In the matter of an Arbitration

and in the matter of The Commercial Rent (Coronavirus) Act 2022

251 Paradise Row Limited

Claimant

v

The Arch Company Properties Limited **Respondent**

FINAL AWARD (Bethnal Green property)

Parties and property

1. This case concerns rent due under a lease of premises situate at and known as 251 Paradise Row, Bethnal Green, London E2 9LE ('the Premises').

2. The rent arises under a lease dated 11 April 2014 and made between (1) Network Rail Infrastructure Limited and (2) 251 Paradise Row Limited.

3. 251 Paradise Row Limited, the original tenant, is the Claimant. The director of 251 Paradise Row Limited is Nigel Owens.

4. The current Landlord is the Respondent, The Arch Company Properties Limited.

5. The business operated from the Premises is a bar.

6. The Claimant is represented by Protected Rent Debt Limited. The Respondent is represented by Realty Law.

7. I refer to the Claimant and the Respondent collectively as 'the Parties'.

Referral to arbitration

8. On 23 August 2022, Nigel Owens on behalf of the Claimant gave notice to the Respondent of an intention to refer this matter to arbitration[1].

9. The Respondent wrote to the Claimant on 6 September 2022 to warn them that they were not eligible for relief under the Commercial Rent (Coronavirus) Act 2022 ('the Act'). The Respondent informed the Claimant that that the Respondent '*will argue this position in respect of costs should the matter proceed*'.

10. On 22 September 2022, the Claimant referred this matter to arbitration under the Act. The referral to arbitration was for an arbitration on the papers with no oral hearing. In the application form for arbitration, the Claimant confirmed that all the criteria for eligibility for relief under the Act, were met.

11. The referral to arbitration was accompanied by the Claimant's 'formal proposal' for resolving the matter of relief from payment of rent provided pursuant to section 11(1) of the Act ('the Claimant's 1st proposal'). The Claimant's 1st proposal was dated 21 September 2021.

12. I was duly appointed arbitrator on 3 October 2022 under the Consumer Code for Online Dispute Resolution.

Protected rent debt and proposals for relief

13. In the application form and the Claimant's 1st proposal, the Claimant claimed the amount of the 'protected rent debt' is £97,392.66. The relief requested by the Claimant was to write off this sum in its entirety, alternatively for the Claimant to be given 24 months to 'pay any balance'.

14. In their formal proposal dated 14 October 2022 ('Respondent's 1st proposal'), the Respondent asserted that the amount of the protected rent debt was £69,480.78 excluding VAT. The Respondent proposed that the Claimant should be made to discharge the entirety of this sum and

[1] Nigel Owens was named as a Claimant party in the form of application for arbitration. However, the Claimant subsequently accepted that the correct party was 251 Paradise Row Limited. See paragraph 26 of the Claimant's revised proposal. This was accepted by the Respondent and the Claimant is for all purposes 251 Paradise Row Limited.

that interest on the arrears should be waived. The Parties therefore do not agree on the amount of the protected rent debt.

15. Neither do the Parties agree upon the relief, if any, to be given to the Claimant. In this regard, I note that, in their revised formal proposals respectively dated 25 October 2022 and 16 November 2022, neither the Claimant nor the Respondent revised their positions relating payment of the protected rent debt.

16. The Respondent's primary argument is that the Claimant is not eligible for any relief under the Act because the Claimant cannot satisfy one of the threshold conditions laid out in the Act. The Respondent argues that the Claimant cannot satisfy the eligibility condition at section 13(4) of the Act of establishing that their business is 'viable' or would become viable if the protected rent debt were to be written off. This is because, according to the Respondent, the Claimant company is dormant and does not trade. The Respondent alleges that the bar at the Premises is operated and owned by another company of which Nigel Owens is director called Mother Kelly's Trading Limited ('Mother Kelly's'). In these circumstances, the Respondent claims the Claimant cannot be said to be 'viable'.

Factual question: who occupies and trades from the Premises?

17. In the Claimant's 1st proposal, they did not distinguish between the Claimant and the bar business operated from the Premises. The Claimant claimed that '*the business that the tenant runs is viable'* (see paragraph 13) and as evidence of this fact produced bank statements for an account in the name of Mother Kelly's.

