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

Between

TPIF (PORTFOLIO NO.1) GP LLP

TPIF (PORTFOLIO NO.1) NOMINEE LIMITED

Applicants

and

NUFFIELD HEALTH

Respondent

AWARD

Introduction

1. In this Award expressions defined in the Commercial Rent (Coronavirus) Act 2022 (**CRCA**) bear the meanings ascribed to them in CRCA.

2. On 15.8.2022 the Applicants made a reference to arbitration pursuant to CRCA s.9(2).

3. As events have transpired, and as detailed below, the reference has been unopposed in that the Respondent has not engaged with the ensuing arbitration.

The premises, the parties and the lease

4. This arbitration concerns rent payable under a lease of land together with a health and leisure club erected on it at Newbury Racecourse (the **Premises**).

5. The Applicants are the freehold owners of the Premises. The freehold is registered at HM Land Registry under title no. BK380878. The Applicants are the registered proprietors, following a transfer to them in November 2019.

6. The Respondent is a company limited by guarantee without a share capital, incorporated in 1957 (co. no. 00576970). It is also a registered charity no. 205533 (the parent charitable company in a group of companies[1]), whose objects are to advance, promote and maintain health and health care of all descriptions and to prevent, relieve and cure sickness and ill health of any kind.[2]

7. According to its 2020 Annual Report[3] (the **Report**),[4] the Respondent runs 31 hospitals[5] and also operates a network of 113 fitness and wellbeing centres.[6] These include the fitness centre at the Premises.[7]

8. By a lease dated 30.12.2002 (the **Lease**) the Premises were demised by Newbury Properties Limited to Cannons Health & Fitness Limited for a term of 35 years.

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[1] See p.99 of the Respondent's 2020 Annual Report (the **Report**).
[2] See https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/205533/governing-document.
[3] Available at https://find-and-update.company-information.service.gov.uk/company/00576970/filing-history.
[4] According to the Applicants' referral form the Respondent's website speaks of over 114 gyms and 37 hospitals. For present purposes nothing turns on the precise extent of the Respondent's business.
[5] See p.9 of the Report.
[6] See p.19 of the Report.
[7] See the Respondent's website https://www.nuffieldhealth.com/gyms/newbury?gclid=CjwKCAjws--ZBhAXEiwAv-RNLyT04cdrdeaCKVmpFzOGL-oprUszOyvn2jezOmBgzc9urdxt4ETHeRoCUKYQAvD_BwE&gclsrc=aw.ds where the Premises are referred to as Newbury Fitness and Wellbeing Gym.

9. The Lease is registered at HM Land Registry under title no. BK381230. The Respondent is the registered proprietor, having been registered in October 2014.

10. The Lease reserves a principal yearly rent of £500,000 subject to quinquennial upward only review. I believe that the passing rent is now at a higher level.[8]

11. Where VAT is chargeable on the rent, clause 8 of the Lease provides that it is payable in addition to the rent.

12. Clause 6 of the Lease stipulates that interest at 4% above Barclays Bank plc's base rate is payable on unpaid rent and VAT.

13. Under the Lease the permitted use of the Premises is as a health and fitness club with ancillary facilities together with bar, catering and shop facilities or other use within class D2 of the Town and Country Planning (Use Classes) Order 1987 and purposes ancillary to such use.

14. The registered titles record that the Lease was varied by a deed of variation dated 25.7.2014. I have not seen that deed and the Applicants have not referred to it. I proceed on the basis that it is irrelevant for the purposes of my decision.

The Applicants' reference to arbitration & formal proposal

15. The Applicants' reference to arbitration was in relation to the matter of relief from payment of a claimed protected rent debt.

[8] The figures in paragraph 18 below tend to suggest that it is £661,500 (£165,375 x 4), although I note that that is lower than the £690,312 rent set by clause 5.1.4 of the Lease as the rent from 2012 (itself subject to subsequent upward review). It may perhaps be that the rent level was altered by the 2014 deed of variation (see paragraph 14) but in the absence of any challenge by the Respondent to the Applicant's figures it is unnecessary for me to determine this.

