 2023, your Solvency Statement confirms that it has accrued Earnings before Tax ("EBT") of £1,078,811. It further confirms that it is now anticipated that EBT of £667,765 is forecast for the period February 2023 to December 2023 … . Further, the forecasts are regularly beaten by actuals and therefore the position is likely to be better.
>
> The Company is viable in Administration. It is trading profitably and is able to meet all its ongoing debts as and when they fall due. Your Solvency Statement demonstrates that over time, in continuing to trade, the position for creditors improves.
>
> <u>Viability of the Company to Exit Administration</u>

The question therefore is whether a healthy trading business, which would never have found itself in this position if it were not for coronavirus, is able to exit administration and be returned to its shareholders. I have always accepted that it is a possibility that it could not. However, at no stage have I been provided with any information which proves that the Company cannot exit administration and each time you have chosen to provide information to us which supports your assertion that it cannot be rescued, my solicitors and I have continued to reach the conclusion that your analysis is flawed.

You will note that under this model, the forecast cash in the business is £787,126 by December 2023 and is £482,319 at its lowest point meaning that even if there are some further costs they are capable of being met by the Company. The increased cash from the "cash proxy" of £1,078,811 to £1,400,000 is simply explainable by timing of payment of ongoing services to the Company which may be met 30 or 60 days later (but may clearly be met ongoing as a result of anticipated and sustained profitable future trading. I suspect that the cash position is in fact stronger than £3,400,000 but you have continually refused to provide that information and therefore hamper our ability to deal with the Arbitration. The position I have demonstrated is markedly different to your supposed shortfall to creditors of £2.239m."

366. The Applicant contends the FRP Administrators' RIR produced for the purposes of Ashtons' letter of 14 March 2023, and specifically for communication within this Arbitration, "endeavours" to show that the Applicant will be unable to exit Administration solvently over the next 24 months. It submits it achieves this by making a number of unjustified deductions of assets (March Submissions, paras. 9-16):

a. In the assets per directors' statement of affairs, the entirety of the FF&E Reserve has been removed. The effect of this is to take out c. £650,000 from the available assets of the Applicant's business as at 31 October 2023 (net FF&E

Reserve, cells F8, F18, EOT v.6 plus c. £280,000 accrued between September 2022 and October 2023).

I am asked to note that the figure is higher than the anticipated position of the FF&E Reserve at 31 December 2024 because the majority of the mandated expenditure will take place in 2024 and 2025[77].

b. The FRP Administrators have also deducted a sum of £82,522 from EBT in respect of customer deposits. The Applicant says customer deposits are, in fact, advance payments by some customers for rooms prior to the booking month. I have been referred to Quantuma's Letter at point 3 on page 2 in respect of this deduction. The Applicant's viability is being determined on a going concern basis. These funds are not trust property and are available as distributable funds. Accordingly, the Applicant submits that they should not deducted.

c. The FRP Administrators also deduct the working capital requirement of £250,000, an FF&E Reserve deficit of £10,000 a month and an RBH Termination Fee of £75,000.

The working capital requirement is relevant for determining what funds the Applicant has available to meet its liability for Protected Rent Debt. It is not, however, a relevant deduction for the purposes of assessing whether the Applicant can come out of Administration solvently.

[77] Mr Johnstone says that to the extent that the Applicant is short of funds for mandated expenditure in 2024 and 2025 it can make up the difference from its profits from trading over and above the amounts reserved to the FF&E Reserve. There would be nothing preventing it from doing that. The Applicant refers me to its Submissions and Reply Submissions, Mr Bonney's evidence and Quantuma's Letter in relation to the FF&E Reserve.

The FF&E deficit deduction is also not appropriate when considering the Applicant's ability to come out of Administration solvently, for the same reasons as noted above in respect of the FF&E Reserve.

The Applicant has accounted for mandatory expenditure in EOT v.6. Other future outlays from FF&E Reserve may be desirable but treating the Applicant as insolvent in 2023 because it is desirable to incur fixtures and fittings expenditure in 2024 and 2025 is "nonsensical".

