FALCON CHAMBERS ARBITRATION

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

Between

Signet Trading Limited

Applicant

and

(1) Fprop Offices (Nominee) 4 Limited
(2) Fprop Offices (Nominee) 5 Limited

Respondents

Final Award

Introduction

1. The Applicant, Signet Trading Limited, is the tenant of premises at Building 3, Imperial Place, Elstree Way, Borehamwood, Hertfordshire WD6 1JN ("the premises"). It seeks relief from payment of a protected rent debt in relation to the premises pursuant to the Commercial Rent (Coronavirus) Act 2022 ("the 2022 Act").

2. The Respondents, Fprop Offices (Nominee) 4 Limited and Fprop Offices (Nominee) 5 Limited, are the Applicant's landlords of the premises. The Respondents dispute whether the Applicant is entitled to relief from payment.

3. The Applicant referred the dispute between the Applicant and the Respondents to arbitration by letter dated 13 May 2022. The matter was referred to Falcon Chambers Arbitration ("FCA") which is an approved arbitration body for the purposes of s.7 of the 2022 Act. Following a period of delay on the part of the parties, I accepted the appointment as arbitrator on 9 June 2022.

Procedural Matters

4. The Applicant's letter of referral referred to above enclosed a referral form. The form stated, at Paragraph 3(c) that the Applicant considered that the following issue was likely to arise (describing itself as "the Claimant")

   "*Whether or not the Claimant's tenancy was 'adversely affected by the coronavirus' within the meaning of ss.3 and 4(1) of the Commercial Rent (Coronavirus) Act 2022 ('the Act').*

   The Claimant carries on trade in the sale of jewellery through retail stores. Its registered offices were at the property which comprised office space. The Claimant contends that its offices were affected by a closure requirement within the meaning of s.4(1) when read with s.4(6) of the Act.

   The Respondents dispute this; they contend that the Claimant's offices at the property were not subject to a 'closure requirement' within the meaning of s.4(1) of the Act".

5. The Applicant also stated, at Paragraph 7(b) of the referral form, that

   "*The Claimant intends to supplement its formal proposal with evidence of fact from the Claimant, addressing the use of the property and the viability of the Claimant's business. If the viability of the Claimant's business is actually in issue, then expert evidence may well be required on this point*".

6. The Applicant's letter dated 13 May 2022 also included a formal proposal within the meaning of section 11 of the 2022 Act.

7. On 18 May 2022, the Respondents' solicitors wrote to FCA. The letter enclosed a written statement which sets out the Respondents' case

concerning whether there is a protected rent debt for the purposes of the 2022 Act.

8. The letter purported to reserve the Respondents' right to submit a formal proposal pursuant to s.11 of the 2022 Act and continued

"*The 14 day time period for our client's response to the formal proposal submitted by the Claimant pursuant to section 11(2) is noted and the Arbitrator is asked to clarify when this time period starts to run at their earliest opportunity. We presume this period will not commence until a decision on eligibility has been made to limit unnecessary costs being incurred in this matter*".

9. On 7 June 2022, the Respondents' solicitors emailed FCA seeking clarification as to whether the Respondents were required to submit a formal proposal with supporting evidence at that stage or whether this is to be provided once the arbitrator had considered the preliminary issue of eligibility.

10. On 9 June 2022, the Applicant's solicitors wrote to the Respondents' solicitors and copied me in on their letter. The letter cites s.11(2) of the 2022 Act and makes the point that, pursuant to that provision, the Respondents had been required to provide a formal proposal in response to the Applicant's formal proposal by 27 May 2022.

11. On 13 June 2022, I issued my Procedural Order Number One. I ordered that the issue of whether there is a protected rent debt within the definition of s.3 of the 2022 Act should be determined as a preliminary issue. I made orders extending time for the provision of further evidence and, in the case of the Respondents, a formal proposal until following the determination of the preliminary issue.

12. I additionally made an order that each party should be entitled to exchange and lodge with me any further legal submissions and/or evidence on which it wished to place reliance by 4pm on 20 June 2022. Only the Applicant took advantage of that direction, lodging the Witness Statement of Matthew Hywel Griffiths dated 17 June 2022 and Legal Submissions drafted by Counsel.

