FALCON CHAMBERS ARBITRATION

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

Between

(1) PIX PINTXO BARS LIMITED First Applicant

(2) JOHN ARCHIE THORNHILL Second Applicant

-and-

MILLBECK PROPERTIES LIMITED Respondent

FINAL AWARD

Introduction, the parties and the Premises

1. The First Applicant is the tenant under a lease of restaurant premises at Ground and Basement Floors, 16 Bateman Street, London W1D 3AH (the "Premises"). The lease is dated 21 March 2011 and demises the Premises for a term of 15 years beginning on and including 18 March 2011 (the "Lease").
2. The Respondent is the original landlord under the Lease and the freehold owner of the building of which the Premises forms part.
3. The Second Applicant is a party to the Lease as guarantor of the First Applicant's obligations under it.
4. The Applicants are represented by Womble Bond Dickinson (UK) LLP and Anthony Tanney of counsel. The Respondent is represented by Hogan Lovells International LLP.

Procedural history and documents before me

The reference and my appointment as Arbitrator

5. On 20 September 2022 the Applicants made a reference in relation to the matter of relief from payment of a protected rent debt arising under the Lease pursuant to s.9 *Commercial Rent (Coronavirus) Act 2022* (the "2022 Act"). The Reference was made to Falcon Chambers Arbitration which is an approved arbitration body for the purposes of s.7 of the 2022 Act.

6. The Applicants' reference identified that the amount of commercial rent arrears in dispute was £63,043.41 (the "Debt") and went on to indicate that it had not been agreed with the Respondent that:

    a. the Lease was a business tenancy within the meaning of s.2 of the 2022 Act;

    b. the protected rent debt was subject to a CVA, IVA or compromise;

    c. the Debt fell within the definition of 'protected rent debt' for the purposes of the 2022 Act.

7. The reference confirmed that the Applicants notified the Respondent of their intention to make a reference to arbitration by way of a letter served on the Respondent on 22 August 2022 and no response to that letter had been received.

8. The parties requested, and I accepted, my appointment as an arbitrator on 20 October 2022.

9. The Respondent has not sought to argue that:

    a. the Lease is not a business tenancy;

    b. the dispute had already been resolved by agreement;

    c. the protected rent debt was the subject to a CVA, IVA or compromise; or

    d. that there is any other procedural reason why the arbitration cannot proceed.

10. Neither party has requested an oral hearing.

11. In the circumstances I am satisfied that this Arbitration is properly constituted and ought to proceed to an Award.

The parties' formal proposals

12. The Applicants made a formal proposal under s.11 of the 2022 Act – this document is undated but no point is taken by the Respondent in relation to that – stating that:

> *The Tenant has already paid over 55% of the rent that fell due during the Protected Period (as defined by [s].4(1) of the Act) and so proposes that it should be extended the maximum relief*

> *available under the Act, and the remaining protected rent debt be written off.*

13. On 31 October 2022 the Respondent made a proposal under s.11(2) of the 2022 Act that:

> *The Arrears of £63,043.41 should be paid in full by way of equal monthly instalments across a period of 12 months.*

14. On 8 March 2023 the Applicants made a revised formal proposal under s.11 of the 2022 Act that:

> *it pay £11,000.00 in equal monthly instalments of £1,000.00 each month commencing June 2023 with the remaining Protected Rent Debt being written off.*

15. On the same day the Respondent also made a revised formal proposal under s.11 of the 2022 Act that:

> *The Arrears of £63,043.41 should be paid in full by way of equal monthly instalments across a period of 24 months with the first payment falling due on the first day of the month following publication of the arbitrator's award*

Directions made in this Arbitration

16. Prior to making this Award I issued directions on:
    a. 6 December 2022;
    b. 11 January 2023; and
    c. 1 February 2023.
17. It is not necessary to recite the detail of those directions other than to note that the parties have complied with them, including the provision of the bundle, witness statements and written submissions referred to below.

