FCA

FALCON CHAMBERS ARBITRATION

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

Between

GLENDOLA LEISURE LIMITED

Applicant

and

MITCHELLS & BUTLERS RETAIL (NO.2) LIMITED

Respondent

AWARD

Introduction

1. In this Award expressions defined in the Commercial Rent (Coronavirus) Act 2022 (**CRCA**) bear the meanings ascribed to them in CRCA. Numbers in bold font in square brackets refer to the corresponding pages in the bundle before me.

2. The Applicant is the tenant of The Lansdowne Public House, 90 Gloucester Avenue, Primrose Hill, London NW1 8HX (the **Property**) under a lease granted to it by the Respondent landlord on 12.7.2019 (the **Lease**). The Applicant's title is registered at HMLR under title no. BB2589.

3. Under the Lease as granted the Base Rent payable is £165,000 per annum (plus VAT), subject to review, plus a 10% Turnover Rent payable on Turnover in excess of £1.4m. The Base Rent is payable by monthly instalments in advance.

4. The Lease does not contain a 'no oral variation' provision.

5. The Applicant seeks relief from payment under CRCA in relation to an alleged protected rent debt, the quantum of which is now agreed (subject to a dispute about liability) to be £163,247.23.

Reference to arbitration & parties' formal proposals

6. On 23.9.2022, the final date for so doing, the Applicant referred to arbitration the matter of relief from payment for an alleged (but disputed) protected rent debt, pursuant to CRCA. The reference **[7 & 15]** was made to Falcon Chambers Arbitration (**FCA**), an approved arbitration body for the purposes of CRCA. I was subsequently appointed by FCA as arbitrator.

7. The Applicant's referral was verified by a statement of truth and:
   (1) Explained that the Applicant denies owing to the Respondent any outstanding rent, contending that on 18.9.2020 the parties agreed that an alternative rent (namely, a 10% turnover rent) was to be paid from that point onwards, backdated to the beginning of July 2020, and that, if required, any formal documentation of that arrangement was a mere formality. **[17, paras.10-12]**
   (2) Put forward the Applicant's formal proposal that, if (contrary to the above) an alleged £272,778.34 protected rent debt should be found to be owed to the Respondent, the same should be written off in full. **[18, para.15]** I explain that £272,778.34 was the sum said to represent outstanding rent arrears which had featured in a letter dated 9.9.2022 from the Respondent's solicitors. **[2]**

8. The Respondent's formal response, also verified by a statement of truth, was given on 7.10.2022. In it the Respondent:

(1) Denied having written off any part of the rent payable by the Applicant under the Lease, contending that all that it had ever agreed was a temporary concession to assist the Applicant's cashflow. **[22, para.8; 25, para.24]**

(2) Asserted that the protected rent debt owed by the Applicant is £163,247.23. **[22, para.10; 26, para.26]**

(3) Proposed that the entire alleged debt be paid by the Applicant by equal monthly instalments over a 2 year period, with the Respondent waiving interest if the instalments are paid on time. **[28, para.36]**

9. On 11.11.2022 the Applicant submitted a revised formal proposal (its final proposal) incorporating a witness statement from Alexander Salussolia (its managing director), again duly verified. In it the Applicant:

(1) Reiterated its stance that the reduced rent had replaced the original rent, and had not simply been a cashflow arrangement. **[36, paras.12-15]**

(2) Stated that, without prejudice to its contention that it owes nothing to the Respondent, of the £163,247.23 claimed by the Respondent, it proposed:

a. To pay £93,122.23 (57%) by equal monthly instalments over 24 months.

b. That the balance be written off.

c. That any interest be waived. **[39, paras.24 & 25]**

10. The Respondent's revised formal proposal (its final proposal) was made on 25.11.2022. The Respondent maintained its previously advanced position. **[30, para.1; 31, para.14.]**

The Arbitration

11. I gave directions on more than one occasion. Both parties provided disclosure and served witness statements. No expert evidence was sought. The Applicant attempted to rely on the late provision of a trading forecast generated for the purposes of the arbitration, the basis of which was wholly unexplained in evidence. I declined to admit the same.

12. Neither party wanted an oral hearing, despite being twice given the opportunity to request one, and they confirmed that they are content for me to determine the dispute on the papers and to make findings of fact on the disputed accounts without cross-examination of the witnesses. The parties are both professionally represented and I proceed on this agreed basis.

13. I have had regard to all the material put forward by the parties which is included in the composite bundle which has been supplied, together with the parties' written submissions. I have considered all the evidence and submissions even though I do not refer to every single matter in this Award.

Eligibility conditions

14. In order to have jurisdiction to make an award resolving the matter of relief from payment of a protected rent debt I must be satisfied that:
    (1) The tenancy is a business tenancy.
    (2) There is a protected rent debt.
    (3) The parties have not resolved the matter of relief from payment of the protected rent debt before the reference to arbitration was made.
    (4) The tenant's business is viable or would be viable if relief from payment of the protected rent debt were given.

15. If I am not so satisfied, I must dismiss the reference: CRCA s.13(2) & (3).

Business tenancy

16. It is agreed that the Applicant's tenancy is a business tenancy. **[64, para.3]** This condition is met.

Viability

17. Further, there is no dispute that the Applicant is viable:
    (1) The Applicant so contended in its original proposal. **[19, para.21]** What is more, relief from payment cannot be granted unless the tenant's business is or would

be viable (this entailing that, where an application for relief is made by the tenant, its case must be that the business is viable).

(2) The Respondent's position in response was that: the Applicant's business had recovered and is performing well **[27, para.32]**; the Applicant had not come close to the threshold entitling it to relief from payment, and should pay its debts in accordance with CRCA s.15(1)(b). **[35, para.28]** Section 15 is only engaged if the tenant is or would be viable, and the Respondent's proposal thus underscores its acceptance of the Applicant's viability.

(3) The Applicant's revised proposal **[38, para.23]**, which states that the Applicant is capable of operating successfully and of bearing financial losses, and which advances a proposal that it will pay 57% of the alleged protected rent debt (if held to exist), **[39, para.25]** similarly indicates that its business is viable, although the Applicant suggests that its viability would be prejudiced if it were required to pay all or a substantial part of the alleged protected rent debt immediately. **[38, para.23]**

(4) The Respondent's revised proposal is a reiteration of its original proposal and position, and so amounts to a contention that the Applicant's business is viable and capable of bearing the alleged protected rent debt.

(5) In a list of agreed facts and issues dated 30.11.2022 the parties maintained the above stances. **[65, para.7]**

(6) The Respondent accepts the viability of the Applicant's business in its submissions (para.55).

18. In the circumstances the viability condition is also satisfied.

<u>Protected rent debt?</u>

19. There is, however, a dispute as to whether there is a (protected rent) debt at all.

20. In this regard:

(1) There is no dispute between the parties that, *if* the debt alleged by the Respondent is outstanding and payable by the Applicant, it constitutes a protected rent debt.