16. The reference was made to Falcon Chambers Arbitration (**FCA**), an approved arbitration body for the purposes of CRCA.

17. The referral form identified the claimed protected rent debt as £457,766.37 plus VAT and interest thereon (the interest being £35,928.85[9] and continuing to accrue).

18. The accompanying formal proposal made by the Applicants pursuant to CRCA s.11(1) gave the following breakdown of the claimed protected rent debt:
    (1) £127,016.37 plus VAT in respect of the period from 24.6.2020 to 28.9.2020.
    (2) £165,375.00 plus VAT in respect of the period from 29.9.2020 to 24.12.2020.
    (3) £165,375.00 plus VAT in respect of the period from 25.12.2020 to 24.3.2021.
    Total: £457,766.37 + £91,553.27 VAT + £35,928.85 interest = £585,248.49.

19. Because CRCA treats both VAT and interest on rent as "rent" for the purposes of the statutory regime (see paragraph 50 below), for shorthand purposes[10] I refer below to the aggregate £585,248.49 sum as "**the Debt**".[11]

20. The referral form and the formal proposal both confirmed that the Applicants had served notice of intention to make the reference to arbitration on the Respondent on 27.4.2022, in accordance with CRCA s.10(1), and that there had been no response from the Respondent to that notification or to a follow-up letter dated 28.7.2022, copies of which documents accompanied the formal proposal.

21. The referral form also gave contact details for the Respondent, namely both its registered office (Epsom Gateway, Ashley Avenue, Epsom, Surrey, KT18 5AL**)** and also the Nuffield Health email address of one Anthony Platt.

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[9] Down to 4.8.2022, as set out in the Excel spreadsheet at tab 6 of the enclosures to the formal proposal.
[10] Without prejudging any issue in this arbitration.
[11] I also refer to the £457,766.37 rent and £91,553.27 VAT elements as "**the Rent and VAT**".

22. The referral form included a statement of truth verifying both the contents of the referral form itself and the accompanying formal proposal (itself bearing a statement of truth).

23. The referral form and the Applicants' formal proposal explained that the Applicants sought an award that no relief from payment of the Debt should be given to the Respondent and that the Respondent should pay the Debt (plus any further interest accruing) in full.

24. The Applicants' reasoning was: based on the financial information regarding the Respondent available to the Applicants (namely, the Report), the Respondent's business is viable and will remain so if it pays the Debt in full; the granting of relief is not necessary to preserve such viability; in the absence of any contrary information having been provided by the Respondent, there is no basis to conclude that the Respondent cannot pay the Debt.

The arbitration

25. Following receipt of the referral form, on 22.8.2022 FCA notified the parties (by email, using Mr Platt's email address for the Respondent) that:
    (1) Arbitration under CRCA is a statutory arbitration for the purposes of the Arbitration Act 1996 (**AA**): AA s.94.
    (2) CRCA is treated as the arbitration agreement, and the Applicants and Respondent are treated as parties to that agreement: AA s.95.
    (3) The arbitration had been commenced by the Applicants making the reference to FCA on 15.8.2022: AA s.14(5).

26. At the same time FCA also notified the parties that it had appointed me as the arbitrator in respect of the arbitration, pursuant to CRCA s.8(1).

27. FCA further advised that the Respondent might put forward its own formal proposal within 14 days of receipt by it of the Applicants' formal proposal, in accordance with CRCA s.11(2) & (3).

28. The Applicants' formal proposal had been served on the Respondent by email to Mr Platt on 18.8.2022. The Applicants had indicated in the email that they would send a hard copy of the formal proposal to the Respondent by special delivery on 19.8.2022. It appears from the documents subsequently supplied by the Applicants (see paragraphs 36 & 37 below) that they did what they said they would and that the hard copy of the Applicants' formal proposal was received by the Respondent at its registered office on 22.8.2022.

29. Therefore, prima facie the Respondent's formal proposal was due on 1.9.2022 or 5.9.2022, depending on whether one runs the 14 day window (see paragraph 27 above) from receipt of the email or hard copy version. For present purposes it is not necessary to determine the precise date.