The RBH Termination fee assumes RBH will be replaced in due course. There is no basis for assuming that RBH will be replaced. These deductions amount to £425,000 by October 2023.

d. The FRP Administrators continue to overstate the Non-Protected Rent Debt quoting a figure of £1,689,534 as opposed to the figure of £1,481,473 if the protected period expired on 18 July 2021. The note refers to the statement of affairs but this in fact notes the Respondent as a creditor in the sum of £3,970,627, incorporating both Protected Rent Debt and Non Protected Rent Debt (B578). The difference is £208,061.

e. The FRP Administrators also deduct £260,000 on the basis that this sum represents the revised proposal by the Applicant. However, the Applicant's proposal was for staged payments of £43,518 on 24 June 2023 and £43,518 on 29 September 2023, so by 31 October 2023, only the sum of £87,000 should be deducted as being payable on exit from Administration in that month. The remaining payments would not be due for payment by 31 October 2023. The difference is £173,000.

f. FRP assume statutory interest will accrue on all the unsecured sums prior to exit. However, following an award of relief from payment, it will be open to the Applicant to make substantial interim payments to unsecured creditors prior to exit, thereby reducing the accrual of statutory interest. Assuming an interim distribution to unsecured creditors of £1,500,000 in May 2023, reducing statutory

interest a month to around £3,000 a month, statutory interest of £50,000 would be saved by 31 October 2023.

g. I am told I may ignore the last section "Assume No PRD Award". The Applicant accepts that if no award of relief from payment is made, the Applicant will be insolvent.

367. Putting alleged motivation on one side, the Applicant's adjustments, set out and explained, total c. £1,585,000 as at 31 October 2023. The FRP Administrators' shortfall for unsecured creditors in October 2023 is £1,343,009 and for November 2023, £1,251,465. In short, Mr Johnstone submits, and I accept for present purposes, the Applicant will be able to come out of Administration solvently at that point in 2023, not even taking into account the possibility that it outperforms RBH's forecasts as it did in 2022 and not taking into account the possibility that some of the Administration costs are reduced by the Court on review.

368. In Mr Bonney's alternative analysis, the Quantuma Analysis – Exit, I am informed he considers the position from a cash perspective for the purposes of determining whether the Applicant can come out of Administration solvently (March Submissions, paras. 19-22). I am told that on the basis of the cash in the business reported at 31 August 2022, totalling £3,317,925 (para 55, Mr Bonney's First Witness Statement, A23-24), Mr Bonney believes the Applicant's business should have had cash in the region £3,800,000 as at 1 January 2023, after adding EBT and provisions to the FF&E Reserve for the period September to December 2022. I am also told that for the purposes of his analysis, Mr Bonney assumes a lower figure of £3,407,854. Mr Johnstone explains that Bonney deducts known payments of Administration costs of £483,652 and then adds EBT from January onwards as a proxy for cash. He assumes further payments of £20,000, £481,124, £20,000, £40,000, £20,000, £40,000, £35,000 and £20,000, for Administration costs

between March and October 2023, for a total of £1,160,000 in respect of Administration costs. Mr Bonney accounts for a payment of the energy contract deposit of £122,400 in April 2023 and an interim distribution of £1,603,823 in May 2023 and a final payment of £688,789 in respect of distributions to creditors in October 2023. I am asked to note that these payment to creditors are inclusive of VAT. In October 2023 he anticipates the recovery of the VAT element of the interim payment made in May 2023.

369. Mr Bonney thereby anticipates that the Applicant will have sufficient cash (Cash at Month End) to make the payments and have a balance remaining. The cash balances provided by the FRP Administrators and reported previously amounted to c. £1,880,365 including the FF&E Reserve. I am told this figure is significantly lower than it should be bearing in mind Mr Bonney's calculation above (March Submissions, para. 23). Mr Johnstone says there are two possible reasons for this or a combination of both. Firstly, the FRP Administrators may not have closed the Applicant's AIB Accounts which held approximately £480,000 at the end of August 2022 (para 55, Mr Bonney's First Witness Statement, A24). The Applicant had understood they were being closed but the FRP Administrators have refused to clarify, he says. Secondly, there may have been further unreported non-trading payments such as Administration costs which the FRP Administrators have not reported. Mr Johnstone says that unfortunately, the Applicant cannot therefore produce a confirmed cash position and instead relies on Mr Bonney's analysis noted above.

Conclusions from the Evidence as a Whole

370. Within this Arbitration, Mr Bonney's evidence is the best evidence presently before me. I consider Mr Bonney's consistent approach in his Witness Statements

and correspondence is a reasonable and balanced one in approaching the statutory assessment of viability under the CRCA at today's date.

371. Each of Mr Bonney's steps in his EOS v.6 is amply explained and supported. I have had the benefit of full submissions in each regard. Including the Respondent's own submissions regarding the EOS v.6 and Mr Bonney's figures. It is apparent that the picture now available in respect of the Applicant's business is more optimistic than it previously was. I also bear well in mind the points I have already made above regarding over reliance upon RBH's forecasts, and the likely fact they are overly conservative in predicting profit, as well as Mr Elliott's evidence.