(2) Further, as to the extent of any debt, it is now common ground that, if the debt is established to exist, it is £163,247.23 (rather than the £272,778.34 which was the subject of the Applicant's original proposal). I recorded this acceptance in my directions made on 12.12.2022. **[72, para.1]**

(3) Whether or not there is a protected rent debt depends on whether the parties reached agreement on 18.9.2020 as to the rent payable under the Lease from July 2020. I address this below.

No agreement on the matter of relief from payment of any protected rent debt

21. There is also no dispute that, if there exists a protected rent debt, the parties have not resolved the matter of relief from payment, as is evident from their conflicting proposals.[1] This jurisdictional condition is also satisfied.

The dispute concerning the existence of the protected rent debt

Overview

22. Therefore, the only live issue so far as eligibility under CRCA is concerned is whether there is a protected rent debt.

23. In this respect, the dispute is one of fact. The issue is whether on 18.9.2020 an agreement was reached which saw the rent payable by the Applicant:

(1) Reduced permanently to a 10% turnover rent from the start of July 2020 (as the Applicant maintains); or

[1] The Respondent submits (para.23.1) that the live issue is whether the parties have reached agreement on the matter of relief from payment. I prefer to analyse the dispute as to whether there is a (protected rent) debt, given that, if the Applicant's case is accepted, the claimed debt (or at least a large part of it) never arose in the first instance because of the parties' agreement to accept a revised, alternative rent from July 2020. In my view, this is conceptually distinct from the scenario where there is an extant debt which is the subject of an agreement for relief. Be that as it may, whichever analysis is to be preferred makes no difference to the end result. If an agreement was struck in September 2022, there is either no protected rent debt or any such debt has been the subject of agreed relief from payment; either way, the Applicant would owe nothing and the reference would stand to be dismissed.

(2) Reduced to a 10% turnover rent only temporarily (as the Respondent maintains).

See e.g. the list of agreed facts and issues. **[64, para.5]**

24. The Applicant says that in September 2020 Mr Salussolia and Richard Flaxman (the Respondent's lease operations manager) agreed in a telephone conversation that with effect from July 2020 *only* a 10% turnover rent would be payable and that it was understood that this was a waiver of the difference between the Base Rent and such turnover rent; it was not merely a case of deferral of the balance.

25. For its part the Respondent says that it was agreed in principle that the Applicant would pay a 10% turnover rent *pro tem*, and that the difference between the Base Rent and such turnover rent would be deferred and, subject to any further agreement, payable at a later date. The arrangement was, it alleges, one of a temporary concession during the pandemic to assist the Applicant with its cashflow.

26. For completeness I record that, if (as the Applicant maintains) the rent was set at an unreviewable 10% turnover rent from July 2020 onwards, there is no dispute that the Applicant has paid the rent at that level down to July 2021 (the end of the protected period), so that there would be no protected rent debt.

27. A lengthy and voluminous chain of email correspondence between the parties, covering the period from March 2020 onwards, has been produced. I have reviewed and considered it in its entirety, although I refer only to extracts.

28. As indicated above, the parties have served witness statements in support of their cases. Again, I have reviewed and considered the same in their entirety, even though I similarly only refer to extracts.

The written records

29. The general background and picture of the parties' dealings can largely be put together from the contemporaneous email traffic (both external and internal) and also some internal notes made by Mr Salussolia. I outline matters in paragraphs 30 to 78 below. Insofar as there is any disagreement between the parties as to the matters recited in those paragraphs, what follows represents findings of fact.

30. On 19.3.2020, right at the start of the pandemic, Mr Salussolia contacted Mr Flaxman requesting a 3 month rent holiday. **[338]** The next day Mr Flaxman offered a deferral of the April rent, with the position to be reviewed monthly. **[340]** Mr Salussolia, evidently somewhat unhappy with the reply, responded seeking a waiver rather than a deferral. He commented that it did not seem proportionate to build up a rent liability for the future. **[341]** Mr Flaxman's reply on 23.3.2020 was unyielding; he wrote, "I can confirm this is a deferral not a waiver." **[342]**

31. Subsequently, the parties engaged in discussions with a view to seeing if they could (a) settle the rent which had accrued during the pandemic when the Property was closed for business and (b) agree on the level of rent as trading resumed. On 26.6.2020 Mr Salussolia telephoned Mr Flaxman enquiring about this. Mr Flaxman suggested that the situation be reviewed in July 2020 after the pub had reopened. **[44, para.23]** He sent an internal email to Mark Thomas (the Respondent's director of estate management) setting out details of this conversation with Mr Salussolia. **[343]** Mr Salussolia himself noted that the parties agreed to speak again on 20.7.2020. **[333]**

32. Mr Salussolia emailed Mr Flaxman on 30.7.2020. **[344]** He then proposed: (a) a 3 month rent-free period from April 2020; (b) paying 25% of the July rent; (c) paying 50% rent for the remainder of the year to March 2021; (d) a re-gear from April 2021 to an 8% turnover rent with a £65,000 floor.

33. After this email was received Mr Flaxman and Mr Thomas discussed matters. They agreed that Mr Flaxman would revert with a proposal that: (a) the Respondent would consider writing off some of the debt if the Applicant was amenable to discharging the balance of the arrears there and then; (b) the Respondent would be open to agreeing a 10% turnover rent as a temporary concession, by way of interim payment on account of the Base Rent, with the balance to be resolved at a later date. **[53, para.24.]**

34. The parties then had a conversation on or around 9.8.2020. On a without prejudice basis, and effectively by way of counter-offer to Mr Salussolia's proposal, and in light of his discussion with Mr Thomas, Mr Flaxman floated the possibility of: (a) writing off 50% of the arrears in return for prompt payment; (b) a 10% turnover rent for a quarter or half year. He stated that both options were subject to board approval. **[45, para.25]**

35. Mr Salussolia made a file note on 27.8.2020 detailing his understanding of the possible offer that the Respondent had intimated, namely: (a) a 10% turnover rent could be considered from the re-opening of the business, to be reviewed frequently; (b) payment of the back rent would not be sought in 2020; (c) if the Applicant wanted certainty, the Respondent would expect 50% payment for the closed period but would be happy to wait for the Government 'ruling' before finalising matters. **[335]**

36. Mr Salussolia emailed Mr Flaxman on 9.9.2020. **[346]** He wrote that he appreciated the Respondent's desire to wait for developments before deciding how to deal with the unpaid accrued rent for the period of closure. He also noted that the Respondent did not intend to seek resolution of the outstanding rent in that calendar year. He rejected the landlord's counter-offer to settle the rent for the period during which the premises had been closed by a 50% payment, and he advised that the Applicant would be happy to wait to see how matters played out. In relation to the "restart trading rent" he recorded that Mr Flaxman had proposed

a 10% turnover rent, for a quarter or a half year, subject to board approval. He stated that he considered that a turnover rent made sense going forward, to share the risks and rewards between the parties. He noted that the Respondent had not accepted the suggestion of a permanent re-gear of the lease. Mr Salussolia then went on to counter-propose a 9% turnover rent from re-opening to March 2022. **[335]**

37. A telephone call took place on 15.9.2020 between Mr Salussolia and Mr Flaxman. In the call Mr Flaxman advised that if the Applicant was not prepared to settle the arrears promptly in return for a 50% write-off, the Respondent would be willing to accept a 10% turnover rent. There was discussion as to the duration of any such arrangement, which remained subject to board approval. **[45, para.27]** Mr Salussolia made a note that the Respondent would not go below 10% turnover and that Mr Flaxman would explore the length of the reduction that the Respondent might be prepared to give. **[335]**

38. On the same day Mr Flaxman emailed Mr Thomas. **[348]** The email, effectively an internal memo, recorded that Mr Flaxman had spoken with Mr Salussolia and that they had discussed the duration of the 10% turnover rent arrangement but that he (Mr Flaxman) had not given any commitment on the point. This chimes with a file note made by Mr Salussolia on the same day **[335]** which recorded that the Respondent would not go below 10% turnover but that the period of reduction had not been settled.