Witness statements and other evidence in the Arbitration bundle

18. I have read and carefully considered the contents of the following witness statements and associated exhibits.
    a. On behalf of the Applicants, three witness statements made by the Second Applicant dated:
        i. 16 September 2022;
        ii. 22 November 2022; and
        iii. 8 March 2023.

b. On behalf of the Respondent two witness statements of Christopher Signellos:

i. one dated October 2022. Whilst no specific date in October 2022 appears on the face of this witness statement no point about that is taken by the Applicants and it does not affect the weight I put on the evidence contained in the statement; and

ii. a second dated 7 March 2023.

19. In addition to these witness statements and their exhibits, the Arbitration Bundle prepared in accordance with my directions also includes by way of evidence:

a. A copy of the Lease (albeit missing at least the first page, but I do not consider this a material omission);

b. A letter dated 25 May 2022 from Barclays Bank PLC to the First Applicant;

c. Accounts for Pix Strand Limited for the year ended 30 September 2021; and

d. Accounts for the Respondent for the year ended 31 March 2021.

20. I have also read and carefully considered these documents.

Written submissions

21. I am grateful to the parties and their representatives for providing the following helpful and focussed submissions as directed:

a. Submissions on behalf of both Applicants dated 8 February 2023 which run to 85 paragraphs;

b. Submissions on behalf of the Respondent dated 8 February 2023 which comprise 9.1 paragraphs;

c. Submissions dated 1 March 2023 on behalf of both Applicants in reply to the Respondent's written submissions which run to 25 paragraphs; and

d. Respondent's 'counter-submissions' dated 1 March 2023 which comprise 13 paragraphs.

22. I have read and considered all these submissions carefully and summarise them where appropriate below. I mean no disrespect to the intricacy of the parties' arguments if my summaries do not encapsulate the full detail of the submissions made. The parties similarly should not presume that because I have not mentioned a point in my summaries I have overlooked that point when making this Award.

The legal framework under the 2022 Act

Fundamental principles

23. s.1(1) of the 2022 Act provides that the statute enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration.

24. s.3(1) of the 2022 Act provides that 'a protected rent debt' is a debt under a business tenancy consisting of unpaid protected rent.

25. From s.3(2) of the 2022 Act, we see that rent due under the tenancy is only 'protected rent' if:

    a. the tenancy was adversely affected by coronavirus; and

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

Availability of an Award – the s.13(2) gateways

26. s.13 of the 2022 Act sets out the awards open to the arbitrator.

27. Under s.13(2) I must dismiss the reference if I determine that:

    a. the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made; or

    b. the Lease is not a business tenancy; or

    c. there is no protected rent debt.

28. It is self-evident that the parties have not resolved the matter of relief from payment by agreement and they agree that:

    a. the Lease is a business tenancy;

    b. the Debt exists; and

    c. the Debt is a protected rent debt.

29. As a result none of those provisions applies here. This means that I must then turn my attention to the issue of viability under s.13(3) to s.13(5).

Availability of an Award – the viability provisions in s.13(3) to s.13(5)

30. Under s.13(3) if I determine that, at the time of assessment – which I take to be the date of this Award – 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 I must make an award dismissing the reference.

31. If, however, I determine having made that assessment that – again at the time of the assessment – the tenant's business either (a) is viable or (b) would become viable if the tenant were to be given relief from payment of any kind then s.13(4) provides that I must resolve the matter of relief in accordance with s.13(5).

32. Under s.13(5) I must resolve the matter of relief by:

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

    b. making an award in accordance with s.14

Assessment of viability

33. s.16 sets out that I must, so far as known, have regard to the following when making an assessment of viability of the business of the tenant:

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

    b. the previous rental payments made under the business tenancy from the tenant to the landlord;

    c. the impact of coronavirus on the business of the tenant; and

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

34. I am required by s.16(3) expressly to disregard the possibility of the parties borrowing money or restructuring their businesses.

35. I must, in accordance with s.15(2), also disregard when considering the viability of the tenant's business anything done by the tenant with a view to manipulating its financial affairs so as to improve its position in relation to an award to be made under s.14.

