Reference No: 27

**IN THE MATTER OF AN ARBITRATION UNDER THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022**

AND IN THE MATTER OF AN APPLICATION

Before Arbitrator Kavish Shah

BETWEEN:

E. CRIS UK LTD T/A PINKO (Applicant)

and

HERMES CENTRAL LONDON GP LIMITED and HERMES CENTRAL LONDON NOMINEES LIMITED (Respondents)

# AWARD

## Introductory matters

1. This Award disposes of an application for strike out made by the Respondents. To avoid confusion, this Award labels the parties as Tenant and Landlord rather than Applicant and Respondent.

2. The Tenant is E. Cris UK Ltd t/a Pinko (incorporated and registered in England and Wales under company registration number 04679185). The Landlord is Hermes Central London GP Limited (incorporated and registered in England and Wales under company

registration number 08580220) and Hermes Central London Nominee Limited (incorporated and registered in England and Wales under company registration number 08580221).

3. The dispute as referred to Falcon Chambers Arbitration related to Unit 3, 92-100 Regent Street, London W1B 5SR ("the Premises") as more particularly described by the lease dated 8 November 2018 and made between the parties ("the Lease").

4. By letter dated 23 September 2022, the Tenant made a reference to Falcon Chambers Arbitration for relief of payment of a protected rent debt. That reference was supported by a statement by Michael Duncan of Burges Salmon LLP. In brief, that statement set out that:

    a. The annual rent due under the Lease was £ [redacted]. The Lease also included a requirement to pay a Building Service Charge and Insurance Rent.

    b. The Premises were subjected to closure requirements between 21 March 2020 and 12 April 2021 by Government regulations as the Tenant provided 'non-essential retail' services.

    c. The unpaid rent that fell due in that period was £ [redacted]. The unpaid Building Service Charge that fell due in that period was £ [redacted]. All Insurance Rent that fell due in that period had been paid.

    d. The required notice under Section 10(1)(a) of the 2022 Act had been served by the Tenant on 25 August 2022. Whilst the Landlord had acknowledged receipt, it had not served a response under Section 10(1)(b).

    e. The Tenant was proposing to pay 50% of the unpaid rent and Building Service Charge in 12 equal monthly instalments, and the other 50% be written off.

5. The parties then agreed to a number of stays/extensions of the timetable lasting around 2 years. The result of the last agreed extension was that the Landlord was required to provide its formal proposal pursuant to Section 11(1) of the 2022 Act by 30 November 2024.

6. In its proposal, the Landlord did not take issue with the calculation of the protected rent debt. The Landlord proposed that the Tenant pay 50% of the protected rent debt in 3 equal monthly instalments, and that the other 50% be written off.

7. No revised proposal was submitted by the Tenant.

8. By email dated 6 January 2025, Falcon Chambers Arbitration proposed my appointment as arbitrator with the proposed fee, noting that fees are payable in advance. By email dated 8 January 2025, CMS on behalf of the Landlord agreed to my appointment. By email dated 17 January 2025, Burges Salmon agreed to my appointment.

9. By email dated 22 January 2025, Falcon Chambers Arbitration provided the fee note for the Tenant to settle. By email dated 4 February 2025, the Landlord chased whether the Tenant had settled the fee note as it was eager to progress with the arbitration without further delay. By email dated 5 February 2025, Falcon Chambers Arbitration confirmed that no payment had yet been received. By email dated 13 February 2025, the Landlord again chased; the landlord also requested that if payment was not made within 7 days, that the arbitration reference be dismissed.

10. On 18 February 2025, I gave directions for any application that the Landlord may wish to make for dismissal of the arbitration reference. Those directions required the Landlord to provide submissions on the source and exercise of my power to make such an award and gave the Tenant 7 days thereafter to provide any response.

11. On 6 March 2025, the Landlord made its application for dismissal of the arbitration reference, with its submissions, primarily based on the ground of delay. That application also noted that on 24 February 2025, administrators were appointed in respect of the Tenant; for this reason, the Landlord also requested dismissal of the arbitration reference on the ground that the Tenant is not a viable entity.

