

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

BETWEEN

**(1) MOHAMMED ABDULKUDDUS, (2) IBRAHIM KUZU, (3) AKIB HANIF
(APPLICANT)**

AND

**(1) SUNDESH KUMAR KUDHAIL, (2) SURINDER KUMAR KUDHAIL, (3)
RANJIT KIMAR KUDHAIL, (4) BALRAJ KUDHAIL
(RESPONDENTS)**

RELATING TO PREMISES KNOWN AS

95-96 WHITECHAPEL HIGH STREET, LONDON, E1 7RA

AWARD NO. 1

OF

ANDREW L CREASE FRICS FCIARB

MARCH 2023

BACKGROUND

1. The Applicant is the head lessee of 95-96 Whitechapel High Street, London, E1 7RA.
2. The Respondent is the freeholder of 95-96 Whitechapel High Street, London, E1 7RA.
3. The parties have been unable to agree the appropriate relief concerning rent arrears arising out of the Coronavirus pandemic.
4. Notice of intention to Arbitrate was served by the Applicant on the Respondent followed by an application to the RICS for the appointment of an Arbitrator.
5. I was approached to act under the Commercial Rent (Coronavirus) Act 2022 (henceforth referred to as the CRCA) and, after conducting conflict checks, indicated that I would be able to accept the appointment.
6. I was appointed as Arbitrator in this matter by the Royal Institution of Chartered Surveyors on 23rd November 2022.
7. I convened an initial meeting by Microsoft Teams on 28th November 2022 with the solicitor representatives of the parties. At that meeting it became apparent that the Respondent was challenging both jurisdiction and eligibility.
8. The parties did not agree to my appointing a legal assessor under Section 37 of the Arbitration Act 1996 (AA 1996).
9. Having discussed matters with the parties' representatives I issued my Directions No. 1 on 6th December 2022.

10. These Directions allowed for sequential written Representations.

PARTIES' REPRESENTATIVES

11. The Applicant is represented by Mr Wakil Ahmed (hereinafter referred to as WA).

12. The Respondent is represented by Ms Rachel Fitzgerald (henceforth referred to as RF).

13. For clarity, it is the Respondent who asserts that I have no jurisdiction and therefore in this Award they are the Applicant, but I have, for ease of reference, continued to refer to them as the Respondent.

14. I hereby publish this my Award No. 1 made this day in London, England.

MATTERS IN DISPUTE

15. Whilst RF states that this is a jurisdictional issue, the arguments of whether the applicant has a business tenancy and whether there is a protected rent debt appear to me to be ones of eligibility.

Is this Tenancy a Business Tenancy?

16. On reviewing the papers before me, the legal issue is centred around whether the applicant had a right under the CRCA to make a referral.

17. RF states that the Applicant does not have a business tenancy as defined under Section 23 of the Landlord and Tenant Act 1954 (LTA 1954).

18. RF states that the application to arbitrate was by the head lessee who holds the headlease of the whole building at 95-96 Whitechapel High Street, London, E1 7RA. This is registered at HM Land Registry under Title AGL285787.

19. RF points out that the Applicant under this reference is not in occupation of the restaurant on ground, first, part-second and basement, a demise which is held by way of a sub-lease under HM Land Registry AGL359688.
20. She further identifies Messrs Aquib Hannif (AH), Mohammed Abdulkuddus (MA) and Ibrahim Kuzu (IK), as the lessee of the headlease.
21. The sub-lease of the restaurant shows the landlords as MA and IK with Aldgate East Limited as lessee having taken an assignment from Clifton & Co Limited, with guarantors of Sherez Ahmed and AH.
22. The proprietor of the sub-lease now is Aldgate East Limited.
23. The other sub-lease covers part second, third and fourth floor and has all three of the headlease tenants, AH, MA and IK as landlords, and the tenant as Truk London Limited with guarantors of MA and IK. This has a Land Registry title of AGL478486.
24. RF goes on to state that the restaurant “which trades from the basement, ground, first and part second floors as ‘Big Moe’s Diner’ (which is referred to in the application to Arbitrate) is carried out in the demise of the restaurant sub-lease”. She states that whilst AH is one of the three individual tenants of the headlease, he is the sole director of Aldgate East Limited, the tenant of the restaurant sub-lease.
25. RF draws my attention to Section 13 (2) of the CRCA stating that under its terms I must dismiss the reference if the tenancy in question is not a business tenancy or there is no protected rent debt.
26. RF states that the headlease is not a business tenancy and that the rent owing under the headlease is not a protected rent debt.
27. On the issue of the definition of business tenancy, RF points me to sub-section 2(5) of the CRCA where it refers to a tenancy to which Part 2 of the LTA 1954 applies.

