
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

Award No 1

Background

1. The Respondent is the Applicant's tenant of two units in Stratford City Shopping Centre, units SU2058A and SU0062a. It is common ground that:
 - a. both leases are within the scope of this reference;
 - b. they are business tenancies;
 - c. there is a protected rent debt; and
 - d. the parties have not resolved by agreement the matter of relief from payment of a protected rent debt before this reference was made.

2. However, the parties disagree over the amount of that protected rent debt, and so it is necessary for that question to be decided as a preliminary issue, pursuant to s. 6(1)(a) of the Act.
3. The source of that disagreement is that the Respondent alleges, and the Applicant denies, that the parties have made binding agreement for a 100% rent reduction between 20 December 2020 and 31 March 2021 (“**the Alleged Rent Concession**”).
4. The Respondent has questioned whether this Arbitration is a suitable form of adjudication for the dispute over the Alleged Rent Concession. However, I am obliged to resolve it by s. 6(1)(a) of the Act, and I determine that I have jurisdiction to do so (see para. 12.6 of the Commercial Rent (Coronavirus) Act 2022 Guidance (“**the Guidance**”)).

Procedural history to date

5. This matter was referred to arbitration to Falcon Chambers Arbitration (“**FCA**”), an approved arbitration body for the purposes of section 7 of the CRCA, on 10 June 2022. As required by s. 11(1) of the Act referral was accompanied by the Applicant’s formal proposal for resolving the matter of relief from payment of the protected rent debt.
6. The Applicant’s formal proposal was received by the Respondent on 16 June 2022, so, pursuant to s. 11(2) of the Act, the deadline for the Respondent’s formal proposal was 30 June 2022.
7. The parties were invited to sign an arbitration agreement. The Applicant did so, but the Respondent did not, so on 28 June 2022 the FCA Arbitration Clerk wrote to the parties, explaining:

“[...] FCA is obliged and entitled to appoint an arbitrator to deal with the matter referred to it. The arbitration is a statutory arbitration (s. 1(1) and (2)(b) of the 2022 Act), to which Part 1 of the Arbitration Act 1996 (“the 1996 Act”) applies, subject to the adaptations, exclusions and modifications specified in ss. 95 to 98 of the 1996 Act (see s. 94 of the 1996 Act) and s. 22 and sch. 1 to the 2022 Act. As modified, the provisions of Part 1 of the 1996 Act apply to a statutory arbitration:

(a) as if the arbitration were pursuant to an arbitration agreement and as if the 2022 Act were that agreement, and

(b) as if the persons by and against whom the reference has been made were parties to that agreement.

The statutory arbitration commenced when the reference was made (s. 14(5) of the 1996 Act). FCA has appointed Greville Healey (“the Arbitrator”) as the arbitrator in respect of this arbitration, and hereby notifies the parties of that appointment.”.

8. In that letter directions were given for the parties to seek to agree directions, or to submit alternative directions, with submissions on them, within 7 days of the last deadline for a revised formal proposal pursuant to s. 11(4).
9. By email dated 29 June 2022 the Respondent applied for an extension to the deadline for its formal proposal to 5 July 2022. The Applicant opposed the application in an email at the end of the same day. The following morning the FCA Arbitration Clerk emailed the parties informing them of my decision to extend the deadline, but only to 5 pm on 1 July 2022, and of the reasons for that decision.
10. The Respondent produced its formal proposal on 1 July 2022, disputing the amount of the protected rent debt, and proposing payment of lower sums. The principal basis on which the Respondent disputed the amount of the protected rent debt was the Alleged Rent Concession. The evidence relied upon in support was a letter dated 25 March 2021, which was attached to the formal proposal (“**the March 2021 Letter**”). A copy of it is reproduced at the end of this award, for ease of reference.
11. The Respondant’s proposal also pointed out that it held two units in the shopping centre, only one of which was referred to in the Applicant’s reference and formal proposal, although the arrears related to both. The Respondent made alternative proposals depending upon whether the reference related to both units, or just the one.
12. In an email dated 22 July 2022 the Applicant argued that the Alleged Rent Concession had not been made, and that the March 2021 Letter was only a draft letter, which was incomplete, and which did not contain a formal offer capable of acceptance. Further, it was argued that if the letter was sent, it was without prejudice, and I was asked to make a direction that the March 2021 Letter was inadmissible, and should be disregarded in this Arbitration.
13. In a letter from the FCA Arbitration Clerk dated 15 August 2022 I invited the parties within 7 days to agree directions to deal with the issues of the amount of the protected debt, the Respondent’s viability, and the dates for revised formal proposals. Following two short extensions, the Applicant produced draft directions on 25 August 2022. The Respondent produced alternative draft directions on 30 August 2022.