13. I also requested the parties to indicate by 4pm on 20 June 2022 whether they wished the preliminary issue to be determined following an oral hearing. Neither party indicated that they wished the preliminary issue to be determined following an oral hearing and I therefore make my award following consideration of the papers.

Background

14. The Applicant occupies the premises pursuant to a lease dated 17 November 2005 and made between (1) Europa Borehamwood IP SARL and (2) Signet Trading Limited.

15. It, along with its subsidiary companies H Samuel Limited and Ernest Jones Limited operate approximately 300 retail stores across the United Kingdom. According to Mr Griffiths' Witness Statement, prior to the COVID-19 pandemic, the Applicant and its subsidiaries operated approximately 450 retail stores across the United Kingdom. Those retail stores sell jewellery and watches and provide associated services such as ear piercing to members of the public.

16. The premises which form the subject matter of this reference do not comprise a retail shop. They comprise offices and were, for the period from 1 July 2016 to 1 February 2022, the Applicant's registered office address. The premises comprise four floors of accommodation.

17. Mr Griffiths' Witness Statement says that those using the premises would include the Applicant's Board of Directors as well as staff responsible for buying and merchandising, marketing, digital, human resources, retails operations, legal, finance and IT. Before March 2020, 174 of the Applicant's staff were based at the premises.

18. On 23 March 2020, as a result of the COVID-19 pandemic, the Applicant closed all of its retail shops. In addition, staff working at the premises were instructed to work from home. The majority of the staff based at the premises were placed on furlough and only 35 members of staff based at the premises continued to work during the pandemic, almost all of them working from home.

19. At Paragraph 21 of his Witness Statement, Mr Griffiths does refer to two employees of the Applicant who continued to work at the premises. One member of staff was retained to monitor incoming post and scan that post to the relevant departments. That individual worked in the post room on the ground floor of the premises.

20. A second member of staff, described as a security guard, was present to ensure that building insurance was not invalidated or voided by virtue of the fact that the premises would otherwise be empty. The security guard also worked from the ground floor of the premises.

21. The rent which is the subject of this reference fell due under the lease for the quarters commencing on 25 March 2020, 25 December 2020 and 25 March 2021. The total sum unpaid is £448,043.04. The Applicant also refers to the fact that contractual interest is due under the lease at a daily rate of £46.03.

22. The Respondents agree that those figures accurately represent the rent and interest currently due and outstanding under the lease. The Respondents also

agree that those sums comprise rent within the meaning of the 2022 Act and that those sums accrued during the protected period within the meaning of the 2022 Act.

23. The Applicant and Respondents additionally agree that the tenancy to which the dispute relates is a business tenancy within the meaning of s.2 of the 2022 Act, that the dispute has not already been resolved before this application was made and that the alleged protected rent debt is not subject to a CVA.

Legal Framework

24. Section 1(1) of the 2022 Act provides that the 2022 Act enables the matter of relief from payment of protected rent debts due from the tenant to the landlord under a business tenancy to be resolved by arbitration.

25. Section 3(1) of the 2022 Act provides that "a protected rent debt" is a debt under a business tenancy consisting of unpaid protected rent. As noted above, there is no dispute that the tenancy of the premises in this case is a business tenancy.

26. By s.3(2) of the 2022 Act, rent due under the tenancy is only "protected rent" if

"(a) the tenancy was adversely affected by coronavirus; and
(b) the rent is attributable to a period of occupation by the tenant for, or a period within, the protected period applying to the tenancy".

Again, it is common ground that s.3(2)(b) of the 2022 Act is satisfied in this case.

27. Section 4 of the 2022 Act provides as follows

"(1) A business tenancy was "adversely affected by coronavirus" for the purposes of section 3(2)(a) if, for any relevant period—

(a) the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or

(b) the whole or part of those premises, was of a description subject to a closure requirement.

