FALCON CHAMBERS ARBITRATION

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

Between

RESTAURANT WC1 LIMITED

Applicant

and

HOGARTH PROPERTIES S.A.R.L.

Respondent

Award on Preliminary Issues

The parties and the premises

1. Hogarth Properties S.A.R.L. ("**the Respondent**") is the registered freehold proprietor of land known as 127 to 136 (odd) High Holborn, 17 to 35 (odd) Southampton Row, 1 to 29 (odd) and 6 to 20 (even) Sicilian Avenue, 1 to 6 Vernon Place, 1 to 4A and 43 to 47 Bloomsbury Square, 1 to 8 and 13 to 23 Southampton Place, 16, 18, 20 and 21 Barter Street, London, registered under title number NGL942924.

2. Restaurant WC1 Limited ("**the Applicant**") is the registered leasehold proprietor of land known as Basement and Ground Floor premises, 131 to 132 High Holborn, London WC1V 6PU, registered under title number NGL884441 ("**the Premises**").

3. The Applicant is the Respondent's tenant pursuant to a Lease of the Premises dated 17 May 2007 and made between (1) Holborn Links Limited and (2) the Applicant.

4. In this arbitration, the Applicant is represented by Jonathan Warren of Teacher Stern LLP. The Respondent is represented by Sue Wilson and Ailish Foad of Greenberg Traurig LLP.

5. The Respondent has issued a claim (with claim number J53YX262) against the Applicant in the County Court seeking to recover sums due under the Lease, which the Applicant says partly comprise a protected rent debt within the meaning of the Commercial Rent (Coronavirus) Act 2022 ("**CRCA**").

Procedural background

6. On 23 September 2022, the Applicant commenced arbitral proceedings by the submission of a Referral to Arbitration form dated 23 September 2022 ("**the Referral**") to deal with the matter of relief from payment of a protected rent debt said to be in the sum of £211,434.11 plus VAT and interest.

7. The Referral was sent by email to Falcon Chambers Arbitration ("**FCA**"), an approved arbitration body for the purposes of the CRCA. The Referral comprised a request that FCA appoint an arbitrator in respect of the dispute between the Applicant and the Respondent.

8. The Referral was accompanied by a PDF document "Applicant_s Formal Proposal dated 23.09/2022- RE44.1.PDF" ("**the Applicant's Proposal**").

9. The Applicant's Proposal described itself as "the Applicant's Formal Proposal in support of their referral to arbitration made on 23 September 2023…", stated that "The Applicant seeks full relief from payment of the sums due during the "protected period" under the Act" (together with a breakdown of those sums) and stated, at paragraph 3: "The Applicant intends to submit supporting evidence, which will follow."

10. To date, no such evidence has been submitted.

11. The Applicant did not send either a copy of the email submitting the Referral or a copy of the Applicant's Proposal to the Respondent or its solicitors.

12. Following the making of the Referral, by email dated 5 October 2022, FCA proposed my appointment as arbitrator and invited the parties to confirm acceptance of my appointment, which they subsequently did.

13. By email to FCA dated 18 October 2022, the Respondent's solicitors wrote:

> "We were, until receiving the below email, not aware that the tenant had referred the matter to arbitration and, despite several requests to the tenant's solicitor, have not been provided with a copy of the tenant's referral documentation or formal proposal for resolving the matter (as required by s11 Commercial Rent (Coronavirus) Act 2022). Could you please let us have a copy of the same?"

14. By email dated 19 October 2022, FCA's arbitration clerk responded:

> "Although I consider that that is the responsibility of the Applicant (which I am of course copying into this reply), I am happy to forward to you what has been supplied to me." The Referral and Applicant's Proposal were attached to that email.

15. Following further email correspondence, on 14 November 2022, FCA emailed the parties inviting them to sign and return signed arbitration agreements. Both parties returned signed arbitration agreements to FCA (the Applicant on 21 November 2022, the Respondent on 5 December 2022).

16. On 6 December 2022, I made a procedural order which, among other things, confirmed that FCA had appointed me as the arbitrator in respect of the arbitration and; that pursuant to section 30 of the Arbitration Act 1996 ("**AA**"), as modified by Schedule 1 to the CRCA, I could rule on my own substantive jurisdiction; and directed that the following matters ("**the Preliminary Issues**") would be determined as preliminary issues on the papers after 10 January 2023 (with written submissions to be supplied in relation to those issues by 4pm on the same date) absent any request for a hearing:

    (1) Whether the Applicant's Proposal was "given to the other party" within the meaning of s.11(7) CRCA on 23 September 2022 ("**the First Preliminary Issue**");

    (2) Whether the Applicant's Proposal was "accompanied by supporting evidence" within the meaning of s.11(3) CRCA ("**the Second Preliminary Issue**"); and

    (3) If the Applicant's Proposal was not "given to the other party" on 23 September 2022, and/or if the Applicant's Proposal was not "accompanied by supporting evidence":

        (a) whether the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA ("**the Third Preliminary Issue**");

(b) if it has, what directions ought now to be given to progress the arbitration, including in particular whether I should direct that time be extended for the purposes of any formal proposal to be supplied under s.11(2) or (4) CRCA ("**the Fourth Preliminary Issue**"); and

(c) if it has not:

(i) whether a reference under Part 2 CRCA has been made such that I have jurisdiction to make an award pursuant to s.13 CRCA ("**the Fifth Preliminary Issue**"); and

(ii) if so, what further directions ought to be made, including in particular whether I should direct that time be extended for the purposes of any formal proposal to be supplied under s.11(2) or (4) CRCA ("**the Sixth Preliminary Issue**").

17. Each party lodged submissions on 10 January 2023 and neither party requested a hearing of the Preliminary Issues in accordance with my procedural directions and accordingly I proceed to determine the Preliminary Issues without a hearing.

18. However, in the course of preparing my award, a further issue became apparent to me, namely that the Applicant's Proposal nowhere refers in terms to s.11 CRCA. I accordingly directed that the following issues should be determined as part of this award as additional preliminary issues ("**the Additional Preliminary Issues**") in light of further written submissions (absent a request for a hearing, which did not materialise):

(a) Whether the Applicant's Proposal was a proposal which is expressed to be made for the purposes of s.11 CRCA within the meaning of s.11(7)(b) CRCA ("**the Seventh Preliminary Issue**");

(b) If not, whether the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA ("**the Eighth Preliminary Issue**"); and

(c) If not, whether I have jurisdiction to make an award pursuant to s.13 CRCA ("**the Ninth Preliminary Issue**").

19. In accordance with my directions, Teacher Stern LLP lodged further written submissions in respect of the Additional Preliminary Issues by email on 18 January 2023. Greenberg Traurig LLP lodged further written submissions dated 25 January 2023. Teacher Stern LLP lodged further written submissions in response on 1 February 2023.

20. This is my award in respect of the Preliminary Issues and the Additional Preliminary Issues.

The legal framework

21. The AA applies to this arbitration as modified by s.22 and Schedule 1 of the CRCA.

22. Arbitration under the CRCA is a statutory arbitration for the purposes of AA: s.94 AA.

23. Arbitral proceedings were commenced by the Applicant giving notice in writing to FCA requesting that FCA appoint an arbitrator, by sending the Referral to FCA: s.14(5) AA.

24. The CRCA is treated as the arbitration agreement, and the Applicant and Respondent are treated as parties to that agreement: s.95 AA.

25. Section 30(1) AA permits me to rule on my own substantive jurisdiction, including as to whether the CRCA applies to the dispute and as to what matters have been submitted to arbitration in accordance with the arbitration agreement (here, in accordance with the CRCA).

26. Section 34 AA provides that it shall be for the arbitrator to decide all procedural and evidential matters subject to the right of the parties to agree any matter.