14. It was evident from the parties' draft directions that it was common ground that the reference should be treated as relating to both units SU2058A and SU0062a, but that they still disagreed about the existence of the Alleged Rent Concession, and the status of the March 2021 Letter. Accordingly, on 31 August 2022 I directed that the reference should be treated as relating to both units, and that question whether the Alleged Rent Concession was made should be determined as a preliminary issue ("**the Preliminary Issue**").
15. For the reasons given in the letter dated 31 August 2022, I gave the parties a further opportunity to put in evidence or submissions in relation to the Preliminary Issue, by 4 pm on 6 September 2022. Both parties have produced further statements. The Applicant's statement is made by Philip Sorensen, General Counsel – Leasing, and the Respondent's is made by Mr Ismail Adam, the sole director of the Respondent. Both are verified by statements of truth. The Respondent's statement was sent to the Arbitration Clerk by email a little under half an hour late, and, to the extent necessary, I unhesitatingly extend time retrospectively to permit reliance on it.
16. I gave the parties until 4 pm on 7 September 2022 to indicate if they wanted an oral hearing. No such request was made, and so I shall decide the Preliminary Issue on paper, on the basis of the evidence and submissions which the parties have produced to date.

Evidence and submissions

17. In its formal proposal, the Respondent's assertion of the existence of the Alleged Rent Concession is based squarely on the March 2021 Letter. In Ismail Adam's statement he says that a verbal agreement was made between him and Robin Psomas, the Applicant's then agent, in early 2021, and that on or around 29 March 2021 he asked Mr Psomas for written confirmation of what rent concessions were being offered to the Respondent. It is common ground that he received an email from Mr Psomas that day at 11:15, which states:

"Dear Ismail,

I hope this email finds you well.

Please find attached the letter related to the Covid support we would like to grant you for the lockdown in December and 01 2021 for you [sic] store located in Unit 2058A.

Please find attached as well an updated Statement Of Arrears showing your arrears discounted of (1) the new Covid support mentioned here above and (2) taking into account the remaining instalments agreed in February 2021 and related to your arrears including November 2020.

Could you please confirm you agree the terms of the letter so I can get it signed internally and officially adapt your arrears accordingly.

Regards,

Robin”

18. The attached letter is the March 2021 Letter, a copy of which is reproduced at the end of this award. Ismail Adam confirms that he made the payments required by para. 1.2 of that letter on 27 July 2021, and refers to an attached bank statement, which shows a payment of £34,500 to the Claimant on that day. He says that he made the payments in good faith, and in the belief that “the offer was made to the Respondent on an open and ongoing basis”. He says that there was no subsequent correspondence relating to the arrears or the payment made after that date, and that he believes the parties entered into a rent concession.
19. The Applicant’s statement refers to and exhibits the full email chain between the parties, and says that it does not evidence a binding concession agreement. The chronology of those emails is as follows.
- a. On 23 March 2021 Mr Adam emailed Mr Psomas referring to two further payments made in accordance with an agreed payment plan.
 - b. Mr Psomas replied a little later that same day, thanking Mr Adam for the payment and confirming that it was in line with the payment plan.
 - c. On 24 March 2022 Mr Psomas wrote Mr Adam an email, headed “Without prejudice, subject to contract”, saying:

“I am happy to tell you that you will benefit from 100% rent discount as per the schedule below pending full payment of Q2 immediately.

Upon confirmation to proceed from you, this will be granted in the coming days for your store located in Unit 2058A. For the second store located in Unit 0062A, the same will be granted upon renewal of your lease.”
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The schedule provided for a 100% reduction for the periods 20 to 31 December 2020, and 1 January to 31 March 2021. The email also set out the proposed lease renewal terms for Unit 0062A.

d. Mr Adam replied later that day, saying:

“I appreciate your proposal but there are just too many things for me to sort out regarding all the leases I have for various businesses and would like to see how trade is post pandemic before I enter into a new lease arrangements.