36. Viability is not defined in the 2022 Act but as the Department for Business, Energy and Industrial Strategy *Commercial Rent (Coronavirus) Act 2022 Guidance* dated April 2022 states at paragraph 6.3 this failure to define is deliberate and:

> *In making the assessment of viability a key question is whether protected rent debt aside, the tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading.*

The Awards I am able to make – s.14 of the 2022 Act

37. Before determining what Award to make I must consider the parties' final proposals made under s.11. Where, as we have here, both parties have put forward final proposals then in accordance with s.14(3):

a. if I consider that both proposals are consistent with the principles in s.15, I must make the award set out in whichever proposal I consider to be the most consistent; but

b. if I consider that one proposal is consistent with the principles in s.15 but the other is not, I must make the award set out in the proposal that is consistent; and

c. if I decide that neither final proposal is consistent I may make an award in terms which I consider to be the most appropriate applying the s.15 principles.

38. Under s.14(6) an Award may either:

a. give the tenant relief from payment by means of, amongst other things, writing off all or any part of the debt or giving time to pay the whole or part of the debt including by instalments; or

b. determine that the tenant should be given no relief from payment.

39. In the event that any award I make gives the Applicants more time to pay, s.14(7) requires that the payment date must be within the period of 24 months beginning with the day after the date on which the Award is made.

The s.15 principles

40. The principles to be applied in accordance with s.15 when considering the matter of relief are that:

a. any award should be aimed at preserving or, as the case may be, restoring and preserving the viability of the business of the tenant, so far as that is consistent with preserving the landlord's solvency; and

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

41. The Respondent does not claim that its solvency will be affected by the making of an award in this Arbitration and therefore I do not concern myself with issues relating to preservation of the landlord's solvency when making this Award.

The issues in this Arbitration

42. On 11 January 2023 I directed, having heard from the parties first on the subject, that the parties should make submissions on the following issues in this Arbitration:

a. whether any award, if made, should apply pro rata over any retrospective rent review, insofar as that rent review applies to the Protected Period, as defined in the 2022 Act;

b. the nature and extent of the 'tenant's business' and 'the business of the tenant' for the purposes of the 2022 Act and this arbitration, in particular mindful of the role (if any) of Pix Strand Limited;

c. the viability of the business of the tenant;

d. the nature of any award under s.14 of the 2022 Act; and

e. the application of s.19 of the 2022 Act to this arbitration and the proper award to make as regards fees.

43. I will proceed to deal with those five issues in turn.

Issue 1 – the Debt and rent reviews

44. I am told that the annual rent currently payable under the Lease is £85,000, but there remain two rent reviews – one from March 2016 and one from March 2021 – which have not yet been determined.

45. As a preliminary issue I must consider whether those uncompleted rent reviews are relevant to this Arbitration. The Applicants say that they are, and the Respondent says that they are not.

46. The Applicants' arguments can be summarised as follows:

a. The March 2016 review fell before all the sums due under the Lease which comprise the Debt and the March 2021 review felt before two of payment dates for sums forming part of the Debt;

b. The effect of a 'balancing charge' at Clause 23.5.3 of the Lease is that the rent due during the Protected Period for the purposes of the 2022 Act would be topped up;

c. The balancing charge counts as 'rent' for the purposes of s.2(1)(a) of the 2022 Act and s.3(1) does not require that a 'protected rent debt' 'should necessarily yet have become due for payment in a contractual sense'. Furthermore, a rent which is 'due' (a word used, for instance, in s.1(1) of the 2022 Act) is 'perfectly aptly applied to a rent that is due upon a future contingency';

d. Further or alternatively I am empowered by the 2022 Act to award relief in respect of 'the whole or any part of the debt' and can only give relief against 'the whole of' a debt such as rent subject to a review and balancing charge if 'the future (final) sum is also relieved against'.

