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

Between

**Stratford City Shopping Centre (No.2) Nominee A Limited (Company number 06530663)
and Stratford City Shopping Centre (No.2) Nominee B Limited (Company number
06530613)**

Applicant

and

Newspoint (Stratford) Limited

Respondent

Final Award

Background

1. As explained in my First Award dated 7 September 2022, Respondent is the Applicant's tenant of two units in Stratford City Shopping Centre, units SU2058A and SU0062a, and it is common ground that: both leases are within the scope of this reference; both are business tenancies; and that there is a protected rent debt. For the reasons given below (see para. 22), I shall not go behind that agreement, and, in particular, shall not consider myself whether the various requirements of ss. 3 to 5 of CRCA 2022 are satisfied.

Procedural history to date

2. Much of the procedural history of this reference up to the date of my First Award is set out in that Award, and will not be repeated here. In that Award I decided as a preliminary issue the amount of the protected rent debt, on the basis of the parties' agreement that there was a protected rent debt, but disagreement over its amount.
3. In my second directions order dated 31 August 2022, I directed:
 - a. The Respondent shall provide to the Arbitrator and to the Applicant the following by no later than 4pm on 7 September 2022:
 - i. legible copies of the bank statements and spreadsheets attached to its formal proposal dated 1 July 2022, together with those spreadsheets in electronic form, in a format which enables them to be opened in Microsoft Excel or a similar application;
 - ii. any further evidence on which it wishes to rely in relation to the current or potential viability of its business, for the purposes of ss. 13 to 15 of the 2022 Act.
 - b. The Applicant shall make any revised formal proposal, pursuant to s. 11(4) of the 2022 Act, by 4pm on 13 September 2022.
 - c. The Respondent shall make any revised formal proposal, pursuant to s. 11(4) of the 2022 Act, by 4pm on 16 September 2022.
 - d. Pursuant to s. 17(1) of the 2022 Act the Arbitrator will make the final award as soon as reasonably practical after 16 September 2022.
4. Pursuant to those directions, on 7 September 2022 the Respondent provided Bank statement for a Lloyds Bank Commercial Account (25799068 30-99-01) spanning the period from 1 March 2021 and 5 September 2022, and its Annual Report and Unaudited Financial Statements for the year ended 31 August 2021.
5. Both parties produced final proposals in accordance with the directions, on 13 and 16 September respectively.

The Respondent's viability – the initial evidence

6. The Applicant's formal proposal refers to and attaches a Credit Report in respect of the Respondent dated 1 June 2022 showing a credit rating score of 76, described as being very low risk, and giving it an international score of A.

The Respondent has scored consistently in the very low risk bracket since September 2018. The Credit Report shows the Respondent as having the following net assets in the years ending 31 August 2017 to 2021:

	31/08/2021		31/08/2020		31/08/2019		31/08/2018		31/08/2017
Net Worth	£160,168	1.2% ▼	£162,095	5.7% ▼	£171,860	21.9% ▲	£140,969	28.2% ▲	£109,954
Working Capital	£129,191	5.1% ▲	£122,980	3.3% ▲	£119,026	22.4% ▲	£97,278	87.6% ▲	£51,841
Total Assets	£193,308	6.1% ▲	£182,225	4.0% ▲	£175,186	7.1% ▲	£163,511	10.0% ▲	£148,605
Total Liabilities	£33,140	64.6% ▲	£20,130	505.2% ▲	£3,326	85.2% ▼	£22,542	41.7% ▼	£38,651
Net Assets	£160,168	1.2% ▼	£162,095	5.7% ▼	£171,860	21.9% ▲	£140,969	28.2% ▲	£109,954

7. The Applicant's formal proposal also refers to and attaches the Respondent's Micro-entity accounts for the year ended 31 August 2021, showing the same net assets figures for the years ending in 2020 and 2021, which correlate with the ones given in the Credit Report.

