

Covid rent arbitration: A summary of recent decisions



The ability to commence an arbitration under the Commercial Rent (Coronavirus) Act 2022 (the Act) has now passed. However a flurry of referrals immediately prior to the expiry of this deadline means there are a significant number of ongoing arbitrations under the Act. With this in mind here is a summary of some recently published arbitration decisions that may be of interest.

Recent arbitration decisions

Signet Trading Limited & (1) Fprop Offices (Nominee) 4 Limited (2) Fprop Offices (Nominee) 5 Limited

The tenant traded in the sale of jewellery through retail stores which were mandated to be closed as non-essential retail premises. These retail tenancies would be considered adversely affected by Covid due to the mandated closure. This arbitration however concerned the tenant's office premises.

The arbitrator determined that while the tenant's retail stores were required to close and that had an impact on the tenant's overall business, the Act required the tenancy relevant to the arbitration to be adversely affected. The mandated closure did not impact on office space and as a result the subject premises would not qualify for relief.

KXDNA Limited & 60 SA Limited

The premises were used as a gym and health club. However the named tenant was a dormant company. The business being run from the premises was by a connected company. Given the named tenant was not running



the business was it permissible for the arbitrator to consider the financial standing of the actual business operator under the Act?

The arbitrator was not required to determine this as the parties agreed she could consider the financial standing of the business operator and the group as a whole. In her decision the arbitrator stated that if she were asked to make a determination on this point she doubted whether she could look beyond the business and financial standing of the named tenant.

Horsham District Council & Bills Restaurants Limited

The Act requires the parties to make formal 'Proposals' which set out their position on what relief, if any, they seek. The arbitrator confirmed the process to follow when considering competing Proposals: Each Proposal has to be considered in order to assess whether it is consistent with the 'Principles' in the Act; namely that awards should be aimed at preserving the business of a tenant but should go no further than necessary, and, relief for preservation aside, the tenant must pay rent and other charges as per its tenancy.

If only one Proposal is consistent with the Principles, the arbitrator must adopt it as the decision. If both parties' Proposals are consistent, the arbitrator must adopt that which is most consistent with the Principles. It is only if neither are consistent that the arbitrator can substitute their own decision.

CRI & RHL Realisations 2022 Limited

The landlord commenced an arbitration under the Act. The tenant was moved to liquidation and did not actively participate. The arbitrator had to consider the gateway criteria of viability.

To qualify for arbitration under the Act the tenant must either be a viable business or, if not, would become viable with the benefit of relief. Viability is judged in the present day. As the tenant was in liquidation when the question fell to be considered, it was not at that time viable and no amount of relief would change that. Consequently the gateway criteria were not satisfied and no determination under the Act could be made.

TPIF & Nuffield Health

Each party bears their own costs in an arbitration under the Act. As to the arbitrator's fees the starting point is that they are borne equally. However the arbitrator retains a discretion to require his/her/their fees to be paid in different proportions. In a case where the Respondent tenant was found to have failed to engage, the arbitrator felt this to be conduct that was 'thoroughly unhelpful' and contrary to the spirit of the Act. As a result he arbitrator decided that the tenant should bear 100% of his fees.

Stratford City Shopping Centre & Newsprint (Stratford) Limited

While the Respondent tenant had participated in the arbitration the arbitrator raised concerns over the way in which tenant had conducted itself in the proceedings. Citing delays in the process, the raising of an argument which was rejected and the need for additional procedural orders due to a failure to fully engage, the arbitrator decided that this conduct warranted the tenant meeting 75% of the arbitrator's fees, notwithstanding it secured an element of relief in the proceedings.

What happens now?

There will no doubt be more decisions published which will further develop our understanding of the arbitration process under the Act. The clear message from the Government, both within the wording of the Act itself and the Codes and guidance notes issued on the question of Covid arrears under commercial leases, has consistently



been one whereby tenants in legitimate need should be given relief but that only so far as necessary and that in all other cases those tenants that can pay should pay. The reassuring news for anyone involved in such proceedings is that, in the main, the decision we have seen so far reflect this principle in seeking to strike a fair balance between landlords and tenants of commercial premises.

Written by



[Nitej Davda](#)

Partner