FCA

FALCON CHAMBERS ARBITRATION

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

Between

Commerz Real Investmentgesellschaft mbH

Applicant

and

RHL Realisations 2022 Limited

(formerly Rush Hair Limited)

(co. no. 03774837)

(in creditors' voluntary liquidation)

Respondent

FINAL AWARD

Background

1. The Respondent (co. no. 03774837) is the tenant of Unit SU0203 at Westfield London Shopping Centre, Ariel Way, White City, London W12 7GF (the **Premises**) under a lease dated 29.11.2018. The Applicant is its landlord.

2. Until recently the Respondent operated a hair salon from the Premises.

3. The Applicant is represented by DAC Beachcroft LLP (**DAC**).

4. On 1.6.2022 the Applicant (through DAC) made a reference to arbitration in relation to the matter of relief from payment of a protected rent debt arising under the Respondent's tenancy, the reference being made pursuant to section 9 of the Commercial Rent (Coronavirus) Act 2022 (**CRCA**). The reference was made to Falcon Chambers Arbitration (**FCA**), an approved arbitration body for the purposes of CRCA.

5. The referral form identified the protected rent debt as being £81,385.41 (together with £4,336.31 accrued interest thereon). It confirmed that the Applicant had served notice of intention to make the reference to arbitration on the Respondent on 16.4.2022, in accordance with CRCA section 10(1), and that there had been no response from the Respondent. It also gave contact details for the Respondent (then known as Rush Hair Limited) and its (then) solicitors, RHF Solicitors (**RHF**).

6. The referral form included a statement of truth verifying both the contents of the referral form itself and the accompanying formal proposal made by the Applicant pursuant to CRCA section 11(1).

7. The referral form and the Applicant's formal proposal explained that the Applicant proposed that no relief from payment of the protected rent debt should be given to the Respondent. The Applicant's reasoning was that, based on the financial information regarding the Respondent which was available to the Applicant (namely, (a) a credit report dated 27.5.2022; (b) the latest accounts for the Respondent (to 31.3.2018); (c) the results of a Land Registry PN1 search; (d) an asset purchase agreement dated 20.4.2022), the Respondent's business is viable and that the granting of relief is not necessary to preserve that viability.

8. Following receipt of the referral form, on 8.6.2022 FCA proposed my appointment as arbitrator, outlined my fee, and invited the parties to confirm acceptance of the proposal, designed to lead to a signed arbitration agreement.

9. The Applicant responded, confirming its acceptance of the proposal. However, the Respondent did not reply. Consequently, on 14.6.2022 FCA notified the parties that the absence of agreement did not preclude the commencement of the arbitration, the appointment of an arbitrator, and progress of the arbitration. The letter explained that:
   (1) Arbitration under CRCA is a statutory arbitration for the purposes of the Arbitration Act 1996 (**AA**): AA section 94.
   (2) CRCA is treated as the arbitration agreement, and the Applicant and Respondent are treated as parties to that agreement: AA section 95.
   (3) The arbitration was commenced by the Applicant's making of the reference to FCA on 1.6.22: AA section 14(5).
   (4) The arbitrator is to be appointed by FCA: CRCA section 8(1).

10. The letter further notified the parties that FCA had appointed me as the arbitrator in respect of the arbitration. It also advised the parties that the Respondent might put forward a formal proposal within 14 days of receipt by it of the Applicant's formal proposal, in accordance with CRCA section 11(2).

11. In the light of my appointment, and to allow time for the Respondent to submit its formal proposal, on 14.6.2022 I directed that the parties notify me by 5.7.2022 what, if any, procedural directions they sought and whether they requested an oral hearing.

12. It transpires that the Applicant's formal proposal was actually served on the Respondent (via RHF) on 14.6.2022. Therefore, prima facie the Respondent's formal proposal was due by 28.6.2022.

13. On 15.6.2022 RHF emailed in the following terms: "*I confirm that I have no instructions to engage with this process at present.*" Following a responsive email from DAC in which the Applicant proposed (if necessary) to serve its formal proposal on the Respondent directly, RHF responded later that day saying, "*Perhaps I phrased this incorrectly. My firm remains instructed and our instructions are not to engage with this process at this time*."