Micro-entity Balance Sheet as at 31 August 2021

	<i>Notes</i>	<i>2021</i>	<i>2020</i>
		£	£
Fixed Assets		58,641	56,779
Current Assets		134,667	125,446
Creditors: amounts falling due within one year		(5,476)	(2,466)
Net current assets (liabilities)		<u>129,191</u>	<u>122,980</u>
Total assets less current liabilities		<u>187,832</u>	<u>179,759</u>
Creditors: amounts falling due after more than one year		(27,664)	(17,664)
Total net assets (liabilities)		<u>160,168</u>	<u>162,095</u>
Capital and reserves		<u>160,168</u>	<u>162,095</u>

8. In the Respondent's formal proposal dated 1 July 2022, and the evidence in support, it does not directly address the question of its current and/or potential viability in its formal proposal. The focus of that proposal was on the apportionment between the two units, certain alleged overpayments – both of which issues were agreed and so fell away – and the alleged rent concession that was the subject matter of my first Award dated 7 September

2022. The closest the proposal came to addressing the topic of viability was in the following paragraphs:

“Our client wants the arbitrator to be aware that since the reopening of the unit it has maintained full payment of all rents and service charges without delay despite the dramatic reduction in footfall and passing trade which has affected their turnover. At one point only our client, the pharmacy and supermarket at the shopping centre were open as they were deemed essential services. The arbitrator is asked to consider the recent ruling in WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbH (unreported), 25 March 2021 (County Court), in which the tenant was seeking clarity on a covid rent suspension clause and its activation. In this case the Judge agreed with the tenant that, it was unlikely ever to be forced to close under non-essential restrictions and yet its business would suffer as a result of the closure of neighbouring shops.

Our client has received no government assistance for furlough etc. throughout the pandemic and yet the Covid 19 pandemic and lack of income from their usual passing trade has had an impact on their liquidity.

We also attach a copy of our client's most recent filed accounts which indicates that the company made a loss.”

9. The Respondent’s formal proposal attached its Annual Report and Unaudited Financial Statements for the year ended 31 August 2020. Confusingly, these have a different net assets figure in the balance sheet for the year ending in 2020, £154,230.

Balance Sheet as at 31 August 2020

	Note	2020 £	2019 £
Fixed assets			
Tangible assets	5	48,548	54,822
Current assets			
Stocks	6	64,706	35,146
Debtors	7	219,032	48,110
Cash at bank and in hand		88,774	37,108
		<u>372,512</u>	<u>120,364</u>
Creditors: Amounts falling due within one year	8	<u>(28,798)</u>	<u>(1,338)</u>
Net current assets		<u>343,714</u>	<u>119,026</u>
Total assets less current liabilities		392,262	173,848
Creditors: Amounts falling due after more than one year	8	<u>(238,032)</u>	<u>(1,988)</u>
Net assets		<u>154,230</u>	<u>171,860</u>
Capital and reserves			
Called up share capital	9	2	2
Profit and loss account		<u>154,228</u>	<u>171,858</u>
Shareholders' funds		<u>154,230</u>	<u>171,860</u>

10. The feature of those financial statements which the Respondent draws attention to is not the balance sheet, but the profit and loss account, and the loss it shows for the year ending in 2020.

Profit and Loss Account for the Year Ended 31 August 2020

	Note	2020 £	2019 £
Turnover		505,841	762,077
Cost of sales		<u>(338,078)</u>	<u>(492,638)</u>
Gross profit		167,763	269,439
Administrative expenses		(229,292)	(238,154)
Other operating income		<u>43,921</u>	<u>-</u>
Operating (loss)/profit		(17,608)	31,285
Interest payable and similar expenses		<u>(22)</u>	<u>(394)</u>
(Loss)/profit before tax	4	<u>(17,630)</u>	<u>30,891</u>
(Loss)/profit for the financial year		<u>(17,630)</u>	<u>30,891</u>

11. The Respondent's formal proposal also attached some illegible bank documents, and a spreadsheet which I understand to have been relevant to the questions which have now fallen away (apportionment between the units,

and alleged overpayments) or been decided already (the rent concession point).