47. The Respondent says, in outline, that:

a. A protected rent debt 'must constitute a debt' and this, absent a definition of the word 'debt' in the 2022 Act, means 'a definite sum which is ascertained and due and which can be sued upon';

b. Clause 23.5.3 of the Lease says that a payment only becomes due once the revised rent has been determined and there can be no 'protected rent debt' in respect of a sum which is presently unascertained;

c. If unascertained sums were to be taken into account it would cause difficulties for arbitrators when determining issues relating to viability.

48. I prefer the Respondent's position. I agree that absent a definition of 'rent' in the 2022 Act a future sum which might, or might not, be due under a lease cannot be a debt. I also note the terms of Clause 23.5.2 of the Lease which provides that:

> *If the Revised Rent payable during a Review Period has not been ascertained by the relevant Review Date then the current rent shall continue to be payable until the Revised Rent is ascertained*

49. Until such time as the Revised Rent is ascertained then the only rent due under the Lease is the 'current rent' which has been used to calculate the Debt.

50. The way the 2022 Act requires me to approach the issue of viability does not appear to anticipate a 'protected rent debt' which is an uncertain or contingent sum. The sums due following application of Clause 23.5.3 of the Lease might be, in due course, rent but I do not consider them currently to be part of the protected rent debt for the purposes of the 2022 Act.

51. In passing I also note that paragraph 5 of the Second Applicant's First Witness Statement states that the:

> *Applicants seek relief from the payment of a Protected Rent Debt (as defined by s. 3(2) of the Act) in the sum of £63,043.41, that accrued during the Coronavirus pandemic, when emergency public health legislation forced it to close its hospitality business during a period of 16 months*

With no reference to rent reviews or sums due under Clause 23.5.3 of the Lease.

52. Furthermore, as set out above, the referral to arbitration was made on the basis that the 'amount of commercial rent arrears in dispute' was £63,043.41, again with no suggestion that this sum might increase in the future.

53. I therefore proceed on the basis that any sums which might be payable in the future, and which might in the future become a 'debt', whether under Clause 23.5.3 of the Lease or otherwise are not relevant to this Arbitration or the Award I am asked to make. This Award therefore relates only to what is defined above as the 'Debt', namely the sum of £63,043.41 which the parties agree is a protected rent debt for the purposes of the 2022 Act.

Issue 2 – the tenant's business and the role of Pix Strand Limited

Matters not in dispute

54. The 2022 Act uses the phrases 'the tenant's business' and 'the business of the tenant' seemingly interchangeably. I will use the phrase 'the tenant's business' throughout this Award.

55. Occupation of the whole of the Premises is described at paragraph 11 of the Second Applicant's first witness statement as being 'shared' with a company called Pix Strand Limited ("Strand"). The relationship between the First Applicant and Strand is important in the context of this Arbitration.

56. It is not in dispute between the parties that, for the purposes of this Arbitration:

    a. the two companies are in the same group for the purposes of s.42 *Landlord and Tenant Act 1954*;

    b. Strand, and not the First Applicant, owns and conducts the restaurant business carried out at the Premises under the Lease;

    c. The First Applicant does not itself generate any income and its ability to pay the rent due under the Lease is dependent on Stand providing the funds for it to do so;

    d. The First Applicant has no formal legal entitlement to require Strand to fund the rent payments under the Lease;

    e. Strand operates a second restaurant elsewhere, at a premises known as 24 Ganton Street. The Ganton Street lease is held by a different company not party to this Arbitration.

The further narrowing of the issues in written submissions

57. Initially it appeared as if there might be a significant dispute between the parties as to whether or not Strand was relevant at all in the context of the meaning of the 'tenant's business' in this Arbitration. By the time the parties replied to each other's initial written submissions, however, it was clear that the issue had narrowed considerably.

    a. The Applicants' position is that the 'tenant's business' for the purposes of this Arbitration is 'the restaurant business conducted by Strand' at the Premises.

    b. The Respondent agrees that the 'tenant's business' should 'include the business of Strand' but says that this should include not only the restaurant business conducted from the Premises but also the restaurant business conducted from Ganton Street.