14. It was thus apparent that RHF *were* indeed instructed by the Respondent, albeit that their instructions were not to take any active steps in relation to the arbitration.

15. Later the same day I wrote to the parties. I noted the Respondent's position and observed that, although it was for the Respondent to decide what, if any, steps to take in the arbitration and in the light of the provisions of CRCA, the arbitration would proceed in line with CRCA and my directions irrespective of whether or not the Respondent elected actively to engage.

16. On 5.7.2022 the Applicant (through DAC) contacted me in response to my directions of 14.6.2022. It advised that it had not received any formal proposal from the Respondent and that it had not heard further from RHF. Neither had (or have) I.

17. The Applicant went on to say that it had learned that the Respondent intended to appoint liquidators in a proposed voluntary liquidation but that it had no further details; it said that more information was not publicly available. In the circumstances the Applicant requested a week's stay of the proceedings to allow a fuller picture to emerge.

18. Later on 5.7.2022 RHF emailed saying, "*Rush Hair Limited is now in liquidation and I have copied in Mr Paul Harding the liquidator to whom all enquiries should now be directed*." No further information regarding the liquidation was given.

19. On 6.7.2022 I decided to see for myself if any details of the liquidation were available at Companies House online. At that time none were. However, I ascertained that the Respondent had recently changed its name not once but twice: (i) to RHF Realisations 2022 Limited on 20.6.2022; (ii) to RHL Realisations 2022 Limited (its current name) on 21.6.2022.

20. I then proceeded the same day to notify the parties (writing to the Respondent via both RHF and also the Respondent's liquidator, Mr Harding of Opus LLP) of such matters, of the fact that details of the liquidation were lacking, and of my provisional view that the Respondent's entry into voluntary liquidation would not of itself stay or terminate the arbitration. I directed that by 11.7.2022 the Respondent must provide details (including confirmatory documentation) in respect of the liquidation, and I extended the time for compliance with my earlier directions to 13.7.2022. I further directed that by the same time the parties should make any submissions they wished in relation to the effect, if any, of the liquidation on the arbitration.

21. Later on 6.7.2022 Mr Harding emailed DAC, copied to FCA, saying, "*I can confirm that the above Company* [i.e. RHL Realisations 2022 Limited]*, previously known as Rush Hair Limited, entered into creditors voluntary liquidation on 30 June 2022 and Paul Harding and Gareth Wilcox of this firm were appointed Joint Liquidators of the Company in these proceedings*."

22. Again on 6.7.2022 Mr Harding emailed FCA as follows:

> "I can confirm that the Board meeting of Rush Hair Ltd (co no 03774837) was held on 17 June, 2022 where it was resolved to instruct my firm to assist in the procedure for placing the Company into creditors, voluntary liquidation.
>
> I was not aware, or informed by the directors or the Company's legal or accountancy advisors, that on 20 June, 2022 and on 21 June, 2022 the Company was to change it's name.
>
> I was not informed by the directors or the Company advisors that there was on-going arbitration proceedings.

> Copies of the appropriate resolutions confirming the liquidation and appointment of Joint Liquidators will be forwarded to you as directed."

23. I remark that whether or not Mr Harding was told by the company or by RHF of the existence of the arbitration is immaterial; any want of communication does not bear on the validity of the arbitration or on the procedures set by CRCA.

24. On 7.7.2022 Opus LLP forwarded copies of a winding up resolution and certificates of appointment confirming the Respondent's entry into creditors' voluntary liquidation on 30.6.2022 and the appointment of the liquidators.

25. By 13.7.2022 I had not heard further from the parties, despite my directions of 6.7.2022. I informed the parties that unless I heard from them by 14.7.2022 I would proceed to make an award as I saw fit without further reference to them.

26. DAC wrote to me on 14.7.2022. They submitted that the liquidation had no direct effect on the arbitration and they invited me to make an award in accordance with CRCA section 14(4), giving no relief from payment of the protected rent debt to the Respondent, essentially for the reasons in the Applicant's formal proposal, namely that the Respondent was in good financial health at the time of such proposal, and on the basis that the Respondent had not engaged or submitted any evidence of its financial position.