The Respondent's viability – the Respondent's further evidence

12. Following the direction that the Respondent should by 7 September 2022 produce any further evidence on which it wishes to rely in relation to the current or potential viability of its business, the Respondent produced:

- a. the statements for the bank account referred to above, which show a positive balance fluctuating between £8,567 on 2 March 2021 and £81,840 on 5 September 2022; and
- b. the Annual Report and Unaudited Financial Statements for the year ended 31 August 2021.

13. In these statements the balance sheet diverges further still from the Micro-entity accounts figures which are available at companies house, and are used in the Credit Report.

Balance Sheet as at 31 August 2021

	Note	2021 £	2020 £
Fixed assets			
Tangible assets	5	42,560	48,548
Current assets			
Stocks	6	65,456	64,706
Debtors	7	169,361	219,032
Cash at bank and in hand		49,600	88,774
		<u>284,417</u>	<u>372,512</u>
Creditors: Amounts falling due within one year	8	<u>(30,791)</u>	<u>(28,798)</u>
Net current assets		<u>253,626</u>	<u>343,714</u>
Total assets less current liabilities		296,186	392,262
Creditors: Amounts falling due after more than one year	8	<u>(203,809)</u>	<u>(238,032)</u>
Net assets		<u>92,377</u>	<u>154,230</u>
Capital and reserves			
Called up share capital	9	2	2
Profit and loss account		92,375	154,228
Shareholders' funds		<u>92,377</u>	<u>154,230</u>

14. The profit and loss account shows a further substantial drop in turnover and a correspondingly increased loss for the year ending in 2021.

Profit and Loss Account for the Year Ended 31 August 2021

	Note	2021 £	2020 £
Turnover		336,737	505,841
Cost of sales		<u>(224,159)</u>	<u>(338,078)</u>
Gross profit		112,578	167,763
Administrative expenses		(223,121)	(229,292)
Other operating income		<u>48,690</u>	<u>43,921</u>
Operating loss		(61,853)	(17,608)
Interest payable and similar expenses		<u>-</u>	<u>(22)</u>
Loss before tax	4	<u>(61,853)</u>	<u>(17,630)</u>
Loss for the financial year		<u><u>(61,853)</u></u>	<u><u>(17,630)</u></u>

The parties' revised formal proposals

15. In accordance with CRCA s.11(4) and the directions both parties made revised formal proposals. Without making any concessions regarding the Respondent's viability, the Applicant makes the following proposal in relation to the Principal arrears:

“Accordingly, subject to immediate payment of interest and costs as set out below, the Applicants are prepared to accept payment of the total principal arrears claimed (being the sum of £49,297.27) on a deferred basis, payable by equal monthly instalments with the first payment due on 19 September 2022 and subsequent payments falling due on the 1st of each month until paid in full. The appropriate period for repayment is subject to the Arbitrator’s discretion but the Applicants request that this is for a period of no longer than 6 to 12 months.”

16. The Applicant also asks for the immediate payment of £5,894 interest, and for the Respondent to pay a higher proportion than the 50% starting point of the arbitration fees under s. 19(5) and (6).

17. In its revised formal proposal the Applicant also makes submissions on the shortcomings it perceives in the Respondent's evidence regarding its viability.

18. The Respondent's revised formal proposal is in fact a repetition of its first one. Again, it offers to pay £8,111 in respect of Unit SU0062A, and £12,618.74 in respect of Unit 2058A, despite the fact that those are the figures which it previously proposed on the basis of the apportionment, overpayment, and alleged rent concession points, all of which have now fallen away or been decided against the Respondent.

19. The Respondent also seeks relief in respect of all the interest on the arrears, and proposes payment of 50% of the arbitration fees.

20. In its revised formal proposal the Respondent again fails to address the issue of its viability directly. It does not refer in any detail to any of the evidence, or seek to explain the discrepancy between the Annual Report and Unaudited Financial Statements for the years ended 31 August 2020 and 2021, and the corresponding Micro-accounts publically available at Companies House. Instead it says:

“The Respondent thanks the Applicant for their revised proposal but feels that they have not taken into account the previous reliefs they granted for the previous lockdown periods. Nor have they considered the adverse effect that the Coronavirus pandemic had on the business. There appears to be an admission that the Respondent did make financial losses during the pandemic, but this is not reflected in the revised proposal.”