30. To allow time for the Respondent to submit its formal proposal, on 22.8.2022 I directed (by email) that the parties notify me by 28.9.2022 what, if any, procedural directions they sought and whether they requested an oral hearing.

31. As it is, the Respondent has put forward no formal proposal. It has not provided any response either to the Applicants or to me.

32. On 21.9.2022 the Applicants responded (by email) to my directions. They explained that they had not heard from the Respondent despite a further letter they had sent it on 12.9.2022 (in which letter they had pointed out that no formal response had been received from the Respondent and had sought a response from the Respondent in respect of my directions order, a copy of which had been enclosed with the letter). They notified me that in the circumstances they did not seek any further directions or an oral hearing.

33. The Applicants did not put forward any revised proposal under CRCA s.11(4).

34. On 29.9.2022, not having heard anything from the Respondent, I emailed the parties advising that I would proceed to make an award based on the material submitted by the Applicants.

35. On 30.9.2022, in the light of the fact that communications in the arbitration had been via email, I sought confirmation from the Applicants that Mr Platt's email address is a known contact address for the Respondent. I wanted to be confident that the Respondent was and is aware of the arbitration.

36. On 4.10.2022 the Applicants' solicitors (Ashurst LLP) emailed in response to my request. They stated that:
    (1) All correspondence from the Applicants (i.e. the letters of 27.4.2022, 28.7.2022, 19.8.2022 and 12.9.2022 mentioned above) has been sent via first class post and special delivery to the Respondent's registered office, as well as being emailed to Mr Platt, and that they have proof of delivery.
    (2) Mr Platt is the Respondent's Head of Estates.[12]
    (3) Mr Platt is often copied into emails from the Respondent's agents, Avison Young, who refer to taking instructions from him.
    (4) Mr Platt was so copied into an email from Avison Young to the Applicants on 12.9.2022 in which it was said, "*our client would prefer to deal with this directly*", also indicating that he is the relevant person in connection with this matter.
    (5) Ashurst had received an automatic out of office response to an email sent on 28.7.2022; the response stated that Mr Platt was on leave until 1 August and that he would respond on his return. In the disclaimer footer there was

[12] Something which I note is in line with the fact that Mr Platt is so described in the publicly available judgments in *Nuffield Health v London Borough of Merton* [2021] EWCA Civ 826 (on appeal from [2020] EWHC 259 (Ch)): see paras. [14] and [2] respectively: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2021/826.html&query=(%22Nuffield)+AND+(Health%22).

reference to the Respondent and its registered office. No alternative email contact address was identified or invited to be used.

(6) No bounce-backs have been received from other emails sent to Mr Platt.[13]

37. To substantiate the Applicants' position Ashurst provided copies of: the proofs of posting and delivery; the email of 12.9.2022; the out of office response.

38. I accept the Applicants' account and in the circumstances I am fully satisfied and find that: Mr Platt, as Head of Estates, is indeed an appropriate person to be sent email correspondence in relation to this matter on behalf of the Respondent; the email address that has been used by the Applicants and by me to correspond with Mr Platt in that regard is a live address; the Respondent has thereby effectively been served with, and has duly received, the documents relating to the arbitration.

39. In addition, I have no hesitation in finding that the Respondent has received the Applicants' formal proposal and the correspondence (including my directions) sent by the Applicants to the Respondent in hard copy via special delivery, and that the Respondent is fully aware of the arbitration and of my directions.

40. As it is, the Respondent has simply chosen not to engage with the process.

41. Separately, there is no suggestion or evidence that the Respondent is or has been subject to an insolvency event falling within CRCA s.10(3) or (5).

42. On the above basis I am satisfied that the arbitration is properly constituted and ought now to proceed to an award.

43. I therefore address in turn the relevant statutory conditions.

[13] This corresponds with my experience. I have received confirmation of delivery in respect of those emails sent by me to (amongst others) Mr Platt. I have not received any out of office messages or message failure notifications.