58. For the purposes of this Arbitration it might only be necessary for me to proceed on the agreed basis that the business of Strand is to be taken as being part and parcel of the 'business of the tenant'. Given that I have received submissions on the narrower

issue of whether that business is just the restaurant at the Premises or at both the Premises and Ganton Street I will go on to consider that issue on the basis that it might be said to be relevant to my assessment of the issue of viability of the tenant's business.

The parties' submissions on the narrow issue

59. The Applicants' submissions in respect of this narrow point can be summarised as follows:

    a. The restaurant at Ganton Street is not part of 'the tenant's business' and does not belong to the First Applicant.

    b. It is Strand's business operations at the Premises 'specifically' which causes the Lease to be a business tenancy for the purposes of the 1954 Act.

    c. The landlord at Ganton Street wrote off a significant amount of money in rent arrears and it would be unfair to that landlord to have Ganton Street earnings used to pay rent under the Lease; and

    d. To include Ganton Street as part of the 'tenant's business' 'would appear to conflict with s.4(5)' of the 2022 Act. This is not a submission which is elaborated upon.

60. The Respondent's submissions in relation to this narrow point can be summarised as follows:

    a. Neither the restaurant business at the Premise or that at Ganton Street belong to the First Applicant;

    b. The 2022 Act requires me to take account of the whole of Strand's business when assessing viability and the need for relief;

    c. Issues connected with unfairness vis-à-vis the landlord of Ganton Street are irrelevant to this Arbitration; and

    d. s.4(5) is not relevant to this issue and is concerned with a wholly different point, namely the issue of whether a particular business tenancy was 'adversely affected by Coronavirus'.

My conclusion on the narrow point

61. Having considered the evidence and the submissions made to me, I conclude that the proper approach in circumstances such as this is for the whole of Strand's business – namely the restaurant at the Premises and the Ganton Street restaurant – to be taken to constitute 'the tenant's business' for the purposes of this Arbitration.

62. Points relating to unfairness can be dealt with swiftly. The concept of unfairness as regards third parties has no role to play in this Arbitration. It was for the landlord of Ganton Street to decide what it wanted to do in relation to rent arrears at that property.

The attitude of that landlord – whether it be generous or parsimonious – should have no bearing on the outcome of this Arbitration. To find otherwise would leave parties such as the Respondent in a position of considerable uncertainty about the operation of the 2022 Act.

63. I agree with the comments of Elizabeth Fitzgerald at paragraph 58 of her award in *The Entertainer (Amersham) Limited v British Overseas Bank Nominees Limited and WGTC Nominees Limited* where she said that:

> *my role as arbitrator is not to make an award based on an assessment of what I regard to be fair and equitable as between the parties/ third parties.*

64. I have considered s.4(5) of the 2022 Act carefully. I accept the Respondent's submission that it is not relevant to the issues before me. s.4 is concerned with an assessment of whether a 'business tenancy' was 'adversely affected by coronavirus' and in that context the 2022 Act acknowledges at s.4(5) that a business might not be carried out 'solely at or from' the premises comprised in the lease. I do not see, however, that it is relevant to this issue in this Arbitration.

65. In the Applicants' written reply submissions (paragraph 22) it is said that

> *If the protected debt is unrelieved, it will have to be paid from resources hypothecated within the group to the business at [the Premises]*

66. A difficulty with this line of argument is that the First Applicant has, on the Applicants' own case, no legal entitlement to call for any money from Strand whatsoever. Against that backdrop, and having considered the evidence in this Arbitration, I am not persuaded that there is any hypothecated pot of money for rent due under the Lease. It seems to me that there is instead a more informal arrangement whereby the First Applicant hopes, and perhaps expects, that Strand will pay the rent as it falls due. Given this fundamental informality it is to my mind artificial to say that this money can only come from earning made at the Premises by introducing a specific element of formality into the arrangement.

67. I therefore conclude that the business of the tenant includes the restaurant business operated by Strand not just at the Premises but also at Ganton Street.