(2) For this purpose—

(a) "closure requirement" means a requirement imposed by coronavirus regulations which is expressed as an obligation—

(i) to close businesses, or parts of businesses, of a specified description, or
(ii) to close premises, or parts of premises, of a specified description; and

(3) A requirement expressed as an obligation to close businesses or premises of a specified description, or parts of businesses or premises of a specified description, every day at particular times is to be regarded for the purposes of subsection (2)(a) as a closure requirement.

(4) It is immaterial for the purposes of subsection (2)(a) that specific limited activities were (as an exception) allowed by the regulations to be carried on despite the obligation to close (and accordingly the fact they were permitted or carried on is to be disregarded in determining whether the tenancy was adversely affected by coronavirus).

(5) Where the premises comprised in the tenancy were occupied by the tenant for the purposes of a business not carried on solely at or from those premises, the reference in subsection (1)(a) to the business carried on at or from the premises is to so much of the business as was carried on at or from the premises.

(6) In this section "coronavirus regulations" means regulations—

(a) made under section 45C of the Public Health (Control of Disease) Act 1984 (whether or not also made under any other power), and
(b) expressed to be made in response to the threat to public health posed by the incidence or spread of coronavirus".

28. Section 6(1) of the 2022 Act provides that "references to the matter of relief from payment of a protected rent debt are to all issues relating to the questions (a) whether there is a protected rent debt of any amount …".

29. Section 13 of the 2022 Act sets out the awards open to an arbitrator on a reference to arbitration under the 2022 Act. Section 13(2)(c) provides that if the arbitrator determines that there is no protected rent debt, the arbitrator must make an award dismissing the reference.

Closure Requirements

30. The background to and timeline surrounding the COVID-19 pandemic is usefully set out in the decision of Lord Hamblen and Lord Leggatt in The Financial Conduct Authority v Arch Insurance [2021] UKSC 1 at [7] to [35] and adopted by Master Dagnall in Bank of New York Mellon (International) Limited v Cine-UK Limited [2021] EWHC 1013 (QB) at [62]. I will therefore set out only the elements relevant to the preliminary issue.

31. On 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (SI 2020/327) ("the 21 March Regulations") were made by the Secretary of State for Health and Social Care pursuant to powers under the Public Health (Control of Disease) Act 1984. These regulations provided for the closure of businesses set out in the Schedule to the 21 March Regulations. These included restaurants, bars, public houses, cinemas, theatres, nightclubs and other businesses where members of the public might

be expected to mingle in close proximity to each other. At that time, neither retail premises nor office premises were affected.

32. The 21 March Regulations were largely revoked by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) ("the 26 March Regulations") which were made by the Secretary of State for Health and Social Care exercising powers under the 1984 Act and which came into force on 26 March 2020.

33. Regulation 5 of the 26 March Regulations provides as follows

"(1) A person responsible for carrying on a business, not listed in Part 3 of Schedule 2, of offering goods for sale or for hire in a shop, or providing library services must, during the emergency period—

(a) cease to carry on that business or provide that service except by making deliveries or otherwise providing services in response to orders received—

(i) through a website, or otherwise by on-line communication,
(ii) by telephone, including orders by text message, or
(iii)by post;

(b) close any premises which are not required to carry out its business or provide its services as permitted by sub-paragraph (a);

(c) cease to admit any person to its premises who is not required to carry on its business or provide its service as permitted by sub-paragraph (a).

…

(9) If a business referred to in paragraph (1) or (3) ("business A") forms part of a larger business ("business B"), the person responsible for carrying on

business B complies with the requirement in paragraph (1) or (3) to cease to carry on its business if it ceases to carry on business A".

34. Regulation 6 of the 26 March Regulations provided that no person could leave the place where they were living without reasonable excuse. The non-exhaustive list of excuses which would be taken to be reasonable set out in r.6(2) included "to travel for the purposes of work … where it is not reasonably possible for that person to work … from the place where they are living". A contravention of any of these provisions was made a criminal offence under r.9 of the 26 March Regulations.