I would appreciate it if you can assist with the rent free on both units without any conditions at this stage and we can discuss the renewal at a later date perhaps in July.”

e. Then Mr Psomas sent the email dated 29 March 2021 which is set out above.

f. Mr Adam replied on 30 March 2021, thanking Mr Psomas, wishing him well, and continuing:

“I shall attend to this over the next few days. I appreciate your support on unit 2058a but is it possible for you to send the same for 0062a please.”

g. Mr Psomas replied on 1 April 2021:

“May I proceed with the signing of the Covid concession letter and get it over with for your unit 2058A?”

Findings of fact

20. In the circumstances, I make the following findings of fact.

21. The rent concession for Unit 2058A proposed in Mr Psomas’s email of 24 March 2022 was made on a without prejudice basis, and was subject to contract. It was also conditional on full payment of the rent for Q2 immediately. The proposed rent concession in respect of Unit 0062A was also conditional upon the granting of a new lease on the proposed terms.

22. By his reply dated 24 March 2020 Mr Adam declined the proposed rent concession in respect of Unit 0062A, because it was conditional upon a new lease, which he was not prepared to commit to at that stage. Nor did he accept the proposed rent concession in relation to Unit 2058A. Instead he counter-proposed unconditional rent concessions in respect of both units.

23. The proposed rent concession in respect of Unit 2058A which was referred to in Mr Psomas's email of 29 March 2021 was also subject to contract, and, in particular, was subject to and conditional upon:
- a. confirmation by Mr Adam that he agreed the terms of the attached draft letter;
 - b. the signing of the agreed draft letter by the appropriate agent of the Applicant.
24. Mr Psomas did not have, and did not hold himself out as having, the authority himself to conclude a binding rent concession agreement, because he made it clear that in order for such an agreement to be perfected, the agreed form of rent concession letter would need to be "signed internally", meaning signed by someone with authority to conclude such an agreement on behalf of the Applicant.
25. The subject to contract and conditional status of the proposed rent concession is incompatible with there having also been a concluded and effective oral agreement for a rent concession in respect of either unit at this time, and I find as a fact that there was no such oral binding agreement, either on the same terms as proposed in the 29 March 2021 email and the March 2021 Letter, or on any different terms. To the extent that Mr Adam's evidence is to the contrary, I prefer the contemporaneous documentary evidence, and the appropriate inferences which can be drawn from that evidence, to his recollection of events in March 2021.
26. Mr Adam did not confirm that he agreed the terms of the draft letter. Rather, on 30 March he said he would attend to the matter over the next few days, and on the basis of the evidence which has been presented to me, I find as a fact that he did not subsequently communicate that approval as required by the terms of the conditional offer made on 29 March 2021.
27. No doubt as a consequence of Mr Adam's failure to confirm he agreed the terms of the draft rent concession letter, no letter in that form (with appropriate corrections) was ever signed on the Applicant's behalf.
28. Given the conditional and subject to contract status of the proposed rent concession, and the fact that Mr Psomas did not have, and did not hold himself out as having, the authority himself to conclude a binding rent concession agreement on the Applicant's behalf, it was not possible for the Respondent reasonably to rely upon those proposed terms in making any

ongoing rental payments or payments of arrears or in taking any other steps under either lease, or in relation to either Unit.

Conclusions

29. On the basis of those findings of fact, I determine that no contractually binding agreement for a rent concession was made.
30. The Respondent's argument for the existence of the Alleged Rent Concession is framed in the most general terms, without reference to any specific legal doctrines or authorities. Nevertheless, I have to consider not only whether a contractually effective rent concession agreement was concluded, but also whether, if there was not, any relevant species of estoppel might be made out.
31. The parties have had the opportunity to produce any evidence they considered relevant to the question of the Alleged Rent Concession, and make any submissions which they wish to make. No specific species of estoppel or waiver is invoked by the Respondent. Nevertheless, on the basis of my finding of fact that it was not possible for the Respondent reasonably to rely upon those proposed terms in making any ongoing rental payments or payments of arrears or in taking any other steps under either lease, or in relation to either Unit, I determine that there was no promise or representation, no encouragement by the Applicant, no common understanding, and no reasonable reliance on what was in fact said and done, which was capable of founding an estoppel, or amounting to a waiver of the Applicant's right to the full rent.
32. The existence of the Alleged Rent Concession now being the only basis on which the Respondent now contests the Applicant's figures for the amount of the protected rent debt, I determine that the Applicant's sums are correct.
33. As well as being subject to contract, the proposed rent concession was made on a without prejudice basis. When the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible: *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436. However, as I have determined that those communications did not result in a concluded agreement, they are not admissible for the purposes of the parties' revised formal proposals, and there should be no further reference to them by either party in this Arbitration.

