FCA

FALCON CHAMBERS ARBITRATION

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

Between

KXDNA Limited

Applicant

and

60 SA Limited

Respondent

Award No 1

Background

1. The Applicant, KXDNA Limited, is the tenant of premises at part Ground Floor and Part Basement, 60 Sloane Avenue, London SW3 ("the premises"). It has applied for relief from payment of a protected rent debt in relation to the premises under the Commercial Rent (Coronavirus) Act 2022 ("the Act").

2. The Respondent, 60 SA Limited, is the freehold owner of the premises. The parties did not reach agreement, and on 20 May 2022, the Applicant referred the dispute to arbitration, via Falcon Chambers Arbitration ("FCA") which is an approved arbitration body for the purposes of s 7 of the Act.

3. Section 11 of the Act states:

Proposals for resolving the matter of relief from payment

(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.

4. The Applicant made a formal proposal in its reference. That proposal was to pay £407,000 in instalments. It said that this was the maximum amount that it could pay and remain viable, and it relied on expert evidence from Ms Dacre in support.

5. My appointment as arbitrator was confirmed on 27 May 2022, and following an extension of time, the Respondent landlord made its formal proposal on 17 June 2022. It sought payment of £1,354,527, also in instalments. The Respondent's expert (Mr Osborne) said that he thought the tenant could pay this sum whilst preserving its viability.

6. The Respondent's expert looked (amongst other things) at the tenant's forecasts in relation to revenue. The tenant's forecasts included projected revenues of £8.4m in 2022, £9 m in 2023 and £9.4m in 2024. The Respondent's expert referred to the fact that an IBISWorld report stated that the industry-wide expected compound annual growth ("CAGR") is 6.9% over the next 5 years. What this means is that the total growth over the 5 year period is the same as it would have been if there had been steady growth at 6.9% per annum, compounding annually. But, what that figure does not tell us is whether the growth over that 5 year period is in fact expected to be linear. The Respondent's expert went on to show that in fact it was not expected that growth would be linear, and he provided a Table 5.1 which showed the expected growth broken down on a year by year basis, which showed that 2022-23 was anticipated to have 17% growth but subsequent years would be much less. In particular, 2023-24 was forecast at 5%. However, to be clear, the total figure including growth after 5 years in Table 5.1 (2.517m) is the same (subject to what I assume are rounding errors) as if a

figure of 6.9% had been applied and compounded each year (which I have calculated at 2.519m).

7. Although this is not stated in the Respondent's expert report, it is important to appreciate that there are an almost infinite number of different growth patterns that could result in a CAGR of 6.9% over 5 years. Thus if there were no growth at all for 4 years and then growth of about 40% in year 5, that would also equate to a growth rate of 6.9% each year for 5 years.

8. At paragraph 5.3.24 of his Report, the Respondent's expert introduced a table, Table 5.2, in which he attempted to show what the revised forecast would be if a "CAGR per IBISWorldwide outlook 6.9%" were adopted, instead of the Respondent's own forecast revenue figures. He applied forecasts for 2023 of £9.604m and 10.255m for 2024. Mathematically, these amount to growth of approximately 14% in 2023 and 7% in 2024.

9. At paragraph 5.3.27, Mr Osborne emphasized that he considered the figures which he had used to be "conservative". He said "Increasing each year at the CAGR of 6.9% does not fully account for the anticipated accelerated increase in earlier years per Table 5.1 above".

10. By letter dated 27 June 2022, the Respondent's solicitors alerted me to the fact that there were "a few arithmetical errors in the underlying calculations" which supported their own formal proposal. These errors were detailed in a letter from the Respondent's expert of the same date, at paragraph 1.2 as follows:

    (i) at Table 5.2 of my report, I did not correctly apply the CAGR formula in arriving at my adjusted EBITDA figure;
    (ii) at Table 5.3 of my report, the 2024 half year "Adjusted forecast revenue" figure of £4,808k is in fact the unadjusted forecast revenue figure per the EBITDA Forecast; and
    (iii) Appendix 1.3 of my report includes the 2024"Annual EBITDA to be apportioned (adjusted)" figure of £840k instead of £929k for 2024.

    The most important of these is the first one.

11. No doubt concerned that correcting the figures in their formal proposal to correct those arithmetical and/or input errors would deprive them of the ability to make a revised proposal under section 11(4) in due course, the Respondent indicated that it was only prepared to tell the Applicant what its corrected figures were if the Applicant accepted that this would not amount to their revised proposal. The Applicant declined to give that assurance – but nonetheless requested production of the corrected calculations in order to enable it to consider those when making its own revised proposal.