12. Noting that 'out of office' responses were now being received from the contact at Burges Salmon on behalf of the Tenant, indicating that they were no longer at that firm, on 10-11 March 2025 Falcon Chambers arbitration asked both CMS and Burgess Salmon who the new contact was. On 12 March 2025, CMS informed Falcon Chambers Arbitration that it had sent copies of its application and the relevant email chains to the Tenant's administrators and their solicitors. CMS also provided the details of a contact at Withers, who is acting for the Tenant's administrators. Copies of the emails to the administrators and their solicitor were also provided. On 13 March 2025, Burgess Salmon confirmed that the contacts for the matter were the administrators.

13. Noting that the administrators and their solicitor may not have had sight of recent developments for very long, noting my initial directions for the Tenant to provide any response to the Landlord's application within 7 days, and wishing to ensure a level of fairness, on 13 March 2025 I invited any application for an extension of time to respond to the application by the end of that day. By email the same day, the administrators stated that they did "not oppose the application to have the arbitration process discontinued".

**The application**

14. The application by the Landlord is to dismiss the arbitration reference. Ground 1 of the application is 'delay'. The application mentions:

    a. Parts of the timeline that I have set out above.

    b. The fact that the fee note dated 22 January 2025 remains unpaid.

c. That the Tenant has "had ample time to make payment […] and they have not provided any update or reason for their delay".

d. Section 41(3) of the Arbitration Act 1996.

e. That the Landlord is suffering serious prejudice; the first payment of part of the unpaid debt fell due over 4 years ago.

15. The application also invites dismissal of the arbitration reference pursuant to Section 13(3) of the 2022 Act on the basis that the Tenant is not a viable entity given the appointment of administrators (Ground 2).

**Decision**

16. I have decided to dismiss the arbitration reference based on Ground 1 of the Landlord's application.

**Reasons**

17. Section 19(4) of the 2022 Act, required the Tenant to pay the arbitration fees in advance of the arbitration taking place:

> *"The applicant must pay arbitration fees (other than oral hearing fees) in advance of the arbitration taking place."*

18. Section 41(3) of the Arbitration Act 1996 states the following:

> *"If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—*
>
> *(a)gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or*
>
> *(b)has caused, or is likely to cause, serious prejudice to the respondent,*
>
> *the tribunal may make an award dismissing the claim."*

19. There has been a period of around 2 and a half years since the initial Section 10 notice and the arbitration reference. Much of that time is not a delay which can be blamed on the Tenant: around 2 years of it resulted from agreed stays between the parties whilst they hoped to settle the matter. The only period of delay which can be said to be on the part of the Tenant is that since 22 January 2025. To date, that is a period of around 2 months. However, it seems to me that the general period of time since the commencement of the arbitration process can be relevant to my discretion if the gateway elements for a Section 41(3) order are made out.

20. The 2022 Act contains various timetables for various acts. For example: a Section 10(1)(b) response by a respondent was to be given within 14 days of a Section 10(1)(a) notice; a Section 11(2) proposal by a respondent was to be given within 14 days of the arbitration reference; revised proposals under Section 11(4) could have been given within 28 days; and if there is an oral hearing Section 17(2) requires an arbitrator to give an award within 14 days of the conclusion of such hearing.

21. These timelines give an impression of the general pace expected for arbitrations under the 2022 Act. In light of that, I find that the non-payment of the fee to date was an inordinate and inexcusable delay on the part of the Tenant in pursuing its arbitration reference: Section 19(4) of the 2022 Act required the Tenant to make such payment before the substantive arbitration could take place. I bear in mind the fact that no explanation for non-payment to date has been expressly articulated despite the email correspondence since January 2025 on the issue. I also bear in mind that no request for time was ever made. Furthermore, it is clear that no payment will be made, given the email from the administrators on 13 March 2025.

22. In its proposal, the Landlord was seeking a period of 3 months for payment by the Tenant. The Tenant was seeking a period of 12 months. A period of 2 months, which will likely continue, extends these periods in which the Landlord is kept out of the unpaid rent.