Eligibility conditions

44. If the case is not eligible for the grant of relief, the arbitrator must dismiss the reference: CRCA s.13(2) & (3).

45. For the case to be eligible for the grant of relief:
    (1) The parties must not have resolved the matter of relief themselves before the reference: CRCA s.13(2)(a).
    (2) The tenancy must be a business tenancy (namely, a tenancy within Part 2 of the Landlord and Tenant Act 1954 (the **1954 Act**) see CRCA s.2(5)): CRCA s.13(2)(b).
    (3) There must be a protected rent debt: CRCA s.13(2)(b).
    (4) It must be shown that the tenant's business is viable or that it would be viable if relief from the protected rent debt were given: CRCA s.13(2) & (3).

46. In passing, I remark that (where there exists a protected rent debt) the *practical* effect of dismissal of a reference to arbitration under s.13 on the ground that the tenant's business is not and could not be viable is the same as that which flows if (despite the case being eligible for relief) the arbitrator grants the tenant no relief under s.14. In either case the temporary statutory moratorium on the enforcement by the landlord of that debt (as to which see CRCA Sch.2) ends when the arbitration concludes: CRCA s.23(2)(b) & (4). So too do the temporary restrictions on initiating certain insolvency arrangements (contained in CRCA Sch.3). Although the *legal* route is different in the two cases, the outcome in practice is the same.

47. I next consider the various conditions outlined in paragraph 45 above.

Agreement on the matter of relief

48. It is clear that, assuming there to be a protected rent debt, the parties have *not* agreed the matter of relief from payment of the Debt. This condition is met.

Business tenancy

49. Prima facie the Respondent's tenancy of the Premises is a business tenancy within Part 2 of the 1954 Act. As set out in the Applicants' formal proposal, the Respondent uses the Premises as a health fitness and wellbeing centre. I find that this condition is also satisfied.

Protected rent debt

50. Rent, in relation to a business tenancy, includes any VAT thereon: CRCA s.2(2). It also includes any interest thereon: CRCA s.2(1)(c).

51. A protected rent debt is unpaid protected rent: CRCA s.3(1).

52. Rent is protected rent if the business tenancy was adversely affected by coronavirus *and* the rent is attributable to a period of occupation by the tenant for or within the protected period: CRCA s.3(2).

53. A business tenancy was adversely affected by coronavirus if the whole or part of the tenant's business or its premises was subject to a closure requirement: CRCA s.4(1).

54. The protected period runs from 21.3.2020 to (in this case) 18.7.2021: CRCA s.5(1) & (2). The Applicants accept (formal proposal, para.9) that a closure requirement was applicable to the Respondent's business/the Premises down to 18.7.2021 – see The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, SI 2021/364 – and I have no reason to conclude otherwise.

55. Since the Respondent has not engaged and has raised no challenge to the sums claimed, there is no reason for me to doubt that the Debt claimed by the Applicants is due, payable and unpaid by the Respondents.

56. In the circumstances, on the material before me I find that:

(1) The Debt is due and payable, and is unpaid by the Respondent.

(2) The Respondent's tenancy was adversely affected by coronavirus.

(3) The protected period is (as above) from 21.3.2020 to 18.7.2021.

(4) In the light of the periods in respect of which the unpaid rent is referable (as to which see paragraph 18 above) the entirety of the Debt (including the interest element[14]) is attributable to a period of occupation by the Respondent for or within the protected period.

57. Thus the whole of the Debt is protected rent debt. This eligibility condition is met.

Viability of tenant's business

58. In assessing viability under CRCA s.13(3) I am required to look to the position at the time of the assessment, i.e. the *current* viability of the Respondent's business.

59. The assessment must be made with regard to such available information as bears on the matters set out in CRCA s.16(1). In this case the available relevant information is very limited; it is confined to that presented by the Applicants and comprises only the Report (which is the latest publicly available financial information in relation to the Respondent).