12. By an email dated 29 June 2022, the parties were informed:
    "*……it would be unsatisfactory to allow (as the Respondent's solicitors appear to envisage) the Respondent to alter its evidence as to what payments it contends the Applicant can make without amending its proposal to match. The Applicant must know what the Respondent's proposal actually is before it provides its "revised proposal". It appears to the arbitrator that s 34(1) of the Arbitration Act 1996 gives sufficiently wide powers to the arbitrator that she could grant permission to the Respondent to amend its initial proposal (without prejudice to the*

Respondent's right to serve a formal revised proposal under s 11(4) in due course). The arbitrator is minded to

(1) *allow the Respondent to amend its initial proposal in order to reflect the errors identified in FRP's letter of 27 June 2022 only, provided that the amended initial proposal (which shows the amendments in tracked changes) is lodged and served, together with an amended report that shows in tracked changes the amendments made in order to correct these errors, by 5pm on 1 July 2022. ……"*

13. The parties were invited to lodge any submissions about this proposed order by 5pm on 30 June 2022. Both parties did lodge submissions. Neither party suggested that it was outwith my powers to permit the Respondent to amend its initial proposal to correct arithmetical and/or input errors, and I considered that they were right to take this course: Arbitration Act 1996 s 34 confers a very broad power on an arbitrator to decide all procedural and evidential matters, including, at section 34(2)(c) "whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended". The Act provides for formal proposals, accompanied by any supporting evidence. The Commercial Rent (Coronavirus) Act 2022 Guidance (which is statutory guidance for arbitrators issued pursuant to section 21 of the Act) makes it clear, at paragraph 12.16, that the formal proposals are intended to take the place of statements of case. And, at paragraph 12.17, the Guidance makes clear that the arbitrator retains the broad discretion under s 34 of the Arbitration Act 1996 to decide all procedural issues. I therefore considered (and consider) that the broad procedural discretion conferred by s 34 does enable an arbitrator to permit a party to amend its formal proposal, by analogy to the power to permit an amendment to a statement of case in 34(2)(c).

14. Neither party suggested that I should not exercise my discretion, in this case, to permit arithmetical and input errors to be corrected. However, the Applicant did suggest that I should not grant permission for all of the amendments sought by the Respondent. The Applicant complained that what the Respondent's expert was seeking to change was more than an input error: it involved a new approach in using the variable growth rates set out in Table 5.1, rather than a rate of 6.9% each year, when forecasting revenue. The Applicant highlighted in its submissions that paragraph 5.3.27 of the original expert Report filed by the Respondent suggested that the expert made a conscious choice to adopt an average growth figure of 6.9% per annum compounding rather than use the figures in Table 5.1 when preparing his adjusted revenue forecast in Table 5.2 – his mistake was simply in applying 2 years' worth of growth in the first year, when he should have applied only 1 year. That is why the growth figure was approximately twice the 6.9% per annum figure. The Applicant pointed out that instead of simply correcting its mathematical error and substituting 6.9% growth (compounding) for each year, the Respondent was seeking to adopt a different methodology by adopting the more granular growth forecast rates in Table 5.1 (17% then 5%) rather than the average 6.9% growth rate previously used.

15. I agreed. It seemed to me that there is a real difference of principle between the correction of arithmetical errors or slips in inputting the wrong number into a calculation and amendments which reflected a change in methodology due to "second thoughts". I was willing to make an order giving permission to amend to correct arithmetical and input errors, but I was not willing to make an order permitting a party to make a substantive change to its methodology by amendment rather than by way of revised formal proposal. I also agreed with the Applicant that, in seeking to adopt the Table 5.1 growth rates instead of a flat rate of 6.9% per annum, the Respondent was seeking to change its substantive methodology.

16. As a result, on 1 July 2022, I made a Procedural Order (No 3) in the following terms:

1. *The Respondent is permitted to amend its initial proposal to correct the arithmetical and/or input errors listed in paragraph 1.2 of the letter dated 27 June 2022 ONLY, PROVIDED that it serves an amended initial proposal showing the changes in tracked changes by 5pm on 1 July 2022. For the avoidance of doubt, this permission does not entitle the Respondent to amend its proposal to reflect a revision in its deliberate decision to use a CAGR of 6.9% each year rather than the figures in Table 5.1.*

2. *The Respondent is also permitted to amend its evidence filed in support of its initial proposal to correct the arithmetical and/or input errors as follows:*

   a. *To amend Table 2.1 of FRP's report to reflect the arithmetical and/or input errors referred to in the letter dated 27 June 2022 only.*
   b. *To produce copies of Tables 2.1, 5.2 and 5.3 of Osborne/1 corrected and prepared consistent with the logic described in Osborne/1 (i.e., a CAGR of 6.9%)*
   c. *Any further amendments consequential on the above*

   PROVIDED that it serves an amended report showing the changes made in tracked changes by 5pm on 1 July 2022.