18. The Respondent, in the Respondent's 1st proposal dated 14 October 2022, asserted that the Claimant company is not 'viable' within the meaning of the Act. The Respondent claimed that the Claimant is a '*non-trading entity'* (para. 13), a '*zombie company'* (para. 17) and *'in a state of dormancy*' (para. 15). As evidence of this, the Respondent produced the accounts of the Claimant filed at Companies House, which are designated as 'dormant accounts' and show the Claimant only has current assets of cash of £2. Curiously, the claimant claims to produce accounts for the years 2015-2021 whereas in fact, at Exhibit 'JC2', the Claimant has produced only accounts for 2015-2019. At paragraph 23 of their formal proposal, the Respondent asserts as follows:

'The nearest that the [Claimant] gets to demonstrating viability is the oblique reference to the business of Mother Kelly's Trading Limited, of which Nigel Owens is a common director of Mother Kelly's Trading Limited, which is a bar which operates from the Premises. Given that [Mother Kelly's] was never a tenant of the Respondent there is no possibility of it ever having qualified as a 'tenant' and so is ineligible for support under the [Act].'

19. In responding to the Respondent's 1st proposal, the Claimant stated (in the Claimant's revised formal proposal) as follows:

    '.... the Respondent wants the [Claimant] to go ahead and expose their inner financial workings ....' (para. 9)

    'The Respondent did not object to using [a shell] as tenant' (para. 27)

    'It is not questioned that [the Claimant] has a role in the business going on at the premises in question' (para. 27)

    'The supply of support to a dormant entity is we say evidence of common ground and the arrangement is not being objected to by the Respondent. That is to say they considered the business arrangement viable enough to support it' (para. 28)

20. The Claimant also claimed reliance on a final award published on the CCODR website called KXDNA v 60 SA Limited ('the KXDNA decision'). In that case, the business of a company associated with the tenant was considered by the arbitrator in assessing the viability of the business carried on by the tenant from the premises. The Respondent invites me to do the same thing- to consider the business of Mother Kelly's in assessing the viability of the Claimant under the Act. (For present purposes, it is not necessary for me to decide upon the status of the KXDNA decision and whether it should bind me in my decision or be persuasive in making my decision.)

21. The Respondent responded to the Claimant as follows on 16 November 2022:

    '*… the entity named on the lease is a £2 'zombie' company which does not and has never traded. The result is that the [Claimant] has no entitlement to benefit under the scheme'* (para. 7b of revised formal proposal)

    '*The arbitration is only concerned with the viability of the company named as the tenant under the Lease. If the [Claimant's] intention was for the arbitrator to consider the viability of any other third party, an application naming that third party should have been submitted within the prescribed time limit'* (para. 6 of statement of John Cook)

'*It is not unfair that the Respondent denies that [the Claimant] is entitled to relief under [the Act], but the other way around. Because the [Claimant] had concealed from them, and has only lately discovered that their tenant 251 Paradise Row Limited (Company Number: 08650071) is a single purpose non-trading vehicle with no assets, the Respondent has no redress if the [Claimant] defaults on the terms of the Lease*' (para. 10 of statement)

'*The Respondent disputes that the [KXDNA decision] has strong parallels with this present case for the following reasons. Firstly, it is clear from paragraph 19 of the arbitrator's award … that had the parties not voluntarily agreed to consider the viability of the wider KX Group, [the arbitrator] would have been reluctant to pierce the corporate veil/construe the Act to permit or require an arbitrator to consider anything other than the business of the actual tenant*' (para.18 of statement)

*'Unlike the case of KXDNA, until only recently did the Respondent become aware that the named tenant was not in occupation of the Property yet was the party paying the rent. The Respondent has never agreed to or considered discussing the viability of the trading entity had this been the case, the trading entity would have been a party to the Lease' (*para. 19)

'The [Claimant] is in breach of clause 6.21 [of the lease] by allowing [Mother Kelly's] to occupy the Property without the prior consent of the Respondent' (para.21 of statement).

22. I note that the Claimant has not disputed the Respondent's allegations that the Claimant does not have any assets (other than cash of £2) and the bar operated from the Premises is owned and operated by Mother Kelly's, not by the Claimant. This fact, and the evidence of the accounts of the Claimant produced by the Respondent for 2015-2019, lead me to find these facts proven[2].