21. In relation to each unit it says:

“The Respondent has confirmed that this proposal is made accepting that the 50% support they received from the applicants in the second lockdown period was helpful, the third lockdown period was lengthier and did more harm to the business. Even when the business was able to open the footfall and lack of business at the shopping centre effected [sic] turnover massively. The immediate payment proposed is what the Respondent has calculated for the overlap of periods when centre was open and 3rd lockdown.”

The eligibility stage

22. It is manifest that the parties had not by agreement resolved the matter of relief from payment of a protected rent debt before the reference was made. Further, it is common ground between the parties that there is a protected rent debt, and that the tenancies in question are business tenancies. Further, given that it is common ground that I should consider the matter of relief from payment as required by s. 13(5), it must be common ground that tenant is viable or would become viable if the Respondent were to be given relief from payment of any kind. Accordingly, for the reasons given by Stephanie Tozer KC in the final award in *KXDNA Limited 60 SA Limited*¹, paras. 7 to 13, with

¹ <https://www.falcon-chambersarbitration.com/images/uploads/news/KXDNA..60SA .finalv2 .pdf>

which I agree, I consider that I should proceed on that basis that the parties have agreed, and resolve the matter of relief from payment under s. 14.

23. In case I am wrong about that – either in principle, or on the facts of this case – and I am required to determine the Respondent’s viability for the purposes of s. 13(3) and (4), as well as for the purposes of s. 14, for the reasons that follow I find as a fact that Respondent either is viable, or would become viable if it were to be given relief from payment of any kind.

The matter of relief from payment

24. The principles which I must apply in resolving the matter of relief from payment are those in s. 15, which provides:

(1) The principles in this section are—

(a) that any award should be aimed at—

(i) preserving (in a case falling within section 13(4)(a)), or

(ii) restoring and preserving (in a case falling within section 13(4)(b)),

the viability of the business of the tenant, so far as that is consistent with preserving the landlord’s solvency, and

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

25. The Applicant landlord does not seek to rely on the preservation of its solvency as a relevant factor in this case. Accordingly, my award must be aimed at preserving or restoring and preserving the viability of the business of the Respondent. So far as consistent with that aim, the award should require the Respondent to meet its obligations as regards the payment of protected rent in full and without delay.

26. I am to assess the Respondent’s viability as at the time of this Award. CRCA s. 16(1) provides:

(1) In assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to—

(a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party,

- (b) the previous rental payments made under the business tenancy from the tenant to the landlord,*
- (c) the impact of coronavirus on the business of the tenant, and*
- (d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.*

27. CRCA s. 16(3) provides:

- (3) In making an assessment under subsection (1) or (2), the arbitrator must disregard the possibility of the tenant or the landlord (as the case may be)—*
 - (a) borrowing money, or*
 - (b) restructuring its business.*

28. Having directed the Respondent to produce any further evidence on which it wishes to rely in relation to the current or potential viability of its business, all I know about its assets and liabilities is what is shown in the bank statements for the Lloyds Bank commercial bank account, the Micro-entity accounts, the Annual Report and Unaudited Financial Statements, and the Credit Report obtained by the Applicant.

- a. As described above, the bank accounts show a fluctuating level of credit. Most recently, on 5 September 2022, the amount of credit was £81,840.03.
- b. The Micro-entity accounts, and the Credit Report, show a relatively stable level of net assets, approximately at around the £160-170k level. The Annual Report and Unaudited Financial Statements show different, lower, figures, in the years ending 31 August 2020 and 2021, at £154,230 and £92,377 respectively. The Respondent does not seek to explain this discrepancy. The Micro-entity accounts are the ones which are publically available at Companies House².

29. There is no suggestion that the Respondent didn't pay its rent previously, and I take it that it was able to do so, and did so.