60. As noted above, the Applicants do not seek any further directions. They have not invited me to direct the disclosure/provision of any additional material or evidence regarding the Respondent's viability and, given the non-engagement of the Respondent in the arbitration process, I do not propose to do so.

61. I must do the best with what little I have. This is reflected in the terms of CRCA s.16(1): "the arbitrator must, *so far as known*, have regard to …".

[14] See CRCA s.3(3).

62. The Report was filed at Companies House on 8.10.2021. It is a 148 page document. It contains: (a) a strategic report; (b) a trustees' report; (c) an independent auditor's report; (d) financial statements; (e) additional information.

63. For present purposes, the key passages in the Report are:

(1) "Despite [the pandemic and lockdowns], we delivered a positive adjusted EBITDA … of £14.0m (2019 – £99.5m) and a net deficit after tax of £92.4m (2019 – £15.0m). This was as a result of rapidly adapting our services, successfully managing costs across the organisation, and carefully renegotiating deals with landlords. We also secured additional funding for the Charity."
(p.13: CEO's statement).

(2) "Despite very challenging trading conditions, due to decisive action, cost and cash mitigations, the Charity achieved a positive adjusted EBITDA position. ***There is a clear impact on the Charity's financial statements, however we have already shown strong signs of recovery in 2021***."
(p.53: financial sustainability)

(3) "Turnover declined by £212.9million (21.4%) to £779.9 million as a result of the impacts of the pandemic, the Charity's support to the NHS and the temporary cessation of a number of the Charity's services aligned to the periods of national restrictions, that took place throughout 2020.
In light of this significant decline in turnover, the Charity took decisive and robust mitigating actions to significantly reduce operating expenditure and to access relevant government support …"
(p.53)

(4) "Operating deficit before exceptional items was £64.6 million, an £80.5 million decrease on 2019, reflecting the impact of the COVID-19 pandemic. This decrease was mitigated by significant cost mitigations, including the deferral of a pay rise for our people, enacting part time working over the summer, focusing on essential operating expenditure only and through government support including the government's Job Loss Retention Scheme, which mitigated the deficit by £45 million. The continuous review of costs as we return to normal trading activities and the introduction of further efficiencies, remains our focus to drive the recovery of the Charity."
(p.54).

(5) "Net debt increased by £32.7 million to £403.1 million evidencing strong cash management relative to the operating deficit increase."
(p.54)

(6) "**Assuring long-term sustainability**
The Charity has made a good start to its recovery from the pandemic in the first quarter of 2021. …
Our fitness and wellbeing centres have re-opened after government restrictions were lifted and our membership is returning. Now we are fully open, we are no longer accessing the government Job Loss Retention Scheme. The Charity continues to challenge itself to drive efficiencies in operating costs to ensure long-term sustainability.
… The outcome of the UK vaccination programme is positive and **the Directors are confident that the Charity will have sufficient cash and continue to meet the covenant restrictions in place, even in the event of further closures of the fitness and wellbeing estate**."
(p.57)

(7) "**Going concern**
…
The financial performance of the Charity in the first six months of 2021 is significantly ahead of expectation mainly driven by healthcare being at the top of everyone's agenda. We have seen an unprecedented level of self-pay demand for the Charity's healthcare services, and the reopening of the consumer estate is showing encouraging membership recovery. **The forecast projections model recovery of our fitness and wellbeing centres to pre-Covid levels of activity in 2022** and continued higher rates of activity in our hospitals due to the backlog of activity from the impact of the pandemic. **These financial projections for the foreseeable future indicate that Nuffield Health will continue to operate well within banking covenants,** with the highest net debt projected at £440 million in December 2021 well within the maximum facility available of £487.5 million. The bank debt facilities expire in October 2022, which is outside the 12 month assessment period.
The impact of further potential disruption, including an autumnal lockdown has also been considered. This has been modelled as a full closure of our fitness and wellbeing facilities for one month, and the associated cessation of revenues as experienced in 2020, alongside mitigations that the Charity would enact in such circumstances. In this scenario, the impact to net debt is minimal and there continues to be sufficient liquidity and positive headroom on all financial covenants, including EBITDA, to absorb this downside.
The Charity's financial statements disclose a net liabilities position at the end of 2020 however this position is not reflective of the market valuation of the hospital freehold assets, which are held at historic cost on the Balance sheet. This net liability position is therefore not reflective of any solvency issue.
The Directors believe the Charity will have adequate resources to continue in operational existence for the foreseeable future and funding is in place for more than 12 months from the approval of the financial statements. Therefore, in accordance with section 3.8 of FRS 102, the

annual report and financial statements for 2020 will be prepared on a going concern basis."
(p.57)