27. Section 9 CRCA (so far as relevant) provides as follows:

> *(1) This section applies where the tenant and the landlord under a business tenancy are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt.*
> *(2) A reference to arbitration may be made by either the tenant or the landlord within the period of six months beginning with the day on which this Act is passed.*

28. Accordingly, no reference to arbitration may be made on or after 24 September 2022.

29. Section 11 CRCA provides as follows:

(1) A reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt.
(2) The other party to the arbitration may put forward a formal proposal in response within the period of 14 days beginning with the day on which the proposal under subsection (1) is received.
(3) A formal proposal under subsection (1) or (2) must be accompanied by supporting evidence.
(4) Each party may put forward a revised formal proposal within the period of 28 days beginning with the day on which the party gives a formal proposal to the other party under subsection (1) or (2).
(5) A revised formal proposal must be accompanied by any further supporting evidence.
(6) The periods in subsections (2) and (4) may be extended—
(a) by agreement between the parties, or
(b) by the arbitrator where the arbitrator considers that it would be reasonable in all the circumstances.
(7) In this section "formal proposal" means a proposal which is—
(a) made on the assumption that the reference is not dismissed for a reason set out in section 13(2) or (3),
(b) expressed to be made for the purposes of this section, and
(c) given to the other party and the arbitrator.

The First Preliminary Issue

30. The First Preliminary Issue is whether the Applicant's Proposal was a proposal "given to the other party" within the meaning of s.11(7)(c) CRCA on 23 September 2022.

31. The Respondent submits that:

(1) The Applicant's Proposal was not "given to the other party and the arbitrator" within the meaning of s.11(7) CRCA because although it was given to "the arbitrator" by being emailed to FCA, it was not given to the Respondent;

(2) The Respondent only became aware that the Applicant had made a reference to arbitration on receipt of FCA's email dated 5 October 2022;

(3) Thereafter, the Respondent's solicitors contacted the Applicant's solicitors on three occasions to request copies of the Applicant's Referral and Applicant's Proposal but were

met with silence. The Respondent was first able to see the contents of the Applicant's Proposal when a copy of it was forwarded to the Respondent's solicitors by FCA on 19 October 2022;

(4) It is implicit in the drafting of the CRCA that it is the applicant, not the arbitrator or his clerk, that must "give" a copy of the formal proposal to a respondent- in particular, the Respondent refers to the language of s.11(7)(c), emphasising the word "and";

(5) The Applicant "has not, to date, attempted to "give" (by email, post or otherwise) a copy of its Referral or Formal Proposal to the Respondent/GT"; and

(6) As a consequence, the Respondent was unable to assess the merits of the Applicant's position, or to calculate the deadline for a formal proposal in accordance with s.11(2) CRCA. It is said that this deadline "should… be calculated by reference to the date of receipt on which a respondent receives an applicant's formal proposal".

32. The Applicant's written submissions do not address the First Preliminary Issue in terms. However, they do state that "on 23 September 2022, the Applicant's solicitors sent to Falcon Chambers Arbitration a completed CRCA Referral to Arbitration Form" and that the "Applicant's Referral Form and their Formal Proposal were sent by the Arbitration Clerk to the Respondent's solicitors on 19 October 2022".

33. A "formal proposal" under s.11 CRCA is a proposal which is (among other things) expressed to be made for the purposes of s.11 (s.11(7)(b)) and "given to the other party and the arbitrator" (s.11(7)(c)).

34. I agree with the Respondent that the word "and" in s.11(7)(c) means that to satisfy the requirement of that subparagraph, a proposal must satisfy two separate requirements before it can constitute a "formal proposal", namely (i) that the proposal is given to the other party and (ii) that the proposal is given to the arbitrator.

35. It does not appear to be in dispute that:

(1) the Applicant did not send the Applicant's Proposal (or a copy of it) directly to the Respondent (whether on 23 September 2022 or at all); and

(2) the Respondent first received a copy of the Applicant's Proposal when the same was emailed to its solicitors by FCA's arbitration clerk on 19 October 2022.

36. Accordingly, if (which is implicit in the Respondent's submissions) s.11(7)(c) required the Applicant to send the Applicant's Proposal (or a copy of it) to the Respondent in order for it to constitute a "formal proposal" within the meaning of s.11 CRCA, the Applicant failed to do so on 23 September 2022 (whether or not the later provision of a copy of the Applicant's Proposal by FCA to the Respondent would have amounted to it having been "given to the other party").

37. The question for present purposes is whether that is what s.11(7)(c) requires, on a true construction.

38. Although the Applicant did not explicitly take this point in its submissions, another possible construction suggests itself, namely that "given to the other party and the arbitrator" should be construed so as to mean "addressed or directed to" or "for the attention of" both the other party and the arbitrator, for the purposes of the statutory arbitration. If that were the case, then the inclusion of a document called a "formal proposal" and expressed to be made for the purposes of s.11 CRCA in the reference to arbitration might be sufficient to satisfy s.11(7)(c).

39. The following matters might be thought to support the Respondent's construction:

(1) The words "given to" may sensibly be construed so as to require receipt by the other party. By way of illustration only, a notice is not "given" for the purposes of ss.48 and 49 of the Bills of Exchange Act 1882 until it is received (*Eaglehill Ltd v J Needham Builders Ltd* [1973] A.C. 992).

(2) I agree with the Respondent that the deadline for a respondent's formal proposal under s.11(2) CRCA should be calculated from the date of receipt by the respondent of the formal proposal under s.11(1). S.11(2) provides that the other party may put forward a formal proposal in response within the period of 14 days beginning with "the day on which the proposal under subsection (1) is received". This language may be said to suggest that the formal proposal under s.11(1) must have been "received" by the other party.

(3) Similarly, s.11(4) permits each party to "put forward a revised formal proposal within the period of 28 days beginning with the day on which the party gives a formal proposal to the other party under subsection (1) or (2)". Here, if "gives" did not involve receipt of the proposal by the other party, the period of 28 days for the applicant's revised formal

proposal might expire before the period for the respondent's formal proposal in response in s.11(2). This would undermine the structure of the sequential exchange of formal proposals and revised formal proposals under s.11. And one might expect the words "gives… to" and "given to" to have a consistent meaning in s.11.

(4) The alternative construction could render s.11(7)(c) effectively otiose as an additional requirement for a valid formal proposal. This is because the alternative construction would invariably be satisfied if a proposal expressed to be for the purposes of s.11 CRCA were included in the reference to arbitration. The additional requirement that the proposal be given to the other party and the arbitrator might be said to add nothing if it did not require the other party to have received the proposal.

(5) The Commercial Rent (Coronavirus) Act 2022 Guidance (issued pursuant to the power in s.21 CRCA) ("**the Guidance**") states as follows:

12.15. Under the Act, rather than the usual form of arbitral proceedings involving statements of claim and defence etc, formal proposals for resolving the matter of relief from payment of a protected rent debt are submitted by the applicant, with the respondent having the opportunity to submit their own proposal. Proposals must be accompanied by supporting evidence. Assessment of those formal proposals and supporting evidence is the main way in which the arbitrator is to resolve the dispute between the parties…
12.16. … the Act's approach of the parties submitting formal proposals (rather than providing for the usual form of arbitral proceedings) is intended to limit the amount of document disclosure to ensure the process is efficient and cost-effective (especially since the parties must meet their own legal or other costs).
12.17. That said, the arbitrator retains the broad discretion pursuant to section 34 of the AA96 to decide, save where they are inconsistent with the provisions of the Act, all procedural and evidential matters in the arbitration, including as to whether further written statements must be provided, further documents disclosed and/or any further questions should be put to and answered by the respective parties and when and in what form this should be done.

Since the formal proposal under s.11(1) serves the same purpose as the applicant's statement of case and evidence (subject to any procedural orders made requiring or permitting further documents to be produced), as a matter of procedural fairness, one might expect that it should be sent to the respondent. The goal of ensuring the process is efficient and cost effective would be undermined if the formal proposal were not sent to the respondent. This could result in unnecessary (and potential unfair) delay and additional cost as the respondent seeks the provision of the formal proposal from the applicant, the arbitration body or the arbitrator.