372. I accept that the evidence submitted by Mr Bonney on behalf of the Applicant in support of viability demonstrates that the Applicant:

a. traded profitably up to and including 31 December 2019 (paras. 20 and 28, Mr Bonney's First Witness Statement);

b. was self-funded by operational cash-flow until early 2020 and had no outstanding loans save for the Westcrown Loan which funded the Rent Deposit and was only repayable in the event that the Rent Deposit was returned to A by R. Westcrown is now dissolved (para. 20, A15);

c. paid the rent and other sums due under the Lease up to 24 March 2020[78];

d. was hit hard by the pandemic. It made a loss of £1,633,723 on trading in 2020 and a loss of £984,443 on trading in 2021, despite receiving Government support (para. 33, A17);

[78] While this is not directly evidenced, I accept that it may be inferred by the fact that the arrears list appended to the Respondent's claim dated 14 January 2022 is limited to rent outstanding from 25 March 2022 (p29, SB4, B558)

e. acted responsibly in response to the pandemic, obtaining such Government support as it could (para. 34, A17). No money was taken out of the Applicant's business by its directors or owner during or following the pandemic (paras. 33 and 81, A17 & A35). It attempted to deal with its rental liabilities during the pandemic but was unable to meet the amended payment terms agreed with the Respondent who, in response, terminated the agreement and, subsequently, issued proceedings (paras. 37-42, A18-19). Unable to meet the Respondent's demand, it went into administration on 31 March 2022 (para. 43, A19); and

f. its business has recovered very strongly since the beginning of March 2022, following the receding of the Omicron variant, which had an impact in January and February 2022 (para. 44, A20). The recovery was such that the Applicant's EBT for the period 1 January to 30 November 2022 more than doubled its EBT for the same period in the pre-pandemic year 2019, despite the significant trading losses incurred in January and February 2022. EBT from January to November 2022 was £939,473 (A. Management Accounts 2022, line 104 and the B. October, C. November and D. December Financial Reports, line 104)[79]. EBT for the same period in 2019 was £367,547 (A. Management Accounts 2019, line 104).

[79] The figure of £939,473 is collated from the actual EBT for the period January to August 2022 in the Management Accounts, tab 2022, and the actual EBT for September, October and November 2022 in the October, November and December 2022 Financial Reports. Note that the spreadsheet entitled Appendix 5 Forecast Period Ended December 2022 to Elliott Two shows a significantly lower figure for EBT for the period from January to October 2022 than is shown in the preceding documents. This is because the rent for March 2022 is stated to be £558, 127 rather than £169,927. The annual rent from March 2022 was £2,039,125, equating to £169,928 per month. the Applicant has no information as to why the figure of £558,127 is included for March 2022 in the latter document. I am told it may be that it was intended to record the quarterly rent due on 25 March 2022 (which would have been around £588,000) but in that event it should not have recorded rents in April and May 2022. I am asked to note that it has been carried over to the EBT figure for March 2022 and through that to the forecast EBT figure for the whole year, significantly decreasing it. This is most likely a mistake and the EBT figures for March 2022 and the whole year in that document should not be relied on. Instead, I am asked to refer to the equivalent figures given in the Management Accounts and the October, November and December Financial Reports. I have so referred.

373. I also accept the submission that the Applicant has the capacity to be a very profitable business in favourable circumstances. As explained by Mr Bonney at the date of the reference, profitable trading in 2022 meant that by 23 September 2022 it had accrued sufficient cash to allow it to meet all of its outstanding pre-administration debts, other than the Protected Rent Debt (para. 45, A20). The only factor that prevented it coming out of administration then were the Insolvency Rules given the need to resolve the contingent liability in the form of the Protected Rent Debt.

374. During the course of this Arbitration, the Applicant's business, in common with the majority of businesses, was heavily affected by the volatility in energy prices in the autumn of last year. The Hospitality Sector and hotels in particular are sensitive to energy prices due to the amount of electricity they use. The Applicant's position with regard to energy price volatility has been exacerbated by the fact that its existing fixed price gas and electricity contracts came to an end on 31 October 2022. The FRP Administrators have not entered into new fixed price contracts and so the Applicant remains on variable rates for the time being. The result is that the Applicant's utility costs are more volatile than would otherwise be the case, which creates difficulties in forecasting its future trading results. However, the Applicant is right to submit that these circumstances do not mean that its business has become not viable under the CRCA at the date of my assessment as a result.