17. I explained in my Reasons:
"*As the Applicant has pointed out, it is quite clear from paragraph 5.3.27 of the Report that the expert made a conscious choice to adopt a conservative 6.9% across the board rather than use the figures in Table 5.1. Departing from that choice is not the correction of an arithmetical and/or input error, and I agree with the Applicant that this is a revision in the Respondent's stance which it is only appropriate for it to make by way of a revised proposal.*"

18. By its letter dated 1 July 2022, the Respondent's solicitor filed a copy of an amended report from Mr Osborne and stated:

"....
Our client's amended initial proposal

..... *As per the Tribunal's third procedural order dated 1 July 2022, the Applicant's amended initial proposal is as follows:....*"

Amendments to the initial proposal were then shown in tracked changes. For reasons which I shall explain, I shall call this "the Disputed Proposal".

19. Notwithstanding what I considered to be a clear limit on the scope of the amendment which I had permitted, the Respondent amended expert's report did not apply an average growth rate of 6.9% per annum compounded, but rather sought to substitute the rates in Table 5.1. The Disputed Proposal followed the figures in this amended expert's report. In an attempt to explain why it had ignored the limitation which I had placed on the scope of the permission, the Respondent's solicitor also produced a further letter from its expert, in which he attempted to argue that he had not in fact used a growth rate of 6.9% at all in his initial calculations, and

that it was necessary to adopt rates of 17% and 5% in order to be consistent with a CAGR of 6.9%.

20. I am afraid that I do not follow the point which the Respondent's expert was seeking to make. The rates in fact applied in the original Table 5.2 were the figures which would be produced by using a rate of 6.9% each year, compounding annually:

    a. The starting figure is 8,405,000.
    b. After one year, applying a growth rate of 6.9%, and compounding, the figure would be 8,984,945.
    c. If a further 6.9% is added to that, by the end of the second year the figure is 9,604,906.
    d. If a further 6.9% is added to that, by the end of the third year, the figure is 10,267,644.

    The figures which Mr Osborne used for 2023 were 9,604,000 and 10,255,000. There are obviously some rounding issues, but it seems clear how the figures in the original Table 5.2 were derived. The expert's letter of 27 June explained that these figures were derived from an application of the CAGR formula, but using the wrong period in error. That indeed appears to be the case. No other explanation for where these figures could have come from has been given. All that Mr Osborne has subsequently said is that he did not intentionally use a figure of 6.9%. (However if, as appears to be suggested when dealing with paragraph 5.3.27, there was a conscious choice to adopt rates which reflected but did not fully reflect the Table 5.1 growth patterns, again, departing from that choice would also be a change in methodology rather than the correction of an arithmetical and/or input error). Further, as I have already explained it is absolutely not implicit in the adoption of a CAGR of 6.9% over 5 years that any particular rate will be adopted in any particular year. It is not necessary to assume a growth rate of 17% in year 1 and 5% in year 2 in order to end up with a CAGR of 6.9% pa over 5 years. Indeed, depending on what assumptions are made about years 3-5, adopting these figures in years 1 and 2 might well NOT lead to a CAGR of 6.9% over 5 years.

21. But, even if I had misunderstood how the Respondent's expert had arrived at the figures in his original report and made the Order on the basis of a misapprehension, that is neither here nor there. I had made an Order indicating what I was prepared to allow by way of amendment to the initial proposal and what I was not prepared to allow, and that order stood at the date when the Disputed Proposal was made - even if the Respondent (or its expert) thought that my decision to limit the scope of the permission to amend was wrong.

22. By letter dated 4 July 2022, the Applicant invited me to determine that the Disputed Proposal is not permitted by the Order of 1 July 2022 and amounts to a revised formal proposal under s 11(4) of the Act. The status of the Disputed Proposal is the subject of this Partial Award.

Submissions

23. Both parties made extensive submissions in writing. A great deal of the parties' submissions were directed to the question of whether Mr Osborne had in fact changed his methodology by using the figures in Table 5.1. In making Procedural Order no 3, I had determined that this was a change in methodology and that the figures in Table 5.1 were not to be used in place of the rate of 6.9% per annum. I do not therefore need to say any more about those matters. Apart from that, the parties' main submissions were as follows.