(8) "The Committee reviewed management's financial modelling and reasonable downside scenario, and the headroom to existing facilities and covenants. **The Committee concurred with management's recommendation to the Board that the Charity should apply the going concern assumption as there was a reasonable expectation that it could continue to meet its liabilities as they fell due over the 12 months following the date of this report.**"
(p.93: Trustees' report: board audit and risk committee)

(9) "Conclusions relating to going concern
In auditing the financial statements, we have concluded that the trustees' use of the going concern basis of accounting in the preparation of the financial statements is appropriate.
Based on the work we have performed, we have not identified any material uncertainties relating to events or conditions that, individually or collectively, may cast significant doubt on the group's and parent charitable company's ability to continue as a going concern for a period of at least twelve months from when the financial statements are authorised for issue."
(p.99: Independent Auditor's report)

The emphasis is mine.

64. Furthermore, within the financial statements themselves: a consolidated income statement is at p.103; a consolidated statement of financial activities is at p.104; a balance sheet is at p105; a cash flow statement is at p.106. Consistent with the above, these record that for the year ended 31.12.2020: total income and endowments was £779.9 m; the operating deficit before exceptional items and tax was £64.6m; EBITDA was £14.0m; the deficit after tax was £92.4m; net debt was £403.1m.

65. Although the financial statements themselves speak directly to the financial position at the end of 2020, nonetheless it is clear from the Report that those responsible (including the auditor) considered that the Respondent was properly to be assessed as a going concern at the time of the approval of the financial statements, which occurred on 10.8.2021 (p.105), and that they did so on the

footing of their shared belief that the Respondent would have resources and funding to continue in operational existence for more than 12 months from then. Also, as evidenced above, those concerned did not regard the Respondent's net liability position as reflective of any solvency issue.

66. As appears therefrom, the Report gives a good picture of the impact of coronavirus of the business of the tenant: see CRCA s.16(1)(c).

67. I record that the notes to the financial statements (p.142) confirm that the accounts and the assessment of the Respondent's financial position made by those charged with its management take/took into account the future rents payable under all non-cancellable leases (including those of land and buildings in the Respondent's portfolio), and there is no suggestion in the paperwork that those figures were discounted in any way[15] from the full sums payable under such leases (which would include the Lease).[16] Accordingly, insofar as I (necessarily) place reliance on information gleaned from the Report, the same allows me to have regard to the assets and liabilities of the Respondent tenant generally, including its commitments under other tenancies to which it is party, and the documentation also reflects the previous payments made under the tenancy by the Respondent (insofar as these are enveloped in the overall figures, albeit that I lack detailed particulars): see CRCA s.16(1)(a) & (b).

68. I find that, for the reasons given in the Report and above, the Respondent's business was viable at the time of the Report.

69. Turning to the present day position, I do not really have any more recent information. For example, I do not know the Respondent's 2021 financial results.

[15] Except, no doubt, in cases where deals had been renegotiated with landlords, as per p.13 of the Report.
[16] Of course, no allowance for any relief under CRCA could conceivably have been made in the 2020 accounts/the Report because CRCA had not been enacted at that time. Indeed, the Bill which led to statute was only introduced in Parliament on 9.11.2021.

Neither have I seen any financial records relating to 2022. Nor do I know, for example, what the position is as regards the Respondent's bank debt facilities which were/are due for renewal around now.

70. However, I do know that:

    (1) There have been no further lockdowns after July 2021.

    (2) There is nothing to suggest that the Respondent is now insolvent.