23. The Claimant's case is that '*the Respondent did not object to using [a shell] as tenant' and* the Respondent supported this arrangement. But the Claimant has not provided any evidence to back up this allegation. This is notwithstanding that the Claimant bears burden of establishing facts to prove the allegation. For their part, the Respondent has flatly denied knowing, '*until only recently'*, that the Claimant was not in occupation, was a shell company and was not the company paying the rent. In the circumstances and taking account the Claimant's failure to provide any evidence to support their case, I find in favour of the Respondent that the Respondent did not have knowledge of or consent to Mother Kelly's occupying the Premises and did not know the Claimant was a non-trading company with no assets. In reaching this conclusion, I am mindful that what the Claimant is alleging would be an unusual and risky arrangement from the perspective of a landlord

[2] Given that the Claimant admits the Claimant company is a 'shell', it does not matter that the accounts of the Claimant for 2020-2021 are missing from the evidence submitted by the Respondent.

(i.e., the Respondent in this case), who would have no recourse to the assets of the trading entity in the event of non-payment of rent under the tenancy or other default on the part of the tenant.

24. I will explain the significance of these findings of fact in due course in the following sections of this Final Award.

Eligibility issue No. 1: does the Claimant have a 'business tenancy'?

25. This is an important issue because section 13(2) of the Act requires the arbitrator to dismiss a reference to arbitration (i.e., an application for relief) if the applicant's tenancy is not a business tenancy.

26. By section 2(5) of the Act, a 'business tenancy' is a tenancy to which has Part 2 of the Landlord and Tenant Act 1954 applies. By section 23(1) of the Landlord and Tenant Act 1954, Part 2 of that Act applies to '*any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes*'. This means that, to qualify as a business tenancy under the Act, the Claimant must occupy the Premises and do so for the purposes of a business carried on by the Claimant.

27. According to the facts I have found, the Claimant does not occupy the Premises (for any purpose) and/or does not occupy the Premises for the purposes of a business carried on by the Claimant. This is because the bar that operates from the Premises is operated and owned by Mother Kelly's which is, notwithstanding that Nigel Owens is a director of both companies and the shareholders of both companies are possibly the same, a separate legal entity from the Claimant. The Premises are therefore occupied by Mother Kelly's for the purposes of their business, not by the tenant who is the Claimant with rights under the Act.

28. Furthermore, as I have found already, there is no evidence before me to suggest that the Respondent agreed to treat Mother Kelly's as the tenant. This means it is not open to the Claimant to claim that Mother Kelly's is eligible for relief under the Act.

29. For completeness, I note that I have checked that I have jurisdiction to rule on the business tenancy issue. Jurisdiction of an arbitrator might be in doubt where parties have agreed that a tenant is eligible for relief under the Act; in such a situation, it is arguably not open to the arbitrator

to open up the issue of eligibility and the arbitrator should proceed to decide what relief to give the tenant as if the Act did apply. This is because Section 30(1) of the Arbitration Act 1996, as amended by section 96(2), provides as follows:

'*Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to -*

whether the enactment applies to the dispute or difference in question.'

30. In this case, even though it might be said that the Respondent has not explicitly argued that the Claimant does not have a 'business tenancy', the Parties have certainly not agreed that the Claimant is eligible for relief and/or that I have jurisdiction to grant relief under the Act. On the contrary, the Respondent's primary argument, as mentioned above, is that the Claimant is not eligible for relief, because their business is not viable. I therefore find that I do have jurisdiction to decide on whether the Claimant has met the eligibility requirement of having a business tenancy of the Premises.

31. My finding is that the Claimant does not have a business tenancy. This is for two reasons: (a) the Claimant is not in occupation of the Premises; and (b) the business carried on at the Premises is not the business of the Claimant. As discussed above, the Premises are instead occupied by Mother Kelly's and the business there carried on is the business of Mother Kelly's.

32. It follows that I must make an award dismissing this reference, pursuant to section 13(2)(b) of the Act.

Eligibility issue No. 2: is the Claimant's business 'viable'?

33. The first point of principle to note is that it is the business of the tenant that needs to be scrutinized to check it is viable, not the business of any third party. This is clear from the relevant provisions of the Act:

Section 13(3) of the Act which provides:

'If, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—

(a) is not viable, and (b) would not be viable even if the tenant were to be given relief from payment of any kind,

the arbitrator must make an award dismissing the reference.'

Section 16(1) of the Act which provides:

(1) In assessing the viability of the business of the tenant, the arbitrator must, so far as known, have regard to—

(a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party,

(b) the previous rental payments made under the business tenancy from the tenant to the landlord,

(c) the impact of coronavirus on the business of the tenant, and

(d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.'