39. On 18.9.2020 there was the central telephone conversation, the parties' accounts of which diverge. I return to their conflicting accounts below. The Applicant's case is that on that occasion a permanent alteration in the rent (from the Base Rent to a simple 10% turnover rent) was unequivocally agreed.

40. Mr Salussolia made a manuscript note of the call with Mr Flaxman on 18.9.2020. **[349]** So far as material the note reads:

10% Turnover *arrange[ment]*[2] reviewed quarterly.
Back Dated to July – Rolling quarter
Set up Teams call with Mark Thomas
In arrears every quarter as per current lease
Teams call Thursday onwards.

41. On 20.9.20 Mr Flaxman emailed Mr Salussolia, enquiring if a Teams conference on 24.9.2020 would be convenient. **[350]** This had been foreshadowed in the 18.9.2020 telephone call: see above. Mr Salussolia confirmed the date worked for the Applicant. **[350]**

42. The Teams call took place on 24.9.2020. Mr Flaxman attended as did Mr Thomas, and for the Applicant Mr Salussolia and Mr Ramsay (the Applicant's accountant) were on the call. **[352 & 353] [53, para.27; 54, para.29]**

43. Mr Salussolia did not refer to the Teams meeting in his original witness statement. After the exchange of evidence the Applicant applied for permission to introduce a further statement from him dealing with the 24.9.2020 meeting. I granted permission on condition that Mr Salussolia explain why he had not referred to the Teams meeting previously.

44. Mr Salussolia made a further witness statement. **[62]** His evidence is that when reviewing his papers in relation to the disclosure process in this arbitration he mistakenly overlooked the occurrence of the 24.9.2020 Teams meeting. I accept that his failure to mention this meeting in his earlier statement was indeed the result of an innocent oversight.

[2] The writing is indistinct and the Respondent suggests (submissions, para.40) that the word may read "average". The point is not clear from Mr Salussolia's evidence. In my view though, nothing turns on the point.

45. It also follows that the statement by Mr Salussolia in his original witness statement **[36, para.12]** that a Teams call with Mr Thomas did not in fact take place until 7.6.2021 is demonstrably incorrect.

46. In his second witness statement Mr Salussolia exhibits his manuscript notes in respect of the Teams meeting on 24.9.2020. **[63]** They read:

> Richard Flaxman & Mark Thomas 24/09/2020
> Teams Meeting with GR + AS
> Consistent with last position
> 10% rent from opening. (re-opening)
> 4th July. – Agreed verify arrears.
> Closed rent held off for now – happy to look @ next year.

47. On 6.10.2020 Mr Salussolia made an internal note which simply reads "*10% agreed*". **[335]** Why he *then* made that particular note is not clear or explained.

48. In October 2020 the Applicant submitted turnover figures to the Respondent and was in turn invoiced and paid a rent based on 10% of turnover. **[354]** This practice continued into 2021. **[357]** Although board approval had not been given, it was de facto applied with the blessing of Mr Thomas. **[46, para.31]** Mr Thomas had the authority to apply an interim concession but did he not have the power to waive or write off rents without board approval. **[54, para.30]**

49. On 11.2.2021 Mr Salussolia emailed Mr Flaxman. **[358]** He said that he wanted to confirm the Applicant's understanding of the current rent position, namely that the rent would be 10% of turnover until the passing annual rent level was achieved, whereupon the parties would revert to the regular rent terms.

50. Mr Flaxman did not reply by email. Mr Salussolia says that he did not respond at all. **[36, para.14]** Conversely, Mr Flaxman says on or around that time he

telephoned Mr Salussolia and advised him that his understanding was not correct and did not reflect what had previously been agreed. **[46, para.32]** I address this conflict below.

51. Some months later, on 7.6.2021 Mr Thomas emailed Mr Flaxman (an internal email) stating that the Respondent should look to striking a settlement in principle with the Applicant. **[360]**

52. On 10.6.2021 Mr Flaxman sent an internal email to Dawn Davis (in the Respondent's finance department) asking for details of what the Applicant would have paid had they paid the Base Rent and, for comparison what they had actually paid by way of the turnover based rent. **[361].** The requested financial information was provided within an hour. Mr Flaxman then forwarded the email chain to Mr Thomas on the same day, advising that nearly one-third of the rent had been paid and commenting, "*That doesn't seem too bad if we are looking to potentially defer nearly half of the remainder and write off the balance*." **[362]**

53. There was an inconclusive call between the parties on 10.6.2021 in which the parties failed to reach agreement on a permanent settlement. **[46, para.34; 55, para.33]**

54. On 28.6.2021 Mr Salussolia made a note recording that the Respondent wanted to return to normal billing from July and that the "*outstanding rent*" was to be confirmed. **[336]**

55. Mr Salussolia then emailed Mr Flaxman on 8.7.2021. **[364]** By that email he forwarded a proposal from Mr Ramsay, as to which see below.

56. Mr Ramsay had emailed Mr Salussolia the day before, 7.7.2021. **[364]** In his email Mr Ramsay stated that it had previously been agreed with the Respondent to revert on two issues: back rent and reversion to fixed rent. He then set out his thoughts

and proposals as to the way forward. Regarding the back rent, he stated that, in the light of the trade achieved and the money already paid to the Respondent, he considered that the Applicant had 'overpaid' but that would not propose seeking a refund but rather a credit note, with both sides moving on. He also outlined his proposals in relation to reversion to fixed rent, expressing the view that it would be reasonable to retain the turnover rent until 31.3.2022.

57. In response to Mr Salussolia's approach of 8.7.2021, Mr Flaxman emailed on 9.7.2021. **[366]** In the email he advised that if the Applicant sent its trading figures for June that might help the Respondent in putting forward a proposal for Mr Salussolia's consideration.

