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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

No. BL-2023-001433

[2024] EWHC 748 (Ch)

7 Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 22 February 2024

IN THE MATTER OF **THE COMMERCIAL RENT (CORONAVIRUS) ACT 2022**
AND
IN THE MATTER OF **THE ARBITRATION ACT 1996**

Before:

MR JUSTICE FAN COURT

B E T W E E N :

GREGARIOUS LIMITED

Claimant

- and -

WESTGROUP INVESTMENT LIMITED

Defendant

THE CLAIMANT appeared by Mr A. Thomas, a director.

MISS A HAWKER (instructed by Ellisons Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

(Via Zoom)

MR JUSTICE FAN COURT:

- 1 On 4 September 2023, Mr Simon Gouldbourn BSc MRICS ACI Arb published an arbitration award in which he decided that he had no jurisdiction to determine a reference under s. 10 of the Commercial Rent (Coronavirus) Act 2022 (“the 2022 Act”). The 2022 Act creates a short opportunity of six months’ duration, starting on 24 March 2022, for a party to a commercial lease to apply for relief (or determination of the amount of relief) in relation to what the Act calls a “protected rent debt”. This, in brief summary, is rent payable under the commercial lease during a period when the tenant’s business was adversely affected by a Coronavirus closure requirement.
- 2 The arbitrator decided he had no jurisdiction because the application reference was not made in accordance with s. 10 of the 2022 Act. That provides, so far as relevant:

“(1) Before making a reference to arbitration:

- (a) the tenant or landlord must notify the other party (‘the respondent’) of their intention to make a reference, and
- (b) the respondent may, within 14 days of receipt of the notification under paragraph (a) submit a response.

(2) A reference to arbitration must not be made before:

- (a) the end of the period of 14 days after the day on which the response under subsection (1)(b) is received, or
- (b) if no such response is received, the end of the period of 28 days beginning with the day on which the notification under subsection (1)(a) is served.

(3) A reference to arbitration may not be made, an arbitrator may not be appointed, and no formal proposal under section 11(2) or (4) may be made, where the tenant that owes a protected rent debt is subject to one of the following...”

and there is then set out various forms of insolvency arrangement or process.

- 3 The period during which a reference to arbitration may be made is set by s. 9(2) of the 2022 Act, which states:

“A reference to arbitration may be made by either the tenant or the landlord within the period of six months beginning with the day on which this Act is passed.”

The 2022 Act was passed on 23 March 2022.

- 4 The reference by the claimant, Gregarious Limited, was made on 22 September 2022 but that was only nine days after the one notice of intention to refer that the arbitrator found to have been validly served on the defendant landlord. There had been previous attempts by the tenant to notify, which the arbitrator found to be invalid, and there was no challenge to his findings in that regard in the original claim form.

- 5 One central question raised in these proceedings is whether a reference to arbitration can validly be made before the time specified in s.10(2) (at least 14 days) has elapsed from the giving of the notice. The arbitrator held that it could not and that the Act mandated a minimum period of 14 days – but in the events that happened in this case, 28 days – between the giving of the notice and the making of the reference.
- 6 The claimant tenant’s difficulties do not end there. The Arbitration Act 1996 requires any challenge to a decision on jurisdiction under s. 67 of that Act to be brought within 28 days of the award. That period expired on 2 October 2023 but the arbitration claim form was not issued until 27 October 2023, so the claimant requires a significant extension of time (in the context of arbitration claims) for bringing this claim.
- 7 The claim form asks the court to determine that the arbitrator had jurisdiction on the basis that the notice dated 13 September 2022 was a valid notice of intention to refer, partly on the basis that that notice was acknowledged by the defendant landlord on 21 September 2022 and that it was therefore a valid notification in view of that acknowledgement, and further that “time should be extended pursuant to s. 12(3)(b) of the Arbitration Act for service of the letter dated 13 September 2022.” This was on the basis that the time provisions of the 2022 Act are a provision barring a claim unless some step is taken to start arbitration proceedings within a specified time.
- 8 Under s. 12 of the Arbitration Act, the claimant tenant sought an extension of time on the basis that the conduct of the other party, that is to say the defendant landlord, made it unjust to hold the claimant to the strict terms of the contractual provision, under sub-section (3)(b) of s. 12.
- 9 Having been served with the claim form, the defendant landlord promptly on 6 November 2023 to strike it out or, alternatively, for summary judgment. The application was made on various grounds, including that the claim had been issued against the wrong party, but also that no proper basis for an extension of time for making the claim under rule 9 of Part 62 of the Civil Procedure Rules was set out in the claim, that there was no ability to override the time limits in the 2022 Act for giving notice and making a valid reference, and, further, that s. 12(3)(b) of the Arbitration Act “did not arise” on the facts of this case.
- 10 Having considered the matter on the papers, I decided that the claim was bound to fail and struck it out. In my order made on 7 December 2023, I gave my reasons as follows:

“No proper evidential basis is advanced for the extension of time that the claimant seeks. The length of delay is not trivial in terms of an arbitration application and the extension sought needs to be justified on proper grounds if it is to be granted. In any event, the substantive relief sought, namely an extension of time for the commencement of the arbitral proceedings, cannot be granted. Section 12 of the Arbitration Act 1996 does not apply to statutory arbitrations (see s. 97) and that section would not in any event confer power to reduce the period of notice required to be given under s. 10 of the Commercial Rent (Coronavirus) Act 2022. If an application is made under para. 3 below, the claimant will be expected to explain how it can succeed on the claim and the defendant’s application will be considered at that stage.”

- 11 Paragraph 3 notified the claimant that since the order was made of the court's own motion, the claimant was entitled to apply within 14 days to set aside or vary the order made. The claimant did so on 20 December 2023.
- 12 The evidence relied on in the claim form contends, simply, that the arbitrator did have jurisdiction, and said that a witness statement in support of this application, and specifically to respond to the requirements set out in para. 1 of the Order, will be lodged on Friday, 22 December 2023. No such witness statement was filed. Indeed, no witness statement was filed or served before 5.30 a.m. today. The hearing today was a remote hearing fixed for the convenience of Mr Anthony Thomas, the director of the claimant company who represents the claimant today.
- 13 At the hearing it became apparent, on hearing Mr Thomas, that the claimant wanted to pursue a different case. I indicated, after hearing Mr Thomas's argument and a response from Miss Hawker, who is instructed on behalf of the defendant company, that I would not give permission to amend the claim form to raise that further case. I will deal with my reasons for that after dealing first with the claim as pleaded. As to that, the claimant argued that the period of delay in issuing the arbitration claim was excusable and various reasons were given to me orally as to why the defendant company was quite busy at the time, that is to say in the period of 28 days after the award of the arbitrator was published. At almost exactly the same time, forfeiture proceedings in the County Court, in which the claimant was represented by counsel, had concluded with an order for relief against forfeiture conditional on payment of arrears in the usual way within a period of 28 days.
- 14 Mr Thomas explained to me that the claimant company also has six other properties which are involved in similar proceedings relating to protected rent debts, or other litigation arising from non-payment of rent during the Coronavirus lockdown period, and also that he is a director of other companies who have a number of similar claims. He said that as a litigant in person he was not conversant with the 28-day time limit for bringing an arbitration claim and that he made it as soon as he could. He said his focus at the time was very much on seeking to comply with the terms on which relief against forfeiture was granted, which obviously would have required raising substantial sums of money to pay off the rent arrears. However, there was no detailed evidence or indeed any evidence put forward, even at the very late stage this morning, which explained why it was that someone on behalf of the claimant company was unable, within 28 days, to take the step of issuing the claim form. The position, therefore, is that the claimant was unaware of the time limit, and Mr Thomas asks for indulgence in that respect on the basis that he is a litigant in person.
- 15 As to the time limits in the 2022 Act, Mr Thomas argued that the Act contains sufficient leeway for non-compliance with the time limits and for an arbitrator and the court to be able to reach a reasonable conclusion on the facts of an individual case. He said that was particularly so if the landlord knows that the tenant wants to make a reference without having been served with a statutory notice. In those circumstances, non-compliance with the minimum notice period under the Act should not matter so much. No argument based on s. 12 of the Arbitration Act was pursued, understandably, in view of the fact that its provisions are excluded in the case of statutory arbitrations, by s. 97 of the same Act.
- 16 In my order of 7 December 2023, I ultimately refused an extension of time for making the pleaded claim on the basis that it was hopeless. The first question, therefore, is whether, as a matter of construction of s. 10 of the 2022 Act, read in its context, a reference to arbitration can be made before the period of notice required by the Act has expired. The defendant did not in this case respond to the notice of 13 September 2022, so the minimum

period specified by s. 10(2) of the Act was 28 days from that date, i.e. 10 October 2022, by which date of course the window for making references under s. 9 of the Act had already expired.