375. In submissions that are now outpaced by both supportive actual utilities figures and RBH's own corrections, Mr Johnstone submitted, and I accept, this was for the following reasons:

a. Looking at the Applicant's business holistically, it has recovered strongly from the impact of the pandemic to the extent that its 2022 results have substantially exceeded its last pre-pandemic results in 2019.

b. The recent rise and volatility in energy prices in the autumn of last year is a single, external and probably temporary factor which has impacted negatively on the Applicant's business. The fundamentals of the Applicant's business remain strong;

c. The sudden rise in energy prices in the autumn of last year was unprecedented. Gas prices have risen since late 2021 and then rose to unprecedented levels as a result of the Russian invasion of Ukraine, which resulted in the majority of European countries seeking to reduce their reliance on piped Russian gas and switching to Liquid Natural Gas (LNG) imported by tankers (see also Tom Kelly's written answers to F+H's questions dated 16 December 2022, A124-125);

d. Experience tells us that markets adapt to circumstances and that extreme volatility tends to be a short-lived phenomenon;

e. This appears already to be happening. The trend in wholesale gas prices is currently downward. Mr Kelly noted this in his answer at 4(a) to F+H's written questions dated 16 December 2022 (A124);

f. Temperatures improved from mid-December and there have been a number of recent press articles stating that wholesale gas prices have now dropped further (eg on 17 January 2023 Gas prices deflate to 16-month low with more supplies shipped to Europe (cityam.com) and 18 January 2023 UK energy bills to fall to about £2,200 from July as wholesale gas costs drop | Energy bills | The Guardian).

g. Accordingly, while energy markets are likely to remain volatile for some time, there is reason to believe that the worst of the volatility may already have passed;

h. The Applicant's own particular position with regard to the costs of utilities ought also to become less volatile following the conclusion of this Arbitration. When it comes out of Administration, as Mr Bonney's evidence supports, it should be able to obtain fixed price utility contracts (Mr Kelly's report, A121),

which Mr Kelly forecasts will result in reduced utilities costs (F. Hampton by Hilton utility costs forecast (scenario iii);

i. Furthermore, to the extent that business costs (including utility costs) increase as a result of inflationary pressures, businesses, including the Applicant's business, have the option to pass on some or all of those costs to their customers;

j. The determination of viability ought not to be concluded by reference to one external and likely temporary factor when the fundamentals of the Applicant's business are otherwise strong. In any event, even if Mr Kelly's forecast fixed price utility costs are not taken into account, the Applicant's business remains viable.

k. The Applicant has also to bear the cost of the Administration itself. These are significant but, like the volatility in energy, likely to be temporary. The Applicant has funds to pay the costs of the Administration along with its pre-administration debts, and it will not have to bear those costs in the future, once it has come out of administration.

376. I have necessarily examined each of the points the Respondent has made in its Submissions with care. They do not undermine the picture the Applicant presents as to viability at the date of my assessment. My view on various of the points set out in those Submissions is as follows:

a. The Applicant has been paying the rent since 31 March 2022 as a matter of fact. Each EOS is prepared on that basis. I have no reason to consider that will alter;

b. Mr Bonney has explained why the Applicant could not pay the rent before the Applicant entered Administration notwithstanding its cash rich position. I accept his evidence at paragraphs 20-23 of his Witness Statement;

c. it is common ground that the rents for the period between 25 March 2020 and 31 March 2022 have not been paid. They remain liabilities of the Applicant's business. In respect of the Non Protected Rent rents, they must be paid in any event. In respect of the Protected Rent Debt it is contingent depending on the outcome of this Arbitration. While they remain liabilities, it is appropriate that they are included in the Management Accounts;

d. The submission that the RBH Forecasts do not include formulas or a set of assumptions or comparison with ExCeL Centre dates is wrong: covering e-mail to the Management Accounts dated 8 September 2022 (pp2-3, SB3, B366-367 and para 69(a)(i), A30 and p2, SB3, B366);

e. Whilst it was quite right to note that the many and various RBH spreadsheets, some within the same month providing different data to different individuals, were a source of confusion, Mr Johnstone's subsequent spreadsheet L and the more recent actual figures have removed previous interpretative concerns;

f. The RBH forecasts have indeed proved unreliable from time to time as alleged. They should properly be considered as part of the wider evidential picture here, including, most importantly the actual trading figures and evidence of actual costs. As matters stand, and treated with the benefit of experience, they are likely to be the best starting point to evidence the Applicant's future performance, however;

g. The Respondent's submissions do not take into account the more extensive market data exhibited to Mr Elliott's Further Report. That does not suggest that 2023 will be worse than 2022 for London hotels;

h. Whilst cash flow forecasts would be helpful, RBH has explained in this case why there are no such forecasts. That is set out in Mr Bonney's evidence;

i. Although the EOS look at the financial picture at the end of December 2024 (or March 2025), my assessment falls to be made today based on my view as to viability. Mr Johnstone is correct that the Applicant does not have to

demonstrate what the position will indeed be for the Applicant as at those later dates or in the specific month a payment falls due (a matter which does not go to viability at step 2 in any event).