40. However, the following points may be made in support the alternative construction:

(1) If the alternative construction were adopted, s.11(2) could still be operable. A formal proposal directed to the other party and the arbitrator might be included in the reference to arbitration without being sent by the applicant to the other party, in which case the time limit in s.11(2) would run not from the date of the reference, but only from the (later) day on which the proposal is received by the other party.

(2) Any problem which might arise as a result of the sequencing of the exchange of formal proposals being thrown out as a result of non-receipt by the other party of the s.11(1) proposal could be cured by the periods in ss. 11(2) and (4) being extended by agreement or by the arbitrator under s.11(6).

(3) The word "given" is a participle which is indefinite in point of time, and may refer to the past or the future: *Broom v Batchelor*, 156 E.R. 1199 per Pollock CB (in which the majority construed the word to relate to the future). "Given to" in s.11(7)(c) might accordingly mean "to be given to" or "directed to" rather than "has been received by".

(4) If "given to" may mean "to be given to", this could make sense of the inclusion of s.11(7)(c) as an additional requirement. It may indicate that the formal proposal is to be supplied to the other party and the arbitrator (without necessarily requiring this be done by the Applicant at the time of or as part and parcel of the Referral).

(5) The Respondent's construction would be a trap for applicants. The alternative construction would avoid the dismissal of references based on a technicality but would still ensure that the mechanics of the statutory arbitration could be operated.

(6) The alternative construction might be said to make more sense of the requirement to "include" a formal proposal in the reference to arbitration (although I acknowledge that the Applicant could theoretically have copied the Respondent into the email commencing the reference to arbitration, I consider it unlikely that Parliament intended this to be a mandatory requirement).

(7) A reference to arbitration must be made to an approved arbitration body: s.10(4) CRCA. The arbitrator is appointed subsequently. Accordingly, if "given to" means "received by", the formal proposal would not be "given to… the arbitrator" until their later appointment, unless perhaps one were to adopt a strained construction which deems the proposal to have been "given to… the arbitrator" when it was received by the approved arbitration body. It is unlikely that Parliament would have intended that a reference made shortly before the end of the six-month period in s.9(2) should be invalidated by the later

appointment of the arbitrator (and their later receipt of the proposal). This supports a construction whereby "given to" means "directed to" or "to be given to", since such a proposal could be "included" in the reference at a time when an arbitrator had not yet been appointed.

41. On reflection (despite having raised this issue of my own accord), on balance I prefer the alternative construction, for all the reasons given above, but particularly the consideration in paragraph 40(7) above. Accordingly, in relation to the First Preliminary Issue, I reject the Respondent's submissions and find that the Applicant's Proposal was "given to the other party" within the meaning of s.11(7)(c) CRCA on 23 September 2022, notwithstanding that a copy of it was only received by the Respondent on 19 October 2022.

42. For completeness, I am also aware of an award made by Mr Joseph Ollech in the case of *Restaurant SW3 Ltd v (1) Sloane Stanley Properties Ltd and (2) Sloane Stanley LLP* dated 2 February 2023, published at https://www.falcon-chambersarbitration.com/images/uploads/documents/Arbitration_32_Restaurant_SW3_Ltd_Preliminary_Issue_Award_02.02.2023.pdf, in which substantially similar issues were determined as preliminary issues and in which similar arguments appear to have been advanced on behalf of the applicant in that case, which was also represented by Teacher Stern LLP. I am fortified in my conclusions in relation to the First Preliminary Issue by paragraphs [83]-[93] of Mr Ollech's award, with which I agree (although I am not bound by his conclusions).

The Second Preliminary Issue

43. The Second Preliminary Issue is whether the Applicant's Proposal was "accompanied by supporting evidence" within the meaning of s.11(3) CRCA.

44. The Respondent submits (in summary) that:

(1) The Applicant's Proposal was not "accompanied by supporting evidence" as required by s.11(3) CRCA;

(2) Despite the Applicant having stated that it intended to submit supporting evidence, no such evidence has been submitted. A stated intention to file evidence in support later is insufficient.

45. The Applicant accepts in relation to this issue that "To date, the Applicant has not yet provided the Respondent with evidence to support its formal proposal."

46. There might conceivably be a question of construction as to whether a formal proposal might be "accompanied" by supporting evidence supplied at a later date. However, it is unnecessary to determine that issue for the purposes of the Second Preliminary Issue, since no supporting evidence has been provided, whether at the time of the reference to arbitration and together with the Applicant's Proposal, or at all.

47. In relation to the Second Preliminary Issue, I find that the Applicant's Proposal was and is not "accompanied by supporting evidence" within the meaning of s.11(3) CRCA.

The Third and Fifth Preliminary Issues

48. The Third Preliminary Issue is whether the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA, in light of its failure to accompany the Applicant's Proposal with any supporting evidence.

49. For the reasons which follow, I have concluded that the Applicant has not made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA, in light of its failure to accompany the Applicant's Proposal with any supporting evidence.

50. In light of that conclusion, and the content of the Applicant's submissions, set out below, it is convenient to deal with the Third and Fifth Preliminary Issues together.

51. The Fifth Preliminary Issue is whether in light of the failure to make a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA, a reference under Part 2 CRCA has been made such that I have jurisdiction to make an award pursuant to s.13 CRCA.

52. For the reasons which follow, I have concluded in relation to the Fifth Preliminary Issue that, the Applicant having failed to include a formal proposal with its reference, no valid reference has been made under Part 2 CRCA conferring jurisdiction upon me to make an award pursuant to s.13 CRCA.

53. The Applicant submits (in summary) as follows:

(1) It made a reference to arbitration including a formal proposal on 23 September 2022 by submitting the Referral, which included the Applicant's Proposal.

(2) In prescribing the period in which a reference must be made, s.9(2) CRCA does not refer to either the formal proposal or the supporting evidence.

(3) S.11(1) stipulates that the reference must "include" a formal proposal, and s.11(3), in turn, provides that the formal proposal must be "accompanied" by supporting evidence. It is "implicit from this wording that the evidence in support is separate from- as opposed to part and parcel of- the Reference".

(4) The failure to provide supporting evidence "accompanying" the formal proposal "is an essentially evidential or procedural defect", not one which goes to the validity of the reference or the inclusion of the formal proposal.

(5) This may be contrasted with the circumstances in s.13 which "are essentially those in which some jurisdictional requirement is not met" so that "dismissal is a readily understandable, and proportionate response".

(6) There is no prescribed sanction or express provision requiring the reference to be automatically dismissed, along the lines of those in s.13 CRCA, for failure to accompany the formal proposal with supporting evidence. Had Parliament intended for such failure to attract the automatic sanction of dismissal, it might reasonably have been expected to make provision for the same.

(7) The arbitrator has procedural powers pursuant to s.34(1) AA to obtain further evidence from the tenant. Paragraph 6.7 of the Guidance envisages that the arbitrator may request information from the tenant.

(8) That power is reflected in the FCA arbitration form, paragraph 10 of which states that "there will be an opportunity to supply further information, if needed".

(9) The arbitrator "has a discretion", absent any prescribed sanction, "as to how best to proceed in the circumstances, including by proceeding with the Reference and directing the Applicant to file and serve its supporting evidence."

54. The Applicant also makes various submissions under the heading "The principles relevant to the Arbitrator's discretion" as to how I should exercise the discretion it is submitted that I have. I do not set these out in full because, for the reasons which follow, I do not consider that I have any such discretion. However, I do bear in mind the following submissions on the part of the Applicant in reaching my conclusions, which were included as part of those submissions as to how my discretion should be exercised:

(1) Sections 1, 33 and 34(1) AA are referred to. (I bear in mind their content.)

(2) It is submitted that since the period for making a reference has now elapsed, it would be "unfair and disproportionate" if the reference were "dismissed by reason of a procedural defect".

(3) It is said that the dismissal of the reference "would represent an unjustified windfall to the Respondents and would therefore engender a marked, and unfair, asymmetry in the respective positions of the Applicant and the Respondent."