34. The Act therefore only contemplates considering the viability of the business of the tenant, not of any other person or company.

35. If I carry out this analysis against what we know about the Claimant, it is clear and obvious that the business of the Claimant is not viable. First and foremost, the Claimant does not have <u>any</u> business (viable or otherwise). Its net assets are only £2 (section 16(a)); the Claimant has not paid any rent under the tenancy (section 16(b)); no business of the Claimant was impacted by Coronavirus (section 16(c)); and I have not been provided with any other information relating to the financial position of the Claimant that alters these facts (section 16(d)). The provision of bank statements relating to Mother Kelly's is not of course relevant to the viability of the Claimant because the accounts do not belong to the Claimant, and I have no information that the Claimant has any charge or other security or other right with respect to monies deposited in those accounts.

36. The Claimant argues that, on the authority of the KXDNA decision and despite what the Act says, I should take account of Mother Kelly's business when assessing the viability of the Claimant. I must reject this argument and agree with the Respondent's submissions referred to above. It is true that the KXDNA case has some similarities with the present case. The tenant, like in this case, was a dormant company and it was an associated company that carried on business from the premises and paid the rent. In the KXDNA case, however, the parties had agreed that the business of the trading company should be taken into account when assessing the viability of the tenant. The arbitrator went along with this approach and did not second guess the parties' agreement that the tenant met the viability test under the Act. But, and it is an important 'but', the arbitrator

only did this because this is what the parties agreed to. To underscore the significance of the parties' agreement, the arbitrator found as follows in her final award:

'*I should make clear that but for the parties' agreement on this matter, I could see real scope for argument as to whether it was appropriate to pierce the corporate veil / construe the Act so as to permit or require an arbitrator to consider anything other than the business of the actual tenant*' (para. 19 of the final award)

37. Therefore, the KXDNA case only assists the Claimant if the Parties agreed to treat Mother Kelly's as the tenant and/or to factor in Mother Kelly's business when assessing the Claimant's viability. But, as I have found already, there is no evidence before me to suggest that the Respondent agreed to any of this. The KXDNA decision does not therefore assist the Claimant and I must apply the test for eligibility set out in the Act

38. In conclusion, there is no factual basis for me to find that the Claimant's business is viable. I therefore agree with the Respondent and find that the Claimant's business is not viable.

39. On this basis, I dismiss the reference under section 13(3) of the Act. This, therefore, is the second reason I have for dismissing the Claimant's application.

Other arguments raised by the Parties

40. I have not discussed and/or decided upon all the arguments advanced by the Parties in their proposals. This is because it is unnecessary for me to do so as the outcome of such arguments would not affect my decision to dismiss the reference.

41. Accordingly, and by way of examples only, I have not covered the Respondent's argument that the Claimant's revised formal proposal is not valid because the Claimant did not revise their original proposal. Neither have I responded to the Claimant's arguments along the lines that the Respondent should share the financial pain of the effects of Coronavirus. Regarding this last matter, that is because, having found that the Claimant has not met the eligibility requirements under the Act, I have no discretion or jurisdiction to award the Claimant any relief; it is mandated by the Act that I must in these circumstances dismiss the application for relief.

Claimant's application for relief

42. Having decided that the Claimant is not eligible for relief under the Act, I dismiss the Claimant's application for me to grant them relief from paying the protected rent debt or any other relief.

Costs of the arbitration

43. I have made orders dismissing the application under section 13 of the Act. As provided by section 19(5), I now order the Respondent to reimburse the Claimant in the sum of £700 plus VAT which represents half the arbitration fees paid by the Claimant. I will not deny the Claimant this contribution towards costs because the Respondent warned the Claimant that they were not eligible for relief under the Act before making the reference to arbitration.

Publication of Final Award

44. Pursuant to section 18(2) of the Act, I am required to publish this award. I intend to publish the award on the CCODR website. I have formed the provisional view that the award contains no commercial information which ought to be redacted from the award pursuant to section 18(4). I will therefore publish the award in full on the CCODR website unless either party indicates to me by 4pm on 2 December 2022 that they wish me to do otherwise in which case I will consider any submissions put forward in relation to that issue together with any evidence submitted in support of any such submissions.

Seat of the arbitration

45. The seat of this arbitration is England and Wales.

MADE AND PUBLISHED by me, Adrian Lifely, of 100 St Paul's Churchyard, London, EC4M 8BU, on 29 November 2022.

Adrian Lifely