377. I also disagree with the Respondent's submission in paragraphs 17-19, that the limited impact of specific coronavirus restrictions between 17 May and 18 July 2021 indicates that there must have been other reasons why the Applicant was not profitable in that period and that this goes to the issue of viability. The management accounts for this period show that the Applicant made losses in each of these months before returning to profit in September 2021 (Management Accounts, tab 19). I note that the loss in each these months was lower than the immediately preceding month. I agree with Mr Johnstone that there are two explanations for this phenomenon. The first is a general point. Hotel bookings took time to recover to their usual level following the end of the closure requirement on 17 May 2021. It is unrealistic to expect bookings to recover to their normal level immediately after 17 May 2021. The second point is more specific to the Hotel. There were fewer events being held at ExCeL London during these months for the same reason and because such events take time to schedule and prepare.

378. I also appreciate the Applicant's business suffered a further COVID-19 related shock between December 2021 and February 2021 as a result of the Omicron variant and it made substantial losses in those months as a result. Neither of these issues go to the question of the viability of the Applicant's business today. I regard this evidence as historic as at the date of my assessment.

379. Mrs Creer submits that the Applicant appears to want to have its cake and eat it. On the one hand it says it has made a strong recovery since COVID and is viable, on the other it wants to pay as little as possible of the Protected Rent Debt. If it can

only afford to pay such a small amount, after two further years of trading, then there must be a very real possibility that it is not viable. Again, I agree with Mr Johnstone.

380. The purpose of CRCA is to restore to and preserve the viability of tenants' businesses which have been adversely impacted by Coronavirus. The CRCA seeks to achieve this by giving relief from payment of Protected Rent Debt, but only in cases where tenants are not able to meet their liability for that debt. CRCA envisages the possibility that relief from payment may involve the writing off of the whole of a tenant's liability for protected rent debt and interest. A tenant that requires relief of that sort in order to be restored to viability will certainly be facing significant financial uncertainty. The CRCA is intended to assist tenants in this situation, not tenants who are financially secure.

381. Accordingly, the Respondent's submissions that the Applicant's financial position is uncertain or precarious in this case does not assist in determining whether its business is viable for the purposes of CRCA. The Respondent is simply describing the likely situation of any tenant seeking relief under CRCA. As such, I must make my determination on viability by reference to the evidence that is before me, applying the usual balance of probabilities test to the key issue as to whether at the time of assessment, or in the foreseeable future, the tenant will be able to meet its obligations and continue trading.

382. The Applicant's evidence is that its business is viable if it is given appropriate relief from payment. I agree. The fact that the Applicant is in administration, and the present purpose of the Administration, are highly relevant and important considerations. As the Applicant and the Respondent accept, that is not the end of matters however. My task is not identical to that of the FRP Administrators. The

legal concepts of viability under the CRCA and solvency are also not one and the same.

383. It is common ground between the parties to this Arbitration that the fact the FRP Administrators considers the Applicant is not viable even if the Protected Rent Debt is reduced to zero does not necessitate that I must share that view on my consideration of the evidence before me. For all the reasons set out above, in this Arbitration under the CRCA I do not.

384. Mr Bonney has himself been a Joint Administrator of the Applicant since 31 March 2022. As a result, he undoubtedly has the benefit of a wealth of insight into the Applicant's business after a year's intimate involvement. Initially, acting in the Administration and, since the FRP Administrators' appointment, through oversight of the conduct of this Arbitration. Mr Johnstone's submissions provide a forensic level of examination of the facts and figures. I consider they demonstrate viability. They also provide an exit strategy from Administration in 2023; although such decisions are a matter for the FRP Administrators in accordance with the Court Order.

385. Mrs Creer's "nuanced" point, as to whether the statutory purpose of an award can be realised in the light of the matters set out in the FRP Administrators' and Ashtons' correspondence, is undoubtedly a very important one. As indicated already, it is necessarily a matter of great concern to me. However, as at the date of my assessment, the evidence and submissions before me includes the fact the FRP Administrators' decisions may be challenged as a matter of law. A submission the Respondent has not sought to rebut. The FRP Administrators' decisions to date are not therefore conclusive when answering the key questions for the purposes of the CRCA as to the Applicant's future means and ability to continue to trade in this

Arbitration today. For me to decide otherwise would be for me to ignore the Applicant's evidence. Evidence which I otherwise accept in this Arbitration.