35. Part 3 of Schedule 2 to the 26 March Regulations set out a list of businesses which formed exceptions to r.5(1) of the 26 March Regulations. These did not include retail shops selling jewellery and watches or providing ear piercing services.

36. On 4 July 2020, the 26 March Regulations were revoked and replaced with more limited restrictions in the Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020 (SI 2020/684) in England. Retail shops were permitted to open once again.

37. With effect from 14 October 2020, the Government introduced a tiering system by the Health Protection (Coronavirus, Local COVID-19 Alert Level) Regulations [2020/1103-5]. These regulations were replaced from 4 November 2020 by the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 [2020/1200] ("the 4 November Regulations").

38. By Regulation 18(1) of the 4 November Regulations, it was provided that

"*A person responsible for carrying on a business, not listed in Part 3 of the Schedule, of offering goods for sale or for hire in a shop, or providing library services must—*

(a) cease to carry on that business or provide that service except—
(i) by making deliveries or otherwise providing services in response to orders received—

(aa) through a website, or otherwise by on-line communication,

(bb) by telephone, including orders by text message, or

(cc) by post;

(ii) to a purchaser who collects goods that have been pre-ordered by a means mentioned in paragraph (i), provided the purchaser does not enter inside the premises to do so,

(b)subject to paragraph (2), (3) and (4)—

(i) close any premises which are not required to carry out its business or provide its services as permitted by sub-paragraph (a);
(ii) cease to admit any person to its premises who is not required to carry on its business or provide its service as permitted by sub-paragraph (a)".

39. Regulation 18(11) provides that "If a business referred to in paragraph (1) or (5) ("business A") forms, or is provided as, part of a larger business ("business B") and business B is not restricted under these Regulations, the person responsible for carrying on business B complies with the requirement in paragraph (1) or (3) to cease to carry on its business if it ceases to carry on business A".

40. On 2 December 2020 the Government introduced the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 [2020/1374] ("the 2 December Regulations") which removed the restrictions on opening retail shops.

41. However, restrictions were once again introduced on 20 December 2020 by the insertion of a Schedule 3A into the 2 December Regulations by the Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020 [2020/1611]. Paragraph 16 of Schedule 3A introduced for areas in England and Wales designated as Tier 4 a further restriction in the same terms as that which had existed before 2 December 2020.

42. The premises were in an area moved into Tier 4 on that date and remained in Tier 4 until 28 March 2021.

The Applicant's Case

43. The Applicant submits that the premises were subject to a closure requirement from 26 March 2020 as a result of the 26 March Regulations.

44. The Applicant submits that s.4(1) of the 2022 Act provides for two alternative means by which a business tenancy might be adversely affected; either the business carried on by the tenant at or from the premises or the whole or part of those premises must have been subject to a closure requirement.

45. It then contends that whilst offices are not premises of a specified description required to be closed, the Applicant's business, being a business involved in the sale of goods, was of a specified description which was required to close.

46. In particular, it contends that the Applicant was carrying on a business of offering goods for sale from retail premises and that the Applicant's business

was not listed in Part 3 of Schedule 2 to the 26 March Regulations so that, pursuant to r.5(1)(a), the Applicant was required to cease to carry on that business and pursuant to r.5(1)(b), was required to close any premises which were not required to carry out its business. Further, the Applicant contends, it was required to "cease to admit any person to its premises who is not required to carry on its business" pursuant to r.5(1)(c). The Applicant submits that because the Applicant's business is a retail business and because the purpose of its office accommodation at the premises was to support that retail business, the restrictions apply to the premises and it can be said that the premises were subject to a closure requirement for the purposes of the 2022 Act.

47. The Applicant then relies on the disjunctive "or" in s.4(3) of the 2022 Act to contend that a business can still be adversely affected where the business being closed does not operate from the premises. Section 4(5) is also relied upon for the same purpose though this sub-section is said to likely apply to "mixed-use properties" where not all of the property is being used by the business being closed.

48. Finally, some reliance is placed upon r.6 of the 26 March Regulations. Because the vast majority of the Applicant's employees were able to work from home during the relevant period, the Applicant was unable to require employees to travel to the premises.