27. DAC recognised, however, that matters had moved on since the formal proposal, in the light of the Respondent's liquidation. They alluded to a "*confidential report to creditors and statement of affairs*" said by them to show substantial debts exceeding assets (which documentation was not produced to me). They stated that they understood the same to be merely a preliminary assessment subject to further investigation, and they referred to the Respondent having paid Opus LLP and its insolvency lawyers c.£30,000 for the initial stages of the litigation. Hence they submitted that, on balance, the Respondent would still appear to be viable

"*notwithstanding the recent news of its proposed voluntary liquidation*". I observe that the liquidation process is not now proposed but actual.

28. DAC properly acknowledged that if, based on the available information, I should consider (effectively contrary to their principal contention) the Respondent's business not to be viable, I would be bound to dismiss the reference pursuant to CRCA section 13(3).

29. For its part, on 14.7.2022 the Respondent (through Mr Harding) wrote:

> "The Joint Liquidators have stated that the directors and the Company's legal advisors did not advise that there were on-going Arbitration proceedings.
>
> The Joint Liquidators have already provided copies of the winding up resolutions to evidence these proceedings.
>
> On current information the Joint Liquidators do not intent to make an application to stay these on-going proceedings as there does not appear to be of any material benefit to the Company or detriment to the general body of creditors. Therefore, if the Applicant wishes to continue the action any award will rank as an unsecured claim against the Company and on present information there are insufficient funds available to enable any dividend to be declared in these proceedings."

30. The Respondent has not proposed any directions or made any other representations in relation to the substantive disposal of the arbitration.

31. I reiterate that the Respondent has not made any formal proposal under CRCA section 11. Neither has it sought any extension of time for so doing under section 11(5). Nor has it indicated that it should be granted some relief from payment under section 14, let alone on what terms. And it has not filed any evidence in support of any such contention.

32. I consider that it is clear from the email recited in paragraph 29 above that in all the circumstances the stance taken by the Respondent company (through its solicitors

and now through its liquidators) is one of continued disinterest in, and only cursory engagement with, the arbitration. That, of course, is its prerogative.

33. In an email on 15.7.2022 I advised the parties that in view of their responses I would proceed to make an award. I issued some further directions, in particular seeking confirmation as to whether the confidential report to creditors and statement of affairs to which DAC referred was the same document as that entitled "statement of affairs" filed at Companies House (a copy of which I had obtained and provided to the parties). That "statement of affairs" is dated 27.6.2022 and is verified by a statement of truth signed by (I believe) a director of the Respondent. The document lists the company's assets and liabilities. It records the assets as having a net book value of c.£4.95m but as having an estimated realisation value of just c.£718k. It also lists preferential creditors totalling c.£1.65m, a c.£41.5k floating charge, and non-preferential creditors totalling c.£8.065m. Its bottom line speaks to a total deficiency as regards creditors of more than £9m.

34. In response to my email, on 15.7.2022 DAC advised that the Premises are currently closed. This tallies with the Rush website which records that the premises are "*temporarily closed*". The Applicant believes that the Respondent's goods and fit-out are, however, still in situ at the Premises.

35. DAC also explained that the "confidential report" and the "statement of affairs" are in fact two separate documents, with the latter corresponding with the statement of affairs I have seen. They informed me that they did not feel that they could supply a copy of the former without the liquidators' consent which they had requested but which request did not receive a response.

36. Having considered the other materials before me, and bearing in mind the points in paragraph 59 below, I decided against directing the provision of the "confidential report", taking the view that it was unlikely materially to advance my understanding of relevant matters.

37. Neither party has requested an oral hearing under CRCA section 20.

The arbitration and the liquidation

38. In the circumstances outlined above I am fully satisfied that the arbitration is properly constituted and ought now to proceed to an award, and no one has suggested otherwise.