(4) The dispute is at an early stage and it is submitted that "the Respondent would suffer no or little prejudice if the Applicant were permitted to file its supporting evidence now".

55. The Respondent submits (in summary) that:

(1) Section 11(1) CRCA provides that a reference to arbitration must include a formal proposal. This is a mandatory requirement and there is no scope for a formal proposal to be submitted after a reference is made.

(2) The use of the word "must" in s.11(3) "confirms" that the requirement that a formal proposal be accompanied by supporting evidence is "a mandatory requirement".

(3) "On the basis that the Applicant's Proposal did not comply with section 11(3) of the CRCA, it was not a valid formal proposal for the purposes of the CRCA."

(4) As a consequence of the failure to accompany the Applicant's Proposal with supporting evidence, the Respondent has been "unable to assess the merits of the Applicant's Formal Proposal, or provide a meaningful formal proposal in response".

(5) The provision of supporting evidence is important to the resolution of the dispute by the arbitrator. Reference is made to paragraph 12.15 of the Guidance (set out above).

56. I agree with the Respondent that s.11(1) imposes a mandatory requirement that the reference to arbitration must include a formal proposal, and that a reference which does not include a formal proposal is a nullity for the purposes of conferring jurisdiction to make an award under s.13 CRCA, it being a requirement of a valid "reference to arbitration" for those purposes that it "include" a formal proposal for resolving the matter of relief from payment of a protected rent debt (albeit that arbitral proceedings may nevertheless be commenced by the submission of a referral to an approved arbitration body). I reach that conclusion for substantially the same reasons as given in paragraphs [57] to [71] of my Final Award dated 15 December 2022 in *Hanbury Print.com Ltd t/a The Print Team v Primack*, which was published on the FCA website at https://www.falcon-chambersarbitration.com/images/uploads/documents/Final_Award_-_Redacted.pdf:

57. For the reasons which follow, I find that, on a true construction of s.11(1) CRCA, no valid reference to arbitration under Part 2 CRCA is made if it does not include a formal proposal for resolving the matter of relief from payment of a protected rent debt. It seems to me that Parliament can fairly be said to have intended that consequence, in light of other indications in the CRCA.

58. First, section 11(1) is expressed in mandatory terms: a reference to arbitration must include a formal proposal. If a valid reference could be made without complying with that requirement, mandatory language would be less appropriate. However, I do not regard this matter as conclusive; there are many cases in which a failure to comply with statutory requirements expressed in mandatory language has not been held to result in the invalidity of the act in breach of that requirement (cf by way of examples only: Tudor v M25 Group Ltd [2003] EWCA Civ 1760; 7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd [2004] EWCA Civ 1669).

59. Secondly, express provision is made in s.11(6) CRCA permitting the time periods in ss.11(2) and (4) to be extended by agreement or by the arbitrator. I find it to be implicit in the omission of s.11(1) from this provision that it is not possible for the arbitrator to extend the time in respect of a formal proposal under s.11(1). This makes sense if there has been no valid reference absent the inclusion of a formal proposal.

60. Thirdly, other provisions of the CRCA presuppose that there will be a formal proposal included in the reference.

61. Section 10(3) CRCA precludes in certain specified circumstances the making of a reference to arbitration, the appointment of an arbitrator and the making of a formal proposal

under ss.11(2) and (4) CRCA. There is nothing expressly precluding the making of a formal proposal under s.11(1) separately in the event that the tenant were subject to the sort of CVA, IVA, compromise or arrangement relating to a protected rent debt listed in s.10(3), because there is no need to preclude this separately from the making of a reference to arbitration, in which it must be included.

62. Similarly, no reference is made to s.11(1) formal proposals in s.10(5). I consider this to be because it is inherent in the making of a reference to arbitration that such a formal proposal should already have been included in the reference.

63. Fourthly, the timing and mechanics of the CRCA do not work properly if a valid reference could be made without including a formal proposal.

64. The respondent may put forward a formal proposal in response under s.11(2) "within the period of 14 days beginning with the day on which the proposal under subsection (1) is received". Absent such proposal, there is no opportunity to put in a formal proposal in response.

65. Similarly, revised formal proposals under s.11(4) may be put forward "within the period of 28 days beginning with the day on which the party gives a formal proposal to the other party under subsection (1) or (2)"

66. It might be suggested that s.14(5) CRCA could be read so as to confer power on the arbitrator to make whatever award the arbitrator considers appropriate (applying the principles in s.15) even absent any formal proposal.

67. It might also be suggested that, although by s.14(2), before determining what award to make under s.13(5), the arbitrator must consider any final proposal put forward to it by a party under s.11, the word "any" is consistent with the possibility of there being no formal proposal whatsoever.

68. However, where both parties put forward formal proposals, the arbitrator must make an award consistent with s.14(3) (i.e. if both are consistent with the s.15 principles, the arbitrator must make the award set out in whichever proposal was most consistent, or if only one is consistent, the arbitrator must make the award set out in that proposal).

69. As explained above, if a valid reference could be made absent a formal proposal, there would then be no opportunity for the respondent to give a formal proposal in response at all. In that case it would be deprived of the opportunity to obtain a mandatory award pursuant to s.14(3) in the event its proposal was consistent with the s.15 principles. I do not consider that this result can sensibly have been intended.

70. Further, the arbitrator's award, pursuant to s.17(1) CRCA, must be made as soon as reasonably practicable after (a) where both parties have put forward a final proposal, the day on which the latest final proposal is received, or (b) otherwise, the last day on which a party may put forward a revised formal proposal (see section 11(4)). It is not contemplated that there might be no formal proposal under s.11(1) such that these time limits are never engaged.

71. I am further reinforced in my conclusion by the following considerations:

(1) If parties had to seek or the arbitrator had to make directions to enable the determination of a reference absent a formal proposal, this would add an extra layer of cost and delay to proceedings that are supposed to be efficient and cost-effective.

(2) If an applicant need not accompany a valid reference with a formal proposal, this could be used by opportunistic tenants to create unfair delay. For while the arbitral proceedings continue, the moratorium period continues and the landlord cannot rely upon specified remedies.

57. Contrary to the Applicant's submission, I do not consider that it makes any difference to that conclusion that s.9(2) CRCA does not refer to the formal proposal. There is no need for s.9(2) to do so. The requirement is built into s.11(1) and inherent in the structure of the CRCA. The requirement in s.9(2) is one concerning the timing of the reference to arbitration, but it says nothing about the requirements for a valid reference to be made.

58. The present question is whether a failure to comply with the requirement in s.11(3) means that, notwithstanding the inclusion of the Applicant's Proposal in the Referral, no "formal proposal" was included in the reference to arbitration for the purposes of s.11(1).

59. I have concluded that the reference to arbitration did not include a valid formal proposal sufficient to satisfy the requirement in s.11(1) because the requirement in s.11(3) has the effect that, absent at least some supporting evidence accompanying it, a proposal is not "a formal proposal under subsection (1) or (2)".

60. In my view, the natural construction of s.11(3) is that, in order to be a valid "formal proposal under subsection (1) or (2)", a proposal must, in addition to satisfying the definitional requirements in s.11(7), be accompanied by supporting evidence.

61. Although I accept the Respondent's submission that the requirement in s.11(3) is expressed in mandatory language ("must"), non-compliance with a statutory requirement expressed in mandatory language does not necessarily result in invalidity. By way of examples only see e.g. *Tudor v M25 Group Ltd* [2003] EWCA Civ 1760, *7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd* [2004] EWCA Civ 1669.

62. The question is whether, on a true construction of the requirement in question, "Parliament can fairly be said to have intended total invalidity": *R v Soneji* [2005] UKHL 49 per Lord Steyn. It is necessary to consider the words of the statute, in the light of its subject matter, the background, the purpose of the requirement and the actual or possible effect of non-compliance on the parties: *Newbold v Coal Authority* [2013] EWCA Civ 584 per Sir Stanley Burnton.