28. The definition in Section 23 of the LTA 1954 requires occupancy by the tenant.
29. RF states that this reference is made by the Applicant as tenant and the Respondent as landlord, therefore it must refer to the headlease as this is the only lease which they are both party to.
30. The rent receivable by the Respondent is from the headlease.
31. The Respondent does not receive rent under either of the sub-leases.
32. The headlease, RF says, is not a business tenancy under Sections 13(2)(b) of the CRCA as the Applicants, having sub-let, are not in occupation. In support of this she refers to Graysim Holdings Limited -v- P&O Property Holdings Limited 1996 AC329. Therefore she says, as the headlease is not one to which Part 2 of the LTA 1954 applies, I must, under Section 13(2) CRCA, make an Award dismissing the claim.
33. In reply, WA states that the facts stated by RF are largely agreed including that AH is the sole shareholder and director of Aldgate East Limited and MA as the sole shareholder of Truk London Ltd, at least until November 2021.
34. WA has a different interpretation of Section 23 of the LTA 1954, quoting Section 1(A)(a) and (b), 1(a) *for the carrying on of a business (a) by a company in which the tenant has a controlling interest, or (b) where the tenant is a company, by a person with a controlling interest in the company.*
35. He also states that the controlling interest is defined in Section 46(2) of the LTA 1954, as a person who has a controlling interest in a company if, had the individual been a company, the other company would have been a subsidiary under Section 1159 of the Companies Act.

36. WA says that Section 23 of the CRCA covers the situation where the tenant carries on a business as their company rather than in his own name. AH further states that Section 42 of the LTA 1954 further supports his view.
37. WA states his interpretation of the CRCA guidance to arbitrators and arbitral bodies (the guidance) beginning at Section 4.6, which he says, does not envisage a situation whereby the headleases and sub-leases involve the same individuals. He also interprets Section 4.8 as supporting his position.
38. He states that Section 4.6 envisages a “chain of tenancies” where claims would be passed up the line. He argues that if the sub-tenant were to apply to arbitrate against the headlease they would in fact be arbitrating against themselves. He submits that this is not how the CRCA 2022 envisaged the arbitration process occurring.
39. WA asks me to look behind the company structures. WA draws the distinction between occupation, use and possession which he says is supported by Hills (Patents) Limited -v- University College Hospital Board of Governors and is distinguishable from Graysim Holdings Limited quoted by RF.
40. WA asks me to take account of the Award of Gary Cohen KC of Falcon Chambers, in his Arbitration on Signet Trading Limited, which he says is an example of an occupation by a company and its subsidiaries which was held to be suitable for referral under the CRCA.
41. WA seeks comfort from the UK Government’s commercial rent code of practice following the covid -19 pandemic (the code) which he states supports his views.
42. Finally, he says that a dismissal of this reference would be contrary to the provisions and spirit of the CRCA and a perverse outcome.