58. On or around 22.7.2021 Mr Flaxman spoke to Mr Salussolia on the telephone and told him from August that the rent billing would be reverting to normal, i.e. to the Base Rent. Mr Salussolia was keen to discuss that, and payment of the back rent, further. **[46, para.36]** In this vein Mr Salussolia's note of 22.7.2021 records that a call was being lined up to explore the "*back rent and if any further concession can be made!*" **[336]**

59. Mr Flaxman sent another internal email to Mr Thomas on 22.7.2021. **[367]** In it he recorded the essence of the above conversation, noting that he had told Mr Salussolia that the rent would return to normal from August, and he noted that Mr Salussolia had expressed a keenness to settle the rent for the previous period too.

60. A further Teams call took place on 9.8.2021. As with the 10.6.2021 call, it did not advance matters. **[47, para.36; 55, para.34]** In that call the Respondent said that it wanted to revert to the full rent in September and to deal with what Mr Salussolia described in his note of 11.8.2021 as the "back rent". **[336]** Mr Salussolia's note also records that Mr Salussolia had pushed back and wanted an exception to be made. It goes on to state, "Also requested [Mr Flaxman] respond to email to clarify if he agrees the outstanding amount."

61. In a further internal email to Mr Thomas also on 9.8.2021 **[368]** Mr Flaxman stated that the full rent had been charged for August but the Applicant had requested an extended 10% turnover period. He also recorded that the parties had *"still to conclude past closure from first Lockdown*".

62. Mr Flaxman sent a further email to Mr Thomas, on 10.8.2021. **[369]** In it Mr Flaxman remarked that the Applicant had paid roughly 50% of the Base Rent.

63. Mr Thomas replied to Mr Flaxman the following day. **[370]** He said that the pair should liaise before reverting to Mr Salussolia, commenting that the dates they applied, i.e. the dates to be set for any staged payments of arrears, would be significant.

64. After his discussion with Mr Thomas Mr Flaxman emailed Mr Salussolia on 12.8.2021 with a summary of the rent account. **[371]** The summary **[342]** indicated that there was a claimed £148,020.54 shortfall between the amount that the document stated should have been invoiced under the Lease and the amount that had been invoiced and paid based on the 10% turnover.

65. The Respondent went back to demanding full rent.

66. Mr Ramsay emailed Mr Salussolia on 21.12.2021. **[374/5]** In the email he wrote that the Applicant had paid full rent for March and April 2020[3] and had then moved to an agreed turnover rent from May 2020 to September 2021, before returning to a full rent from October 2021. He considered that the Applicant had 'overpaid' (relative to rents charged by other landlords) and suggested that the Applicant "agree the current historic position as it is and then move back to a turnover rent

[3] Something acknowledged internally by Mr Flaxman on 18.1.2022. **[381]**

from this month to March 2022." I believe that the final point was made in light of the prevalence of the Omicron variant of Covid in late 2021.

67. This email from Mr Ramsay was in turn forwarded to Mr Flaxman by Mr Salussolia on 22.12.2021. **[374]**

68. A Teams meeting between the parties was then scheduled for 21.1.2022.

69. On 18.1.2022 Mr Flaxman emailed Mr Thomas. **[381]** He outlined the financial reckoning (set out in an accompanying table **[382]**) if the Respondent asked the Applicant to pay two-thirds of the overall rent and, alternatively, if it charged turnover rent (already invoiced) for the period when the premises had been open and half rent for when they had been closed.

70. The parties had the Teams meeting on 21.1.2022. It is not suggested that it yielded anything of consequence.

71. On 3.2.2022 Mr Salussolia emailed Mr Flaxman asking when he hoped to come back with a counter-proposal. **[385]**

72. Mr Thomas sent an internal email to his superiors, copied to Mr Flaxman, on 7.2.2022. **[388]** The email sought confirmation of the position to be taken with the Applicant. In it Mr Thomas explained that the Respondent had agreed to accept limited payments to date from the Applicant, to protect its business and cashflow, with the intention to 'settle up' when the conclusion of the rent moratorium/basis of (statutory) arbitration (under what became CRCA) was announced. He also stated that the position that had been taken with the Applicant was that, because it preferred to defer payments and protect its cashflow rather than reaching an earlier settlement, the Respondent would look to recover the full rent from them over a period to be agreed.

73. Mr Flaxman asked Mr Salussolia on 17.2.2022 if he would be available for a phone call the next day. **[390]** Mr Salussolia's reply was that he sought a written counter-offer which he and Mr Ramsay might consider before responding. **[390]** He added that he thought that sensible "*considering we find ourselves in this position because we both have a misunderstanding of what our conversations actually meant*."

74. On 18.2.2022 Mr Flaxman replied that no counter-proposal would be forthcoming. **[391]** The email was headed 'without prejudice – subject to contract' but (like various other emails) has been disclosed by the Respondent (without objection from the Applicant) to me.[4]

75. In an email dated 1.3.2022 Mr Salussolia asserted that it had been clearly understood that the Applicant was on a turnover rent, that this was the basis on which turnover information had been provided, and that just left the periods when the business had been closed to be dealt with. He rejected the notion that the Applicant should pay full rent. **[392/3]**

76. Battle lines were thus drawn.

77. On 18.5.2022 Mr Salussolia wrote to Mr Thomas. **[396]** In the email he explained his belief that as a result of the telephone conversation with Mr Flaxman on 18.9.2020 a 10% turnover rent had been put in place with effect from July 2020, in lieu of the Base Rent, and that there had been no deferral of the difference between such turnover rent and the Base Rent. He said that had the Applicant thought the position was otherwise, it would have sought an alternative arrangement. As it was, it believed that it had achieved certainty as opposed to a 'waiting game'.

[4] I remark in passing that without prejudice is a joint privilege and not something which can be waived by one of the parties unilaterally, as the Respondent appears to believe. **[49, para.54; 59, para.60]**

78. When further without prejudice negotiations (the content of which, although put before me, I have ignored in reaching my Award) did not result in a compromise, the Applicant initiated this arbitration.

The parties' accounts

79. So far as the parties' evidence and contested accounts of their conversations is concerned (beyond the documentary materials), I summarise the rival positions in paragraphs 81 to 91 below.

80. At the outset I remark that the Respondent's evidence is overall more thorough and detailed than that of the Applicant which is presented at a rather high level of generality.

81. In line with the position he set out on 18.5.2022, Mr Salussolia's evidence is that "*the problems really arose … because Mr Flaxman never mentioned … in [the] oral negotiations that the turnover rent was just a 'cashflow' arrangement*". **[36, para.12]** Neither, says Mr Salussolia, did Mr Flaxman ever state (at any material time) that the difference between the turnover rent and the Base Rent would be payable down the line and that the turnover rent was merely paid on account of the Base Rent. **[36, para.15]** Therefore, Mr Salussolia maintains that, when he spoke with Mr Flaxman on 18.9.2020, he was left with the impression that the turnover rent was all that was to be paid for the period while some form of restrictions remained in place and he did not think that the amount paid by way of turnover rent would later be increased. **[36, paras.12 & 14]** He says he remained of that view until the conversation with Mr Flaxman on 22.7.2021, and that if he had thought that the position was otherwise at any earlier time he would have suspended payment of rent to bring matters to a head (against the backdrop of the protections conferred by the Coronavirus Act 2020). **[36, para.15]**

82. In his second witness statement **[63, para.5]** Mr Salussolia says that his disclosed notes of the 24.9.2020 Teams meeting **[63]** are consistent with his understanding

of what had been agreed. He says that a distinction was drawn between (a) the historical arrears (referable to the period when the business was closed before July 2020) and (b) the turnover rent in place from July 2020 onwards.