Issue 3 – viability of the business of the tenant

The parties' respective positions on viability and solvency

68. As set out above, matters relating to the solvency of the Respondent are not in issue in this Arbitration.

69. I am concerned therefore solely with the viability of the business of the tenant as identified in issue 2 in this Arbitration.

70. The Applicants' position is relatively straightforward. They submit that:

    a. Strand's business as a whole is viable;

    b. the Premises is a 'successful and profitable location' which 'generates sufficient revenue to fund ongoing rent as it falls due';

    c. the business run from the Premises is also viable but relief from payment is necessary to preserve that viability.

71. This is because:

    a. The impact of coronavirus on the tenant's business was to reduce income from the business to zero;

    b. The First Applicant paid all rent due under the Lease up to the start of the coronavirus restrictions, and then paid all of the June 2020 rent and two thirds of the September 2020 rent;

    c. The First Applicant has no significant assets beyond the Lease, which carries with it a countervailing liability to pay rent;

    d. The 'only source of funding … upon which [the First Applicant] can count consists of the business earnings at' the Premises;

    e. If the First Applicant is required to pay the protected rent debt 'the group is likely (in effect) to pull the plug on' the Premises. The First Applicant is said to have 'no enforceable chose in action against Strand to require the rent [under the Lease] to be funded from income earned at' Ganton Street;

    f. The amount of the protected rent debt exceeds forecast profit for 2023;

    g. Any concession of a 'cash flow character' – such as instalments over a 24 month period – 'would leave the business very vulnerable to other cost / revenue pressures that may arise'.

72. Whilst the Respondent submits that it finds 'the Applicants' position on viability is increasingly difficult to reconcile' I understand the overall thrust of the Respondent's submissions to be that:

    a. given its importance to the issue of the tenant's business the Applicants are not entitled to ignore the financial position of Strand when assessing viability;

    b. taking the tenant's business at the Premises and Ganton Street together it is viable;

    c. the tenant's business from the Premises is forecast to generate a net profit of £55,540 in 2023 and is therefore viable even if Ganton Street is left out of account.

The 2022 forfeiture and relief from forfeiture proceedings

73. The witness statements and submissions refer to forfeiture and subsequent relief from forfeiture proceedings in relation to the Premises which appear to have been compromised in late 2022. The forfeiture was brought about by a failure to pay rent due under the Lease and it seems not to be in issue that the forfeiture did, to some extent, cause loss of trade to the tenant's business.

74. Mindful of the time at which I need to assess viability, the fact that the forfeiture was a one-off event, and the provisions of ss.15(2) and 16(1)(d) I have concluded that matters relating to the forfeiture are not matters that I should take into account when considering viability.

My conclusion on viability

75. Neither party argues that an Award is required to restore viability. I therefore proceed on the basis that ss.13(4)(b) and 15(1)(a)(ii) of the 2022 Act are not in issue in this Arbitration.

76. The question, therefore, is whether the tenant's business is viable for the purposes of s.13(4)(a).

77. Having carefully considered all the evidence and submissions I find that the tenant's business is viable, in particular because:

    a. This is the position of both parties, neither of whom seeks to argue that the restaurant business conducted by Strand at the Premises is anything other than viable. The Applicants additionally say that Strand's overall business is viable.

    b. The tenant's business in this context cannot be limited to the First Applicant alone given the way in which the Applicants advance their case – it must, as a minimum, be the restaurant business conducted by Strand at the Premises or, as I have found above, the restaurant business conducted by Strand at the Premises and Ganton Street.

    c. The Applicants' submissions appear to proceed on the basis that the Ganton Street business is viable by itself.

    d. The 'Pix Bateman Street 2022 & 2023 Management Forecast' document which forms part of the Applicants' evidence (the "Forecast") is believed to be accurate to within 5% and projects £55,540 of profit for the Premises in 2023.

    e. Taking into account the matters which I am obliged to take into account, and disregarding those which it is open to me to disregard, and mindful of the guidance as to the meaning of viability a restaurant business producing an annual profit at that level is viable for the purposes of the 2022 Act.