386. The FRP Administrators have stated they continue to re-appraise the Applicant's position within the Administration (27 January 2023). There is no factual evidence before me that demonstrates the Administration has reached the point of no return for the Applicant. The Applicant continues to trade. Its assets remain. The Administration has been extended to 31 March 2024. As Mrs Creer herself points out, the purpose of the Administration will fall to be reconsidered in March 2024 (if not before), if the Applicant remains in administration.

387. Following this Arbitration, the correct quantification of the contingent Protected Rent Debt (subject to the terms of relief), and the correct calculation of the Non Protected Rent Debt can also properly be taken into account.

388. As at the date of my assessment, taking into account all of the evidence referred to above, including the RBH evidence and Mr Elliott's overall views, and adopting a holistic and common sense approach, the Applicant's business remains viable under s. 13(3) CRCA. The present picture is one where the Applicant's actual 2022 results of c.£994,000 profit from trade and its results for January and February 2023 now mean RBH is forecasting profits of about £500,000 for 2023 and 2024. These are likely to be under estimated. The tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading. As such, the s. 13(3) CRCA eligibility condition is also fulfilled.

Relief from payment

389. Having determined that the Applicant's business remains viable, I turn to the issue of relief from payment: s. 13(4) CRCA. Section 13(5) provides that in this event, the arbitrator must resolve the matter of relief by considering whether the tenant should receive any relief from payment and, if so, what relief, and make an award in accordance with s.14.

390. Section 14 states that the arbitrator must consider the parties' final proposals and make an award in accordance with the final proposal that they consider to be most consistent with the principles in s.15, or, otherwise, the arbitrator must make whatever award the arbitrator considers appropriate, applying the principles in s.15.

391. Section 14(6) states that an award may give the tenant relief from payment or state that the tenant is to be given no relief from payment. Section 14(7) states that the maximum period of time the tenant can be given to pay any amount is 24 months beginning with the day after the day the award is made.

392. Section 15 states that any award should be aimed at:

a. preserving or restoring and preserving the viability of the business of the tenant, so far as it is consistent with preserving the landlord's solvency, and

b. that the tenant should, so far as it is consistent with the principle in s.15(a) to do so, be required to meet its obligations as regards the payment of the protected rent in full and without delay.

393. The following principles may be drawn from these sections:

a. if the tenant is viable or would be viable if granted relief from payment, the arbitrator must make an award;

b. the arbitrator must make an award in accordance with the final proposal that is most consistent with the principles in s.15 or, if only one of the final proposals is consistent with the principles in s.15, in accordance with that final proposal. The arbitrator may only make a different award, subject to the application of the principles in s.15, under s.14(5), if neither of the final proposals are so consistent;

c. the pre-eminent aim is to preserve or restore the viability of the tenant so far as that is consistent with preserving the solvency of the landlord;

d. the principle that the tenant should pay the protected rent in full and without delay is subordinate to the aim of preserving or restoring and preserving the viability of the tenant's business. Accordingly, if it is necessary to write off the entirety of the Protected Rent Debt and all of the interest, that is the award that the arbitrator must make, subject only to the requirement to preserve the solvency of the landlord.

394. I have considered all the Submissions put forward by the parties with regard to relief. I also apply the Guidance. Much of the material I have set out above informs the conclusions I now draw.

395. As a starting point, in the light of the information before me, I note that the Respondent accepts the Applicant must be granted relief (if considered viable). It is common ground that the Applicant cannot pay the Protected Rent Debt in full and the Respondent does not contend that it can. I also note that the principle of payment of a reduced sum by 6 instalments is accepted.

396. The Applicant has previously explained why it concluded that a cash-flow forecast over the two years covered by RBH's forecasts was unlikely to assist the

Arbitral Tribunal. It points to the fact RBH's forecasts are heavily caveated and a detailed cash-flow based on the forecasts would be little more than guesswork. It said then that it proposed a payment schedule of the part of the Protected Rent Debt that it believes that it will be able to pay that is realistic taking into account its known liabilities and likely trading over the next two years. For present purposes, I consider this must be sufficient.

397. I agree with the Applicant, and for the reasons it sets out, that I should not take into account the type of matters referred to by the Respondent in paragraphs 37 to 43 of Mrs Creer's Submissions. This statutory exercise requires to be carried out on the basis of the financial evidence before me regarding the Applicant's business as at the date of my award and in accordance with the s. 15 principles. The application of those principles must respond to the financial picture at this stage. Not in 2020 and 2021.