- 17 The purpose of the notice required by s. 10 of the Act is to give the likely respondent to a reference a short period in which to send a considered response: the Act gives the respondent 14 days for that purpose. But then there is contemplated a further period of at least 14 days before the applicant may refer the matter to arbitration. That is no doubt to allow for sensible negotiations to take place, which may potentially avoid the need for a reference to an arbitrator and the incurring of further costs.
- 18 The time sequence contemplated by the Act also needs to take account of what s. 11 of the Act provides, which is that the reference, when it is made, has to include the claimant's formal proposal for mitigation of the protected rent debt, supported by evidence, and that the respondent then has only 14 days in which to put forward its response supported by evidence (though the parties or the arbitrator can agree to extend the time limit). The evidence required as to the viability of the business and the impact of lockdown may be complex. Further, under s. 14(4) of the Act, if a respondent does not put in a formal response within that time, the arbitrator is then required to make an award in accordance with the claimant's proposal unless it is inconsistent with certain basic principles set out in s. 15 of the Act.
- 19 The 2022 Act, it seems to me, therefore creates a tight timeframe within which the respondent is expected to act, either to avoid a reference by negotiating and reaching an agreement, or otherwise to prepare and submit an evidenced case in response to the claimant's proposal. If the claimant were able to refer the matter to arbitration without waiting at least 14 or up to 28 days after giving notice, the respondent could be deprived of time that it needed to consider its position, negotiate and prepare evidence for a response.
- 20 The effect of s. 10 is that a reference, as the section says, must not be made before the minimum period has expired. The side note to subsection 10 is "Requirements for making a reference to arbitration", which gives some clue as to the nature of the content. The use of the imperative in s. 10(2) also suggests that the requirement specified in it is indeed a strict requirement of a valid reference, but the language used does not necessarily compel that conclusion (see *R v Soneji* [2006] 1 AC 340 and the many decisions following it applying the principles on statutory construction that are stated). The first question to ask is whether the Act specifies the consequence of failing to comply with a requirement. If it does, that is conclusive, but the 2022 Act does not. It does not say that any application made too soon is invalid. That being so, it is a matter of construction of the statutory provision in the context and scheme of the Act as a whole whether Parliament intended the consequence of invalidity to follow in all cases or whether non-compliance would not always invalidate the reference.
- 21 In support of concluding that there ought not to be automatic invalidation, it can be said that if the s.10(2) time limit is strict it has the effect of reducing significantly the period of six months during which a reference can be made, because effectively proceedings towards starting a reference have to be begun at least 28 days before the end of the six-month period. It can also be said that s. 11(6) of the Act allows the parties to extend the time limits for a respondent's counter-proposal and any subsequent steps (or the arbitrator to grant an extension) so that loss of time for the respondent under s. 10, before the reference is made, could be compensated by extra time afterwards. On the other hand, it seems to me to be

notable that the Act does not specify that the time restrictions in s. 10 can be varied by agreement or by an arbitrator.

- 22 In my judgment, it is clear in this case, on the true construction of the relevant statutory provision in the context of the scheme as a whole, that the time restrictions in s. 9(2) and s. 10(2) are meant to be strictly complied with, and that if they are not a reference is invalid. It must be clear whether a reference is or is not a valid reference at the time when it is issued, as the parties immediately start to incur substantial costs as a result. The Act provides a tight and fixed timescale for the procedure of notice, reference and proposals which could be seriously compromised, in terms of its fairness, if a claimant could effectively disregard the need for a period of time to elapse after their notice under s. 10 before referring the matter to arbitration. There is nothing in Mr Thomas's reliance on the defendant having acknowledged receipt of the 13 September notice before the reference was made: there was no acknowledgement or representation that the notice (or a reference made in reliance on it) was treated as being valid.
- 23 In my judgment, there is simply no warrant for implying into the subsection any leeway in a case where a respondent happens to know by other means that the claimant wants to refer to arbitration. However reasonable it might be, on particular facts, if the Act had provided some power of reasonable dispensation, the Act does not do so. It requires a formal notice to be given which has particular consequences under the Act.
- 24 That conclusion means that the notice dated 13 September 2022 was served too late to enable a valid reference to be made. The reference in fact made on 22 September 2022 was therefore one that, by the terms of the Act, "must not" be made. In my judgment, that means that the reference is invalid as a consequence of the correct interpretation of the Act. The claim is therefore bound to fail and for that reason I will not set aside my refusal on paper to grant an extension of time.
- 25 Even if there had been an arguable case on the correct interpretation of s. 10 of the Act, I would not, on the facts of this case, have granted an extension of time. In the case of *Aoot Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128, Colman J set out the relevant considerations on an application to extend time for an arbitration claim as follows:
- (i) "the length of the delay;
 - (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
 - (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
 - (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
 - (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have;
 - (vi) the strength of the application;
 - (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