Disposition

34. I hereby award and direct as follows.

- a. The amount of protected rent debt to be decided on in the arbitration is as set out in the revised Statement of Arrears filed by the Applicants on 25 August 2022, namely:
 - i. £30,010.00 of arrears due in respect of SU2058A, together with interest accrued thereon totalling £3,448.76 to 24 August 2022 and thereafter accruing at a daily rate of £5.94 until payment; and
 - ii. £19,287.27 of arrears due in respect of SU0062a, together with interest accrued thereon totalling £2,221.30 to 24 August 2022 and thereafter accruing at a daily rate of £3.82 until payment.
- b. The parties shall not refer to the without prejudice correspondence relating to the proposed rent concession in their revised formal proposals.

Publication

35. 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 9 September 2022. If any such representations are made, I will consider them before publishing the award.

Seat of the Arbitration

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

Date of the Award

37. This Award is made by me, Greville Healey, this 7th day of September 2022.

Date: March 25th 2021

Newpoint (Stratford) Ltd
8 Royd Wells
Mirfield
West Yorkshire
WF14 9TP

Dear Sirs

Newpoint (Stratford) Ltd
Units SU2058A, First Floor Level, Westfield Stratford City (the "Premises")

The arrangements set out in this letter:

- are ancillary to the terms of the current lease and all relevant side letters and associated documents of the Premises (including the first covid agreement document) (the "**Lease**") dated 19 December 2014 made between (1) Stratford City Shopping Centre (No.2) Nominee A Limited (Company Registration Number 06530663) and Stratford City Shopping Centre (No.2) Nominee B Limited (Company Registration Number 06530613) as trustees for and on behalf of Stratford City Shopping Centre (No.1) Limited Partnership (registration number LP012959) (the "**Landlord**") and (2) Newpoint (Stratford) Ltd (Company Registration Number 07727081) ("the **Tenant**") and (3) Ismail Adam
- are for the Tenant's sole benefit and apply for so long only as the Tenant is the tenant and in occupation of the whole of the Premises;
- (unless otherwise defined in this letter) utilise words and definitions with the meanings given by the Lease;
- are intended by us to be binding on both ourselves and anyone in whom the immediate reversionary interest in the Lease is from time to time vested; and
- are entered into by Westfield Europe Limited as agent for and on behalf of the Landlord.

In this letter:

The arrangements are as follows:

1. Rent reduction

1.1 Notwithstanding the provisions of the Lease and the definition of "Principal / Base Rent" in the Other Particulars of the Lease and subject to the provisions of this letter for the period:

Start Date	End date	Discount
20th December 2020	31st December 2020	100%
1st January 2021	31st March 2021	100%

This concession is in addition to that agreed in the side letter dated 11th February 2021 between the two parties relating to 2020 covid concessions.

1.2 If the Tenant has not paid to the Landlord in cleared funds the full amount of arrears owed to the Landlord as at the date of this letter, within seven (7) days of the date of this letter (but where not covered in the Schedule, taking into account the rent concessions referred to above), the Landlord may thereafter serve immediate notice on the Tenant withdrawing the rent concession referred to in paragraph 1.1 above and then the provisions of paragraphs 1.1 **Error! Reference source not found.** above will cease to apply and the Principal / Base Rent will again become payable in full pursuant to the Lease without further reference to provisions of paragraph 1.1 **Error! Reference source not found.** above.

2. Confidentiality

The Landlord and the Tenant and the Surety shall keep the existence and nature, and the detailed terms and conditions, of this letter confidential and may not use that information in any press release, publicity advertisement or other disclosure unless and to the extent that it is required to do so by law or under the regulations of The Stock Exchange, other relevant stock exchange or other regulatory requirement.

Signed by:

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**Director
Westfield Europe Limited
As agent for and on behalf of
Stratford City Shopping Centre (No.2) Nominee A Limited
and Stratford City Shopping Centre (No.2) Nominee B Limited**