30. The Respondent says, entirely plausibly, that the impact of coronavirus on its business was that it caused a dramatic reduction in footfall and passing trade

² <https://find-and-update.company-information.service.gov.uk/company/07727081/filing-history>

which has affected its turnover. What the respondent does not address in its proposals is the extent of that reduction in turnover, or the impact of that on the viability of its business. Although the Respondent does not refer to any details about its turnover, the profit and loss accounts in the Annual Report and Unaudited Financial Statements for the years ending 31 August 2020 and 2021 (reproduced above) show a drop in turnover from £762,077 in 2019, to £505,841 in 2020, and to £336,737 in 2021. That is by any measure a very significant drop, which one could well imagine might have affected the viability of the Respondent's business, though on the evidence before me that is not demonstrated.

31. Other information relating to the financial position of the Respondent which I consider it appropriate to consider includes:

- a. the drop in the profit figures shown in the the profit and loss accounts from £30,891 in the year ending 31 August 2019, to -£17,360 in 2020, and to -£61,853 in 2021;
- b. the consistently high credit score which the Respondent has been given throughout the relevant period, and the fact that this means it has been described as being a very low credit risk;
- c. the fact that it is the Respondent's case that since the reopening of the unit it has maintained full payment of all rents and service charges without delay.

32. Para. 7.19 of the Guidance states:

"The items set out in paragraphs 7.17 and 7.18 will only be known to the arbitrator if a party provides evidence of them, including in response to a request from the arbitrator. The arbitrator is not required to seek out information. The tenant and landlord are responsible for providing the evidence to enable viability and solvency, respectively, to be assessed."

33. The Respondent has not assisted me by making any submissions which directly address its actual and potential viability, or explaining what it says the evidence it has produced shows about its viability. It does not say that paying the protected rent debt now is incompatible with its continued viability, or that being given relief from that liability to the extent it proposes is necessary to preserve, or to restore and preserve, its viability. Therefore there does not seem to me to be any proper basis for me to conclude that requiring the Respondent to meet its obligations as regards the payment of the protected

rent in full and without delay is inconsistent with the principle in s. 15(1)(a) (save to the limited extent identified below).

34. On the contrary, while the very significant drop in turnover, and the slide from profitability into loss-making, in the years ending 2020 and 2021, obviously represented a major and damaging impact on the Respondent's business, it does not follow that it has made it unviable (without relief) now, which is when I am required to assess its viability, and does not show that relief is necessary in order to preserve, or restore and preserve, its viability. What I do know is that from the evidence available to me it appears that, without further borrowing or restructuring (the possibility of which I am required to disregard by s. 16(3)), the Respondent has sufficient cash in the bank, and sufficient net assets (even accordingly to the Annual Report and Unaudited Financial Statements for the years ending 31 August 2020 and 2021), to pay the arrears (£49,297.27) and interest thereon (£5,894.54 up to 16 September 2022).
35. In the circumstances, I do not consider that the principle that the Respondent should be required to meet its obligations as regards the payment of protected rent in full and without delay is displaced by the principle that this Award should be aimed as preserving or restoring and preserving the viability of the business of the Respondent, except to the extent that giving it some further time to pay would help ensure that the requirement for payment in full did not have a negative impact on its viability, and therefore would help preserve, or restore and preserve, that viability.
36. Where both parties have put forward final proposals under s. 11, I have to consider whether both, or either, of those proposals, is consistent with the principles in s. 15. For the reasons given above:
- a. I consider that the Respondent's proposal is not consistent with the principles in s. 15; it appears simply to be an attempt to revisit the issue of the rent concession which was offered, but not concluded, previously, as I decided in my First Award; and in particular, I see no basis for an award which relieves the Respondent from the liability to pay contractual interest on the arrears; and
 - b. subject to the questions of the period for payment, and of costs, I consider that the Applicant's proposal is consistent with the principles in s. 15.
37. I bear in mind the observation regarding s. 14 made by Stephanie Tozer KC in the final award in *KXDNA Limited 60 SA Limited* para. 23, with which I agree:

“It seems clear from this provision that (a) Parliament envisaged that there could (in at least some cases) be more than one figure which was consistent with the principles in section 15; and (b) the arbitrator is not entitled to substitute his/her own figure if one or more of the proposals made by the parties fall within the range of figures which are consistent with the principles set out in section 15. The purpose of this provision is obvious: it is to encourage parties to make sensible proposals.”