- 26 Twenty-five days of delay in issuing the claim form is a significant delay in terms of an arbitration claim and, as I have said, there is no evidence before me that explains with any particularity why it was not possible to issue the arbitration claim on time and why it then took a further 25 days. As I have summarised, Mr Thomas's case is really that he was unaware of the need to comply with the deadline. While the court does its best to afford some leeway to litigants in person, the claimant company is a company that had recourse to (and could afford) legal representation at exactly the same time as the award was published. This is not, therefore, the case of a claimant that was unable to obtain advice about such matters.
- 27 I cannot accept that the fact that, in relation to this claim, the claimant company was acting "in person" is a sufficient justification for an extension of time, nor is the fact that the claimant company's director was unaware of the time limit. I can understand that Mr Thomas was busy at about this time with other matters, including the affairs of several other companies with similar issues, though this was only advanced by way of submission and without any detailed evidence. But the fact of a company's director being busy is not in itself an adequate basis on which to extend the time in this case.
- 28 The delay was not, despite what Mr Thomas says, contributed to in any relevant sense by the conduct of the defendant in pursuing forfeiture proceedings, or in any way by the arbitrator. For the reasons I have given, even if I considered that the argument in the claim form was sufficiently arguable to go forward to a full hearing, I would not consider it to be a strong case that justified an extension of time. It is unfortunate for the claimant that it has lost the opportunity to pursue its case in bringing a claim before the court in relation to the arbitration but, in any event, for the reasons that I have given, the claim as pleaded is hopeless.
- 29 I turn, finally, to the new case that Mr Thomas sought to put forward. This was that the arbitrator was wrong to conclude that the letter of 23 August 2022, which he said it was common ground had been sent to the wrong address for the landlord, was indeed sent to the wrong address and was invalid. (If the 23 August 2022 letter was validly served, the reference to arbitration on 22 September 2022 would have been valid.) It emerged that the argument Mr Thomas wanted to advance was based on the service provisions in clause 56 of the lease. I am far from persuaded that those provisions apply to service of a statutory notice as opposed to a notice under the terms of the lease. But, in any event, Mr Thomas accepted that that clause was not referred to and the argument was not advanced before the arbitrator. I cannot therefore see how the arbitrator can be said to have been wrong in that regard in reaching the conclusion that he did.
- 30 Mr Thomas further sought to rely on an email of 9 September 2022 which he says was in the material supplied to the arbitrator but to which the arbitrator does not refer in his award; he refers instead to a separate email of 12 September 2022. Mr Thomas says that the arbitrator was wrong not to deal with the 9 September 2022 email. I doubt very much that there is a viable argument based on the email of 9 September 2022 because it did not attach a copy of the notice, unlike the email of 12 September 2022 that the arbitrator did refer to, and it does not purport to be a notice of intention to refer to arbitration. Nor was it given 28 days before the reference was made.
- 31 But these are arguments that have not to date been pleaded. They have substantial difficulties on the merits. No application was made in the light of my order of 7 December 2023 to amend the claim form, and no draft application to amend has been put before me. The effect is to raise a new and unpleaded case four months after the original claim form

was issued, which was itself 25 days out of time for making such a claim. There is no proper explanation for why an attempt to raise the new claim was not made until 5.30 a.m. this morning at the earliest, when it is referred to in Mr Thomas's witness statement, but in substance in the course of Mr Thomas's submissions to me.

- 32 The new argument raises issues about what was and what was not before the arbitrator and what was contained in submissions and, if permission to amend were granted, it would undoubtedly require me to adjourn this hearing to enable the respondent first to put in any relevant evidence in relation to the way that the matter was presented to the arbitrator and, secondly, to prepare submissions to deal with the point. It could not be just and in accordance with the overriding objective to allow at this stage, on such a late application, a case that would otherwise remain struck out to be given a new lease of life to allow a further argument to be pursued late at an adjourned hearing.
- 33 Those were the reasons, in a little more detail, why I indicated during the course of the hearing that I would not give permission for the amendment unless I concluded in any event that the existing pleaded case was sufficiently arguable and an extension of time should be granted for it to proceed as a full hearing on another date. For the reasons I have given, I have not so decided and, accordingly, the informal application to allow the claim form to be amended and the application to set aside my order of 7 December 2023 are dismissed.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.