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LIKE BUSES… NOTHING FOR MONTHS THEN THREE COVID ARREARS ARBITRATION AWARDS ALL AT ONCE

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SUMMARY

Falcon Chambers Arbitration has recently published three awards under the Commercial Rent (Coronavirus) Act 2022, that provide welcome guidance on the interpretation and application of the 2022 Act.

Introduction

In a victory for landlords, the first known Arbitration Award under the Commercial Rent (Coronavirus) Act 2022 refused to grant the tenant any relief from its £450,000 arrears relating to its head-office premises. In dismissing the tenant's referral to arbitration under the 2022 Act, Gary Cowen QC determined that the rent from which the tenant claimed relief was not a protected rent debt under the 2022 Act, because the premises to which the arrears related were not subject to a closure requirement, so the tenant had not been adversely affected by coronavirus.

The second Award, of Stephanie Tozer QC, concerned a procedural matter, the key takeaway being that whilst an Arbitrator is likely to permit amendments to correct clerical/arithmetic/input errors in parties' initial formal proposals, more substantive amendments concerning methodology or reasoning will not be permitted, and will instead have to be addressed afresh in the second round of proposals.

Finally, in the third most recent Award, the fact that the tenant had entered into voluntary liquidation shortly after the landlord had referred a protected rent debt to arbitration did not impact or disrupt the arbitration process. The Arbitrator therefore proceeded to an award, which required him to first determine whether the dispute was eligible for the grant of relief (before going on to consider how to resolve the matter of relief). One of the eligibility conditions is that the tenant's business is viable (or could become viable if awarded relief from payment of the rent debt). In this case, Martin Dray determined that the tenant's business was not viable and would not become viable even if

relief from payment of the c.£81,000 rent debt was awarded. The dispute was therefore not eligible for the grant of relief, and was consequently dismissed.

This article will focus on the first Award, as it concerns an issue that many have been grappling with since the commencement of the arbitration scheme under the 2022 Act.

Facts and arguments

The tenant, Signet Trading Ltd, operates around 300 retail stores under the H Samuel and Ernest Jones brands, but the Arbitration related solely to its four-storey head office premises in Hertfordshire.

On 23 March 2020, as a result of the pandemic, all of its 300-plus retail stores were closed, and all but two employees working from its head office were forced to work from home.

Signet argued that the rent that fell due during the pandemic in respect of its head office premises was a "protected rent debt" under the 2022 Act, in respect of which relief could be sought, on the following basis:

- Lockdown Regulations forced all of its retail stores to close, and the vast majority of its head office employees to work from home
- Even though office premises were not forced to close, the business it carried on from its head office premises supported its retail business so in effect was also subject to a closure requirement
- The tenant's business was therefore adversely affected by coronavirus during the relevant period

The Determination

The Arbitrator disagreed with the tenant, determining that the 2022 Act is concerned only with the rent attributable to the specific premises demised by the business tenancy, in this case the tenant's head office premises. A protected rent debt only arises if a tenant can show that a closure requirement affected the whole or part of the business carried on at or from the specific premises in respect of which a relief from payment is sought.

The business carried on by the tenant at its head office premises was not a retail shop that was forced to close. Even though most of the head office staff were forced to work from home, the lockdown Regulations did not require the closure of the premises themselves, so the tenant's business that it operated specifically from the premises could not be said to be adversely affected by coronavirus. The arrears that had accrued in respect of the head office premises were therefore not considered to be protected rent debt in respect of which relief from payment could be sought under the 2022 Act.

The Arbitrator dismissed the reference and expressed a provisional view that the tenant, being the losing party, should pay the landlord's costs.

Comment

This Award provides useful clarity on the position concerning head office premises of retail businesses. There is no question that many retail head office businesses were impacted by the pandemic, as all of their (non-essential) retail shops were forced to close and offices were largely empty during lockdown periods when individuals were forced to stay at home with limited exceptions.

However, the 2022 Act requires a narrow consideration by the Arbitrator of the business carried on specifically at the premises to which the rent arrears relate. If neither the tenant's business carried on at the premises, nor the type of premises were restricted or forced to close, then even though that business may have been indirectly impacted by the forced closure of other related businesses/premises, it will not be considered to have been "adversely affected by coronavirus" for the purpose of the 2022 Act, and it cannot seek relief from payment of rent arrears that accrued during the pandemic.

It will be for the shops or business that were forced by lockdown Regulations to close to seek relief from payment of the rent that accrued in respect of their individual retail premises.

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