71. Consequently – noting that the Respondent has not sought in any way to gainsay the Applicants' case, and bearing in mind that (a) the Respondent envisaged having sufficient funds to trade even in the event of further (post July 2021) mandated closure of its fitness and wellbeing estate (which has not occurred to date), (b) membership levels were improving following the removal of closure requirements, (c) activity in Respondent's fitness and wellbeing centres was forecast to return to pre-pandemic levels this year, (d) there is nothing to indicate that the anticipated improvement in fortunes will not have materialised (let alone to suggest that the Respondent's position is now worse than it was) – I consider that on the evidence before me the appropriate conclusion is that the Respondent's business remains viable, as it was at the time of the Report, and I so find.

72. For completeness I remark that by CRCA s.16(3) I am obliged to disregard the possibility of the Respondent borrowing money or restructuring its business.

73. I do not interpret this direction as requiring me to *assume* that the Respondent has no extant borrowings and/or will not seek to renew its existing debt facilities. Such an interpretation would, to my mind, entail a counterfactual *assumption* which, in any case where a tenant had existing borrowings of any significance, would likely render the tenant's business unviable (regardless of the position vis-à-vis the protected rent debt), a conclusion which would have the perverse effect of denying the tenant any relief under CRCA because the arbitrator would be bound to dismiss the reference for want of eligibility.

74. Rather, I believe that the effect of s.16(3) is merely to preclude an arbitrator from taking into account any *future* additional borrowing that the tenant might take, if necessary, to fund payment of the protected rent debt (e.g. if relief were refused), as opposed to any borrowing that the tenant *already* has in place.

75. This chimes with the statutory instruction of a *disregard*, with that which is to be *disregarded* being the *possibility* of the tenant borrowing (extra) money (to defray the arrears) and not the *actuality* of its having previously borrowed money (or, in my view, re-financing or renewing existing debt facilities).

76. Further, the view I favour accords with the rationale for s.16(3) which, as noted in paragraph 6.3 of the Commercial Rent (Coronavirus) Act 2022 Guidance (issued by the Secretary of State under CRCA s.21(1)(a)), is that:

> "If a business took on more debt to become viable for the purposes of arbitration under the Act, they would likely be delaying the problem and risking their long-term viability."

77. This clearly indicates that the intention underlying s.16(3) is to avoid foisting a tenant with "*more* debt" so as "*to become* viable" (i.e. to convert a non-viable business to a viable business in order for the tenant to be eligible to claim relief under CRCA); it is not to ignore a central facet of a viable tenant's existing financial status.

78. Consequently, I do not believe that my conclusion regarding the Respondent's viability is impacted by s.16(3). In reaching my above conclusion I have not taken account of the possibility of future borrowing or business restructuring by the Respondent.

79. For the above reasons I determine that the Respondent's business is viable at this time. This condition is also fulfilled.

Relief from payment

80. The above means that all the eligibility conditions are satisfied and so the Respondent is eligible in principle for the grant of relief from payment of the Debt. In turn I must determine whether, and if so what, relief should be granted, and make an award under CRCA s.14: see CRCA s.13(4) & (5).

81. An award may: write off the whole or part of the protected rent debt and extinguish or reducing any interest thereon; give the tenant up to 2 years to pay (including by instalments); (at the other end of the spectrum), grant the tenant no relief: CRCA ss.6(2) and 14(6) & (7).

82. Significantly, by CRCA s.14(2) before determining what award to make I must consider any final proposal put forward a party to the arbitration.

83. In the circumstances, the Applicants' above-mentioned formal proposal constitutes its final proposal: s.14(11)(b). By contrast, the Respondent has made no proposal at all. There is thus no final proposal from it (within the meaning of that term in s.14(11)).

84. Where, as here, only the referring party makes a final proposal, the arbitrator must make the award set out in that proposal if they consider that the proposal is consistent with the principles set out in the CRCA s.15: s.14(4). In such a case it is only if the final proposal is not so consistent that the arbitrator is free (and required) to make whatever award they consider appropriate: s.14(5).