24. The Respondent sought to argue that the Disputed Proposal was an amended initial proposal as permitted by Procedural Order no 3. However the Respondent did not demonstrate that the Disputed Proposal was consistent with the permission to amend: it merely sought to challenge my decision in Procedural Order no 3 that there had been a deliberate decision to use a rate of 6.9% each year and not to allow an amendment to substitute the figures in Table 5.1 instead of a rate of 6.9% each year.

25. However, the Respondent also submitted that the Disputed Proposal could not be a revised formal proposal because

    a. It is evident that it was not intended to be such from the context; and
    b. A formal proposal must be "expressed to be made for the purposes of this section": section 11(7).

26. Finally, the Respondent suggests that discretion (although it is unclear what discretion the Respondent was seeking to invoke) should be exercised in its favour because it would be a very serious matter for it to be precluded from making a revised proposal or adducing any further evidence; it had sought to act properly by drawing the error to everyone's attention when it came to light; and it would be disproportionate for it to be prevented from making a revised proposal due to a minor error in its attempt to amend its initial proposal.

27. The Applicant stressed that it would not be in accordance with the Act or fair to allow the Respondent three formal proposals, when it would only be allowed two, especially in circumstances where the Respondent had chosen to ignore a clear warning about what it needed to do to come within the permission to amend. It also requested its costs arising from the Respondent's change of position.

Decision

28. The Respondent was given a limited permission to amend, conditional on providing an amended proposal in accordance with the Order by 5pm on 1 July 2022. The Respondent has failed to meet the condition, because its amended proposal did not accord with the Order. The Respondent therefore does not have permission to amend its initial proposal. Its initial proposal remains in its original form. I agree with the Applicant about this.

29. Further, it is not obvious that the letter of 1 July 2022 amounts to a formal proposal at all. Section 11(7) provides that a formal proposal means a proposal which is (inter alia) "expressed to be made for the purposes of this section". In *Wood v Waddington* [2015] EWCA Civ 538, the Court of Appeal determined (at [59] – [68]) that a contrary intention was only "expressed" in a conveyance (for the purposes of Law of Property Act 1925 s 62(4)) if there were clear words indicating that that was the intention; factors (such as the context) which might otherwise have been pointers to the parties' intentions were not relevant. I infer that the purpose of the requirement in s11(7)(b) is so that both parties can be clear as to what is and what is not a formal proposal within the statutory scheme, and I therefore take the view that it should be interpreted strictly – so that there can be little doubt about whether the requirements have been met or not. The letter of 1 July 2022 does not state that it is made for the purpose of section 11 – or mention section 11 at all. It does state that it is made "per the Tribunal's third procedural order" but that does not seem to me to be sufficient to satisfy the requirement of section 11(7)(b). Accordingly, it cannot amount to either an amended initial proposal or a revised proposal. The Respondent can therefore still make a revised proposal in due course.

30. I should make clear that I do not consider that I have any discretion about this: either the Disputed Proposal was or was not a formal proposal within s 11. In my view, it was not for the reasons I have given.

31. To the extent that the Respondents' submissions amount to an application for me to vary Procedural Order no 3, I reject that application. Quite apart from the fact that I am not persuaded (for the reasons set out in paragraph 20) that there is anything in the suggestion that the Order was based on a misapprehension, given that the Applicant has now completed its further evidence, there is nothing to be gained by permitting the Respondent a further opportunity to amend its initial proposal. If I were now considering an application to amend the initial proposal anew, I would reject the application because there is no purpose, now, to an amendment to the initial proposal being made. Any changes that the Respondent wishes to make to its proposal can and should be made in its revised proposal.

32. I make no decision on the Respondent's application for costs because I have had no detailed submissions on it. Should the Respondent wish to renew its application for costs, it will need to set out the basis for that claim, bearing in mind that section 19(7) of the Act requires the parties to bear their own costs (save as regards the arbitrator's fees).

Publication of this Award

33. I have designated this an Award rather than a Procedural Order because I have determined a matter of substance which is at least potentially relevant to the final outcome of the arbitration. It therefore seems to me that I am required to publish this award, pursuant to s 18 of the Act, and I intend to publish the award on the FCA website. If either party considers that the award should not be published and/or that parts of the award should be redacted in accordance with s 18(4) of the Act, they must file written submissions by 4pm on 12 July 2022.

Now I, Stephanie Tozer QC, having carefully considered the submissions of the parties, hereby award and direct as follows:

The letter dated 1 July 2022 is not (and does not amend) a formal proposal within section 11 of the Commercial Rent (Coronavirus) Act 2022.

MADE AND PUBLISHED by me, Stephanie Tozer QC at Falcon Chambers Arbitration, London, which is the seat of the arbitration, on 11 July 2022.

11 July 2022