63. However, for the reasons given above, I have concluded that on a true construction of the CRCA, a failure to include a formal proposal under s.11(1) in the reference was indeed intended to result in invalidity.

64. In turn, a formal proposal under that subsection "must be accompanied by" supporting evidence. In my view, this is an additional requirement for the validity of the formal proposal to be included in the reference, so that a failure to accompany the formal proposal with supporting evidence does result in the invalidity of the reference. I do not think there are sufficient indications in the language of the section or the Act to displace that conclusion in light of the purpose of the requirements of that section.

65. I consider that the better construction of s.11 is one which gives the word "must" a consistent mandatory meaning in both s.11(1) and s.11(3). Absent clear contraindications in the language and structure of the CRCA, I do not think that Parliament would have used the word "must" in a mandatory sense in s.11(1) resulting in invalidity for non-compliance (as I have found), but then give the word "must" a different, watered-down meaning in s.11(3).

66. I agree with the Applicant that there a linguistically available alternative reading of the language of s.11(3) which distinguishes between the formal proposal itself and the supporting evidence which must accompany it. I do not disagree that the proposal complying with the requirements of s.11(7) and the supporting evidence are separate things.

67. However, I do not accept the submission that this results in a failure to comply with paragraph 11(3) resulting in no consequence (or only the application of a procedural discretion vested in the arbitrator).

68. Rather, the requirement in s.11(3) does in my view indirectly impose an additional requirement for the validity of a reference, by reference to the materials that must be supplied together with a proposal in order for it to be a valid formal proposal "under subsection (1)".

69. The requirement is expressed in mandatory language similar to the mandatory language in s.11(1), in the context of a section concerning the requirements for the applicant's proposals for relief.

70. While I accept the Applicant's submission that s.11(1) stipulates that the reference must "include" a formal proposal, and s.11(3), in turn, provides that that formal proposal must be

"accompanied by" supporting evidence, I do not consider it to be implicit in that language that the requirement in s.11(3) does not go to the validity of the formal proposal under s.11(1), or, in turn, the reference. Rather, it seems to me that the Applicant's construction is the less natural, or more strained construction, in that it requires the word "must" to be interpreted so as to result in invalidity of the reference for a failure to include a formal proposal, but less strictly in s.11(3) so that it is a mere evidential suggestion, and one that undermines the purpose of the requirement to supply a proposal with evidence at that.

71. It seems to me that the purpose of the requirement in s.11(3), taken together with the requirement of s.11(1), and as reinforced by the Guidance, is to ensure that the proposal (satisfying the requirements of s.11(7)) and supporting evidence are supplied at the outset as one package in order to limit the amount of document disclosure and to ensure the process is efficient and cost-effective. It is to create an effective and efficient base of material (in the form of a proposal *and* evidence) from which the reference may be determined under CRCA.

72. This purpose would be undermined if no evidence had to be supplied with the parties' initial proposals. There would then be no express mechanism for resolving when or how that evidence should be supplied, save by reference to the arbitrator's general procedural powers. The other party and the arbitrator would then be left in limbo until either the defaulting party takes it upon itself to supply the evidence or the arbitrator is prevailed upon to give directions. I do not think that the structure of the Act (which requires the provision of a formal proposal upfront) was predicated upon the possibility of the applicant supplying no evidence until forced to do so. This generates delay (as it has in the present case) and could be abused by tenants seeking to extend any moratorium period artificially (for the avoidance of doubt, I do not make a finding of abuse against the Applicant, but I take into account the general possibility of abuse in concluding that the true construction of the CRCA is that supporting evidence must be included in the reference with the proposal as a precondition of the validity of the formal proposal).

73. I am reinforced in my conclusion by the requirement that an applicant must pay arbitration fees (other than oral hearing fees) in advance of the arbitration taking place: s.19(4). It is more difficult for the approved arbitration body or the proposed arbitrator to estimate the appropriate fee payable up front if no evidence accompanies the formal proposal whatsoever.

74. I accept the Applicant's submission that there is no express sanction in the CRCA for non-compliance with s.11(3). But there is no need for one, in light of the conclusion I have reached in respect of s.11(1) and the proper construction of s.11(3).

75. It might have been suggested (as mentioned above in the context of the Second Preliminary Issue) that a formal proposal could be "accompanied by" supporting evidence supplied at a later date. Just such an argument was made, and rejected, in *Restaurant SW3 Ltd v (1)*

Sloane Stanley Properties Ltd and (2) Sloane Stanley LLP. I do not understand the Applicant to be advancing such a submission in terms in the present case. But in any event in my view that would be an unnecessarily strained reading of the words "accompanied by" and I would reject it. I find that "accompanied by" means "together with", that being the natural construction of those words as a matter of ordinary English, and being consistent with the purpose of s.11 and the requirement in s.11(3) as I have found it to be above. I reach this conclusion having had regard to the following reasoning of Mr Ollech at [37]-[53], with which I agree and which I adopt:

37. I appreciate that there is a different choice of wording between s.11(1) and s.11(3) – where in the former the word "include" is used, and in the latter the phrase "accompanied by" is used. As a matter of language Peter "accompanies Jane" when he works alongside her. If he is walking at a distance behind her then he is following her – the word accompany might be used in that instance, but it would be stretching the meaning of the word, and I consider that it is stretching a point too far to say that "accompanied by" in s.11(3) can have that stretched meaning. In my view, the correct interpretation "accompanied by" in s.11(3) (a) as a matter of ordinary English, (b) in the context of this section and (c) in light of its statutory purpose is that has the same sense as "together with".

38. I derive support for this interpretation in several ways.

39. First, as a matter of language I do not consider that there is a material difference between "must include" and "must be accompanied by". It is not disputed, correctly in my view, that "must include" in s.11(1) means that the formal proposal to come together with the reference to arbitration. But if the Applicant is correct that it is possible for there to be a valid reference to arbitration with a bare formal proposal, but no supporting evidence because it can come at a later date – at which point the formal proposal is then "accompanied" by the evidence, then by the same token it could be argued that the formal proposal itself is not required at the outset. It can be sent later, at which point the reference to arbitration will "include" it.

40. In addition, the present tense of "must be accompanied by" indicates that the applicant was required to prepare a package of two items to constitute the reference – the formal proposal and the supporting evidence. S.11(3) does not, for example, provide that the formal proposal should be "supplemented by" or "followed by" supporting evidence, or that "supporting evidence must be provided" by a date or set time period thereafter…

41. I am fortified in my understanding of the natural meaning of word "accompany", or the phrase "accompanied by" by a decision of the New Zealand courts. In Wielgus v Removal Review Authority [1994] 1 NZLR 73, concerned with a statutory requirement that an appeal be "accompanied by" a prescribed fee, Fisher J said:

> *It would be difficult to suggest that where the notice of appeal takes the form of a facsimilied communication, and the fee is then despatched by a different method of communication half an hour after the facsimile, and received on the day following the receipt of the facsimile, the appeal is still "accompanied" by the fee, at least within the time limit….Language is elastic to a certain point but snaps when asked to part company altogether with previously accepted meanings…*

42. Secondly, if, as the Applicant contends, supporting evidence can be submitted at a later date, then s.11 does not provide a mechanism or a deadline for when that evidence should be provided. In that indeterminate sense both the respondent to the reference and the arbitrator are left in limbo until either the applicant provides that evidence or the arbitrator is required to make directions. Whilst the arbitrator does have the power to make procedural orders it is unlikely that s.11 was predicated on the reference getting off to an incomplete start which would require the very type of procedural difficulty and delay that is a feature of this reference itself.

