FALCON CHAMBERS ARBITRATION

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

Between

TPIF (PORTFOLIO NO.1) GP LLP

TPIF (PORTFOLIO NO.1) NOMINEE LIMITED

Applicants

and

NUFFIELD HEALTH

Respondent

FURTHER AWARD

Decision and reasons

1. This Further Award follows and is supplemental to my Award dated 5.10.2022. It concerns liability to pay the arbitration fees pursuant to CRCA s.19.

2. In paragraphs 97 to 100 of my earlier Award I set out my provisional view in relation to this issue but I invited representations from the parties.

3. The Applicants made representations on 7.10.2022. Those representations can be summarised as a contention that the Respondent should bear the arbitration

fees in full on the basis of its conduct, specifically its failure to engage at any stage of the CRCA process (before and during the arbitration). It is the Applicants' case that the Respondent's disregard of correspondence etc. and its refusal to engage caused the Applicant unnecessarily to incur the arbitration fees.

4. The Respondent, true to its form throughout, has not made any representations.

5. CRCA s.19 provides that the default position is that the arbitration fees are to be split 50/50 (subsection (5)) but that the arbitrator may make a different award if they consider it more appropriate in all the circumstances of the case (subsection (6)).

6. As set out below, the Applicant has persuaded me to revise my provisional view.

7. This is not a case where the Respondent reasonably engaged with the CRCA process and the arbitration but was unsuccessful. In such a scenario it might very well be that the default position would hold good, defeat not necessarily being a sufficient ground to displace the prima facie sharing of the arbitration fees.

8. In this case I regard the Respondent as unreasonably having failed to engage at any stage and thus having effectively bound the Applicant to pursue what was, in the event, a one-sided arbitration.

9. Although a respondent is not compelled to engage, nonetheless it is tolerably clear that CRCA envisages and distinctly encourages such participation. For instance, s.10 requires notice of intention to make a reference to arbitration to be given before the arbitration is commenced and provides for the respondent to have an opportunity to submit a response. Plainly, if a respondent is not minded to contest the matter, it can (and I suggest should properly) at that stage notify the prospective applicant that it agrees its proposal as to the resolution of the matter of relief from payment of the protected rent debt. That will obviate any need for arbitration.

10. Further, CRCA s.11 provides that, in the context of a commenced arbitration, the respondent may put forward a formal proposal in response to that of the applicant. Again, this presents a respondent with a ready chance to raise the white flag if, on reflection, it considers that it cannot sensibly resist the applicant's case. Such a course, if taken, will no doubt lead to an agreed award on appropriate terms, pursuant to the Arbitration Act 1996, s.51, with the likely consequence of reducing the arbitration fees (given the time saved in relation to disposal of the matter).

11. As it is, however, in this case the Respondent simply buried its head in the sand and adopted a policy of radio silence. Despite several opportunities and invitations to engage, it did nothing at all.

12. Such recalcitrance left the Applicants with no option (unless they wished simply to await for the expiry of the CRCA s.9(2) statutory period for making a reference to arbitration, which I do not consider they were obliged to do) to refer the dispute to arbitration and, in the process, to incur (in the first instance) the arbitration fees.

13. The Respondent could have avoided this waste of time and expense altogether if only it had engaged in a timely fashion and confirmed that it did not contest the matter.

14. For completeness, I have considered whether it might be argued (although, of course, nothing has actually been said by the Respondent) that the Respondent was entitled to put the Applicants to proof and to require them to justify the refusal of relief from payment of the protected rent debt under CRCA. In my view, there is nothing in this point. Quite apart from anything else, in the absence of any positive (and evidenced) claim for relief from payment being advanced by the Respondent, there was no realistic prospect of a conclusion other than one in the Applicants' favour, especially given that the only material relating to the viability of the Respondent's business which was available to the Applicants and me was the

Respondent's 2020 Annual Report. The only conclusions that could possibly have been drawn therefrom, certainly in the absence of any other input from the Respondent, were either that its business is not and would not be viable (a conclusion which would have led to the dismissal of the reference, rendering the protected rent debt enforceable) or (as I found) that its business is indeed viable and that it can afford to pay the protected rent debt (this leading to the refusal of the relief, and likewise rendering the protected rent debt enforceable).

15. Accordingly, I consider that the Respondent's lack of engagement effectively forced the Applicants to undertake a needless exercise; it required the Applicants to go through an arbitration process, shouldering the attendant arbitration fees, really just for the sake of it. Unless the Respondent engaged in a meaningful fashion, the whole process was inevitably going to result in victory for the Applicants (in one form or another), albeit after delay and expense.

16. In my judgment, the Respondent's conduct was manifestly unreasonable and contrary to the spirit and intent of CRCA, which (as noted above) is aimed at affording the parties the chance to resolve their differences, with determination by arbitration only being required if dialogue cannot produce a consensus.

17. In the circumstances I believe that in the circumstances of this case it is appropriate to depart from the default position under CRCA s.19(5) and that, pursuant to CRCA s.19(6), it is appropriate to reflect the Respondent's thoroughly unhelpful behaviour and its consequences by directing that it reimburse the Applicants the totality of the arbitration fees paid by the Applicants under s.19(4), namely £6,100 plus VAT. I so award.

Publication

18. Pursuant to CRCA s.18, this Further Award must be published. There is no confidential information herein, and my earlier Award has already been published

(in the absence of any representations from the Respondent). I shall thus publish this Further Award on the FCA website.

Disposition

19. I hereby award and direct as follows:

The Respondent is to reimburse the Applicants for the totality of the arbitration fees paid by the Applicants, namely £6,100 plus VAT, by 4pm on 2nd November 2022.

Seat of the arbitration

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

Date of the award

21. This Further Award is made by me, Martin Dray FCIArb, this 19th day of October 2022.

Signature

Martin Dray FCIArb