78. The key issue, therefore, is the application of s.13(5) and the issue of relief and an Award in accordance with s.14.

Issue 4 – the Award

79. I remind myself of the statutory provisions discussed above and, in particular, the provisions of s.14(3).

The Applicants' proposals

80. The nature of the Applicants' proposals under s.11 is to deny the Respondent payment of protected rent in full which is not consistent with the principle in s.15(1)(b).

81. Owing to the way s.15(1) is structured this is, however, a subsidiary point. Requiring a tenant to pay protected rent in full should first be consistent with 'aiming at' preservation (in a case such as this falling within s.13(4)(a)) of the viability of the business of the tenant as per s.15(1)(a)(i).

82. In this regard I note that the Applicants' revised proposal involves writing off around £52,000 of protected rent debt. It does this against the backdrop of:

    a. Strand having in excess of this amount as cash in the bank; and

    b. the Premises alone being forecast to generate a profit higher than this amount in 2023.

83. The fact that Strand has money in the bank sufficient to discharge the Debt and appears, as a minimum, to be in the habit of paying the rent due under the Lease in order to allow the tenant's business to trade from the Premises strikes me as a relevant consideration when deciding whether the Applicants' proposals are consistent with the s.15 principles. If Strand chooses not to fund the rent due under the Lease – including the Debt – then this, given the way the Applicants have framed the nature of the tenant's business for the purposes of this arbitration, would be akin to Strand actively deciding to close down the tenant's business despite it currently being profitable.

84. I appreciate that some of the money in Strand's bank account might be referable to Ganton Street. I refer back, however, to my comments above about hypothecation of Stand's resources. In circumstances where there would appear to be no formal obligation on Strand to pay anything to the First Applicant at all I am not persuaded that the Applicants should be allowed to rely on an argument that Strand's liability to pay money should be capped by reference to income from the restaurant business at the Premises. It seems to me on the evidence in this Arbitration that if Strand wanted to use money generated at Ganton Street to pay the Debt it may well – absent any legal framework governing its financial relationship with the First Applicant – be able to do so if it wanted to.

85. The current financial resources of Strand are not, however, a deciding factor in the exercise of assessing whether or not the Applicants' proposals are consistent with the s.15 principles.

86. The financial information provided to me, and in particular the Forecast, suggests that by using profit generated from the Premises alone the Applicants could pay the Debt within the 24 month period anticipated by the 2022 Act. This financial information does not support a conclusion that the Applicants would be unable to pay the Debt in full.

87. I do not, therefore, consider the Applicants' proposals to be consistent with the principles in s.15 of the 2022 Act.

The Respondent's proposals

88. The revised proposal made by the Respondents is that the sum of £63,043.41 be paid in full by equal monthly instalments across a period of 24 months. This is a proposal which is valid under the 2022 Act mindful in particular of s.14(7). The proposal would require the sum of £2,626.81 per month to be paid for 24 months.

89. I note and take account of the reference in the Applicants' submissions to how a 'cash flow' concession could leave the tenant's business vulnerable to other financial pressures but it seems to me that these are pressures which any business would face.

90. I consider that, in light of the evidence and the financial information available to me, the Respondent's revised proposal is consistent with both the principles in s.15. Had I found that the Applicants' final proposal was consistent with the principles in s.15 I would have found for the purposes of s.14(3)(a) that the Respondent's proposal was more consistent.

91. My reasons for this are because:

    a. Whether one adopts – as I have done – a broad meaning of the 'tenant's business' which includes both the Premises and Ganton Street or a narrow view – as contended for by the Applicants – which includes just the Premises, the Respondent's proposal is 'aimed at' preserving the viability of the business of the tenant by smoothing out the cash flow issues associated with paying the Debt. It is therefore consistent with s.15(1)(a).

    b. The Forecast, if it is 5% too high, would give an annual profit for the Premises in 2023 of £52,763.00 or average profits of £4,396.92 per month. After paying the monthly sum of £2,626.81 the Applicants/Strand would still be left with average monthly profits of £1,770.11 from the Premises alone. This money could be used as a buffer against the financial pressures referred to by the Applicants in their submissions. This is consistent with the principle in s.15(1)(a), in particular when compared with an instalment arrangement which leaves less or no spare estimated profit.