43. The 2022 Act is designed to provide a practical and efficient vehicle for the timely resolution of disputes, and in my view s.11 does so by directing that the tenant produce a combined formal proposal and evidence in support. That provides the platform for the arbitration that follows – the respondent knows what it has to reply to, and why, and the arbitrator understands the parameters of the dispute. This does not contradict the arbitrator's powers to direct further or additional evidence as may be appropriate in any given case – but the starting point has to be that there at least a baseline of evidence that the applicant has adduced by which to start the process. On the facts before me I do not need to consider what would be sufficient baseline evidence to satisfy s.11(3), because the Applicant in this case has filed nothing at all. I merely observe that if there are other cases where an applicant has filed some evidence, albeit it weak evidence, it may be that it has done the minimum necessary to comply, and that that the arbitrator can thereafter progress matters and give further directions for additional evidence if he or she so chooses; but that is not the case here.

44. Thirdly, s.11(6) expressly allows extensions of time only in respect of s.11(2) and s.11(4) – i.e. the counter-proposal or revised formal proposals. If, as the Applicant contends, the supporting evidence is something that can be submitted separately from the formal proposal, then there would or should have been a power to extend time for that as well. But on my reading of s.11, there is no need for such a power at all – and hence its absence. When the arbitrator extends time for s.11(2) and or s.11(4), he or she is by definition giving the same time for the supporting evidence because that evidence will have to "accompany" those proposals.

45. Fourthly, my approach is consistent with the approach taken in an award published on 15.12.2022 in the case of Hanbury Print.com Ltd v Serge and Vivienne Primack, a decision by Mr Toby Boncey, in which it was determined that a failure to include a formal proposal with the reference to arbitration rendered the reference invalid, and is incurable. As explained in that decision, a valid reference requires a valid formal proposal, otherwise the timing and mechanics of the 2022 Act cannot work properly. In my view, and for the same reasons, the formal proposal requires supporting evidence and without it the timing and mechanics of the 2022 Act do not work properly...

46. Fifthly, I am fortified in my view that a reference to arbitration must be made ab initio with both the formal proposal and evidence in support having regard to the statutory guidance that was publicly available in support of the 2022 Act and well in advance of the deadline of 24.09.2022, as follows. The statutory guidance all points in the same direction.

47. On 07.04.2022 the government published updated guidance entitled "Commercial rent code of practice following the Covid-19 pandemic" ("the Code"). Part Two and Annex C to that guide gave guidance as to the 2022 Act and the arbitration process. The guidance at Part

Two, para.64 et seq post is expressly stated to be statutory guidance under the Secretary of State's power in s.21(1)(b) of the Act.

48. Part Two, para.96 explains the submission of formal proposals. It states (emphasis added):

> *96. Under the Act, a formal proposal is a proposal* ***which is****:*
>
> *a. made on the assumption that the arbitrator is required to resolve the matter of relief from payment of a protected rent debt;*
>
> *b. specified as made for the purposes of section 11 of the Act;*
>
> *c. given to the other party and to the arbitrator;*
>
> ***d. accompanied by supporting evidence****; (see suggested non-exhaustive list at Annex B);*
>
> *and e. verified by a statement of truth.*

49. The point is repeated at Annex C, under the heading "Reference to Arbitration", where it states in bullet point form that (emphasis added):

> *• The applicant must make a reference to an approved arbitration body.*
>
> *• It must confirm that the pre-arbitration steps have been carried out and that the dispute is eligible for arbitration.*
>
> *•* ***It must include a formal proposal for resolving the dispute with its reference accompanied by supporting evidence****.*
>
> *• It must pay arbitration fees in advance of the arbitration taking place.*
>
> *• It is recommended that the applicant state whether it is party to any other eligible disputes with the respondent that can be consolidated*
>
> *• The approved arbitration body will review the information provided and appoint an arbitrator from its list to deal with the case.*

50. This guidance to landlord and tenants is consistent with the guidance issued to arbitrators, published by the government in April 2022 and entitled "Commercial Rent (Coronavirus) Act 2022 Guidance: Guidance to arbitrators and approved arbitration bodies on the exercise of their functions in the Act" ("the Guidance"). Para.1.2 of this guide states that Part 1 thereof is statutory guidance issued under s.21(1)(a) of the 2022 Act.

51. Part One, para.2.4 states: "The reference to arbitration must be accompanied by a formal proposal for resolving the dispute with supporting evidence".

52. Part One, para.3.17 states (emphasis added):

> *At Stage 3, having established that the dispute is eligible for arbitration, the arbitrator is to resolve the matter of relief from payment of the protected rent debt. This stage differs from the usual form of arbitral proceedings involving statements of claim and*

defence. Instead, ***when making a reference to arbitration the applicant is required to include (at Stage 1) a formal proposal (together with supporting evidence) for resolving the matter of relief from payment.***

53. Part One, para.7.4 states (emphasis added)

7.4 Under the Act, a formal proposal is a proposal which is:

7.4.1. Made on the assumption that the arbitrator is required to resolve the matter of relief from payment of a protected rent debt;

7.4.2. Expressed to be made for the purposes of section 11 of the Act;

7.4.3. Given to the other party and to the arbitrator;

7.4.4. ***Accompanied by supporting evidence****; (see table at Annex B of the Code of Practice28 and, in relation to the viability of the tenant's business, see evidence column in table after paragraph 6.17);*

7.4.5. Verified by a statement of truth (a formal proposal is a 'written statement' – see paragraph 12.24).

76. I do not consider that the absence of a reference to the supporting evidence in s.9(2) assists the Applicant. As explained above in the context of s.11(1), s.9(2) concerns the timing of the reference to arbitration, but it says nothing about the requirements for a valid reference to be made, which in my view are contained in s.11 CRCA. There is no need for it to do so.

77. I do not agree with the Applicant's submission that one might expect the "sanction" of dismissal to have been expressly provided for, as is said to occur in s.13. In my view, s.13 is concerned with valid references to arbitration where the requirements of ss.11(1) and (3) have been complied with (i.e. where the arbitrator does have jurisdiction to make an order under s.13). In circumstances where subsections 13(2) or 13(3) apply, the arbitrator is required to dismiss the reference. But s.13 is not concerned with invalid references. It does not need to provide that these should be dismissed, because this is the natural consequence of their being invalid. The point can be tested by considering a reference made out of time following the period in s.9(2). There is no need for s.13 to tell the arbitrator that they must dismiss the purported reference. This goes without saying. The dismissal of the reference is not a sanction. It simply gives effect to the arbitrator's lack of jurisdiction where there is an invalid reference.

78. I also reject the submission that s.13 deals with "jurisdictional" requirements (whether exhaustively or otherwise) for the same reasons. It simply imposes certain substantive hurdles which must be surmounted before the arbitrator in a valid reference could make an award under s.14 (as opposed to the prescribed award dismissing the reference under ss.13(2) or (3). Indeed, s.13(3) concerns the position at the time of the arbitrator's

assessment of the viability of the tenant's business, and therefore presupposes a valid reference has been made in which viability should be assessed.

79. I can see the force in the Applicant's (linguistically possible) submission I have rejected above that it is implicit in the language of s.11 that the evidence is dealt with as a separate matter (from the requirement to include a formal proposal in s.11(1)). After all, it could be said that it is only if a proposal *is* a "formal proposal" (within the meaning of s.11(7)) that the requirement that it be accompanied by supporting evidence is engaged. And it could be (and is) said that the requirement in s.11(3) is accordingly a separate one from the validity of the formal proposal.

80. This is the point I have found least straightforward. But I have concluded that this is to misunderstand, on a true construction, the structure of s.11. In my view, the reason s.11(3) is expressed as a separate requirement is because it applies to both ss.11(1) *and* 11(2), but not s.11(4). To be "A formal proposal under subsection (1) or (2)", a proposal must be accompanied by at least some supporting evidence. By contrast, there is a different requirement for a revised formal proposal under s.11(4), which is provided for in s.11(5) (that it be accompanied by "any further supporting evidence"). This explains why the definition of "formal proposal" in s.11(7) does not refer to the requirements to accompany the formal proposal with evidence. There are different requirements in respect of different kinds of formal proposal. But that does not diminish, in my view, the mandatory nature of the requirement in s.11(3), which support the efficient resolution of references by ensuring a sufficient baseline for the matter to be resolved without a period of limbo in which the arbitrator has to be troubled to give directions for the supply of evidence that should have been supplied in the first place.