398. As at the date of Submissions, the Applicant said that I should consider the Revised Formal Proposal of £261,112 plus VAT was consistent with s. 15 CRCA principles (para 81). However, on the basis of the new figures now available, the Applicant also reminds me of my jurisdiction to make an Award under s. 14(5) if I take a different view and the view the Respondent's Proposal is also inconsistent. Nevertheless, the Applicant urges some caution. It suggests that if I increase the level of the payments, I should allow staged payments to 31 December 2024 rather than to September 2024.

399. As mentioned above, the Respondent has produced no evidence relating to its own "solvency" for the purposes of CRCA that can be weighed in the balance in this Arbitration. I accept the Applicant's submission that the Respondent's own solvency must, therefore, be assumed for the purposes of my assessment under the

CRCA (para. 68). Inevitably, any shortfall in recovery as a result of the operation of the CRCA impacts upon the Respondent.

400. Given the change in the Applicant's fortunes since its Formal Proposal was made, largely as a result of greater clarity around utility pricing, and as anticipated by the Applicant, I do not consider the Applicant's Revised Formal Proposal in the sum of £261,112 plus VAT, paid in instalments between 24 June 2023 and 29 September 2024 [para. 81 above, (A4-5)], is now consistent, or more consistent, with the s. 15 principles.

401. The Respondent's own Revised Final Proposal is that the Applicant should pay the sum of £962,664 in instalments between and on the same dates [para. 99 above]. I note first that the Respondent's final proposal does not make reference to VAT. I agree with the Applicant that, accordingly, it should be treated as being inclusive of VAT.

402. The Respondent commends Mr Elliott's Report supporting the Proposal to me. I have already made reference to Mr Elliott's experience, and the value I have extracted from his views regarding the Applicant's business. When considering all the evidence, I have not, however, accepted Mr Elliott's deductions to the FF&E Reserve in his own EOS v.2. This immediately has an impact upon the composition of the Proposal.

403. The Applicant submits that the Respondent's Final Proposal is not consistent with the principles in s.15, because it would not have the effect of preserving or restoring and preserving the viability of the Applicant's business. With regard to Mr

Elliott's evidence, the Respondent makes a number of specific submissions, with which I agree, when applying s. 15 CRCA (Submissions, paras. 74-80):

a. Mr Elliott's calculation in EOS v.2 affords too much weight to wider market data over the actual present data available in respect of the Applicant's business. The wider market data is very useful background as part of all the evidence as to viability, however I must assess the sum I consider appropriate relief by reference to the Applicant's business not the wider market;

b. there are some indications in his evidence that Mr Elliott believes that if the data from the wider market suggests that the Applicant's business could become more efficient, for example, by reducing costs, it should be assumed that the Applicant's business will become more efficient. I agree that I must assess the Applicant's business, not a hypothetical business that might be more cost efficient than the Applicant's;

c. Mr Elliott's conclusion that the Applicant can afford to pay £963,000 in respect of the Protected Rent Debt is dependent on the Applicant's business achieving significant improvements on its historic results. Adopting these conclusions would therefore involve a very significant risk of failing to preserve the viability of the Applicant's business if those improvements are not realised;

d. Mr Elliott has not provided analysis as to how those profits are calculated. Specifically, with regard to the cost of utilities.

As a result, as at the date of my award, I do not consider that the Respondent's Revised Formal Proposal, supported by Mr Elliott's EOS v.2, is consistent, or more consistent with the principles in s.15. In any event, I am sceptical that Mr Elliott would analyse the picture identically in the light of changed circumstances since that date.

404. I, therefore, make an award under s. 14(5) CRCA. It is based upon the Applicant's EOS v.6 as set out in the body of this Award [Course of Arbitration, para. 171 above]. I consider that the Applicant's approach to the amount it calculates to be available in respect of the Protected Rent Debt in EOSv6 is transparent and appropriate and robust. It accords with the application of the s. 15 principles. In the circumstances, it is to be inferred that the Applicant considers that its business can sustain payment of the sum of £513,181 plus VAT, if allowed to do so over the period to 31 December 2024.

405. As at the date when the Formal Proposals were made, the first date for payment proposed was 23 June 2023 and the last was 29 September 2024. As at today's date, it is more appropriate that the first payment should be made on 29 September 2023 and the last payment on 25 December 2024. In the light of Ashtons' correspondence, I consider it unrealistic to direct that payments should now commence on 24 June 2023. The payment schedule I set out will, however, terminate prior to the last date (2 years hence), to which payments by instalments could otherwise have run under the CRCA.