23. The Landlord's application contains the following paragraph:

> *"Viewed as a whole since the arbitration was purportedly constituted, there has evidently been inordinate and inexcusable delay on the part of the Applicant, as detailed above, and the Respondent is continuing to suffer serious prejudice as a result of the debt remaining unpaid."*

24. As set out in paragraph 19 above, the serious prejudice must have been caused by the delay since 22 January 2025, not since September 2022. However, I consider that where there is a continuing serious prejudice suffered by the Landlord, and the delay since 22 January 2025 continues or exacerbates that serious prejudice, that can be relevant to the test under Section 41(3)(b) of the 1996 Act. In this regard, the fact that the Landlord has been kept out of the unpaid rent for a period of years is a serious prejudice and I accept this part of the Landlord's application. It is also relevant that the parties' proposals would have resulted in payment within 3-12 months. The general delay appears to have caused the Landlord serious prejudice in this regard. The further delay since 22 January 2025 has continued and exacerbated this.

25. It appears that the Landlord could have agreed to the 12-month proposal by the Tenant early on in the process and could have then been paid by now. It could be argued that this means that it has not suffered serious prejudice or that any prejudice caused was by it not agreeing to that proposal. However, I think it is important not to speculate about matters which are likely properly covered behind the without prejudice wall. Furthermore, the obvious rebuttal to such an argument is that at any one stage, the Landlord would not have known of the delay which would ultimately come.

26. For the reasons set out in paragraph 19-25 above, I find that the delay since 22 January 2025 has caused or is likely to cause serious prejudice to the Landlord.

27. I also consider the fact that the administrators accede to the application is a relevant consideration.

28. I had considered whether it might be relevant that the Tenant is now in administration which is likely to make recovery by the Landlord harder. However, the timeline between 22 January 2025 and the appointment of administrators is such that even if the Tenant had been prompt in payment of the fees, the chances of any recovery by the Landlord would likely have been similar to what it is now.

29. I had also considered whether Section 28(1) of the Arbitration Act 1996 means that the delay since 22 January 2025 is in some way caused by the Landlord rather than the Tenant. However, in my view, Section 19(4) of the 2022 Act displaces Section 28(1) of the 1996 Act for this purpose: Section 94(2)(a) of the 1996 Act.

30. I have found that the gateway criteria for an order under Section 41(3) of the 1996 Act are made out. As set out above at paragraph 19, once that is the case, I have a discretion as to making such an award. This is apparent from the use of the word "may" in the statutory provision.

31. For the reasons set out above, I find that it would be appropriate to exercise my discretion to make such an award. I emphasise the fact that payment from the Tenant will not be forthcoming. I also draw specific attention to the large amount of time which has passed since this dispute began. It is in the interest of all parties for these proceedings to end.

32. I make no determination on Ground 2 of the application. Ground 2 asks me to make a determination on the substance of the arbitration reference. I am unable to do so given (1) the non-payment of fees by the Tenant as required by Section 19(4) of the 2022 Act before the arbitration can be substantively determined and (2) because the arbitration reference is in any event being dismissed on the ground of delay. The substantive arbitration reference is not proceeding so no findings are made on it.

**Consequential matters**

33. I consider that notwithstanding the lack of determination on the substantive arbitration reference, this Award is an award on a reference under Part 2 of the 2022 Act. Therefore, Section 18 of the 2022 requires publication of the Award. I invite the parties to make representations as to the redaction of any confidential information by 4:00pm on 27 March 2025. This Award will thereafter be published on the website of Falcon Chambers Arbitration.

34. Section 19(7) of the 2022 Act provides for each party to bear their own costs other than the fees paid by the Tenant in advance of the arbitration and for any hearing fees paid in respect of an oral hearing. No submissions to the contrary have been made to me so costs are not an issue for me to consider.

**Disposition**

35. The arbitration reference is dismissed.

36. For the purposes of Section 95(2) of the Arbitration Act 1996, the seat of this Arbitration is England and Wales.

37. This Award is made by me, Kavish Shah, this 21st day of March 2025.