81. I also reject the submission that the failure to comply with s.11(3) is a mere evidential or procedural defect. I agree with Mr Ollech in *Restaurant SW3 Ltd v (1) Sloane Stanley Properties Ltd and (2) Sloane Stanley LLP* at [56] when he said that "*I do not consider that [the absence of supporting evidence] can be characterised or minimised as such. If the 2022 Act intended to treat supporting evidence as a subsequent and subsidiary stage of the process then it could reasonably have treated it as a separate, and distinct requirement that followed on after the reference to arbitration with a formal proposal had been made. It did not. It required that the formal proposal itself be accompanied by evidence.*" In my view, it is that combined package that must be included in the reference for the reference to be valid. A failure to comply with s.11(3) in my view goes to the validity of the "formal proposal" that must be accompanied by supporting evidence. Absent accompanying supporting evidence, a proposal is not a "formal proposal under" s.11(1) or s.11(2). And absent a valid formal proposal included in the reference, the reference is invalid and the arbitrator has no jurisdiction to grant relief under the CRCA.

82. I accept that I have, as arbitrator, powers to request further information from either party. The Applicant also refers to para 6.7 of the Guidance. It provides that:

> *6.7. 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 AA96.*

83. It seems to me that that paragraph supports, rather than detracts from, the construction I prefer. It is the tenant's responsibility, at the outset, to supply evidence in support of their proposal. Thereafter, there is a valid reference and the arbitrator can, if appropriate, exercise powers under the AA to direct the provision of further information or evidence. I do not think this discretion could appropriately be exercised (even if it existed, in the context of an invalid reference) to resurrect a reference which was invalid for the purposes of conferring jurisdiction on the arbitrator to make a substantive order under s.13 CRCA.

84. I do not consider that paragraph 10 of the arbitration form assists the Applicant. This is consistent with my preferred construction. It states that there "will be an opportunity to supply **further** information, if needed" (my emphasis). This presupposes that some information has been provided at the outset. It also follows paragraph 8 of the form, which states: "Please attach a copy of your Formal Proposal, **including any supporting information**" (my emphasis). That paragraph is consistent with the requirements of s.11(3).

85. I do not agree with the Applicant's submission that I have a discretion as to how to proceed where the reference is (as I have found) invalidly constituted for the purposes of conferring on me jurisdiction under s.13 CRCA. I find that this is the automatic consequence of a failure to include a formal proposal accompanied by supporting evidence in the reference, by virtue of s.11(1).

86. The various submissions made by the Applicant in relation to fairness or proportionality are made in the context of seeking to persuade me to exercise a discretion I do not consider I have in the context of a reference which was invalid from the outset.

87. Even had I concluded (which I do not) that the consequence of invalidity was in some sense disproportionate to the failure to accompany the proposal with supporting evidence, I do not think, having concluded (a) that on a true construction, a proposal is not a "formal proposal" for the purposes of s.11(1) CRCA if it does not satisfy the s.11(3) requirement and (b) that the Applicant's Proposal did not satisfy that requirement, that there would be any basis in the language of the statute to conclude that the reference should nevertheless be valid.

88. However, I have considered the Applicant's appeal to considerations of fairness and the effect of the construction I have reached, namely that the Applicant is now out of time to make a valid reference to arbitration under the CRCA. As to that, I agree with and adopt the following remarks of Mr Ollech in *Restaurant SW3 Ltd v (1) Sloane Stanley Properties Ltd and (2) Sloane Stanley LLP*:

> *69. I appreciate that the process of interpretation and construction, whether of contractual or statutory wording, is something that is a little more of an art than a science, and that words can strike different people in different ways. In that sense, and in particular in the context of the Covid 19 pandemic and its impact on business tenants across the country, it is perhaps tempting to try and find a reading of the 2022 Act that will assist the applicant tenant who may otherwise lose its opportunity to mitigate the debt it owes it landlord.*
>
> *70. However, to allow such considerations to affect one's reading of the statute would be to allow the heart to rule the head. It would also be misplaced sympathy. It is simplistic to suggest that it is only tenants who suffered the effects of the pandemic on their businesses. There are landlords of all shapes and sizes who also suffered enormously in terms of the rental income stream they depended upon. It is not the function of the law or the arbitrator to determine whether a landlord or tenant is more or less deserving of a reading of the s.11 that will tend one way or the other. Parliament chose to strike a balance by interfering with what would otherwise have been the parties' common law rights by creating a regime that provided a particular time limited pathway for the resolution of arbitrations that were properly constituted within that time frame. It is not unreasonable that for a tenant to take advantage of the protection offered by this regime it comply promptly and properly with the requirements imposed. If a reference to arbitration was not made, or was not validly made, in that window of time, then Parliament did not otherwise or further interfere with the parties' common law or statutory rights in respect of rent arrears.*
>
> *71. In my view, this answers the question posed by Lord Steyn in R v Soneji, in that I consider that it can be said that Parliament intended to set requirements that would control the validity of the reference to arbitration. I also consider that it meets the considerations referred by the Court of Appeal in Newbold. The process created by Parliament, to mediate between the equally important yet competing interests of landlords and tenants affected by the pandemic, was to create a simplified arbitration process which required, from the outset, the applicant to bring forward and present together its formal proposal and accompanying supporting evidence in order to trigger a valid reference. It is not uncommercial or insensible, in the event that such steps are not take, that a reference to arbitration has not been properly made.*

The Fourth Preliminary Issue

89. In light of my conclusion in relation to the Third Preliminary Issue, the Fourth Preliminary Issue does not arise.

The Sixth Preliminary Issue

90. In light of my conclusion in relation to the Fifth Preliminary Issue, the Sixth Preliminary Issue does not arise.

The Seventh Preliminary Issue

91. I have concluded above that the reference was invalid for want of supporting evidence accompanying the Applicant's Proposal. The Additional Preliminary Issues raise a discrete problem as to validity of the reference independent of my conclusions in respect of the Third and Fifth Preliminary Issues.

92. The Seventh Preliminary Issue is whether the Applicant's Proposal was a proposal which is expressed to be made for the purposes of s.11 CRCA within the meaning of s.11(7)(b) CRCA.

93. For the reasons which follow, I conclude in respect of the Seventh Preliminary Issue that the Applicant's Proposal is not a proposal which is expressed to be made for the purposes of s.11 CRCA within the meaning of s.11(7)(b) CRCA.

94. The Applicant's Proposal stated:

> 1. *This is the Applicant's Formal Proposal in support of their reference to arbitration made on 23 September 2022 under the Commercial Rent (Coronavirus) Act 2022 ("the Act").*
> 2. *The Applicant seeks full relief from payment of the sums due during the "protected period" under the Act, which they consider amount to £211,434.11 plus VAT and interest and broken down as follows:*
>   i. *Estate Service Charges (plus VAT) for the relevant period: £1,318.32*
>   ii. *Insurance (plus VAT) for the relevant period: £2,474.12*
>   iii. *Insofar as the sums claimed as 'ad hoc maintenance recharges' are service charges, these sums: £354.00*
>   iv. *Rent (plus VAT): £207,287.67*
>   v. *Interest on the above sums.*
> 3. *The Applicant intends to submit supporting evidence, which will follow.*

95. Section 11(7)(b) expressly provides that a formal proposal is (among other things) one which is "expressed to be made for the purposes of this section".

96. As can be seen, the Applicant's Proposal does not refer expressly to section 11 at all. The Applicant accepts that "the formal proposal does not specifically refer to s.11 in terms".

97. The Respondent (in very brief summary) submits that the Applicant's Proposal accordingly did not comply with that requirement so that, as a consequence, no valid reference has been made to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA.