39. The fact that the Respondent is in voluntary (not compulsory) liquidation does not automatically stay the arbitration under the Insolvency Act 1986 (section 130(2) does not apply to voluntary liquidations) and, as it is, neither party has sought a stay. Indeed, the liquidator has distinctly eschewed an intention to seek a stay.

40. Additionally, the restrictions on making a reference to arbitration etc. which are imposed by CRCA section 10(3) & (5) are not here engaged because entry into liquidation is not a relevant insolvency event in that context.

41. Also, the possibility that (if the reference is dismissed under CRCA section 13 or, alternatively, if the Respondent is given no relief from payment under CRCA section 14) the Applicant may be left with an unsecured debt which it will have to prove in the liquidation (a situation acknowledged by the Applicant) in no way affects the fact that the arbitration is on foot and fit for substantive determination.

Eligibility conditions

42. CRCA section 13 sets out the awards open to the arbitrator as follows:

> "(2) If the arbitrator determines that—
> (a) the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made,
> (b) the tenancy in question is not a business tenancy, or
> (c) there is no protected rent debt,
> the arbitrator must make an award dismissing the reference.

(3) If, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—
(a) is not viable, and
(b) would not be viable even if the tenant were to be given relief from payment of any kind,
the arbitrator must make an award dismissing the reference.

(4) Subsection (5) applies if, after making that assessment, the arbitrator determines that(at the time of the assessment) the business—
(a) is viable, or
(b) would become viable if the tenant were to be given relief from payment of any kind.

(5) In that case the arbitrator must resolve the matter of relief from payment of a protected rent debt by—
(a) considering whether the tenant should receive any relief from payment and, if so, what relief, and
(b) making an award in accordance with section 14."

43. CRCA section 14 in turn deals with the award on the matter of relief from payment. If relief is potentially available, the protected rent debt may be written off in whole or part, or the tenant may be given time to pay (including by instalments), limited to a 2 year maximum deferral. Alternatively, as appropriate, the tenant may be granted no relief.

44. It can be seen that the structured approach set by section 13 operates as follows. The arbitrator must first determine whether the dispute is eligible for the grant of relief. This determination must be undertaken before the arbitrator proceeds to consider how to resolve the matter of relief under section 14.

45. For the dispute to be eligible for the grant of relief: the parties must not have resolved the matter of relief themselves before the reference; the tenancy must be a business tenancy (namely, a tenancy within Part 2 of the Landlord and Tenant Act 1954 (the **1954 Act**): CRCA section 2(5)); there must be a protected rent debt; and it must be shown that the tenant's business is viable or would be viable if relief from the protected rent debt were given: section 13(2) & (3). If any of these

conditions is not met, the case fails on grounds of eligibility, does not pass 'go', and the reference must be dismissed. It is only if *all* the above conditions are satisfied, such that the dispute is eligible for relief, that a decision as to whether or not to grant relief and, if so, on what terms, is required.

46. In passing, I remark that (where there exists a protected rent debt) the practical effect of a dismissal of a reference to arbitration under section 13(3) is the same as that which flows if the arbitrator grants the tenant no relief under section 14. In either case the temporary statutory moratorium on the enforcement by the landlord of that debt (as to which see CRCA, Schedule 2) ends when the arbitration concludes: CRCA sections 23(2)(b) & (4). So too do the temporary restrictions on initiating certain insolvency arrangements (contained in CRCA, Schedule 3).

47. I therefore consider the various conditions. I take them in the order in which they appear in CRCA sections 13(2) & (3).

Agreement on the matter of relief

48. As for subsection (2)(a), it is clear that, assuming there to be a protected rent debt, the parties have *not* agreed the matter of relief from payment of such debt.

Business tenancy

49. As for subsection (2)(b), prima facie the tenancy is a business tenancy. Or at least it *was* such a tenancy. Since the Respondent tenant is no longer trading from the Premises, having gone into liquidation, it may very well be open to question whether (despite the apparent continued presence of its goods and fit-out) the Premises can properly be said to remain occupied by the tenant for its business purposes and hence whether Part 2 of the 1954 Act still applies to the tenancy.