83. For his part, Mr Ramsay's evidence is that insofar as he was party to conversations with the Respondent's representatives (which, I remark, appears to have been only on limited occasions), the notion that the turnover rent was just a cashflow arrangement was never mentioned. **[60, para.2]** His 1-page statement is, however, very limited; it lacks any real detail and is largely a commentary/submission on the documentation. To my mind, it does little to advance matters. It is however noteworthy that, so far as timing is concerned, Mr Ramsay refers to having believed that the turnover rent agreement was in place *by 6.10.2020*. **[60, para.3]**

84. For the Respondent, which presents a markedly different account from that put forward by the Applicant, Mr Flaxman says that the 10% turnover rent was agreed only as temporary concession and on an interim basis subject to a final settlement to be agreed. **[43, para.15]** He states that this was a 'cashflow' arrangement to assist the Applicant during the pandemic and, moreover, that the fact that the turnover rent was an interim measure on account of the Base Rent, and that the balance would be considered at a later date, was explicitly communicated to the Applicant by Mr Thomas during telephone calls with Mr Salussolia and Mr Ramsay, to which calls Mr Flaxman says he was party. **[43, para16]**

85. Mr Flaxman says that all that was ever agreed was an interim position of a 10% turnover rent, to allow the Applicant to pay what it could afford at the time, and that this was always without prejudice to the Respondent's entitlement to recover the full Base Rent at a later date. **[48, para.51; 49, para.53]**

86. So far as the call on 18.9.2020 is concerned, Mr Flaxman says that it was a brief call in response to a text from Mr Salussolia. Mr Flaxman was in his car. Mr

Flaxman says that on this occasion it was agreed that there would be a Teams call on 24.9.2020 to continue negotiations. This is of course consistent with (a) Mr Salussolia's note of the call **[349]** and (b) the fact that it is now common ground that a Teams call was held on 24.9.2020. This being so, it is Mr Flaxman's view that neither party could have believed that a deal had been struck on 18.9.2020 (as alleged by the Applicant). **[45, para.28]**

87. Mr Flaxman maintains that, insofar as Mr Salussolia believes that the parties agreed on 18.9.2020 that the turnover rent was in lieu of the Base Rent, he (Mr Salussolia) is mistaken. **[47, para.43]**

88. As for the Teams call on 24.9.2020 Mr Flaxman's evidence is that it was made clear that any proposal was subject to board approval, and moreover that there was no full and final settlement agreement but merely an agreement to accept a 10% turnover rent on a temporary basis to protect the Applicant's cashflow, with a final settlement to be agreed down the line. **[46, para.29; 48, para.44]**

89. Mr Thomas's evidence is that Mr Flaxman has responsibility for the day to day management of the Applicant's premises and that Mr Flaxman regularly updates him and seeks his input and authority as appropriate. He confirms that, so far as he is aware, Mr Flaxman's account is accurate. **[52, para.20]** He repudiates the notion that the 10% turnover rent was agreed in full and final settlement of the rent payable under the Lease. **[54, para.30; 59, para.59]**

90. Mr Thomas says that, given the communicated need for board approval, and the fact that this was never sought nor obtained, neither party can ever have envisaged that a binding deal was in place. **[53, para.26]**

91. In relation to the Teams call on 24.9.2020 Mr Thomas's specific evidence is in line with that of Mr Flaxman; the arrangement was only an interim, temporary one and was subject to board approval. **[54, para.29]**

Decision

92. I now turn to resolve the factual dispute. I make the following observations:

(1) In my opinion, the burden of proof lies on the Applicant to establish the existence of the claimed agreement.

(2) I reject the Applicant's submission (para.22) that it is hard to characterise the disjunction between the parties' accounts as the product of mere misunderstanding. To my mind, the present case is not one in which one party or the other is necessarily lying. Indeed, in my view, the rather more likely analysis – which I favour – is that the divergence of accounts is simply the product of bona fide but mistaken and distorted recollection, and perhaps a degree of crossed wires. I find that all the witnesses have given what they believe to be an honest account. I consider that the case classically turns on reliability rather than credibility.

(3) I emphatically reject the Applicant's submission (paras.22 & 25) that doubt is cast on the Respondent's evidence because of its alleged unwillingness to face the dispute head on, put its case at an oral hearing, and cross-examine the Applicant's witnesses. The submission is thoroughly bad. It wholly ignores the fact, that as I made clear in my directions, *either* party could insist on an oral hearing: CRCA s.20(1). As it is, *neither* party has requested a hearing. The Respondent's decision not to elect for a hearing can be held against it no more than the Applicant's like decision. If the Respondent were to be criticised in that regard, the Applicant could similarly be criticised for having declined to come and face the music. In my view, the point is irrelevant. I attach no weight to it.

(4) Although the Applicant made some contemporaneous notes and the Respondent did not, I do not accept the Applicant's contention (para.20) that this undermines the reliability of the Respondent's account. I add that:

(a) I do not regard the Applicant's brief notes as particularly supportive of its case on the key disputed matters; they are not verbatim, comprehensive notes, and are at best equivocal and certainly in no way determinative. For

instance, Mr Salussolia's note of the 24.9.2020 meeting does not record *in terms* a permanent waiver of the Base Rent or rent debt otherwise payable.

(b) Although the Respondent did not make notes as such, Mr Flaxman did (as part of his reporting) send a number of contemporaneous emails to Mr Thomas, the nature of which is, in my view, closely akin to internal notes.

(c) I reject the Applicant's submission (para.22) that those emails (which I have carefully considered) are on examination simply self-serving; if and insofar as it is suggested that they were written with a view to bending the truth and/or for the eyes of an external audience down the line, I find no support for such a contention. I am satisfied that the reports made by Mr Flaxman to Mr Thomas fairly set out his understanding of the various discussions with the Applicant's representatives.

(5) I do not accept that, as the Applicant submits (para.21), the Respondent's case and evidence is materially inconsistent, incoherent and incapable of standing scrutiny. It is said that the Respondent tries to take two inconsistent positions, one that a limited agreement was made and another that no binding agreement was made. I consider, though, that this is not a fair reading of the Respondent's evidence as a whole. The Respondent's overall case is that any agreement was both limited (i.e. a temporary concession, not a permanent waiver) and, what is more, not binding in any event (because of want of board approval).

93. Having considered and weighed all the conflicting evidence in its overall setting, I prefer the Respondent's account and evidence to that of the Applicant. Where the parties' accounts differ, I accept the Respondent's version of events.