The Respondents' Case

49. The Respondents contend that r.5 of the 26 March Regulations applies only to the Applicant's retail shops and does not apply to office premises which were not, at any stage, required to close.

50. They say that because these premises were used as office space and not for the purposes of offering goods for sale in a shop, they were not subject to a closure requirement. The Respondents rely on s.4(5) of the 2022 Act.

Determination

51. The starting point in considering whether the 2022 Act applies to the rent payable in respect of the premises is to consider the wording of the 2022 Act itself.

52. Section 1(1) of the 2022 Act refers to relief from payment of protected rent debts due from the tenant "under a business tenancy" and "rent" is defined in s.2 of the 2022 Act as an amount payable by the tenant "under the tenancy for possession and use of the premises comprised in the tenancy".

53. The 2022 Act is therefore concerned with rent falling due pursuant to specific business tenancies relating to specific premises. Each business tenancy for which relief from payment is sought must be considered separately and must meet the criteria set out in the 2022 Act.

54. Section 4(1) of the 2022 Act provides that a business tenancy is only adversely affected by coronavirus where the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy or the whole or part of the premises was of a description subject to a closure requirement.

55. Consistent, therefore, with the fact that the 2022 Act concerns itself with the rent attributable to the specific premises demised by the business tenancy, section 4(1) of the 2022 Act makes it clear that what must be shown by the tenant is that a closure requirement has affected the whole or part of the business carried on by the tenant at or from those specific premises in respect of which a relief from payment is sought.

56. This is reiterated in s.4(5) of the 2022 Act which expressly provides that where the premises are occupied for the purpose of a business which is also carried on elsewhere, the 2022 Act is concerned only with "so much of the business" as was carried on at or from the premises.

57. The Applicant, in its written submissions, characterises this provision as providing for an "attribution of how much of the business was carried on from the [premises] in question. It is submitted that this likely applies to mixed-use properties i.e. where not all of the property was used by the business being closed". The first sentence quoted suggests that the purpose of the section is to divide up a business conducted in more than one location and to attribute proportions of that business to specific premises. In my judgment, that is not its function. Section 4(5) is, in my judgment, designed to make clear that the effect of the 2022 Act is limited to the business carried on from the specific premises in respect of which a claim to relief from payment has been sought. If the owner of that business additionally carries on business elsewhere, then that must be considered separately.

58. The reference to mixed use properties does not appear to me to be apt. Section 4(5) is concerned with businesses conducted from more than one location rather than one location which plays host to more than one business.

59. The Applicant also places significance on s.4(3) of the 2022 Act and in particular, the fact that that provision refers to an obligation to close businesses "or" premises or parts of businesses "or" premises. The argument advanced appears to be that that provision – and its references to businesses or premises - would only be required if a business which had to close completely did not necessarily have to close the particular premises in question.

60. That is not the purpose of s.4(3) of the 2022 Act. It is tolerably clear from s.4(1) that a business tenancy is adversely affected if a closure requirement applies either to the tenant's business or to the tenant's premises. It is not surprising, therefore, that s.4(3) should be consistent with that provision. Section 4(3) is concerned with an obligation to close premises every day at particular times (for instance, where a public house is required to close by a certain time each evening) and clarifies that notwithstanding that the premises may be open for certain periods during each day, such a provision is nonetheless to be treated as a closure requirement. That provision is not material in this case and it does not, to my mind, carry the weight placed upon it by the Applicant.

61. The key question, then, is whether a closure requirement applies to the business carried on by the Applicant from these specific premises.

62. Paragraph 5(1) of the 26 March 2020 Regulations states that a person responsible for carrying on a business not listed in Part 3 of Schedule 2 of offering goods for sale in a shop must cease to carry on that business.

63. It is clear that the Applicant's business is not one which falls within Part 3 of Schedule 2.

64. The issue, then, is whether the Applicant is carrying on a business of offering goods for sale in a shop from these premises. It is notable that in its written submissions, the Applicant emphasises by underlining the words "offering goods for sale" without then similarly highlighting the qualifying words "in a shop".