c. An Award in these terms would provide for the Respondent to be paid the protected rent in full. This is consistent with the first element of s.15(1)(b).

d. Whilst an Award in these terms would introduce some delay in the Respondent being paid the protected rent – which is not consistent with the second limb of s.15(1)(b) – this is a delay which has been volunteered by the Respondent itself and is subsidiary to the principle at s.15(1)(a). I do not see the introduction of delay as meaning that the Respondent's revised proposal is inconsistent with the s.15 principles, particularly in circumstances where instalment payments are expressly anticipated by the 2022 Act.

The period of time anticipated by the Respondent's revised proposal and s.14(6) and 14(7)

92. I have considered whether there is a difficulty with the Respondent's revised proposal given the wording of ss.14(6)(a) and 14(7) which say:

> *(6) An award under this section may—*
>
> *(a) give the tenant relief from payment of the debt as set out in the award …*
>
> *(7) Where an award under subsection (6)(a) gives the tenant time to pay an amount (including an instalment), the payment date must be within the period of 24 months beginning with the day after the day on which the award is made*

93. The Respondent's revised proposal anticipates 24 instalments with 'the first payment falling due on the first day of the month following publication of the arbitrator's award'. This would give a first payment due on 1 April 2023. 24 monthly payments of £2,626.81 from (and including) that date means that the final payment would be due on 1 March 2025. This is a date 'within the period of 24 months beginning with the day after the day on which the award is made' and therefore the Respondent's revised proposal anticipates an Award which I am able to make under the 2022 Act.

The Award I must make

94. It follows that, owing to the way in which s.14(3)(b) operates, I must make an Award as set out in the Respondent's final proposal dated 8 March 2023. Had s.14(3)(a) applied, I would have determined that the Respondent's final proposal was more consistent with the s.15 principles and in any event been bound to make an Award as set out in the Respondent's final proposal dated 8 March 2023.

Issue 5 – Arbitration fees

95. When making an Award under s.14 I must, in accordance with ss.19(5) and 19(6), also make an Award in respect of arbitration fees paid by the Applicants under s.19(4).

96. I have considered the submissions made on behalf of the Applicants and the Respondent in this regard which boil down to:

a. The Applicants saying that the Respondent should pay all the fees under s.19(6) 'to prevent where possible costs eating into the benefit of relief obtained by the Applicant'; and

b. The Respondent saying that in the event I find in favour of the Respondent's proposal – as I have done – 'the whole of the Arbitrator's fees and expenses should be borne by the Applicant on the basis that the Applicant will have unnecessarily put the Respondent to the (substantial) costs of engaging with the Arbitration process'.

97. Given the nature of the issues raised in the Arbitration I have concluded that there is no reason to depart from the 'general rule' in s.19(5) and I therefore make an Award that the Respondent reimburses the Applicants for half of the arbitration fees paid under s.19(4).

The Award and publication

98. In accordance with s.18 of the 2022 Act I intend to publish this Award on the Falcon Chambers Arbitration website. I have formed the provisional view that this Award does not contain confidential information which must be excluded under that section. I will therefore publish the Award in full on the Falcon Chambers Arbitration website unless either party indicates to me by 4pm on 31 March 2023 that they wish me to do otherwise in which case I will consider any submissions put forward in relation to that issue together with any evidence submitted in support of any such submissions

99. I, having carefully considered the evidence in this Arbitration and the submissions of the parties, hereby award and direct as follows:

a. The Applicants are to be given relief from payment of the Debt in that the Debt is to be paid by 24 equal monthly instalments of £2,626.81 with the first payment due on 1 April 2023; and

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

MADE AND PUBLISHED by me, Michael Ranson at Falcon Chambers Arbitration, London, which is the seat of the arbitration, on 27 March 2023.

Michael Ranson

27 March 2023