98. The Applicant's submissions may be summarised as follows.

99. First, it is submitted that s.11(7)(b) should not be construed so as to require s.11 to be referred to in terms. It is said that this would involve needless formalism. It is said that, instead, s.11(7)(b) can be construed as requiring only a reference to the "purposes" of s.11.

100. Secondly, the Applicant submits that "the purposes of s.11 are- essentially- to facilitate the making of formal proposals by the parties for resolving the matter of relief from payment of a "protected rent debt" in an arbitration under the 2022 Act. The Applicant submits that the Applicant's Proposal is "expressed" to be made for these purposes in that it states that "(i) it is made 'in support of their referral for arbitration under the Commercial Rent (Coronavirus) Act 2022'; and (ii) that the application is seeking full relief from payment of the sums due during the "protected period" under the Act'." It is said that a person receiving the Applicant's Proposal "would be in no doubt as to the purpose for which it was being provided. (By contrast, the Respondent submits that, the Applicant's Proposal made "no express reference to… the statutory purpose of the Formal Proposal (i.e. "*for resolving the matter of relief from payment of a protected rent debt*")". I understand this to be a submission that, if the Applicant's first submission is accepted, s.11(7) should be read as imposing a requirement that the formal proposal expressly rehearse the italicised words from s.11(1).)

101. As to the Applicant's primary submission on the question of construction, I agree with the Applicant that it is an important function of s.11(7) to identify with certainty the parties' formal proposals for the purposes of s.11. But I have concluded that the Applicant is wrong to say that s.11(7)(b) does not require it to be stated that the proposal is made for the purposes of s.11. I find that that is exactly what s.11(7)(b) says and is what it requires. That is its ordinary and natural meaning. The requirement is express and straightforward. Rather than being unduly formalistic, the natural construction of the language of that paragraph enables the clear and straightforward identification of the document that represents a party's formal proposal(s) for the purposes of s.11 (whether an applicant's initial formal proposal, a respondent's formal proposal in response, or either party's revised formal proposal). It also avoids prospect of any dispute about what the purposes of s.11 might be said to be or to what extent or how these may need to be stated and the uncertainty and delay inherent in the resolution of such a dispute (which, as demonstrated by the submissions made to me, would

arise on the Applicant's proposed construction). I reject the Applicant's construction, which I regard as straining the ordinary and natural meaning of s.11(7)(b) and giving rise to potential uncertainty.

102. Accordingly, I do not need to resolve the dispute between the parties in respect of the Applicant's secondary submissions and I find in respect of the Seventh Preliminary Issue that the Applicant's Proposal is not a proposal which is expressed to be made for the purposes of s.11 CRCA within the meaning of s.11(7)(b) CRCA.

The Eighth Preliminary Issue

103. In light of my conclusion in respect of the Seventh Preliminary Issue, further submissions on behalf of the Applicant fall to be considered.

104. The Eighth Preliminary Issue is whether the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt, for the purposes of s.11(1) CRCA, in light of the failure to include a formal proposal expressed to be made for the purposes of s.11 CRCA with the reference.

105. The Applicant submits that, if s.11(7) does impose a requirement that the formal proposal must expressly refer to s.11 in terms, "in the absence of very clear wording to that effect, non-compliance with the same ought not to have any bearing on the validity of the reference". It is submitted that s.11(7) does not lay down requirements for the validity of a formal proposal, but rather it simply defines in the interests of certainty what a formal proposal is (to distinguish a formal proposal from any other document or correspondence which may pass between the parties in which "informal" proposals have been advanced for resolving the matter of relief from payment). It is said that absent s.11(7) explicitly laying down formal requirements for the validity of a formal proposal, such as "a formal reference is only valid if…", there is no consequence for a failure to comply. It is submitted that otherwise, "the consequences of non-compliance would be disproportionate to the point of being draconian, in that the Applicant would be shut out of the arbitration process entirely" and "the Respondents would thereby incur an unexpected- and unjustified- windfall". The Applicant further draws my attention to the speech of Lord Steyn in *R v Soneji* [2005] UKHL 49, in which his Lordship stated that when construing a statute to determine whether non-compliance with some provision has invalidated the relevant act, "*the emphasis ought to be on the consequences of non-compliance and posing the question whether Parliament can fairly be said to have intended total invalidity*".

106. I reject those submissions.

107. S.11(1) is the subsection which creates the result that a reference is invalid for want of the inclusion of a formal proposal. Accordingly, there is no need for any additional express sanction to be set out in respect of a failure to comply with the requirements of s.11(7).

108. I agree that s.11(7) defines what a formal proposal is for the purposes of s.11. A "formal proposal" for the purposes of each of ss.11(1), (2) and (4) is a proposal that satisfies the conditions in s.11(7). (In addition, as I have found above, by virtue of s.11(3), a formal proposal under subsections (1) and (2), but not a formal proposal under subsection (4), must additionally be accompanied by at least some supporting evidence.) If a proposal does not satisfy the requirements of s.11(7), it is simply not a "formal proposal" within the statutory definition, and the requirement in s.11(1) is accordingly not satisfied.

109. I have considered in detail the consequences of non-compliance with s.11(1) at paragraph 56 of this Award above and have concluded that Parliament ***can*** fairly be said to have intended total invalidity for a failure to include a formal proposal in the reference.

110. While I accept that the stark consequence for the Applicant is that its reference is invalid and it has no opportunity to make a new reference having missed the statutory deadline, I do not agree that this constitutes an "unjustified windfall" for the Respondents. This is a consequence of the Applicant's failure to comply with what I find to be a straightforward, express statutory requirement and having submitted its reference to arbitration very shortly before the statutory deadline.

111. Even had I concluded that the consequence was in some sense disproportionate, I do not think, having concluded (a) that on a true construction, a proposal is not a "formal proposal" for the purposes of s.11 CRCA if it does not satisfy the s.11(7) requirements and (b) that the Applicant's Proposal did not satisfy those requirements, that there is any proper basis in the language of the statute to conclude that the reference should nevertheless be valid.

112. Accordingly, I do not consider that the Applicant has made a reference to arbitration which included a formal proposal for resolving the matter of relief from payment of a protected rent debt (whether or not my conclusions as to the Third and Fifth Preliminary Issues independently invalidate the reference, as I have found they do).

The Ninth Preliminary Issue

113. In light of my conclusions and reasons in respect of each of the Fifth and Eighth Preliminary Issues (each of which would independently result in my having no jurisdiction to

make an award under s.13 CRCA), I find that I do not have jurisdiction to make an award pursuant to s.13 CRCA and the reference falls to be dismissed.

Arbitration fees and costs

114. By s.19 CRCA:

> *(4) The applicant must pay arbitration fees (other than oral hearing fees) in advance of the arbitration taking place.*
> *(5) When the arbitrator makes an award under section 13 or 14, the arbitrator must (subject to subsection (6)) also make an award requiring the other party to reimburse the applicant for half the arbitration fees paid under subsection (4).*
> *(6) The general rule in subsection (5) does not apply if the arbitrator considers it more appropriate in the circumstances of the case to award a different proportion (which may be zero).*
> *(7) Except as provided by subsection (5) and section 20(6), the parties must meet their own legal or other costs.*

115. S.19(5) is of no application here since I am not making an award under s.13 or s.14 CRCA.

116. S.20(6) relates to the costs of hearing fees where an award is made under s.13 or s.14, so also does not apply.

117. Accordingly, pursuant to s.19(7) CRCA, the parties must meet their own legal or other costs and I make no award as to costs.

Publication

118. Pursuant to s.18 CRCA, this Award must be published.

119. The Award contains no confidential information which ought to be redacted pursuant to s.18(3) CRCA. In accordance with s.18 CRCA I intend to publish this Award in full on the FCA website.

Disposition

120. **I hereby award and order that:**

(1) The Applicant's reference to arbitration is dismissed.

Seat of the arbitration

121. The seat of this arbitration is in England and Wales: s.95(2) AA.

Date of the award

122. This Award is made by me, Toby Boncey, on 6 February 2023.

Signature

Toby Boncey