50. Further, it is a moot point whether (in view of the potentially ambulatory status of a tenancy vis-à-vis status under the 1954 Act) CRCA effectively ceases to apply in

a case where e.g. the tenancy *was* a 1954 Act tenancy at the date of the reference to arbitration but subsequently ceases to be so; i.e. at what point in time the requirement in section 13(2)(b) that the tenancy in question *is* a business tenancy must be satisfied.

51. I have not received (or invited) argument on such matters since I have reached a firm conclusion (below) in relation to the condition in subsection (3). Consequently, I do not find it necessary to determine the potential issues arising in respect of subsection (2)(b), and I say no more about them.

Protected rent debt

52. As for subsection 2(c), whether there is a protected rent debt depends, amongst other things, on whether the tenancy is a business tenancy because CRCA section 3(1) defines "protected rent debt" as a debt *under a business tenancy* consisting of unpaid protected rent. So this issue is, in part, parasitic on the (unresolved) answer to the earlier issue.

53. Further, in this context a neat question might perhaps arise as to whether, if the tenancy was formerly a business tenancy and the rent in question was thus a "protected rent debt", a subsequent change in the status of the tenancy would alter the character of such rent debt.

54. Again, I do not find it necessary to determine such matters, given my firm conclusion (below) in relation to subsection (3).

55. For completeness though, I observe that, leaving aside the business tenancy issue, on the material before me there is no reason to doubt (and I find) that:
    (1) The claimed rent debt (and the associated interest) exists and is unpaid in the amount asserted by the Applicant.

(2) The Respondent's tenancy was "adversely affected by coronavirus" for the purposes of CRCA section 4, i.e. the business/Premises were the subject of a closure requirement for a relevant period.

(3) The claimed rent debt (which has been apportioned by the Applicant, as required by CRCA section 3(5)) is attributable to a period of occupation by the Respondent for the "protected period" applicable to its tenancy (as defined in CRCA section 5), i.e. (in this case) the period from 21.3.2020 to 18.7.2021.

56. Thus, subject only to the business tenancy point, the rent debt in this case (including the associated interest thereon) has all the hallmarks of protected rent debt.

Viability of tenant's business

57. I now come to the condition in CRCA section 13, subsection (3). I approach on this on the *assumption* that the tenancy is a business tenancy and that, therefore, the rent debt is a protected rent debt (in respect of which relief might potentially be available). This assumption is favourable to both: (a) the Applicant, whose primary position is, as noted above, to invite me to make an award under section 14 rather than to dismiss the reference under section 13; also (b) the Respondent, on the basis that it keeps ajar the eligibility door so far as relief from payment is concerned (although, as noted above, the Respondent appears disinterested in the result one way or the other).

58. In the context of subsection (3) the issue I have to decide is whether the Respondent tenant's business is viable or would become viable if it were to be given any kind of permissible relief from payment of the (assumed) protected rent debt.

59. The assessment of the viability of the tenant's business must be made with regard to such available information as bears on the matters set out in CRCA section 16(1). In this case the available information is very limited; it is confined to that

which was initially presented by the Applicant and that which has emerged in respect of the liquidation, outlined above. Nonetheless, I must do the best with what I have. Neither party has invited me to direct the disclosure/provision of any additional material or evidence and, given both the status and attitude of the Respondent and also the concern of the Applicant about delay and costs (and its desire to draw a line under the matter as soon as possible), I do not propose to do so.

60. I am required to disregard any possibility of the tenant borrowing money or restructuring its business: CRCA section 16(3). It is right to say that no suggestion to the contrary was made by the Applicant. As it is, it strikes me that there is no such possibility anyway, given the Respondent's entry into liquidation.

61. CRCA section 15(2) provides that the arbitrator must disregard anything done by the tenant with a view to manipulating its financial affairs so as to improve its position in relation to an award to be made under section 14. For the avoidance of doubt, I do not believe that, when considering viability *for the purposes of CRCA section 13(3)*, I am thereby required to blind myself regarding the Respondent's entry into liquidation – and I note that the Applicant has not contended otherwise. In my opinion:

(1) Section 15 itself concerns the principles to be applied in the context of resolution of the matter of relief under section 14. It is not engaged at the eligibility stage under section 13. Section 15(1) presupposes that a decision has already been made that the case falls within either section 13(4)(a) or (b), as appropriate.