43. WA provides me with a Witness Statement from MA. He explains the history of the taking of the headlease and the granting of the sub-leases in 2015. He states that the Respondents insisted that AH be added as a guarantor to the sub-lease and that he and IK be added as guarantors to the Truk London Limited leases.
44. RF, in her response, reiterates the position in her Submission. She points out that there is no evidence that AH is the sole shareholder of Aldgate East and that MA is the sole shareholder of Truk London Limited as at the reference date.
45. She reiterates that the business referred to in the application in this reference is 'Big Moe's Diner' which, as a matter of fact, is carried out in the demise of the restaurant sub-lease. She points out that the reference does not relate to the remainder of the building.
46. RF observes that in WA's Response to her Submission he does not make any reference to the business of 'Big Moe's Diner' or that 'Big Moe's Diner's' business was undertaken by the Applicants. She disagrees that the Applicants to this reference were in occupation of 'Big Moe's Diner'.
47. RF disagrees with WA on the analysis of Section 42 of the LTA 1954 and on the definition of Section 23 LTA 1954. RF points out that the head lessees are not a body corporate but three individual persons and therefore Section 42 does not apply.
48. RF reasserts para 4.6 of the Guidance "only the business under which the tenant occupies the premises is in the scope of the Act". This, RF says, is the restaurant sub-lease which Aldgate East Limited occupies, trading as 'Big Moe's Diner' which is in the scope of the Act.
49. She points out that Section 4.8 of the guidance does not help the Applicant as the right of forfeiture exists for the headleases but does not for the sub-leases. She denies that Section 4.6 contemplates a chain of Arbitrations

or that the outcome contemplated would be perverse, as suggested by WA.

50. RF states that no evidence is given as to why I may break the corporate veil. She points out that the Respondents have no right to recover rents from the sub-leases and points to Section 36.2 of the sub-leases which confirm that the sub-tenants are not liable for rents payable to the freeholder/head-lessor.
51. RF points out that no evidence has been submitted that WA is a shareholder of Aldgate East Limited.
52. RF has a different interpretation of the case law that WA employs to rebut her case law and also does not accept that the Arbitration Award quoted is relevant. She states that the code does not alter Sections 2 and 3 of the CRCA.
53. In reference to MA's Witness Statement she points out the lack of evidence to support the account of the discussions relating to the sub-lettings.

REASONS

54. My starting point is the reference under which I have been appointed. The Applicant is stated as MA, IK and AH as the tenant, and the Respondent as the landlord.
55. The business to which the protected rent applies is the restaurant known as 'Big Moe's Diner', as per the application.
56. I find that the lease under which the referral has been made is the headlease of the whole of 95-96 Whitechapel High Street. The Respondent is a party to this lease alone.
57. The tenants of the headlease are three individuals as stated above, MA, IK and AH. This is not disputed and is evidenced from the headlease.

58. The tenant of the restaurant lease is Aldgate East Limited. It is alleged that AH is the sole shareholder and director of this company and no evidence to the contrary is produced.
59. The tenant of the upper floors is Truk London Limited and there is no evidence before me that AH is connected to Truk London Limited.
60. As a result of their respective sub-leases, Aldgate East Limited and Truk London Limited pay rent to the head lessee, MA, IK and AH. They have no duty to pay rent to the Respondent.
61. Also as a result of the respective sub-leases, Aldgate East Limited has the right to occupy the basement, ground, first and part second as restaurant, which it does, trading as 'Big Moe's Diner', and Truk London Limited occupy the remainder of the second, third and fourth floors as offices.
62. Having sub-let the property in two parts, the three headlease tenants do not have a right to occupy as three individuals.
63. AH is the only one of the three individuals listed as headlease tenants, who has the right to occupy the basement, ground, first and part second floors and that right derives from being a shareholder director of Aldgate East Limited.
64. I can see nothing in WA's arguments that alter the above simple analysis which largely matches that put forward by RF.
65. I agree with WA that AH is by being the sole owner of Aldgate East Limited the occupier of the lower sub-lease. Where I depart from him is that under this reference (which has been made on the headlease) the tenant is three individuals of which only one has been granted the right to occupy the lower sub-lease which is the subject business of this application.
66. Turning to the requirements of the CRCA and the Guidance, my starting point is Section 4.6 of the guidance which both RF and WA refer to.