94. My core reasons for so concluding are:

(1) From the outset (see paragraph 30 above) the Respondent had consistently taken the stance that it would not countenance writing off part of the Base Rent unless the Applicant made a substantial % contribution towards the same. Its position had been to agree deferral, not outright waiver. I discern nothing which clearly indicates that such general attitude ever changed or which supports the

notion that the Respondent later became amenable to rewriting the Lease, implementing a re-gear (which it had earlier rejected: see paragraphs 32, 33 & 36 above), and foregoing potentially significant income on a permanent basis without a like agreement and payment.

(2) The Applicant's evidence and case regarding the date and occasion of the alleged agreement is unsound. It maintains (submissions, para.10(a)) that the deal was struck *on 18.9.2020*. The fundamental problem with this is that it is readily apparent (and I find) that the short conversation on 18.9.2020 was an informal one which took place when Mr Flaxman was in his car and was, at most, only a precursor to the setting up of the more formal meeting (to involve Mr Thomas) which took place on 24.9.2020. In my opinion, Mr Salussolia's note of the 18.9.2020 conversation ("Set up Teams Call with Mark Thomas …. Teams call Thursday onwards") underscores that. I find that the discussion on 18.9.2020 was no more than a preliminary one in which the provisional outline of a potential consensus was aired. Matters were certainly not then tied down. No concluded deal was reached on that occasion, and neither Mr Salussolia or Mr Flaxman understood otherwise. It was recognised by both that, at the very least, a further call with Mr Thomas was required.

(3) The difficulty with the Applicant's account of the timing of the alleged agreement does not stop with the fact that 18.9.2020 did not witness the making of a binding agreement. A further issue is that Mr Salussolia himself elsewhere says that a 10% turnover rent was recorded by him as being agreed *by 6.10.2020*. **[35, para.11d]** (So too does Mr Ramsay: see paragraph 83 above.) 6.10.2020 is, of course, the date of Mr Salussolia's (unexplained) "10% Agreed" note. **[335]** However, stating that agreement was reached *by* 6.10.2020 is not really the same as claiming that agreement was reached *on* 18.9.2020. **[36, para.12]**

(4) Mr Ramsay had, I find, limited direct involvement in the discussions and, on top of the fact that his account is thin on specific details, I consider that his knowledge of the key matters is not especially reliable. For instance, he wrote in an email that the turnover rent was applied from May 2020 (see paragraph 66 above) when in fact, as Mr Salussolia says, the start date was July 2020.

(5) As for both the conversation on 18.9.2020 and the meeting on 24.9.2020, I am not satisfied that the Applicant's recollection is wholly correct. It is accurate to an extent but the picture is incomplete and somewhat distorted. The Applicant is right to say that a 10% turnover rent from the re-opening of the business in July 2020 was discussed and (on 24.9.2020) agreed in principle (subject to the point noted in (6) below) as the way forward, and also that resolution of the rent arrears for the period before July 2020 during which the business had been closed was parked. However, I do not accept that the 10% turnover rent was itself put forward and accepted as anything other than an interim measure, with the overall reckoning of the Applicant's financial liabilities falling to be reviewed in the future. I reject the idea that a permanent substitution of a 10% turnover rent in lieu of the Base Rent was then agreed. Indeed, Mr Salussolia's note of the 18.9.2020 conversation records that the 10% turnover rent was to be "reviewed quarterly"; I accept that could conceivably refer simply to the duration of the agreement as opposed to its ambit, but to my mind the statement is hardly redolent of an irreversible commitment on the part of the Respondent.

(6) The Respondent had previously made it quite clear that any deal would require board approval (see paragraphs 34 & 37 above). Mr Salussolia himself had acknowledged this on 9.9.20, a matter of days before the alleged agreement (see paragraph 36 above). Yet it is the Applicant's case that Mr Flaxman and Mr Thomas proceeded to strike an accord which was not so dependent. I regard this to be a failure of memory on the part of the Applicant's witnesses, and I find that the Respondent's representatives reiterated the qualification on 24.9.2020. The fact that, in practice, the Respondent went on to accept the 10% turnover rent without board approval (as I find occurred) does not alter the fact that the parties' consensus had been conditional on such approval.

(7) If an agreement (involving the irreversible replacement of the Base Rent by the turnover rent) was reached, as the Applicant maintains, it is striking that, even on the Applicant's evidence, there is uncertainty as to for how long such arrangement would endure. Would it last: for a set period; until revoked by either party (presumably at will); in perpetuity; until some other event? The

Applicant's evidence does not address this. That leaves, in my view, a major lacuna in the supposed agreement, especially when it is tolerably clear that not long before the alleged agreement (i.e. on 15.9.2020) the parties had clearly not been in agreement regarding the length of any potential arrangement.

(8) In the above regard, Mr Salussolia says (see paragraph 81 above) that he believed that the turnover rent was all that was to be paid during the period *while some form of restrictions remained in place.* **[36, para.12]**. But it is not at all clear where he got this impression from. It is not really consistent with, and certainly is not borne out clearly by, his contemporaneous notes of the September 2020 discussions, and I find that such mindset (and the belief that the turnover rent wholly replaced the Base Rent) was a triumph of hope on the part of Mr Salussolia over what had actually been agreed with the Respondent.

(9) Further, on 11.2.2021 (see paragraph 49 above) Mr Salussolia wrote that his understanding was that the rent was 10% of turnover *until the passing annual rent level was achieved, whereupon the parties would revert to the regular terms*. **[358]** Again, this refinement to the alleged agreement does not appear to have any obvious foundation, and it is inconsistent with the foregoing. To my mind, it is the product of an internal, subconscious, reconstruction of events by the Applicant and represents a departure from anything that had been discussed and agreed the previous September.

(10) Mr Salussolia acknowledges **[36, para.14]** that on 11.2.2021 he "*tried to obtain absolute certainty in writing*" in relation to the parties' agreement. No cogent explanation is given why he felt the need to seek certainty and confirmation (at a time before any dispute arose, which on his case was on 22.7.2021), and I infer that it was because he had doubts about the solidity and scope of the agreement and was at the time (rightly) concerned that the 10% turnover arrangement was an interim measure only and that the Applicant's ultimate rent liability remained to be agreed. I also accept Mr Flaxman's evidence that he telephoned Mr Salussolia and rejected the understanding he had set out in his email. **[46, para.32]**

(11) I regard the Respondent's assorted internal communications and their reactions and conduct in 2021 (see e.g. paragraphs 51 & 52 above and **[362, 370, 381]**) as corroborative of the fact they did not regard themselves as having wiped the slate clean so far as the rent from July 2020 onwards was concerned. Of course, Mr Flaxman and Mr Thomas could have been wrong to hold that belief – but I find that they were not so mistaken. They then regarded matters as remaining open for future resolution, and proceeded to look to strike a settlement with the Applicant, for the very reason that this was how matters had been left in September 2020.

(12) In like vein are the parties' discussions in 2021 and beyond (see e.g. paragraphs 53, 54, 59 above); they continued then to negotiate, and I find that this was to try to resolve the issue of the payment of rent generally and was not limited to the rent for the initial period during which the Applicant's business had been closed. I find that when the parties were talking about the "back rent" they were dealing with the rent over the entire period since the start of the pandemic.