(2) Further and in any event, even if section 15 were in play in relation to the assessment to be made under section 13(3), I do not consider that the Respondent's entry into liquidation is to be regarded as something done *with a view to improving its position i*n relation to an award of relief under section 14. In fact, as I explain below, such action serves (in my view) to underscore the fact that the Respondent is <u>not</u> (and, even if relief were granted, would not be)

viable. It thus undermines, rather than improves, its chances of relief because it increases the likelihood that it will fail to pass through the section 13(3) eligibility gateway.

62. Standing back and taking a holistic and common sense view, and despite DAC's attractive but measured submissions on behalf of the Applicant, I am firmly of the opinion (and find) that the Respondent's business is not viable and, further, that it would not become viable even if relief from payment of the c.£81k rent debt were granted.

63. My reasons for this conclusion are:
    (1) The Respondent has entered creditors' voluntary liquidation.
    (2) A creditors' voluntary liquidation (unlike a members' voluntary liquidation) occurs where the company is insolvent.
    (3) In consequence of, or at least associated with, its insolvency and liquidation, the Respondent has stopped trading; its business (at least that element conducted at the subject Premises) has ceased. This is consistent with section 87(1) of the Insolvency Act 1986 which provides that in the case of a voluntary winding up the company shall from the commencement of the winding up (i.e. when the winding up resolution is passed) cease to carry on its business, except so far as may be required for its beneficial winding up.
    (4) Moreover, the liquidation process entails the winding up of the Respondent, with a view to its eventual dissolution. Hence there is no realistic prospect of the Respondent's business continuing; the whole enterprise is to be closed down (if and insofar as the business has not already ceased).
    (5) The 27.6.2022 statement of affairs clearly shows that the Respondent's liabilities very considerably exceed its assets (even if the same are taken at net book value). Although the document may be a provisional account, the final figures in which may be altered, there is no particular reason to suppose that it is wildly inaccurate. It supports the notion that the Respondent cannot, and will not be able to, pay its way.

(6) The (assumed) protected rent debt in this case (from which relief might potentially be given, all other things being equal) is but a drop in the ocean when set against the overall indebtedness of the Respondent. Taking it out of the equation will not alter the outcome.

(7) If the Respondent had believed that its business was in fact viable, notwithstanding its substantially negative balance sheet, it is reasonably to be inferred that it would not have entered creditors' voluntary liquidation and that it would surely have advanced a claim for relief from payment of the protected rent debt (certainly when faced with the reference to arbitration by the Applicant).

(8) As it is, it is the expressed view of Mr Harding, the joint liquidator, that the arbitration offers no material benefit to the Respondent and that no dividend will be declared in the liquidation.

64. In relation to the above I recognise that "viability" – a concept not defined in CRCA – is not the same as solvency, and I do not base my decision simply on the grounds of the Respondent's insolvency (although this is not to say that solvency or the absence thereof is not a relevant consideration, since – despite not being determinative of the issue of viability – it plainly is).

65. As the DBEIS Commercial Rent (Coronavirus) Act 2022 Guidance – issued under CRCA section 21 – explains (paragraph 6.3): "*In making the assessment of viability a key question is whether, protected rent debt aside, the tenant's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading*."

66. In the circumstances of this case I consider that it is impossible, and certainly manifestly unrealistic, to conclude that (leaving the protected rent debt on one side) the Respondent's business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue (or, for that matter, recommence) trading. In the light of the liquidation, there is presently no meaningful ongoing

business of the Respondent, certainly at the Premises, for the company is in the course of being wound up. Further, there will plainly be no such business (viable or otherwise) at all down the line, i.e. when the liquidation has concluded.

67. I have had regard to all the points raised by DAC. However, I am not persuaded that, whatever the position prior to the liquidation, it is correct to conclude (on the balance of probabilities) that the Respondent is still viable despite its entry into liquidation. To my mind, such a conclusion is simply not tenable.