85. Therefore, the first issue is whether the Applicants' formal proposal squares with the s.15 principles. If it does, I am bound to make an award upholding it.

86. So far as material to the present case the s.15 principles are that:

(a) Any award should be aimed at preserving the viability of the Respondent's business, so far as that is consistent with preserving the Applicants' solvency;[17] and

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

87. I remind myself that the Applicants' formal proposal is that the Respondent be given no relief, i.e. that it be obliged to pay the Debt in full and without deferment.

88. Is that proposal consistent with the s.15 principles? In my view it is.

89. As for principle (a), based on the evidence concerning the viability of the Respondent's business (as to which see above), I am satisfied that a refusal to grant the Respondent any relief against payment of the Debt (and any further interest which may accrue) will not undermine or prejudice such viability.

90. I find that, in the light of the information before me, the Respondent's business is and will remain viable, even if it has to pay the Debt (and further interest) in full immediately.

91. I consider that the Respondent is a continuing going concern, operating in a trading environment which has improved compared with the 2020 lockdown position, and that it has adequate resources to continue to run its business for the foreseeable future notwithstanding payment of the Debt (and further interest).

92. I determine that payment of the Debt (and further interest) in full and without delay will not cause the Respondent's business to cease to be viable and to go under;

[17] The Applicants (who have submitted their financial statements for the year ended 31.03.2021) do not contend that their solvency is at risk on account of the protected rent debt in this case.

the bottom line is that the Respondent can afford to pay the Debt (and further interest).

93. As for principle (b), given the above conclusion, it is right (and consistent with the operation of principle (a) in this case) that the Respondent should be required to pay the Debt in full and without delay.

94. Hence I determine that the Applicants' proposal is consistent with the s.15 principles.

95. Therefore, I am required to make an award giving the Respondent no relief from payment of the Debt (and further interest). I do so below.

Conclusion

96. For the reasons given above I determine the matter of relief from payment under CRCA s.14 by making an award (below) which gives the Respondent no relief from payment of (a) the Debt and (b) all further interest on the Rent and VAT.

Arbitration fees

97. Pursuant to CRCA s.19(5), when an award is made under s.14, the arbitrator must (unless they consider it more appropriate to award a different proportion under s.14(6)) also make an award requiring the respondent to reimburse the applicant for half of the arbitration fees paid by the applicant.

98. In this case the Applicants have not made any specific representations in relation to the arbitration fees. In view of (a) the mandated default position, (b) the absence of any invitation by the Applicants to depart therefrom, and (c) the fact that I do not believe that CRCA s.19 envisages a 'costs following the event' approach (for that would be inconsistent with the default position and, if such an approach had been

intended, the statute would clearly have so provided), I am *provisionally* minded to make an award in respect of half of the arbitration fees.

99. However, it is appropriate to give the parties an opportunity to address the particular issue, if they wish. Accordingly I direct that if either party wishes to make representations in support of a different award in relation to the arbitration fees, they must do so by 4pm on 19.10.2022.

100. In the absence of any such representations, after that date I shall make a further award in these terms: “The Respondent must reimburse the Applicants 50% of the arbitration fees paid by the Applicants.”

Costs

101. CRCA s.19(7) provides that (arbitration fees aside) each party must bear its own costs. Therefore, costs are not an issue for me.

Publication

102. Pursuant to CRCA s.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 s.18(3). Not only is the central 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. Therefore, I shall publish this award in full on the FCA website unless either party makes representations to the contrary by 4pm on 12.10.2022. If any such representations are made, I will consider them before publishing the award.

Disposition

103. I hereby award and direct as follows:

The Respondent is to be given no relief from payment of:

(a) the Debt (as defined in paragraph 19 above);

(b) all further interest accruing on or after 5.8.2022 in respect of the Rent and VAT (as defined in footnote 11 above) or any part thereof.

Seat of the arbitration

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

Date of the award

105. This Award is made by me, Martin Dray FCIArb, this 5th day of October 2022.

Signature

Martin Dray FCIArb