4.6 - *“Where the business tenancy is one of a chain of tenancies for the same premises (i.e. the business is in occupation leases the premises from a landlord, who is themselves leasing from another landlord and so on), only the business under which the tenant occupies the premises is in the scope of the Act.”*

67. Having concluded above that the occupier of Big Moe’s Restaurant (the business), located at the basement, ground, first and part second floors of the building, is Aldgate East Ltd and having read their sub-lease, I conclude that they have a business tenancy and that they potentially could be an applicant under the scope of the CRCA.
68. RF points out that nowhere does the WA assert that the Applicant, i.e. the three individuals on the headlease, are in occupation of the restaurant at basement, ground and part second floor levels.
69. Section 4.6 of the guidance indicates clearly that the Applicant must be in occupation to be within the scope of the CRCA. Only one of the three individuals on the headlease is entitled to occupy the premises and only as a result of being as a director shareholder of the company that is the tenant under the sub-lease.
70. Aldgate East Limited could have made an application to arbitrate against their landlord MA, IK and AH. I agree with RF that, if that had been the case, MA, IK and AH would not have been able to make a claim against the Respondent /freeholder as MA, IK and AH were not in occupation and therefore outside the scope of the CRCA. In statutory terms, not being in occupation puts them outside the definition of a Business Tenancy under Section 23 of the LTA 1954.
71. The demise granted under the headlease involves two sub-let elements, Aldgate East Limited, which has the right to occupy the lower sub-lease, but no rights to occupy the demise of the upper sub-lease. Similarly, Truk

London Limited has the right to occupy the upper sub-lease but no right to occupy the lower sub-lease.

72. The fact that this Referral is on the whole building, which is sub-let to two separate limited companies with not even a single common shareholder leads me to the conclusion that this Referral is incorrectly made.
73. I now turn to MA's Witness Statement. Whilst it sheds some light on how the current lease structure might have come into being at the property, it is not helpful to the task at hand. I must look at the lease structures in place at the date of the referral rather than how they have come into existence.
74. In terms of the authorities cited the Graysim case is I find most analogous to the situation hear i.e., the head lessee having sub-let it is the sub-tenant's who are in occupation.

FINDINGS

75. **I find that the tenant in occupation of 'Big Moe's Diner' was Aldgate East Limited. I find that Aldgate East Limited could have made an application under the scope of the CRCA against their landlord, namely MA, IK, AH. I find that the reference under which I was appointed was made on the headlease and that the applicants were MA, IK, AH. I find that MA, IK, AH had no right to occupy the headlease demise having sub-let their demise in two parts. As a consequence I find that the referral is incorrectly made. The Applicant is not the occupier of the property and therefore does not have a business tenancy.**

AWARD

76. Under Section 13(2) of the CRCA 2022, I dismiss this reference.

COSTS

77. The Act provides, within Section 19(5), that I am to make an Award on my costs and the application fee to the arbitral body, requiring the Respondents to reimburse the applicant for half the arbitration fees, unless in the circumstances (Section 19(6)) I consider it more appropriate to make an Award on a different basis.

78. I have not received pleadings on costs but given this Award I will issue further Directions on Costs if either party requests me to do so.

PUBLICATION

79. Pursuant to CRCA Section 18, this Award must be published. I intend to publish this on the RICS website.

80. Please indicate any redactions you wish me to make to preserve confidentiality within the Award before publication. If I have not back you within the next seven days I will assume that you are happy for me to public the unredacted Award.

SEAT

81. The seat of this Arbitration is England and Wales.

Signed

A handwritten signature in black ink, appearing to be 'A.L. Crease', written in a cursive style.

.....
Andrew L Crease FRICS FCI Arb

Date: 21th March 2023