68. DAC points to the evidence the Applicant supplied in support of its formal proposal. This material does not alter my above conclusion. In particular, the financial information so presented is historical. The credit report (detailing a £35m turnover, £573k pre-tax profit, £368k retained profit, £2.8m net assets/shareholder funds etc.), predominantly speaks to the position as at March 2018, this being the date to which the latest available company accounts are drawn. This is long before the pandemic. It is now 4 years' old. Even though the Respondent may have been profitable in the past, this information really tells one nothing about the position post-pandemic. Further, so far as the more recent data is concerned, the existence of 9 CCJs since September 2022 (only two of which are recorded as satisfied) plainly does not paint an especially rosy picture of the Respondent's more up-to-date financial health. As for the PN1 results, the mere fact that company is the registered proprietor of 46 properties is again inconclusive; it tells one nothing about the nature of those properties, e.g. whether freehold or leasehold, rack rented, encumbered etc. And the mere fact that the Respondent apparently paid £30k to initiate its liquidation does not demonstrate that (despite all the other contra-indications) its business is in fact viable.

69. In my view, the fact of the recent liquidation of the Respondent and the associated statement of affairs speak volumes; I consider that they are markedly more cogent and probative as regards the Respondent's viability (or lack thereof) than is the largely passé information presented by the Applicant.

70. As I see matters, if and insofar as the Respondent's business was formerly viable, that state of affairs has clearly been overtaken by events, namely the pandemic (which, as the Applicant accepts, would undoubtedly have had an impact on the Respondent) and, most significantly, the Respondent's subsequent and recent liquidation.

71. It should be borne in mind that pursuant to CRCA section 13(3) my assessment of the viability of the tenant's business must be made *at the time of the assessment*. Thus evidence relating to viability at the current time, as opposed to some earlier time, is key. I consider that the Applicant's evidence is, through no fault of the Applicant, outdated and of no real weight or utility when it comes to determining the viability of the Respondent's business now that the Respondent is in insolvent liquidation. This is a case where the past is not a safe guide to the present.

Conclusion

72. For the reasons given above I am required by CRCA section 13(3) to dismiss the reference. It follows that I am not empowered to, and do not determine, the matter of relief from payment under CRCA section 14.

Arbitration fees

73. Pursuant to CRCA section 19(5), when an award is made under section 13, the arbitrator must (unless they consider it more appropriate to award a different proportion under subsection (6)) also make an award requiring the respondent to reimburse the applicant for half of the arbitration fees paid by the applicant.

74. In this case the Applicant, which has paid the arbitration fees, invites me to make an award under section 19(5) in respect of half of the arbitration fees. It does not seek a different proportion.

75. On 15.7.2022 I gave the Respondent an opportunity to respond, if it wishes, to this request by the Applicant. The Respondent did not do so.

76. This being so, in view of the mandated default position and the absence of any invitation by the Applicant to depart therefrom, I shall also make an award in respect of half of the arbitration fees.

Costs

77. So far as costs are concerned, CRCA section 19(7) provides that (arbitration fees aside) each party must bear its own costs. Therefore, costs are not an issue for me.

Publication

78. Pursuant to CRCA section 18, this award must be published. I intend to publish it on the FCA website. I am of the provisional view that this award contains no commercial information which must be excluded under section 18(3). Not only is the information in this award publicly available but also I do not conceive that the information can harm, let alone significantly harm, the legitimate interest of either party, particularly since the Respondent is in liquidation. Therefore, I shall publish the award in full on the FCA website unless either party makes representations to the contrary by 4pm on 19.7.2022. If any such representations are made, I will consider them before publishing the award.

Disposition

79. I hereby award and direct as follows:

(1) The reference to arbitration is dismissed.

(2) The Respondent must reimburse the Applicant 50% of the arbitration fees paid by the Applicant.

Seat of the arbitration

80. Pursuant to AA section 95(2), the seat of this arbitration is in England and Wales.

Date of the award

81. This Award is made by me, Martin Dray FCIArb, this 18th day of July 2022.

Signature

Martin Dray FCIArb