Conclusion

406. I determine the matter of relief from payment under s. 14 CRCA by making an award which gives the Applicant relief from payment in the following manner and on the following terms:

a. In settlement of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period 25 March 2020 to 18 July 2021 falling within the definition of Rent in s. 2(1) CRCA, the sum of £513,181 plus VAT;

b. The Applicant shall be given time to pay the sum of £513,181 plus VAT, which shall be paid to the Respondent by monthly instalments as follows:

i. £85,530,16 plus VAT on 29 September 2023

ii. £85,530,16 plus VAT on 25 December 2023

iii. £85,530,16 plus VAT on 25 March 2024

iv. £85,530,16 plus VAT on 24 June 2024

v. £85,530,16 plus VAT on 29 September 2024

vi. £85,530,16 plus VAT on 25 December 2024.

c. The balance of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2020 and 18 July 2021 falling within the definition of Rent in s. 2(1) CRCA is written off.

Arbitration fees

407. Pursuant to s. 19(5) CRCA, when an award is made under s. 14, the arbitrator must (unless they consider it is more appropriate to award a different proportion under s. 19(6)) also make an award requiring the Respondent to reimburse the Applicant for half of the Arbitration fees paid by the Applicant.

408. In this case the Respondent has not made any specific representations in relation to the Arbitration fees. In view of (a) the mandated default position, (b) the absence of any invitation by the Respondent to depart therefrom, and (c) the fact that I do not believe that s. 19 CRCA envisages a "costs follow the event approach" (as that would not be consistent with the default), I am provisionally minded to make an award in respect of half the Arbitration fees.

409. However, it is appropriate to give the parties an opportunity to address the particular issue, if they wish. Accordingly I direct that if either party wishes to make

representations in support of a different award in and to the Arbitration fees, they must do so by 4:00pm on 16 May 2023. In the absence of any such representations, after that date I shall make a further award in these terms: "the Respondent must reimburse the Applicant 50% of the Arbitration fees paid by the Applicant."

Costs

410. Section 19(7) CRCA provides that (Arbitration fees aside) each party must bear its own costs. Therefore, costs are not an issue for me.

Publication

411. Section 18 CRCA provides that this award must be published. I intend to publish it on the FCA website. If either party wishes to make representations to me identifying commercial information which must be excluded under s. 18(3) CRCA, they must make those representations to me by 4pm on 16 May 2023. Unless either party makes representations to the contrary by that date, it will be published shortly thereafter. If any such representations are made, I will consider them before publishing the award.

Disposition

412. I hereby award and direct as follows:

a. In settlement of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period 25 March 2020 to 18 July 2021 falling within the definition of Rent in s. 2(1) CRCA, the sum of £513,181 plus VAT;

b. The Applicant shall be given time to pay the sum of £513,181 plus VAT, which shall be paid to the Respondent by monthly instalments as follows:

i. £85,530,16 plus VAT on 29 September 2023

ii. £85,530,16 plus VAT on 25 December 2023

iii. £85,530,16 plus VAT on 25 March 2024

iv. £85,530,16 plus VAT on 24 June 2024

v. £85,530,16 plus VAT on 29 September 2024

vi. £85,530,16 plus VAT on 25 December 2024

c. The balance of the Protected Rent Debt and all interest thereon and any other sum or sums due under the Lease in the period between 25 March 2020 and 18 July 2021 falling within the definition of Rent in s. 2(1) CRCA is written off.

Seat of the Arbitration

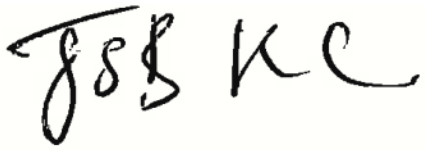
413. Pursuant to s. 95(2) of the Arbitration Act 1996, the seat of this Arbitration is in England and Wales.

Date of the award

414. This Award is made by me, Janet Bignell KC FCIArb, this 2 May 2023.

N.B. The figures I have stated as figures "to date" for the Protected Rent Debt and Non Protected Rent Debt (with interest), inclusive and exclusive of VAT, are the respective figures calculated as at 28 April 2023 on the basis of the (then) rival cases of the Applicant and Respondent. These figures were agreed by F+H and Freeths in their exchange of emails at 3.01pm and 4.15pm on 28 April 2023.

Signature



Janet Bignell KC FCIArb

2 May 2023

FURTHER ORDER:

The Respondent must reimburse the Applicant 50% of the Arbitration fees paid by the Applicant. Such payment to be made to the Applicant's solicitors (or as they direct) by 4pm on Tuesday 30 May 2023.

Janet Bignell KC FCIArb

17 May 2023