65. It is plain that the Applicant is not offering goods for sale in a shop from these premises. The premises do not comprise or include a shop. The Applicant's case is that the business actually being carried on at the premises was, in

essence, an ancillary part of the same business with the office use merely supporting the Applicant's retail business. That may well be the case but in my judgment, the wording of r.5(1) was not intended to and does not extend to such a situation. The requirement of r.5(1)(a) was that the person responsible for carrying on business offering goods for sale in a shop must cease to carry on that business. The words "that business" relate back specifically to the reference to the sale of goods in a shop. Elements of the business other than the sale of goods in shops was permitted.

66. Regulations 5(1)(b) and 5(1)(c) do not seem to me to alter that position. In my judgment, those regulations must be read in conjunction with r.5(1)(a). In so far as r.5(1)(a) requires a business to cease, the premises in which that business is carried out must be closed and must cease to admit any person to those premises. Conversely, in so far as r.5(1)(a) includes an exception to that general provision, r.5(1)(b) and 5(1)(c) must be read consistently with that exception.

67. Neither the 26 March Regulations nor the 4 November Regulations or the 2 December Regulations which followed and which adopted the same wording imposed any closure requirement on office accommodation. Office accommodation remained capable of occupation. If the Applicant's interpretation of r.5 of the 26 March Regulations was correct, a de facto two tier system would have existed whereby offices occupied by tenants whose principal business was the sale of goods in shops were required to close those offices whereas occupiers of offices unconnected to a retail business were entitled to remain open even though the risk of the spread of coronavirus associated with each would be similar. In reality, that was not the position in 2020 or subsequently. Indeed, the fact that the Applicant continued to use the premises, albeit with a much reduced staff, is consistent only with the fact that no closure requirement applied to the premises.

68. The Applicant relies in addition on r.6 of the 26 March Regulations which made it an offence for a person to leave the place where they were living without reasonable excuse. In my judgment, this does not assist the Applicant. Regulation 6 imposed an obligation on individuals and not on persons carrying on business. Whilst it is true that the indirect effect of that provision was that many offices and other places of work remained empty for a significant period, the regulation did not require the closure of the premises themselves. As noted in the preceding paragraph the Applicant was able to take advantage of one of the expressly stated reasonable excuses for leaving a place of residence, namely where it was not reasonably possible for that individual to work from home.

69. It follows from my judgment that the business carried on by the tenant specifically at the premises with which this reference is concerned was not subject to a closure requirement and that, accordingly, it was not adversely affected by coronavirus for the purposes of s.4 of the 2022 Act. Given that such a requirement is a prerequisite of a "protected rent debt" for the purposes of s.3 of the 2022 Act, it follows that there is no protected rent debt in this case.

70. Accordingly, I am required by s.13(2)(c) of the 2022 Act to dismiss the reference.

71. It follows that it will not be necessary for me to consider any further evidence or submissions in relation to issues other than the preliminary issue.

Costs

72. The normal rule in arbitrations is that the losing party should pay the winning party's costs of the arbitration. My provisional view is that that rule should apply in this case. I will direct that the parties should have until 4pm on 19 July 2022 to make any submissions concerning the costs of this arbitration.

Publication of this Award

73. Pursuant to s.18 of the 2022, I am required to publish this award. I intend to publish the award on the FCA website. I have formed the provisional view that the award contains no commercial information which ought to be redacted from the award pursuant to s.18(4) of the 2022 Act. I will therefore publish the award in full on the FCA website unless either party indicates to me by 4pm on 8 July 2022 that they wish me to do otherwise in which case I will consider any submissions put forward in relation to that issue together with any evidence submitted in support of any such submissions.

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

(i) The Applicant's reference is dismissed.

(ii) The Applicant and the Respondents shall exchange and lodge any submissions on the issue of the costs of this arbitration by 4pm on 19 July 2022

MADE AND PUBLISHED by me, Gary Cowen QC at Falcon Chambers Arbitration, Falcon Chambers, London EC4Y 1AA which is the seat of the arbitration on 5 July 2022.