95. All in all, on the balance of probabilities I prefer and accept the Respondent's evidence. I find that at no time did the parties reach a binding agreement pursuant to which a 10% turnover rent wholly replaced the Base Rent. All that was agreed (itself strictly subject to board approval) and implemented was a temporary concessionary measure whereby the Respondent would accept such a turnover rent in order to assist the Applicant's cashflow on an interim basis, leaving the final reckoning to be resolved in the future. I find this was objectively made clear by the Respondent.

96. Mr Salussolia says in his second witness statement **[63, para.5]** that his understanding was that the parties had agreed to draw a distinction between (a) the historical arrears (referable to the period when the business was closed before July 2020) and (b) the turnover rent in place from July 2020 onwards, suggesting that the former but not the latter might later be revisited. However, it follows from the above that I do not accept that such a distinction was drawn. Any impression

which Mr Salussolia (and Mr Ramsay) formed along those lines was a confused and erroneous one. As Mr Salussolia has alluded to (see paragraph 73 above), there was a genuine misunderstanding. However, viewed objectively, there was no *consensus ad idem* of the nature alleged by the Applicant.

97. In my view, in convincing themselves that a permanent deal had been agreed, based on an exclusive 10% turnover rent from July 2020 in lieu of the Base Rent, the Applicant's representatives got ahead of what was actually agreed.

98. In the circumstances, I conclude that there exists a protected rent debt of £163,247.23.

Relief from payment

Principles

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

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

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

102. I remind myself that the Applicant's final proposal is that £93,122.23 should be paid over 24 months, with the remaining debt written off. By contrast, the Respondent proposes that the full debt be paid, albeit over 24 months.

103. Where, as here, both parties make a final proposal:

(1) If I consider that *both* proposals are consistent with the principles set out in CRCA s.15, I must make the award set out in whichever of the proposals I consider to be the *most* consistent: s.14(3)(a).

(2) If I consider that *only one* proposal is consistent, I must make the award set out therein: s.14(3)(b).

(3) If I consider that neither proposal is consistent, I must make whatever award I consider appropriate, applying the s.15 principles: s.14(5).

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

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

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

See CRCA, s.15(1).

<u>The parties' positions</u>

105. There is no suggestion that the Respondent's solvency is at risk, and by s.15(3) solvency is effectively to be presumed unless there is evidence that the landlord is, or is likely to become, unable to pays its debts as they fall due, which there is not in this case. Thus I disregard any solvency related issue.

106. The Applicant's case is that: (a) its business suffered as a result of the pandemic and it has limited cash resources; (b) the award it proposes is necessary and appropriate to preserve the viability of its business; whereas (c) the Respondent's proposal is inadequate in that regard and would materially threaten and compromise the Applicant's viability. In other words, it maintains that its proposal is consistent with the s.15 principles and that the Respondent's is not.

107. For its part the Respondent contends that: (a) the Applicant has provided limited financial material and no forecasts of future performance; (b) the Applicant's accounts, in particular the latest accounts (to 26.3.2022), show that it operates as a going concern and has the resources to pay the protected rent debt; (c) the Applicant is a viable business which is performing well and does not need the grant of relief (in terms of writing off part of the protected rent debt) to preserve its viability; (d) the Respondent's proposal (insofar as it requires the payment of the debt in full) would not undermine or prejudice the Applicant's viability. In other words, its case is that its proposal is consistent with the s.15 principles and that the Applicant's is not.

108. That, then, is the dispute between the parties.

The evidence

109. So far as the financial and other evidence before me is concerned:

(1) It is common ground that the Applicant's business was adversely affected by coronavirus, as can be seen from the following.

(2) The statutory coronavirus restrictions required the business to shut its doors and, even when the restrictions were relaxed, there were still significant limitations e.g. outside-only trading.

(3) The Applicant's annual accounts to 30.3.2019 record a profit after tax of £327k (on a turnover of £6.265m) and a balance sheet of £1.417m, including £139k cash at bank and in hand and £299k net current assets. **[200/201]**

(4) The accounts to 28.3.2020 show a £102k post-tax loss for the year (on £6.602m turnover) and the balance sheet standing at £1.315m with £0 cash and £242k net current assets. **[224/225]**

(5) The accounts ending 27.3.2021 disclose a £21k loss (on a greatly reduced turnover of just £821k), a balance sheet of £1.294m, with £2k cash and £352k current assets. **[254/255]**

(6) The accounts to 26.3.2022 speak to a £157k loss (on £3.65m turnover), a balance sheet of £1.138m, £339k cash and £169k current assets. **[287/288]**

(7) The notes to the 2022 financial statements record that the statements were prepared on a going concern basis which was considered by the directors to be appropriate. In addition, it was stated that consideration to the impact of Covid had been given and that it had been concluded that even in a severe but plausible downside scenario the group of which the Applicant forms part would have adequate cash resources and that its banking covenants would be met (i.e. that satisfactory forecasts had been made). **[318]**

(8) In relation to latest statements the auditors reported that the use of the going concern basis of accounting was appropriate and there were no material uncertainties casting significant doubt on the Applicant's ability to continue as a going concern for at least 12 months from when the financial statements were authorised for issue. **[310]**

(9) The 2022 accounts records that during the year to 3.2022 the Applicant acquired the assets of The Fox pub from a related party at market value. **[303]**

(10) The 2022 accounts also record that at the year end the Applicant was owed £205k by its parent company, Glendola Leisure (Holdings) Limited, the debt having reduced from £347k the previous year. **[347]** It has been reported in the press that the parent company has reported a sharp upturn in revenues and a return to a pre-tax profit of £2.4m, with £2.3m cash. **[58, paras.54 & 55; 425/426]**

(11) As regards the Applicant's trade at the Property itself:

a. Turnover reduced from £1.07m in the year to 3.2018 to £699k in 2020, £436k in 2021, before then starting to recover to £927k in 2022. **[19, para.23] & [21]**

b. A £179k loss was made in the year to 3.2020 (before the pandemic), the largest ever loss of £207k was seen in 2021, and a £70k loss was seen in 2022. **[21]**

c. The above figures exclude the protected rent debt.

d. The figures for the first 6 (out of 14) trading periods for the 2022/2023 year show £2.47m turnover and a net loss of £76k, taking account of the £165k Base Rent. **[308]**

(12) As at 11.11.2022 the Applicant is said to have £64k available cash. **[38, para.23]**

Decision

110. From the above I conclude:

(1) The Applicant's business at large was successful and profitable prior to the pandemic.

(2) The Applicant's business, both generally and also the specific trade at the Property, was undoubtedly materially impacted by the pandemic.

(3) Nonetheless, at all times the Applicant has been, and remains, operated as a going concern.

(4) Further, it is evident that the business is capable of bearing financial losses.

(5) The Applicant's turnover has bounced back since the nadir of the pandemic and continues to improve, and hence the signs are encouraging for a return to the former success of the business.

(6) That said, trade at the Property has yet to return to a profit (based on the latest figures produced by the Applicant).