Accordingly, it does not seem to me to be relevant that in the light of my findings above it might also have been consistent with the principles in s. 15 to give the Tenant no relief at all, provided that the Applicant’s final proposal is also consistent with those principles. The Applicant has made a sensible proposal, and, provided it is consistent with those principles, which I have determined it is, I must make the award set out in that proposal (s. 14(3)(b)).

38. The Applicant’s proposal expressly leaves to my discretion the length of the time to pay, within the range of 6 to 12 months. This compares to the maximum deferred period of 24 months (s. 14(7)). Given that I have indicated above that I consider that it might also have been consistent with the principles in s. 15 to give the Tenant no relief at all, but also that I consider that time to pay may well help preserve the Respondent’s viability, I determine the appropriate deferral period to be the mid-point of the range proposed by the Applicant, being 9 months. That will help ensure that the requirement for payment in full does not negatively affect the Respondent’s viability.

Costs

39. Pursuant to s. 19(7), the parties must meet their own legal costs, except the arbitration fees, which are dealt with in ss. 19(5) and (6). Those sections provide that I must make an award requiring the Respondent to reimburse the Applicant for half the arbitration fees paid under subsection (4), unless I consider it more appropriate in the circumstances of the case to award a different proportion (which may be zero). For the following reasons, I consider that it would be more appropriate in this case to order that the Respondent reimburses three-quarters of the arbitration fees paid by the Applicant.

- a. the Respondent raised and failed on the Preliminary Issue, which caused delay and no doubt increased the parties’ costs;
- b. the Respondent initially failed to address the question of its actual or potential viability, or to produce sufficient evidence to enable that to be assessed, which caused further delay, leading me to make my second

directions order dated 31 August 2022, expressly requiring it to produce any further evidence on which it wishes to rely in relation to the current or potential viability of its business;

- c. following that directions order:
- i. the Respondent produced the further evidence identified above, but it did not seek to explain the discrepancies between the Micro-accounts filed at Companies House and the the Annual Report and Unaudited Financial Statements for the years ending 31 August 2020 and 2021 which it produced;
 - ii. the Respondent failed in its revised proposal and submissions directly to address the question of its actual or potential viability;
- d. in substance, the Respondent's revised proposal was simply a repetition of its initial formal proposal, despite my already having determined the Preliminary Issue against the Respondent, and further it was not consistent with the principles in s. 15.

40. Taken together, I consider that these factors make it more appropriate to dissaply the general rule in subsection 19(5), and to award the higher proportion indicated above.

Disposition

41. I hereby award and direct as follows.

- a. the Respondent shall be given relief from payment of the protected rent debt of £55,191.81 (including interest) in the form of time to pay;
- b. the Respondent shall pay the Applicant £6,132.42 per month by nine equal monthly payments starting on Monday 26 September 2022 and on each subsequent 26th day of the month until and including 26 May 2023;
- c. the Respondent shall reimburse the Applicant for three-quarters of the £4,500 arbitration fees paid by the Applicant, being £3,375, by 4 pm on 6 October 2022.

Publication

42. Pursuant to CRCA section 18, this award must be published. I intend to publish it on the FCA website. I am of the provisional view that this award contains no commercial information which must be excluded under section

18(3). Therefore, I shall publish the award in full on the FCA website unless either party makes representations to the contrary by 4pm on 23 September 2022. If any such representations are made, I will consider them before publishing the award.

Seat of the Arbitration

43. Pursuant to s. 95(2) of the Arbitration Act 1996, the seat of this arbitration is in England and Wales.

Date of the Award

44. This Award is made by me, Greville Healey, this 22st day of September 2022.