(7) The Applicant has failed to present evidence of its performance in 2022/2023 generally; it has presented only figures in relation to the Property. This is a partial picture. It means that assessment of the viability of the Applicant's overall business (which I consider is what CRCA requires: see s.16) is heavily constrained.

(8) The absence of any financial forecasts, duly substantiated with reasons and explanations, is also unhelpful, although the Applicant says that it does not make such forecasts, even though the group plainly does (as per the accounts) – but I must work with what I have.

(9) The reported currently available and very limited cash reserve is not substantiated by documentary evidence, and the drop from the £339k in paragraph 109(6) above is not explained by the Applicant.

(10) Although the Applicant maintains that (without borrowing more money, a possibility which I accept must be disregarded under CRCA, s.16(3(a)), it could not pay the £163k protected rent debt in full without completing depleting its cash reserves **[38, para.23]**, it fails to explain how it could nonetheless afford to pay the £93k it proposes to pay. In this regard I do not conceive that the Applicant has made a proposal which it believes will materially undermine its own viability.

111. By CRCA s.16(1), in assessing the Applicant's viability I must have regard, so far as known, to:

(1) Its assets and liabilities.

(2) The previous rental payments made under the tenancy.

(3) The impact on coronavirus on the business.

(4) Any other information relating to its financial position that I consider appropriate.

112. Points (1) & (3) are addressed above. As to (2), the Applicant has paid all the rent in respect of the Property except the £163k protected rent debt (and, possibly, the balance of the rent due for August 2021 – but I do not consider this to be material in the overall scheme of things).

113. In my opinion, in all the circumstances not only is the Applicant currently viable but also its viability will not be undermined if it is required to pay the £163k debt in full, at least if (as the Respondent proposes) some considerable time to pay the same is given.

114. My reasons for this conclusion are:

(1) The financial facts, figures, review and analysis outlined above.

(2) The historical performance of the Applicant and the marked improvement in the Applicant's fortunes since the height of the pandemic.

(3) The fact that there have been no coronavirus restrictions in the last year, something which can only to serve to present more favourable trading conditions for the Applicant.

(4) The fact that in all the circumstances there is no reason to believe that the Applicant's overall business will not return to profitability in the next year, such renewed profitability enabling it to fund repayment of the debt.

(5) The directors and auditors of the Applicant have consistently regarded it as a going concern, without any stated qualification, and there is no reason to imagine that in this regard account was not had to the Respondent's claim (even though the same has been disputed).

(6) The fact that, despite being then loss-making, the Applicant felt able to purchase another pub at market value in the year to 3.2022; this amply demonstrates a confidence in the business's ability to thrive and expand.

(7) There is every reason to believe that the Applicant will be repaid the £205k which it is owed by its parent company (which debt is repayable within 1 year of the 2022 accounts: **[288, 304]**) in timely fashion, especially given the return to profitability of the parent and the fact that the debt was reduced last year.

(8) It is to be inferred that – despite the apparently heavily depleted cash reserves – the Applicant believes that its business can sustain a payment of £93k towards the £163k protected rent debt over the next 2 years without undermining its viability, and on the material before me there is no basis on which to conclude that payment of the balancing £70,125 on the same basis would be the straw that would break the camel's back so far as the Applicant's viability is concerned. Repaying the same over 24 instalments would see the Applicant have to find an additional £2,921.88 per month. In all the circumstances I am satisfied that it will be able to do so without its business being put at risk (or it having to resort to additional borrowing).

115. In the light of the above conclusion, I conclude that:

(1) The Applicant's proposal is not consistent with the s.15 principles because: (a) payment of the protected rent debt in full (over time) would not jeopardise the viability of the Applicant's business; (b) relief from payment of the £70,125 is not necessary to preserve such viability; (c) in the circumstances the grant of such relief would conflict with the principle in s.15(1)(b) that the Applicant should meet its obligations as regards the payment of protected rent in full, where (as here) that is not inconsistent with the preservation of its viability.

(2) The Respondent's proposal is consistent with the s.15 principles because by deferring the payment of the total £163k debt by instalments over 2 years the Applicant will be able to repay the protected rent debt slowly and steadily, and the Applicant will likely be able to afford this without being subjected to an undue and unmanageable financial burden which would imperil the viability of its business.

116. Consequently, by CRCA s.14(3)(b) I am required to make the award sought by the Respondent in its final proposal. I do so below.

Conclusion

117. For the reasons given above I determine the matter of relief from payment under CRCA s.14 by making an award (below) which gives the Applicant relief from payment of the protected rent debt in the following manner and on the following terms:

(1) The Applicant shall be given time to pay the £163,247.23 debt, which shall be paid to the Respondent by monthly instalments as follows:

a. £6,801.97 shall be paid on 3 April 2023;

b. £6,801.97 shall be paid on the first working day of each month from May 2023 to February 2025 inclusive (22 instalments); and

c. £6,801.92 shall be paid on 3 March 2025.

(2) Any interest otherwise payable under the terms of the Lease in relation to the debt shall be reduced to zero, provided that each instalment is paid on time.

Arbitration fees

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

119. In this case neither party has made any specific representations in relation to the arbitration fees. In view of (a) the mandated default position, (b) the absence of any invitation to depart therefrom, and (c) the fact that I do not believe that CRCA s.19 envisages a 'costs following the event' approach (for that would be inconsistent with the default position and, if such an approach had been intended, the statute would clearly have so provided), I am *provisionally* minded to make an award in respect of half of the arbitration fees.

120. However, it is appropriate to give the parties an opportunity to address the particular issue, if they wish. Accordingly I direct that if either party wishes to make representations in support of a different award in relation to the arbitration fees, they must do so by 4pm on 15.3.2023.

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

Costs

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

Publication

123. Pursuant to CRCA s.18, this Award must be published. I intend to publish it on the FCA website. I am of the *provisional* view that this Award contains no

commercial information which must be excluded under s.18(3). Not only is the majority of the financial information in this award publicly available but also I do not conceive that the information can harm, let alone significantly harm, the legitimate interest of either party. Therefore, I shall publish this Award in full on the FCA website unless either party makes representations to the contrary by 4pm on 15.3.2023. If any such representations are made, I will consider them before publishing the award.

Disposition

124. I hereby award and direct as follows:

The Applicant is given relief from payment of the protected rent debt in the following manner and on the following terms:

(1) The Applicant shall be given time to pay the £163,247.23 debt, which shall be paid to the Respondent by monthly instalments as follows:

a. £6,801.97 shall be paid on 3 April 2023;

b. £6,801.97 shall be paid on the first working day of each month from May 2023 to February 2025 inclusive (22 instalments); and

c. £6,801.92 shall be paid on 3 March 2025.

(2) Any interest otherwise payable under the terms of the Lease in relation to the debt shall be reduced to zero, provided that each instalment is paid on time.

Seat of the arbitration

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

Date of the award

126. This Award is made by me, Martin Dray FCIArb, this Monday 13.3.2023.

Signature

Martin Dray FCIArb